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Commercial Contracts in Germany

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List-price discount: Yet the main remuneration component is the gross margin, meaning the difference between the distributor's purchase price and his resale price to the (end) customer. The distributor is normally granted a discount on the principal's list price. This difference minus the distributor's costs for administration, warehousing, marketing, logistics and overhead costs constitutes the distributor's net income. The distributor may, to a certain extent, unilaterally influence his net income, as he is generally free to determine the resale price.

Reimbursement of expenses: The principal may grant the distributor allowances for certain services such as marketing, warehousing or the keeping of a repair shop. Where the parties have not agreed on allowances or on reimbursement of expenses such as travel costs, telephone and communication costs, use and maintenance of vehicles, rents or salaries, the principal is not under the obligation to refund these expenses or services.

5. Typical Content of a Distributorship Agreement

The parties to a distributorship agreement are well advised to define the following in their agreement (as minimum content): (i) contractual territory; (ii) exclusivity, if any; (iii) products to be distributed by the distributor (minimum purchase requirement, if any) and prices; (iv) payment conditions including due date; (v) obligations of the parties, in particular, extent of the distributor's marketing and advertising duties; (vi) retention of title; (vii) warranty and liability, including product liability; (viii) competition; (ix) term and termination; (x) termination compensation (possibly exclusion or upfront payment); (xi) return of sample collection; (xii) miscellaneous (confidentiality, severability clause, choice of law, jurisdiction or arbitration clause).

III. Subsidiary and Side Agreements

1. Warehousing Agreement

In practice, the principal often requires that the distributor ensure his delivery capacity by maintaining a warehouse of his own. This can be done by keeping a consignment stock warehouse (*Konsignationswarenlager*) or a self-owned warehouse (*Eigenlager*). Whereas the products in a self-owned warehouse are owned by the distributor, a consignment stock is still located in the vicinity of, or possibly even on, the distributor's premises. The goods, however, remain the property of the principal until such time as the distributor removes them from the warehouse. Maintaining a consignment stock warehouse frequently involves high costs for the principal, whereas in a self-owned warehouse, the liquidity risk remains with the distributor. A consignment stock warehouse agreement ends automatically once the distributorship agreement is terminated.[367] However, the parties can and should expressly stipulate the term and termination options of the warehousing agreement.

[367] *Cf. Manderla*, in: Martinek/Semler/Habermeier/Flohr, Vertriebsrecht, 3rd ed., 2010, §22 no. 33.

2. Agreement to Maintain a Service and Repair Shop

In specific industrial sectors, such as automotive, electronics or the machine-building industry, the principal has a high interest in supplying end customers with sufficient repair services. Therefore, the principal often requires the distributor to maintain a service and repair shop, thereby placing specific requirements on the distributor such as, for example, employee training, uniform appearance or exclusive use of original spare parts. The principal may require that the distributor only use the principal's original spare parts, as the manufacturing principal usually has – for reasons of safety and quality – a legitimate interest in his products being used for the operation of his equipment only.[368]

However, block exemption 461/2010 prohibits a manufacturer of motor vehicles from restricting the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use those parts for the repair and maintenance of motor vehicles, Article 5 (a). Without this prohibition, independent repairers would be fully excluded from using the manufacturer's spare parts, thereby lowering the competitive pressure on the manufacturer to the disadvantage of the consumers. A corresponding agreement between the manufacturer and a supplier of spare parts is void, Article 5 (b).

It is strongly recommended to explicitly regulate the future of the service and repair agreement upon termination of the distributorship agreement. It makes sense to link both the distributorship agreement and the service and repair agreement. Where the parties have failed to regulate the consequences of termination of the distributorship agreement for the service and repair agreement, the future of the service and repair shop largely depends on how closely both agreements were connected with each other. Where it becomes apparent that the distributor relationship was the sole basis for the repair shop, the parties may have a claim for cancellation of the service and repair agreement upon the termination of the distributorship agreement pursuant to § 313 (1), (3) BGB.

IV. Antitrust Law

The principal usually has an interest in coordinating its distributors by assigning them specific territories, specific sectors or buying groups. An entrepreneur is generally free to determine and coordinate its distribution channels. Yet, where the principal's coordination of its distribution channels contains restraints of competition, these agreements between principal and distributor may be prohibited and therefore be void depending on the severity of the restraints and the market strength of the parties (principal and distributor) involved. Thus, the general concept of antitrust law is briefly discussed below insofar as vertical restraints are concerned. Moreover, particular scenarios referring to the business cooperation between the principal (also referred to as supplier or manufacturer here) and its distributors will be discussed below.

