

# **ENSURE YOUR DISTRIBUTION AGREEMENT RUNS LIKE CLOCKWORK - BEWARE OF BANNING EXPORTS TO SWITZERLAND**

29 January 2014

---

Manufacturers and suppliers experienced in entering into EU distribution agreements will be aware that there are limits upon the restrictions which they may lawfully place upon on their resellers - including in respect of territorial restrictions.

But what about the impact of such distribution agreements on Switzerland given that Switzerland is not in the European Union or the European Economic Area?

A swathe of recent decisions and investigations by the Swiss competition authority in relation to parallel import restrictions - for example Nikon in respect of cameras, certain beer manufacturers and piano manufacturer Steinway & Sons - highlight that the Swiss competition authority will not take lightly the restriction of trade into Switzerland and resulting higher prices for consumers.

Manufacturers should therefore be careful not to carve Switzerland out of EEA/EU distribution arrangements thereby restricting parallel trade into Switzerland.

## **Exclusive distribution agreements**

Under exclusive distribution agreements a distributor is granted an exclusive territory. EU and national antitrust laws limit the extent of the exclusivity and permissible restrictions within such agreements.

Absolute territorial protection is not permissible within the EU. So, while it is usually open to a manufacturer (assuming the market power of the parties is not high) to prevent the distributor "actively" selling outside the territory allocated to them, the distributor must generally be free to make "passive" sales outside of the exclusive territory allocated to the distributor. This means, for example, that a distributor with exclusivity to France can be prevented from actively soliciting business outside France, but the French distributor is

permitted to supply a German customer who has made their own approach to that distributor.

Restrictions of passive sales are 'hard-core' restrictions of competition law with serious consequences - and they will be unlikely to attain exemption from the rules, save in very exceptional circumstances.

## Swiss Competition Commission decisions

A decision of the Swiss Competition Commission (recently upheld by the Swiss courts) has highlighted the potential trap for manufacturers if they ignore or sideline Switzerland in their distribution agreements. A subsidiary of Colgate Palmolive was fined SFr 4.8m (about £3.2 million) because its agreement with an Austrian distributor contained a clause banning exports out of Austria. That export ban prevented parallel imports into Switzerland by third parties, effectively isolating the Swiss consumer from intra-brand competition, with an evident presumption of higher prices.

This follows a similar decision of the Swiss Competition Commission against BMW in 2012. BMW was fined SFr156m (about £100 million) for banning its EU dealers from selling new BMW and MINI cars to customers outside of the EEA. This decision is being appealed by BMW. This case again demonstrates the Swiss authorities' frustrations at Pan-EU distribution arrangements respecting the free trade rules for inter-EU trade but then impeding trade into Switzerland, leading to higher prices for Swiss consumers.

Following the Colgate Palmolive decision, the Swiss Court released a statement commenting that territorial restriction clauses in distribution agreements "banning passive sales...and therefore parallel imports into Switzerland" will restrict competition "by their nature" - i.e. there will very rarely be, if ever, a permitted justification for such clauses.

### Key points to note:

- In your distribution agreements make sure exclusivity is carefully defined - just what is meant by exclusivity?
- Do not carve Switzerland out of EEA/EU distribution arrangements to give the Swiss market protection from parallel imports as the Swiss authorities may investigate and issue fines.
- Consider the antitrust implications of exclusivity - bear in mind that the EU's rules on distribution agreements will vary depending on issues such as the market power of the

parties.

- Do not ban the distributor from all export sales whether directly or indirectly (for example through price discrimination or that product guarantees are only available in a Member State where the purchase was made). Specifically state that the distributor is able to make passive sales to customers outside of its territory.

---

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.

---

**Related** [Commercial](#), [ThinkHouse](#)