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Active Sales Restrictions Revisited

Frank Wjickmans
and Filip Tuytschaever

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Frank Wijckmans and Filip Tuytschaever*

Introduction

Commission Regulation (EC) No.2790/99 of December 22, 1999 on the application of Art.81(3) EC to categories of vertical agreements and concerted practices¹ (hereafter "Reg.2790/99") by and large abandons the Commission's conventional straightjacket approach to block exemption regulations. Forcing the parties to paraphrase the provisions of the block exemptions, this approach resulted in more or less standardised distribution agreements. Under Reg.2790/99, distribution agreements with anti-competitive provisions benefit from the block exemption as long as their provisions are not blacklisted pursuant to Art.4.

There is one important exception to this radical change in approach. Art.4(b) Reg.2790/99 blacklists agreements which have as their object (directly or indirectly)

the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services.

It then offers four exceptions to this restriction. As a consequence, Art.4(b) does not abandon the straightjacket approach: distribution agreements containing territorial or customer restrictions are condemned to stick to one of the four exceptions of Art.4(b) if they wish to enjoy the benefit of the block exemption. One of these exceptions concerns restrictions on active sales: permitted is

the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer (Art.4(b), first indent).

This contribution seeks to provide an insight into the Commission's approach to this exception and to show that it is very treacherous to implement. Taking the analysis a step further, it also aims at offering a roadmap to prevent unintentional infringements of Art.4(b) Reg.2790/99, so as to avoid the benefit of the block exemption being forfeited for the entire agreement.²

Definition of active sales

The notion of "active sales" is defined in the Guidelines on Vertical Restraints ("the Guidelines")³ (no.50) as

actively approaching individual customers inside another distributor's exclusive territory or exclusive customer group or customers in a specific territory allocated exclusively to another distributor through advertisement in media or other promotions specifically targeted at those customer groups or targeted at customers in that territory; or establishing a warehouse or distribution outlet in another distributor's exclusive territory.

As opposed to active sales, passive sales involve

responding to unsolicited requests from individual customers including delivery of goods or services to such customers.

The notion of passive sales nevertheless does not exclude all advertising:

General advertising or promotion in media or on the Internet that reaches customers in other distributors' exclusive territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in non-exclusive territories or in one's own territory, are passive sales.⁴

The definition of active sales obviously encompasses the establishment of a distribution outlet or the appointment of a sub-dealer. In all other hypotheses, the

2 Art.4 reads: "exemption provided for in article 2 . . . shall not apply to vertical agreements . . ." [emphasis added]. Unlike Art.5, Reg.2790/99, the principle of severability does not apply to infringements of Art.4 Reg.2790/99. Where Art.4 is infringed, the parties concerned can no longer invoke the block exemption for any aspect or clause of the agreement which comes within the scope of Art.81(1) EC.

3 [2000] O.J. C291/1.

4 Guidelines, no.50.

* Members of the Brussels bar. Filip Tuytschaever is also a lecturer at the Law Faculty of the University of Brussels. The authors wish to thank the members of the EU and Competition Law Team of VVEW Advocaten for their insightful comments on earlier drafts.

1 [1999] O.J. L336/21.

distinction between active and passive sales is much more delicate and does not in any event depend on whether a sales is concluded with a customer. What is essential is whether there has been a targeted sales effort. For instance, sales following unsolicited e-mails sent to individual customers or specific customer groups (or sales following the unsolicited sending of catalogues) are considered active selling. Conversely, correspondence via e-mails or the sending of a catalogue at the initiative of a customer leads to passive sales only. Promotions or sales via the internet are generally not regarded as active sales. This will only be different where the website concerned uses banners or links in pages of providers which are specifically available to customers outside the contract territory or to customer groups exclusively allocated to another distributor.⁵ Advertising in the national press of the country where a dealer's territory is situated will typically not qualify as an active sales effort. The opposite conclusion applies where the dealer advertises in a local or regional magazine that is typically circulated outside the dealer's territory.

While the distinction between active and passive sales does not pose any specific problems in theory, the contrary is true in practice. Only in exceptional circumstances will it be possible to show that promotional efforts amount to a violation of the active sales restriction. It is of course generally not hard to show that there have been sales in a given territory or to a given customer group. As opposed to this, it is often very difficult to prove that those sales are due to an active sales effort by the dealer concerned.

