

13

DLC COUNTDOWN



“VERTICAL” IN THE SPOTLIGHT: ACTIVE SALES RESTRICTIONS PARALLEL IMPOSITION REQUIREMENT

WHAT?

Classic notions in the world of vertical agreements are those of “active sales” and “passive sales”. **Active sales** involve some form of active targeting of a particular customer group or territory. **Passive sales** consist of transactions in response to unsolicited requests from individual customers without having initiated the sales by means of active targeting of such customers.

In order to protect efforts and investments made by **exclusive, but non-selective distributors**, the block exemption regime accepts under strict conditions that other distributors may be obliged to refrain from active selling into the territory or to a customer group that is allocated to an exclusive distributor. Passive sales by such other distributors are however always black-listed.

This countdown deals with the second of three conditions (the **parallel imposition requirement**) that must be met to render active sales restrictions compatible with the block exemption and thus automatically exempted under the EU competition rules. Given the complexity of the matter, the first condition (the exclusivity requirement) was addressed in the previous countdown no. [12](#) and the remaining third condition (the roll-over prohibition) will be addressed separately in the next countdown no. [14](#).

Now?

The current Vertical Block Exemption Regulation (the “VBER”) places the imposition of restrictions on active and passive selling in principle on the black list. There is however a limited exception, that is subject to **stringent cumulative conditions**.

The **second of such conditions** requires the supplier (and all of the companies that directly or indirectly control the supplier or are controlled by the supplier) to **impose the same active sales restriction on all of its buyers within the EU**. Practically speaking, if a supplier designates an exclusive distributor in Finland and it wishes to protect the distributor against active sales by the distributors located in the other Scandinavian countries, it will have to impose an active sales restriction towards Finland not only on the other Scandinavian distributors, but on all of its distributors that are located anywhere in Europe.

This second condition is often referred to as the **parallel imposition requirement**.

It is important to add that the parallel imposition requirement does not apply to the supplier itself. In other words, it is not necessary that the supplier accepts to refrain from engaging in active sales to (in our example) Finland. The requirement applies only to all of the buyers within the EU.

It is interesting to note that this condition is not stated in the VBER itself, but only in the Vertical Guidelines.

THE FUTURE AS OF 1 JUNE 2022?

The Commission proposals are confusing in respect of the second condition. It is simply **unclear whether the parallel imposition requirement remains in place or is abandoned**.

The definition of “exclusive distribution” seems to put the requirement aside by referring to “other buyers” and not to “all the other buyers”, which is the language of the current Vertical Guidelines. However, the language included in several paragraphs of the proposed new Vertical Guidelines creates doubts and could still be read as leaving the second condition intact.

IN PRACTICE?

This is an issue of considerable practical importance. In the [Expert Report](#) submitted on the issue of territorial and customer restrictions we highlighted the practical difficulties with implementing the parallel imposition requirement. These difficulties apply in particular to existing distribution networks that have evolved over time.

The failure to comply with this second condition turns the active sales restriction into a **hardcore restriction** and places it on the black list. Returning to the example of the exclusive distributor in Finland, the failure to include the active sales restriction towards Finland in the distribution agreement concluded with a distributor located in Barcelona, Nice or Valletta brings the black list into play. This is difficult to comprehend.



ASSESSMENT?

Abstraction being made of the fact that we fail to see the economic justification for the very rigid second condition (the parallel imposition requirement), it is in any event desirable that the future regime tackles the issue head on. **It must be clear whether the second condition is still part of the future regime or whether it is being abandoned.** This will require appropriate clarifications in the future Vertical Guidelines.



THE FINAL REVISED VBER IS PLANNED TO ENTER INTO FORCE ON 1 JUNE 2022.

WANT TO KNOW MORE? STAY TUNED...

Counting down towards 1 June 2022, we aim to provide you with regular updates and the necessary legal know-how in order to fully prepare your business for the future. Please also check out the Distribution Law Center platform (www.distributionlawcenter.com) and our [LinkedIn page](#) for much more information on the laws governing vertical agreements, covering both competition and commercial law. 27 specialized teams from all over the EEA are working hard to turn the platform into your favourite source of guidance and information.