To Market, To Market Alternative Methods of Distribution in a World of E-Commerce

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Michael Dean
Partner
Dentons UK & Middle East LLP, United Kingdom
michael.dean@dentons.com

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1 George Square Glasgow G2 1AL DX GW67 or LP 33 Glasgow-6

INTERNATIONAL DISTRIBUTION

OVERVIEW OF RELEVANT DISTRIBUTION LAWS: EUROPE

Michael Dean
Partner
Dentons UK & Middle East LLP, United Kingdom[1]
michael.dean@dentons.com

US lawyers dealing with distribution in Europe will encounter the usual commercial challenges which distribution in its many forms will bring. In addition, they will quickly become aware of the enormous impact which European antitrust law principles have on distribution, both physical and online. Territorial issues and pricing restraints are key areas. In addition to outlining those minimum rules and their framework, this paper shall briefly address other commercial laws regarding distributorships and agency and differing methods of distribution will be considered.

1. EUROPE: INTRODUCTION

1.1 Law affecting distribution: EU law and State law

Europe is both a unified area for many principles relevant to distribution and a patchwork of 28 countries within the EU (perhaps 30 legal systems), soon to be 27 should Britain exit the EU on 29 March 2019 as expected.

A distribution issue may be affected by State law; European competition laws applicable to vertical agreements and possibly the law of a US or other State. For example, a US supplier terminating his German distributor due to his unsatisfactory pricing regime, may consider:

- German and/or EU competition law on resale price maintenance;
- German Commercial Code provisions and case law on distribution and agency contracts;[2]
- The EC Directive on Commercial Agents which may overrule contrary German law[3];
- EU or German cartel law if the pricing arrangement is part of a conspiracy among producers;
- US or German or other law governing the contract.

Indeed, most of the decisions on distribution and pricing in Europe emanate from the national competition authorities. The European Commission has been less active.

2. EUROPEAN COMPETITION LAW

It is important to set out the basic approach of EU competition law to vertical arrangements and, in doing so, briefly to describe the EU regime.

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[1] In revising this paper I am grateful for the assistance of former colleagues Johan Sahl, now with the Swedish Competition Authority and Maria Held, Associate Attorney, *Gibson, Dunn & Crutcher LLP* in Munich, Germany.

[2] See for instance Section 89b of the German Commercial Code (“Handelsgesetzbuch” / “HGB”).

[3] Directive 86/653, [1986] OJ L 382/17. Implemented in Germany through the "Gesetz zur Durchführung der EG-Direktiv zur Koordinierung des Rechts der Handelsvertreter” dated 23 October 1989. Implemented in the UK by the Commercial Agents Regulations 1993.

2.1 Domestic and European competition laws

2.1.1 Overlapping jurisdictions, increasingly harmonised rules

EU antitrust law heavily influences individual State laws; State authorities enforce EU antitrust law as well as their domestic laws. The European Commission drives EU antitrust policy and enforces antitrust law.

EU policy is largely driven by the aim of creating a single European market and there is much focus on limiting the division of national markets, even where such arrangements might affect only intra-brand competition. The European Commission takes an ideological approach to the right to use online methods to market products. Restricting online sales maybe viewed as restricting on a territorial basis.

2.1.2 Client-attorney privilege in the EU and the Member States

Note that the treatment of client-attorney privilege is quite different in the EU. For lawyer-client communications to enjoy privilege in EU antitrust proceedings, the lawyer must be "independent", i.e. not employed by the client. In-house lawyers' communications do not enjoy privilege in such proceedings[4] in direct contrast with, for example, UK competition law proceedings.

Moreover, EU competition law restricts privilege to lawyers admitted to a European Bar. Therefore, legal advice of US attorneys is not privileged and such advice may be discoverable and used in an EU investigation – and those of many EU States' authorities.

3. EU COMPETITION LAW – ARTICLE 101 TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

EU competition law is based principally on two Treaty provisions, Articles 101 and 102 of the TFEU[5] as well as a range of EC Regulations, Commission Notices and Guidelines, decisions and European Court judgments.

3.1 Art 101 TFEU: The rule

In summary, **Article 101(1)** prohibits a wide range of vertical and horizontal anti-competitive agreements and practices. It prohibits:

"all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market…".

The prohibition is automatic and leads to automatic unenforceability. Equally automatic is the possibility to meet exemption criteria in Article 101(3) and therefore be enforceable and valid.

Typical examples of distribution arrangements caught by Art 101 are:

- attempts by the supplier to prevent a distributor selling outside its allocated territory or to purchasers intending to resell outside the distributor's territory, i.e. protecting other territories from parallel trade;[6]

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[4] Case 155/79 *AM&S Europe Limited v Commission*, ECJ judgment of 18 May 1982.

[5] Following the entry into force of the Lisbon Treaty on 1 December 2009, (the Treaty on the Functioning of the European Union (TFEU)). As to terminology, the term "European Community" has been replaced by "European Union" and "Common Market" by "Internal Market".

[6] See e.g. T-325/01, *DaimlerChrysler v Commission*, in which the CFI partially upheld the Commission's decision that the car maker unlawfully had agreed with its distributors various measures to prevent parallel trade between Member States. See also the Commission's *JCB* decision (COMP/35.918), largely upheld on appeal to the Court of First Instance ("CFI") and European Court of Justice ("ECJ") (cases T-67/01 and C-167/04), in which JCB was ultimately fined €30 million for

- attempts by the supplier to set fixed or minimum prices for distributors' downstream sales, or to prevent distributors from using discounts;[7]
- attempts by the supplier to discourage online reselling by distributors;[8]
- excessively long-term distribution agreements, tying in the "weaker" party;[9] and
- excessively exclusive agreements, foreclosing the market to competitors.[10]

3.2 Art 101 TFEU: Agreement "between undertakings" or internal group practice?

Most antitrust problems between supplier and distributor can be avoided by taking distribution "in-house"; i.e. by having wholly or partly owned subsidiaries which do not enjoy autonomy, undertaking distribution. Article 101 applies only to agreements **between** independent undertakings. If there is a lack of autonomy on the part of a subsidiary, Article 101 will not apply to an agreement with its parent.[11] In *Viho,* territorial restraints prohibiting distributors from selling outside their territories were not caught by Article 101; the distributors were all subsidiaries, forming part of the same economic unit.[12]

Likewise, the European Commission in the E-books case[13] proceeded against five publishers of e-books who had agreed with Apple to sell their books for Apple devices on an agency basis which might have allowed them to control the retail prices of their books.

3.3 Art 101 TFEU: Effect on trade within the Internal Market

3.3.1 Effect on trade between Member States

EU competition law applies where there is an appreciable effect on trade between Member States; a test interpreted broadly in case law and guidance.[14]

European Commission guidance presumes there is an insufficient effect on trade where:

- the aggregate market share of the parties is below 5%; **and**
- the parties' turnover is below €40m in the EU.

Care must be taken when applying this presumption.

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agreeing with its distributors to partition the market. In 2002, Nintendo was fined €168 million, and its distributors were also fined, for agreeing to prevent parallel trade (COMP/35.587).

[7] See e.g. Commission Decision COMP/36.516 Nathan Bricolux [2001] OJ L54/1 and Commission Decision COMP/36.693, *Volkswagen* [2001] OJ L 262/14. Note, however, that the Volkswagen decision was overturned on appeal to the CFI in T-208/01 (and the CFI's decision upheld on appeal to the ECJ, case C-74/04, as the Commission had failed to show the existence of an agreement between VW and its distributors (see the following section below)).

[8] See e.g. the Commission's decision in *B&W Loudspeakers* (discussed below) and judgment of ECJ in case C-439/09 Pierre Fabre Dermo-Cosmétique SAS Président de l'Autorité de la Concurrence and others dated 13 October 2011.

[9] See e.g. Commission Decision COMP/38.348, *Repsol* [2006] OJ L 176/104, by which the Commission accepted commitments from a Spanish petrol supplier to free a number of service stations from long-term exclusive supply agreements.

[10] See e.g. Commission Decision IV/35.079 *Whitbread* [1999] OJ L88/26, regarding "beer ties". But see also case C-234/89, *Delimitis v Henninger Bräu* [1991] ECR I-935.

[11] C-15/74 *Centrafarm BV v Sterling*, 1974 ECR 1147.

[12] T-102-92 *Viho v Commission,* 1997 4 CMLR 419; upheld by the ECJ in C-73/95, *Viho v Commission*

[13] Case COMP/39.847 – E-Books summary of Commission Decision of 12 December 2012 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 3 of the EEA Agreement OJ C73,13.3.2013 p17-20.

[14] Guidelines on the effect on trade concept OJ [2004] C101/81.

3.3.2 Appreciable effect on competition – the *de minimis* test

Not all restrictive agreements are caught by EU competition rules, even if there is an effect on trade between Member States.

With the exception of strongly objectionable ("hard-core") provisions, only agreements which have an appreciable economic impact are caught by Article 101.[15] The European Commission has indicated that agreements between competitors may be regarded as *de minimis* if the parties have a combined market share of less than 10%. Where parties are not competitors, either party's market share would have to exceed 15% before Article 101 was applicable. Where parallel networks of agreements restrict competition in a market, *de minimis* thresholds are reduced to 5% for all agreements.[16]

Export bans, price-fixing and market sharing agreements as well as resale price maintenance and certain territorial restrictions will still be caught by Article 101 even below the *de minimis* market share levels. A recent decision of the European Court also suggests that **any** agreement which has as its **object** the distortion, prevention or restriction of competition will be presumed as to have an appreciable effect on competition.[17]

3.3.3 Territorial reach of Art 101

Article 101 can apply to an agreement between two non-EC undertakings entered into outside the Union where that agreement is implemented, wholly or partly, within the EU.[18] This may fall short of the US "effects doctrine", but is broad nonetheless. In *Javico v Yves Saint Laurent,* a restraint on distributors in Russia and the Ukraine exporting was held to have an effect in the EU and to infringe Article 101(1).[19]

3.4 Art 101 TFEU: The Art 101(3) exemption

Falling within Article 101(1) is not fatal. It is still possible to meet the criteria for exemption. Exemption is available under Article 101(3) to agreements which:

"contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit", and :

(a) impose only restrictions which are indispensable to those objectives; and

(b) do not eliminate competition in respect of a substantial part of the products in question."

3.5 Art 101 TFEU: Block exemptions – the safe harbours

It is attractive to ensure an arrangement falls within one of the "Block Exemption Regulations" which exempt categories of agreements. A number of Block Exemption Regulations for different types of agreement have been issued, including Vertical Agreements and Technology Transfer Agreements.

3.6 Art 101 TFEU: Consequences of infringement[20]

Voidness: An agreement or practice caught by Article 101(1) is not enforceable. The offending part of the agreement, or the entire agreement (if the offending part cannot meaningfully be severed), will be void. Principles of severance under national law apply.

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[15] C-5/69 *Völk v Vervaecke* 1969 ECR 295.

[16] Notice on agreements of minor importance OJ [2001] C 368/13.

[17] C-226/11 Expedia Inc v Autorité de la concurrence and others dated 13 December 2012 (not yet published).

[18] Case 114/85, *A Ahlstrom Oy v Commission* [1988] ECR 5913 (Re the *Woodpulp* cartel case).

[19] Case C-306/96 [1998] ECR I-1983.

[20] This section covers also the consequences of infringements of Article 102 TFEU. Article 102 TFEU is further discussed separately below.

Fines: An infringement may lead to penalties imposed by the European Commission of up to 10% of parties' worldwide annual turnover.[21]

Third Party Actions: Damages actions against third parties adversely affected by anticompetitive agreements or abuses of dominance are becoming more common in Europe. A new Directive which aims to encourage private enforcement by harmonising national rules governing actions for damages for infringements of competition law has been passed by the EU legislature and should shortly become law.[22]

4. DISTRIBUTION IN THE EU: COMPETITION ISSUES

4.1 Vertical Agreements Block Exemption

Most vertical agreements are enforceable either because they do not contain any restraints, the agreement is insignificant or they are drafted in order to satisfy Vertical Agreements Block Exemption Regulation (the "**VBER**").[23] (This may be covered in the Technology Transfer Block Exemption).

4.1.1 Basic requirements for safe harbour

The agreement must **relate to the conditions under which the parties may purchase, sell or resell** certain goods or services. An agreement which has, as its primary objective, the transfer of IP is not covered by the VBER.

A fundamental requirement is that the market shares of each of the parties is under 30%.

4.1.2 Unenforceable restrictions

Some provisions may not be enforceable, but that fact does not prevent other provisions enjoying the protection of the VBER.[24] Others are so heinous that they prevent the block exemption applying to any part of the agreement.[25]

(a) **Severable clauses**

(i) **Non-competes**

Exclusive purchasing or "non-compete" obligations (which extend to an obligation on the buyer to purchase more than 80% of his total demands from the same supplier[26]) is not protected by the block exemption where its duration exceeds five years or is indefinite or automatically renewable.[27]

(ii) **Post-term covenants**

These will be automatically exempted only if necessary to protect "substantial" know-how, have a duration of less than one year and are limited to the market on which the buyer operated during the contract period (these must also be limited to the premises and land from which the buyer has operated during the contract period); conditions met in most retail franchise agreements.