Active sales prior to Reg.2790/99

Prior to Reg.2790/99, the supplier could impose a flat restriction on active sales outside the territory of its exclusive dealers.

Reg.67/67 permitted that the exclusive seller had

to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch and from maintaining any distribution depot (Art.2(1)(b)).

Similarly, Reg.1983/83 allowed that the exclusive distributor had

to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch and from maintaining any distribution depot (Art.2(2)(c)).

For motor vehicle distribution, the same approach was adopted in Reg.123/85 (Art.3(8)) and Reg.1475/95 (Art.3(8)), which allowed exclusive distribution as well as shared exclusivity.⁶ Finally, Reg.4087/88 concerning franchising agreements also contained an unlimited possibility to impose active sales restrictions (Art.2(d)).

Block exemption regulations not covering any form of exclusive distribution (whether exclusive distribution or shared exclusivity) generally did not permit a restriction on active sales. This resulted implicitly from Reg.67/67 and expressly from Reg.1984/83. The latter block exemption, dealing with non-exclusive distribution linked to exclusive purchasing, contained no reference to active sales restrictions. Pursuant to the straightjacket approach, the imposition of such a restriction therefore led to the non-applicability of Reg.1984/83.

For customer restrictions which restrict the dealer as to the customers or the customer group he may approach, the Commission Notice concerning Reg.1983/83 and Reg.1984/83⁷ explicitly stated:

In principle inadmissible, pursuant to these prescriptions, are the contractual clauses which limit the reseller in his free customer choice (no.17)

or, even more to the point:

Incompatible with the regulation would also be the imposed obligation on the exclusive distributor to supply only certain groups of buyers within his defined territory (e.g. retailers in a certain branch) and to leave the supply of other groups of buyers (e.g. warehouses) to other resellers, who were appointed by the supplier (no.29).

It follows from the above that, prior to Reg.2790/99, the rationale of active sales restrictions seemed to be linked to the territorial exclusivity enjoyed by the dealer concerned: the underlying idea must have been that a supplier could expect from his exclusive dealers to concentrate their sales efforts on their own contract territory and not seek to sell actively outside their territories.

⁶ Exclusive distribution means that the supplier has committed himself to appointing only one reseller in a particular territory. In the event of shared exclusivity, the supplier commits himself to appointing a restricted number of resellers (two or more) in the contract territory.

⁷ [1984] O.J. C101/2.

⁵ Guidelines, no.51.

Active sales in the context of Reg.2790/99

Reg.2790/99 embraces a totally different approach. The situation in the territory of the dealer on whom the restriction is imposed has become irrelevant. In addition, the impossibility of enjoying a block exemption for customer restrictions included in a distribution agreement is abandoned. Both aspects of this new approach are discussed below.

The restriction of active sales to other territories according to Reg.2790/99

As a rule, Art.4 Reg.2790/99 does not allow territorial restrictions.⁸ Prominent on the blacklist features the "restriction⁹ of the territory into which . . . the buyer may sell the contract goods or services". There are nonetheless exceptions to this rule. A first exception is

the restriction of active sales into the exclusive territory . . . reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer.

Such a territorial restriction is permitted.

On this basis, an active sales restriction on sales outside the buyer's territory can be reconciled with Reg.2790/99 subject to certain conditions being fulfilled. These conditions not only stem from Reg.2790/99 itself, but also result from the Guidelines.

A first condition flows directly from the wording of Art.4(b), first indent, namely that the restriction must be directed at a territory reserved exclusively to the supplier or allocated exclusively to another buyer. It would appear from the Guidelines (no.50) that a supplier can reserve a territory for himself even if he is not commercially active in that territory (*e.g.* because he is still seeking a suitable dealer). For a territory to be allocated exclusively to another buyer, the Guidelines (no.50) clarify that the supplier must agree to sell his product to only one distributor. The exception of Art.4(b), first indent, therefore does not apply to shared exclusivity.

A second condition does not flow from Art.4 Reg.2790/99 itself, but is added by the Commission in

⁸ Although Reg.2790/99 does not state this expressly, the Commission presumes that only territorial restrictions with intra-EEA effect are caught by the blacklist. A restriction on exports outside the EEA will, as a rule, not fall under Art.4 (see Guidelines, no.46).

