

Reform of the Vertical Block Exemption Regulation and of the Motor Vehicle Regulation

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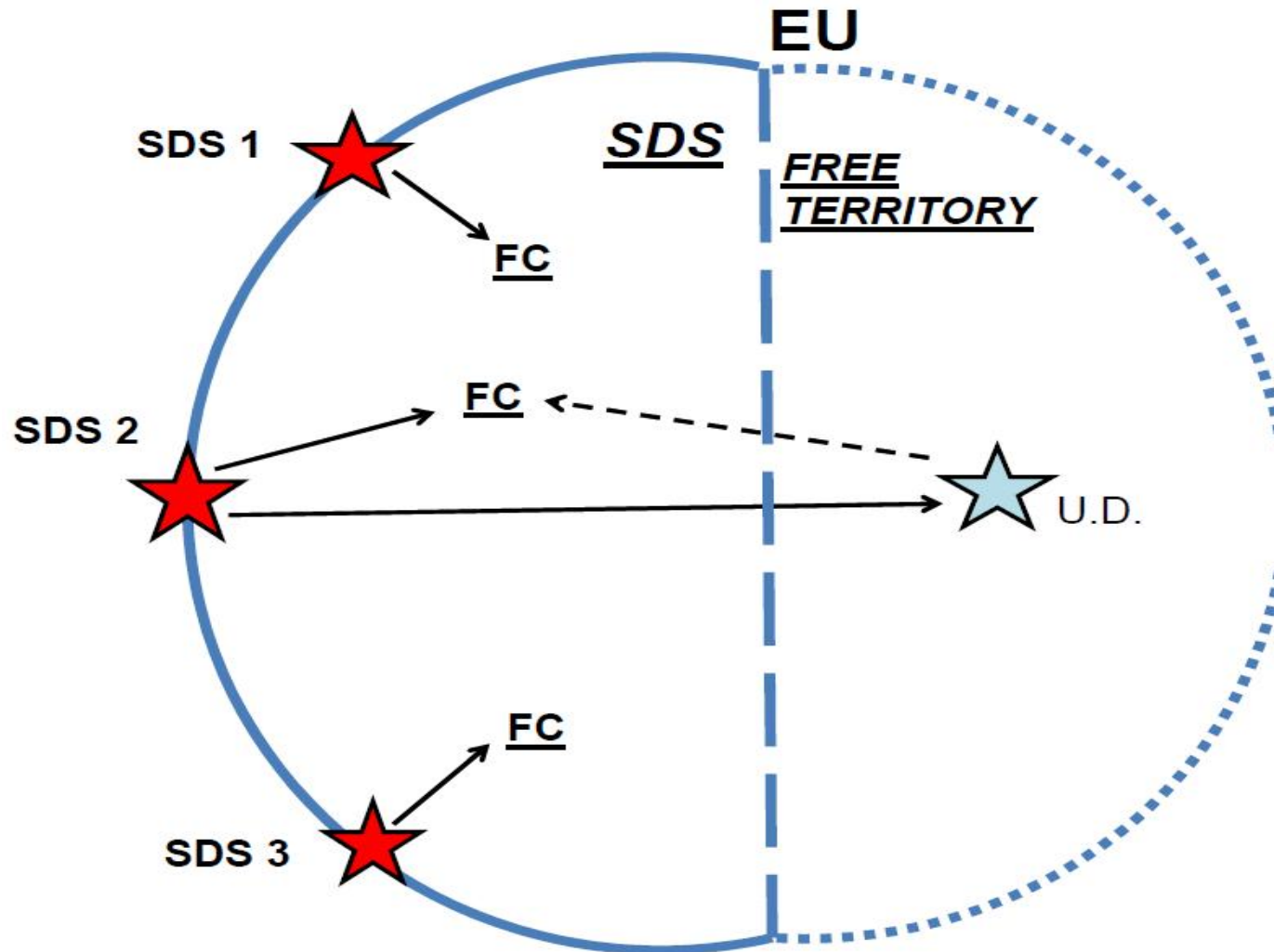
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* Selective Distribution

