

## Antitrust Client Service Group

From Bryan Cave Hamburg and London

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# Companies with Distribution or Franchising Operations in the European Union

**Adoption of Regulation 330/2010/EC, replacing Regulation 2790/1999/EC (on the application of Article 101(3) to categories of vertical agreements and concerted practices)**

## Background

Under EU antitrust law, Article 101(1) of the Treaty on the Functioning of the European Union prohibits agreements and concerted practices among firms which may affect trade between Member States and “have as their object or effect the prevention, restriction or distortion of competition within the internal market”. In the exercise of its enforcement powers concerning possible infringements of Article 101(1), the Commission has determined that certain categories of these vertical agreements unless they contain certain “hardcore restrictions” are presumptively unlikely to result in a restriction of trade and has exempted such categories of agreements by Regulation (also called a “Block Exemption”).

The current Regulation, 2790/1999/EC, expires on May 31, 2010. The successor Regulation 330/2010/EC and new Guidelines thereto were adopted on April 20, 2010 with an effective date of June 1, 2010 and a term ending May 31, 2022.

The *De Minimis* exception to the application of Article 101(1) continues, however, to apply.

## Importance

The new Regulation and Guidelines will have importance for companies which distribute goods or services within the European Union through exclusive distribution, selective distribution or franchising systems (“vertical agreements”). Common provisions in these types of agreements, for example concerning pricing, territory, sales and customer restrictions, non-competition, sales over the internet, or cross supplies within the distribution network (so-called “vertical restraints”) may constitute an infringement of the antitrust rules of the European Union, if they do not satisfy the conditions in the Regulation for exemption.

## Highlights of the Changes

The ten year experience with the expiring Regulation is generally considered to have been positive. Therefore it was not expected that the new Regulation and the new Guidelines would contain major changes. The two major market developments experienced over the term of the expiring Regulation, the increased market power of certain buyers and the increased use of the Internet, are also the two areas in which revisions were implemented.

### 1. Buyer's market power

In order to fall within the new Block Exemption, as before, the supplier's share of the relevant market must not exceed 30%. Now in the new Regulation, the buyer's market share may also not exceed the 30% threshold. The Commission believes that this change will be particularly beneficial to small and medium sized enterprises which, as competitors of a powerful buyer or as supplier to a powerful buyer, may be unable to countervail the buyer's market power. Where these thresholds are excluded, non-hard core restraints will not necessarily be prohibited but must be examined on a case by case basis.

### 2. Internet sales

The actual changes concerning Internet sales do not appear in the new Regulation but in the accompanying Guidelines.

The Guidelines start from the general principle that "every distributor must be allowed to use the Internet to sell products". A distinction is made, however, between active and passive sales. Whereas restrictions on passive sales over the Internet continue to constitute a hardcore restriction, more guidance is provided in the Guidelines as to what constitutes an active sale, which can be restricted into territories or to customer groups exclusively reserved to the supplier or to other distributors.

Prohibited as a restriction on passive sales would be agreements to limit access to the website by persons outside the territory or to terminate their transactions; to limit the proportion of sales that can be made over the Internet; or to charge differing prices for products intended to be resold online (so-called "dual pricing").

On the other hand, the Guidelines permit the requirement that a distributor must also maintain a brick and mortar shop; to sell at least a certain absolute amount in value or volume of the products off-line; or to require links to websites of other distributors or to the supplier. The supplier is also permitted to pay a fixed (not variable) fee to support the distributor's off-line sales efforts.

Finally, the supplier is permitted to impose quality standards for the use of an Internet website just as for sales at a shop or by catalogue. The supplier may even impose these quality standards on third party platforms used by its distributors to host their internet presence and may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.

## Suggested or Required Action

All companies with distribution or franchising operations in the EU should have their existing agreements reviewed to determine if those agreements conform to the conditions for continued exemption under the new Regulation and also whether the agreements take full advantage of the provisions of that Regulation, in particular of the clarified rules concerning Internet sales.

Of particular urgency are a review of their agreements by those companies which may qualify as buyers, or which have concluded agreements with buyers, holding a relevant product market share within the threshold of 30% and thus within the scope of the new Regulation.

A copy of the new Regulation and of the Guidelines can be found on the EU Competition Law website: <http://ec.europa.eu/competition/antitrust/legislation/vertical.html>

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