ANTITRUST RULES OF THE EUROPEAN UNION APPLICABLE TO DISTRIBUTION

AGENCY, DISTRIBUTORSHIP, SELECTIVE DISTRIBUTION AND FRANCHISING

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ANTITRUST RULES OF THE EUROPEAN UNION APPLICABLE TO DISTRIBUTION

The EU antitrust rules are of fundamental importance for distribution contracts made within the European Union, a geographic area which now extends to the greatest part of Europe. Such rules impose a number of constraints which should be considered by the parties when drafting distribution contracts which may have effects within the EU.

Since distribution contracts with parties of countries of the EU must (except in very exceptional cases) comply with such rules, it has been decided to concentrate the information about this subject matter in this specific report. In principle the country reports of the EU countries will not deal with this issue, unless there is need for specifying further aspects regarding that specific country.

A
THE EU ANTITRUST RULES IN GENERAL

1. THE PROHIBITION OF RESTRICTIVE AGREEMENTS (ARTICLE 101(1) TFEU)

The antitrust rules of the European Union substantially affect the drafting of distribution contracts interesting such geographic area.

Although distribution contracts, and more generally vertical agreements (i.e. agreements entered into between undertakings operating at a different levels of the distribution chain), are **normally less harmful to competition** than horizontal agreements, this doesn't exclude that they may nevertheless restrict competition and, consequently, conflict with the prohibition of restrictive agreements contained in Article 101 of the Treaty on the Functioning of the European Union (hereafter "TFEU").

It is important to mention that before the entry into force (on 1 May 1999) of the modifications to the EC treaty, which brought to a renumbering of the articles of the EC Treaty, the provision prohibiting restrictive agreements (which remained unchanged) was contained in Article 85, which then became Article 81. Thereafter, with the entry into force (on 1 December 2009) of the Lisbon Treaty the provision prohibiting restrictive agreements became Article 101. Consequently all literature and case law before 1 May 1999 makes reference to Article 85 and therafter, during the period from 1 May 1999 to 1 December 2009, to Article 81.

In order to avoid confusion we will refer in this paper always to Article 101, even when quoting decisions, judgments or other documents where the reference was originally made to Article 81 or to Article 85.

Article 101 TFEU, which exactly corresponds to the previous Articles 85 and 81, states as follows:

> «1. The following shall be prohibited as incompatible with the common market: 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 common market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make 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.
>
> 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
>
> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> – any agreement or category of agreements between undertakings;
>
> – any decision or category of decisions by associations of undertakings;
>
> – any concerted practice or category of concerted practices,
>
> which contributes 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 which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.»

In particular, clauses which **prevent the parties from dealing with third parties** (e. g. the obligation to supply exclusively a certain purchaser or the obligation of a distributor not to market products which compete with those of the supplier) or which **restrict the freedom of a distributor to deal with the acquired goods** (e. g. the prohibition to sell to certain customers or in certain territories, or the **obligation to respect a resale price** fixed by the supplier) may conflict with the prohibition of restrictive agreements contained in Article 101(1) of the TFEU.

Agreements falling under the prohibition of Article 101 are **null and void**. Furthermore in case of infringement of Article 101 fines may be imposed by the Commission.

However, not all agreements containing clauses restricting competition are to be considered unlawful.

In this context we must distinguish between:

- agreements which do not fall under the prohibition of Article 101(1) TFEU *(infra,* § 2), and
- agreements which are caught by Article 101(1), but are exempted from the prohibition if they fulfil the conditions of Article 101(3) (*infra,* § 3).

2. AGREEMENTS WHICH DO NOT FALL UNDER THE PROHIBITION OF ART. 101(1)

It is obvious that agreements which do not restrict competition or which otherwise do not fall under the definition of restrictive agreements given in Article 101(1), are not prohibited. In order to fall under the provision of Article 101, all the elements part of the Article need to be fulfilled; therefore, if there is no agreement between undertakings or if such agreement exists but not between undertakings[1], as well as if it does not restrict competition or it has no effect on trade between Member States, the prohibition of Article 101(1) will not apply.

This is also true for distribution agreements which do not fall, as such, under Article 101(1), but only to the extent they contain clauses or give rise to practices which restrict competition. So, for example, a simple agreement for the supply of products for resale will normally not be considered to restrict competition.

At the same time, it must be considered that most distribution contracts implying close integration of the intermediary or reseller in the network of the principal/supplier imply by their very nature potentially restrictive clauses (exclusivity, non-competition, etc.).

We will examine in parts B to E which clauses may be considered restrictive within the different types of distribution agreements. In the following paragraphs we will deal in general terms with some situations where the prohibition of Article 101(1) does not apply for reasons which do not regard a particular kind of agreement, such as in particular:

- agreements which do not affect trade between Member States (*infra,* § 2.1);
- agreements which do not affect competition to an appreciable extent under the so called *de minimis* rule (*infra,* § 2.2).

2.1 Agreements which do not affect trade between Member States

Article 101 TFEU applies only to agreements «which may affect trade between Member States». The purpose of this «effect on trade criterion» is to exclude from the scope of application of Article 101 agreements which exclusively affect the **internal market of a single member State** and have consequently no appreciable effect on competition at the European level. These agreements will be governed by the national antitrust law of the country where they produce

1 But only a unilateral request of one party to which the other party has not given its adhesion, not even tacitly. See Court of Justice, 6 January 2004, joined cases C-2/01 P and C-3/01 P, Adalat.

their effects. Where - as it happens almost always for agreements of a certain importance - the agreement affects both internal and community trade, the national authorities and courts of the Member States must apply Article 101 together with their national competition law[2].

It should be said from the outset that case law has developed a rather **wide notion** of the «effect on trade» criterion.

During the first years after the entry into force of the Rome treaty it was discussed whether Article 101 required trade between Member States to be affected in a «negative» or «harmful» way or if, on the contrary, the above condition should be interpreted more neutrally, in the sense that it is sufficient that the flow of the pattern of trade might develop differently from what would have been the case in the absence of the agreement. In the *Grundig* case[3] the defendant (Grundig), supported by the German Government, upheld the first theory arguing that an agreement which increased the volume of trade between Member States (like the distribution agreement in question) did not affect trade in the sense of Article 101. This argument was firmly rejected by the Court, which said that:

> « ... what is particularly important is whether the agreement is capable of constituting a threat, either **direct or indirect, actual or potential**, to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States. Thus the fact that an agreement encourages an increase, even a large one, in the volume of trade between States is not sufficient to exclude the possibility that the agreement may 'affect' such trade in the abovementioned manner.»

By doing so the Court, although rejecting the «quantitative» interpretation described above, did not make a clear choice in favour of the «neutral» approach, but, on the contrary, gave the impression that only agreements which created barriers between Member States, could affect inter-state trade. The same concept was expressed in more general terms in the *Technique Minière* case[4], decided in the same days, where the Court said in more general terms that:

> « it is in fact to the extent that the agreement may affect trade between Member States that the interference with competition caused by that agreement is caught by the prohibitions in Community law found in Article 101, whilst in the converse case it escapes those prohibitions. For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between

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2 See Article 3, § 1 of Regulation 1/2003 where it is said that «Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 101 of the Treaty to such agreements, decisions or concerted practices...».

3 Court of Justice, 13 July 1966, joined cases 56 and 58/64, *Ets. Consten and Grundig-Verkaufs-GmbH v. Commission,* ECR, 1966, 299.

4 Court of Justice, 30 June 1966, case 66/66 *Société Technique Minière v. Maschinenbau Ulm,* ECR 1966, 235.

> Member States. Therefore, in order to determine whether an agreement which contains a clause 'granting an exclusive right of sale' comes within the field of application of Article 101, it is necessary to consider in particular whether it is capable of bringing about a partitioning of the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create.»

The position taken by the Court, which was evidently influenced by the particular situation of the distribution agreements, would have left outside the reach of Article 101 many restrictive practices which, although not creating barriers between Member States, undoubtly affected the Community market. In order to cope with situations of this type, the Court developed later the theory of the impact on the competitive structure within the Community. Thus, in *Commercial Solvents v. Commission*[5] the Court held (with respect to Article 102, which contains the same requirement) that:

> « ... when an undertaking in a dominant position within the Common Market abuses its position in such a way that a competitor in the Common Market is likely to be eliminated, it does not matter whether the conduct relates to the latter's exports or its trade within the Common Market, once it has been established that this elimination will have repercussions on the competitive structure within the Common Market.»

However, after a number of years also the traditional theory, based on the idea that only agreements which create barriers between Member States fulfil the «effect on trade criterion», has been abandoned by the Court and it is now clear that the agreement need not necessarily to create barriers between Member States, and that it is sufficient that inter-state trade is affected in whatever way. So, in the *SSI* case[6], the Court, expressly overruled *Technique Minière* by saying that:

> «it must be emphasized that the partitioning of the market is only one example of the effects on trade between Member States covered by Article 101(1) of the Treaty.
>
> As a result, even where there is no partitioning of markets, an agreement concluded between undertakings established in a Member State and covering only the market of that State affects trade between Member States, within the meaning of Article 101 of the Treaty, if it concerns, even partly, a product imported from another Member State, even where the parties to the agreement obtain the product from a company belonging to their own group.»

It is therefore clear that all agreements which are capable of producing restrictive effects at a Community level, through an alteration of trade flows between Member States will be caught by Article 101.

This means that cross-border distribution agreements within the EU will in principle fall under the EU antitrust rules. The outcome is less simple for do-

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[5] Court of Justice, 6 March 1974, case 6/73, *Commercial Solvents v. Commission,* ECR 1974, 223, § 33.

[6] Court of Justice, 10 December 1985, case 240/82, *SSI v. Commission,* ECR 1985 3831, §§ 48-49.

mestic agreements and agreements with parties outside the EU, as we will see hereafter.

2.1.1 Domestic agreements

The wide notion of affectation of inter-state trade developed by the Commission and by the Court of Justice implies that only agreements producing their effects exclusively within a domestic market (or on markets outside the Community) will be excluded, while many domestic agreements (i.e. between undertakings of the same Member State) will be considered capable of affecting inter-state trade.

Thus, in *Vereeniging van Cementhandelaren*[7], a horizontal cartel of cement traders of the Netherlands (covering 67% of the sales in such country), which only regarded domestic sales, was found to infringe Article 101. The Court rejected the defence of the members that the agreement was purely domestic and could not affect inter-state trade, by saying that:

> «An agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production.
>
> In particular, the provisions of the agreement which are mutually binding on the members of the applicant association and the prohibition by the association on all sales to resellers who are not authorized by it make it more difficult for producers or sellers from the other Member States to be active in or to penetrate the Netherlands market.»

An interesting example of this wide interpretation, which is capable of bringing under Article 101 a great part of the domestic agreements of a certain size, can be found in the *BNIC-Aubert*[8] case. Here the question arose if an agreement whereby a French inter-trade body (the "Bureau National Interprofessionnel du Cognac") fixed production quotas for the spirits used in the manufacture of cognac, which spirits were sold exclusively on the domestic market could nevertheless affect inter-state trade. The Court decided that:

> « ... although it is true that the agreement deals with spirits used in the manufacture of cognac, that is to say a semi-finished product which is not normally sent out of the region in which it is produced, the fact remains that that product constitutes the raw material from which another product is manufactured, namely cognac, which is marketed throughout the Community. Agreements requiring payment of levies where marketing quotas are exceeded are therefore likely to affect trade between the Member States.»

There are however also situations where agreements covering the whole domestic market have been considered as not capable of affecting trade between

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7 Court of Justice, 17 October 1972, case 8/72 *Vereeniging van Cementhandelaren v. Commission* ECR 1972, 977, §§ 29-30.

8 Court of Justice, 3 December 1987, case 136/86, *BNIC v. Aubert,* ECR 1987, 4789, § 18.

Member State. See, for example, *Bagnasco*[9] where the Court decided that standard bank conditions (observed by all banks doing business in Italy), governing the guarantees requested by the banks from their customers for securing current-account credit facilities, «are not, taken as a whole, liable to affect trade between Member States».

In any case, as regards distribution agreements, it is advisable to check compliance with the Community rules of all contracts covering (e.g. through a network) a whole national market or a relevant part of it. Only in case of contracts affecting merely local trade within a member State there is place for arguing that Article 101 is not applicable and even in this case it should be considered that national competition rules (which would then apply) tend more and more to be harmonised with the EU antitrust rules and consequently tend to follow the same principles of Community law.[10]

2.1.2 Agreements with undertakings of third countries

Also agreements between a party of a member State of the EU and a party of a third country may affect trade between Member States of the EU.

In case of contracts between a supplier of a third country and a distributor of a member State the likeliness of an effect on trade between Member States is quite high, especially if the agreement can have an impact on exports from the distributor's country to other Member States[11], or on trade from other Member States[12]. In other words, suppliers from third countries which appoint distributors in a member State of the EU should in principle take the view that they must comply with the antitrust rules of the EU without relying upon the «effect on interstate trade» defence.

Also agreements between a supplier of the Community and a distributor appointed for a territory in a third country can produce effects within the Community. As the Court said in the *Javico* case[13]:

> « Article 101(1) of the Treaty precludes a supplier established in a Member State of the Community from imposing on a distributor established in another Member State to which the supplier entrusts the distribution of his products in a territory outside the Community a prohibition of making any sales in any territory other than the contractual territory, including the territory of the Community, either by direct marketing or by re-exportation from the contractual territory, if that prohibition has the effect of preventing, restricting or distorting competition within the Community and is liable to affect the pattern of trade between Member States.

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9 Court of Justice, 21 January 1999, case C-215/96, *Bagnasco,* ECR 1999, I-135.

10 See European Commission Regulation 1/2003 of 16 December 2003 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p.1-25

11 Typically in case of export prohibitions imposed upon the distributor or other practices having similar effects.

12 E.g. by precluding exports that would have existed otherwise. So, if the supplier of a third country appoints a distributor in country A, it is likely that imports from country B, where these products were already marketed, may decrease.

13 Court of Justice, 28 April 1998, case C-306/96, *Javico,* ECR 1998, I-1983, § 28.

> This might be the case where the Community market in the products in question is characterised by an oligopolistic structure or by an appreciable difference between the prices charged for the contractual product within the Community and those charged outside the Community and where, in view of the position occupied by the supplier of the products at issue and the extent of the supplier's production and sales in the Member States, the prohibition entails a risk that it might have an appreciable effect on the pattern of trade between Member States such as to undermine attainment of the objectives of the common market».

However, a closer examination of the statements of the Court shows that the likelihood that export prohibitions imposed upon a foreign distributor affect trade between Member States is not very high. In fact clauses limiting the distributor's right to export from a third country into the Community will fall under Article 101 only in cases where such prohibition actually aims at preventing such practices and not in the most common cases where the distributor would anyhow not be interested in exporting the products to the European Union (e.g. because of trade barriers or insufficient price differences).

2.1.3 The appreciability of the effect on trade between Member States

As we will see hereunder in paragraph 2.2, restrictive agreements are prohibited only if they restrict competition to an appreciable extent.

According to the Commission, this *de minimis* rule also applies, although under slightly different terms, to the effect on trade criterion. In its «Guidelines on the effect on trade concept contained in Articles 101 and 102 of the Treaty»[14] the Commission takes the position that:

> « ... in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:
>
> (a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%, and
>
> (b) [...] In the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro. In the case of licence agreements the relevant turnover shall be the aggregate turnover of the licensees in the products incorporating the licensed technology and the licensor's own turnover in such products. In cases involving agreements concluded between a buyer and several suppliers the relevant turnover shall be the buyer's combined purchases of the products covered by the agreements.»[15]

This means that there is a rebuttable presumption that agreements which cumulatively meet the above thresholds do not appreciably affect trade between Member States and are therefore not caught by Article 101(1) «irrespective of the nature of the restrictions contained in the agreement, including restrictions

[14] OJ 27.04.2004 C 101, 81.

[15] «Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty», § 52.

that have been identified as hard-core restrictions in Commission block exemption Regulations and guidelines[16]».

2.2 Agreements which do not affect competition to an appreciable extent

The *de minimis* rule, i.e. the principle that restrictive agreements are not prohibited if their impact on the market is too low to be «appreciable», has been developed on one side by the Court of Justice and on the other by the Commission which has tried to work out more precise guidelines in a series of subsequent notices.

Since the two approaches are substantially different, we shall examine them separately in the following paragraphs.

2.2.1 The *de minimis* theory of the Court of Justice

The principle of the irrelevance of agreements which do not affect the market to an appreciable extent has been established by the Court of Justice in the *Völk-Vervaecke* case[17], which concerned an agreement the object of which was clearly to restrict competition (an exclusive dealing agreement with absolute territorial protection).

In particular, the Court stated that:

> «Even an exclusive dealing agreement with absolute territorial protection may escape the prohibition laid down in Article 101 where it affects the market only insignificantly, regard being had to the weak position of the persons concerned on the market of the products in question».

As concerns the criterion for evaluating the existence of an «appreciable» impact under the *de minimis* rule, normally reference is made to the market share of the parties.

There is no clear indication about the market share which must be reached in order to consider a competition restraint as «appreciable». A market share under 0,2% should certainly be considered as insignificant[18], while an undertaking having a 5% market share

> « ... is an undertaking of sufficient importance for its behaviour to be, in principle, capable of affecting trade[19].»

Between these two extremes there is a «grey zone» which requires a case by case assessment. So, for example, in *Pioneer*[20], the market shares of the distributors who had agreed to prevent parallel exports, were about 3% in the respective countries (3,38% France and 3,18 in the UK). The Court, taking into account

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16 *Ibidem*, § 50.

17 Court of Justice, 9 June 1969, case 5/69, *Völk v. Vervaecke,* ECR 1969, 295.

18 In the *Völk-Vervaecke* case the supplier's market share was 0,08% of the community market and 0,2 of the German market; the distributor had a 0,6% of the Belgian market.

19 Court of Justice, 1 February 1978, case 19/77, *Miller v. Commission,* ECR 1978, 131, § 10.

20 Court of Justice, 7 June 1983, case 100-103/80, *Pioneer v. Commission* ECR 1983, 1825, § 86-87.

further elements (like the absolute turnover of the parties and the fact that their market share exceeded that of most competitors) decided that the agreements were capable of «appreciably affecting trade between Member States». In the *Distillers* case[21] the Court seems to have given more importance to the absolute dimension of the participating undertaking than to its market share. Actually, the Distillers Company Limited, which had a strong position on the market of whisky (which was the main subject matter of the judgment), was also selling a particular beverage, called Pimm's, for which its market share was below 1%. The Court said that:

> « ... although an agreement may escape the prohibition in Article 101 (1) when it affects the market only to an insignificant extent, having regard to the weak position which those concerned have in the market in the products in question, the same considerations do not apply in the case of a product of a large undertaking responsible for the entire production. In those circumstances there is no reason for the purposes of the action to distinguish between Pimm's and the other drinks produced by the applicant.»

The Court's statements are rather ambiguous: on one side it would seem that the Court considered the absolute dimension of the undertaking (by referring to a *large* undertaking) while on the other side there is space for the assumption that the Court considered the market of Pimm's as a separate market (by referring to the *entire* production).

Considering the above, it can be reasonably assumed that the *de minimis* threshold may be situated between 1% and 5% market share, and that within such «grey zone» further aspects, such as the market power and the absolute dimension of the undertakings in question, should be considered.

2.2.2 The Commission's notice on agreements of minor importance

Also the Commission has taken, already before the *Völk v. Vervaecke* case, the position that agreements which cannot «appreciably» affect the market do not fall under Article 101 TFEU. So, in its very first decision applying the rules on competition[22] the Commission stated, in order to justify its decision to consider Article 101 inapplicable in the present case, that

> « ... circumstances show that competition within the Common Market is not prevented, restrained or distorted to any appreciable extent as a result of the contract in question.»

As a matter of fact, the Commission applied the above principle in its first decisions in purely theoretical terms, without any assessment of the actual market situation. So, in one of the very first cases on distribution[23] the Commission argued that the grant of an exclusivity to a distributor «appreciably» restricted the freedom of third parties wishing to market the same on the mere basis of

[21] Court of Justice, 10 July 1980, case 30/78 *Distillers v. Commission* ECR 1980, 2229, § 28.

[22] Commission, decision *Grosfillex/Fillistorf* of 11 March 1964, OJ 1964, 915.

[23] Commission, decision *DRU/Blondel* of 8 July 1965, OJ 1965, 2194.

the fact that the products bore a trademark and were consequently differentiated from the products of competing manufacturers[24], without any further inquiry.

When the Court of Justice developed the *de minimis* theory, the Commission begun working out its own «interpretation» of such principles, through the indication of precise market share and turnover thresholds under which Article 101 would not apply, with the purpose of offering the interested parties a tool that could actually help them to assess the lawfulness of their agreements.

The first Commission's Notice on «Agreements of minor importance», issued in 1970[25], has been replaced by successive notices, the last of which published in 2001[26].

In its last notice the Commission has set rather generous quantitative criteria for the purpose of establishing which agreements are considered as not «appreciably» affecting trade and may consequently be considered as not falling under the prohibition of Article 101(1).

In particular the Commission has stated that it holds the view that:

> « ... agreements between undertakings which affect trade between Member States do not appreciably restrict competition within the meaning of Article 101(1):
>
> (a) if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors); or
>
> (b) if the market share held by each of the parties to the agreement does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors).»

This means that for vertical agreements the 15% threshold will normally be applicable. Consequently, if the market share of both parties is lower than 15% the agreement should remain outside the reach of Article 101 TFEU[27].

