



At a glance: competition issues with distribution and agency agreements in Germany

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Regulation of the distribution relationship

Competing products

Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Non-compete obligations towards distributors and franchisees are enforceable if they conform to antitrust law. Generally, agreements that aim at or result in restraints of competition are prohibited by antitrust law, namely by the German Act Against Restraints of Competition (GWB) and articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), details: Rohrßen, VBER 2022, EU Competition Law for Vertical Agreements.

Unless agreements contain hardcore restrictions, a safe harbour is provided by the De Minimis Notice of 30 August 2014 and the Vertical Block Exemption Regulation (VBER) (ex Regulation (EU) No. 330/2010, now updated because of the rise of internet sales and replaced by Regulation (EU) No. 2022/720, applying since 1 June 2022 for new agreements and from 1 June 2023 for existing agreements). Agreements between non-competitors are safe if each party's market share does not exceed 15 per cent in any relevant market affected.

If one party's market share exceeds 15 per cent, but all market shares are below 30 per cent, the parties can agree upon a non-compete obligation during the contractual term for a maximum period of five years. For non-competes, EU competition law now provides for new leeway: According to the European Commission so-called evergreening non-competes (ie, those that are tacitly renewable beyond a five-year term) can also be exempt under the VBER if the buyer can effectively renegotiate or terminate the vertical agreement with a reasonable notice period and at a reasonable cost in such a way that the buyer can effectively switch its supplier (Guidelines on Vertical Restraints of 30 June 2022, paragraph 248; cf Rohrßen, VBER 2022: EU Competition for Vertical Agreements, Chapter 5.22). This time limit does not apply if the products are sold on premises owned by the supplier or leased by the latter from third parties who are independent of the buyer. In any case, the non-compete obligation cannot exceed the term for which the buyer is entitled to occupy the premises. Upon termination of the contractual term, a non-compete obligation involving a party with a market share exceeding 15 per cent, but without market shares exceeding 30 per cent, is valid if it is necessary to protect the know-how granted to the distributor and limited to competing products, to the distributor's premises and to a one-year term.



If one party's market share exceeds 30 per cent, a non-compete obligation and any other restriction of competition can only benefit from the individual exemption under the strict criteria of article 101(3) of the TFEU (efficiency defence).

Restraints within franchisee agreements can be exempted. They are considered not to restrict competition in terms of EU antitrust law if they are essential for running the franchise system (similar to the ancillary restraints doctrine under US law) (cf Court of Justice of the European Union, 28 January 1986, *Pronuptia*). This is particularly true for non-compete obligations (for details, see Rohrßen, VBER 2022: EU Competition for Vertical Agreements, Chapter 7).

Non-compete obligations towards agents are enforceable. As the principal bears all risks connected with the sale and purchase of the products or services, antitrust law generally does not apply (Guidelines on Vertical Restraints of 19 May 2010, paragraphs 12 et seq, 18 and 49, now replaced by the Guidelines on Vertical Restraints of 30 June 2022, paragraph 29 et seq, with special comments on agency agreements in the platform economy in paragraphs 46 et seq). Specific limits apply under German commercial agency law to post-contractual non-compete obligations that were stipulated before termination: they must be limited to a two-year period, to the agent's territory or customers, and to the contractual products or services, and they must be done in writing and delivered to the agent. The principal is obliged to pay indemnity for the non-compete obligation's term (section 90a HGB).

Prices

May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

Generally, a supplier cannot control the resale price or price level of its distributors or franchisees (except for suppliers selling newspapers, magazines and books, section 30 GWB). A violation of this rule represents a hardcore restriction and is therefore generally void (see article 4(a) VBER and Guidelines on Vertical Restraints of 10 May 2010, paragraphs 48 and 223, respectively Guidelines on Vertical Restraints of 30 June 2022, paragraphs 185 et seq; for practical tips cf Rohrßen, *ZvertriebsR* 2020, 406 et seq). By exception, the supplier can enforce the efficiency defence (eg, when introducing a new product or a coordinated short-term, low-price campaign). The supplier can also influence resale prices by recommending resale prices or setting maximum resale prices.

Suppliers can control the price at which they sell the products or services via agents because the antitrust law restrictions do not apply.

However, this strong market position must not be abused. Such abuse is deemed to exist if the supplier, through its own or affiliated dealerships, offers sale prices at the authorised dealer's level of trade that are so low that the dealer is unable to offer them at an economically profitable price and which are only possible for its own or affiliated dealerships by the entrepreneur compensating for their resulting loss. The decision of the Vienna Supreme Court of 17 February 2021 – 16 Ok 4/20d on section 4 paragraph 3 of the Austrian Cartel Act is also significant for Germany due to the comparable legal situation under section 20 paragraph 1 sentence 1 and section 19 paragraph 1 and paragraph 2 No. 1 of the German Act against Restriction of Competition (GWB).