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[21] As of 1 May 2004, the maximum fine under UK competition law is the same as under EU law (i.e. 10% of annual worldwide turnover).

[22] www.europarl.europa.eu/oei/popups/ficheprocedure.do?reference=2013/0185(IOD)@=en

[23] Regulation 330/2010 [2010] OJ L 102/1 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices.

[24] Article 5.

[25] Article 4.

[26] Article 1(d).

[27] Article 5(1)(a).

(iii) **Targeted non-competes within a selective distribution system**

A supplier can prohibit resellers in a selective system from selling competing products in general, as long as the duration of that obligation is not capable of exceeding five years but may not be targeted so as to exclude "particular competing suppliers".[28]

(b) **Hard-core restraints**

No provision can be exempted by the VBER where the agreement in which it sits contains a hardcore provision. Although there is no presumption that the agreement is illegal – it may meet the exemption criteria – a hard-core restriction is not likely to be enforceable before national courts. Article 4 of the VBER lists the following as hard-core restrictions:

(i) **Resale price maintenance**

There has been debate in the EU, post-Leegin,[29] on RPM but little has changed. RPM is generally prohibited *per se,* in effect.[30]

Under the VBER, no protection is available where the supplier directly or indirectly dictates fixed or minimum resale prices of the buyer. Recommended or maximum sales prices are acceptable but should be analysed carefully to ensure they do not constitute indirect resale price maintenance. In 2001, Volkswagen was fined €31m for attempts to maintain resale prices of one VW model in Germany by monitoring resale prices and circulating letters "warning" distributors against selling below VW's recommended resale price, overturned on appeal.[31] Other forms of indirect resale price maintenance include:

- fixing maximum discounts from prescribed prices;
- making supplier rebates and reimbursement of promotional costs subject to downstream pricing level;
- linking price to competitors' resale prices;[32]
- threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations.

The VBER suggest an efficiency defence is available where:

- RPM is used during the introductory period of expanding demand;
- a coordinated short term low price campaign (2-6 weeks) in a franchise system (a distribution system applying a uniform distribution format);

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28 Article 5(c).

29 *Leegin Creative Leather Products, Inc v PSKS, Inc*. 55/US,877 (2007).

30 See e.g. agreement between Irish Competition Authority and Double Bay Enterprises Limited (a distribution of the Fit Flop brand) not to engage in RPM and associated Court Order (2012 No4 CMP).

31 Commission Decision COMP/39.693; [2000] OJ L 262/14; overturned by the CFI in case T-208/01, judgment of 3 December 2003, on the issue of proof of dealers' acquiescence. The CFI's ruling was upheld by the ECJ on 13 July 2006, see case C-74/04.

32 This was one of the pricing infringements for which retailers and tobacco manufacturers were fined £225m by the UK Office of Fair Trading in April 2010 although the case collapsed when challenged as witness evidence did not support the allegations.

- in relation to complex/experience products, the extra margin would allow distributors to provide additional pre-sales services and free-riding is a problem.

A ban on supplying discounting outlets would be regarded as interference in pricing policy except where the ban was imposed in the context of protecting the culture and prestigious image of a brand or mark and contained in a trade mark licence.[33]

There is no mention in EU guidance of Minimum Advertised Pricing programmes, a common practice in the US. It is likely that such a practice in the EU would be viewed as an indirect means of RPM and would not benefit from the VBER. Nor is there acceptance of an equivalent of Colgate programmes. They would probably be regarded as involving consensus or acquiescence.

The CMA recently fined a supplier of light fittings (National Lighting Company Group)[34] for a minimum advertised pricing policy which restricted the price at which retailers could sell the supplier's products online. In the CMA's view, these arrangements restricted the retailers' ability to sell their products online at independently determined prices, reducing price competition between competing retailers and contributing to keeping prices artificially high.

The CMA has previously concluded that that the application of a minimum advertised price (MAP) policy genuinely restricted in practice the ability of resellers to determine their online sales prices at a price below the MAP, and therefore amounted to RPM in respect of online sales of the product (see e.g. Commercial catering equipment sector: investigation into anti-competitive practices). The European Commission would likely adopt similar reasoning and consider minimum advertised pricing policies as an indirect means of RPM which do not benefit from the VRBE.

Unilateral minimum retail pricing policies are not accepted. Announcing a minimum resale price and refusing to supply those distributors that did not observe it (as per the US Colgate doctrine) would probably be regarded as indirect RPM and involving consensus or acquiescence.

There are other ways in which a supplier can attempt to influence pricing, which fall short of RPM. For example, it can oblige distributors to follow its instructions with regard to advertising, provided that those instructions do not seek to regulate the advertising of prices or conditions of sale. This does not prevent a supplier from encouraging the distributor to achieve optimum brand positioning, provided there are no incentives offered or pressure applied to price at, or above, a notified recommended resale price.

(ii) **Platforms and Pricing**

A supplier may set a maximum resale price provided it does not, in effect, mean a fixed resale price.

The prevalence of retail MFNs in the context of online platforms such as online travel agents, price comparison websites (PCWs) and online marketplaces, such as Amazon marketplace, iBookstore, Booking.com, Expedia, etc. has been highlighted by recent competition investigations across the EU. When adopted by such platforms in their agreements with

[33] See *Copad v Christian Dior* – Case C.59/08 discussed later.

[34] Online Resale Price Maintenance in the Light Fittings Sector Case 50343.

the providers or sellers seeking to reach consumers through the platforms, MFN clauses can ensure that the provider or seller does not charge a higher price on their platform than it does when selling directly, on another platform or via another channel.

However, the recent investigation by the UK's competition authority into hotel online booking indicates some movement in this regard, at least in the UK. Intercontinental Hotels Group was investigated in relation to restrictions it imposed on discounts which could be offered by online travel agents, Expedia and Booking.com. In its commitments Decision, the Office of Fair Trading (now the Competition and Markets Authority) appeared to accept an efficiency defence in relation to some discounting restrictions provided that discounts of up to the value of the online travel agent's commission could be offered to a "closed group"[35] i.e. available discounts would not be widely advertised. The effect on competition of the lack of price transparency inherent in this scheme forms part of the grounds of an appeal by a downstream "metasearch" website against the Decision. The particular dynamics of yield management pricing in the hotel sector may limit the extent to which this decision can be applied more widely.

However, there is still much uncertainty with different approaches being taken in EU jurisdictions. The German competition authorities came down against narrow MFNs in the Booking.com case, whereas other national competition authorities have accepted commitments permitting narrow MFNs. Elsewhere in Europe, notably France, Italy, Austria and Switzerland, moves were made in 2017 to legislate to ban price parity clauses.

The CMA also looked at MFNs in the context of online auction services in 2017 which concluded after the CMA accepted undertakings from ATG Media, the market leader in online bidding services, to stop restricting customers from using rival platforms (i.e. a wide MFN). It is currently investigating MFNs imposed by a price comparison website in relation to home insurance products.

In January 2017, Amazon responded to European Commission concerns about parity clauses contained in contracts between Amazon and e-book publishers which required those publishers to inform Amazon about more favourable or alternative terms offered to Amazon's competitors and offer Amazon similar terms and conditions. Amazon agreed to scrap these clauses for a period of five years from August 2017.

In contrast to the complex retail MFNs which are widely under investigation, MFNs in distribution agreements may not always be problematic. They are particularly likely to raise competition concerns where the customer benefiting from the clause is dominant and the effect of the clause is to reduce the incentive of the supplier to offer other customers discounts, thereby aligning prices at a higher level than would otherwise be the case. This may not be very likely in most distribution scenarios and, in the absence of other restrictive effects, narrow MFNs may be enforceable. Each case should be assessed on the facts.

At the wholesale level, EU and UK competition law would step in where a supplier's discrimination in price is designed to penalise the independent resellers: for low resale prices; for selling into a territory of another dealer (except where a geographical restraint is permissible); or for selling over

[35] Hotel online booking: Notice of Intention to accept building commitments to remove certain discounting restrictions for Online Travel Agents, 9 August 2013, OFT1500.

the internet. Pricing to discourage any of these activities would also be caught. Price discrimination devised to restrict where buyers can resell the products will also infringe Article 101 TFEU. This typically involves 'dual pricing policies', which offer discounts for products that are resold only locally or charge a premium price for products intended for export. Dual pricing will rarely be regarded as unilateral conduct. Rather, such policies are the result of vertical agreements between the supplier and distributor which have as their object or effect the restriction of intra-brand competition contrary to Article 101(1) TFEU. In the GlaxoSmithKline (GSK) cases, the European Court of Justice concluded that, for an agreement to exist, it is sufficient for the parties to show a joint intention to conduct themselves on the market in a specific way. Signing the sales conditions (which contained dual pricing) and returning them to GSK indicated GSK's and the wholesalers' joint intention to adhere to the conduct and limit parallel trade. In the GSK case the European Court agreed that the dual pricing practised by GSK in Spain to deter (or make more expensive) purchases destined for export was an infringement of Article 101, but did require that the Commission should not have refused to consider efficiency arguments before assessing them.

European Commission guidance provides that a dual pricing agreement between a supplier and an independent distributor may fulfil the conditions of Article 101(3) TFEU in some limited circumstances. For example, where offline sales include installation by the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims and may therefore justify different pricing on- and offline.

Enforcement in relation to distribution

As stated earlier, Member State authorities have been particularly active in resale price issues.Some examples of national fines for RPM include: BSH Hvidevarer (€200,000, Denmark, appliances); Unilever (€200,000, Denmark, ice cream); Young Digital Planet (€6,681, Poland, educational software); TTS Tooltechnic (€8,200,000, Germany, trade tools); Ludwik (Poland, dishwashing detergent); Iittala (€3,000,000, Finland, glassware); HUSKY (€90,000, Czech Republic, outdoor clothing); Lise Aagaard Copenhagen (€80,500, Denmark, jewellery); Kofola (€527,000, Czech Republic, soft drinks).

(iii) **Market partitioning**

Generally, buyers (and their customers) should be free to resell without restraint. Restricting sales by the buyer outside of specified territories or specified customers is a serious restriction, whether imposed directly (by contract)[36] or indirectly (e.g. by an incentive scheme).[37] Schemes designed to monitor the destination of goods (e.g. differentiating serial numbers) may be regarded as illegally facilitating market partitioning. However, market partitioning can be acceptable to some degree, in the following circumstances:

Exclusive distribution rights. A supplier may legally prevent a buyer from selling **actively** to customer groups or territories reserved exclusively for the supplier or to another buyer. The supplier must not restrict a buyer's ability to make sales into reserved areas in response to unsolicited

[36] See Commission Decisions COMP/38.085 of 17.02.2005 and COMP/38.307 of 10.06.2005 which found that Gazprom's gas supply contracts with its Austrian and German distributor infringed competition law as they prohibited resales outside Austria and Germany.

[37] See for example Commission Decision COMP/37.275 of 5 October 2005 where Peugeot was fined €49.5million for preventing exports of new cars from the Netherlands by making remuneration of its distributors conditional on the destination of the vehicles.

demand; i.e. from making **passive** sales.[38] Consequently, suppliers cannot offer distributors within the EEA absolute territorial protection from parallel imports from other EEA territories even where they have an exclusive distribution network.

Where distributors have non-exclusive appointments they cannot be protected either from active or passive sales.

However, restrictions on all sales, even passive sales, are acceptable in some exceptional cases:

New product launch. Restraints necessary to create a new product market or to introduce an existing product on a new market are acceptable. **Even restraints on parallel imports will be acceptable for two years, insofar as intended to protect a distributor in a new geographic market**.[39]

(iv) **Certain restrictions within a selective distribution system**

Selective distribution allows a supplier to restrict the handling of its products to dealers meeting certain criteria, for example, relating to the quality of the outlet. This is often preferred for products which require a high level of expertise such as high-tech products and products which rely heavily on brand image.[40] This is permissible subject to certain conditions.[41]

Sales to end-users by retailers in a selective system cannot be restricted. *That is the case for both active and passive sales.* Furthermore, members of a selective system must be permitted to supply one another.

4.2 **Price discrimination/dual pricing**

Pricing is a key consideration in sales and distribution. Suppliers may wish to price differently between customers according to their location or other factors. Great care must be taken with this in the EU where this may inhibit cross border trade.

4.2.1 **Permitted conduct**

Provided a supplier is not dominant (and, as discussed below, dominance may begin at market shares of 40% and above), it is free to price its products as it chooses. Suppliers can charge different prices to direct customers according to their location. In practice, this allows a company to direct its subsidiary in one territory not to sell products to customers located in other territories. Instead, that subsidiary can refer those customers to the associated company in their own territory. Dominant companies should avoid this activity.

European Commission guidance also provides that a dual pricing agreement between a supplier and an independent distributor may fulfil the conditions of Article 101(3) in some limited circumstances. For example where offline sales include installation by

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38 Double Bay Enterprises Ltd involved restrictions on passive sales (by requiring retailers to resell only within their allocated territories).

39 2010 Guidelines on Vertical Restraints, paras 61-62.