However, the above thresholds do not apply to all types of agreements.

Paragraph 11 of the Notice expressly excludes from the benefit of the Notice on agreements of minor importance all vertical agreements containing a number of «hard-core» restrictions, i.e., with respect to agreements between non-competitors,

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24 As a matter of fact, considering the type of product in question (kitchen pans), it is rather unlikely that the parties to the distribution agreement could have reached the minimum threshold for the agreement to actually affect trade «appreciably».

25 OJ 1970, C 64/1.

26 OJ 2001, C 368/13.

27 This threshold is reduced to 5% in case of cumulative effect of parallel networks: see § 8 of the Commission Notice.

« … restrictions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except the following restrictions which are not hardcore:

- the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
- the restriction of sales to end users by a buyer operating at the wholesale level of trade,
- the restriction of sales to unauthorised distributors by the members of a selective distribution system, and
- the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade;

(e) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier's ability to sell the components as spare parts to end users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods …»

This list actually corresponds literally to Article 4 of Regulation 2790/1999 and consequently also to Article 4 of Regulation 330/2010, except for some minor modifications introduced in the second Block Exemption. By doing so the Commission has further differentiated its own *de minimis* rule from the principles established in this field by the Court of Justice, with the result that the treatment of agreements of minor importance under the two sets of principles may not be the same.

This means, in practical terms, that agreements which do not contain the hardcore restrictions listed in in Article 4 of Regulation 330/2010, and which would in any case be exempted by the BER provided they do not contain further restrictions of competition, can benefit from the de minimis rule. Consequently the actual impact of the Commission's notice will be mainly limited to contracts containing non-hardcore restrictions, like those mentioned in Article 5 of the BER.

In other words, the restrictions under Article 5 of the BER, i.e. mainly the non-compete or exclusive purchase obligations, will benefit from the Commission's de minimis notice whenever the market share of the parties remains under the 15% threshold (except in case of cumulative effect of parallel networks): see *infra*, §§ 6.3 and 6.4.

It should in any case be reminded that the Commission's notice does not bind other authorities, like the Court of Justice, national courts, national antitrust authorities) which may nevertheless qualify them as falling under the prohibition of Article 101(1)[28].

With respect to the practical application of the Commission's notice (but the same problem exists with the *de minimis* rule of the Court) the main problem which arises is the difficulty of determining the relevant market on which the parties' share is to be calculated. Since it is very difficult to define with reasonable certainty the relevant product and geographic market, this implies that there is always the risk that an undertaking which does not reach the threshold according to a certain market definition, may exceed it if the market is defined differently.

This means that the «appreciability» criterion may be less safe for a prior assessment of the lawfulness of an agreement and should therefore be used with caution, while it may be an important defence in case of a dispute where the nullity of the agreement is invoked.

2.2.3 The position of the Court of Justice in the Expedia case

More recently in the Expedia case[29] the question was raised whether, under the jurisprudence established by the Court of justice, the *de minimis* rule applies to hardcore restrictions or, in general terms, to “infringements by object”.

In fact this judgment contains (in § 37) a rather surprising statement according to which it must be held that

> « ... an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction of competition.»

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[28] Actually, the risk that this may happen is not very high: the Commission's indication that the agreements covered by the Notice are not of real interest for the EU competition rules, will probably be followed also by other authorities. However, in cases where a party has interest to show that Article 101 applies (a situation which is rather frequent where a dispute between private parties arises and one of them needs to show – for reasons which have nothing to do with competition – that the agreement or clause is invalid) it is not excluded that a court may come to a different conclusion.

[29] Judgment of 13 December 2012, case C-226/11, *Expedia Inc.* v. *Autorité de la Concurrence and Others.*

This statement clearly contradicts § 16 of the same decision where it is said, with express reference to previous cases regarding agreements containing infringements by object (such as in particular the Völk/Vervaecke judgment) that

> « ... it is settled case-law that an agreement of undertakings falls outside the prohibition of that provision, however, if it has only an insignificant effect on the market».

We can therefore conclude that it is unlikely that the statement by the Court in the Expedia case (which statement should be qualified as an *obiter dictum,* since it does not directly regard the issue to be decided in that case) can be considered as implying a change of the "settled case-law" mentioned by the Court itself.

In fact, it is true, under settled case law, that in case of restrictions "by object" the anticompetitive effect is presumed, and the Commission need not to prove it, but this does not exclude that a party may prove the contrary, i.e. that such agreement cannot have any significant effect on competition.

After the Expedia case the European Commission has published a draft of a revised notice on agreements of minor importance based on the assumption that agreements containing restrictions by object have by their very nature an appreciable effect on competition. The Commission has made a public consultation on the draft which gave rise to almost unanimous criticism, especially with respect to its literal interpretation of the Expedia judgment.

2.2.4 Conclusions on the *de minimis* rule

To sum up, when establishing whether an agreement can benefit of the *de minimis* rule we must consider three different thresholds:

1. If the agreement does not contain any hard-core restrictions, the higher thresholds of the Notice of 2001 (see above, § 2.2.2).
2. If the agreement contains hard-core clauses one can refer:
    - to the thresholds of established by the Commission for evaluating the appreciability on the effect of trade, or
    - to the thresholds which can be implied from the case-law of the Court of justice.

3. AGREEMENTS EXEMPTED UNDER ARTICLE 101(3) TFEU

Article 101(3) TFEU specifies the conditions under which certain types of agreements are exempted from the prohibition on restrictive agreements laid down in article 101(1). This happens when such agreements:

> «...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 which does not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the product in question».

While under the previous system of Regulation 17/62 an agreement could benefit of Article 101(3) only through an individual or collective exemption granted by the Commission, after the entry into force of Regulation 1/2003, agreements which fall under Article 101(1) TFEU, but which meet at the same time the conditions of Article 101(3), are lawful from their outcome and need not to be exempted by any authority.

Before examining Article 101(3), it is necessary to say some words about the relations between the first and the third paragraph of such provision.

3.1 Relations between Article 101(1) and 101(3) TFEU: rule of reason, individual exemption and block exemptions

Not all agreements which can in theory be called «restrictive», and which may thus fall under the rule prohibiting restrictive agreements, are actually harmful to competition. So there are agreements which, although containing clauses which restrict the commercial conduct of the parties, are not capable to affect competition to an appreciable extent or which show positive aspects which outweigh their restrictive character.

In these conditions one of the main tasks of the antitrust authorities is to draw a borderline between prohibited and lawful agreements so that the interested undertakings can establish if their agreements are compatible with the rules on competition.

3.1.1 The rule of reason approach

Now, a peculiar characteristic of Article 101 is that it contains two different tools for establishing the lawfulness of potentially prohibited agreements:

- Under Article 101(3) an agreement which falls under the prohibition of Article 101(1) is exempted, and thus declared lawful if it meets the requirements stated in such Article.
- Under Article 101(1) certain agreements or clauses can be considered as not fulfilling the conditions required by such provision for being qualified as «restrictive agreements» and can so be considered as lawful. In other words, the rather undetermined notion of «restriction of competition», contained in Article 101(1), offers the possibility to exclude certain types of restrictive practices from the very notion of «restrictive agreement», through a strict interpretation of the notion of restrictive agreement[30].

[30] Thus, for example, both the Commission and the Court of Justice consider «qualitative selective distribution systems» (i.e. selective distribution networks implying that the selection of the dealers is based on objective qualitative criteria) as not infringing Article 101(1) TFEU although such agreements un-

This second type of approach, which substantially corresponds to the «rule of reason» of US antitrust[31], represents an important alternative with respect to the exemption under Article 101(3).

The possibility of establishing the lawfulness of certain less harmful clauses and types of agreements within the framework of Article 101(1) TFEU has played a very important role before the «modernization» implemented by Regulation 1/2003, i.e. when the exemption of Article 101(3) TFEU could be given only by the Commission. Since under the system of Regulation 17/62 agreements falling under the prohibition of Article 101(1) could be exempted only by the Commission by means of an individual decision or through a block exemption Regulation, the possibility of qualifying certain less harmful agreements as not being sufficiently restrictive and consequently not falling under the prohibition of Article 101(1), has been an essential tool for validating a series of clauses and agreements which were considered to substantially comply with Article 101 TFEU[32].

3.1.2 The rule of reason after the modernization

Now that the application of Article 101(3) is no more reserved to the Commission, the need to have recourse to the «rule of reason» has become less essential: agreements which comply with Article 101(3) are exempted from their outcome, and this can be ascertained by any authority: European Commission, National Antitrust Authorities, State Courts. However, the fact that under Regulation 1/2003 the possibility of having recourse to 101(1) TFEU under the so called rule of reason has become less important does in no way change previous case law: clauses or types of agreements previously considered as not falling under the prohibition of Article 101(1) still remain outside such prohibition and do not need to be examined under Article 101(3).

It should however be noted that, in some recent cases, the Court of first instance[33] has apparently denied the existence of a rule of reason as a means for weighing the pro and anti-competitive aspects of a restriction of competition within the framework of Article 101(1). Thus, in the Métropole case, the Court of first instance stated (at § 74) the following:

> «Article 101 of the Treaty expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a

disputably contain a restrictive undertaking (i.e. the distributor's obligation not to sell the contractual products to traders who do not belong to the network). Thus, the Court of Justice has stated in the Pronuptia case that certain clauses in franchising agreements do not infringe Article 101(1) TFEU.

31 Where it appears the more necessary, since the Sherman Act does not contain a provision corresponding to Article 101(3) TFEU.

32 This was done mainly by striking a balance between the pro-competitive and the anticompetitive aspects of certain clauses. So, for example, the Court of Justice affirmed in the Pronuptia case the compliance with Article 101 of a great part of the restrictive clauses normally contained in franchising agreements: see *infra*, § 9.1.

33 E.g. Court of First Instance, 18 September 2001, case T-112/99, *Métropole télévision and others,* ECR, 2001, II-254; Court of First Instance, 2 May 2006, case T-328/03, *O2 (Germany) GmbH & Co./Commission.*

> number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed».

This restrictive attitude taken by the Court of First Instance is probably due to the aim of protecting the Commission against the objection raised by the parties that it did not sufficiently consider possible pro-competitive aspects of the agreement[34].

However, the fact remains that the Court of Justice in several cases made use of the rule of reason (e.g. as regards franchising with the *Pronuptia* case) and that such jurisprudence is still in force, at least until the Court changes its mind. Moreover, it should be stressed that the wider scope given to Article 101(3) does not mean that the difference between agreements which benefit of the «rule of reason» and agreements which need to be exempted under Article 101(3) has become without relevance, due to a **fundamental difference in the burden of proof**.

In fact, according to Article 2 of Regulation 1/2003:

> «In any national or Community proceedings for the application of Articles 101 and 102 of the Treaty, the burden of proving an infringement of Article 101(1) or of Article 102 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 101(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled».

Considering the substantial burden of proof requested for the application of Article 101(3) It therefore still makes a fundamental difference to know if a clause or type of agreement is to be considered, on the basis of the existing case law, as complying with Article 101(1) or not.

In the first case the agreement must be considered lawful, unless the inquiring authority (or the party) alleging an infringement proves that the agreement nevertheless infringes Article 101 TFEU because it produces actual or potential anti-competitive effects.

In the second case, i.e. where the agreement is in principle caught by Article 101(1), the interested party will have the rather uneasy task of proving that all the conditions of Article 101(3) - which are actually not so easy to satisfy - are met.

[34] In other words, the possibility of applying the rule of reason in certain cases, where pro-competitive aspects prevail over anti-competitive ones, does not mean that the Commission needs to explain, in any case of non-hardcore agreements, why it does not follow a rule of reason approach. But this does not exclude that the Commission may follow this approach where it deems it appropriate and must do so when the Court of Justice has stated that certain restrictive agreements do not fall under the prohibition of Article 101(1) TFEU.

3.1.3 The block exemption Regulations after the modernization

In the «old» system existing before the «modernization», where agreements caught by Article 101(1) could be exempted under Article 101(3) only by the Commission, the block exemptions played an essential role. In fact, within the system of Regulation 17, the block exemptions were a necessary tool for coping with a wide range of agreements which, although containing clauses restricting competition, could, if certain conditions were met, be considered as non-objectionable from the point of view of competition. As a matter of fact, once the antitrust authorities decided that agreements of this type fell under the prohibition of Article 101(1), the only way to warrant their lawfulness without exempting them individually[35] was to exempt them through a block exemption, applicable to all agreements meeting certain conditions warranting their compliance with Article 101(3).

Now that agreements which meet the requirements of Article 101(3) are lawful from their outcome, without need to exempt them individually or collectively, block exemptions are no more an indispensable tool for warranting their lawfulness.

However, the block exemptions still maintain a useful function, which is to ensure, without leaving room to contradictory assessments by different authorities, that the agreements which meet the conditions of the block exemption Regulation are lawful. In fact, once the Commission has decided by Regulation that the conditions of Article 101(3) are fulfilled (or, to be more precise, are deemed to be fulfilled), there is no more space for other authorities to put this choice in discussion. So, even when a Court (or national competition authority) should come to the conclusion that an agreement covered by a block exemption does not meet the conditions of Article 101(3), it must consider the agreement as lawful, at least until the exemption is withdrawn in accordance with the procedure possibly foreseen in the Regulation itself[36] for such purpose.

Another reason for continuing to make use of block exemptions within the new system is that a block exemption prevails over a possible prohibition under a national competition law[37], thus warranting the uniform application of certain minimal rules (establishing the lawfulness of agreements corresponding to certain standards fixed by the Commission) throughout the European Union.

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35 Which was obviously impossible for agreements existing in very large numbers, since the Commission, due to its limited administrative resources and to the complexity of the procedure provided under Regulation 17, was unable to manage more than 10-20 individual decisions per year.

36 See especially §13, 14 and 15 of Regulation no. 330/2010.

37 See Article 3(2) of Regulation 1/2003 where it is said that «the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) of the Treaty, or which fulfil the conditions of Article 101(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty».

3.2 The block exemptions applicable to distribution agreements

Before the entry into force, on the first June 2000, of Regulation No. 2790/1999, the rules exempting supply and distribution agreements were contained in several Regulations:

- Regulation no. 1983/83 concerning the block exemption of certain exclusive distribution agreements;
- Regulation no. 1984/83 concerning the exemption of certain categories of exclusive purchasing agreements;
- Regulation no. 4087/88 concerning the exemption of certain categories of franchising agreements;
- Regulation no. 1475/95 concerning the exemption of certain categories of motor vehicle distribution and servicing agreements.

These Regulations have been replaced, with the exception of Regulation 1475/95[38], by Regulation 2790/1999 and finally by Regulation 330/2010.

The block exemption regulation (BER) applies to vertical agreements concerning the sale of all kinds of goods and services. The only exception concerning the motor vehicles, i.e. Regulation No. 1400/2002, has been in force until 31 May 2013.

3.3 Regulation no. 330/2010 on vertical agreements

Regulation no. 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices applies to vertical agreements concerning the purchase or sale of goods and services defined as follows:

> «agreements or concerted practices entered into between two or more undertakings each of which operates for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the condition under which the parties may purchase, sell or resell certain goods or services».[39]

The exemption applies to all distribution agreements (including those which before the entry into force of Regulation 2790/1999 were not covered by a block exemption, such as, for instance, selective distribution agreements) and, also, to some vertical agreements which are not, strictly speaking, to be qualified as distribution agreements, like industrial supply agreements.

We will examine the provisions of the Regulation rules more in detail when dealing with the specific types of agreements in parts B (agency), C (distribution), D (selective distribution) and E (franchising). In this context only its general characteristics will be described.

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[38] Which has in the meantime been replaced by Regulation 1400/2002 of 31 July 2002, in force until 31 May 2013. After such date also motor vehicle distribution agreements fall under Regulation 330/2010.

[39] Article 1, § (a), Regulation no. 330/2010.

3.3.1 Regulation 330/2010 is all comprehensive

The first peculiarity of Regulation 330/2010, as it was for Regulation 2790/1999, is that it deals with vertical agreements in an **all-comprehensive manner**: this means, on the one hand, that the Regulation covers every kind of distribution agreement (while the previous block exemptions dealt only with a limited number of specific agreements) and, on the other hand, that an attempt has been made to work out rules to be applied, in a uniform way, to all these agreements. In other words, the Regulation tends to consider more the kind of restraint of competition than the kind of agreement in which the restraint is contained, although in some cases specific rules for some types of agreements are provided for: see the special rules for selective distribution agreements contained in article 4, (c) and (d).

This approach, which has, without doubt, the merit of warranting that similar restrictions within agreements of different kinds are treated in the same way, makes the exact identification of the rules applicable to every type of agreement more difficult, since it is necessary to verify for each one, which provision of the Regulation is applicable to it[40].

3.3.2 Automatic exemption of not expressly prohibited restrictions

The second characteristic of the Regulation is the principle according to which **any restriction which is nor expressly prohibited is automatically exempted**. In other words, in the context of Regulation 330/2010 every restrictive clause is automatically exempted with the sole exception the hard-core restrictions, listed in Article 4 (resale price maintenance, limitations to the buyer's ability to resell goods, etc.) and the non-exempted restrictions contained in Article 5 (non compete obligation lasting more than 5 years).

This implies that many restrictive clauses which were the object of specific provisions in the Regulations enacted before Regulation 2970/1999 (a significant example is represented by the «open» territorial exclusivity in favour of the distributor) are now «automatically» exempted by the simple fact that they are not mentioned among the «prohibited» restrictions.

Regulation no. 330/2010 makes a distinction between two kinds of prohibited restrictions:

- on the one hand, the **hard-core restrictions**, listed in article 4, the presence of which prevents the agreement on its whole from being exempted;

[40] Another problem is that it is not always true that similar restraints should be treated in the same way within different types of agreements. It may be that in some cases a given restraint is more justified within a certain agreement than within another one. Thus, for example, a clause limiting the purchaser's right to deal with competing products is far more justified in a distribution agreement (as expression of the loyalty link binding the distributor to his supplier) than in a selective distribution contract or in an industrial supply agreement.

– on the other hand, the restrictions listed in Article 5 which are not exempted but the presence of which does not prevent the agreement from being exempted for the rest.

Thus, the provision in the agreement of a clause fixing the resale price contrary to Article 4(a) or an export prohibition contrary to Article 4(b) entails the prohibition of all other restrictive clauses which would otherwise have been exempted by the Regulation.

On the contrary, a post-contractual non-compete obligation, incompatible with article 5(b), will not be exempted, but this will not preclude the application of the block exemption to the remaining clauses of the contract.

3.3.3 The 30% threshold

The third peculiarity of the Regulation, which may create serious problems to the interested parties, is the principle contained in Article 3(1) of the Regulation according to which:

> « ... the exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services».

This provision has been changed with respect to Regulation 2790/1999: whereas in the former regulation the 30% market share was required only with respect to the undertaking active in upstream market, namely the supplier, in the current regulation also the undertaking operating in the downstream market, namely the buyer, has to comply with the limit of 30% market share.

The basic idea behind this rule is that the wider scope of the block exemptions enacted after 1999, which cover a greater number of agreements than those exempted in the block exemptions in force before such date, should be accompanied by a system preventing that companies having great market power may take advantage of these more generous exemption criteria.

This implies, however, that the undertakings concerned must make sure that their market share does not exceed the 30% threshold, which may not always be an easy task if one considers the difficulty of identifying the relevant market (relevant product market and relevant geographic market) for the calculation of said market share.[41] This may create problems especially when the specific product market can be defined narrowly, because in such case the risk exists that undertakings having apparently low market shares exceed the threshold if the inquiring authorities decide for a more narrow definition of the product market.

[41] See the Commission Notice on definition of the Relevant Market, OJ, C 372, 9 February 1997.

3.4 The Guidelines on vertical restraints

On the occasion of the entry into force of the Regulation no. 330/2010, the European Commission published the «Guidelines on Vertical Restraints»[42] (hereafter «Guidelines») the purpose of which is, on one hand, to clarify the contents of the block exemption Regulation and, on the other hand, to help companies to make a case by case assessment of the compatibility of their agreements with the competition rules by providing a framework for the analysis of vertical restraints.

The Guidelines are of the greatest importance for understanding the point of view of the European Commission, the institution empowered by the Treaty to establish and implement the antitrust policies of the EU.

However, notwithstanding the authoritativeness of the source, the Guidelines should not be taken too literally.

It should always be kept in mind that they represent the point of view of an institution which has the responsibility of implementing the antitrust policy of the Community and which cannot consequently be considered totally independent. In other words, it may happen that the Commission takes in the Guidelines a position which is more rigid than the position which might be taken by the Court of First Instance or the Court of Justice when reviewing a decision of the Commission.

In these cases, the parties drafting the agreement are put before a difficult choice: if they follow blindly the the Guidelines they are forced to avoid contractual solutions which actually do not infringe Article 101; if they disregard the Guidelines, they risk that the authorities called to decide on the validity of their agreement (Commission, national courts, national competition authorities) simply apply the principles stated in the Guidelines without a more in-depth analysis.

B
THE RULES APPLICABLE TO AGENCY CONTRACTS

4. THE RULES APPLICABLE TO COMMERCIAL AGENTS.

Since commercial agency contracts normally contain a series of potentially anti-competitive clauses (e.g. territorial exclusivity, non compete obligation, the obligation of the agent to limit his activity to the territory or to the customers assigned to him), it is necessary to verify whether the commercial relationship to which such clauses apply may fall under prohibition of Article 101(1) TFEU.