May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

A supplier may recommend resale prices or set maximum resale prices if the parties' market shares do not exceed 30 per cent and if the recommendation or maximum resale price is not backed up by further negative (eg, pressure) or positive (eg, incentives) factors from one party (article 101(1) TFEU and article 4(a) VBER), such as announcing that the supplier will not deal with customers who do not follow its pricing policy.

Establishing a minimum advertised price policy is exempt from antitrust law if it is regarded as a recommendation. Otherwise, it can – very rarely – be exempted under the efficiency defence.

If, on the other hand, a supplier announces it will not deal with distributors or franchisees refusing its pricing policy, it will be treated as fixing the selling prices.

May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

A most favoured nation or customer clause can be enforced only if agreed between non-competitors and if the parties' market shares amount to a maximum of 30 per cent (otherwise, only the efficiency defence can be used to argue that the clause does not represent a prohibited restriction of competition).

Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Generally, based on freedom of contract, a seller can charge different prices to different customers. However, this general rule does not apply if a seller:

- holds a dominant or similarly strong market position (sections 19 and 20 GWB and article 102 TFEU); and
- differentiates on grounds of race or ethnic origin. The same is true for grounds of gender, religion and disability. A different treatment is allowed if it is based on objective grounds, especially where it serves to avoid threats, prevent damage, etc (sections 19 and 20 Anti-Discrimination Act).

Geographic and customer restrictions

May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

Whether measures restrict competition and are prohibited is to be determined by the antitrust law of the country in which the measures have an effect (the effects doctrine). Within the European Union or the European Economic Area (EEA), a supplier is generally prohibited from restricting the territories in which or the customers to whom its intermediary sells; such restrictions are generally null and void (article 101(1)b, (2) TFEU and article 53 EEA Agreement). The following restrictions are, however, exempt from the ban owing to block exemption:

- active sales into an exclusive territory or customer group reserved to the supplier or another distribution partner;
- sales to end users if the distribution partner is a wholesaler;
- sales from members of a selective distribution system to unauthorised distributors within the system's territory; and
- sales of components, supplied for incorporation, to customers who would use them to produce analogous products (article 4(b-d and f) VBER 2022/720).

Active sales (now defined in article 1(1)(l) VBER 2022/720) refers to actively approaching actual or potential customers (eg, by direct, unsolicited mail, email, calls or visits) in a specific territory through specifically targeted promotions. Passive sales (now defined in article 1(1)(m) VBER 2022/720) refers to the response to

unsolicited requests from individual customers, including advertisements addressed to customers outside exclusive territories or customer groups, if done reasonably.

This also holds true for the internet: in principle, online sales may not be excluded. A supplier may only require its intermediary to meet specific quality standards, especially in selective distribution systems (Guidelines on Vertical Restraints of 10 May 2010, paragraphs 51 and 54). The European Court of Justice shed further light on internet resale restrictions within selective distribution systems during deliberation on the Higher Regional Court of Frankfurt's request to give a preliminary ruling on how to interpret European antitrust rules, namely article 101 of the TFEU and article 4(b) and (c) of the VBER (decision of 19 April 2016, *Coty Germany*, File No. 11U 96/14 (Kart)). According to the European Court of Justice's decision of 6 December 2017 (*Coty Germany*, Case No. C-230/16), manufacturers of luxury products may stop the distributors within their selective distribution network from selling the goods via third-party platforms if the contractual clause meets the following three conditions: '(i) that clause has the objective of preserving the luxury image of the goods in question; (ii) it is laid down uniformly and not applied in a discriminatory fashion; and (iii) it is proportionate in the light of the objective pursued.' If these *Metro*-criteria for selective distribution (referring to the *Metro* case of 25 November 1977, Reference No. 26/76) are not met, the clause may nevertheless benefit from an exemption under the VBER by reason of article 101(3) of the TFEU, because banning sales via third-party online platforms does not, at least according to the court, under a selective distribution system for luxury goods, constitute a hardcore restriction as listed in article 4 of the VBER, which would otherwise exclude applying the block exemption to the whole vertical agreement (cf paragraph 47 of the Guidelines on Vertical Restraints of 10 May 2010). In particular, the third-party platform ban would not constitute a restriction of customers in terms of article 4(b) of the VBER, or a restriction of passive sales to end users in terms of article 4(c) of the VBER. The court left open whether this interpretation also applies to goods other than luxury goods and outside selective distribution. The German competition authority made the following declaration immediately via Twitter on 6 December 2017: 'The #ECJ has taken care to limit its findings to genuine luxury products. #Brandmanufacturers have not received carte blanche to issue blanket #platformbans. First assessment: Limited impact on our practice.'