40 Selective distribution networks can in principle be set up in relation to any goods, but it will be harder to prove efficiency gains other than marginal ones in relation to "normal" products. The Commission indicates that it is unlikely that such gains will outweigh the reduction in price competition.

41 A recent case confirmed that suppliers operating a quantitative selective distribution system (as opposed to one open to all distributors provided quality criteria are satisfied) need not publish its entry criteria and such criteria need not be objectively justified or related to quality issues. It is sufficient that they are verifiable (Case C-158/11 Auto 24 SARL v Jaguar Land Rover Finance SAS. This case means that dealers can be refused entry to such systems with relative ease, provided market share thresholds are met.

the distributor but online sales do not, the latter may lead to more customer complaints and warranty claims and may, therefore justify different pricing on and off-line.

4.2.2 Unlawful conduct

(a) Agreements to restrict parallel trade

Price discrimination devised to restrict where customers can resell the products will infringe Article 101.[42] This typically involves "dual pricing policies" which offer discounts for products which are resold only locally or charge a premium price for products intended for export.

Dual pricing will rarely be regarded as unilateral conduct. Rather such policies are the result of vertical agreements between the supplier and distributor which have as their object and/or effect the restriction of intra-brand competition contrary to Article 101(1). In the *GlaxoSmithKline* case[43] the CFI concluded that, for an agreement to exist, it is sufficient for the parties to show a joint intention to conduct themselves on the market in a specific way. Signing the sales conditions (which contained dual pricing) and returning them to GSK indicated GSK's and the wholesalers' joint intention to adhere to the conduct and limit parallel trade.[44]

(b) Price discrimination amounting to an abuse of dominance

Discriminatory pricing by dominant companies (including discrimination based on nationality or location) for customers who are equivalent is prohibited[45] unless the difference in treatment can be objectively justified (e.g. by genuine cost savings or market conditions). A recent case suggests that a dominant company is permitted to set different prices between various Member States where there are already distinct geographical markets and the differences relate to the variations in the conditions of marketing and competition.[46]

4.3 Most Favoured Nation (MFN) or Customer Clauses

Until recently, MFN clauses were relatively unexplored in EU or UK antitrust law.[47] A spate of cases has, however, highlighted their prevalence, particularly in relation to online retailing and has forced the authorities to take a closer look at their effects.[48] It would appear that guidance is still emerging from these cases, but such clauses will be viewed particularly seriously if they are imposed by a dominant supplier or by a number of suppliers collusively.[49] In those cases, MFNs

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[42] See for example, *Pittsburgh Corning Europe* OJ [1972] L272/35 (differential prices according to territory to prevent parallel imports); *Kodak* OJ [1970] L147/24 (orders from outside the territory to be charged at the price in the territory where the order originated, not where order received); Case 30/78 *Distillers v Commission; Commission Decision GlaxoSmithKline* OJ [2001] L302/1 where the Commission declined to grant an individual exemption to a dual pricing policy.

[43] Case T-168/01 of 27 September 2006 OJ [2006] II-2969.

[44] See para 25 of the Guidelines on Vertical Restraints for discussion of acquiescence and the distinction between unilateral conduct and deemed consensus.

[45] In Case 27/76 *United Brands v Commission* and Case T-83/91 *Tetra-Pak International SA v Commission, geographic price discrimination was found to be an abuse of dominance.*

[46] Paragraph 177, Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* (although these observations were *obiter* as the case concerned Article 101.)

[47] One of the few investigations involving MFN clauses was undertaken by the European Commission against six Hollywood Studios in relation to contracts with European pay-TV Companies. It was closed in 2004 after the MFN clauses (which ensure that if better terms were agreed between a pay TV company and one studio, similar terms must be offered to the other studios) were withdrawn or waived by the Studios.

[48] See e.g. COMP/39847 European Commission investigation into e-books; OFT investigation into online hotel booking (it is looking at price parity clauses imposed by online hotel booking sites, including Expedia, Booking.com and Priceline, which prevent partner hotels from offering lower prices to other websites); Bundeskartellamt investigation into Amazon Marketplace price parity clause (which prevents sellers from offering their products at a lower price elsewhere).

[49] In the e-books investigation against Apple and a number of publishers, the European Commission suspected that the parties had colluded to raise retail prices for e-books. The retail MFC clause in agency agreements between Apple and the publishers acted as a joint "commitment device" which ensured that the publishers would have the same financial

will have the effect of aligning prices, at a higher level than would otherwise have been the case, to the detriment of price competition.

In other cases, the operation of MFN clauses may not raise antitrust concerns. In the UK, the OFT commissioned an economic report into the effects of MFNs which highlighted benefits in some contexts.[50] Also in the UK, the Competition Commission[51] initially recognised that MFN clauses could have restrictive effects on competition, but that these may not be sufficient to warrant further investigation in the context of private motor insurance price comparison websites due to the benefits offered by the MFN clauses in that context[52] and the ability of insurers to offer different prices through other 'offline' channels.[53] However, following consultation, it revisited this decision and is now considering the impact of MFN clauses in contracts between price comparison websites and insurance providers.[54] The UK OFT dodged this issue when it accepted commitments from hotels and online travel agents in lieu of making a finding of infringement in its investigation the online hotel room booking market. The OFT Decision to accept commitments has been appealed to the UK Competition Appeal Tribunal. However, the equivalent investigation in Germany has focused on "best price" clauses with portal HRS agreeing not to enforce the clauses until the investigation is resolved. In Europe, the issue is being investigated also by authorities in France, the Netherlands, Italy, Hungary, Sweden, Austria, Norway and Switzerland. The European Commission is considering initiating an investigation.

Amazon has also made changes to its contracts with online traders, removing price parity clauses which meant that sellers were restricted from offering products more cheaply on other platforms. Both the UK and German competition authorities are likely to close their investigations as a result.[55]

4.4 The use of EU competition rules in distribution disputes

Where termination can be linked to a desire on the part of the supplier to punish the distributor for failure to adhere to pricing policies of the supplier, a damages action can be available in national courts, based on competition law. Threats to terminate may precede actual termination and, at that stage, a distributor may seek to pre-empt the inevitable with an injunctive or declaratory action. Equally, it may threaten to complain to a competition authority. **Care must be taken by US suppliers considering taking action against the pricing activities or export related activities of distributors or resellers in the EU.**

Although the VBER classifies certain restrictions, such as non-competes of an excessive scope, as "unenforceable but severable" (see above), the issue of severability will depend on the circumstances in each case. In *McCabe v Scottish Courage,*[56] regarding severability from a distribution agreement of a "beer-tie" clause which was argued to be anti-competitive, an English Court held that, even if the clause was unlawful, it would not be severable as it had been instrumental in inducing the supplier to enter into the contract. To sever the clause would have damaged the fundamental nature of the agreement, according to the Court.

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incentives to make Amazon and other retailers switch to the agency model during the same time period (as otherwise the publishers would have to offer Apple any lower prices offered by other retailers).

[50] Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements. A report prepared for the OFT by Lear, September 2012.

[51] Private Motor Insurance Market Investigation by the Competition Commission. This sector-wide investigation is wider than just MFNs and is looking at how the market as a whole functions. The MFNs considered were imposed by price comparison websites and required insurers to quote the same price for a given policy on the price comparison website as for sales through other online distribution channels.

[52] In this context the Competition Commission considered that if the investments of price comparison websites were not protected by MFN clauses, they may invest less to encourage insurers to sign up, which would be likely to cause consumers to face higher search costs (paragraph 93, Statement of Issues, CC Private Motor Insurance Market Investigation).

[53] *Ibid, para 94.*

[54] Working paper: Theory of harm 5: Impact of MFN Clauses in contracts between PCWs and PMI providers dated 2 August 2013.

[55] OFT Press Release 29 August 2013: OFT welcomes Amazon's decision to end price parity policy.

[56] *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 Comm, judgment of 28 March 2006

Calor Gas Ltd v Express Fuels (Scotland) Ltd [57] further clarified the use of competition law in distribution disputes. This case concerned the enforceability of two clauses. The first was an exclusivity clause, binding the dealer to Calor for the duration of the agreement. The second was a post-termination restriction, preventing dealers handling Calor's gas cylinders post-termination. The court held that together the two clauses infringed EU competition law, neither could be enforced and that the combined anti-competitive effect meant that neither clause could be severed.

The Dutch Court of Appeal, Arnhem, held that termination by a furniture producer of a discounting dealership in response to pressure from other dealers was not lawful termination.

4.5 Online distribution

The VBER and the respective accompanying Guidelines strengthen online distribution.

4.5.1 Territorial restraints and online trade

European policy is that every distributor must be free to use the internet to advertise or sell products. How does that square with the right to allocate timelines exclusively and therefore to restrict active sales efforts by other dealers? The imposition of a restriction on internet sales could be justified if the restriction related to active sales efforts into the exclusive territory or customer group of another distributor, as with physical sales. However, using the internet as a sales medium is not in itself considered a form of **active** sales. The 2010 Guidelines discuss restraints and how territorial restraints and internet sales co-exist in more detail.

The following are unacceptable restrictions of online sales:-

- agreeing that the (exclusive) distributor shall prevent customers located in another (exclusive) territory from viewing its website or shall put on its website automatic rerouting of customers to the manufacturer's or other (exclusive) distributor's websites;
- agreeing that transactions are to be cancelled when credit card addresses reveal the purchaser to be located in another territory;
- agreeing that the distributor should limit the proportion of sales made over the internet. A supplier may insist on an absolute amount of sales being made off line;
- agreeing that higher prices are paid by the dealer for products intended to be resold online. A fixed fee can be agreed to support the offline or online sales efforts.

Where a website is accessible to all and does not target certain customers, then it is not regarded as making "active" sales. Where a customer visits the website of a distributor, contacts that distributor and the contact leads to a sale, then that is considered passive selling. Insofar as a website is not specifically targeted at customers primarily inside the territory or customer group exclusively allocated to another distributor, for instance, with the use of banners or links in pages of providers specifically available to these exclusively allocated customers, the website is not considered to be a form of active selling.

Sending unsolicited e-mails to individual customers or groups is active selling, as is paying a search engine or online advertiser to have adverts displayed to users in a particular territory.

New rules recently came into force on 22 March 2018 (and will apply from 3 December 2018) in the EU to prohibit the practice known as "geo-blocking". Geo-blocking affects

[57] 2008 S.L.T. 123

sales made online: as soon as the credit card details reveal the location of the customer, the customer is directed to a local website which may charge higher prices. The new rules, which have not yet been formally adopted but have been agreed in principle by the Council and European Parliament, identify three situations where geo-blocking is not justified:

- The sale of goods without physical delivery - if a Belgian customer wishes to buy a refrigerator and finds the best deal on a German website, the customer will be entitled to order the product and collect it at the trader's premises or organise delivery himself to his home.
- The sale of electronically supplied services – if a Bulgarian consumer wishes to buy hosting services for her website from a Spanish company, she will now have access to the service, can register and buy this service without having to pay additional fees compared to a Spanish consumer.
- The sale of services provided in a specific physical location – an Italian family can buy a trip directly to an amusement park in France without being redirected to an Italian website.

However, suppliers are free to choose not to supply cross-border customers and need not harmonise their prices with those in other jurisdictions.

4.5.2 Selective distribution and online standards

And how does this general entitlement to use online methods square with selective systems and quality standards?

The VBER Guidelines state that "a supplier may require quality standards for the use of the internet site to resell his goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general".[58] This is particularly relevant for selective distribution but may also apply to ordinary distribution arrangements. However, an outright ban on internet sales is possible only if there is an objective justification.[59] Restrictions equivalent to those imposed on shop retailers may also be imposed on internet retailers. In that context, it is possible to impose purely qualitative restrictions, on the basis of objective criteria, e.g. training required for sales staff, point of sale service and the range of products being sold. Qualitative criteria are likely to be acceptable for products which justify selective distribution. They need not be identical but should pursue the same objectives and achieve comparable results. Any difference in the criteria should be justified by the different nature of the two different distribution modes.

Suppliers may require distributors to have one or more bricks and mortar shops as a condition for becoming an authorised dealer. The use of third party platforms may also be subject to any such conditions for the use of the internet (for instance, that customers do not click through to the distributor's website from a site carrying the name or logo of the third party platform e.g. eBay).

Although dealing with mail order rather than online sales, the European Commission's 1991 *Yves Saint Laurent* decision[60] illustrates the Commission's approach. The European Commission held that YSL's selective distribution system for luxury cosmetics, including a total ban on mail-order sales, was justified as it was necessary to ensure the presentation of the products in a homogeneous way. The European Commission's decision was essentially upheld on appeal to the CFI in the *Leclerc*

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[58] Commission Guidelines on Vertical Restraints, paras 54-58.