42 European Commission, Guidelines on Vertical Restraints, 2010/C 130/01, 2010.

4.1 The starting point: the agent as an auxiliary of the principal.

The traditional position of the European Antitrust Authorities is that commercial agency contracts do not fall under Article 101 TFEU.

This principle has been affirmed by the Commission since the Communication of 24 December 1962[43], also called «Christmas Notice», where it is said that:

> « ... in the Commission's opinion, the conditions for the prohibition laid down in Article 101, paragraph (1), are not fulfilled by exclusive agency contracts made with commercial agents, since they have neither the object nor the effect of preventing, restricting or distorting competition within the common market. The commercial agent only performs an auxiliary function in the commodity market. In that market he acts on the instructions and in the interest of the enterprise on whose behalf he is operating. Unlike the independent trader, he himself is neither a purchaser nor a vendor, but seeks purchasers or vendors in the interest of the other party to the contract, who is the person doing the buying or selling. In this type of exclusive representation contract, the selling or buying enterprise does not cease to be a competitor; it merely uses an auxiliary, i.e. the commercial agent, to dispose of or acquire products on the market.»

In other words, since the agent is a mere auxiliary of the principal, the agreement between agent and principal must be regarded as an internal matter of the principal (like the relation with an actually controlled subsidiary) which does not fall under Article 101(1).

This position has been shared by the Court of Justice, which stated in the Grundig case[44] that:

> «... it is pointless to compare on one hand the situation, in which article 101 applies, of a producer bound by a sole distributorship agreement to the distributor of his products with on the other hand that of a producer who includes within his undertaking the distribution of his own products by some means, for example by commercial representatives, to which article 101 does not apply. These marketing organisations, one of which is integrated into the manufacturer's undertaking whilst the other is not, may not necessarily have the same efficiency. The wording of article 101 causes the prohibition to apply, provided that the other conditions are met, to an agreement between several undertakings. Thus it does not apply where a sole undertaking integrates its own distribution network into its business organisation».

It can therefore be taken for granted, in principle, that the relationship between an agent and his principal is not caught by Article 101, to the extent the agent can be considered as an auxiliary of the principal, «integrated into the business organisation» of the latter. This means that typical agency agreements, where the agent acts as the *longa manus* of the principal and carries out the principal's marketing strategies, must be treated in the same way as agreements between parent company and a subsidiary, i.e. as an internal matter not covered by Article 101.

[43] Now replaced by paragraphs 12-20 of the Guidelines.

[44] Court of Justice, 13 July 1966, joint cases 56 and 58/64, *Ets. Consten and Grundig-Verkaufs-GmbH v. Commission,* ECR, 1966, 299.

On the contrary, as we will see in § 4.2, agency agreements which are closer to distribution agreements («non-genuine» agency agreements) will be treated as agreements between independent undertakings, and will consequently fall under Article 101.

Until some years ago there was no doubt that «genuine» agency agreements were wholly outside the reach of Article 101, and that consequently whatever restrictive clause contained in such agreements could not breach Article 101, because such provision was not applicable to them.

However, this principle, which was stated in very general terms in the Grundig case, has been partially modified in subsequent judgments of the Court of Justice[45], which have introduced, also for «genuine» agency agreements, a distinction between obligations which remain out of the reach of Article 101 TFEU and obligations which, on the contrary, fall within the scope of such provision, as we will see later in § 4.2.2 and 4.3.3.

4.2 The distinction between «genuine» ("true") and «non-genuine» («untrue») agency agreements

This being said, it is essential to decide how the «genuine» or «true» agents can be distinguished from other situations where an agency or intermediary is closer to an independent trader falling under Article 101 TFEU.

4.2.1 The «Christmas notice»

The Commission's traditional approach – clearly expressed in the «Christmas Notice» mentioned above – has been to look at the financial and commercial risk borne by the agent: if the latter takes upon himself certain charges and risks or exercises certain rights which are typical of a buyer-reseller, he should be treated as an independent trader and the contract will consequently fall under Article 101.

On this basis the Commission identified, in its notice of 24 December 1962, a number of situations where the agent, although acting as an intermediary, was to be treated as an independent trader, particularly where he:

> « ... is required to keep or does in fact keep, as his own property, a considerable stock of the products covered by the contract, or is required to organize, maintain or ensure at his own expense a substantial service to customers free of charge, or does in fact organize, maintain or ensure such a service, or can determine or does in fact determine prices or terms of business».

By doing so the Commission focused mainly upon the financial and commercial risk undertaken by the agent.

[45] Court of Justice, 14 December 2006, case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio* v. *Compañía Española de Petróleos SA,* ECR, 2006, I-11987 ; Court of Justice, 11 September 2008, case C-279/06, *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL.*

4.2.2 Further developments in case law

However, in a second time a further aspect emerged, which had been mentioned by the Court of justice in the Grundig case but had not been considered by the Commission in the Christmas notice: the integration of the agent in the sales network of the principal. Thus, in the context of individual cases, where parties argued that Article 101 did not apply because of the agency relationship, the idea gradually developed that agents who are not integrated in the principal's network and who are free to determine their action in full independence must be considered as independent traders and consequently submitted to Article 101, even when they bear the typical risks of an agent.

So, for example, in the Sugar case[46] the status of a «true» agent has been denied to a trader who was dealing with several competing producers and was acting as reseller on certain markets, and as agent on others.

These statements, if taken literally, cannot be used for distinguishing between «genuine» and «non-genuine» agents: in fact, it is obvious that agents may represent several principals; and the fact that an agent acts as distributor/reseller for other producers does not, as such, change the relationship with his principal.

Actually, the real meaning of the statements made by the Court in the *Sugar* case can be understood only by analyzing the specific functions carried out by the intermediary in the context of that particular case. Thus, it appears that in the actual case the agent did not have the structural characteristics of an integrated intermediary, i.e. of a component of the principal's sales network, having the function of acting in the principal's interest *against* the competitors of the latter[47]; he was actually a trader acting for an indefinite number of manufacturers, bound to certain producers by a commercial agency agreement (a contract which is normally - but not necessarily - used for integrated intermediaries) without really becoming part of the network of a given producer.

Within the above context it is easier to understand the statements made in the Sugar case: it is not the fact that the agent represented several principals[48], nor the fact that he also acted as a reseller as such that made him consider to be an «untrue» or «non-genuine» agent, but the lack of integration, which was shown - *inter alia* - by the above aspects.

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[46] Court of Justice, 16 December 1975, *Suiker Unie v. Commission,* ECR, 1975, 1663, 2008-2010.

[47] It is actually a typical characteristic of the integrated agent (as well as of the integrated reseller, i.e. the distributor) that he acts in the interest of his principal and consequently cannot at the same time promote business for competing manufacturers (while it is normal that he completes his offer, by dealing with non-competing goods). But it is also possible to use the agency contract in the context of a non-integrated intermediary relationship: in such a case - which is rather exceptional within commercial agency contracts while it is rather common for commission agents - the «agent» will act for several competing principals and the principals will market their products through several competing agents.

[48] It should be noted that, in the specific case the activity carried out by the agent for the competitors of the principal referred to the same products and the same territory.

The above position has been expressed more explicitly in the *Vereeniging Vlaamse Reisbureaus* case[49] where the Court considered Article 101 TFEU to be applicable to travel agents who were selling travel packages on behalf of a large number of competing tour operators who, in turn, were selling them through a large number of competing travel agencies, arguing that these travel agents could not be considered as auxiliaries, integrated in the network of a specific tour operator[50]. In the actual case, the undertaking of the agents not to grant discounts to their customers was considered as a resale price maintenance, as if they were resellers. Now, it is important to stress that also in this case the Court was dealing with a situation which is far away from normal agency agreements since the travel agencies were in this case much closer to resellers, who are forced to act as intermediaries simply because this is the only way to market a package of services which by their nature cannot be the object of resale[51].

Another borderline case examined by the Commission concerned agents distributing Mercedes cars[52] which were considered equal to distributors for the application of Article 101. Actually, the agents had to bear risks and costs (demonstration cars and cars for the employees that they were to purchase on their own; setting up and managing a workshop for assistance and repair: maintaining a stock of spare parts) which are not normal for commercial agents. However, the Court of First Instance[53] took a different view and came to the conclusion that the risks assumed by the agents did not justify their qualification as «non-genuine» agents.

Other cases refer to situations where the activity as agent has an accessory character with respect to the activity as independent trader. In the VAG Leasing case[54] Volkswagen imposed upon its dealers the obligation to provide leasing contracts to their customers exclusively through a company of the Volkswagen (VAG leasing) which entered into agency agreements with them. The Court decided that such agency agreements, which prevented other leasing companies to access the Volkswagen network, did fall under Article 81. In this case the «agents» were certainly integrated in the network (in the same way as they

49 Court of Justice, 1 October 1987, case 311/85, *Vereeniging Vlaamse Reibureaus v. Sociale Dienst,* ECR, 1987, 3801.

50 A similar reasoning has been developed by the Commission in a case (decision of 18 October 1991, *Eirpage,* OJ 1991, L 306, 22) where undertakings selling paging equipment or providing paging services agreed with the principal (a company providing paging services) to act as non exclusive agents for the sale of the subscription to such service.

51 It is also important to stress that in this case the travel agents were directly cashing the price from the «purchasers» of the travel package and were consequently in a condition to grant a discount (which would have been impossible for a «normal» agent who receives the commission from the principal after the principal has been paid by the customer).

52 Decision of 10 October 2001, *Mercedes Benz* (OJ 2002 L 257, 1).

53 Court of First Instance, 15 September 2005, case T-325/01, *DaimlerChrysler AG v. Commission,* ECR 2005, II-3319.

54 Court of Justice, 24 October 1995, *Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH,* ECR, 1995, I-3477.

were in their quality of dealers); however, the agency contract was accessory to the distributorship contract and the result of such link was that the dealer/distributor could not avail himself of leasing services of other companies when selling the cars as dealer[55].

A further important development in case-law occurred in the context of contracts regarding the distribution of petrol in Spain. In this country most oil companies distribute petrol through stations bound by an agency agreement instead of the supply agreement generally used in most other countries. This has given rise to several questions regarding the qualification of such contracts as «genuine» or «non-genuine» agency agreements.

But, since many of these contracts had actually been qualified as «true» agency agreements, the question arose whether also these contracts could, at least under certain aspects (and in particular with respect to the exclusive purchase/non-competition clauses), be subject to Article 101. In fact, the existence of parallel networks of agency contracts for petrol stations could give rise to a cumulative effect and a possible foreclosure of other oil producers from the market.

It is in the context of this very special situation that the Commission introduced in § 19 of the Guidelines of 2000 a substantial change of the general rule which excludes the applicability of article 101 to «genuine» agency agreements, by providing that **also «genuine» agency contracts may fall under Article 101** with respect to clauses which concern the **relationship between the agent and the principal**, and especially the territorial exclusivity and non-competition obligations. In particular, the Commission argued that, while territorial exclusivity clauses will normally not lead to anti-competitive effects, since they concern only intra-brand competition

> « ... non-compete provisions, including post-term non-compete provisions, concern inter-brand competition and may infringe Article 101(1) if they lead to foreclosure on the relevant market where the contract goods or services are sold or purchased ...».

This rather new principle (which actually contradicted the previous case law of the Court of Justice, which made no distinction within «true» agency agreements) has been thereafter endorsed by the Court of Justice in two subsequent judgments[56], which introduced, also for «genuine» agency agreements, a distinction between obligations which remain out of the reach of article 81 and obligations which, on the contrary, fall within the scope of such provision.

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[55] See also the Commission decision of 27 October 1992, *Distribution of package tours during the 1990 Word Cup,* (OJ 1992 L 326, 31) relating to the distribution of package tours during the 1990 Word Cup, where a company which organised and sold package tours also acted as agent for the sale of the entrance tickets.

[56] Court of Justice, 14 December 2006, case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio* v. *Compañía Española de Petróleos SA,* ECR, 2006, I-11987 ; Court of Justice, 11 September 2008, case C-279/06, *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL.*

In particular, according to the Court[57]

> « … only the obligations imposed on the intermediary in the context of the sale of the goods to third parties on behalf of the principal fall outside the scope of that article. As the Commission submitted, an agency contract may contain clauses concerning the relationship between the agent and the principal to which that article applies, such as exclusivity and non-competition clauses. In that connection it must be considered that, in the context of such relationships, agents are, in principle, independent economic operators and such clauses are capable of infringing the competition rules in so far as they entail locking up the market concerned.»

This theory is based on the assumption that with respect to agency agreements two different markets must be considered:

> « … on the one hand the market on which the agent offers his agency services tro potential principals, and on the other the market on which he offers his principal's goods or services to potential customers»[58].

Consequently, with respect to the agency services offered by the agent, he should be considered in any case as an independent undertaking and clauses regarding the rights and obligations of the parties concerning the provision of such services, like the grant of exclusive rights to the agent or the agent's obligation not to deal with competitors of the principal, will in principle fall under the prohibition of Article 101, even in the case of «genuine» agents[59].

4.2.3 Conclusions

If we consider the existing case law globally, we can conclude that contracts with commercial agents (and, more generally, with intermediaries) remain outside the scope of Article 101 TFEU provided the following three conditions are met:

(a) the agent must not bear financial and commercial risks which are typical of a reseller;

(b) the agent must be actually integrated in the principal's sales network;

(c) the agency agreement must not be part of a more general framework where the agent is actually acting as distributor/reseller.

This means that it is not correct to focus upon one of the distinctive criteria alone, without considering the other ones. So, for example, an agent who does not take any risks which are typical of a reseller may nevertheless fall under Article 101 if he is not integrated within the principal's sales network while, on

[57] Court of Justice, 14 December 2006, case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio* v. *Compañía Española de Petróleos SA*, § 62.

[58] Opinion of Advocate General Kokott, delivered on 13 July 2006 in case C-217/05, § 47.

[59] On the contrary, clauses of the agency agreement regarding the sale by the agent of the principal's goods, like the obligation to respect resale prices, contained in «true» agency agreements, will not fall under the prohibition of Article 101.

the other side, an integrated agent will need to respect Article 101 if he takes risks which bring him closer to a distributor.

4.3 The principles on agency agreements contained in the Guidelines

In the Guidelines the Commission has attempted to state in general terms the criteria for distinguishing between «genuine» agency agreements which remain outside the reach of Article 101 TFEU and «non-genuine» agency agreements which are subject to the prohibition of Article 101.

It must be said from the outset that this task is very difficult, if not almost impossible, because the various distinctive criteria have a quite different impact depending on the actual context of the specific agreement.

As we have stated in our observations submitted to the European Commission in occasion of the consultation regarding the draft Guidelines proposed together with the draft block exemption regulation[60], now Regulation 330/2010,

> « ... most of the cases where the problem has arisen do not relate to the «normal» relationship between principal and agent, but – on the contrary – to very special situations which have little to do with the great majority of commercial agency agreements.
>
> In fact, several critical cases where the question has arisen regard agents:
>
> - who provide products (or services) to consumers: petrol (CEPSA, etc.), travel packages (Vlaamse Reibureaus), cars (Mercedes), and
> - who directly deliver the products to the customer and cash the price.
>
> These situations are far away from the great majority of «normal» agency contracts.
>
> The «normal» commercial agent promotes sales towards resellers or industrial end-users, not towards consumers at the retail level. He does not deliver the products and cash the price: he simply collects an order and transmits it to the principal who will deliver the goods to the customer, obtain payment, and who will some months later pay the commission to the agent.
>
> When establishing criteria for distinguishing between «genuine» and «non genuine» agents the Commission should remember that these criteria must be applied also to these «normal» agents, which probably represent 95% of the category

The Commission, unfortunately, did not consider our observations and maintained the previous approach, based on a limited experience of very particular situations, which are far away from «normal» agency agreements, with the result that several criteria mentioned in the Guidelines are inappropriate for such «normal» agency contracts.

Thus, the Guidelines, instead of attempting to make the point of the various criteria examined in the previous paragraph, tend to simply widen the criterion of the financial and commercial risk, on the basis of reasons which are often pure-

[60] Observations of the International Distribution Institute (IDI) on the Draft Guidelines on Agency Agreements:http://ec.europa.eu/competition/consultations/2009_vertical_agreements /index.html.

ly theoretical and not always in line with the principles established by the Court of justice.

Moreover, by listing a large number of situations which the Commission says to be inconsistent with a «genuine» agency, and by adding in the paragraph which comes after the list that

> « .... where the agent incurs one or more of the above risks or costs, then Article 81(1) may apply as with any other vertical agreement»

the Guidelines give the (wrong) impression that the category of the «non-genuine» agency agreements is much broader than it actually is (on the basis of the existing case law).

4.3.1 Risks considered by the Commission

The Commission identifies three types of risks which must be considered in order to determine the applicability of Article 101 to an agency agreement:

- risks relating to the sales contracts he promotes,
- risks regarding market-specific investments made for the exercise of his activity, and
- risks related to other activities required by the principal and carried out by the agent for its own risk.

According to the Commission:

> « For the purposes of applying Article 101(1), the agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal, in relation to market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken on the same product market. However, risks that are related to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an agent or general investments in for instance premises or personnel, are not material to this assessment.»[61]

Now, actually the Commission's view is not wholly supported by the case law examined in the paragraph 4.2.2. It is true that the agent should not bear the risks of a reseller, but to say that the agent should bear no risks or almost no risks in order to be a «true» agent is a purely theoretical and substantially unfounded assumption. The agent, as any self-employed trader, bears the normal risks implied in his activity, so that the actual problem is not to see if his risks are non-existent of insignificant but, on the contrary, to ascertain if they are «normal» or abnormal for an intermediary.

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[61] Guidelines, § 15. It should be noted that while in the previous Guidelines the Commission referred to «genuine agency agreements» in the 2010 edition the «genuine» agency agreements are simply called «agency agreements». This means that the Commission makes a distinction between «agents» and «non-agents» for the purpose of the application of Article 101 TFEU, a terminology that may be misleading since the «non genuine agents» are actually «agents» to all effect, although they do fall under the prohibition of Article 101 TFEU.

So, if we look at the **first type of risk** considered by the Commission, the risk relating to the sales contract, it is true that the risk of selling the goods at a fair price and of obtaining payment lies in principle with the principal. The agent will not take the risk that no sale is made (except that he will get no commission if his promotional activity remains ineffective) and, if the customer to whom the goods have been sold does not pay, this will be in principle the principal's problem (except where a del credere clause has been agreed[62]).

As regards the **price of the goods sold**, it is interesting to note that in the Mercedes Benz case[63] the Commission dealt with the situation where possible discounts granted by the agent to customers were deducted from his commission and has come to the conclusion that where this happens the agent is not a «genuine» agent because he bears a considerable part of the risk that the customers are not willing to pay the list price fixed by the principal, which would make him more similar to a buyer-reseller who risks his margin. This conclusion is not correct, because there is a substantial difference between the agent who risks his commission if he does not convince the customer to purchase and the dealer who risks to remain with the products he has bought and he is unable to resell (which risk is obviously much higher than his margin). It is normal, within agency agreements, that the agent cannot grant discounts without the principal's agreement and that, where the parties agree upon a discount this may imply a reduction of the agent's commission. This has also been the conclusion of the Court of First Instance[64] which annulled the Commission's decision on this point and stated in particular that

> « .. the fact that a German Mercedes-Benz agent is authorised, without, however, being obliged, to grant discounts which are deducted from his commission and exercises his commercial freedom in forgoing a part of his commission on individual sales in order, if possible, to maximise his overall commission by selling more cars cannot be classified as "price risk"».[65]

If we consider the second type of risk, i.e. the **investment risk,** it is difficult to understand why the agent should not take the risk of market-specific investments. It is only normal that an agent wishing to promote business with respect to certain types of products makes the investments which are necessary for such activity. The distinction between market-specific and other investments is not relevant and the Commission's position on this point (which seems not to be confirmed by any case law) is not acceptable. The distinctive criterion, if any, should be between investments that are reasonable for an intermediary and investments that are typically taken up by a buyer-reseller.

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62 Which means that it is not «abnormal» that the risk of non-payment is partially shifted to the agent, while a generalized assumption of such risk by the agent would inconsistent with a «true» agency contract.

63 Decision of 10 October 2001, *Mercedes Benz* (OJ 2002 L 257, 1), § 156.

64 Court of First Instance, 15 September 2005, case T-325/01, *DaimlerChrysler AG v. Commission,* ECR 2005, II-3319.

65 Judgment of 15 September 2005, § 99.

So, for example, in cases where the burden of after sale services, stock of spare parts, technical assistance etc. appears to be very important (with respect to the overall turnover) it is normal to have recourse to a distributor, acting as buyer-reseller (who will have the necessary financial background), and the fact of appointing an agent instead of a dealer might show that the agent bears a risk which would be normal for a dealer-reseller[66].

But where the agent makes the necessary investments for carrying out the after sales service and the technical assistance required for the goods he promotes, and provided such investments are not out of proportion with respect to his earnings (commission) as agent, there is no reason not to consider him a «true» agent.

Finally, as regards the **third type of risk**, i.e. the risk related to other activities required by the principal to be undertaken on the same product market, probably the Commission had in mind the situation where the agent is required to perform activities other than those of an intermediary, like setting up a workshop for assistance and repair, a situation analyzed in the Mercedes case mentioned above.

But here too, even leaving aside the fact that in the Mercedes case the Court of First instance did not qualify the agent who took upon him this obligation as a «non-genuine» agent, it is clear that activities of this type do not change the characteristics of a commercial agent, provided they are of an accessory nature and do not imply the assumption of disproportionate risks.