⁹ Art.4(b) only concerns agreements which *directly or indirectly aim at* a territorial restriction. This article therefore does not aim at those situations where an agreement results in a territorial restriction, without however having this restriction as its aim or objective.

its Guidelines (no.50), stating that a territory will be considered exclusively allocated only

if the exclusive distributor is protected against active selling into his territory . . . by the supplier and all the other buyers of the supplier inside the Community.

The practical consequence is that an active sales restriction imposed on a buyer can only be exempted under Reg.2790/99 where a similar restriction is imposed on all other buyers of the supplier in the EEA and on the supplier himself. Put differently, an active sales restriction will escape the blacklist only if the supplier, as well as all other buyers of the supplier in the EEA, commit to abstaining from actively selling into the exclusive territory concerned. Hereafter this second condition is referred to as the "parallel imposition of an active sales restriction".

According to the wording of the Guidelines (no.50), the condition of the parallel imposition of an active sales restriction only applies to restrictions aimed at territories where a dealer has been appointed. Although not very logical, the Guidelines contain no reference to the necessity of the parallel imposition of an active sales restriction aimed at territories which the supplier has reserved for himself. It would therefore be inappropriate to contest the legality of an active sales restriction on this point.

In short, the new active sales approach of Reg.2790/99 amounts to the following:

1. Whether or not a dealer has been appointed exclusively within his contract territory has become irrelevant in deciding if it is lawful to impose an active sales restriction on him. The conditions of Reg.2790/99 and the Guidelines exclusively concern the target territory, *i.e.* the territory at which the restriction is aimed.

2. A restriction may be imposed only if it concerns a territory which the supplier has reserved for himself or where he has agreed to appoint only one distributor. As a result, an active sales restriction is blacklisted where it concerns:
 - a territory which the supplier did not allocate to a dealer, nor reserve for himself;
 - a territory which the supplier allocated to one dealer, but where he reserves the right to appoint additional dealers; or
 - a territory which the supplier already allocated to several dealers.

3. An active sales restriction must be accompanied by the imposition of the same restriction on the

supplier himself and on all his other dealers in the EEA.

Examples

Examples can illustrate the new rules on active sales restrictions. Suppose that an importer of hi-fi sets has put in place a distribution network in six Member States: the UK, Ireland, France and the Benelux. The importer reserved the Netherlands and Luxembourg for himself. In Belgium, two dealers are appointed on the basis of shared exclusivity. In France, the importer currently has only one dealer but has the right to appoint others. In Ireland, his network consists of one dealer and a number of own distribution outlets. Finally, in the UK he appointed only one dealer. The UK distribution agreement moreover provides that the importer will not appoint other dealers in the country, nor engage in active sales in this area himself.

In this example, an active sales restriction will only be covered by Reg.2790/99 if it concerns the Netherlands and Luxembourg (reserved to the importer) and the UK (contractual commitment not to appoint other dealers, nor to engage in active selling). An active sales restriction will not be permissible for Belgium (more than one dealer), France (the importer has the right to appoint additional dealers) or Ireland (active sales by the importer through his own outlets).

If the importer wishes to prohibit active sales in the UK by dealers appointed elsewhere, the importer must impose a restriction on himself and on all his other dealers in the EEA. In other words, assuming the importer limits his activities to the above Member States, he must impose the restriction on himself, on his dealers in Belgium, France and Ireland.

If the importer were to expand his activities to Spain, he must impose the restriction on his Spanish distribution network as well. If the importer were to appoint a dealer, say, in Alicante, without imposing an active sales restriction to the UK on this dealer, the condition of parallel imposition is no longer met. As a result, not only the dealer in Alicante, but also the dealers in Belgium, France and Ireland would be entitled to engage in active sales in the UK, as the active sales restriction imposed on them would no longer be enforceable.

What is more, because territorial restrictions are blacklisted, any oversight regarding the parallel imposition of the active sales restriction on all EEA dealers leads to the inapplicability of Reg.2790/99 to the distribution agreements in their entirety. As a result, the importer would no longer be able to rely on the block exemption to enforce any restriction of competition coming within the ambit of Art.81(1) EC (*e.g.* location clauses, non-compete clauses meeting the conditions of

Art.81(1) EC, etc.). The consequences of the failure to impose an active sales restriction towards the UK on the Alicante dealer are potentially far-reaching. A dealer whose contract is terminated for the alleged infringement of a non-compete obligation has every interest in examining closely the enforceability of the active sales restriction contained in his agreement. If such enforceability is lacking, either because the first (characteristics of the target area) or the second (parallel imposition) condition is not met, the distribution agreement infringes the blacklist of Art.4 Reg.2790/99 and the importer can no longer rely on Art.5 Reg.2790/99 to safeguard the enforceability of the non-compete clause.