The European Commission disagreed; in its Competition Policy Brief of April 2018, the European Commission stated that the European Court of Justice's argumentation in the *Coty Germany* case applies irrespective of the luxury character of the products marketed:

The arguments provided by the Court are valid irrespective of the product category concerned (i.e., luxury goods in the case at hand) and are equally applicable to non-luxury products. Whether a platform ban has the object of restricting the territory into which, or the customers to whom the distributor can sell the products or whether it limits the distributor's passive sales can logically not depend on the nature of the product concerned.

The European Court of Justice's decision in the *Coty Germany* case provides good abstract arguments that manufacturers of both luxury and other brand-name products may ban their sale via internet platforms either according to the *Metro* criteria or according to the VBER. In this regard, see also the decision of the Higher Regional Court of Hamburg of 22 March 2018, which held that the ban that a producer of food and cosmetics (ie, not luxury goods, but products 'qualitatively committed to a high (production) standard') imposed on its own distributor to sell via third-party internet platforms was valid (for details see Rohrßen, *ZVertriebsR* 2018, 277–285 (281)).

The new VBER has now vastly codified these principles, as in its article 4(e) VBER has added a new hardcore restriction: suppliers must not prevent the buyers' (or their customers') effective use of the internet to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold within the meaning of points.

With regard to resale restrictions, the EU Geo-blocking Regulation (Regulation (EU) No. 2018/302) prohibits traders from discriminating against customers within the European Union for reasons of nationality, place of residence or place of establishment with regard to the access to online interfaces (article 3) and the application of general conditions of access to goods or services (article 4). Within the range of means of payment accepted, traders shall not apply different conditions for payment transactions based on nationality, place of residence, place of establishment of the customer, location of the payment account, place of establishment of the payment service provider or place of issue of the payment instrument within the European Union (article 5). Where distribution agreements impose obligations to exercise any form of unjustified geo-blocking as laid down in articles 3, 4 and 5, those provisions shall be automatically void (article 6(2)). The Geo-blocking Regulation has been applied since 3 December 2018. However, article 6(2) will only apply to agreements on passive sales concluded before 2 March 2018 as of 23 March 2020 (for details see Rothermel and Schulz, *K&R* 2018, 444–449; Rohrßen, *ZVertriebsR* 2018, 277–285 (283–284)).

Online sales

May a supplier restrict or prohibit e-commerce sales by its distribution partners?

Yes, a supplier may restrict e-commerce sales by its distribution partners (especially distributors or franchisees) under German and EU antitrust law; however, suppliers may hardly impose a comprehensive prohibition on the online sale of goods (or services) because they are considered passive sales (cf European Court of Justice, decision of 13 October 2011, *Pierre Fabre*, Case No. C-439/09, reaffirmed in *Coty Germany*; paragraph 52 of the Guidelines on Vertical Restraints of 10 May 2010; and paragraph 212 of the Guidelines on Vertical Restraints of 30 June 2022; see also the *Asics* decision of the German Federal Court of Justice (BGH) of 12 December 2017, which states that a general ban on the use of price comparison tools is void, though setting up guidelines for the use of those tools may be valid (see Rohrßen, *ZVertriebsR* 2018, 277–285 (282–283)). Restrictions short of a total ban are commonplace, particularly the prohibition of sales via third-party online platforms (especially marketplaces), the ban of purely online sales by requiring the operation of brick-and-mortar shops (paragraph 52(c) of the Guidelines on Vertical Restraints of 10 May 2010) and setting quality criteria for internet sales regarding the domain name, the online store's appearance, the language, the services provided, etc (for details, see Rohrßen, *GRUR-Prax* 2018, 39–41 and *DB* 2018, 300–306). Such restrictions within a selective distribution system are allowed if they either meet the *Metro* criteria or can be exempt under the VBER, which requires that: the supplier's and the buyer's market shares do not exceed 30 per cent; and there are no hardcore restrictions listed in article 4 of the VBER or excluded restrictions under article 5 of the VBER. To be exempt under the VBER, the new hardcore restriction of article 4(e) VBER must be observed: the distribution agreement must not have as its object 'the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which or the customers to whom the contract goods or services may be sold (...)'. What suppliers may explicitly impose, however, are other restrictions on online sales and restrictions on online advertising that do not have the object of preventing the use of an entire online advertising channel (for details: Rohrßen, VBER 2022: EU Competition Law for Vertical Agreements, Chapters 4.5 and 9).