[59] See also Commission decisions *Yves Saint Laurent Parfums* 92/33/EEC, [1992] OJ L12/24; *B&W Loudspeakers,* COMP/37.709 and Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS Président de l'Autorité de la Concurrence and others dated 13 October 2011

[60] [1992] OJ L12/24

case.[61] The 1991 YSL decision was up for renewal in 2001; however, following the adoption of the VBER and the Guidelines, the European Commission considered that a complete ban on internet sales was not acceptable. YSL therefore applied selection criteria authorising approved retailers already operating a physical sales point to sell via the internet as well. This was accepted by the European Commission.[62]

In the French case *Pierre Fabre Dermo-Cosmetique SA v Alain Breckler,*[63] PFDC asked the court to order B to cease selling PF's cosmetic products online. PFDC and B had a selective distribution agreement; however, that agreement did not contain any references to sales over the internet. The Tribunal held that restrictions on sales in selective distribution agreements must be interpreted narrowly. Since there was no mention of online sales in the agreement, a ban could not be implied. Online selling was merely an addition to B's traditional marketing methods, and could not be stopped by the Tribunal.

In another case, also involving PFDC , the French competition authority fined the company for seeking to restrict its selected distributors selling online.[64] Although some of the products concerned were "parapharmaceutical", the authority distinguished them from pharmaceuticals proper, and concluded that the existing network of selective distribution was sufficient to protect the manufacturer's interest in safeguarding brand reputation, without the need or justification for an outright ban on online sales. The fine was set at a low level due to "the circumstances of the case" and the limited effect of the conduct.[65]

PFDC challenged the decision before the Paris Appeal Court, which asked the European Union Court whether a general and absolute ban on internet selling amounts to a restriction of competition 'by object' and whether such an agreement may benefit from an exemption.

The Court held that selective distribution agreements are, in the absence of objective justification, restrictions by object (i.e. akin to *per se* restrictions).

However, the Court confirmed that a selective distribution may pursue a legitimate aim which justifies a reduction in price competition and would not infringe Article 101(1) TFEU. This will be the case where the conditions outlined above are met, i.e.:

- objective criteria of a qualitative nature;
- applied in a uniform and non-discriminatory fashion;
- nature of products necessitate such a network; and
- criteria do not go beyond what is necessary.

However, the Court went on to say that a de facto ban on internet sales did not have a legitimate aim and was not objectively justified. The need to maintain a prestigious image was not a legitimate aim for restricting competition.

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61 Case T-19/92, *Groupement d'Achat Edouard Leclerc v Commission*, judgment of 12 December 1996.

62 EC Press Release IP/01/713 of 17 May 2001 at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/713|0|RAPID&lg=EN

63 Tribunal de Commerce, Pontoise, 15 April 1999.

64 The selective distribution agreement stipulated that sales of the relevant cosmetic and personal care products must be made in a physical space and that a qualified pharmacist must be present.

65 Conseil de la Concurrence, Decision 08-D-25 of 29 October 2008

Furthermore, the VBER was not available as a ban on internet sales prevented passive sales to end users contrary to the block exemption. Whether an individual exemption under Article 101(3) was available was a matter for the State court.[66]

4.5.3 The *Coty* Judgment[67]

More recently, the *Coty* judgment has put to bed the issue of whether or not a manufacturer can impose on its distributors in a selective distribution system a ban on selling on online third party platforms such as Ebay and Amazon. Before the Court of Justice delivered its judgment, there had been a divergence of judicial opinion on the matter. Some German courts, for example, had concluded that such restriction in distribution agreements constituted a hard-core restraint under VBER and a by-object restriction under Article 101 TFEU.

The case concerned a contractual restriction imposed Coty Germany GmBH (a manufacturer of certain luxury perfumes) on one of its distributors. The relevant clause prohibited the engagement by the distributor of a third party undertaking which was not an authorised retailer of Coty. Coty sought to prohibit the distributor from using Amazon's marketplace. The German Regional Court in Frankfurt dismissed Coty's claim, concluding that such a restriction constituted a hard-core restraint under VBER and a by-object restriction under Article 101 TFEU. The Higher Regional Court in Frankfurt referred the matter to the Court of Justice for a preliminary ruling. The Court of Justice was asked to clarify three questions:

- Whether, selective distribution systems aimed at the distribution of luxury goods and the preservation of a 'luxury image' for such goods may constitute an element of competition which is compatible with Article 101(1) TFEU, in line with the *Pierre Fabre* judgment;
- Whether a ban on using third party platforms in a (selective) distribution agreement for luxury goods is compatible with Article 101(1) TFEU; and
- Whether such a restriction is a hard-core restriction within the meaning of Articles 4(b) and 4(c) of VBER.

On the first question, the Court held that selective distribution systems for luxury goods can be compatible with Article 101(1) TFEU, as long as resellers are selected on objective criteria of a qualitative nature, applied in a uniform and non-discriminatory manner, that the nature of the products necessitated such a network, and that the criteria set out do not go beyond what is necessary (commonly referred to as the Metro-criteria). In this regard, the Court relied on *Copad*[68] to affirm that the quality of luxury goods is not solely the result of their material characteristics, but also of their 'aura of luxury'.[69] This allows the consumer to distinguish such goods from other similar goods. Therefore, the Court recognised that the distributor's use of the marketplace could harm a product's 'aura of luxury' if sold alongside other non-luxury goods.

Part of the significance of the *Coty* judgment lies in the Court's clarification of its earlier statement in *Pierre Fabre* which had caused considerable consternation. In that case, the Court held that:

[66] The French Cour d'Appel ruled that the internet ban did not benefit from an individual exemption and the original fine was upheld.

[67] Judgment of 6 December 2017, *Coty*, C-230/16, EU:C:2017:841 (*Coty* Judgment).

[68] Judgment of 23 April 2009, *Copad*, C-59/08, EU:C:2009:260.

[69] Ibid, paras 24-26.

'The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.'[70]

The Court of Justice in *Coty* distinguished *Pierre Fabre*, ruling that this statement should be read in the context of that judgment and that it concerned a very specific clause in a contract relating to a *total* ban on internet sales. It did not concern the entirety of the selective distribution system.

This analysis relates to the second question the Court considered, namely the proportionality of the marketplace ban. In contrast to *Pierre Fabre*, the distributor in *Coty* was not subject to a total ban on online sales, albeit limited to selling on its own website. The Court therefore held that the ban was proportionate, adding that any quality conditions the manufacturer imposed on the distributor were not effective in relation to the third party platform as there was no contractual relationship.[71]

In relation to the third question, the Court effectively affirmed that not every restriction on internet sales through third party platforms will amount to a hardcore restriction. The Court explained that the marketplace ban in the present case neither restricted the customers to whom the distributor could sell nor passive sales to end users (in accordance with Articles 4(a)-(b) VBER).

In summary, the Court of Justice held that selective distribution systems with the purpose of preserving the luxury image of products can comply with Article 101(1) TFEU. In analysing whether a marketplace ban in a selective distribution agreement falls outside Article 101(1) TFEU, reference must be made to the so-named Metro criteria. Although marketplace bans may be deemed restrictive of competition, they do not constitute hard-core restrictions pursuant to Articles 4(b) – (c) of VBER.

4.5.4 **The *ASICS* Judgment**[72]

Asics operates a selective distribution system and in 2012 introduced new rules for its German distributors (Distribution System 1.0'), Distribution System 1.0 prohibited the use by distributors of ASICS trademarks on third party online platforms. The rules also stated that distributors must not cooperate with price comparison engines. The German Federal Cartel Office (FCO) initiated its investigation after complaints by ASICS distributors. They concluded that the rules constituted a restriction on distributors, specifically in terms of their 'passive sales' which is a hardcore restriction under Article 4(c) VBER.

This was confirmed at first instance, and thereafter ASICS sought permission to appeal to the BHG, which was refused on the basis that price comparison tool prohibitions constitute hardcore restrictions. The FCJ held that this ruling was consistent with the *Coty* judgment of the Court of Justice for three principal reasons:

1. Asics' products were not luxury products and therefore could not claim the same justification as the manufacturer in that case. They could not argue in relation to protection of brand image;
2. The Distribution System 1.0 rules had also prohibited the use of ASICS' trademark on third party platforms; and
3. These two factors cumulatively resulted in a *de facto* restriction of the distributors' online sales.

[70] Judgment of 13 October 2011, *Pierre Fabre Demo-Cosmetique*, C-439/09, EU:C:2011:649, para 46.

[71] *Coty* judgment, para 48.

[72] Judgment of 12 December 2017, *ASICS*, case KVZ 41/17.

It is interesting to note that, although the *Coty* case was concerned not with price comparison websites, but rather with third party platforms, the reasoning deployed by the CJEU in that case arguably applies also to the former. Additionally, and somewhat inconsitently with the German Federal Court of Justice's ruling, the District Court of Amsterdam in the Netherlands ruled that Nike products constitute 'luxury goods' for the purposes of the Article 101(1) TFEU prohibition.[73] This raises the question of consistency from a harmonisation standpoint.

4.6 Agency in the EU: Competition issues

It has long been the position that where an agent agreed to negotiate or conclude contracts on the principal's behalf in his own or the principal's name, the agreement would not infringe Article 101.

The VBER Guidelines[74] confirm that the determining factor is the financial or commercial risk borne by the agent in relation to the contract activities: those directly related to the contracts entered into by the agent for the principal; and those associated with investment for entry to the market - usually "sunk" costs. When the agent bears no such risks, or insignificant risks, its activities are not economically distinct from the principal's, and Article 101 does not apply.

Case law[75] reaffirms that only those resellers that do not assume financial or commercial risks linked to the sale of the products, or assume only a negligible share, will be regarded as "genuine" agents for the purposes of escaping the application of Article 101.

In the *DaimlerChrysler* case,[76] the European Commission found that Mercedes Benz agents bore a considerable price risk since price concessions were deducted from their commission. The European Commission also argued that the agents bore risks as regards: (1) transport costs for the delivery of cars; (2) purchasing demonstration vehicles from Mercedes-Benz; and (3) carrying out repairs under the sales guarantee.

The CFI held that the European Commission had failed to analyse properly the scope of these risks and their likely impact on agents' behaviour. There was no real price risk since agents were under no obligation to make price concessions. The risk of transport costs was also low since many customers collected from the factory. Similarly, the risk surrounding demonstration vehicles was low since these vehicles could be sold on by agents. The European Commission had also exaggerated the risks regarding the requirement to carry out repairs as costs were covered by Mercedes-Benz. Consequently, the CFI quashed the European Commission's €47 million fine for the infringement of Article 101.

If an agency agreement lies outside Article 101, all clauses which are an inherent part of the agency agreement are free from scrutiny. The principal may legitimately restrict the customers to whom or territory in which the agent sells the goods, and also dictate the price and conditions for sale through the agent.

The agent may also be protected from the activities of other agents in his territory or in respect of his customers (i.e. exclusive agency). However, the reverse situation, in which the agent is restricted from acting as agent for competitors of the principal, may breach Article 101. Such arrangements risk inhibiting inter-brand competition and are likely to infringe the law if they foreclose the market to other suppliers.

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[73] Nike European Operations Netherlands B.V. v Action Sport Soc. COOP A.R.L., District Court of Amsterdam, Case C/13/615474/Ha ZA 16-959, ECLI:NL:RBAMS:2017:7272, 4 October 2017.

[74] 2010 Guidelines on Vertical Restraints, paras 12 to 21.

[75] See the *DaimlerChrysler* and *CEPSA* cases, discussed at 3..4 and Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*.

[76] Case T-325/01 *Daimler Chrysler AG v Commission*, 15 September 2005.

5. DISTRIBUTION: TERMINATION ISSUES

On termination of any distributorship or agency arrangement, the consequences will be determined, principally by the terms of the contract between them but may also be affected by mandatory rules of law such as competition laws or laws protecting the intermediary.

As with any contract termination, the consequences depend on the facts, but in Europe it is worth bearing in mind national laws which protect various types of intermediary – failure to do so can be costly.

Commercial agents in Europe receive significant protection from laws which regulate their rights and obligations and which allow them to receive a compensatory payment from the principal on termination. This type of protection is not generally available to **distributors** though the laws of individual States differ on this issue and should be borne in mind. The position of distributors will be briefly considered in this section, before considering agents in more depth in section 9.

5.1 Compensation upon termination

The obligation to compensate or indemnify on termination or to pay damages can arise, of course, out of the contract (failure to terminate according to the terms of the contract, failure to give notice, no reasonable grounds for termination etc). As stated above, EU law provides no particular basis for distributors to claim compensation on termination. However, such claims may arise out of national laws of relevant States. German law provides an interesting example.

5.1.1 Germany

A German law of 1953[77] was the model for the EC Directive on Self Employed Commercial Agents. There is no specific protection in German legislation for distributors. However, the rationale for compensating agents has been considered applicable to certain supplier-distributor relationships. It did not take long for the German courts to extend the agency protection to distributors and other independent sales people.[78]

The courts will examine whether the specific situation of the person / legal entity which has been terminated resembles the position of an agent. If it does, compensation may be awarded.

In general terms, the more a distributor is integrated into the sales organisation of a supplier the more likely it will be that courts will decide that compensation must be paid. Integration is likely to be established where there is control or influence exercised over marketing, pricing (insofar as legal under antitrust laws) minimum sales requirements and other similar control mechanisms.

The calculation of termination compensation is very complex. Relevant factors for the calculation are, for example, whether the distributor has generated new customers for the supplier's business, or has significantly increased the extent of business with already existing customers and the supplier continues to derive substantial benefits from business with said customers.

