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Restrictions of cross-border sales under EU competition rules

Companies are in principle free to establish in Europe the distribution system that best serves their interests, including selective distribution where their products are put on the market through qualified distributors only.

However, recent fines imposed by the European Commission confirm that licensing and distribution systems must nevertheless comply with Article 101 and 102 TFEU which respectively prohibit anti-competitive agreements and abuses of dominant position.

Under Article 101 TFEU, agreements whose object or effect is to restrict cross-border sales in Europe, are in principle not allowed. In conformity with some EU regulations and case law, such agreements may benefit from an exemption under Article 101, § 3 TFEU in well-defined hypotheses only.

Under Article 102 TFEU, unilateral measures by which a dominant company restricts cross-border sales in Europe, are in principle not allowed either. Such restrictions may only be considered legal if the company is in fact not in a dominant position, or is in a dominant position but can objectively evidence that these restrictions are justified by, and proportionate to, a legitimate business behaviour, a legitimate public interest or efficiency considerations.

1. Nike and Sanrio: agreements restricting cross-border sales in Europe

Early 2019, Nike and Sanrio were both fined by the Commission under Article 101 TFEU, which prohibits agreements between companies that may affect trade between Member States and whose object or effect is to prevent, restrict or distort competition.

During more than ten years, licences had been granted in Europe by Nike for the manufacture and distribution of products featuring the brands of football clubs and federations, and by Sanrio for the distribution of products featuring Hello Kitty characters.

In both cases, the Commission found that the agreements concluded by Nike and Sanrio were in breach of EU competition rules because they imposed restrictions on cross-border sales by licensees in the form of direct measures (such as clauses prohibiting these sales) and indirect or additional measures (such as audits to ensure compliance with these restrictions).

These recent decisions confirm that, after having paid less attention to them for some years, the Commission has decided to focus increasingly on vertical agreements in particular to fight illegal restrictions of cross-border sales in Europe. Such restrictions are regarded as "by object" and cannot enjoy the de minimis regime.

Regarding selective distribution systems, the Commission considers that the appointed distributors should be free to sell actively and passively to all end-users, everywhere, offline or online. Therefore, such vertical agreements restricting (active or passive) sales by members of a selective distribution system cannot benefit from an exemption under Article 101, § 3 TFEU.

More generally, in conformity with the CJEU case law, the Commission considers that the licensing of IP rights in the context of a distribution agreement cannot justify the imposition on licensees of restrictions to sell the licensed merchandise across borders (see, in particular, CJEU, judgment of 6 October 2009, C 501/06 P, C-513/06 P, C-515/06 P and C 519/06 P, GSK, para. 59 to 61).

Based on these elements, it appears increasingly difficult for agreements restricting cross-border sales in Europe to benefit from an exemption under Article 101, § 3 TFEU.

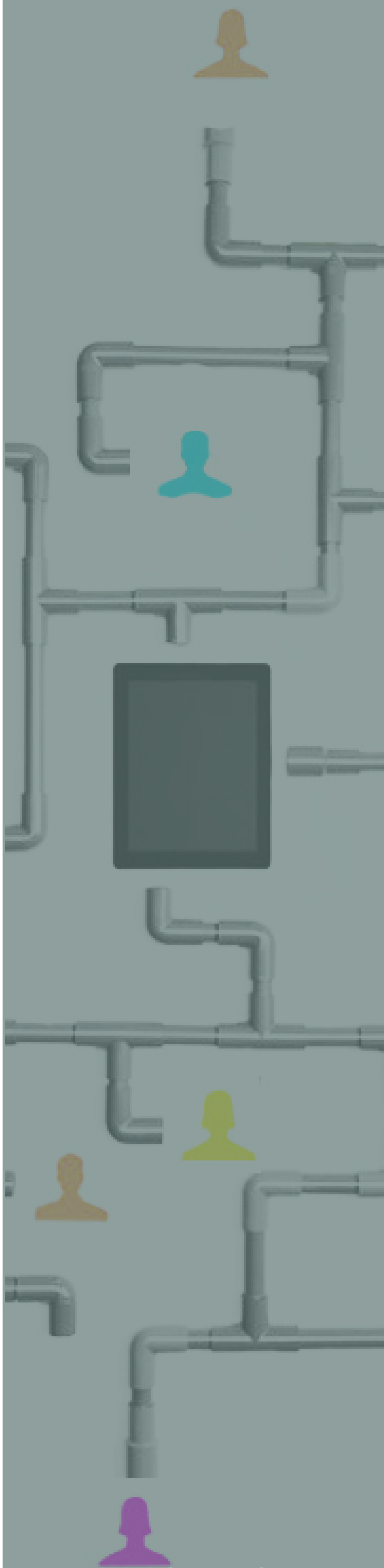
In general, and in conformity with Article 4, b), of the (block exemption) Regulation n°330/2010 (applicable to vertical agreements), there are only four hypotheses where vertical agreements (distribution systems) containing cross-border sales restrictions may still benefit from an exemption, namely when (further to complying with the other exemption requisites in the Regulation):

- the agreement restricts active sales into the exclusive territory of an appointed distributor, without restricting the sales by the customers of the distributor concerned;
- the agreement restricts sales by a wholesaler to end-users, in order to keep the wholesale and retail level separate;
- the agreement restricts sales by an appointed distributor (selective distribution) to an unauthorised distributor in a selective distribution territory;
- the agreement restricts sales of components by an appointed distributor to a competitor of the supplier.

