



Exclusive distribution, territorial restrictions, and geoblocking

Exclusive distribution agreements are an appropriate contractual framework for both supplier and distributor to serenely develop their business on the long term. In that regard, the territorial exclusivity granted by the supplier to the distributor is at the heart of a balanced relationship between the parties.

However, a territorial exclusivity clause might be deemed to be a prohibited anti-competitive practice in the meaning of article 101 § 1 TFEU and of article L420-1 of the French commercial code if it restricts, in purpose or in fact, the free play of competition (subject to the individual exemptions provided for in article 101 § 3 TFEU). This concerns especially network-wide exclusivity clauses, whose implementation on the market (off- and online) is restrictively analysed by competition law.

1. TYPOLOGY OF EXCLUSIVITY CLAUSES

There are four different types of exclusivity clauses, according to how they impact the market.

A **simple territorial exclusivity clause**, by which the supplier agrees not to sell the products covered by the exclusivity to other distributors in the same territory, is generally not considered to be an anti-competitive practice. Indeed, in such a case, the exclusivity clause **does not have any "network effect"** since the distributor is free to resell products to all customers in or outside the territory.

An **exclusivity clause** by which the supplier **forbids their distributor from actively canvassing** customers outside their territory (or categories of customers not covered by the exclusivity) is also an authorized practice under French and EU competition law. Such an exclusivity clause, which prohibits active competition with other distributors outside the exclusive territory, applies to canvassing, targeted advertising, or the setting-up of branches or warehouses outside the territory.

On the other hand, both French and EU competition law prohibits exclusivity clauses that effectively **hinder passive competition between distributors**, notably by forbidding passive sales. Passive sales are sales made by the distributor following spontaneous (i.e., without prior canvassing) enquiries or orders from customers outside their territory. Forbidding passive sales is a hardcore restriction that precludes the benefit of the block exemptions provided for by EU Regulation no. 330/2010 of 20 April 2010 on vertical agreements or applicable to agreements of minor importance (Commission notice on agreements of minor importance no. 2001/C368/07 of 22 December 2001).

The French competition supervision authority, the Autorité de la concurrence, recently recalled that the prohibition also applies to **de-facto network practices** ([press release of 07 March 2018, sale of agricultural tractors](#)). The Autorité de la concurrence's investigation of the John Deere and Agco groups had shown that their exclusivity clauses in practice caused dealers to refrain from responding when receiving orders from customers outside their territory, or to request their supplier's prior approval. Therefore, the practice effectively restricted competition between dealers of the same brand and limited the range of offers available to purchasers. After taking due note of the fact that both suppliers had clarified the wording of their exclusivity clauses and clearly advised their respective dealers that they were free to make passive sales with purchasers outside their territories, the Autorité de la concurrence closed its investigation of both groups.

A fortiori, **absolute territorial exclusivity clauses** are prohibited. An absolute territorial exclusivity clause is a clause by which a supplier obliges their exclusive distributor to forbid their own

customers from reselling purchased goods outside the exclusive territory, thus creating an absolutely compartmentalized market.

2. ONLINE SALES AND TERRITORIAL EXCLUSIVITY

Competition law also governs exclusivity clauses in the online distribution segment. First of all, **suppliers may not forbid distributors from reselling goods on the internet**. There are a few exceptions however, as suppliers may invoke (i) objective grounds for forbidding online sales (e.g., hazardous substances or weapons) or (ii) the new-market-entry or new-brand-on-the-market exceptions.