Furthermore, the payment of termination compensation does not deprive the distributor from claiming compensation for damages based on other causes of action.

5.1.2 United Kingdom

In the UK, distributors are entitled only to contractual compensation based on contractual rights. There is no special protection. Due notice, in the absence of express provisions, will be reasonable notice. What is reasonable will be inferred from

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[77] Section 89b German Commercial Code.

[78] Case BGHZ 29, p 83.

the particular circumstances, e.g. the duration of the agreement and the investment made by the distributor in expectation of continuing the trading in the goods.[79]

5.2 Continuation of fixed-term contracts after expiry

Expiry of a fixed-term distribution agreement deserves further examination, in particular where the parties' continue the agreement after its expiry. The comparable situation regarding agency agreements is governed throughout the EU by the Commercial Agents Directive (see further below) to the effect that "[a]n agency contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an indefinite period."[80] With respect to distribution agreements, however, there are no uniform rules. Instead, the situation is governed by the contract laws of the individual Member States.

In the overwhelming majority of EU States, there is no specific statutory provision determining the effects of the continued performance of an expired fixed-term distribution contract. A rare exception is the Belgian Act of July 27 1961 which provides that even a fixed-term distribution agreement has to be terminated by due notice, in the absence of which it is deemed to have been renewed for an indefinite term (or for such term as provided in the agreement).

In other EU States, the situation – whether inferred from general rules or principles of contract law, from agency law or from case law – is generally that the parties' continued performance of the contract can be taken as an expression of their intention to renew the contract. Depending on the circumstances, in the absence of an agreement to the contrary the renewed contract will generally be for an indefinite term. The main difference between different EU jurisdictions appears to lie in the assessment of whether the parties' behaviour can be taken to imply a clear intention to renew.

In *Karoulias v Drambuie,*[81] the question arose whether a renewal of a distribution agreement had been effected even though the new agreement had not been signed. K was D's exclusive distributor in Greece. Ahead of expiry of the fixed-term contract, the parties entered into negotiations for a new contract. Consensus was reached on the terms of the new contract, but the agreement was never signed. When D later entered into an exclusive agreement with another distributor, he argued that the contract with K was not binding and that K had made no effort to correct the non-signature. The Court held that there was no binding agreement. The parties' conduct since the day of their un-signed agreement had not suggested that they believed a valid contract had been concluded before the agreement had been signed, and there was no extra-contractual protection for distributors upon termination under Scots law.

In a UK case, a post-termination restraint of 12 months in a franchising agreement which had expired over a year before and in which the franchisee had continued to operate within the franchise could not be enforced – it could not be implied that the post-term restraint extended beyond the expiry of the agreement.[82]

5.3 Examples of Reasons to beware!

Whereas many EU Member States have left the regulation of distribution agreements to be dealt with by more generally applicable rules, and so do not confer specific protection upon distributors, Belgian distribution laws are an exception to the rule.

The termination of distributorship agreements is regulated by the Act of 27 July 1961 on Unilateral Termination of Exclusion Distribution Agreements of Indefinite Duration. Article 4

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[79] See for example, *Decro-Wall International SA v Practitioners in Marketing* 1971 2 All ER 216 where 12 months was reasonable given 5 years' duration and the level of expenditure. Also see, *Automatic Systems S.A. v. Methon B.V.*, Amsterdam Court of Appeal on 6 April 2010, LJN:BM2020, the Court of Appeal of Amsterdam, the Netherlands decided that, given the circumstances of the case, a notice period of three years was to be considered a reasonable term of notice for the termination of a Distribution Agreement which has existed for 30 years.

[80] Directive 86/653/EEC, Article 14.

[81] *WS Karoulias SA v Drambuie Liqueur Co Ltd (No.2)* (OH) Court of Session, 17/8 2005.

[82] *Pirtek (UK) Ltd v Joinplace Ltd* [2010] EWHC 1641 (ch).

provides: if a distribution has suffered damage further to the termination of a distribution agreement covering all or part of Belgian territory, he may in any event bring legal proceedings against the supplier before the Belgian courts or before the courts for the place where supplier is domiciled or has its registered office. If proceedings are brought before the Belgian courts, they must apply Belgian law exclusively. In a dispute between a Belgian importer of whisky (Corman-Collins SA) and a French supplier La Maison du Whisky this provision was held to be over-ridden by general European rules on jurisdiction found in Council Regulation 44/2011 on Jurisdiction and the recognition of and enforcement of judgments.

The Court also went on to analyse what distinguishes a contract for the sale/purchase of goods from a distribution agreement and recognised the framework nature of a distribution appointment and the services which a distributor provides.

Furthermore, Belgium enacted a new franchise law which has a potentially very wide scope, thus catching agreements which may not be considered as franchise agreements in other jurisdictions. The law applies to all

"commercial partnership agreements", defined as "agreements between two persons, each of whom acts in its own name and on its own account, by which one of the persons grants to the other, in consideration for remuneration of any nature whatsoever, whether direct or indirect, the right to use in the selling of products or the provision of services, a commercial formula falling within one or more of the following forms:"

- a common sign or brand;
- a common commercial name;
- a transfer of know-how; or
- commercial or technical assistance.

Where the law applies, the franchisor must provide a "disclosure document", the content of which is closely dictated by the law, at least 30 days ahead of conclusion of the contract. If not, the agreement, or certain clauses, may be unenforceable.

The disclosure document must set out the main provisions of the agreement, such as terms for calculation of royalties, non-competes, renewal and termination, but also very detailed information about the market and relating to the performance of and outlook for the franchisor's business. This must include historical data from the previous three years.

In France, where Article L 330-3 of the Code Commercial imposes on franchisors a similar duty to provide all the "necessary information" to franchisees within 20 days after conclusion of the contract. A Court recently declared a franchise agreement null where the franchisor had not provided enough information. The Court stated that the franchisee should have obtained further specifications "about the number of contracts that the franchisor has previously concluded in this field, about his experience and the turnover realised by the competitors".[83]

As stated above, in Germany, distributors can be entitled to termination compensation where their position is akin to that of an agent. The German courts will apply Section 89(b) of the Commercial Code (HGB) to distributors provided certain criteria are met. The distributor must be integrated into the supplier's distribution system – demonstrated by having an assigned sales territory, an obligation to purchase minimum volumes, the existence of a non-compete and an obligation to promote the products. Most significantly, there must be an obligation on the distributor to inform the supplier of his customers. The thinking is that the supplier will, post-termination, be able to benefit from the customer base built by the distributor. Note – a right to inspect

[83] *Cleret v Euromark International*, Paris Court of Appeal, judgment of 23 June 2006.

the distributor's books may suffice! There have been cases in other jurisdictions where this has been successfully argued for distributors.[84]

6. ARTICLE 102 TFEU: ABUSE OF DOMINANCE

Article 102 is concerned with unilateral conduct by firms with market power. It prohibits the abuse by a dominant undertaking (or a number of jointly dominant undertakings) of their market strength.[85]

The first step is to determine whether the company is dominant in the relevant market and this is typically achieved well short of monopoly. The relevant product and geographical market must be defined. The European Commission has published Guidelines to assist in the determination of the relevant market.[86]

As a rule of thumb, a market share in excess of 40% is likely to be considered as evidencing dominance in any substantial part of the EU.[87] However, a full analysis of other factors, e.g. position of competitors, is usually also necessary. The test of dominance is whether the entity is in a position to behave "to an appreciable extent independently of its competitors, customers and ultimately of its consumers".[88] Market share is the starting point.

Abuse can take many forms; examples in the context of verticals include unjustifiably long term supply agreements, exclusive purchasing and supply, discriminatory pricing,[89] bundling,[90] fidelity pricing, etc.

A number of cases have dealt with the exclusivity afforded to suppliers of food and drink products in outlets or in vending machines where they supply such machines.[91] The European Commission took into account dominance of the suppliers as well as dependence of retailers in condemning such provisions. In the *Coca Cola* case, the Commission accepted undertakings from Coca Cola Enterprises that they would, save in specific circumstances, refrain from entering into total or partial exclusive dealing arrangements with customers and from granting growth and target rebates.[92] Further, for vending machines in particular, the settlement agreement ensured that equipment exclusivity agreements would not equate to outlet exclusivity. The commitments reduced contract duration, gave customers the option of repayment and termination without penalty, and freed up a certain share of cooler space.

In March 2006, the European Commission fined the Norwegian Tomra Group €24million for the abuse of dominance in the market for the supply of reverse vending machines (machines which

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84 Successfully, for example, in a decision of the Swiss Federal Supreme Court of 22 May 2008 as regards claims by distributors of perfumes in the Czech and Slovak Republics and in Portugal – Decision 15.11.07 proc No.0783933; unsuccessfully (but possibly only on its facts) in a decision of Spain's Supreme Court (Sentencia No.652/2008).

85 "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist of:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

86 See European Commission Notice on the definition of the relevant market for the purposes of Community competition law at http://europa.eu.int/comm/competition/antitrust/relevma_en.html.

87 There have however been cases in which market shares of less than 40%, have nevertheless been found to be dominant. For example, the Commission found British Airways to be dominant with a market share of 39.7%. Furthermore, in *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA* C-250/92 the ECJ ruled that market share of 32% may be held to be dominant, dependent upon the strength and number of its competitors.

88 C-27/76, *United Brands v Commission* [1978] ECR 207.

89 See e.g. C-497/99P *Irish Sugar plc v Commission* [2001] ECR I-5333.

90 See for example Commission decision COMP/37.792, *Microsoft/W2000.*

91 Langnese-Iglo v. Commission, Case T-7/93; Van den Berghs Foods Ltd v. Commission, Case T-65/98.

92 Coca Cola v. Commission, Case COMP/A.39.116/B2 OJ (2005) L 253/21

collect used drink containers in return for a deposit) in four EU States and Norway. Tomra's agreements with retailers granted Tomra the status of the exclusive supplier of such machines and imposed individualised quantitative targets or retroactive rebate schemes the thresholds of which usually corresponded to the total, or almost total, machine requirements of its customers.

In the pharmaceutical industry, some uncertainty exists as to whether abuse such as discriminatory pricing and refusal to supply may be more easily justified due to the particular characteristics of the pharmaceutical market where prices are often affected by Member State intervention, for example through price control and subsidies and not simply determined by market forces. A judgment of the ECJ on a preliminary reference from the Greek Courts in *Sot Lelos Kia Sia E.E & Others v GlaxoSmothKlineAEVE*[93] provides some further guidance on the application of EU competition rules in relation to parallel imports. GSK held marketing authorisations for a number of prescription drugs in Greece and ceased supply to wholesalers in Greece to prevent export into other Member States. GSK continued to market the drugs itself within Greece. GSK later resumed supply to the wholesalers but in limited quantities. The ECJ held that a dominant undertaking cannot cease to honour the ordinary orders of an existing customer for the sole reason that the purchaser wishes to export the products for resale where prices are higher. Furthermore, it held that where a dominant undertaking wishes to counter the threat to its commercial interests, it must do so in a proportionate and reasonable way.

The *Intel* case saw the European Commission impose even larger fines - €1.06billion – the largest imposed to date.[94] Intel breached Article 102 by giving rebates which were conditional on manufacturers buying all, or almost all of their requirements for x86 central processing limits from Intel (to the detriment of AMD). Intel also made direct payments to halt or delay the launch of competing products (so-called "noted restrictions"). Intel sought to conceal these restrictions – most were unwritten and based on oral agreements. Intel appealed the decision.[95]

Member States are not permitted to ban anything which EU law exempts. However, in dominance, they can impose stricter provisions that prohibit abuse. Many Member States also prohibit abuse of "economic dependence". In the *ATA* case[96], the French Competition Council examined whether a supplier of taxi meters had abused an economic state of dependence in breach of domestic French law. The Council found, however, that the fact that a distributor carries out a significant, or even exclusive share of its provisioning with one supplier, is not enough to characterise such economic dependence, if he would have a possibility of substituting its supplier(s) under comparable conditions.

In December 2008, the European Commission published its guidance paper[97] setting out the principles it will follow in applying the abuse of dominance rules to exclusionary conduct by dominant companies. The paper outlines the European Commission's enforcement priorities as regards a range of abuses.

7. AGENCY: EXTENSIVE PROTECTION IN THE EU

Commercial agents may enjoy extensive rights and protections in Europe, a factor to bear in mind prior to an appointment decision and certainly prior to a termination letter.

7.1 The essence of agency

The legal consequences of an agent's actions are governed by national laws and legal responsibility can also, at least to some extent, be shared between the agent and the principal in the contract. In the UK, an agent who does not disclose his role as such in negotiations with a customer, may be sued alongside the principal. In Germany, the agent is solely liable.

[93] C468/06

[94] COMP/37990 Intel 13 May 2009.

[95] Case T-286/09 Intel v Commission Application: OT/[2009] C220/41.

[96] Conseil de la concurrence, 28 July 2005.