4.3.2 The distinctive criteria listed in § 16 of the Guidelines

The Commission lists in § 16 of the Guidelines a number of situations which it considers to be inconsistent with «genuine» agency agreements. This type of approach is unsatisfactory because it looks at each single aspect, which may not al all be conclusive on its own, instead of analysing the situation in its whole.

This is why the following criteria, which will be examined one by one, should be considered with caution without implying necessarily - as the Commission apparently does[67] - that each of them could be sufficient for denying the existence of a «genuine» agency agreement.

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[66] So, in the specific context of distribution of cars examined by the Commission in the Mercedes Benz case, where the agents had to set up a workshop on their account for performing customer and warranty service and to keep a stock of spare parts, the conclusion of the Commission that they should be treated as dealers appears reasonable. It is however important to underline that such conclusion has not been based simply on the type of investment risks borne by the agents but also on the quantitative scope of such risks with respect to their activity as intermediaries. Nevertheless, the Court of First Instance (15 September 2005, case T-325/01, *DaimlerChrysler AG v. Commission,* ECR 2005, II-3319, §§ 110-112) did not share the Commission's view and came to the conclusion that the Commission failed to prove that the investments for the customer and warranty service were so important as to imply a commercial risk which would justify the agent to be qualified as an independent operator.

[67] When it says, in § 17 that « .... where the agent incurs one or more of the above risks or costs, then Article 101(1) may apply as with any other vertical agreement.»

1. *The agent acquires the ownership of the contract goods or supplies himself the contract services.*

   Here the Commission confirms a well-established principle, i.e. that a buyer-reseller relationship brings the agreement under Article 101. The reference to the «contract goods» should make it clear that it does not matter if the agent acts as buyer-reseller in the context of contracts with other parties.

   However, the present wording of the Guidelines seems to imply that also contracts where the agent's activity as reseller has a merely accessory character (see, for example Article 2.6 of the agent-friendly and principal-friendly IDI model contracts and Article 2.7 of the balanced IDI model) should be considered as «non-genuine» agency agreements and should consequently be submitted Article 101. It is doubtful whether this attitude, which appears to be stricter than the position taken in the Christmas notice[68], is justified. In cases where the activity as reseller is merely accessory and does not modify the overall role of the agent, like for example a practice commonly used in the fashion industry, where the agent, after having promoted the sale of the seasonal collection to the customers, purchases a small stock for direct supply to customers who need additional products during the season, there is no reason to submit the agreement to Article 101.

   This has also been confirmed by the jurisprudence of the Court of First Instance which denied that an obligation of the agent to purchase a number of demonstration cars (which could be resold as used cars after having accumulated 3.000 kilometres) could be considered as a reason for qualifying the agent as «non-genuine»[69].

   Another situation which might in theory transform the agent into a «non-gent» or «non genuine agent» arises when the principal establishes a **consignment stock** of his products at the agent's premises. If the agent acts as buyer-reseller when he takes the products from the stock and delivers them to a customer, he will in theory act as a reseller, although without taking the risk of a reseller[70].

2. *The agent contributes to the costs relating to the supply/purchase of the contract goods or services, including the costs of transporting the goods.*

   Here the Commission refers to a rather exceptional situation where the agent delivers the goods to the customer (like in the Mercedes case). But in

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[68] Where the Commission said that the «true» agent should not keep, as his own property, a considerable stock of the products covered by the contract.

[69] Court of First Instance, 15 September 2005, case T-325/01, *DaimlerChrysler AG v. Commission,* ECR 2005, II-3319, § 108-109.

[70] But, if he sells them in the principal's name as a commission agent, then he would be considered as a «genuine» agent. For further details, see: BORTOLOTTI, GENTY, *Contrat d'agence et interdictions des ententes. Les critères distinctifs entre «vrais» et «faux» agents sont-ils réellement applicables?*, in *Concurrences*, 3-2010, p. 59

the great majority of agency contracts, **it is the principal who delivers the goods** and the problem does not arise.

And, even when, exceptionally, the agent has to ship himself the goods (e.g. because he has a consignment stock of products owned by the principal), the simple fact that he may bear the costs of transportation should not be decisive, if the impact of such activity is limited[71].

Only in case the agent sells the goods on behalf of the principal in his outlet (e.g. fuel in a service station), it is likely that he bears the risk of a reseller if he assumes the cost of transport from the principal to his place of business[72], but we should bear in mind that this type of agreement is totally different from a «normal» international agency agreement.

3. *The agent maintains at his own cost or risk stocks of the contract goods, including the costs of financing the stocks and the costs of loss of stocks and cannot return unsold goods to the principal without charge, unless the agent is liable for fault (for example, by failing to comply with reasonable security measures to avoid loss of stocks).*

   This means that the «genuine» agent should not keep a stock of contract products of his own, but that he may keep a consignment stock of products owned by the principal, provided the costs relating to such products (such as insurance for the risk of loss) are borne by the principal.

   The above considerations seem reasonable if the agent is contractually bound to keep a consistent stock on his own[73]. However, if the stock is of little importance with respect to the agency contract (e.g. a limited quantity of spare parts), it is doubtful whether the ownership of a stock as such would justify the conclusion that the agent is not a «genuine» agent.

   The same should apply if the agent acts as buyer-reseller for limited amounts of products, a quite common situation in international agency contracts.

   Thus the IDI model contract («International Agency Contract – Balanced») expressly provides at Article 2.7, the following:

   > «The parties may agree, when appropriate, that the Agent will buy a certain amount of Products from the Principal for resale, in his own name, in the Territory.

[71] The Guidelines expressly state that the agent may carry out the transport service, provided that the costs are covered by the principal. In the Mercedes Benz case the Commission considered as relevant the fact that the agents were to deliver the cars to the customers, thus bearing the transport costs. However, the Court of First Instance (15 September 2005, case T-325/01, *DaimlerChrysler AG v. Commission,* ECR 2005, II-3319, § 104-105) took a different view, arguing that the the agent could charge the cost of transport to the purchaser.

[72] See, Court of Justice, 14 December 2006, case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio* v. *Compañía Española de Petróleos SA,* ECR, 2006, I-11987, § 53.

[73] In the Commission's decision in the case Mercedes Benz, mentioned before, § 159 (c), the fact of keeping a consistent stock of spare parts was considered as a reason for qualifying the agent as an independent contractor. However, this was not accepted by the Court of First Instance.

> Unless otherwise agreed in writing, the Agent is not entitled to commission on such sales. It is expressly agreed that such activity as buyer-reseller, to the extent it remains of an accessory character, does not modify the legal status of the Agent, as a self-employed commercial intermediary»

4. *The agent undertakes responsibility towards third parties for damage caused by the product sold (product liability), unless, as agent, he is liable for fault in this respect.*

   The Commission apparently refers to the situation where the agent takes upon himself the risk for possible damages arising out of product liability, a rather unlikely situation (since the principal, and not the agent, is the seller of the goods) which need not to be further considered[74].

5. *The agent takes responsibility for customers' non-performance of the contract, with the exception of the loss of the agent's commission, unless the agent is liable for fault (for example, by failing to comply with reasonable security or anti-theft measures or failing to comply with reasonable measures to report theft to the principal or police or to communicate to the principal all necessary information available to him on the customer's financial reliability).*

   Apart from some incomprehensible statements on security and anti-theft measures, the above statements seem to imply that a «genuine» agent cannot undertake a del credere obligation. Now, it is true that in case of a del credere obligation covering 100% of the loss[75], the agent would bear a responsibility which would bring him closer to a reseller. However, to say that any assumption of responsibility in case of non performance of the customers (including del credere limited to a small percentage of the loss or agreed upon case by case with reference to specific customers) is inconsistent with a «true» agency, would imply that also absolutely «normal» agency agreements would be subject to Article 101, whenever they contain a delcredere clause. It is likely that the Commission's statements on this issue - by the way not supported by case law - are a merely theoretical exercise, which should not be taken too seriously.

6. *The agent is, directly or indirectly, obliged to invest in sales promotion, such as contributions to the advertising budgets of the principal.*

   This criterion refers to the case where the agent has an obligation to invest in promotion, not where he does so spontaneously.

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[74] The inclusion of this paragraph is probably due to the aim to take into account the particular situation of service station operators who sell fuel as agents of the supplier. It should be reminded that this situation, which is almost identical to a supply contract, is totally different from a normal agency agreement. See also the observations to the draft Guidelines made by the International Union of Commercial Agents and Brokers (IUCAB), where it is said that «... whereas an agent is not the seller of the contract goods but the agent's principal, the product liability risk is for the principal and not the agent. In view thereof, it does not make sense to have this product liability risk in the guidelines as a criterion in the risk-analysis.»

[75] Which would be unlawful under many national laws containing rules protecting the agent.

A literal application of this principle could bring under the prohibition of Article 101 all contracts where the agent agrees to bear (in whole or in part) advertising expenses or to participate at his expense to fairs and exhibitions, which are very common clauses within agency agreements[76]. If the above were true, most cross-border commercial agency agreements should be considered as non-genuine agency contracts, falling under Article 101.

It is however unlikely that the Commission's position on this point can be considered as justified. In fact, since the promotion of sales is the main contractual obligation of an agent, his undertaking to bear the costs of promotional activities which are very common in cross border agency contracts[77] (like advertising and participation to fairs) cannot be considered as implying the assumption of risks which are abnormal for an intermediary, unless they are clearly out of proportion with respect to the agent's role as intermediary.

6. *The agent makes market-specific investments in equipment, premises or training of personnel, such as for example the petrol storage tank in the case of petrol retailing or specific software to sell insurance policies in case of insurance agents.*

   If taken literally, the above statement would mean that any investment in equipment, premises or training of personnel, made by the agent for the exercise of his activity in favour of principals belonging to a certain market (and not for his activity in general terms), would put the agreement under the prohibition of Article 101.

   Now, all agents make investments which are market-specific (and which are recoverable where the agent changes principal but remains in the same type of business), like the setting up of a show room (in the fashion industry), the acquisition of specific technical know-how or trained personnel (for the promotion of highly technical products), etc. It is consequently reasonable to assume that the Commission meant to refer to situations where the investments are exceptionally high[78] or not at all recoverable in case of change of principal.

8. *The agent undertakes other activities, within the same product market, required by the principal, unless these activities are fully reimbursed by the principal.*

   The meaning of this sentence is not very clear. Probably the Commission was referring to the Mercedes case where the agent undertook to supply a repair and assistance service to the customers.

[76] See, for instance, Articles 4.1 (Advertising) and 3.4 (Fairs and exhibitions) of the Principal-friendly IDI model. In the balanced model costs are shared by the parties as agreed between them from time to time: thus also in this case, the agent would bear some expenses of this type.

[77] The situation may be different for local agents within a country where it is more common that the principal reserves all publicity and participation to fairs for himself.

[78] This seems confirmed by the fact that the examples given by the Commission regard rather exceptional situations which have little to do with normal commercial agency agreements.

> Now, it is true that additional activities of this type may not be compatible with a «true» agency if they are disproportionate with respect to the agent's activity as intermediary. However, when this is not the case, there is no reason to consider that the agreement is no «genuine» agency. It is interesting to note that also the Court of first instance rejected the Commission's position regarding the obligation to supply repair and assistence services.

As already said before, the list contained in §16 of the Guidelines should be considered with great caution, always remembering that one should consider the overall picture, and not a single aspect, before deciding that an agent is not a «genuine» agent for the purpose of applying Article 101. It should in particular be considered that most of the cases considered by the Commission and the Court concern situations which are far away from a normal agency relationship.

Thus, for example, in the contracts between service-station operators and oil companies the fuel is delivered to the agent who provides it to the customers and receives the payment, which gives rise to a situation which is very close to a resale of the goods[79]. On the contrary, in most «normal» agency agreements, the agent simply promotes the conclusion of a contract of sale (by transmitting a purchase order) which is thereafter carried out by the principal, who delivers the goods and obtains payment.

Finally, it is important to bear in mind that the case law of the Court of Justice will in any case prevail over the statements made by the Commission in the Guidelines.

4.3.3 Antitrust rules which would nevertheless be applicable to «genuine» agency agreements

As we have seen above, in § 4.2.2, also «genuine» agency agreements are subject to the prohibition of Article 101(1) with respect to clauses regarding the rights and obligations of the parties concerning the provision of services, like the grant of exclusive rights to the agent or the agent's obligation not to deal with competitors of the principal.

The theory described above might give rise to paradoxical results if applied generally in the context of regulation 330/2010. In fact, if it were applied generally to non-competition clauses, the result would be that non-competition clauses contained in agency contracts for an indefinite term (or for a duration exceeding five years) as well as non post-contractual non-competition clauses would not benefit from the block exemption (see *infra,* § 6.3.3). This result is clearly inacceptable, at least for «normal» agency contracts, considering that such clauses are necessary in such context[80] and are furthermore not capable of

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[79] In particular where the agent has to pay the goods within a fixed time after delivery, independently of their resale: see Opinion of Advocate General Kokott, delivered on 13 July 2006 in case C-217/05, § 12.

[80] In fact, the obligation not to deal with competitors of the principal is a logical consequence of the typical function of the agent, whose task is precisely to promote the principal's products *against* those of his competitors, which by its very nature requires that the agent does not work for the competitors of

producing restrictive effects[81], except in extraordinary situations, which almost never arise in «typical» agency agreements.

It should in particular be reminded that the theory according to which Article 101 also applies to «genuine» agency agreements with respect to exclusivity and non-competition clauses has been developed in the context of the particular framework of contracts with petrol stations which are substantially different from «normal» agency agreements and which may produce a cumulative effect, due to the existence of parallel networks, a situation which is not likely to arise within typical commercial agency agreements.

This aspect seems to have been taken into consideration by the Commission in the 2010 Guidelines, § 19, where it is said that:

> «Since the agent is a separate undertaking from the principal, the provisions which concern the relationship between the agent and the principal may infringe Article 101(1). Exclusive agency provisions will in general not lead to anti-competitive effects. However, single branding provisions and post-term non-compete provisions, which concern inter-brand competition, may infringe Article 101(1) if they lead to or contribute to a (cumulative) foreclosure effect on the relevant market where the contract goods or services are sold or purchased».

In fact the reference to a (cumulative) foreclosure effect, shows that the Commission had in mind the rather exceptional situation of parallel networks giving rise to a cumulative effect, which may arise with respect to petrol stations, and not in case of «normal» agency agreements.

4.3.4 The rules applicable to «non-genuine» agency agreements

With respect to agency agreements which fall under Article 101, the further problem arises to see which clauses would be considered restrictive and thus prohibited by Article 101(1) and which ones may benefit of the group exemption contained in Regulation 330/2010.

It should be noted in this respect that, in order to make it possible to apply Regulation 330/2010 (which in principle refers to the relations between suppliers and buyers) also to intermediaries, Article 1 (h) expressly states that

> «"buyer" includes an undertaking which, under an agreement falling within Article 101(1) of the Treaty, sells goods or services on behalf of another undertaking.»

This means that, where an agency agreement exceptionally falls under Article 101, the rules applicable to suppliers will apply to the principal and those regarding the buyers to the agent, to the extent this is possible.

In order to check this aspect it is appropriate to examine the most common clauses of an agency agreement which might be considered restrictive.

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the principal. In some legislations (e.g. Article 1743 Italian civil code) the non-compete obligation is even implied by law.

81 Since it is very unlikely that the agent's obligation not to deal with competitors of the principal may foreclose the market for the principal's competitors, who will have no difficulty in finding other agents.

As regards the **territorial exclusivity,** there are no problems. Since such clause is not within the hard-core or prohibited clauses, it is exempted.

On the contrary, as regards **clauses prohibiting the agent to promote business outside the contractual territory**, these must in principle comply with Article 4 (b) of the Regulation. Thus, applying by analogy the principles governing distribution agreements *(infra,* 6.2.1) it is possible to oblige the «non-genuine» agent to refrain from actively selling into territories reserved exclusively to the principal or to other agents and distributors of the principal, it being understood that the agent must in any case remain free to accept unsolicited orders from customers established outside his territory.

A first problem that arises in this context regards the notion of exclusive territories towards which active sales can be prohibited. In fact, the Commission says in § 51 of the Guidelines that

> « ... a territory or customer group is exclusively allocated when the supplier agrees to sell its product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into its territory or to its customer group by all the other buyers of the supplier within the Union, irrespective of sales by the supplier.»

If we apply these principles to agency agreements, where it is common that the principal retains the right to make direct sales in the territory of his agents (although paying the agent a commission)[82], one could come to the conclusion that these territories are not «exclusively allocated» which would make it impossible to prohibit active promotion of sales in such territories.

Further problems arise when it comes to actually apply the rules recognizing the agent's right to «passively» promote business outside the contractual territory.

It should first of all be considered that the agent, unlike the distributor, does not sell products purchased from the principal which are already at his disposal when he decides to sell them (except in rather exceptional cases where the agency contract is used in a context - like petrol stations - which is much closer to that of a retailer selling to end-users); he promotes business (contract proposals) which the principal is free to accept or to refuse. Now, if the agent transmits an order which not agreeable to the principal, the latter may easily refuse it without needing to say that it is because the sale is outside the territory.

Second, the agent will (under the contract conditions normally practiced in trade) have no right to commission on business with customers established outside the contractual territory, and will therefore not be interested in promoting such sales.

[82] See, for instance, Article 11.2 of the IDI principal-friendly and balanced agency models.

Finally, even where the principal would be willing to pay a commission on such sales, there would be a problem of coordinating this payment with the right of the agent of the country of the customer to receive a commission.

As regards the **non-competition obligation**, it should in principle respect the five years' duration term (*infra,* 6.3.3) and will not be applicable in the period following the end of the contract.

However, complying with with Article 5 of Regulation 330/2010, according to which the agreement containing a non-compete obligation cannot be concluded for an indefinite term or contain an automatic renewal clause would create substantial problems. In fact if the agency contract should be concluded for a fixed term of five years (or shorter), and a new contract should be concluded thereafter, the agent would be entitled to goodwill indemnity at each term. It is therefore desirable that the Commission clarifies that the non-competition clauses in agency agreements (true or untrue) do not fall under Article 101(1), except in the exceptional case of parallel networks giving rise to a cumulative effect.

Finally, rather complicated problems arise when it comes to apply the rules prohibiting **resale price maintenance**.

As we will see later in more detail (*infra,* 6.5), Regulation 330/2010 prohibits resale price maintenance. Within distribution agreements the actual meaning of the rule is clear: the supplier cannot impose upon the buyer/distributor an obligation to respect certain resale prices. But within agency agreements the product **is sold by the principal through the agent:** and the principal must of course have the right, in his quality of seller, to determine the price of his own goods.

This means that the prohibition of resale price maintenance can actually only apply to the agent's margin, or to be more precise, to his commission. In other words, while the «genuine» agent must respect without exception the price fixed by the principal (unless the principal himself authorizes him to modify it, e.g. by granting a discount) the «non-genuine» agent should in principle remain free to grant discounts on the part of the price corresponding to his commission, and such right cannot be limited by the principal.

This has been recognized by the Court of Justice in *Vereeniging Vlaamse Reisbureaus*[83] where the prohibition imposed upon the agent to share his commission with his customers was found to amount to a form of price fixing prohibited by Article 101.

The Commission considered this aspect in § 49 of the Guidelines where it says that

> « ... In the case of agency agreements, the principal normally establishes the sales price, as the agent does not become the owner of the goods. However, where such

83 Court of Justice, 1 October 1987, case 311/85, *Vereeniging Vlaamse Reibureaus v. Sociale Dienst,* ECR, 1987, 3801.

> an agreement cannot be qualified as an agency agreement for the purposes of applying Article 101(1) (see paragraphs (12) to (21)) an obligation preventing or restricting the agent from sharing its commission, fixed or variable, with the customer would be a hardcore restriction under Article 4(a) of the Block Exemption Regulation. In order to avoid including such a hardcore restriction in the agreement, the agent should thus be left free to lower the effective price paid by the customer without reducing the income for the principal».

However, also in this case, the practical application of the rule may cause problems. In fact, while granting a discount may be easy for more independent intermediaries, which have been granted the power to conclude the sale on behalf of the principal, to cash the price and then to retain the commission, this is absolutely not the case within «normal» agency agreements where the agent has no right to conclude contracts on behalf of the principal[84] and where the customer pays the full price to the principal and the agent receives some time later the commission from the principal. Now, in such a «normal» context the agent cannot materially «grant a discount», i.e. reduce the price on his initiative by deducting the discount from his commission: he should ask the principal to reduce the price (and his commission) before being able to propose such discounted price to the customer, which is obviously almost impracticable.[85].

C
THE RULES APPLICABLE TO DISTRIBUTION AGREEMENTS

5. THE HISTORICAL BACKGROUND

In order to understand the present state of the rules governing distribution contracts, and more generally the basic principles of EU antitrust in the field of distribution, it may be useful to give a short description of the evolution of the principles established by the Commission and by the Court of Justice in the past years.

5.1 The first steps: the distinction between «open» and «closed» exclusive distribution contracts

When the European Commission had been empowered, in 1962, by Regulation 17/62, to apply the antitrust rules of the EC Treaty, one of the first problems that arose was that of deciding if exclusive distribution agreements, which were (and still are) very common within the European community, fell under the prohibition of Article 101(1) and, in the affirmative case, if they could be authorized under Article 101(3). The uncertainty about this issue brought the

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84 Which means that the price possibly negotiated with the customer (if the principal has authorized the agent to do so within a limited range) will be part of a contract proposal (order) transmitted to the principal, which may be accepted or refused by the latter.