*“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 where these **distributors** undertake **not to sell** such goods or services to **unauthorised distributors within the territory reserved by the supplier to operate that system**” (BER 330/2010)*

<u>SELECTIVE DISTRIBUTION</u> Sales to unauthorised distributors by members of a S.D.S. (Art.4(b)(iii))	Reg. 2790/1999	Reg. 330/2010
	No sales at all to unauthorised distributors (closed system)	Sales to unauthorised distributors outside S.D.S

Illustration:



Rationale/justification for this approach in the BER 330/2010?

- Prevent suppliers from undermining their S.D. system by selling also to unauthorized distributors.

N/A:

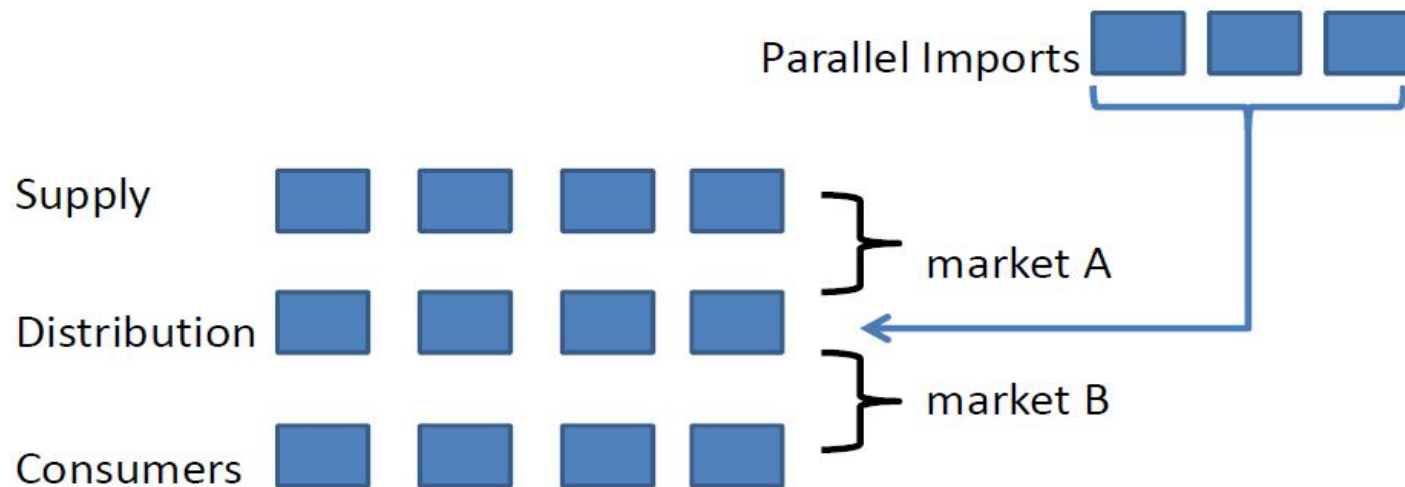
- suppliers can be restricted to supply only SDS members within SDS.
- always could sell outside system and/or to exclude other distributors outside SDS area.
- Enhance price competition (higher prices in SDS).
- If SDS members sell to Unauthorised Distributors outside SDS area, sign that criteria are not necessary.
- Have SDS gone too far?

*** New Market Share test**

- **BER 330/2010: market share of both supplier and buyer up to 30%.**
 - Supplier market share on the relevant market where it sells goods/services.
 - Buyer market share on the relevant market where it purchases goods/services.
- **Evolution**
 - 2790/99 concerned only with excl. supply.
 - Consultation 330/2010: 30% on market where buyer sells the contract goods.
 - 330/2010: 30% on market where buyer purchases the contract goods.
- **Rationale**
 - Double market share test introduced to address large retailers with strong market power which may foreclose –through exclusive or restrictive supply agreements- competitors from reaching suppliers.