Practical solutions

The possible uncertainty on the matter of the enforceability of active sales restrictions can essentially be solved in two ways

The first solution is to include a clause which reads as follows:

The [distributor] will exercise his activities within [the territory]. The [distributor] shall not engage in active sales in territories, or in relation to customer groups, which are exclusively reserved for the [supplier] or exclusively allocated to other distributors appointed by the supplier.

This type of clause ensures compliance with the Commission's conditions even where there are changes within the distribution network (*e.g.* an additional dealer is appointed in a territory which used to be exclusive; an exclusive dealership is terminated without there being an immediate replacement). Since dealers are often unaware of the characteristics of the entire distribution network, this type of clause may have undesirable consequences from a competition law perspective. It may indeed cause dealers to become reluctant to engage in any active selling outside their territory. As a result, the position on active sales restrictions risks remaining *de facto* the same as that existing at the time of Regs 67/67 and 1983/83.

A second, more radical, but also more careful and possibly more dealer-friendly, solution is to simply avoid the non-enforceability risks attached to active sales restrictions by removing them from the distribution agreements. It goes without saying that the choice in favour of this option will depend on the circumstances: the bargaining power of the dealers, the complexity of the distribution network (simple distribution networks being less prone to being confronted with problems of non-enforceability), the importance of other restrictions of competition (such as location clauses or non-competes), etc. Generally speaking, however, there are

many instances in which there is much to say in favour of this radical solution, in particular if the supplier has a complex distribution network consisting of many dealers.

The restriction of active sales to an exclusive customer group according to Reg.2790/99

Reg.2790/99 permits the exclusive allocation of a group of customers to a given dealer or to the supplier himself. Such allocation cannot, however, be phrased in absolute terms. If the supplier decides to make use of this possibility, he is entitled to impose a restriction on active sales to this exclusive customer group on his importers or dealers. This restriction must comply with the same conditions as those discussed above for the protection of a dealer territory. Hence passive sales towards such customer groups must at all times remain permitted.

Direct sales by the supplier

Prior to the entry into force of Reg.2790/99, the supplier could reserve the right to supply certain customers himself. Suppliers traditionally made use of this possibility for important customers (*e.g.* governments; supermarkets). Since the entry into force of Reg.2790/99, the combination of such direct sales with an active sales restriction raises some difficulties. If a supplier reserves the right to sell to certain customer groups in a given territory, he does not, with respect to those customer groups, respect the exclusivity of the dealer appointed in that territory. Put differently, as a result of his active sales in the exclusive territory concerned, the supplier no longer complies with the condition of the parallel imposition of the restriction of active sales as laid down in the Guidelines (no.50).

Careful drafting continues to make it possible to combine direct sales in an exclusive dealer territory with an enforceable active sales restriction. This can be done by defining the dealer's exclusivity on the basis of two parameters—territory and customer groups—and to grant territorial exclusivity only for those customer groups which the supplier has no intention of supplying himself.

Assume an importer of office supplies wishes to appoint an exclusive dealer in Scotland, but wants to maintain a direct sales right to companies with more than 150 employees. Under the given circumstances, the best solution is to grant the dealer exclusivity for all customers in Scotland, save for companies with more than 150 employees. As a result, the dealer's exclusivity is not only confined geographically (Scotland), but also by reference to a specific customer group (all customers

having fewer than 150 employees). An active sales restriction imposed on dealers outside Scotland must then, in turn, be restricted to the exclusive customers of the Scottish dealer (*i.e.* all customers except for companies with more than 150 employees). The Guidelines (no.50) expressly allow such a combination of the allocation of an exclusive territory with an exclusive customer group.

In practice, this type of active sales restriction will nevertheless be difficult to implement. As the Scottish dealer does not have exclusive rights with respect to companies with more than 150 employees, he will have to tolerate other dealers actively seeking customers in his territory. Whilst these sales efforts must in theory be limited to companies with more than 150 customers, there is clear potential for abuse.