85 The fact that the antitrust rules applicable to distributors cannot be extended to «normal» agency agreements, confirms the view that the notion of «non-genuine» agents should be construed very narrowly.

interested parties to notify all their agreements to the Commission, requesting their exemption, thus obliging the Commission's services to cope with a problem of mass notification.

The question was all but easy. On one side it was clear that exclusive distribution agreements were one of the main tools for expanding cross-border trade and thus favouring the integration of the national markets, since the appointment of an «exclusive importer», willing to promote the sale of goods of a foreign manufacturer in exchange of an exclusive right was (as it still is today) a powerful system for entering new markets. On the other side, it was feared that a too effective protection of the distributor's exclusivity (particularly against parallel imports) could have the effect of partitioning national markets: in other words, there was the risk that by permitting a too strong protection of the distributor's exclusivity, the export to other Member States (and also the interbrand competition within each State) would have increased, but without a real integration of the national markets, because in each member State manufacturers and importers would have been protected against the competition of other sellers of the same goods[86].

In order to solve this problem the Commission came to a compromise solution, which was to admit the so called «open» or «simple» territorial exclusivity (i.e. the grant to the distributor of the exclusive right to be directly supplied by the manufacturer) and to forbid the «closed» systems, i.e. those granting the distributor a protection against parallel imports («absolute territorial protection»)[87].

In other words, the Commission considered that the distributor could be granted an exclusive right to directly purchase the goods from the principal for resale in his territory, but that he should not be protected against the competition of third parties wishing to sell the same goods in his territory after having purchased them from others (e.g. wholesalers or distributors of other countries). The basic idea supporting this solution is that an «open» territorial exclusivity gives the distributor a competitive advantage which is sufficient to repay him for the obligations undertaken for organising the distribution of the goods in his territory, without granting him an absolute monopoly (by protecting him against «parallel imports») which would be unacceptable from a point of view of the competition rules.

In other words, while the «open exclusivity» is not contrary to Article 101 because the intra-brand restriction such agreement is counterbalanced by the

[86] With the result that, in presence of higher prices on one national market, the imported products would have followed the local price level instead of the (lower) level existing in the country of origin.

[87] Although the terminology has partially changed (today the notions of «active» and «passive» sales are more commonly used), the basic principle that parallel exports must remain free and no territorial protection can be permitted has remained substantially unchanged during the last 50 years and has the more acquired the characteristics of almost a «dogma» that can in no way be put in discussion.

overall advantages of this distribution system[88], the «absolute territorial protection» of the distributor's territory is inadmissible.

5.2 The Grundig and Maschinenbau Ulm cases

This theory has been set out the first time by the Commission in the *Grundig-Consten* decision[89] which has been substantially confirmed by the Court of Justice[90].

Actually the case regarded an exclusive distribution agreement between the German company Grundig and its French exclusive distributor/importer Consten for the distribution of consumer electronics goods (radios, televisions, tape recorders etc.). The contract granted Consten a territorial exclusivity with absolute territorial protection: Grundig not only undertook to refrain from directly or indirectly selling to French customers, but also imposed upon its distributors in other countries and upon its German wholesalers the obligation not to export to Consten's exclusive territory. Moreover, Grundig had granted Consten the right to register in France its trademark GINT (Grundig International), which was put on all Grundig products (together with the Grundig trademark): in this way Consten could intervene against any parallel imports by invoking the infringement of its trademark rights[91].

The Commission held that such a «closed» distribution system (which made it possible to maintain a substantial price differential between Germany and France[92]), which gave Consten an absolute monopoly in the distribution of Grundig's products in France, constituted an infringement of Article 101, which could not be exempted under Article 101(3)[93]. Consequently the Commission considered the agreement as a whole as an infringement of Article 101 of the Treaty.

The Court of Justice substantially confirmed the Commission's view, particularly with respect to the applicability of the prohibition of Article 101(1) and the non exemptability under Article 101(3) of distribution contracts with absolute territorial protection. As regards the incompatibility of such agreements with Article 101(1) the Court took a very clear-cut position.

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88 We will examine in the next paragraph the further question of determining whether this reasoning should be made within article 101(1) or in the context of Article 101(3).

89 Decision of 23 September 1964, *Grundig/Consten*, OJ 1964, 2545/64.

90 Court of Justice, 13 July 1966, joined cases 56 and 58/64, *Ets. Consten and Grundig-Verkaufs-GmbH v. Commission,* ECR, 1966, 299.

91 This aspect has no more relevance at present since it is now established that the import of products put on the market in another member State by the proprietor or with his consent cannot be considered as an infringement of the trademark.

92 According to the Commission the actual prices in France were about 20% higher than in Germany, with peaks up to 44%.

93 According to the Commission, whatever the positive aspects of the agreement, the absolute territorial protection was in any case a restriction which was not indispensable to the attainment of the objectives pursued by the parties, and thus the agreement did not satisfy the condition contained in Article 101(3) a.

> «Since the agreement thus aims at isolating the French market for Grundig products and maintaining artificially, for products of a very well-known brand, separate national markets within the Community, it is therefore such as to distort competition in the Common Market.
>
> It was therefore proper for the contested decision to hold that the agreement constitutes an infringement of Article 101(1). No further considerations, whether of economic data (price differences between France and Germany, representative character of the type of appliance considered, level of overheads borne by Consten) or of the corrections of the criteria upon which the Commission relied in its comparisons between the situations of the French and German markets, and no possible favourable effects of the agreement in other respects, can in any way lead, in the face of abovementioned restrictions, to a different solution under Article 101(1).»

The Court so not only made clear that distribution agreements with absolute territorial protection infringe Article 101(1), and consequently that a restriction of mere intra-brand competition can fall under Article 101(1)[94], but also that such agreements are prohibited *per se*, already on the basis of their restrictive purpose, without need to ascertain their effects on competition (and in particular without a market analysis e.g. for the purpose of taking into account possible positive effects at the level of inter-brand competition).

While there was a total correspondence of view between the Commission and the Court on the position to take with respect to «closed» exclusive agreements, the Court took a rather different attitude towards «open» exclusive distributorship agreements: contrary to the Commission's view that these agreements infringed article 101(1) but should be exempted under Article 101(3), the Court took the view that they would normally not even fall under the prohibition of Article 101(1). By deciding that the Commission was wrong in annulling the whole contract between Grundig and Consten instead of the clauses regarding the territorial protection only[95], the Court gave clearly to understand that the clauses granting a territorial exclusivity as such (i.e. without the additional contractual provisions warranting an absolute territorial protection) did not necessarily imply an infringement of Article 101(1).

This «rule of reason» approach was confirmed by the Court in the *Technique Minière* case[96] which deserves to be examined with some detail, given its importance for the subsequent evolution of case law. In this case, the Court was asked to give a preliminary ruling (under article 177 of the EC Treaty[97]) on the following question:

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[94] At least with in case of oligopolistic markets: this seems to be the meaning of the reference to products of a «very well-known brand», and thus to products which are differentiated, through the use of a trademark, from those of the competitors.

[95] Paragraphs 34 to 38 of the judgment.

[96] Court of Justice, 30 June 1966, case 66/66 *Société Technique Minière v. Maschinenbau Ulm* ECR 1966, 235.

[97] Now Article 234 of the EC Treaty.

«What interpretation should be given to Article 101(1) of the Treaty of Rome and to the Community Regulations adopted in implementation thereof with regard to agreements which have not been notified and which, whilst granting an "exclusive right of sale".

- do not prohibit the *concessionnaire* from re-exporting to any other markets of the EEC the goods which he has acquired from the grantor;
- do not include an undertaking by the grantor to prohibit his *concessionnaires* in other countries of the Common Market from selling his products in the territory which is the primary responsibility of the *concessionnaire* with whom the agreement is made;
- do not fetter the right of dealers and consumers in the country of the *concessionnaire* to obtain supplies through parallel imports from *concessionnaires* or suppliers in other countries of the Common Market;
- require the *concessionnaire* to obtain the consent of the grantor before selling machines likely to compete with the goods with which the concession is concerned?»

In other words, the agreement with respect to which the Court was to state if it fell under Article 101(1) was a cross-border distributorship agreement containing two potentially restrictive clauses:

- a territorial exclusivity without territorial protection ("open exclusivity") in favour of the distributor, and
- an undertaking by the distributor not to sell products competing with those of the contract without the manufacturer's consent.

The Court, after having made a vague statement in favour of the possibility of balancing positive and negative effects, by saying that:

« it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking»

concluded with respect to the applicability of Article 101(1) to the agreement in question[98] as follows:

« in order to decide whether an agreement containing a clause 'granting an exclusive right of sale' is to be considered as prohibited by reason of its object or of its effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the *concessionnaire* on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.

[98] It should be noted that the agreement on which the Court was asked to decide although called by the Court «an agreement containing a clause granting an exclusive right of sale» was actually an agreement containing two potentially restrictive clauses, i.e. an «open» territorial exclusivity together with an obligation not to sell products competing with those of the manufacturer.

Although not expressed in a crystal-clear way, the Court’s message could be read as follows:

- when applying Article 101(1) to «open» exclusive distribution contracts, a global evaluation of the possible effects of the agreement on both levels of intra-brand and inter-brand competition must be made;
- in normal situations (i.e. in where there is sufficient competition between manufacturers) the typical restraints of «open» exclusive distribution agreements (exclusivity without territorial protection and non competition obligation) do not infringe Article 101(1).

5.3 The different attitude of the Court towards «open» exclusive agreements

When the Court’s more flexible attitude towards «open» exclusive distribution agreements became evident, the Commission had already made a choice in favour of a different solution, i.e. to exempt this type of agreements on the basis of Article 101(3) through a block exemption, in the framework of Regulation 19/65 of the Council, which enabled the Commission to exempt certain categories of agreements by Regulation. Thus the Commission established in Regulation 67/67 of 22 March 1967, which would later be replaced by Regulation 1983/83 of 22 June 1983, then by Regulation 2790/1999 and finally by Regulation 330/2010, the conditions to be met by exclusive distribution agreements in order to benefit of the exemption of Article 101(3).

By doing so the Commission took a direction which did not conform with the Court's position: while for the Court the «open» exclusive agreements were normally to be considered as remaining outside the prohibition of Article 101(1), the Commmission's position was - on the contrary - that they were prohibited by Article 101(1) but could be exempted, by the Commission, under Article 101(3).

This difference in approach had little practical relevance in the context of Regulations 67/67 and 1983/83: once it was clear that «open» exclusive agreements were covered by the block exemption, it did not matter if their lawfulness was due to the non-applicability of Article 101(1) or the exemption under Article 101(3). But now that under Regulation 330/2010 agreements exceeding the 30% market share threshold are no more covered by the block exemption, the question becomes less theoretical, as we will see later (*infra,* § 6.6).

6. EXCLUSIVE DISTRIBUTION AGREEMENTS UNDER REGULATION 330/2010

Regulation 2790/1999 represented a substantial innovation with respect to the previous block exemptions, especially because of the principle that restrictions which are not expressly forbidden are automatically exempted. The contents of Regulation 2790/1999 have been substantially maintained in Regulation 330/2010, except for some minnor adjustments.

As regards distribution agreements, this means that all restrictions other than those listed in Articles 2, § 4 (distribution contracts between competitors), Article 4 (resale price maintenance, export prohibitions) and Article 5 (non-competition) are automatically exempted, and the interested undertakings do no more have the risk (which existed before 1999) that a restrictive clause they did not consider could have the effect of excluding their agreement from the block exemption.

In the following paragraphs we will examine the rules applicable to exclusive distribution agreements and check the compliance of some of the most common clauses of distribution agreements with such rules.

6.1 The territorial exclusivity

While Regulation 1983/83 expressly mentioned (and exempted) territorial exclusivity clauses, i.e. the supplier's obligation to sell the products only to the distributor for resale in the contractual territory, Regulation 2790/1999 and now Regulation 330/2010 contains no such reference, since these clauses **are automatically exempted** by virtue of the principle that all clauses which are not prohibited are exempted.

The only limitation resulting from the Regulation is that, according to Article 4 (b), the supplier **may not protect the distributor's exclusivity** by imposing upon other purchasers restrictions as to the customers or the territory where they may resell the goods (with the exception of «active sales»), as we will see in the next paragraph.

The fact that possible restrictions regarding the supplier himself are not included in the hard-core restrictions of Article 4, apparently implies that the the supplier may undertake the obligation:

- not to sell (not even «passively») to customers of the exclusive territory of the distributor;
- not to supply third parties (outside the distributor's territory) if he knows (or ought to know) that they intend to resell the goods in the territory of the distributor.

As regards the first situation, the Commission took the position, under Regulation 1983/83, that the supplier should remain free to make «passive» (unsolicited) sales to customers of the distributor's territory, provided the goods were to be delivered outside such territory and provided the purchaser paid the transport costs. Under Regulation 330/2010 a possible undertaking by the supplier not to sell to purchasers established in the distributor's territory who would come to him in order to purchase the products, must be considered as exempted, since there is no provision in the block exemption prohibiting such type of restriction.

There can consequently be no doubt about the compliance with Regulation 330/2010 of Article 16.1 of the IDI distribution model where it is said that

> « ... the Supplier will sell the Products, in the Territory, only to the Distributor.»

As regards the second case, i.e. a possible obligation not to sell to third parties established outside the distributor's territory which intend to resell into such territory, the lawfulness of such a clause is less clear.

In principle clauses of this type should be exempted for the same reason examined above, i.e. because they are not mentioned between the hard-core restrictions. However, it could also be argued that the supplier's undertaking not to sell to third parties who intend to sell in the distributor's territory falls under Article 4(b) because it would have as its object, although indirectly, a restriction of the territory into which such third party may sell the goods. Such a wide interpretation of Article 4 is probably not justified, considering the aim of Regulation 330/2010 to set out clear and unambiguous rules which can be understood by the users (if the Commission intended to include this situation between the hard-core clauses, it should simply have included this situation in the list Article 4). At the same time, however, it should be considered that a prohibition imposed by the supplier upon a purchaser to sell in a given territory would be clearly prohibited by Article 4(b). Consequently a refusal by the supplier to sell (in compliance with a possible obligation not to sell to purchasers who intend to sell in the exclusive territory of the distributor) is very near to an agreement between the supplier and the purchaser whereby the latter undertakes not to sell in such territory[99].

Considering all this, it is not advisable to use, within the EU, clauses whereby the supplier undertakes, in general terms, not to sell to buyers who intend to resell in the distributor's exclusive territory.

On the contrary, a clause whereby the supplier undertakes not to actively solicit or otherwise provoke sales to third parties made for the purpose of circumventing the exclusivity, like Alternative A of Article 16.2 of the balanced IDI distributor agreement[100], which intends to protect the distributor against an intentional circumvention of his exclusivity, should in any case be considered as admissible.

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[99] Especially where it could be argued that the supplier makes the supply conditional upon the assumption by the purchaser of the obligation not to sell in a certain territory, a situation which is likely to arise in the context of a continuous relationship with the purchaser.

[100] «The distributor's exclusive right does not prevent the Supplier from selling the Products to customers outside the Territory who may thereafter export the Products into the Territory. However, the Supplier undertakes not to actively solicit or otherwise provoke such sales to third parties with the purpose of circumventing the exclusivity under Article 16.1.»

6.2 Territorial and customer restrictions

One of the fundamental principles of EU antitrust law, which has remained substantially unchanged, is the prohibition of any type of protection of distributors against parallel imports.

The basic idea is that distributor's exclusive territory can only be protected against «active» sales of other distributors, but that all distributors must remain free to make «passive» sales so that parallel imports are possible.

6.2.1 The general principle contained in Article 4(b)

According to Article 4 of Regulation 330/2010:

> «The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:
>
> [.....]
>
> (b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:
>
> – the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer ...»

Regulation 330/2010 so confirms the traditional view whereby distribution agreements with territorial protection are absolutely prohibited, while the exemption is granted for «open» exclusive agreements, where the distributor remains free to make passive sales outside his territory, i.e. to accept «unsolicited orders» from customers outside his territory.

In the context of Article 4(b), territorial restrictions imposed by the supplier upon his buyers (distributors or other purchasers) intending to protect the exclusivity of other distributors (or of the supplier himself), are admitted only:

- to the extent they are limited to **active sales** (which means that the buyer must remain free to accept possible unsolicited requests, even from customers belonging to the territory of an exclusive distributor), and
- provided they concern **a territory which is exclusively reserved** to the supplier himself or to another buyer.

This means that the supplier may impose upon his distributors (or other purchasers) an obligation not to actively sell the products only with respect to territories which have been **allotted exclusively to another purchaser** (normally distributors of other territories) or **reserved by the supplier exclusively for himself**.

On the contrary, the supplier must leave his purchasers free to sell (even «actively») in territories which are not exclusive. This implies that the clause prohibiting the distributor from actively selling outside his contractual territory, which was currently used under Regulation 1983/83, cannot no more be used in the context of Regulation 330/2010 and must be replaced by a clause prohibiting active sales to territories or customer groups reserved by the supplier exclusively to himself or to other purchasers.

By introducing this additional condition, the Regulation has created a mechanism which is more complicated than it appears at first sight and which may have unexpected consequences, particularly if one follows the strict interpretation of exclusivity given in the Guidelines (§ 51) where it is said that:

> « ... a territory or customer group is exclusively allocated when the supplier agrees to sell his product only to one distributor for distribution in a particular territory or to a particular customer group and the exclusive distributor is protected against active selling into his territory or to his customer group by the supplier and all the other buyers of the supplier within the Union, irrespective of sales by the supplier.»

Now, this means that the supplier cannot prohibit the distributor to make active sales **into territories which are not totally exclusive**. So, for example, if the supplier decides to appoint, in a given territory, a distributor, but without granting him an exclusivity, he would in theory not have the right to impose upon other distributors a prohibition to make active sales into such territory[101].

Thus, for example, following a literal application of the principles stated in the Guidelines, all contracts containing the clause whereby the supplier may, as an exception to the exclusivity, make direct sales into the distributor's territory[102], should be considered as non exclusive. This would lead to a paradoxical result: a great part of the existing distribution agreements would not be exclusive and the clauses prohibiting active sales into these «non-exclusive» territories would be ineffective.

It is to be hoped that this formalistic approach will not be followed by the Courts. It appears far more reasonable to adopt a notion of «exclusivity» which includes also situations where the exclusivity is not absolute.

As regards the clause prohibiting active sales, a rather simple solution should be a clause like that of Article 11, Alternative A of the IDI Distributorship contract, which reads as follows:

> «The Distributor agrees not to actively promote sales (e.g. through advertising, or by establishing branches or distribution depots) into the territories reserved by the

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101 Moreover, if he nevertheless does so, because he has overlooked this problem, the distribution agreement would in principle not fall under the block exemption because, by forbidding active sales to an extent exceeding what is admitted under Article 4 (b), the parties would have agreed upon a «hardcore» clause.

102 See for example Article 16.3 of the balanced IDI distribution model: «**(Direct sales by the Supplier).** As an exception to Article 16.1 above, the Supplier may directly contact customers of the Territory and make direct sales to such customers, provided he informs the Distributor in advance. The Distributor shall be entitled on such direct sales to a commission, at the rate indicated in Annex B-2».

> Supplier exclusively for himself or allocated by the Supplier to other exclusive distributors or buyers.»

The advantage of this clause is that parties need not to define which are the exclusive territories or customer groups: the clause as such complies with the Regulation, but of course the supplier cannot impose restrictions on active sales towards territories which are not exclusive.

A critical aspect of this solution is that, unless the distributor is given from time to time an updated list of the territories which have been allotted exclusively to others, he cannot know which are the territories where the prohibition of active sales is actually applicable. It is unlikely that the supplier should take the initiative to give this information to his distributors, since nothing in this sense is foreseen in the Regulation. However, should the supplier give the distributor incorrect information (showing certain territories to be exclusive where they are not), this would imply a violation of Article 4 and, consequently, the loss of the exemption for the distribution agreement.

6.2.2 The criteria for distinguishing between active and passive sales

Another difficult point is the actual application of the distinction between active and passive sales.

As said before, no limitation can be imposed upon the distributor with respect to «passive» or «unsolicited» sales.

As regards the notion of active sales, the Commission specifies in § 51 of the Guidelines that

> «'Active' sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific costumer group or costumers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory is considered active selling to that customer group or customer in that territory. .»

On the contrary, the Commission considers as passive sales

> « ... responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotions are considered a reasonable way to reach such costumers if it would be attractive for the buyer to undertake these investments also if they would not reach costumers in other distributors' (exclusive) territories or customer groups.»

These statements, if taken literally, may excessively widen the notion of passive sales. Imagine, for example a Hungarian producer having appointed distributors in Germany and in France but not in Belgium; according to the BER, the German distributor is free to actively sell in Belgium, since this country has not been allocated to an exclusive distributor. Now, if the German distributor launches an advertising campaign on reviews written in French and sold in Belgium and in France, he could pretend that he is not effecting active sales in France because he is using a reasonable means for reaching Belgian customers.

The problem is even more critical if one considers **sales through the Internet**. The Commission expressly takes the view that the use of the Internet is not a form of active sales into the territories of other distributors since it is a reasonable way to reach every customer. According to the Commission[103], the fact that promotion or sales through Internet may have effects outside one's own territory results from the technology, i.e. the easy access from everywhere and cannot be considered as an active sale.