Criticism

- Makes BER safe harbor narrower, increases uncertainty
- The dual market share test places a huge burden upon companies measuring market power.



- Unintended consequences: Reg.1400 → 1/6/2013 → transfer from one dealer to another.

Further issues with market share measurement

- High-tech products (dynamic pace of development) for which the market changes rapidly (and considerably).
 - e.g. Information technology (software-hardware), telecommunications (network industries).
 - e.g. PCs, mobile phones, game consoles etc.
- Market shares become gradually irrelevant in certain markets where there is fusion of products.
 - e.g. Laptop / TV / Cinema.

* Resale Price Maintenance

- a) Fixed retail prices
- b) Recommended retail prices
- c) Maximum retail prices

- Fixed retail prices is hardcore restriction Art.4(a) BER 330/2010.
- Prohibition applies equally to both 'offline' and 'online' commerce.
- New BER Guidelines provide a more lenient approach in RPM for efficiency reasons:

A) **fixed and minimum RPM** – para.225 Guidelines:

- Introducing a new product
- Initiating a short-term low price campaign (2-6 weeks) in a uniform distribution format system (e.g. franchise, selective)
- Distributing experience/complex products requiring significant pre-sales services (free riding issue)

B) **maximum and recommended RPM** – para.226 Guidelines:

- Avoiding the problem of double marginalization

- Article 101(3) assessment of the RPM.

- Other considerations:
 - US **Leegin** case: *“the rule of reason, not a per se rule of unlawfulness, would be the appropriate standard to judge vertical price restraints.”*
 - No uniformity in RPM between State-Federal level (RPM per se violation in many States e.g. California)

Issues raised with RPM in innovation industries

Innovation high-tech products require additional products/services to operate as a full functioning system:

e.g. a smart mobile telephone device necessitates other services to become operative and to acquire value for consumers.

- Sophisticated nature of high-tech products bundled with services may lead to information asymmetry – double/multiple marginalization and raise the final price significantly.
- In pragmatic conditions of competition, a 2-6 weeks campaign may not be appropriate to introduce products (learning curves), e.g. introducing a new car, introducing a new software in markets with strong network effects → Art. 101 (3)

Introducing such products may require a different time scale in advertising alongside low price.

* Online Sales

- New vertical restraints guidelines (VRG): “The Internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, **which explains why certain restrictions on the use of internet are dealt with as (re) sales restrictions.** (VRG par. 52)
- A compromise between the opposing interests: online commercial platforms (consumers’ benefit) vs luxury brand producers (risk of free riding).
- An outright prohibition to sell or advertise a product over the Internet is a hardcore restriction.

Online sales: a form of passive sales

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- VRG par. 52: **“In general, where a distributor uses a website to sell products, that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor”**
- Passive selling examples (VRG par. 52):
 - If a customer visits a website of a distributor and contacts the distributor and if such contact leads to a sale, including delivery.
 - If a customer opts to be kept (automatically) informed by the distributor and it leads to a sale.
 - Offering different language options on the website does not, in itself change the passive character of such selling.
- Active selling examples (VRG par. 53):
 - Territory-based banners on third party websites.
 - Paying a search engine or online advertisement provider specifically targeting users of a particular territory.

Additional hardcore restrictions in the context of online sales

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- Reason:
 - preventive measures obstructing the very possibility of passive sales
- Requiring a(n) (exclusive) distributor to prevent customers located outside (exclusive) territory from viewing the (exclusive) distributor's website or automatically re-routing those customers to either the manufacturer's or other (exclusive) distributor's websites (VRG 52a).
- Requiring a(n) (exclusive) distributor to terminate customers' transactions over the internet should their credit-card data reveal an address that is **not** within the distributor's (exclusive) territory (VRG 52a).

