

Vertical rules – novelties and challenges:

Exclusive and Selective Distribution; Resale Price Maintenance

**Mario Krka, MLB (Bucerius /WHU)
Senior Partner**

DTB

1. EXCLUSIVE AND SELECTIVE DISTRIBUTION

DIVJAK TOPIĆ BAHTIJAREVIĆ & KRKA

Law Firm

Novelties - general

- More **flexibility** for distribution networks
- Introduced **definition** of exclusive distribution
- **Shared exclusivity**, up to five!
- **Mix and match** different distribution setups
- New protection tools for exclusive distribution (roll-over one level further down) and selective distribution (protection against all distributors in all other territories)

**Both
definitions
– finally!**

EXCLUSIVE DISTRIBUTION SYSTEM:

the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers

+

restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group

SELECTIVE DISTRIBUTION SYSTEM:

the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria

+

these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system

EXCLUSIVE distribution definition – deep dive

A distribution system where the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group

EXCLUSIVE distribution definition – deep dive

(1)

A distribution system where the supplier allocates **a territory or group of customers** exclusively to itself or to a maximum of five buyers and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group

2010 VBER (Art 4 (b) (i)):

(...) into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer

EXCLUSIVE distribution definition – deep dive

(2)

A distribution system where the supplier allocates a territory or group of customers **exclusively to itself** or to a maximum of five buyers and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group

Reserving territory/ customer group to the supplier = exclusive distribution

EXCLUSIVE distribution definition – deep dive

(3)

A distribution system where the supplier allocates a territory or group of customers exclusively to itself **or to a maximum of five buyers** and restricts all its other buyers from actively selling into the exclusive territory or to the exclusive customer group

NOVELTY – shared exclusivity of up to five distributors

- Territory size?
- Is it „or” or „and/or”?

EXCLUSIVE distribution definition – deep dive

(4)

A distribution system where the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers **and restricts all its other buyers** from actively selling into the exclusive territory or to the exclusive customer group

Parallel imposition requirement!

- ALL buyers – regardless of the distribution system operated
- Applies also to territories that supplier allocates to itself

EXCLUSIVE distribution definition – deep dive

(5)

A distribution system where the supplier allocates a territory or group of customers exclusively to itself or to a maximum of five buyers and restricts all its other buyers **from actively selling** into the exclusive territory or to the exclusive customer group

No protection against passive sales

SELECTIVE distribution definition – deep dive

A distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system

SELECTIVE distribution definition – deep dive

(1)

A distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system

Unchanged 2010 definition

SELECTIVE distribution definition – deep dive

(2)

A distribution system where the supplier undertakes **to sell** the contract goods or services, **either directly or indirectly**, only to distributors selected on the basis of specified criteria and these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system

A true system – undertaking covers direct and indirect distributors

SELECTIVE distribution definition – deep dive

(3)

A distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors **selected on the basis of specified criteria** and these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system

Caselaw + decisional practice

SELECTIVE distribution definition – deep dive

(4)

A distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and these **distributors undertake not to sell** such goods or services **to unauthorised** distributors within the territory reserved by the supplier to operate that system

Sales only within the network.

Protection of exclusive network

Restrictions of **active sales**
by the **buyer** and **its direct**
customers

into exclusive distribution
territory/customer group

- Parallel imposition is a must
anyhow
- Roll-over made possible, but
only to direct customers of
the buyer

Protection of selective network

Restrictions of **active or passive**
sales

by the **buyer and its customers**

to unauthorised distributors
located in a selective
distribution territory (for the
contract goods or services)

- Exception to hardcore restrictions
- Roll-over made possible to all direct and indirect buyers

Certain exceptions to hardcore restrictions clarified

Restrictions of

- **active or passive sales** to end users by a wholesaler (i.e., the buyer operating at the wholesale level of trade);
- the buyer's ability to **actively or passively** sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

DTB

2. RESALE PRICE MAINTENANCE

DIVJAK TOPIĆ BAHTIJAREVIĆ & KRKA

Law Firm

Any novelties?

- The regime **largely unchanged**.
- Supplier still allowed to
 - **communicate** recommended resale prices and
 - **impose maximum** resale prices.

Worthwhile noting:

- A provider of online intermediation services qualifies as a supplier
- The new Vertical Guidelines - more guidance on:
 - RPM, including price monitoring,
 - minimum advertised prices (**MAPs**)
 - fulfilment contracts
- A MAP might be justified to prevent a particular distributor from regularly using a product as a loss leader.
- In a fulfilment contract, the supplier may impose a resale price on the company fulfilling the contract, if that company is selected by the supplier (and not by the customer).

Happy
anniversary,



Croatian Competition Agency



get cape.



wear cape.



fly.

Author: unknown

DTB

THANK YOU!

Mario Krka, senior partner (mario.krka@dtb.hr)

Divjak, Topić, Bahtijarević & Krka law firm LLC

Ivana Lučića 2a/18, 10 000 Zagreb, Croatia

Tel.: +385 1 5391 600

E-mail: info@dtb.hr

DIVJAK TOPIĆ BAHTIJAREVIĆ & KRKA

Law Firm