Furthermore, in selective distribution systems, territorial restrictions are not allowed at the end-users level and between appointed distributors either (letters c) and d) of said Article 4).

Based on the above, companies are advised to refrain from concluding agreements whose object or effect is to restrict cross-border sales in Europe, except in the cases where they may benefit from an exemption based on Regulation n°330/2010.

Under **Regulation n°316/2014 (applicable to technology transfer agreements)**, a vertical technology transfer agreement imposing some territorial restrictions on sales may also benefit from an exemption in this respect, provided the other exemption requisites are complied with, but only in well-defined hypotheses, and depending on whether the parties are competing undertakings or not. It is a complex regime requiring a



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detailed analysis of the market situation and the contractual provisions or practices at stake.

One can simply note here that also under this regulation, in selective distribution systems, a vertical technology transfer agreement may not restrict sales (active or passive) to end-users by a non-competing licensee operating at the retail level (letter c) of Article 4, § 2).

2. AB InBev: unilateral measures restricting cross-border sales in Europe

Early 2019, AB InBev was fined by the Commission under Article 102 TFEU, which prohibits abuses of a dominant position that may affect trade and prevent or restrict competition.

During approximately eight years, the market strategy of AB InBev had consisted in restricting the possibility for Belgian retailers to buy Jupiler beer at lower prices in the Netherlands in order to maintain higher prices in Belgium.

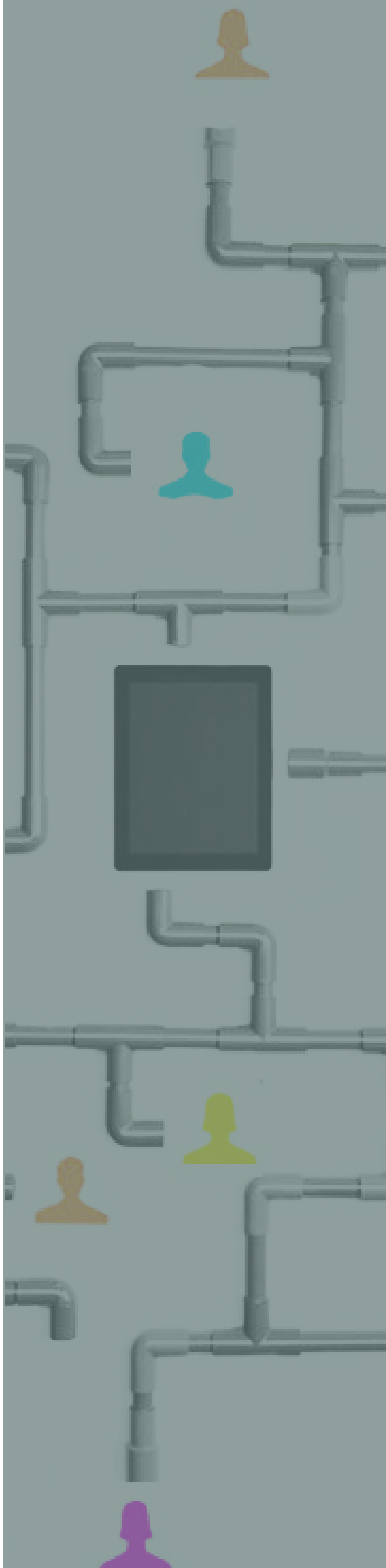
After finding that AB InBev was in a dominant position on the Belgian beer market, the Commission concluded that it had abused its market power by taking unjustified unilateral measures, such as the modification of the packaging of its products supplied in the Netherlands to make them harder to sell in Belgium.

In that context, the Commission underlined that such restrictions of cross-border sales would also qualify as an infringement under Article 101 TFEU if they resulted from an agreement between independent companies irrespective the supplier was dominant or not.

This decision confirms the scrutiny of the Commission as regards restrictions of cross-border sales, be it on the basis of Article 101 or 102 TFEU, as well as the difficulty for dominant companies to justify the imposition of such restrictions.

In that regard, the Commission and the CJEU have gradually recognised that companies can rely on three categories of "objective justifications" to establish that their behaviour is, in fact, not abusive, namely:

- *a legitimate business behaviour*, such as the protection of one's own commercial interests (see CJEU, judgment of 14 February 1987, C-27/76, United Brands, para. 189);
- *a legitimate public interest objective*, such as environmental concerns (see Commission, decision of 21 October 1997, 97/745/EC, Port of Genoa, para. 21);
- *efficiency considerations*, showing that the exclusionary effect may be counterbalanced by advantages in terms of efficiency which also benefit the consumer (see CJEU, judgment of 15 March 2007, C-95/04, British Airways, para. 86).



These justifications are, however, very uneasy to invoke in practice. The proportionality test is of the essence. For example, regarding cross-border sales, the CJEU found that a pharmaceutical company had abused its dominant position by refusing to supply patented medicines in order to impede parallel trade, and took the view that the company had not adopted a "legitimate business behaviour" even in the presence of a State intervention in fixing the prices for pharmaceuticals (see CJEU, judgment of 16 September 2008, C-468/06 to C-478/6, Sot. Lélos kai Sia, para. 70 to 77).

Based on the above, dominant companies should be extremely cautious in imposing unilateral measures aiming – or having as an effect – to restrict cross-border sales in Europe, except in the very few cases where they may rely on the doctrine of "objective justifications".

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