According to the EU Commission's [Guidelines on vertical restraints interpreting EU Regulation no. 330/2010 of 20 April 2010](#), **online sales are likened to passive sales** while at the same time **other practices aiming to indirectly guarantee territorial protection for distributors are considered to be hardcore restrictions**. The Guidelines cite four (non-exhaustive) examples of prohibited clauses:

- Supplier and exclusive distributor agree that the exclusive distributor **shall prevent customers in another territory from visiting their website** or shall automatically refer them to the supplier's or other distributors' websites (but the inclusion, on the exclusive distributor's website, of hypertext links to the supplier's website and/or to other distributors' websites is authorized...).
- Supplier and exclusive distributor agree that the exclusive distributor **shall terminate an online sale if the purchaser's credit card data show that the purchaser is not from the exclusive distributor's exclusive territory**.
- Supplier and exclusive distributor agree to **limit the share of sales made by the exclusive distributor through the internet** (but the contract may provide for minimum offline targets in absolute terms and for online sales to remain coherent compared to offline sales).
- Supplier and exclusive distributor agree that the exclusive distributor **shall pay a higher price for goods intended for sale on the internet** than for goods intended for sale offline (but the supplier's pricing terms may provide for separate customer categories...).

The Guidelines also put a dampener on the rule according to which online sales are to be likened to passive sales. In fact, **an online sale can be deemed to be an active sale**, possibly forbidden under the exclusive distribution agreement. For instance, according to the EU Commission, online sales may qualify as active sales where the exclusive distributor has recourse to online advertisements (advertising banners, hypertext links) or profiling tools or even cookies specifically targeting customers outside the exclusive territory. On the other hand, displaying a website in the official language of another territory is not by itself sufficient to define an active sale.

In any case, suppliers may impose **website quality standards** on distributors reselling their products via the internet.

3. GEOBLOCKING AND TERRITORIAL EXCLUSIVITY

After the Commission noticed that offers on the internet were highly segmented (63 % of e-commerce sites) and commerce very weak within the EU, the EU bodies looked for ways to do away with or at least **restrict geoblocking**. [EU Regulation no. 2018/302 of 28 February 2018](#) on addressing unjustified geoblocking and other forms of **discrimination based on customers' nationality, place of residence or place of establishment** within the internal market will enter into force on 02 December 2018.

The new Regulation will only apply to online sales between businesses and end-user consumers or businesses, and its scope does not include purely domestic transactions.

Firstly, under the Regulation, a business **may neither block nor restrict, through the use of technological measures, access to their online interfaces** for reasons related to nationality, place of residence or place of establishment.

However, businesses are authorized to redirect customers to a different website than the one they were trying to access provided the customer expressly agrees thereto and can still easily visit the website version they originally tried to access.

Secondly, the Regulation forbids businesses from applying **different general conditions of access to goods or services** according to a customer's nationality or place of residence or place of establishment (as identified by their IP address in particular) in the following three cases:

- where **the goods sold by the business are delivered in a different member state** to which the business offers delivery (or where the goods are collected at a location jointly agreed upon by the business and the customer);
- where the business offers **electronically supplied services** such as cloud, data storage, hosting services etc. (but not services offering access to copyright-protected content such as streaming or online-gaming services);
- where the business supplies **services received by the customer in a country in which the business also operates** (such as car rental and hotel accommodation services or ticketing services for sporting or cultural events).

Thirdly, the Regulation forbids businesses from applying **different conditions for payment transactions** to accepted means of payment for reasons related to a customer's nationality, place of residence or place of establishment, or to the location of the payment account or the place of establishment of the payment service provider (provided that authentication requirements are fulfilled and that payment transactions are made in a currency accepted by the business).

Although formally excluded from the scope of the Regulation, relations between suppliers and distributors or wholesalers will still be impacted by it since **provisions of agreements between businesses under which distributors undertake not to make passive sales (e.g., by blocking or restricting access to a website) for reasons related to a customer's nationality, place of residence or place of establishment "shall be automatically void"**.

The Geoblocking Regulation therefore **impacts distributors twofold**, directly in their relations with customers (end-user consumers or businesses), and indirectly in regard to their obligations under the exclusive distribution agreement.

The positions recently adopted, in varying forms, by the Autorité de la concurrence and the EU Commission respectively show that both suppliers and distributors must be particularly careful when shaping a territorial exclusivity clause, especially where they wish to lay down a contractual framework for sales through multiple channels (including of course the internet).

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