The Commission states in particular the following (§ 52 of the Guidelines):

> «The internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor. The use of a website may have effects that extend beyond the distributor's own territory and customer group; however, such effects result from the technology allowing easy access from everywhere. If a customer visits the web site of a distributor and contacts the distributor and if such contact leads to a sale, including delivery, then that is considered passive selling. The same is true if a customer opts to be kept (automatically) informed by the distributor and it leads to a sale. Offering different language options on the website does not, of itself, change the passive character of such selling».

At the same time, the Commission clarifies that a restriction on the use of the internet by distributors is compatible with Regulation 330/2010 to the extent that such promotion on the internet or use of the internet would lead to active selling into other distributors' exclusive territories or customer groups. An example of active selling on the internet could be, for instance, the online advertisement specifically addressed to certain territories or customers, such as territory-based banners.

A further question regards the supplier's right to impose specific quality standards for the distribution of its products on the internet, in order to safeguard its image, its trademarks, or, more generally, the way of offering its products to the public.

There should be no doubt that the supplier, in its quality of owner of the trademarks characterizing its products may require that distributors who wish to sell the products on the internet comply with precise indications and limitations regarding their presentation on the website. It is however unlikely that

[103] Guidelines, § 52.

the the supplier go so far as to prohibit any sales through internet, not even in cases where a sale without a relation with a physical person as seller would not be advisable.

The Court of Justice recently ruled on this aspect in the *Pierre Fabre*[104] case, concerning the distribution of cosmetic products.

The case concerned the imposition by a manufacturer (Pierre Fabre Dermo Cosmetique), in the context of a selective distribution system, the requirement upon all its authorised distributors that sales of the products in question were to be made in a physical space, in the presence of a qualified pharmacist, with the exclusion of internet sales.

The Court however considered that in the absence of a objective justification (which had not been proved in the case at issue, since there was no evidence that the products could not be sold without the presence of a qualified pharmacist) a prohibition to use the internet amounted to breach of Article 101(1). In particular, the Court concluded as follows:

> «In the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a **restriction by object** within the meaning of that provision where, following an individual and specific examination of the content and objective of the contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not **objectively justified**»

Consequently, it is advisable to avoid any clause prohibiting the distributor to establish Internet sites and to sell through internet[105].

The supplier may however exercise a certain control over the use of his trademarks by the distributor and require the respect of certain quality standards. This issue has been dealt with by the Commission in the Guidelines, where it has stated (§ 54) the following:

> « ... However, under the Block Exemption the supplier may require quality standards for the use of the internet site to resell its goods, just as the supplier may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general. This may be relevant in particular for selective distribution. Under the Block Exemption, the supplier may, for example, require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system. Subsequent changes to such a condition are also possible under the Block Exemption, except where those changes have as their object to directly or indirectly limit the online sales by the distri-

[104] Court of Justice, 13 October 2011, Case C-439/09, *Pierre Fabre Dermo Cosmétique SAS v Président de l'Autorité de la Concurrence and Ministre de l'Economie, de l'Industrie et de l'Emploi.*

[105] See also the decision of the French competition authority (Autorité de la concurrence) of 12 December 2012 (Bang & Olufsen) which decided that an absolute prohibition of Internet sales by distributors in a selective distribution system amopunts to a breach of Article 101 TFEU. This decision was confirmed by the Paris Court of Appeals on 13 March 2014 (case N. 13/00714) which however reduced the fine of 900.000 € to 10.000 € on the grounds that *"the applicable law in the area were not clearly settled"*.

> butors. Similarly, a supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the distributors' use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.»

Another interesting option may be that of setting up a global website, managed by the supplier, on which all the distributors would appear.

6.2.3 Export prohibitions and similar practices

The distributor's right to carry out passive sales implies the unlawfulness of measures which the supplier might take in order to prevent the distributor from selling to customers outside his territory.

This implies, first of all, the unlawfulness of clauses imposing upon the distributor an obligation not to export the contractual products or not to sell them to purchasers who intend to resell them outside his territory.

If the supplier himself undertakes not to sell the products to purchasers who intend to resell them in the exclusive territory of other distributors, such a clause should in principle be exempted by Regulation 330/2010 (*supra,* § 6.1). However, since such a clause might, in its actual application, amount to a prohibition on resale imposed upon the purchaser, it is advisable not to include it in contracts concerning the European Union.

As regards indirect means intended to prevent passive sales outside the territory by purchasers (distributors) the principles developed by the Court of Justice before Regulation 330/2010 should apply without limitations. A typical means for obtaining this result is to fix different prices for products intended for the home market of the distributor and for products to be exported outside such market: if a higher price (corresponding to the price level which exists abroad) is fixed for products to be exported, the purchaser will have no interest to sell the products outside his territory and possible passive sales will be prevented[106].

Another indirect tool is that of establishing guarantee and after-sale systems which do not apply to goods that have been the object of parallel imports. In the past the Commission has stated in several occasions that the guarantee must be available without any discrimination between products sold by the «official» network and products introduced through parallel imports[107], which

[106] Commission's decision *Pittsburgh Corning Europe* of 23 November 1972, OJ 1972 L 272, 35; Commission's decision *Distillers* of 20 December 1977, OJ 1978, L 50, 16. The same result can be obtained by granting a bonus to the purchaser who shows that he has not exported the products: *Commission's decision Sperry New Holland* of 16 December 1985, OJ 1985, L 376, 21.

[107] See Commission's decision *Zanussi* of 23 October 1978 (OJ 1978, L 322, 36) followed by several informal decisions.

position has been confirmed by the Court of Justice in the case relating to «Swatch» watches[108].

Under Regulation 330/2010 such practice should in principle be exempted, since it does not fall under the hard-core restrictions. However, the Commission takes the view that an indirect territorial restriction infringing Article 4 (b) of Regulation 330/2010 may result:

> « ... from the supplier not providing a Union-wide guarantee service, under which normally all distributors are obliged to provide the guarantee service and are reimbursed for this service by the supplier, even in relation to products into their territory.[109]»

It is therefore advisable, also for commercial reasons, to avoid using the guarantee systems for the purpose of protecting the members of the network against parallel imports.

6.2.4 Restrictions regarding customers

Concerning the restrictions regarding to the customers to whom the buyer may resell the goods, Regulation 330/2010 has made clear that it is possible to impose restrictions on active sales to groups of customers which the supplier has reserved exclusively for himself or allotted exclusively to other buyers.

Thus, the supplier may reserve the so called «modern distribution» (supermarkets, etc.) to himself or to a distributor specialized in dealing with this channel, provided this is done on an exclusive basis. If this is the case, he may require his purchasers not to actively sell to such group of customers, it being understood that they cannot be prevented from making passive sales, i.e. from accepting unsolicited orders from such customers.

The supplier may also reserve the right to directly supply certain customers (reserved or special customers). If he leaves the distributor free to make supplies to them, these customers will not be considered exclusive and no limitation can be imposed in principle upon the distributor (except that the direct supplies made by the manufacturer will not be in breach of the distributor's exclusivity). But he may also reserve such customers exclusively for himself, in which case he will be entitled to impose upon his distributor(s) an obligation to refrain from active sales to such reserved customers.

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108 Court of Justice, 10 December 1985, case 31/85, *Eta Fabriques d'Ebauches* of, ECR 1985, 3933. The Court stated that the clause of a distribution contract whereby the supplier undertook to give a guarantee to final users only on products sold by the official network (and not on those supplied by parallel importers) infringed Article 101(1). The Court has come to a different conclusion with respect to a selective distribution network in the case *Metro Cartier* (judgment of 13 January 1994, ECR 1994), affirming that within a selective network complying with Article 101(1) the producer may refuse to give the guarantee for products which have not been marketed through authorized resellers.

109 Guidelines, § 50. This statement is not very convincing. The Commission is probably trying to remedy a gap which was left in the block exemption. It is in fact difficult to sustain that where the supplier does not impose upon his purchasers an obligation to make the guarantee available to any purchaser, he infringes the provision prohibiting agreements which directly or indirectly have as their object «the restriction of the territory into which [...] the buyer may sell the contract goods ...».

If the supplier wants to make sure that the distributor may not actively sell to the special customers reserved to him, clause 16.4 of the balanced IDI distribution agreement could be modified as follows (amendments are underlined):

> **16.4 (Special Customers).** The Supplier retains the exclusive right to deal directly with the special customers listed in Annex B-3 (hereafter called «Special Customers»). The distributor shall refrain from any active sales to such customers. In respect of the sales to such customers the Distributor shall be entitled to a commission, at the rate indicated in Annex B-3.

6.2.5 Clauses «channelling» distribution

A further issue is that of determining in which cases the supplier may «channel» distribution, for instance by limiting the right of his distributors to purchase from other members of the network.

Unless the supplier has set up a selective distribution system (i.e. a system where the members of the network may only sell to end-users or to authorized resellers, being part of the network), where cross-supplies between distributors must remain free[110], clauses whereby the distributor is bound to purchase the contractual products exclusively from the supplier are lawful under Regulation 330/2010. This is due to the fact that exclusive purchase obligations are considered as non-compete clauses[111], which are exempted under Article 5 (a), provided their duration does not exceed five years.

On the contrary, clauses prohibiting the distributor to sell to other distributors or resellers are prohibited because they fall under the prohibition of Article 4 (b).[112]

6.3 Non-compete obligations during the contract

As regards the distributor's non-competition obligation, a distinction should be made between clauses applicable when the distribution contract is in force (dealt with in this paragraph) and clauses relating to the period after contract termination (*infra,* § 6.4).

[110] See Article 4 (d) of Regulation 330/2010 which prohibits «the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade».

[111] See the definition in Article 1 (d) of Regulation 330/2010: «"non-compete obligation" means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year».

[112] It should be noted that, if the supplier establishes a selective distribution network a prohibition to sell to unauthorized resellers will be admitted, but in this case cross-supplies between members of the network must remain free as well as active sales to end users without territorial limitations.

6.3.1 Non-competition clauses in Regulation 330/2010

It should first of all be specified that non-compete obligations are not hard-core restrictions, but only non-exemptable restrictions.

This means that, where the contract contains a non-competition clause which does not comply with the requirements of Article 5, such clause will be ineffective, but the contract as such will be exempted for the rest (if it does not contain hard-core restrictions, of course).

While under Regulation 1983/83 non-compete obligations in distribution agreements were exempted without time limitation, Regulation 2790/1999 and now Regulation 330/2010 states in Article 5 (a) that the block exemption does not apply to:

> « ... any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years».

This time limit actually makes little sense within a typical «integrated» distribution agreement, in the context of which the obligation not to deal with products of competitors of the supplier is an essential element of the agreement[113], which should have the same duration as the contract itself. Moreover, the foreclosure effect which the Commission fears (i.e. the difficulty for the supplier's competitors to enter the market) is almost inexistent for this type of agreement - at least in normal situations - since alternative distributors are easily available.

This aspect has apparently been considered in the Guidelines (§ 161), where, after having said that the combination of exclusive distribution with single branding (i.e. with a non-compete obligation) may have the effect of foreclosing the market to the competitors of the supplier, the Commission concludes by saying that:

> « ... when the combination does not lead to significant foreclosure, the combination of exclusive distribution and single branding may be pro-competitive by increasing the incentive for the exclusive distributor to focus his efforts on the particular brand. Therefore, in the absence of such a foreclosure effect, the combination of exclusive distribution with non-compete may very well fulfil the conditions of Article 101(3) for the whole duration of the agreement, particularly at the wholesale level.

It would therefore seem that in normal conditions (i.e. where no particular risk of foreclosure exists) the non-competition obligation need not be limited to 5 years. And even admitting that the absence of a foreclosure effect should be avaluated under Article 101(3) – thus contradicting the jurisprudence of the Court of Justice, in particular with reference to the Technique Minière case – it would not be necessary to prove the conditions for the application of such arti-

[113] It would indeed be inconsistent with the distributor's primary function, i.e. to promote the supplier's products «against» his competitors, that he could at the same time act for such competitors.

cle (improvement of production and distribution, fair share to consumers, etc.) since this has already been done by the Commission in the Guidelines.

In any case, in order to avoid any risk (and since the five years' limit is not particularly burdensome[114]), it may be advisable - as we will see later in § 6.3.3 - to limit the maximum contract duration to five years.

6.3.2 The definition of the non-compete clause

First of all, we must examine the definition of the non-compete obligation.

According to Article 1 (d) of Regulation 330/2010:

> «"non-compete obligation" means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year».

This means that such notion not only includes the typical obligation of the distributor not to manufacture or market competitive products[115], but also the obligation by the distributor not to purchase from third parties competitive products, as well as the obligation to purchase more than 80% of certain products from the supplier[116].

It is not clear whether the obligation to purchase the contractual products exclusively from the supplier (and not from other sources) falls under the definition of «non-compete obligation» of Article 1 (b). In principle this should be the case considering that such obligation should fall under the

> « ...obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods»

Consequently the clause whereby the distributor must purchase the contractual products exclusively from the supplier will be subject to the 5 years' limit[117].

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[114] At least for the supplier. A distributor might prefer a clause warranting an automatic renewal at the end of the five years' period.

[115] See for example Article 2, § 2 of Regulation 1983/83, which expressly exempted «(a) the obligation not to manufacture or distribute goods which compete with the contract goods; (b) the obligation to obtain the contract goods for resale only from the other party; (c) the obligation to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch, and from maintaining any distribution depot».

[116] This last situation is unlikely to arise within distribution contracts. Although it could be said that contracts whereunder the distributor is free to sell less than 20% of competing products do not fall under the definition (and thus would not need to respect the 5 years' duration limit), there is actually no space for such clauses in distribution contracts. Unlike industrial supply agreements, where this clause intends to warrant a minimum purchase engagement, in distribution agreements the purpose is to avoid that the distributor promotes business also for competitors of the supplier, and such activity is inconsistent with his role, whatever the quantity of products sold.

[117] However, if the distributor is part of a selective distribution network the clause will be prohibited, since in such context cross-supplies must remain free: see Article 4 (d) of the Regulation.

A further interesting point regards non-competition clauses having a wider scope than usual, like, for instance, clauses whereby the distributor undertakes not to sell any product other than the contractual products[118] (distributor dealing with one supplier only) or clauses whereby the distributor must refrain from marketing non-competing products of competitors of the supplier[119], or a non-competition obligation applicable to territories other than the contractual territory[120].

Clauses of this type were not exempted under Regulation 1983/83 because they did not fall under the non-compete clauses exempted by such Regulation because they were beyond the definition of non-competition clauses contained in such Regulation. Since Regulation 2790/1999 and now Regulation 330/2010 establishes the principle that all restrictions which are not expressly prohibited are exempted, it could in theory be argued that these «wider» «non-compete» clauses[121] are automatically exempted since they do not fall under the definition of Article 1 (d). However, such too formalistic approach does not seem reasonable. Since these clauses are more restrictive than those referred to in Article 5 (a), it seems reasonable that they should as well be submitted the five years' duration limit.

6.3.3 The five years' time limit

According to Article 5 (a) the block exemption does not apply to:

> « ... any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years. [...] A non-compete obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration.»

Since the non-compete obligation is an essential clause within a distribution agreement, it is important to make sure that the individual contracts comply with the requirements set out in Article 5 (a). It is indeed rather unlikely that a supplier might be interested to enter into a distribution contract not containing a non-competition obligation of the distributor or where the distributor's non-competition obligation could become ineffective while the contract is still in force.

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118 The purpose of this clause is to make sure that the distributor will devote all his efforts to the promotion of the products of the supplier.

119 This clause may be justified where the fact in itself of acting as distributor of a competitor of the supplier (even if the products marketed are not in competition with the contractual products) would be inconsistent with the performance of the distribution contract (e.g. because of the risk of confidential information being transmitted to competitors).

120 Due to the same reasons set out above. In certain cases the supplier is not willing to accept that his distributor also works for a competitor, even if he does so in a different territory.

121 At least the first two examples. As regards the third one (non competition outside the contractual territory) it probably falls under the definition of non-compete clause.

The only way to comply with Article 5 (a) seems to be that of limiting the duration of the distribution contract as such to a five years' period, after which the parties may enter into a new contract.

This solution complies with the criteria established by the Commission. So it is said in § 66 of the Guidelines that:

> « ...non-compete obligations are not covered by the Block Exemption Regulation when their duration is indefinite or exceeds five years. Non-compete obligations that are tacitly renewable beyond a period of five years are also not covered by the Block Exemption Regulation. However, non compete obligations are covered when their duration is limited to five years or less, or when renewal beyond five years requires explicit consent of both parties and no obstacles exist that hinder the buyer from effectively terminating the non-compete obligation at the end of the five year period.»

A clause complying with Article 5(1)(a) is contained in Article 18, Alternative C of the IDI balanced and supplier-friendly Distribution Agreement, which says:

> « **18.1 (Entry into force and notice for termination).** This contract enters into force on the date of its signature and will continue in force until terminated by either party respecting the terms of notice specified in Article 18.2 hereunder or by mutual consent, but will in any case expire - if not terminated earlier - after five years from its signature.
>
> **18.2 Termination with prior notice).** Either party may terminate this contract by notice communicated to the other party in conformity with Article 20 not less than four months in advance. If the contract has lasted for more than four years, the period of notice will be of six months. The end of the period of notice must coincide with the end of a calendar month.
>
> **18.3 (Duration and renewal).** The maximum duration of this contract is five years and the contract shall definitively expire at the end of such five years' period. The parties shall meet at least three months before the end of the above five years' period and discuss if they wish to enter into a new contract after its expiration.»

It is important to note that the fact of setting a maximum time limit of five years does not mean that the contract is made for a period of five years. So, in the above clause it is clearly stated that it can be terminated at any time by respecting a reasonable term of notice.

The Regulation does not expressly state if a non-compete clause which does not comply with the conditions of Article 5(1)(a) (like a non-competition clause included in a distribution contract made for an indefinite time or with automatic renewal) should be considered as being ineffective from the outset or only at the end of the five years' period. Considering the purpose of the provision, which is to avoid non-compete obligations lasting more than five years, the second alternative should be preferred.

In cases where a non-competition clause appears to be ineffective due to its non-compliance with Article 5(1)(b), there is always the possibility to argue that such clause needs not to be exempted, since it can be considered as complying with Article 101(1) under the jurisprudence of the Court of Justice[122], or that it benefits from the exemption under Article 101(3)[123].

6.4 Non-compete obligations after contract termination

With respect to non-compete obligations imposed upon the distributor for the period after contract termination, Article 5(1)(b) of the Regulation should be considered, which says that the block exemption does not apply to:

> « ... any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services.

However, Article 5(3) provides a number of exceptions by stating that:

> « ... By way of derogation from paragraph 1(b), the exemption provided for in Article 2 shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled:
>
> (a) the obligation relates to goods or services which compete with the contract goods or services, and
>
> (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period, and
>
> (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer
>
> (d) the duration of the obligation is limited to a period of one year after termination of the agreement.
>
> Paragraph 1(b) is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain».

The above provision leaves practically no space for the exemption of post-contractual non-competition clauses in distribution agreements[124], which clauses should in principle be avoided in contracts which may interest the EU.

However, where the supplier's market share does not exceed 15%, and the contract can consequently be considered as not appreciably restricting competition according to the principles contained in the Commission Notice on «Agreements of minor importance» (*supra,* § 2.2.2.), a contract containing a post-contractual non-competition clause (which does not belong to the hard-core

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[122] Especially considering the principles affirmed by the Court in the *Technique Minière* case: *supra,* § 5.2.

[123] See the statement by the Commission in § 161 of the Guidelines: « ... when the combination does not lead to significant foreclosure, the combination of exclusive distribution and single branding may be pro-competitive by increasing the incentive for the exclusive distributor to focus its efforts on the particular brand. Therefore, in the absence of such a foreclosure effect, the combination of exclusive distribution with non-compete may very well fulfil the conditions of Article 101(3) for the whole duration of the agreement, particularly at the wholesale level». This means apparently, that where no risk of foreclosure exists, the non-competition clause is exempted under Article 101(3), without needing to prove the requirements of such provision (improvement of production or distribution, fair share of benefit to consumers, etc.) which are taken for granted by the Commission's statement.

[124] Since the conditions set out for the exemption of such clauses are applicable only to other types of agreements, especially franchising.

restriction which prevent the Commission's *de minimis* notice to apply) would be valid.

6.5 Resale price maintenance

According to Article 4(a) of Regulation 330/2010 the block exemption does not apply to agreements which directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object

> « ... the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.»

Resale price maintenance is a typical hard-core restriction considered by the antitrust authorities as unlawful and not exemptable. Thus the supplier may not agree with the distributor[125] that he must respect a fixed or minimum resale price, directly or by indirect means. As the Commission underlines in the Guidelines (§ 48) resale price maintenance:

> « ...can also be achieved through indirect means. Examples of the latter are an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level.»

An important innovation introduced by Regulation 2790/1999 and maintained in Regulation 330/2010 is that of permitting the supplier to impose maximum resale prices, i.e. to prohibit the distributor to exceed certain prices. This possibility may be important for the supplier who may wish to prevent that the distributor uses the exclusivity for fixing too high prices.

This option has been considered in Article 10.1 of the IDI balanced Distribution model, where the following is said:

> **10.1 (Resale prices).** The Distributor is free to autonomously determine the actual sale price of the Products, with the only exception that he agrees not to sell at prices higher than the maximum resale prices that the Supplier may impose.

The prohibition of resale price maintenance does in principle not extend to **recommended prices**, i.e. resale prices that the distributor is free not to follow, e.g. by granting discounts on such prices. This means that the supplier is entitled to establish and to advertise recommended prices, provided it is clear that the distributor is in no way bound to follow them.

