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VBER – Exclusive Distribution Agreements

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[1] The views expressed are those of the author and cannot be regarded as stating an official position of the European Commission
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Block Exemptions – Legal framework

- **Legal basis: Art. 103 TFEU + Council empowerment regulations**
- **Concept**
  - Block exemption regulations (BER) determine in general terms for certain kinds of agreements under what circumstances these agreements will generally qualify for exemption under Art. 101 para. 3 TFEU.
  - The block exemptions create a more or less safe harbour for companies. As long as they can bring their agreements under the provisions of a block exemption they can be certain that their agreements are valid and do not trigger fines.
  - Oversimplified, the block exemptions are a combination of market share thresholds and the specification of hard core restraints, so called black clauses, which make the entire contract void.
- **Do not define a particular contractual model or regulate contractual relations between parties**
- **There is no such thing as breaking the law if BER is not complied with**

Block Exemptions – No more work for us?

- **Self-assessment is the rule**
  - Companies do a self-assessment whether
    1) Agreement not caught by Art. 101
    2) A BER applies
    3) No BER applies but 4 cumulative conditions of 101(3) are fulfilled
- **Commission still active, either ex-officio or through a complaint**
  - Example: Airline Alliances (oneworld, STAR, SkyTeam JVs)
- **Art. 10 of Reg. 1/2003: Inapplicability**

Block Exemptions – VBER

- **Relevant BER for Distribution agreements**
  - BER 330/2010 Vertical Agreements, plus Guidelines
- **Market share threshold of 30%: benefit of BER depends not only on the supplier's market share, but also the buyer's market share:**
  - Not only suppliers, but also distributors may have market power (e.g. supermarkets) => coverage by the BER should also depend on buyer's market share
  - For supplier: share on the market where supplier sells contract products to the buyer
  - For buyer: share on the market where buyer purchases the contract products from the supplier

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VBER – Exclusive Distribution

- **Suppliers grants exclusivity to distributor in a particular territory**
  - Exempted if market share of both supplier and distributor does not exceed 30%
  - Can also be combined with single branding
  - Other retailers barred from actively selling in exclusive territory
  - Loss of intra-brand competition
- **Becomes hardcore if combined with passive sales ban**
  - So-called absolute territorial protection (ATP), Article 4 (b)
  - Outside 101(1) for first 2 years if otherwise new entry not possible (Para. 61 Guidelines

VBER – Dealer Exclusivity

- **Dealer must only carry suppliers brand**
  - Also called non- compete obligations, single branding , or exclusive dealing
  - Risk for competition: Customer foreclosure of competing brands
  - Accepted for up to 5 years if market shares do not exceed 30% (Art. 5 (1)a)
  - Up to 80% not considered dealer exclusivity (Art.1 (1) d)
  - Single Branding can fall outside the safe haven also if network effects leading to foreclosure (Delimitis-judgment)

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Single Branding as an Art. 102 problem

- Obliging/enticing the customer to exclusively source from one supplier against special rebates has led to an array of cases under Art. 102
  - Prokent/Tomra
  - Intel
  - Qualcomm
- In all these cases market share of supplier well beyond 30%