

“ Plain speaking legal advice ”

The Internet and Online Trading: Changes to Competition Law

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Changes to Competition Law

Imminent changes to competition law mean that all suppliers need to understand and take advice on competition law issues before attempting to impose any restrictions on their distributors. A replacement Vertical Agreements Block Exemption is due to come into force on 1 June 2010, which will apply to agreements for the purchase, sale or resale of goods or services where the parties operate at different levels of the production or supply chain (i.e. manufacturers, wholesalers and retailers – hence the term vertical agreements).

Appointment of Exclusive Distributors

Subject to the parties not exceeding set market share thresholds (30% of the relevant market), the appointment of an exclusive distributor for a particular territory (or customer group) affords that distributor a limited degree of territorial exclusivity. However, territorial protection cannot be absolute, parties within the distribution network must remain free to supply customers from within the exclusive distributor's territory so long as they do not solicit their custom: so solicited or “active sales” into the exclusive distributor's territory can be prevented but unsolicited or “passive sales” sales cannot.

The fundamental change with the new Block Exemption is that the guidelines now specifically address in far greater detail how sales through the Internet should be treated in terms of whether or not these constitute active or passive sales into a territory. The guidelines state that “as a general rule, a website is not considered a form of active selling to certain customers unless it is specifically targeted at these customers” and go on to provide that the “language options used on the website or in communication play normally no role in that respect”. Crucially, the guidelines state that “every distributor must be free to use the Internet to advertise or sell products” and that any restriction over use of the Internet would only fall within the Block Exemption to the extent that it was necessary to prevent active sales into another's exclusive territory or customer group.

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Luxury Brands and Online Sales

The change in approach is, in part, an attempt to address the long-standing feud between some of the large online retailers and a number of prestige brands who have previously used trade mark law in an attempt to prevent sales through the Internet, on the basis that such online sales adversely affect their products' "aura of luxury". The resultant change in the guidelines provides a level of comfort to online retailers by stipulating that all distributors must be free to use the Internet. However, there is a significant carve out available to luxury brand owners. As before, they can establish a selective distribution system for their products whereby only authorised dealers meeting specified criteria can sell their products. Additionally, they can now also require that their authorised dealers have a bricks and mortar shop or showroom before engaging in online distribution and require that they sell a certain minimum amount, whether in value or volume, of their products off-line. In this way, it appears difficult to see how purely online retailers can realistically meet such criteria and thereby qualify for a luxury brand owner's selective distribution system.

Relevance To All Suppliers

The new approach to the Internet is relevant to all suppliers, not just to the luxury brand owners. If you need help in setting up a distribution system which both achieves your goals and avoids infringing competition law, please contact Nick Hothersall by telephone 01276 686222 or by email nick.hothersall@herrington-carmichael.com.

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