1. No Restraint of Competition

Article 101 (1) AEUV stipulates that all agreements which may affect trade between European Member States and which have as their object or effect the pre-

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[368] Guidelines on Vertical Restraints no. 59. Article 5 (1) (a) and Article 1 (1) (d) vertical block exemption 330/2010 need to be regarded.

vention, restriction or distortion of competition within the internal market are prohibited. This covers horizontal competition restraints (referring to agreements between competitors at the same economic level) as well as vertical competition restraints (referring to agreements between undertakings each of which operates at different levels of the production or distribution chain).[369] Therefore, the relationship between the principal (often a manufacturer) and the distributor is generally governed by Article 101 (1) AEUV, as agreements between them may constitute a vertical restraint of competition. Pursuant to Article 101 (2) AEUV, an agreement containing a restraint of competition is generally void unless it is exempted according to Article 101 (3) AEUV. An exemption may apply where the preconditions of a group exemption regulation (block exemption) are fulfilled. If no block exemption (*Gruppenfreistellung*) applies, the preconditions of Article 101 (3) AEUV may still lead to an exemption on a case-by-case basis (*Einzelfreistellung*).

The effects doctrine (*Auswirkungsprinzip*) ensures that European antitrust law only applies to restraints of competition within the European market (internal market). Therefore, where the agreement of a German principal with its Chinese distributor concerning its Chinese territory contains restraints of competition, these restraints are governed by European antitrust law only insofar as the restraints have an effect on the internal European market. For instance, price maintenance agreements may not be governed by European antitrust law where there is no effect on the internal market. However, where – by agreement between the principal and the distributor – a third country's competitor is prevented from entering the European market, there is an effect on the internal market and European antitrust law applies.[370]

2. Legal Consequences

Voidness: Any agreement or decision prohibited pursuant to Article 101 (1) AEUV shall be automatically void unless it is exempted by one of the block exemptions or exempted on an individual basis pursuant to Article 101 (3) AEUV. The ineffectiveness, however, only applies to such provisions of an agreement that either (i) violate Article 101 (1) AEUV or (ii) are inseparably linked to such provisions. Where a separable agreement remains, the question of whether the remainder of the agreement still constitutes a valid contract is subject to national law. In German law, § 139 BGB stipulates that a legal transaction (*i.e.* an agreement) is void if only a part of it is invalid, unless it is to be assumed that it would have been undertaken even without the void part. § 139 BGB is applicable only if doubts exist about the intention of the parties. Where the agreement between the principal and the distributor contains a severability clause or a replacement clause, it must regularly be assumed that the parties wanted to adhere to the contract in the event that a separable part of it was void. There is generally no severability for hardcore restrictions.[371]

Fines: A violation of Article 101 AEUV (either intentionally or negligently) gives the European Commission the right to impose fines on undertakings or associations of undertakings pursuant to Article 23 Council Regulation (EC) No 1/2003. In exercising its power to impose such fines, the European Commission enjoys a

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[369] Article 1 (1) (a) Commission Regulation (EU) No 330/2010 (also referred to as vertical block exemption 330/2010).

[370] See *Rehbinder*, in: Immenga/Mestmäcker, EU-Wettbewerbsrecht, 5th ed., 2012, II. A. no. 32.

[371] Guidelines on Vertical Restraints no. 70.

wide margin of discretion within the limits set by Council Regulation (EC) No 1/2003. The European Commission has issued guidelines on the method of setting fines (2006/C 210/02) that help to apply fines in a consistent manner. The European Commission takes into consideration both the gravity and the duration (number of years) of the infringement. The basic amount is calculated as a percentage of the value of the sales connected with the infringement and multiplied by the number of years the infringement has been taking place. The basic amount calculated may then be adjusted by the European Commission, downwards if it finds that there are mitigating circumstances (*e.g.* negligence, marginal participation, cooperation with investigators, termination of infringement), or upwards in the event of aggravating circumstances (*e.g.* re-offending, refusal to cooperate, role of leader). The maximum fine for each firm shall not exceed 10% of the undertaking's total turnover in the preceding business year.[372] In recent years, the European Commission has imposed individual fines of up to almost EUR 500 million on individual undertakings or corporate groups for violating Article 101 AEUV.

Prohibition order: Pursuant to Article 7 Council Regulation (EC) No 1/2003, the European Commission may require an undertaking to bring infringements of Article 101 AEUV to an end. For this purpose, it may impose on undertakings any behavioral or structural remedies (prohibition orders are common), including corresponding interim measures (Article 8). Furthermore, the European Commission may, by decision, render commitments of undertakings "binding" where an undertaking has made such commitments to bring infringements of Article 101 AEUV to an end (Article 9).

