
New European Antitrust Regulation Will Retroactively Affect Existing Distribution and Reseller Agreements

2001-01-08

A recent [European Union antitrust regulation](#) will deliver a unwelcome New Year's present on January 1, 2002 to Internet and other technology companies distributing goods or services through third parties - retroactive application to agreements entered into on or prior to May 31, 2000, the effective date of the Regulation. In light of the fundamental changes resulting from the new Regulation, any company marketing its goods and services in the European Economic Area ("EEA") through distributors, resellers, systems integrators, strategic allies or other third parties should review its existing distribution, purchase, OEM, franchise and service agreements to determine whether any of those agreements extending beyond December 31, 2001 need to be adjusted.

The new Regulation applies to all vertical agreements with a party in the EEA or relating to the distribution of goods or services in EEA countries. The EEA currently consists of the following 18 countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

As a "block exemption," the new Regulation offers a safe harbor against antitrust challenges under Article 81 of the Treaty of Rome, which generally

prohibits all agreements and practices which may prevent, restrict or distort competition within the EEA. Exclusivity provisions, non-competition covenants and territorial restrictions may run afoul of Article 81, unless covered by a block exemption. The new Regulation replaces several earlier block exemptions, including two 1983 regulations that provided safe harbors for exclusive distribution agreements and exclusive purchase agreements.

Under the new Regulation, for the first time, the market share of the parties is relevant in determining whether the safe harbor is available. The safe harbor is not available if the supplier's market share exceeds 30% or, in exclusive supply arrangements, the buyer's market share exceeds 30%. For companies that offer goods and services that are often promoted as having no competitive alternatives, it may sometimes be difficult to prove that relevant market shares are less than 30%.

Several contractual restrictions do not fall within the new Regulation's safe harbor, meaning that they will remain subject to antitrust challenge under Article 81. These include restrictions on the buyer's ability to determine the resale price or to resell goods or services in a defined territory or to specified customers, as well as prohibitions on members of a selective distribution system from selling products of particular competing suppliers. Some exceptions to this general rule are still available. For example, the supplier may still restrict active sales into an exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another reseller.

Agreements that were already in force on or prior to May 31, 2000 and satisfied the prior block exemptions for exclusive distribution agreements, exclusive purchase agreements and franchise agreements will continue to benefit from those safe harbors until December 31, 2001. After that date, to

remain shielded from Article 81 antitrust challenges, pre-May 31, 2000 vertical agreements may need to be amended to comply with the new Regulation. However, if the supplier's market share exceeds 30% under a distribution agreement or if the buyer's market share exceeds 30% under an exclusive supply arrangement, the new Regulation's safe harbor will not be available and the parties will need to choose between (1) removing exclusivity, non-competition and other restrictive provisions from their agreement or (2) seeking protection through either an individual exemption or an informal ruling from the European Commission.

© 2001 Hale and Dorr LLP. All rights reserved.

This alert is provided with the understanding that it does not constitute the rendering of legal, tax or other professional advice or services by Hale and Dorr LLP or its attorneys.