In our view, a more practicable solution for the importer is to reserve the companies with more than 150 employees exclusively for himself. In so doing, he is entitled to impose an active sales restriction on all dealers in so far as those customers are concerned. The Scottish dealer's exclusivity would remain the same, namely all customers in Scotland, save companies with more than 150 employees. In so doing, the customers that are exclusively reserved, either to the importer or to the dealer, constitute the entirety of customers in Scotland. This, in turn, makes it possible to impose a flat prohibition on active sales in Scotland on all dealers outside Scotland.

Active sales restrictions in case of the simultaneous application of distinct distribution systems

To complicate matters, a supplier may wish to set up a distribution system combining exclusivity with selectivity. In this event, two scenarios can be distinguished.

In a first scenario, the supplier wishes to combine exclusivity and selectivity for all dealers. This implies that the dealers must meet certain selection criteria (*e.g.* quality standards; the obligation not to resell to unauthorised dealers). At the same time, they will enjoy territorial exclusivity.

Art.4(c) Reg.2790/99, juncto the Guidelines (no.35), allows this combination provided that active and passive selling are not restricted anywhere. Dealers may nevertheless be held to a location clause, meaning that the most aggressive form of active selling, *i.e.* the establishment of a sales outlet, may be prohibited by the supplier.

In a second scenario, the supplier wishes to combine exclusive distribution (without selectivity) in one territory (e.g. the Netherlands) with selectivity in another (e.g. Belgium).

According to Art.4(c) Reg.2790/99, this combination is possible only if there are no restrictions on active and passive sales. Informal contacts have nonetheless shown that DG COMP has a different view, namely that in this second scenario an active sales restriction may be imposed on the dealers in Belgium for their sales in the Netherlands. While this is difficult to reconcile with the wording of Reg.2790/99, DG COMP is of the opinion that a different interpretation would prevent companies from setting up a system of exclusive distribution in a given territory (e.g. a territory where the network has not been developed to an extent that permits selective distribution), while reserving selective distribution to territories where the distribution network already meets higher standards. This interpretation by DG COMP can only be applauded as it enables producers to develop their distribution networks in line with commercial reality. The problem of course, as will also be seen below, remains that the Community courts are not bound by the Commission's views and may at any time adopt a more narrow reading of Reg.2790/99.¹⁰

Legal nature and consequences of the Guidelines

It follows from the above that the Guidelines do not merely explain, but sometimes also add conditions to, the application of Reg.2790/99. Art.4(b), first indent, Reg.2790/99 permits an active sales restriction for territories reserved to the supplier or allocated by the supplier to another dealer. The Guidelines add to this that the exclusive dealer must be protected against active sales in his territory from the supplier and all other buyers of the supplier in the EEA. If a supplier omits to impose the latter condition, he infringes (in the Commission's view) the blacklist of Reg.2790/99 and loses the benefit of the block exemption for all anti-competitive clauses in the dealer agreements.

Obviously this begs the question as to the legal nature and consequences of the Guidelines. As far as the legal nature is concerned, the Guidelines are part of the growing corpus of *soft law* in EC law in general and EC

competition law in particular. In this respect, the Guidelines can be put on the same footing as "codes of conduct" and "inter-institutional agreements". According to the Court of Justice, the legal consequences of soft law differ between the institution which adopted it and third parties.

The Commission is bound by the Guidelines on the basis of the principle *patere legem quam ipse fecisti*.¹¹ The contrary would indeed mean that the Commission is entitled to breach the legitimate expectations of those who rely on the Guidelines to assess whether or not their vertical agreement may enjoy the block exemption contained in Reg.2790/99. Since the respect of the principle of legitimate expectations is a general principle of EC law, this cannot be allowed.

Conversely, soft law (here, the Guidelines) is not legally binding upon third parties, who can be either other EC institutions (specifically the Court of Justice), national authorities (national courts and competition authorities) or individual companies.