- Requiring a(n) (exclusive) distributor to limit the proportion of overall internet sales.
 - Permitted: Obliging (exclusive) distributor to sell a certain absolute amount via bricks & mortar shops, if this does not limit the online sales of the distributor.
- Requiring a(n) (exclusive) distributor to pay a higher price for products intended to be resold online (dual pricing).
 - Permitted: agree fixed fee to support (offline-online) sales efforts (marketing/sales contributions).

Is the passive/active distinction valid?

- Threshold question: Is it the distributor or the customer who initiated the contact?
- Is the activity an invitation to treat or an offer?
 - Criteria: Behavioural & emotive
 - Alternative approach: **Invitation to treat** v **Offer**
(passive) (active)
- Does the activity (restriction) prevent or hinder valid offers?

Application of equivalency requirement re. criteria for online sales in the context of selective distribution

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- **Commission's view:** The Commission considers any obligations which dissuade appointed distributors from using the internet by imposing criteria which are not equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction (VRG par. 56).
 - Equivalence entails that criteria imposed for online sales must pursue same **objectives** and achieve comparable **results** as those allowed for offline sales.
 - The Commission has not defined equivalency to ensure that terms crucial for the interpretation of VRBER are clearly defined and understood.

ex. –

Acceptable criteria:

- Obliging distributor to offer different languages on their website for the respective countries to which they make deliveries (French Competition Council, 8 March 2007:selective distribution of cosmetics). Equivalent to multi-lingual pamphlets.
- Obliging distributor to use suppliers' central homepage with portal links to distributor's own webpage **v.** re-routing customers outside a territory to manufacturer's or other distributor's site.

Unacceptable criteria:

- Obliging distributor to use webcams enabling him to see its customers.
- Obliging distributor to set up website exclusively for the sale of the specific product **v.** Tiered SDS.

Comments

- Separate distribution channel: Equivalency irrelevant
- If a product/service can be offered online what is the validation of criteria for brick & mortar outlets?

* *Vehicle sales*

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Issue	1400/2002	330/2010
De-link sales and service/subcontracting	De -link explicit	No mention but case law suggests link possible to ensure quality and proper use
Multi branding	Cannot be prohibited. The supplier should allow dealers to sell at least three different brands in the same showroom	Single branding is allowed for 5 years
Additional sales outlets	Yes if they meet the criteria applied in the same geographic area	They can be prohibited
Selective distribution	Members of the selective distribution system could be prevented to sell to unauthorized resellers	Members of a selective distribution system can now sell to unauthorized resellers in regions where the supplier has not applied this system

Termination for convenience	Yes, 2 years notice but must be in writing and include detailed, objective and transparent reasons	National law applies
Minimum period of fixed term agreements	5 years	National law applies
Minimum Resale Price	Hard core restriction	May be allowed, for short promotions in a franchise system or similar distribution system applying a uniform distribution format or a coordinated short term low price campaign
Intermediaries	Dealers must be allowed to sell to intermediaries	No special rule applies

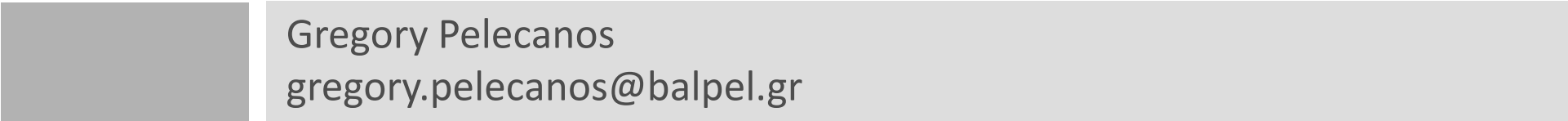
Market definition & aftermarkets

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- Another area where confusion and uncertainty remains is market definition. The general trend in the Commission's thinking remains that aftermarkets and motor vehicles are separate markets. Although the Commission seems to allow alternative thinking on the subject, it remains in favour of its older market perceptions.



Thank you for your attention!



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