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[125] A unilateral measure by the supplier, like a request not to grant discounts, is not sufficient for the application of Article 101 if it has not been proved that the distributor actually acquiesced the supplier's request: Court of First Instance, 3 December 2003, case T-208/01, *Volkswagen AG v. Commission,* http://curia.eu.int/en.

These principles are set out in Article 10.2 of the balanced IDI Distribution model, stating the following:

> **10.2 (Recommended prices).** The Supplier may indicate recommended resale prices: such prices are not binding and do in no way affect the distributor's right to grant lower prices to his customers.

6.6 Rules applicable to distribution agreements which exceed the 30% threshold

Distribution agreements which exceed the market share threshold indicated in Article 3(1) of the Regulation, i.e. where the parties have a market share of more than 30% (see above, § 3.3.3), **are not block-exempted** and their compliance with Article 101 must be assessed case by case.

As regards «open» exclusive distribution agreements, such as those examined in the *Technique Minière* case[126], it can be reasonably assumed that they do not fall under the prohibition of Article 101(1), at least where there is sufficient competition on the relevant market.

On the contrary, distribution agreements providing a territorial protection of the distributor would in any case be prohibited and not exemptable.

Problems may arise in cases where the supplier has consistent market power and it is possible to foresee anticompetitive effects, especially foreclosure of competitors of the supplier. It should however be reminded that on markets where potential distributors are numerous (and the access of new undertakings to distribution is not subject to particular barriers), the risk of foreclosure is rather low.

D
RULES APPLICABLE TO SELECTIVE DISTRIBUTION CONTRACTS

7. GENERAL CHARACTERISTICS OF SELECTIVE DISTRIBUTION CONTRACTS

7.1 What is selective distribution?

Through selective distribution contracts a producer establishes a preferential relationship with a number of retail outlets, selected on the basis of such characteristics as the producer considers to be necessary for the optimal sale of his products.

This type of agreement is used especially when the producer wishes to have a direct control over the way his products are distributed by retailers. This is particularly the case with respect to high technology products (where it is important that the sale to the end-user is made by technically qualified person-

[126] *Supra,* § 5.2.

nel) and luxury products (which must maintain a high level image which can be warranted only if they are sold in shops of a certain standard).

Since the purpose of a selective network is that the products are only sold in the selected outlets, the establishment of such a network by its very nature implies that the members of the network must undertake not to sell the products to traders who do not belong to the selective distribution network. This is the main issue which gives rise to possible conflict with the rules of competition, as we will see hereafter.

Selective distribution is normally used at the same time by several competing manufacturers, which means that the distributor will offer his customers a choice of different brands[127]. This is a fundamental difference with respect to franchising, which normally implies the obligation to sell only the franchisor's brand.

As said before, the main reason for establishing a selective distribution is to make sure that the products are sold in compliance with standards which the producers considers necessary for the most appropriate marketing of his goods. Another reason, which should not be underestimated, is to warrant a strict control over the network of retailers, which is easier if the products are marketed only by traders who have a contractual relationship with the producer.

7.2 Distinctions with respect to different types of selection

The selection of the points of sale admitted into the network can be made according to more or less strict criteria: one extreme is to admit all those who comply with certain characteristics; the other extreme is to have only a limited number of outlets determined on the basis of a discretionary choice.

The competition authorities developed in the past the following distinction based on the different types of selection:

(a) *Qualitative selection based on purely objective criteria* (simple qualitative selection). This selection criterion implies that the producer is willing to accept in the network any retailer who complies with purely qualitative requirements (such as technical qualification of the reseller and his equipment, suitability of the premises, etc.).

(b) *Qualitative selection with additional obligations of the retailer* (qualified qualitative selection). In this case the outlets complying with the qualitative criteria are required to accept further obligations of commercial nature (such as the obligation to purchase minimum quantities of goods or to keep a full range of products). In this way the range of the authorized retailers is reduced to those who are willing to accept the additional obligations.

[127] However, particularly within selective distribution of luxury products, the supplier may require that the retailer does not sell products of a lower range which may adversely affect the image of its own brand.

(c) *Quantitative selection.* Quantitative selection occurs when the producer decides to limit the number of retailers for a given territory. This is the case when the producer grants exclusive rights to his resellers (so that each of them is the only one in a given territory), or when the supplier decides unilaterally which retailers to appoint and which not. In this case the extension of the network is furthermore reduced; another consequence is that since the admission in the network (and exclusion from the network) is discretionary, the degree of dependence of the members from the supplier increases.

8. THE COMPETITION RULES APPLICABLE TO SELECTIVE DISTRIBUTION

Since the rules applicable to selective distribution have been developing through the years, it is important to give a general overview of such developments before concentrating on the situation resulting from the block exemption regulation 2790/1999, and now regulation 330/2010.

8.1 The principles established by the Commission and the Court

The principles resulting from the case law are mainly based on the distinction between the different types of selection of the members of the network.

If the access to the network is open to any retailer having the characteristics (technical qualification of the reseller, his personnel and equipment, suitability of the premises, etc.) prescribed by the supplier, and provided the selection criteria are justified, the agreement will not fall under the prohibition of Article 101. In other words, although these agreements contain a provision (the prohibition to sell to non-members of the network), which is in principle restrictive and should be prohibited under Article 101, the agreement as a whole is considered not to fall under the prohibition of Article 101(1).

This principle, which constitutes in fact an application of the rule of reason (see *supra,* § 3.1.1), has been clearly established by the Court of Justice in the Metro (1) case[128], where it is stated that:

> « ... selective distribution systems constitute [...], together with others, an aspect of competition which accords with article 101(1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises an that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.»[129]

However, the above applies only in case of «simple» qualitative selection.

On the contrary, if the reseller is required to undertake additional promotional obligations, like minimum purchase obligations, keeping a full range of prod-

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[128] Judgment of 25 October 1977, *Metro v. Commission,* case 27/76, ECR 1977, 1353.

[129] § 20 of the Judgment.

ucts, etc. (**«qualified» qualitative selection**), the selective distribution contracts will fall under the prohibition of Article 101(1) but will normally be exemptable under Article 101(3).

Finally, when the selection is effected in such a way as to limit the number of resellers in a given territory, in order to warrant to each of them a sufficient turnover (**quantitative selection**) the respective agreements will fall under the prohibition of Article 101(1) and must be considered as non-exemptable under Article 101(3).

As a general rule a selective distribution network can be considered lawful only if the **sale between members** of the network is free. In other words, while it is possible to prohibit sales to traders who do not belong to the network, the members must have the possibility to sell to other members without limitations.

8.2 Selective distribution under Regulation 330/2010

With the enactment of Regulation 2790/1999, and now under Regulation 330/2010, the status of selective distribution agreements has been substantially modified.

On the one hand, the Regulation has included selective distribution contracts in the block exemption, while in the past these agreements – when falling under Article 101(1) – were not block-exempted and could only be exempted individually.

On the other hand, some basic principles developed in the past have been substantially changed. Thus, for example, agreements implying a quantitative selection of the retailers, which in the past would not be exempted individually, are now exempted by the Block Exemption Regulation.

8.2.1 The special rules applicable to selective distribution

The basic idea of Regulation 330/2010 is to state, as far as possible, rules which apply in a uniform way to all vertical agreements defined in Article 2, § 1, of such Regulation. Only exceptionally the Regulation states special rules for specific types of agreements. This is the case for selective distribution agreements, which are defined in Article 1.1.e), as

> « ... a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors».

It is likely that this general definition covers any type of agreement having the above characteristics, even if it is not a typical selective distribution agreement, like franchising agreements containing an obligation by ther franchisee not to sell to traders not belonging to the network (see *infra,* § 10.3.6).

Regulation 330/2010 expressly authorizes, in Article 4(b)(iii),

> « ... the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system».

In this way the Regulation authorizes, as an exception to the prohibition of the hardcore restriction consisting in «the restriction [...] of the customers to whom the buyer may sell the contract goods ...» the restriction which characterizes selective distribution agreements (i.e., the prohibition to sell to non members of the distribution network), provided, however, that a number of additional prescriptions are respected.

In this way the Commission has been able to establish a special system of rules for selective distribution agreements, characterised by the following additional requirements, which will be examined in detail hereafter:

- the members of a selective distribution network remain free to sell to unauthorized dealers in territories where the supplier does not operate a selective distribution system.
- distributors belonging to the selective distribution network operating at the retail level must be free to make active and passive sales to end-users, except that they may be prohibited from operating out of an unauthorised place of business (Article 4(c));
- cross-supplies between distributors within a selective distribution network, including those between distributors operating at different levels of trade, must remain free (Art. 4(d));
- the parties may not agree upon any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

8.2.2 Products to which selective distribution may apply

According to the jurisprudence of the Court of Justice, the benefit of the more favourable rules developed for selective distribution can be applied only with respect to products for which the recourse to specialized trade (and consequently the selection of distributors having certain characteristics) is objectively justified.

Regulation 330/2010, on the contrary, does not contain this limitation, which means that it exempts selective distribution networks independently of the type of product distributed. In other words, if a producer decides to market through a selective distribution network products for which distribution through a specialized channel is not justified, he is free to do so, provided the specific provisions of the Regulation applicable to selective distribution are respected[130].

Of course, this applies only to contracts covered by the block exemption: consequently, in case the 30% market share threshold is exceeded (*supra*, § 3.3.3), the more restrictive principles set out by jurisprudence will in principle apply.

Moreover, the establishment of a selective distribution network for products for which this is not objectively justified will benefit from the block exemption, but might provoke a subsequent intervention of the antitrust authorities aiming at withdrawing such benefit (under Articles 6 and 7 of the Regulation).

8.2.3 Selection criteria which may be used

With respect to this issue, Regulation 2790/1999 (and now Regulation 330/2010) introduced a substantial change with respect to the past.

Under Regulation 330/2010 all selective distribution agreements, including those based on a quantitative selection (which would not be exemptable on the basis of the existing case law) benefit of the block exemption. In fact, the definition of selective distribution only requires the selection to be based on specified criteria, without stating anything more. It should therefore be obvious that parties are free to include as additional criterion a limitation of the number of outlets.

As expressly stated in the Guidelines (§ 176),

> « ... Qualitative and quantitative selective distribution is exempted by the Block Exemption Regulation as long as the market share of both supplier and buyer each do not exceed 30 %, even if combined with other non-hardcore vertical restraints, such as non-compete or exclusive distribution, provided active selling by the authorised distributors to each other and to end users is not restricted.»

This means that also networks based on a quantitative selection are now lawful, provided the additional requirements of the Regulation (including in particular the freedom of active sales to end-users), as we will see in the next paragraph.

8.2.4 Restrictions which may (or may not) be imposed upon the distributor

First of all the Regulation exempts the obligation imposed upon the distributors to refrain from selling to non authorised distributors, which is actually the characteristic obligation of a selective distribution system.

However, at the same time Article 4(d) prohibits

> « ...the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade ...».

[130] See Guidelines, § 176: «The Block Exemption Regulation exempts selective distribution regardless of the nature of the product concerned...»

This means that the members of the network must be left free to sell the products to other members, and this not only at the same level (retailer to retailer) but also at different levels (e.g. wholesaler to retailer o retailer to wholesaler). The purpose of this provision is clear: the Commission is willing to authorize distribution within a closed network of authorized distributors, but at the same time it wishes to make sure that the products can at least circulate within the network itself, in order to warrant a minimum of free circulation within the common market.

Furthermore, Article 4(c) states that the exemption does not apply to:

> «the restriction of active or passive sales to end-users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment».

In this way the Regulation introduces for retailers belonging to a selective distribution system a stricter rule than that provided generally on the basis of Article 4(b), first slash.

While the general rule is that the distributor may be prohibited from *actively* selling into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer (see *supra*, § 6.2.1), the retailers of a selective distribution network must remain free to sell, even actively, to end-users outside their territory.

This means that retailers of a selective distribution network are free to actively promote sales throughout the European Union, provided they sell to end-users or to members of the network.

The only limitation which may be imposed upon them is the obligation to sell the products only from their authorised place of establishment. This limitation considerably reduces the impact of the freedom of active sales to end-users.

However, the progress of Internet has changed the picture and it is now possible, by promoting the products through Internet, to reach end-users everywhere, although operating out of an authorised place of establishment (i.e. the retailer's shop). We will examine this issue in in the next paragraph.

Finally, Regulation 330/2010 admits the possibility of imposing upon the distributor an obligation to refrain from selling competing products, an obligation which was not considered as admissible within selective distribution in the past[131]. This change is probably due to the decision of the drafters of the Regulation to extend the application of the provisions on selective distribution to

[131] In fact, a characteristic feature of «typical» selective distribution networks is that the distributors are multi-brand shops which sell a range of competing products. It is likely that one of the reasons justifying the relatively permissive policy followed by the antitrust authorities in the past was precisely the existence of inter-brand competition within the retail stores bound by selective distribution agreements.

franchising contracts, where the absence of a non-compete clause is not conceivable.

8.2.5 Internet sales by members of a selective distribution system

The fact that the distributor of a selective distribution system must remain free to sell, even actively, to end-users through Internet, provided he does so «from his place of establishment», does not mean that such freedom is unlimited.

In fact, if there are certain requirements for becoming member of the network (technical expertise of the seller, exclusive image of the location, pre-sale assistance, etc.), these should in principle be complied with also when selling through Internet. However, this does not mean that, when the producer imposes requirements which are incompatible with Internet, this would automatically justify a general prohibition to sell through the Internet[132].

The Commission has stated, in two cases[133], that the retailers must be free, at certain conditions, to sell through Internet.

On the same line, the French *Conseil de la Concurrence* has specified in a detailed way, in the context of several cases, which limits may be imposed by the producers upon the members of the network with respect to their sales through Internet[134].

Also the Danish Competition Authority dealt with a case where a chain of perfumery and chemist shops prohibited its members to sell through Internet. Due to the Intervention of the Authority, the prohibition was replaced by rules fixing standards (regarding protection of image, customer service, loyalty to the chain) which the members must observe in establishing their webpages and webshops.

As already mentioned, also the Court of Justice confirmed this tendency in the Pierre Fabre case, in which the Court considered the prohibition to sell through the internet as a restriction of competition falling under article 101(1). It should therefore be concluded that an outright prohibition of sales through the Internet, even if apparently justified by the aim of warranting an adequate pre-sale service, is a restriction of competition which excludes the selective distribution contract from the benefit of block exemption. In particular, the Court pointed out that such restrictions on the sales on internet, in order to be considered out

[132] Thus, for instance, where the members of the network must provide pre-sale assistance and advice through qualified personnel (which would in principle require that the customer visits the shop), this problem can be overcome through other means of communication (hot-line, visual presentation, etc.): see for example the Court of Justice decision, already quoted, of the 13 October 2011, Pierre Fabre Cosmetique. .

[133] Notice IP/02/916 of 24 June 2002, *B&W Loudspeakers,* and Notice IP/01/713 of 17 May 2001, *Yves Saint-Laurent.*

[134] See the following cases: *Festina France* (decision 06-D-24 of 26 July 2006); *Matériels Hi-fi et Home cinema* (decision 06-D-28 of 5 October 2006); *Distribution des produits cosmétiques et d'hygiène corporelle* (decision 07-D-07 of 8 March 2007).

of article 101, must have an **objective justification**. Such justification has to be evaluated in light of the content and objective of the clause, as well as of the legal and economic context[135].

Even if the Court of Justice opened the door for an objective justification allowing the total ban of internet sales, such exception must be interpreted narrowly. It is then advisable not to prohibit the total use of internet sales: a better solution could be to require the websites to fulfil minimal standards in order to protect the products' name, reputation, image, etc…

E
RULES APPLICABLE TO FRANCHISING CONTRACTS

9. THE DEVELOPMENT OF EC COMPETITION RULES ON FRANCHISING

The rules of competition regarding franchising agreements have been developing during a long period which begins with the Pronuptia judgment of 1986.

This evolution must be taken into account for a better understanding of the present situation, under Regulation 330/2010, which will be examined in more detail in § 10.

9.1 The Pronuptia judgment

The Pronuptia judgment of the Court of Justice[136] is still of basic importance because it establishes a number of principles which are the basis for determining which clauses in a franchise contract may be considered as not falling under the prohibition of Article 101(1).

Since the statements made by the Court prevail over possible rulings by the Commission, we will proceed to a detailed analysis of the main issues dealt with in such judgment.

First of all, it is important to specify that the Pronuptia judgment only refers to « … distribution franchises, under which the franchisee simply sells certain products in a shop which bears the franchisor's business name or symbol»[137], characterized by the fact that the franchisor grants to the franchisee certain business methods (know-how) and the right to benefit from the reputation of the franchisor's business name[138].

[135] Court of Justice, 13 October 2011, Case C-439/2009, Pierre Fabre Cosmetics, Para 35

[136] Court of Justice, 28 January 1986, case 161-84, *Pronuptia de Paris v. Pronuptia de Paris Irmgard Schillgallis,* ECR 1986, 353.

[137] Pronuptia, § 13.

[138] Pronuptia, § 15.

This means that the principles set out in the Pronuptia judgment do not necessarily apply to situations which are different from those specified in it, like, for example, service franchising or forms of franchising based exclusively on the image of the network (but without transfer of know-how).

The reasoning followed by the Court is based on the assumption that, since franchising

> « ...gives traders who do not have the necessary experience access to methods which they could not have learned without considerable effort and allows them to benefit from the reputation of the franchisor's business name»,

such distribution system does not in itself interfere with competition and consequently does not fall under Article 101[139].

On the basis of these considerations the Court decided to consider as not being in breach of Article 101(1) the contract provisions which are necessary for attaining the following two fundamental goals:

- on one side to warrant that the **know-how** can be transferred to the franchisees in a way that does not benefit the franchisor's competitors (which justifies in particular the non-compete clause and the prohibition to transfer the shop).
- on the other side, to allow maintaining the **uniformity and reputation** of the network (which justifies a number of additional obligations which will be examined hereafter).

In this way, the Court has made a wide use of the rule of reason approach, through a balancing within Article 101(1), instead of Article 101(3), of the positive and negative effects of several restrictive clauses. This is very important because such clauses remain out of the reach of the prohibition of Article 101(1) and need not to be exempted by virtue of Article 101(3).

We will examine in the following paragraphs the clauses to which the prohibition of Article 101(1) does not apply (§ 9.1.1) and thereafter the clauses which fall under the prohibition (§ 9.1.2).

9.1.1 Clauses not subject to the prohibition of Article 101(1)

The Court has listed and analyzed in detail seven types of potentially restrictive provisions which may be considered, in the context of a franchising contract, as not falling under Article 101(1).

[139] Pronuptia, § 15. The Court assumes that there must be the transfer of a business method (and thus of commercial know-how) and the grant of the right to use a trademark or symbol permitting the franchisee to benefit from the reputation linked to such symbol. This means that contracts which lack these characteristics (even if frequently called franchising) cannot benefit from the principles stated by the Court. It is however not clear to what extent these two features must be present and especially if the principles of Pronuptia apply to franchising agreements where the image of the network (and of the goodwill linked to such image) prevails over the «method» transferred to the franchisee.

A) Non-compete obligation

The Court affirms the compatibility with Article 101(1) of:

> « ... a clause prohibiting the franchisee, during the period of validity of the contract and for a reasonable period after its expiry, from opening a shop of the same or a similar nature in an area where he may compete with a member of the network ...»[140]

This clause covers the obligation not to engage, during the contract and after its end (provided only for a reasonable period) in competing activities, like opening shops belonging to networks which compete with the franchisor or selling products of competitors of the franchisor, in territories where they might find themselves to compete with other members of the network.

The precise meaning of this statement is disputable.

At first sight it would seem that the main concern of the Court is to prevent the disclosure of the franchisor's know-how by prohibiting the franchisee to establish contractual relations with competitors of the franchisor. However, this interpretation is difficult to reconcile with the territorial limitation of the non-compete obligation, since the territory where the franchisee is carrying out his activity for a competitor is irrelevant with respect to this issue[141].

Actually, it is more likely that the Court intended to protect the franchisor against the risk that customers might be diverted in favour of his competitors; in fact, when the Court says, at the end of the paragraph, that this obligation «is intended to prevent competitors from indirectly benefiting from the know-how and assistance provided» by the franchisor, it would seem that it does not refer primarily to the know-how as such, but more generally to the goodwill developed through the know-how. Only this interpretation can explain why the prohibition of a competing activity should be limited to the territory of other franchisees and for a limited duration[142].

B) Obligation to sell only the products supplied by franchisor

In the framework of the need to warrant full control over the uniformity of the network the Court holds that the franchisor should be granted the right to control the range of products offered by the franchisee, in order to make

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140 Pronuptia, § 16.

141 The same consideration applies to the time limitation of the non-compete obligation: if the purpose were to protect the confidentiality of the know-how, the obligation should last until the know-how remains confidential.

142 In fact, the risk that the franchisee may transfer the goodwill linked to the shop to a competitor if he enters into his network arises mainly in the period which immediately follows contract termination.

sure that the customers can find in any franchised shop goods of the same quality[143].

After having considered that it may be impractical, in certain cases (like, for instance, for the distribution of fashion articles) to lay down objective quality specifications, the Court states that

> « ... in such circumstances a provision requiring the franchisee to sell only products supplied by the franchisor or by suppliers selected by him may be considered necessary for the protection of the network's reputation. Such a provision may not however have the effect of preventing the franchisee from obtaining those products from other franchisees.»[144]

This means that, according to the Court, it is admitted, without breaching Article 101(1) - at least when a control over the quality of the products sold would be impractical - to prohibit the franchisee not only to sell competing goods, but also to determine the range of the products sold in the outlet, by excluding any products other than those of the franchisor.

