



# TERRITORIAL VERTICAL RESTRAINTS UNDER EU LAW

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Competition



## Background

- Aim of the rules on verticals is to **prevent consumer harm, while preserving any pro-competitive effects** of the agreement.
- EU rules on vertical restraints are influenced by the goal to create a **Single market**.
- The Vertical Block Exemption *safe harbour* applies when:
  - The market share of supplier and buyer does not exceed 30%.
  - The agreement does not contain any hardcore restrictions.

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## Territorial/customer restrictions: principles

- Territorial restraints in vertical agreements, save for certain exceptions, are considered hardcore restrictions and cannot benefit from the safe harbour of the Vertical Block Exemption: the concern is **market partitioning and price discrimination**.
- The buyer/distributor should be **free to (re)sell where and to whom it wishes**. As a general rule:
  - Active sales restrictions are hardcore restrictions.
  - Passive sales restrictions are hardcore restrictions.



## Territorial/customer restrictions: types

- **Direct obligations**, for example:
  - Obligation not to sell or supply certain customers/territories.
  - Obligation to refer orders from those customers to other distributors.
- **Indirect measures** aimed at inducing compliance, for example:
  - Refusal or reduction of bonuses/discounts.
  - (Threat of) termination of supply.
  - Requiring a higher price for exported products.



## Territorial/customer restrictions: exceptions

There are **exceptions**, where sales restrictions may benefit from the Vertical Block Exemption:

- Restriction of active sales in exclusive distribution.
- Restriction of selling to unauthorised distributors in the context of selective distribution.
- Restricting wholesalers from selling to end users.
- Restricting the resale of components to competitors of the supplier.
- Restriction on the buyer's place of establishment.

Moreover, hardcore sales restrictions might be objectively necessary in exceptional cases.



## Active/passive sales

- Distinction particularly relevant for exclusive distribution. **Absolute territorial protection** will in most cases constitute an infringement (*Consten and Grundig*).

Active sales

- Actively approaching customers (e.g. direct marketing, targeted ads/promotions).

Passive sales

- Responding to **unsolicited** requests from individual customers (including delivering)



## Online sales restrictions (1)

- **Online sales are considered passive sales** (the customer takes the initiative to visit the distributor's website).



- A ban on internet selling "*has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area*" of the distributor. (Pierre Fabre)
- The aim of maintaining a prestigious product image is not a legitimate purpose and cannot serve as an objective justification (but 101(3) individual exemption not excluded).



## Online sales restrictions (2)

- Certain **indirect** online sales restrictions will also be considered as hardcore, such as:
  - Requiring website re-routing of customers or termination of consumers' internet transactions where their credit card data or IP address reveal an address outside an allocated territory ("**geo-blocking**").
  - **Limiting the proportion** of permitted online sales.
  - Requiring to pay a higher price for products intended to be resold online, than for products intended to be sold offline (**dual pricing**).



## Online sales restrictions (3)

- However, not all limitations concerning online sales amount to hardcore restrictions. Question is: **does the restriction limit the ability to use the internet** as a distribution means?
- A supplier is for example:
  - Not required to accept Internet-only distributors into its sales network (**brick and mortar requirement is OK**).
  - Permitted to impose a **minimum amount of sales offline**.
  - Permitted to require **quality standards** for advertising and sales online (relevant for selective distribution).