[97] Available at: http://ec.europa.eu/competition/antitrust/art82/index.html

It should also be noted, that there are different "types" of agents in the laws of different Member States. Broadly, the "commissionaire" model, used in France, Germany and Italy, entails that agents will conclude contracts in their own name and the principal remains undisclosed, so that there is no relationship between customer and principal. Under the "del credere" model, the agent indemnifies the principal for the customer's non-payment. Finally, in other jurisdictions, agents are treated essentially as employees.

EU law has to some extent harmonised national laws on the protection of commercial agents. The main features of such harmonisation will be discussed in the following paragraph.

7.2 The Commercial Agents Directive

If you distribute goods in the EEA through agents, or indeed through any intermediation by a third party, you should note the potential impact of agency law. The Commercial Agents Directive (86/653/EEC) sets out a number of significant rights for commercial agents charged on a continuing basis with negotiating contracts for the supply of goods (not services – thought the protections extend to services in some Member States), although the rights to compensation or indemnity on termination are by far the most contentious of the rights granted by this legislation.

The Directive has been implemented in all Member States and similar legislation has been adopted in EFTA States and in other European countries.

The Directive applies to self-employed commercial agents who can be individuals or corporations. The concept of "self-employed" refers to the intermediaries being generally free (unlike employees) to organise their commercial activity broadly as they see fit.

The Directive obliges Member States to introduce protections which were already available in a number of European States. The principal protections are:

- minimum notice;
- rights to a written agreement;
- rules on entitlement to commission;
- rules on due date for payment of commission;
- rules for removal of customers or parts of a territory;
- rights to relevant documentation / information;
- rights to commission after termination in respect of transactions generated by the agent;
- rules as to when the right to commission can be extinguished (and when it cannot);
- rights to be indemnified or compensated on termination.

7.3 Scope of the Directive: UK case law

In the United Kingdom, the Directive is implemented through the Commercial Agents (Council Directive) Regulations 1993. A 2005 English High Court ruling interpreted the definition of the word "negotiation", for the purpose of determining a trader's status as an agent under the Regulations. The case *PJ Pipe & Valve*[98] concerned a claim by P for indemnity/compensation upon A's termination of two agency agreements.

Regulation 2 of the 1993 Regulations provides that by definition an agent must have "continuing authority to negotiate the sale or purchase of goods on behalf of" the principal. This definition is taken from the Directive's Article 1.2. Under the agreements, P did not have the authority to vary

[98] *PJ Pipe & Valve Co Ltd v Audco India Ltd* [2005] EWHC 1904 (QB).

prices or other terms when negotiating, nor to conclude contracts on A's behalf. P had however had a significant role in creating connections between A and his buyers and promoting A's products, thereby creating significant goodwill. The court held that a restrictive interpretation of the word "negotiate" would lead to the exclusion from the protection afforded by the Regulations of commercial agents who created valuable goodwill for their principals. Analysing the general principles of the Directive, it concluded that P was covered by the Regulations. The case of *Nigel Fryer Joinery Services Ltd v Ian Firth Hardware Ltd*[99] reiterated the approach taken to the concept of negotiation in *Pipe Valve*.[100]

In 2006, the ECJ also looked at the issue of whether an agent has "continuing authority" (as required by Regulation 2(1) of the 1993 Regulations).[101] It confirmed that the fact an agent is authorised to, and does conclude "a number of transactions" for the principal is "normally an indicator of continuing authority". An agent who is only authorised to conclude a single contract will not have "continuing authority", unless the agent is authorised to negotiate successive extensions to that contract.

In Georgios Kontogeorgos v Kartonpak AE (Case C-104/95 [1997] 1 CMLR 1093), the Court of Justice held that a commercial agent who is in charge of a particular area has a right to commission even if the contracts are concluded without the agent's intervention (eg, the principal concludes the contracts directly). The same would apply in respect of orders from a group of customers for whom the agent was responsible. However, it is clear that the agent is not entitled to commission when it is a third party selling into the exclusive territory or customer group rather than the principal (Case C-19/07 Heirs of Paul Chevassus-Marche v Groupe Danone).

7.4 Indemnity or compensation?

This concept is intended to reward an agent in the circumstances of termination where the principal will continue to benefit from the customer base which the agent has built up, whereas the agent would expect to cease to benefit from that customer base. On the contrary, the agent would have to start over again with a new principal / product.

The concepts "indemnity" and "compensation" are slightly different. As regards most European States, you need to determine whether the regime provides for indemnity or compensation or whether, as in the UK, a choice can be made.

7.4.1 Indemnity

Indemnity is due where the agent has brought new customers or increased the volume of business with existing customers and the principal continues to derive substantial benefits and where payment is found to be equitable in all the circumstances.

Guidance on these concepts can be obtained not only from case law of the ECJ but from the Report issued by the European Commission on the application of the concept of indemnity/compensation.[102] The approaches of the German and French courts have also been highly influential.

Indemnity has the advantage, from the principal's point of view, of being capped at one year's commission averaged over the preceding five years or, if less, the duration of the agreement. Although every case will be different, it may be useful to set out a likely approach to any claim.

Agents typically receive commission during the contract. This does not generally reflect the value of the goodwill generated for the principal which provides no benefit to the agent post-termination. This is the commercial justification for the payment of a

[99] Nigel Fryer Joinery Services Ltd v Ian Firth Hardware Ltd [2008] EWHC 767.

[100] However, a self-service petrol station operator does not negotiate the sale of petrol. See *Parks v Esso Petroleum Company Limited* [1999] EWCA.

[101] Poseidon Chartering BV v Marianne Zeeschip VOF and others (C-3/04 judgment of 16 March 2006)

[102] COM/90/364 final, 23.7.96, referred to in a number of English Court decisions, e.g. *Moore & Piretta*. [1999] 1 All ER 174.

goodwill indemnity, which represents the continuing benefits to the principal due to the efforts of the agent. If no goodwill has been generated by the agent (i.e. the agent has generated no new customers or increased business with existing customers) no indemnity need be paid.

7.4.2 Compensation

Compensation is for damage on termination irrespective of contractual damages. The agent is entitled to be compensated for deemed damage, and damage is deemed to have occurred where termination takes place in circumstances depriving the agent of commission which proper performance (continuing performance) of the agency contract would have provided, whilst the principal continues to enjoy substantial benefits attributable to the agent's activities. Further, an agent is entitled to compensation where termination prevents the agent amortising costs and expenses incurred in performing the agency contract on the principal's advice.

The compensation system was based on French law dating from 1958. Its aim was to compensate the agent for the loss suffered as a result of the termination of the agency agreement. A body of case law has developed in France concerning the right level of compensation under the national law. Justification for compensation has included that it:

- represents the cost of the agent's successor of purchasing the agency; or
- represents the time it takes for the agent to re-constitute the client base of which the agent is forcefully deprived.

UK courts will not slavishly follow the French tariff approach.[103] The UK courts have in the past taken account of duration and history of the agency. However, a recent case in the UK House of Lords[104] confirms that the correct UK approach will be to value compensation against the market reality of the worth of the agency. It is therefore necessary to calculate what the sale of the agency would be worth to a hypothetical buyer. The consequences of this ruling will likely see a sharp derogation from the standard French compensation package of two years gross commission. The case also clarifies that in the UK the attribution of market value to an agency is likely to be a hypothetical calculation, but nonetheless the correct approach to follow.

In 2006, the ECJ in *Homyvem v de Totti*[105] adopted a pro-commercial agent stance on liquidated damages clauses. Agreements can specify that compensation/indemnity will be calculated on the basis of different criteria to those in the Commercial Agents Directive only if it is absolutely certain at the time of making the agreement that it will, in every individual case where the agreement is applied, provide indemnity/compensation equal to or better than what the agent would receive under the Directive. There is little point in a principal pursuing an alternative model.

7.5 Reasons for termination

The Directive provides[106] that the compensation (which includes indemnity for this purpose) is not payable to the agent where the agreement is validly terminated for breach (unless it is the principal who is in breach) or when the agent, with consent of the principal, assigns its rights and duties under the contract to another person.

Therefore, if a sufficiently material or fundamental breach of the agency contract can be established which would entitle the principal to terminate according to the contract law rules applicable to the obligation in question, then the agent's rights to compensation / indemnity are

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[103] *Barrett McKenzie v Escada (UK) Ltd, [2001] E.C.C. 50,* 1/2/2001.

[104] *Lansdale v Howard & Hallam ltd [2007] UKHL 32*

[105] C-465/04 judgment of 23 March 2006.

[106] Article 18.

lost. In *Fryer,*[107] the breach by which the agent was held to have repudiated the contract was a minor, but persistent breach (non-provision of weekly reports where there had been a number of formal warnings).

It is therefore important to consider adequate specification of fundamental contractual provisions and the laws applicable to them. Failure to meet targets may be insufficient if the principal was to blame. In the French Cour de Cassation, it was held that the burden of proof was on the principal to prove the agent was in breach where the agent blames economic stagnation, price increases or competition from the principal for failure to reach results.[108] If an agent takes clients with him, that may affect the compensation payable.[109] The English courts will allow a claim for compensation / indemnity to "top up" any common law claim of damages for breach of contract.[110]

8. MERGERS AND JOINT VENTURES

8.1 Acquiring a distributor

As in the US, companies in the EU may consider acquiring the business of a third party distributor – either to supplement or expand their existing distribution business or as an alternative to setting up their own distribution system or to appointing an independent distributor.

US attorneys should be aware that such acquisitions may be regarded as mergers under EU member State competition laws or EU competition law. Merger filings may need to be made to the European Commission in Brussels or to one or more national competition authorities in the EU who may investigate the impact on competition of the acquisition. Importantly, if a merger does need to be filed then, with the exception of the UK where merger filings are voluntary, completion will generally have to be postponed until clearance is granted by the relevant authorities.

8.2 When are merger filings needed?

In the EU the European Commission has exclusive competence to examine mergers which meet the financial thresholds in the EU Merger Regulation.[111] In these circumstances, national competition authorities cannot, in principle, examine a merger and only a single filing to the European Commission need be made. Where a merger does not have such a dimension, filings to authorities in one or more Member States may be necessary if the relevant national filing thresholds are met.[112]

As in the US, merger control only comes into play when a deal relates to the acquisition of a business. Most EU jurisdictions define "business" broadly. For example, the EU Merger Regulation applies to any business *"with a market presence, to which market turnover can be clearly attributed"*[113] whereas the UK's merger control regime applies to the *"acquisition of business activities of any kind".*[114] Consequently, even if an acquisition only relates to a distributor's customer records or goodwill, a merger is still likely in the EU. Similarly, a merger may also exist where the transfer relates to physical assets alone (for example, elements of a distributor's logistics system) – at least in situations where these assets enable a particular business activity to be continued post acquisition.

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[107] Fryer, footnote 99 above.

[108] *Acodin Sarl v. Etablissements Rabaud* [1992] ECC 84.

[109] See the Dutch case; *Rosa Ronstedt GmbH v ST Fashions, [1993] ECC 57.*

[110] *Duffen v Fra.Bo SpA*, [2000] 1 Lloyd's Rep.180, Court of Appeal 30.4.98.

[111] The thresholds are outlined in Article 1(2) of the EU Merger Regulation, Official Journal L 24, 29.01.2004, p. 1-22. The primary thresholds require mergers to be notified to the European Commission when the combined worldwide turnover of the parties to an acquisition exceeds €5 billion and where more than two parties have individual EU-wide turnover of more than €250 million. There are secondary thresholds which apply if the primary thresholds are not met.

[112] For a list of current filing thresholds in EU Member States see the website of the International Competition Network - http://www.internationalcompetitionnetwork.org/index.php/en/publication/293

[113] See European Commission consolidated jurisdictional notice of 10 July 2007 at para 24.

[114] See OFT document "Mergers Procedural Guidance" para 4.8
http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft526.pdf

8.3 When are competition issues likely to arise?

8.3.1 Horizontal mergers

If the acquiring company has its own "in-house" distribution activities on the same relevant market(s) as the target company, the acquisition is likely to be viewed as a so-called "horizontal merger" in the EU. Although there are certain important differences, the EU rules on horizontal mergers broadly resemble those in the US. Such mergers can lead to competition concerns where market shares and concentration levels on relevant markets are high.[115] The European Commission's decision in the *Rexel/Hagemeyer* case illustrates the types of issues which can arise when two distributors merge. In this case, the European Commission required Rexel to divest Hagemeyer's Irish electrical wholesale distribution business which it had acquired, due to concerns that the parties' strong position (combined market shares were between 30% and 40%) and the absence of serious competitors would significantly impede effective competition on the market.[116]

8.3.2 Vertical mergers

Where the acquiring company has no distribution system of its own but acquires one, EU law will normally view this as a so-called "vertical merger".

Vertical mergers are generally less likely to impede competition than horizontal mergers since they do not result in the loss of direct competition between the merging businesses. In addition, they often produce efficiencies (e.g. a reduction in the mark-ups normally associated with using an independent distributor) which may or may not be passed on to consumers.

Vertical mergers involving the acquisition of a distributor can, however, restrict competition when they hamper or eliminate rivals' access to supplies (i.e. so-called "foreclosure"). An example of foreclosure would be where the acquisition of a distributor leads an upstream supplier to restrict third party distributors from accessing its products/services, thus raising their costs.

