

Selective distribution



Selective distribution: How to protect your brand image and how to prevent your products from being sold by any random discounter?

Are you a supplier of luxury products or products sold under prestigious brands - say, Guess or Nike - and you want to protect your brand? Then you can - subject to certain conditions - exercise greater control over the retail channels of your products to achieve a consistent standard and quality of service and protect your brand image. In this article, we will inform you about ways to maintain control over the retail channels of your products.

Prohibition of agreements about customers and prices

The cartel prohibition (Article 6 of the Dutch Competitive Trading Act [Mededingingswet] and Article 101 of the Treaty on the Functioning of the EU) essentially means that distributors of your products need to have the power to select their customers and to decide in which territory to sell your products. It follows that it is basically up to your distributors to determine whether to sell, or resell, your products to discounters or through specific marketplaces, such as Amazon, bol.com or eBay. You, however, may find such practices to be harmful to your brand image. The cartel prohibition does not allow you to fix the selling price to be applied by your distributor either. In principle, your distributor is free to resell your products at bargain prices.

Exemptions from the prohibition

EU law permits certain exemptions from the prohibition against restricting, directly or indirectly, the sale by your distributor or their customers. To protect your brand and brand image, you could, subject to certain conditions, implement what is known as a selective distribution system.



What is a selective distribution system?

Typically, selective distribution arrangements restrict the number of authorised distributors and the reselling options. The restriction on the resale of contract goods to third-party resellers is based on selection criteria deriving from the nature of the product. Unlike exclusive distribution, the restriction on resale does not involve a restriction on the active sale in another territory. Rather, it concerns a restriction on any resale to non-recognised distributors, leaving only authorised resellers and end users as potential customers.

When are you allowed to use a selective distribution arrangement?

Virtually all selective distribution arrangements relate to the distribution of finished products of a specific brand.

EU case law has confirmed that Article 101 TFEU does not apply to selective distribution systems that relate to complex consumer goods and luxury goods and that are primarily aimed at the conservation of a specialist commerce, which is capable of achieving a particular level of performance for such products, provided that the following three conditions are satisfied:

1 Non-discriminatory, qualitative criteria

The distributors are selected solely on the basis of non-discriminatory, qualitative criteria relating to their, and their employees', technical ability to handle the goods and the suitability of their premises, which are applied consistently to all potential distributors;

2 Nature of the products and necessity

The nature of the products in question means that a system of selective distribution is necessary to preserve the quality of the products and ensure their proper use (without, incidentally, the European court determining that nature);

3 Proportionality

The selection criteria do not go beyond what is necessary.

Exemption (under the EU Block Exemption for vertical agreements)

By virtue of the European block exemption regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, selective distribution agreements are essentially exempt - irrespective of the particular nature of the product in question - as long as the market share held by the supplier and the market share held by the buyer does not exceed 30%. The arrangement of a selective distribution system is subject to a number of requirements. For instance, selling to end consumers and other authorised distributors must be permitted.



The possibilities of control offered by selective distribution systems

A selective distribution system may help you avoid your luxury products from being sold by parties that may harm your brand image. EU competition law allows you to impose the following four restrictions on your authorised distributor:

- 1** A restriction prohibiting the sale of your products to unauthorised distributors in the territory where your selective distribution system applies, irrespective of the level of trade (wholesale and retail, for example) at which the various distributors operate;
- 2** A restriction prohibiting the use of the internet for resale, through such third-party platforms as Amazon, bol.com or eBay; and
- 3** A stipulation that customers are not allowed to visit the distributor's website by reference from a website bearing the name or the logo of a third-party platform.
- 4** Quality standards for the use of an internet site for the resale of the products, as can be imposed on a distributor for a brick-and-mortar shop or for catalogue resale.

In what way can you control the resale channels for your products?

It may be useful to explore the options at your disposal, as a different distribution policy may suit your product and interests better. One particular reason for switching to a selective distribution system would be the various options suppliers may find for controlling, to a degree, the resale channels of their products. This would result in a qualitative upgrading of those resale channels, among other things.

More information?

If you require more information about the arrangement of your distribution system, you should not hesitate to contact one of the AKD specialists named below



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