A supplier may require that e-commerce sales by its distribution partners (and now, also by their direct customers, cf Rohrßen, VBER 2022, Chapter 4.2.4) are not resold outside the distribution partner's assigned territory, but only with respect to active sales into the exclusive territory or an exclusive customer group reserved

to the supplier or another distribution partner, and only provided that the supplier's and the distribution partner's market shares do not exceed 30 per cent. Passive sales over the internet, that is, upon unsolicited requests from individual customers, can, in principle, not be restricted.

An alternative is to use commercial agents or commission agents because they are, in principle, exempt from the competition law restrictions: 'Since the principal bears the commercial and financial risks related to the selling and purchasing of the contract goods and services all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1)' (paragraph 18 of the Guidelines on Vertical Restraints of 10 May 2010, now paragraph 30 of the Guidelines on Vertical Restraints of 30 June 2022).

A supplier may require reports of e-commerce sales in the same way that a supplier may require reports of any other sales from its distribution partner; however, care must be taken that this does not result in resale price maintenance. Invasion fees or similar amounts, regardless of how they are named (contractual penalties, liquidated damages, etc), may be stipulated in the distributorship agreement for any breach of contract for which the distributor is responsible, including active sales into territories exclusively reserved to the supplier or allocated to another distributor.

Refusal to deal

Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

A supplier may refuse to deal with customers because of freedom of contract, unless restrictions by antitrust or anti-discrimination law apply.

A supplier may restrict its distributor's ability to deal with particular customers only if an exemption from antitrust law is given.

Competition concerns

Under what circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Typically, German or European rules on merger control do not apply to the conclusion of a distribution or agency agreement because the agreement is a form of cooperation between companies that differs from a merger or acquisition. By way of exception, the conclusion of a distribution agreement may be subject to merger control under:

- German law if it is considered a 'combination of undertakings enabling one or several undertakings to exercise directly or indirectly a material competitive influence on another undertaking' (section 37 et seq GWB). However, this combination shall only exist if the parties are somehow affiliated; mere economic influence shall not suffice; and
- European law if it results in gaining direct or indirect control of the whole or parts of one or more other undertakings, including by contract (article 3(1b) of the Merger Regulation (Regulation (EC) No. 139/2004)). This control may also exist because of mere economic dependencies (which are to be measured on the circumstances of the case).

Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Generally, agreements that aim at or result in restraints of competition are prohibited by antitrust law. Certain hardcore restrictions are generally prohibited regardless of the parties' market shares: for example, price-fixing, restricting the geographic areas or categories of customers and – under the new VBER – vertical agreements that have the purpose of preventing buyers or their customers from using the internet effectively for the online sale of goods and services remain unlawful hardcore restrictions (article 4(e) VBER). Other hardcore restrictions apply in particular to selective distribution (eg, no restriction of cross-supplies between distributors within a selective distribution system).

Unless there are hardcore restrictions, a safe harbour is provided by the De Minimis Notice and the VBER. However, if the market share of one of the parties exceeds 30 per cent, an agreement or concerted practice that restrains competition can only benefit from the efficiency defence of article 101(3) of the TFEU.

Antitrust law is mainly enforced by the authorities (the European Commission and the German Federal Cartel Office), especially through fines. However, it can also be enforced by private action, aiming to remove the infringement of antitrust law or claim damages (section 33 et seq GWB).

Also agreements concerning minimum purchase obligations are permissible in principle. Under the De Minimis Notice, a minimum purchase agreement may be exempted if the parties' combined market shares fall below 10 per cent or 15 per cent. The percentage is reduced to 5 per cent if the individual contract is part of comprehensive distribution agreements and the contract network covers at least 30 per cent of the relevant market. In addition, the minimum purchase obligation may be exempted pursuant to article 2 (1) VBER.

However, agreements on minimum purchase obligations are subject to the test of reasonableness (BGH, decision of 25 April 2001, Case No. VIII ZR 135/00; BGH, decision of 13 July 2004, Case No. KZR 10/03) and thus may be ineffective under German law of standard form contracts if they significantly exceed the distributor's resale opportunities. If a minimum purchase obligation is combined with a non-competition clause or an exclusive purchasing obligation, the manufacturer is only entitled to refuse orders from its authorised dealer for objective reasons.

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