According to the EU's guidelines, the risk of foreclosure will not materialise unless the merged entity has a significant degree of market power in at least one of the markets concerned (i.e. the upstream supply market or the downstream distribution market).[117] In practice, the European Commission is unlikely to find a risk of foreclosure in a vertical merger where the market share post merger on each market concerned is less than 30% and the post merger "HHI" (i.e. the measure of concentration on the market) is below 2000.[118]

Vertical mergers can also restrict competition when they change the structure of the market in such a way that businesses are more likely to coordinate their behaviour, and raise prices, or otherwise harm competition post transaction.

Examples at EU and UK level of vertical mergers which involved an investigation of competition concerns include:

EU

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115 For details see guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004/C 31/03).

116 See OJ 2008/C 7/13 http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4963_20080222_20212_en.pdf

117 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2008/C 265/07.

118 As in the US, the Herfindahl Herschmann Index (HHI) of a market is calculated by summing the squares of the percentage market shares held by the respective firms.

- The acquisition of Reuters by Thomson (the vertical issue related to the ability of independent producers of desktop products to access financial information post transaction).[119]

- The proposed acquisition of the South African steel and vanadium producer Highveld by the Luxembourg steel company Evraz (the merger brought together Highveld's vanadium mine in South Africa and Evraz's finished vanadium products).[120]

- TomTom's proposed acquisition of digital map provider Tele Atlas (the merger brought together the downstream activities of TomTom which develops and sells satellite navigation devices and Tele Atlas which produces digital navigable maps).[121]

UK

- The proposed acquisition of the London Stock Exchange by Deutsch Börse AG (the issue related to the vertical overlap between the parties' clearing and settlement services and the downstream trading of equities and other financial instruments).[122]

- The CMA considered that Heineken had already, on 7 October 2015, acquired legal control over D&G who owned the Target Brands and material influence over the Target Brands in GB. This acquisition of material influence was further supported by the Manufacturing, Bottling, Selling, Distribution, and Marketing Agreement that was in place between D&G (now controlled by Heineken) and Diageo GB. However, with the transfer of the licence and distribution rights of the Target Brands to Heineken, Heineken would acquire a higher level of control ('legal' control) over these brands.

The merger control authority in the UK is the Competition and Markets Authority ("CMA") and it has set out a range of relevant factors:

"The transfer of customer records is likely to be important in assessing whether an enterprise has been transferred.

The application of the TUPE regulations would be regarded as a strong factor in favour of a finding that the business transferred constitutes an enterprise.

The CMA would normally (although not inevitably) expect a transfer of an enterprise to be accompanied by some consideration for the goodwill obtained by the purchaser. The presence of a price premium being paid over the value of the land and assets being transferred would be indicative of goodwill being transferred.

4.9 Outsourcing arrangements involving ongoing supply arrangements will not generally result in enterprises ceasing to be distinct, but may do so where, for example, they involve the permanent (or long-term) transfer of assets, rights and/or employees to the outsourcing service supplier and where those may be used to supply services other than to the original owner/employer. The CMA will assess whether, overall, the assets, rights and employees transferred to the outsourcing service supplier are such as to constitute an enterprise under the principles set out above."

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[119] http://ec.europa.eu/competition/mergers/cases/decisions/m4726_20080219_20600_en.pdf.

[120] See http://ec.europa.eu/competition/mergers/cases/decisions/m4494_20070220_20212_en.pdf.

[121] See http://ec.europa.eu/competition/mergers/cases/decisions/m4854_20080514_20682_en.pdf.

[122] A report on the proposed acquisition of London Stock Exchange plc by Deutsche Börse AG or Euronext NV, November 2005, Competition Commission.

8.4 Ancillary restraints

Acquisitions often result in the break-up of internal lines of supply which existed within the vendor before the acquisition. For example, if a vendor sells off certain of its manufacturing capabilities but retains its general sales and distribution functions, it may have to arrange access to the manufactured products post acquisition. Conversely, if the buyer only purchases distribution capabilities, it may be reliant on the vendor for certain products/services and may need to enter into agreements with the vendor to secure access to them.

Supply and purchase obligations between the vendor and purchaser of a business are necessary for a transitional period post acquisition to ensure continuity of supply. As a general rule, such obligations will be regarded as ancillary restraints[123] (and hence unproblematic from a competition perspective) where they are for a period of up to five years and do not contain obligations providing for unlimited quantities, exclusivity or preferred-supplier or preferred-purchaser status.

8.5 Distribution Joint Ventures

Competitors may wish to cooperate in the selling or distribution of their products to reduce costs and to benefit from efficiencies or economies of scale. The assessment of these arrangements depends on how the distribution joint venture is structured.

8.5.1 Contractual distribution JVs

If the joint venture is contractual, it must be assessed in accordance with the European Commission's Guidelines on horizontal cooperation agreements which were published in 2010.[124]

Concerns arise from joint distribution only if the parties are competitors. The primary concern is price-fixing of the competing products through the joint distribution. Agreements limited to joint selling (i.e. the joint determination of price and other terms and conditions) will almost always fall under Article 101(1), as they have as their object or effect the coordination of competitors' pricing and/or the limitation of output. This will be the case regardless of the parties' market power. Price-fixing is unlikely to benefit from an exemption under Article 101(3) and significant fines are a real risk[125]

Even if the arrangement falls short of joint selling, it may still fall under Article 101(1) if it enables the exchange of sensitive confidential information on pricing and marketing strategy or results in competitors having common final costs (with the result that scope for price competition is reduced). However, the parties must have some degree of market power for this to be viewed as a problem. The Commission interprets this as arising where there is a combined market share of 15% or more. Below that Article 101(1) will not apply.

If the parties' market share is above 15%, the effects on competition of joint distribution might be reduced by implementing certain safeguards, such as firewalls to prevent the flow of confidential pricing information between the parties and each party retaining decision-making on pricing/marketing strategy for their own products. The likely impact of joint distribution on the market must be assessed under Article 101(3). Real efficiencies must be demonstrated, rather than merely cost savings as a result of the elimination of competition. Investment by the parties, such as the contribution of significant capital, technology or other assets will assist the analysis. Cost savings through reduced duplication of resources and facilities will also be viewed favourably.

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[123] See Commission Notice on restrictions directly related and necessary to concentrations, OJ 2005/C 56/03, paras 32-35.

[124] See footnote 31.

[125] Commission Decision (78/732/EEC) *CSV;* Commission Decision (80/182/EEC), *Floral.*

8.5.2 **Corporate distribution JVs**

Alternatively, competitors may create a corporate joint venture (or acquire joint control of an existing legal entity) to carry out the distribution/marketing function.

These JVs may be subject to national or EU merger control rules if the creation of the JV or the acquisition of joint control constitutes a "merger" under the relevant rules[126] and the appropriate jurisdictional thresholds are met.

If merger control rules do apply, the substantive test will depend on the jurisdiction (e.g. substantial lessening of competition in the UK, significant impediment to effective competition in the EU). However, regardless of the specific test, all competition authorities will consider the extent of the competitive overlap between the parties, combined market share, likely impact of joint distribution on competition, the likelihood of coordination between the parent companies and whether efficiencies can be said to result from the JV.

Generally, competition authorities prefer structural remedies to perceived competition problems such as divestment of brands, although behavioural remedies (e.g. firewalls) have been accepted.

To avoid such potential scrutiny by competition authorities of corporate JVs, parties may structure their JV to ensure the thresholds are not met, the JV is not full function (if this is an appropriate consideration) or entering into a contractual arrangement only.

9. JURISDICTION AND CHOICE OF LAW

9.1 Introduction

Issues of jurisdiction and choice of law are not specific to distribution but it may be useful to give an overview of the regime as it broadly operates in Europe.

9.2 The Brussels Convention

Prior to the entry into force of the Brussels Regulation, jurisdictional issues were regulated by the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil & Commercial Matters.

The basic rules laid down by the Brussels Convention, which also apply to cyberspace, are as follows:-

- Persons domiciled in an EU member State may be sued in the courts of that State.[127]
- In matters relating to a contract, a party may be sued in the courts of the place of performance of the obligation in question.[128]
- In matters relating to tort, a party may be sued in the courts of the place where the harmful event occurred.[129]
- Consumers may choose between filing an action either in the country in which they are domiciled or in the other party's country of domicile, while the other party can only sue the consumer in the consumer's country of domicile. This provision applies so long as

126 Under EU rules, for example, the creation of new JVs will constitute a "concentration" subject to the merger control rules if it can be regarded as "full function" (i.e. sufficient resources to operate independently on the market, activities beyond one specific function for the parents, lasting basis). However, according to new guidance from the European Commission, this is not a consideration where joint control is acquired over an existing entity. It is also not usually a consideration under all national merger control rules (e.g. UK and Germany).

127 Article 2.

128 Article 5.

129 Article 5.

the consumer has been subject to a specific invitation addressed to the consumer or advertising in her State of domicile.[130]

- With the exception of disputes involving consumers, the parties to a contract can determine which country's courts shall have jurisdiction to adjudicate a dispute.[131]

9.3 The Brussels Regulation ("Brussels I")

Following consultations which started in 1997, the Council of the EU issued Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil & Commercial Matters (the Brussels Regulation). This Regulation was an attempt to harmonise the rules of conflict of jurisdiction in civil and commercial matters and to simplify formalities for recognition and enforcement of judgments.[132]

Despite the issuing of this Regulation, the main structure of the Brussels Convention is not affected, however a number of changes have been made.

Under the Regulation, the courts of the consumer's home country will have jurisdiction over a foreign defendant if the latter "pursues commercial or professional activities in the member State of the consumer's domicile or, by any means, directs such activities to that member State […] and the contract falls within the scope of such activities".[133]

"by any means" is specifically intended to cover e-commerce transactions and to give consumers the ability to bring a lawsuit relating to any contracts executed via the internet in their own country of domicile.[134] The European Commission has indicated that it intended a broad interpretation of "by any means".[135]

The Brussels Regulation abolishes the requirement that consumers must have taken the necessary steps to conclude their contracts in their home country to be able to sue in their own country.[136]

The Brussels Regulation provides that the consumer contract must fall within the scope of those activities which the defendant directed to the consumer's State, without specifying that the consumer must have contracted from that State.[137]

9.4 Staying proceedings under Brussels I

Under Article 27 of the Brussels Regulation, where proceedings involving the same course of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized must stay proceedings until the court first seized determines jurisdiction. This procedural requirement trumps an 'exclusive jurisdiction' clause in a distribution agreement.[138] Additionally, the ECJ has ruled, in *Turner v Grovit,*[139] that anti-suit injunctions preventing foreign proceedings are not compatible with the Brussels Regulation. Accordingly, the English court could not prevent the German court from carrying on with their proceedings to determine jurisdiction. The practical consequences of these decisions are

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130 Articles 13 and 14.

131 Article 17.

132 The Brussels Regulation is not directly applicable in Denmark, but has effectively been extended to Denmark by a separate agreement between EU and Denmark which took effect on 1 July 2007.

133 Article 15 (1) (c).

134 European Commission, Explanatory Memorandum to the Proposal for a Council Regulation on Jurisdiction, COM (1999) 348 of 14 July 1999, available at http://www.europa.eu.int/comm/justice.home/pdf/com1999-348-en.pdf .

135 See Opinion of the Economic and Social Committee on the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, CES 233/2000-99/1054 CNS, March, 2000.

136 See European Commission, Explanatory Memorandum to the Proposal for a Council Regulation on Jurisdiction, COM (1999) 348 of 14 July 1999, at 16.

137 Article 16.

138 Case C-116/02, *Gasser v MISAT* [2005] QB1, preliminary reference to the ECJ as to which Court, the first seized or the exclusive jurisdiction Court, should decide who hears the case.

139 Case C-159/02 [2005] 1 AC 101, reference for a preliminary ruling.

evidenced by the *Primacom* litigation concerning an action for payment of interest on a loan.[140] *Primacom* commenced proceedings in Germany in breach of an exclusive jurisdiction clause in favour of the English courts. The German court finally declined jurisdiction in favour of the English courts, but only after an 18-month delay in considering the position.

A solution to the problem may be the inclusion of an arbitration clause in the distribution agreement. In *ET Plus (Eurotunnel)*, the English Courts held that proceedings had to be stayed in favour of the Paris Arbitration Tribunal, given that the agreement had provided for such arbitration.[141] The English proceedings had been commenced prior to arbitration in France but in breach of the arbitration agreement. Arbitration is outwith the Scope of the Brussels Regulation[142] and jurisdiction is, conversely, dealt with in the UK under the Arbitration Act 1996. Section 9 expressly permits an anti-suit injunction whereby an application may be made to the Court to stay proceedings in breach of an arbitration agreement. If granted, the Court will not even be able to determine the issue of jurisdiction, thus affording better and more efficient protection. An alternative option may be to insert an arbitration clause in an agreement that only allows the client to commence Court proceedings. Proceedings raised by the other side will be in breach of the clause and, again, subject to an anti-suit injunction.