The Guidelines expressly state that they are

without prejudice to the interpretation that may be given by the Court of First Instance and the Court of Justice of the European Communities in relation to the application of Article 81 to vertical agreements.¹²

Hence the Guidelines have no more than interpretative force *vis-à-vis* the Community judiciary: the Community judge may indeed interpret EC law on the basis of certain declarations from the institutions, as long as the content of those declarations is publicly available.¹³ The Community judiciary is not bound by the Guidelines and may let its own views prevail over those of the Commission. It should be clear that the risk of conflicts increases in those cases where the Guidelines go beyond the wording of Reg.2790/99 and add conditions required for the application of the block exemption. A conflicting ruling by the Community judiciary would be binding upon the Commission.

In respect of the national authorities (national courts or competition authorities), the Guidelines again have no more than interpretative force. Since the Commission issued the Guidelines autonomously, Art.10 EC (the "loyalty clause") cannot be invoked against the national authorities. Logically, the national authorities will seek inspiration from the Guidelines in developing their

¹⁰ Reg.1400/2002 (the new block exemption on motor vehicle distribution) lends support to DG COMP's interpretation. See recital 13 and Art.4(1)(d) Reg.1400/2002.

¹¹ *cf.* Case T-105/95 *WWF UK v Commission* [1997] E.C.R. II-313, no.55; [1997] 2 C.M.L.R. 55 (regarding the former Commission Code of Behaviour on access to documents).

¹² Guidelines, no.4.

¹³ Case C-292/98 *Antonissen* [1991] E.C.R. I-745, [1991] 2 C.M.L.R. 373, no.18; Case C-25/94 *Commission v Council* [1996] E.C.R. I-1469, no.38; Case C-329/95 *Länsrätten I Stockholms Län* (1997) E.C.R. I-2675, no.23.

national Art.81(3) EC-policy after May 1, 2004. They should not, however, automatically apply the Guidelines, but adopt a critical attitude, especially where these go further than Reg.2790/99. In cases of doubt, the national judge can always refer the matter to the Court of Justice for a preliminary ruling.

Finally, the legal consequences of the Guidelines for individual companies and their legal advisers are no different than those towards the national authorities. They are first and foremost bound by the wording of Reg.2790/99. Where a supplier's distribution policy is questioned on the basis of its active sales restriction, the supplier may contest the Guidelines (no.50) in light of Art.4(b), first indent, Reg.2790/99.

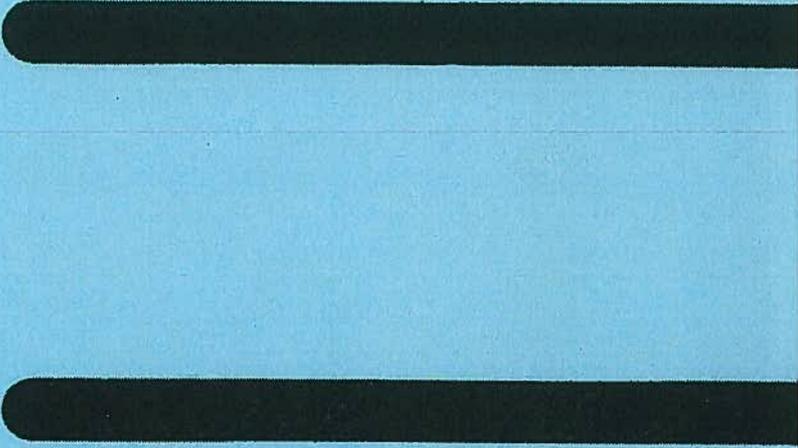
Conclusion

Since the entry into force of Reg.2790/99, a pragmatic approach towards active sales restrictions is advisable

so as to avoid difficulties with the block exemption's blacklist:

– If the parties believe that the restriction is of little practical relevance (*e.g.* because infringements are difficult to prove), there are compelling arguments not to include an active sales restriction. This substantially reduces the danger of infringing the blacklist of Art.4 Reg.2790/99—and the attendant danger of losing the benefit of block exemption for the agreement in its entirety.

– If the parties decide to have an active sales restriction, they should have recourse to a safe clause, such as the one suggested above, which does not have to be adjusted whenever there are changes in the distribution network. Where applicable, such clauses must be modulated to take into account the supplier's wish to continue direct sales in a given dealer territory.



Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London NW3 3PF
United Kingdom

<http://www.smlawpub.co.uk>

Telephone: 020 7393 7000 (UK)
+44 207 393 7000 (International)

Fax: 020 7393 7333 (UK)
+44 207 393 733 (International)