C) Prohibition to transfer the shop

The Court has also recognized the lawfulness of

> « ... the franchisee's obligation not to transfer his shop to another party without the prior approval of the franchisor».[145]

This obligation is justified, according to the Court, in order to prevent competitors from indirectly benefit from the know-how and assistance provided.

If we coordinate this obligation with the prohibition «of the assignment by the franchisee of his rights and obligations under the contract without the franchisor's approval», considered in § 20 of the judgment, it would seem that the Court intended primarily refer here to the transfer of the premises, i.e. of the location which in the eyes of the customers is closely linked to the image of the network.

D) Obligation to apply the business methods developed by the franchisor

The «franchisee's obligation to apply the business methods developed by the franchisor and to use the know-how provided»[146] represents the logical consequence of the uniform character of the network: although not expressly specified in this context, it is obvious that this does not go so far as to cover obligations which would be in breach of the rules of competition (such as, for example, the obligation to respect resale prices).

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143 Pronuptia, § 21: «By means of the control exerted by the franchisor on the selection of goods offered by the franchisee, the public is able to obtain goods of the same quality from each franchisee».

144 Pronuptia, § 21.

145 Pronuptia, § 16.

146 Pronuptia, § 18.

E) Obligation to sell only in the franchised premises

This is a further limitation which may be imposed upon the franchisee.

In particular the Court affirms the lawfulness of

> « ...the franchisee's obligation to sell the goods covered by the contract only in premises laid out and decorated according to the franchisor's instructions, which is intended to ensure uniform presentation in conformity with certain requirements»[147],

as well as of the obligation not to transfer his shop to another location without the franchisor's approval.

This means that the franchisor can require his franchisees:

(a) to set up and maintain sales outlets complying with the characteristics (location, furniture, etc.) specified by him, and

(b) to sell the products only in such authorized outlets.

As regards the first point, it would seem that it implies a prohibition to open new shops without the franchisor's approval. In fact, if the transfer of the location requires the franchisor's consent, the same should also apply in case of creation of a new outlet (since the franchisor should be entitled to verify the conformity to his standards of the location and other characteristics). However, this issue is disputed because of the apparent contradiction with the statements contained in § 24 of the judgment (*infra*, § 9.1.2).

It should be noted that the Commission has apparently taken a more restrictive view when it said in the decision Yves Rocher of 1986[148] that the franchisor is entitled to refuse its consent to the transfer of the shop only in case of valid reasons regarding the reputation of the network.

As regards the second point, it is interesting to underline that the Court refers to the franchisee's obligation to sell «in» the premises and not «out of» the premises. This aspect may be of considerable importance for the purpose of establishing the franchisee's right to sell through Internet *(infra,* § 10.3.8).

A further interesting point, which has not been expressly considered in the Pronuptia judgment, regards the possible prohibition to sell to traders outside the franchising network (i.e. the characteristic obligation of selective distribution). Actually, the franchise agreement of Pronuptia did not contain such an obligation, although it would seem that the obligation to sell only in the shop specified in the contract (see § 6(C) of the judgment) is based on the assumption that the products would be sold only to end-users. It could therefore be argued that the obligation to sell only in the

[147] Pronuptia, § 19.

[148] Decision of 17 December 1986, in OJ 1987, L 8, 49.

shop could also cover a possible obligation to sell only to end-users, which would as well fall under the rule of reason.

F) Prohibition to assign the contract and discretionary choice of the franchisees

At § 20 of the judgment the Court affirms the lawfulness of

> « ... the prohibition of the assignment by the franchisee of his rights and obligations under the contract without the franchisor's approval»

since this prohibition

> « protects the latter's right freely to choose the franchisees, on whose business qualifications the establishment and maintenance of the network's reputation depend.»

This statement on one side confirms the lawfulness of the prohibition to assign the contract (which is quite obvious in the context of an integrated distribution system) and on the other side clearly specifies that a purely discretional choice of the resellers (amounting to the extreme form of quantitative selection[149]) is admissible in the context of franchising, without breaching Article 101(1).

G) Control of advertising by the franchisee

Finally, the Court affirms the lawfulness and compliance with Article 101(1) of a provision

> « ... requiring the franchisee to obtain the franchisor's approval for all advertising [...], so long as that provision concerns only the nature of the advertising»[150]

since such clause is also essential for the maintenance of the network's identity.

9.1.2 Clauses subject to the prohibition of Article 101(1)

The rather permissive approach of the Court in applying the rule of reason to a great number of typical restrictions of franchising contracts is counterbalanced by a very restrictive position taken with reference to the clause which grants the franchisee an exclusive territory, thus protecting the latter against the intra-brand competition of other franchisees.

Since this appears to be a disputed issue, it is appropriate to expressly reproduce the relevant paragraphs of the judgment:

> « 23. It must be emphasized on the other hand that, far from being necessary for the protection of the know-how provided or the maintenance of the network's

[149] Which was traditionally inadmissible within selective distribution systems, before the enactment of Regulation 2790/1999: *supra,* § 8.1 and § 8.2.3.

[150] Pronuptia, § 22. The reference to the nature of advertising means that the franchisor may control the way advertising is carried out without imposing, through this means, restrictions on competition, like resale price maintenance.

identity and reputation, certain provisions restrict competition between the members of the network. That is true of provisions which share markets between the franchisor and franchisees or between franchisees or prevent franchisees from engaging in price competition with each other.

24. In that regard, the attention of the national court should be drawn to the provision which obliges the franchisee to sell goods covered by the contract only in the premises specified therein. That provision prohibits the franchisee from opening a second shop. Its real effect becomes clear if it is examined in conjunction with the franchisor's undertaking to ensure that the franchisee has the exclusive use of his business name or symbol in a given territory. In order to comply with that undertaking the franchisor must not only refrain from establishing himself within that territory but also require other franchisees to give an undertaking not to open a second shop outside their own territory. A combination of provisions of that kind results in a sharing of markets between the franchisor and the franchisees or between franchisees and thus restricts competition within the network. As is clear from the judgment of 13 July 1966 (joined cases 56 and 58/64 Consten and Grundig v. Commission (1966) ECR 299), a restriction of that kind constitutes a limitation of competition for the purposes of article 101(1) if it concerns a business name or symbol which is already well-known. It is of course possible that a prospective franchisee would not take the risk of becoming part of the chain, investing his own money, paying a relatively high entry fee and undertaking to pay a substantial annual royalty, unless he could hope, thanks to a degree of protection against competition on the part of the franchisor and other franchisees, that his business would be profitable. That consideration, however, is relevant only to an examination of the agreement in the light of the conditions laid down in article 101(3) »

The position taken by the Court seems to be that the cumulation of the clause which requires the franchisee to sell the goods only in the authorised shop (which prevents him from opening other shops without the franchisor's consent) on one side with the franchisor's undertaking to grant the franchisee the exclusive use of his business name and symbols in a given territory on the other side, gives rise to a partition of markets between franchisees and between franchisor and franchisees, which falls under the prohibition of Article 101(1) and therefore requires for its lawfulness, to be exempted under Article 101(3).

The likely interpretation of this part of the judgment is that franchising contracts containing a clause which obliges the franchisee to sell only in the franchised shop and not to open further outlets without the franchisor's consent, fall under the prohibition of Article 101(1) where the franchisees are granted an exclusive territory.

This would mean that the «location clause» would be covered by the rule of reason in franchising contracts not providing an exclusive territory in favour of the franchisee. On the contrary, within franchising contracts granting an exclusive territory, the location clause would need to be exempted individually or though a block exemption.

9.2 The block exemption contained in Regulation 4087/88

After the Pronuptia judgment the Commission decided to provide general rules on franchising through the enactment of a block exemption regulation specifically dealing with franchising agreements.

This regulation has provided, a detailed definition o «franchise» and «franchise agreement».

According to Article 1(3)(a) «franchise» means a package of industrial or intellectual property rights relating to trade marks, trade names, shop signs, utility models, designs, copyrights, know-how or patents, to be exploited for the resale of goods or the provision of services to end users.

Article 1(3)(b) defines «franchise agreement» as an agreement whereby one undertaking, the franchisor, grants the other, the franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purposes of marketing specified types of goods and/or services; it includes at least obligations relating to:

- the use of a common name or shop sign and a uniform presentation of contract premises and/or means of transport,
- the communication by the franchisor to the franchisee of know-how,
- the continuing provision by the franchisor to the franchisee of commercial or technical assistance during the life of the agreement.

It is important to note that Regulation 4087/88 contained a rather restrictive notion of know-how, defined as a package of non-patented practical information, resulting from experience and testing by the franchisor, which is secret, substantial and identified.

The Regulation exempted all the typical clauses of franchising agreements (exclusivity, non-compete, ban on active sales outside the territory, location clause, etc.) provided that the freedom of cross-supplies was warranted and the franchisee remained free to fix his resale prices.

Regulation 4087/88 has been replaced by Regulation 2790/1999 and afterwards by regulation 330/2010.

10. FRANCHISING AGREEMENTS UNDER REGULATION 330/2010

Regulation 330/2010 does not provide special rules for franchising contracts.

However, the Commission takes into account that franchising contracts normally imply a license of trademarks and know-how and that consequently certain obligations which are necessary to protect the franchisor's IP rights will be permitted within the context of these contracts.

Furthermore, the Commission apparently considers that the special rules on selective distribution (*supra,* § 8.2.1) also apply to franchising contracts, when the network is «selective», i.e. when the franchisees are bound not to sell to non authorized resellers.

10.1 Special rules for IPR-related obligations

§ 43 of the Guidelines underlines the fact that franchising agreements contain licenses of intellectual property rights relating to trade marks or signs and know-how for the use and distribution of goods or the provision of services.

Consequently the Commission takes a more permissive approach with respect to clauses which are deemed necessary for protecting such rights.

It should however be reminded that Article 1(1)(g) of the BER contains the following definition of know-how:

> «'know-how' means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, 'secret' means that the know-how is not generally known or easily accessible; 'substantial' means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; 'identified' means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality;»

Although this definition is wider than that contained previously in regulation 4087/88, the fact remains that one should verify if the know-how transmitted to the franchisee corresponds to the above definition before deciding that the special rules provided for franchising contracts can apply.

As regards the special principles that apply to contracts implying transfer of know.how and other IP rights, the Commission makes the following general statement in § 44 of the Guidelines:

> «45. The following IPR-related obligations are generally considered to be necessary to protect the franchisor's intellectual property rights and are, where these obligations fall under Article 101(1), also covered by the BER:
>
> (a) an obligation on the franchisee not to engage, directly or indirectly, in any similar business;
>
> (b) an obligation on the franchisee not to acquire financial interests in the capital of a competing undertaking such as would give the franchisee the power to influence the economic conduct of such undertaking;
>
> (c) an obligation on the franchisee not to disclose to third parties the know-how provided by the franchisor as long as this know-how is not in the public domain;
>
> (d) an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant the franchisor, and other franchisees, a non-exclusive licence for the know-how resulting from that experience;

(e) an obligation on the franchisee to inform the franchisor of infringements of licensed intellectual property rights, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;

(f) an obligation on the franchisee not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise;

(g) an obligation on the franchisee not to assign the rights and obligations under the franchise agreement without the franchisor's consent. »

On the basis of these considerations the 5 years time-limit for non-compete clauses does in principle not apply to franchising agreements (since an obligation not to engage for competing brands should be obviously necessary in order to protect the image of the trademark characterising the network). This means that contracts containing non-compete clauses are admissible also for durations exceeding five years[151]. This is clearly said by the Commission in § 220 of the Guidelines, which contains the following sentence:

> « A non-compete obligation on the goods or services purchased by the franchisee falls outside Article 101(1) when the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases, the duration of the non-compete obligation is also irrelevant under Article 101(1), as long as it does not exceed the duration of the franchise agreement itself.»

As regards post-contractual non-compete clauses, Article 5(3)(c) of regulation 330/2010 expressly admits a non-compete obligation for one year after termination of the agreement, provided such obligation is indispensable to protect the know-how transferred by the supplier to the buyer, which provision is especially meant for franchising agreements.

10.2 Applicability of the rules on selective distribution

Regulation 330/2010 has introduced a wide definition of selective distribution which apparently refers to any distribution system, including franchising networks, which are selective, i.e. which require their members not to sell to resellers not belonging to the network.

It would consequently seem that the special rules on selective distribution, examined in § 8.2.4, also apply to «selective» franchising contracts, i.e. to franchising contracts which give rise to a closed network[152].

It has been argued that franchising is different from selective distribution and that consequently the rules provided for selective distribution cannot apply.

Now, it is certainly true that what is normally called selective distribution (i.e. distribution through a closed network of selected retailers, who also sell com-

[151] And the same should apply to contracts for an indefinite time, although this situation is unlikely to arise in practice, since it is mre common to conclude franchising contracts for a fixed term, with or without renewal.

[152] See, for instance, WIJCKMANS, TUYTSCHAEVER, VANDERELST, *Vertical Agreements in EC Competition Law,* Oxford-New York, 2006, 222; VAN BAEL, BELLIS, *Competition law of the European Community,* 5th ed., 2005, 309-310; MENDELSOHN, ROSE, *Guide to the EC Block Exemption for Vertical Restraints,* 2002, 87-89.

peting goods and whose shops are not characterized by a common image) is quite different from franchising, which is characterized by the grant of IPR rights, a common image of the network and other distinctive features.

However, the fact remains that Regulation 330/2010 gives a much wider definition of selective distribution, which apparently intends to cover any system where the products cannot be sold outside a network of resellers selected on the basis of specified criteria. Now, this wide definition of selective distribution applies in principle to any network having these characteristics, including franchising networks which are «selective», i.e. where the franchisees are prohibited to sell the contract products outside the network[153].

It may be argued that the Commission's approach is wrong, because it does not sufficiently consider the special characteristics and needs of franchising, but it cannot be denied that under Regulation 330/2010 - as it stands now - the special rules on selective distribution apply to franchising contracts which fall under the wide definition of selective distribution contained in Article 1 (d).

10.3 The rules governing specific clauses

We shall now verify, with respect to each of the potentially restrictive clauses, how they are regulated within Regulation 330/2010.

10.3.1 Resale price maintenance

Clauses which require the franchisee the respect of resale prices are clearly prohibited. Article 4 (a) of Regulation 330/2010 expressly prohibits

> « ... the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentive offered by, any of the parties.»

A problem may arise when the franchisee does not «resell» the goods, but is acting as a commission agent who sells the goods in his own name but on behalf of the franchisor, a situation that may arise when the franchisee has a consignment stock of products belonging to the franchisor.

In this case, one might argue that the franchisee is to be considered (with respect to the supply of the goods to the end-user) as a «genuine agent» (see above, § 4.2), which would justify the obligation to observe the price specified by the franchisor.

However, one might object that the franchisee (who normally cashes the full price and is bound to pay to the franchisor only the net sum resulting after deduction of his commission) has a high degree of independence which makes him more similar to a franchisee who acts as reseller.

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[153] As regards the other prerequisite, i.e. the selection based on specified criteria, this should be implied generally, since all franchising systems are based on uniform requirements to be observed by the members of the network.

In this case the franchisee should remain free to grant discounts within his commission (*supra*, § 4.3.4).

10.3.2 Territorial exclusivity

Clauses which grant the franchisee an exclusive territory are automatically exempted by Regulation 330/2010 by virtue of the principle that all clauses which are not prohibited are exempted (see, *supra*, § 6.1).

Of course, the territorial exclusivity only means that the franchisor agrees not to appoint other franchisees (or resellers) in the territory granted to the franchisee, but it does not imply a protection of the franchisee against parallel sales. In fact, as we will see hereafter, if the franchising network is selective, franchisees are free to sell, even actively, in the territories of other franchisees (provided sales are made out of their shop), while in the case of non-selective franchising networks, the franchisees can be protected against active sales of other members of the network.

10.3.3 Non-compete obligations during the life of the contract

Non-compete obligations of the franchisee consisting in the obligation to refrain from competitive activities (like establishing sale outlets of its own or with competing networks) and not to sell competing products in the franchised shop, in principle fall under Article 5(a), which provides for a time-limit of five years. However, when the franchising contract implies the grant of IPR rights (as will normally be the case), the time limit will not apply (see *supra*, § 9.3.1).

Also wider non-compete obligations, such as the obligation to refrain from carrying out any other activity than the management of the store, or the obligation not to sell any products other than those of the franchisor, will in principle be exempted on the basis of the rule which says that all restrictions which are not prohibited are exempted.

10.3.4 Non-compete obligation after the end of the contract

As we have seen before, Article 5(3)(c) of regulation 330/2010 expressly admits a non-compete obligation for one year after termination of the agreement, provided such obligation is indispensable to protect the know-how transferred by the supplier to the buyer.

This provision has been introduced mainly for franchising agreements, where it is important to prevent the franchisee engaging in a competing activity after contract termination, which may facilitate the passage to third parties of the goodwill created with the franchise.

It should be noted that the conditions under which the post-contractual non-compete clause is permitted under the block exemption are more restrictive than those provided in the Pronuptia judgment where reference is made to a «reasonable period».

10.3.6 Obligation to sell only out of the franchised store

This obligation is expressly permitted, in the context of selective distribution, by virtue of Article 4(c).

Consequently, in case the rules on selective distribution apply, the franchisee may be obliged to sell out of his place of establishment.

If, on the contrary, the rules on selective distribution do not apply (e.g. in case of an «open» franchising network, where the members are free to sell the products to traders not belonging to the network[154]), the clause should be in any case exempted by virtue of the rule that all clauses which are not prohibited are exempted.

It is in any case important to underline that under the block exemption the franchisee may be obliged to sell «out of» the shop, while under the Pronuptia judgment he may be obliged to sell «in» the shop.

It could therefore be argued that a clause imposing upon the franchisee a prohibition to sell outside the shop (e.g. through Internet) could be considered as not falling under Article 101(1), by virtue of the Pronuptia judgment, but it is unlikely that this position might be shared by the Commission.

10.3.7 Territorial limitations which may be imposed upon the franchisee

As regards this aspect, it is essential to decide whether the rules on selective distribution apply or not.

On the one hand, if the franchising network is an «open» network, where the distributors are free to sell the products to non-members of the network, one should refer to the general rules applicable to exclusive distribution.

In this case:

- the franchisor may impose upon the franchisee a prohibition to make active sales in the territory of other franchisees or reserved to the franchisor, provided such territories are exclusively allocated to other franchisees or to the franchisor;
- the franchisor may require the franchisee to purchase the contractual products exclusively from him or from other undertakings designated by him (thus excluding the possibility of purchasing from other members of the network), provided the 5 years' time-limit of Article 5(3)(c) is respected;
- the franchisor may not prohibit sales by the franchisee to other members of the network (since this would amount to as a restriction of the customers to which the buyer may sell, in breach of Article 4(b)).

[154] This situation may arise, for instance, in the context of franchises of supermarkets.

On the other hand, if the franchise network is a «closed» one, where the franchisees have the obligation not to sell the contractual products to traders who do not belong to the franchised network, the following rules will apply:

- the franchisee must refrain from selling the products to resellers not belonging to the network;
- the franchisee must be free to effect cross-supplies to or from other members of the network, at any level;
- the franchisee must be free to effect active and passive sales to end-users, wherever they are established,
- the franchisee may be obliged to sell only out of the franchised store.

10.3.8 Franchising and Internet sales

As regards sales by franchisees through Internet, a preliminary question would be that of deciding if, and to what extent, the special characteristics of franchising may justify restrictions to the use of Internet.

The Court of justice has recognized in the Pronuptia judgment that

> « ... the franchisor must be able to take the measures necessary for maintaining the identity and reputation of the network bearing his business name or symbol. It follows that provisions which establish the means of control necessary for that purpose do not constitute restrictions on competition for the purposes of article 101(1)[155].

and that

> « ... that is also the case with regard to the franchisee's obligation to sell the goods covered by the contract only in premises laid out and decorated according to the franchisor's instructions, which is intended to ensure uniform presentation in conformity with certain requirements.»

This implies that prohibiting or limiting sales through the Internet by the franchisees may be considered as not implying a breach of Article 101(1), to the extent such prohibitions or limitations are necessary for maintaining the identity and reputation of the network.

The problem is of course to establish what is necessary (and consequently justified) and what is not.

It is certain that a reasonable control over the way products are offered on the Internet, in order to protect the common image of the network, is justified.

On the contrary, it is unlikely that the sale of the products on Internet as such may be prohibited as a means that could harm the reputation of the network.

It is true that in the context of franchising contracts the need to exclude any possibility of sales on the Internet by the franchisee might have a stronger jus-

[155] Pronuptia, § 17.

tification than within selective distribution, at least in cases where it can be shown that the «concept» characterizing that particular franchising system is not compatible with the Internet.

However, considering the recent trend in selective distribution (*supra,* § 8.2.5), where the recourse to Internet has been admitted even when there would have been strong arguments justifying the need of a personal contact with the retailer (and thus the need to sell only *in* the shop), it is likely that the antitrust authorities would follow a similar approach.

It is therefore recommended, in case franchisees wish to promote sales through Internet, that the franchisors take a positive approach to this issue and look for solutions which recognise the right of the franchisees to sell through Internet, but at the same time dictate specific conditions for the use of Internet in order to warrant a common image of all websites of the franchisees and compliance with the standards required by the franchisor[156]

156 Another solution may be that of creating a system managed by the franchisor to which the franchisees can have access.