9.5 Patent litigation

Where multiple defenders are involved in patent litigation, it had previously been thought that Article 6(1) of the Brussels Regulation permitted consolidated litigation before a single forum, notably the domicile of any of the defenders, where the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments. However, a judgement of the ECJ challenged such a practice[143] and means the end for cross-border injunctions in patent cases. The ECJ confirmed that Article 6(1) does not apply in European patent infringement proceedings, even where the defendants may have acted in an identical or similar manner. This is because there is no risk of irreconcilable judgments as the facts of the cases and legal context would be different.

9.6 Impact of Brussels I on non-Member States

Generally, where the Brussels Regulation does not apply, the national procedural law of a State will determine whether its Courts will have jurisdiction over a matter. Moreover, there is currently no substantial international mechanism, outwith the EU, whereby a foreign Court must recognise a judgment arising from another jurisdiction.[144] International enforceability is simply governed by local domestic law and the principles of comity and reciprocity. Consequently, a better option may be to raise the action in the State in which it is desirable to enforce the judgment.

Nevertheless, the Brussels Regulation can affect jurisdiction over non-EU businesses, at least for all those countries incorporating the rules into the internal conflict of laws statutes. The implications for US companies are considerable. For example, if a US company is conducting business online with EU consumers, then it may be sued in the courts of the consumers' own country. The European courts may claim jurisdiction regardless of how or where a consumer purchased a product so long as the company's web site advertising the product was accessible in the forum country. Enforcement of any judgment may not be so straightforward.

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[140] *JP Morgan Europe Limited v Primacom AG and others* [2005] EWHC 508.

[141] *ET Plus SA and Others v Welter and Others* [2005] EWHC 2115. Note also that competition issues under Article 81 and 82 were held to fall within the ambit of the arbitration clause.

[142] Article 1 (2) (d).

[143] Case C-539/03 Roche *Nederland B.V. and Others v Frederick Primus and Milton Goldenberg*, reference for a preliminary ruling. On the same day as it issued its decision in *Roche*, the ECJ also handed down its decision in *GAT v LuK* (C-4/03). The effect of *GAT v LuK* is that only the courts of the country of grant have jurisdiction to decide on the validity of a patent, regardless of how the validity issue is raised. This decision therefore ended the practice whereby some European courts (including those in Germany and the Netherlands) had been willing to rule on the validity of a foreign patent between the parties in an infringement action. The consequence of the *GAT v LuK* decision is that, in the majority of European national courts, an infringement action relating to a foreign patent will now be inadmissible as soon as the invalidity of the patent is asserted even as a defence.

[144] The Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971 is relevant but only applies to Albania, Cyprus, The Netherlands, Portugal and Kuwait.

9.7 Jurisdiction issues in cyberspace

Computer technology is advancing so rapidly that it is forcing us to reassess the traditional link between geographical location and the ability of governments to assert control over online behaviour. Cyberspace does not have territorially based boundaries. The internet allows transactions between people who have no idea of the physical location of the other party.

The effects of online activities are not tied to geographically proximate locations. Information on the world-wide web is available to anyone with a connection to the global network. In such an environment, jurisdiction has become a key issue as well as an extremely complex one. Both the operators of the web site and consumers need to know which rules are applicable in the context of cyberspace. Courts and legislators must decide where to draw the line in asserting personal jurisdiction over foreign entities whose only contact with the forum State may be that their web site is accessible in that State.[145] A number of cases have considered the issue of jurisdiction in the context of libel cases where the material in question was available on the internet. In the English case of *King v Lewis* [146] the libels were in texts stored on a website based in California and downloaded in England. The judgment stated that *"the parties accept that a text on the internet is published at the place where it is downloaded. Accordingly, there is no contest but that, subject to any defences on the merits, the respondent has been libelled in this jurisdiction".*[147]

Within the EU, the Brussels I Regulation will determine jurisdiction. As regards e-commerce, and as mentioned above, the Regulation confers jurisdiction upon the courts of the consumer's home country over a foreign defendant if the latter "pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State […] and the contract falls within the scope of such activities".[148]

"by any means" is specifically intended to cover e-commerce transactions and to give consumers the ability to bring a lawsuit relating to any contracts executed via the internet in their own country of domicile.[149] The European Commission has indicated that it intended a broad interpretation of "by any means".[150]

As also discussed above, Brussels I abolishes the requirement that consumers must have taken the necessary steps to conclude their contracts in their home country to be able to sue in their own country.[151] The Regulation provides that the consumer contract must fall within the scope of those activities which the defendant directed to the consumer's State, without specifying that the consumer must have contracted from that State.[152]

9.8 Reform of the Brussels Regulation[153]

Amendments to the Brussels Regulation were adopted in December 2012 and have applied from 10 January 2015 (with the exception of Articles 75 and 76 which applied from 10 January 2014).

Some key revisions are set out below:

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145 See *League Against Racism & Antisemitism v Yahoo! Inc*, No RG00/05308 (2000), available at http://www.gigalaw.com/library/france-yahoo-2000-11-20.html.

146 *Don King v Lennox Lewis, Lions Promotions LLC and Judd Burnstein* [2004] EWCA Civ 1329

147 This issue had previously been considered in the Australian case of *Dow Jones v Gutnick [2002] HCA 56, 10 Dec 2002.* This case concluded that publication takes place in the country where the defamatory material is downloaded therefore an Australian businessman could bring his libel case n Australia even though the material was distributed over the internet from the defendant's server in the US.

148 Article 15 (1) (c).

149 European Commission, Explanatory Memorandum to the Proposal for a Council Regulation on Jurisdiction, COM (1999) 348 of 14 July 1999, available at http://www.europa.eu.int/comm/justice.home/pdf/com1999-348-en.pdf).

150 See Opinion of the Economic and Social Committee on the Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, CES 233/2000-99/1054 CNS, March, 2000.

151 See European Commission, Explanatory Memorandum to the Proposal for a Council Regulation on Jurisdiction, COM (1999) 348 of 14 July 1999, at 16.

152 Article 16.

153 Recast Regulation 12/5/2012.

Lis pendens rules

The recast Regulation seeks to address the so-called "Italian torpedo", where, for tactical reasons a case has been brought in a court to delay proceedings in another jurisdiction. A court second seized previously had to stay proceedings until the court first seized has determined whether it has jurisdiction. The new rules provide that where parties have agreed an exclusive jurisdiction clause, this will take precedence over the "first in time" rule. In practice, this means that the chosen court (whether or not first seized) will be able to decide at jurisdiction and all other courts will have to stay proceedings.

Jurisdiction of choice of court agreements

Such agreements will have a greater likelihood of being enforced: validity is unaffected by unenforceability of the rest of the contract; and domicile of the parties is no longer relevant. However, EU courts need not decline jurisdiction where the choice f court is outside of the EU (unless, perhaps, proceedings have already been commenced in the third state.

It should be noted that Denmark has opted into this Recast Regulation and will be bound by its terms along with all of the other EU Member States, including the UK.

Enforcement of Judgments

This will be made easier and faster. There will be no need for any specific procedure or declaration.

9.9 **Choice of law: Rome I**

The Rome Convention on the Law Applicable to Contractual Obligations of 1980 (the Rome Convention) provides that parties are free to choose which law is applicable to the agreement entered between them. If the parties fail to choose, then the applicable law will be that of the country most closely connected with the agreement.

The Rome I Regulation, "Rome I", has been introduced to update the Rome Convention. Rome I was adopted by the EU Council on 6 June 2008 and has applied from 17 December 2009 to all contracts concluded after that date in all Member States, save for those that have decided to opt out. The European Commission does not intend that the new Regulation should apply to industries which already regulate cross-border arrangements. The E-Commerce Directive includes a provision that the laws of the country where the supplier or web site is situated should apply in disputes and it is therefore arguable that e-commerce would be exempted.

Initially the UK expressed concern over a number of changes proposed by Rome I and as a result decided to opt out (the UK's big concern was the position of third country mandatory rules). However, further negotiations have resulted in the problematic provisions either being amended or removed and as a result the UK has opted in.

9.10 **Choice of law: Rome II**

Whereas Rome I deals only with choice of law issues in relation to contractual disputes, "Rome II", applies to choice of law in relation to extra-contractual claims.

Amongst the many types of claims governed by Rome II are antitrust damages claims brought by claimants without a direct contractual relation with the infringing company. However, competition law presents some difficult issues in relation to jurisdiction and choice of law – especially regarding international cartels, but also in respect of vertical arrangements. The regulation prescribes that in the case of restriction of competition, the applicable law shall be the law of the country where the market is, or is likely to be affected.

Another contested issue in Rome II is the inclusion of claims against "unfair competition"; a legal concept used in continental Europe but unknown to the common law system. The European Parliament successfully lobbied for the inclusion of a clear rule to ensure courts apply one single law and so prevent 'jurisdiction-shopping'.

All other areas of disagreement between the branches of the EU legislature were ironed out at a formal conciliation meeting on 15 May 2007 and the Rome II Regulation was formally adopted by the European Parliament on 10 July 2007. It has applied in all EU Member States (except Denmark) from 11 January 2009.

10. BRIBERY

10.1 What is the Bribery Act 2010?

The Bribery Act 2010 came into force 1 July 2011. Guidance has been published by the Ministry of Justice **("the MoJ")**, which provides some detail of the implementation of the Act including the new strict liability corporate offence of failing to prevent bribery.

The Act replaces all previous law on bribery in the UK. It widens the law in several ways:

- It extends the definition of bribery;
- It extends the territorial reach to include offences arising outside the UK;
- It includes a new offence based on vicarious liability for directors/senior managers; and
- It introduces a corporate offence of failing to prevent bribery.

The Act also increases the punishment for convictions for a bribery offence by increasing the maximum imprisonment sentence to 10 years and allowing for unlimited fines.

10.2 What are the offences?

The Act creates four new offences. This includes:

- offering, promising or giving a bribe;
- requesting, agreeing to receive or accepting a bribe;
- the corporate offence of failing to prevent a bribe being paid; and
- bribing a foreign public official (which overlaps significantly with the offence of offering, promising or giving a bribe, but with a different test for whether a payment amounts to a bribe).

It should be noted that the first 3 offences extend to include bribing both public and private persons.

The definition of 'bribe' in the context of the Act extends to include any financial or other advantage intended to induce or reward improper performance of a function or activity. This clearly extends to include gifts and corporate hospitality, which are excessive in the business context. Of particular importance, the Act, unlike the US Foreign Corrupt Practices Act, does not include an exemption for facilitation or 'grease' payments unless such payments are permitted or required by written law in the territory concerned.

10.3 Who can be liable?

- Individuals can be prosecuted for any of the first three offences. So an employee could be liable for receiving a kickback for allocating a contract, or for paying such a kickback.
- A company can be prosecuted for any of these offences, if a senior manager was the "directing mind and will" behind the offence. The Act includes the strict offence, under which the company will be guilty if it fails to prevent a bribe being paid on its behalf. It

can, however, escape liability if it can show that it had adequate systems in place generally to prevent bribery.

- Company directors will themselves commit an offence if they give or receive a bribe. In addition, if the company is found guilty itself of giving or receiving a bribe, its directors will be liable if they are found to have 'consented or connived' in the offence.

10.4 **Extra-territorial application**

- An individual who, or an organisation which, pays or receives a bribe **in the UK** is caught by the Act, even if they have no other connection with the UK. The Act does not apply to acts committed abroad by individuals unless they are connected with the UK, for example by being a British citizen or ordinarily resident in the UK. Except in relation to the corporate offence, the Act does not apply to acts committed abroad by an organisation, unless it is incorporated or formed in the UK.

- In relation to the corporate offence of failing to prevent bribery, it does not matter where the bribery takes place. The offence will be committed if the organisation is incorporated or formed in the UK, wherever it carries on business; or if the organisation carries on business, or part of a business, in the UK, wherever it is incorporated or formed.

10.5 **Penalties**

If a bribery offence is committed, individuals and organisations, in both the public and private sector, will be punishable by unlimited fines and/or up to 10 year's imprisonment in the case of individuals.

10.6 **General Recommendations**

Whilst there is no one-size fits all approach to anti-bribery compliance, the MoJ has outlined six principles for commercial organisations to use as a guide when developing their own anti-bribery policies and procedures. Having such policies and procedures in place may allow a company to escape the corporate liability offence of failing to prevent bribery.

- Develop **clear, practical, accessible procedures** that are **proportionate** to the bribery risks faced by your organisation and to the nature, scale and complexity of the activities you undertake. Ensure that these procedures are **effectively implemented and enforced**.

- Take steps to ensure that a **strong anti-bribery culture** is established throughout your organisation, from the **top down**.

- **Periodically** assess the nature and extent of your organisation's **exposure to potential external and internal risks** of bribery, and ensure that this process is **informed and documented**.

- Develop and apply **due diligence** procedures to business relationships with persons who perform or will perform services for or on behalf of your organisation.

- Ensure through internal **and external communication, including training**, that your anti-bribery policies and procedures are embedded and understood throughout your organisation.

- **Monitor and review** your anti-bribery policies with internal checks and balances. External trigger-events which should prompt a review, like government changes, corruption convictions, or negative press reports, should also be identified.

Michael Dean
Dentons UK and Middle East LLP
London, Edinburgh, Glasgow, Aberdeen