Civil law sanctions: In addition to fines, a cartel infringement may also trigger civil law sanctions if civil law damages occur. This might be the case where competitors have collusively agreed on a cartel and therefore lowered the market price of certain goods. Customers and even competitors might claim damage compensation, injunctive relief or restitution in such cases.[373]

3. Appreciability and *De Minimis* Notice

Restraints of competition that are not appreciable (*spürbar*) do not fall under Article 101 (1) AEUV and are therefore not pursued by the European Commission. The commission notice on agreements of minor importance which do not appreciably restrict competition (*De Minimis* Notice 2001/C 368/07) defines, with the help of market share thresholds, what is not considered as an appreciable restriction of competition (*Bagatellbekanntmachung*) under Article 101 AEUV. This negative definition does not imply that agreements between undertakings which exceed the thresholds will automatically restrict competition. However, it creates a safe harbor for enterprises below the thresholds (in particular for small and medium-sized enterprises). For vertical agreements (*i.e.* agreements between non-competitors), the market share held by each party (*i.e.* or the principal and the distributor) should not exceed 15% on any of the relevant markets in order to benefit from the *De Minimis* Notice. Yet, agreements that fall under the scope of the *De Minimis* Notice may still not be exempted where the hardcore restrictions listed in no. 11 of the *De Minimis* Notice apply. Those hardcore restrictions listed in the *De Minimis* Notice are almost identical to the hardcore restrictions listed in

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[372] On the whole, see Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003 (2006/C 210/02) in particular nos. 19, 27 *et seqq.* and 32.

[373] For details, see *Klusmann*, in: Wiedemann, Kartellrecht, 2nd ed., 2008, § 57 no. 111.

Article 4 vertical block exemption 330/2010. Therefore, the additional benefit of the *De Minimis* Notice is basically the absence of excluded restrictions comparable to Article 5 vertical block exemption 330/2010.

4. Group Exemption Regulations

Pursuant to Article 101 (2) AEUV, any agreement or decision restricting competition within the EU according to Article 101 (1) AEUV is void unless it is exempted either by a block exemption or pursuant to Article 101 (3) AEUV (individual exemption). Hence, with regard to the relationship between the principal and the distributor, the group exemption regulations (*Gruppenfreistellungsverordnungen*) and, in particular, Commission Regulation No 330/2010 of 20 April 2010 on categories of vertical agreements and concerted practices (vertical block exemption 330/2010) are quite important.

a) System of Block Exemptions

Vertical block exemption 330/2010 applies to vertical agreements unless the subject matter of such a vertical agreement falls within the scope of any other block exemption regulation. This means, where a block exemption regulation more precisely regulates the subject matter of a vertical agreement, such block exemption applies. Other block exemptions are, in particular, the block exemption on technology transfer agreements (No. 772/2004), the block exemption on research and development agreements (No. 1217/2010) and the block exemption on agreements, decisions and concerted practices in the insurance sector (No 267/2010). The block exemption on vertical agreements and concerted practices in the motor vehicle sector (No. 461/2010) has expired insofar as the purchase, sale or resale of new motor vehicles is concerned. With effect as of 1 June 2013, vertical block exemption 330/2010 applies to vertical agreements relating to the purchase, sale or resale of new motor vehicles. Block exemption 461/2010, however, is applicable beyond 1 June 2013 insofar as the automotive aftermarket (purchase, sale or resale of spare parts, repair and maintenance services for motor vehicles) is concerned.

b) Scope of Application

Article 2 (1) vertical block exemption 330/2010 provides a general exemption for vertical restraints pursuant to which Article 101 (1) AEUV shall not apply to any vertical agreement containing vertical restraints. However, vertical block exemption 330/2010 combines such exemption with several conditions and, in addition, limits the scope of this general exemption as described below:

Market share threshold: Pursuant to Article 3 (1) vertical block exemption 330/2010, the exemption established in Article 2 vertical block exemption 330/2010 shall apply where (i) the market share held by the supplier (principal) does not exceed 30% of the relevant market on which it sells the contract products or services and (ii) the market share held by the buyer (distributor) does not exceed 30% of the relevant market on which it purchases the contract goods or services either.

Hardcore restrictions: The exemption established in Article 2 vertical block exemption 330/2010 shall not apply to hardcore restrictions (*schwarze Klauseln*). Such hardcore restrictions are (i) certain agreements regulating the resale price (*Preisbindungsklauseln*), (ii) territory or customer protection (*Gebiets- und Kundenschutz*) in certain cases, (iii) restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade,

(iv) restriction of cross-supplies (*Querlieferungsverbot*) between distributors within a selective distribution system and (v) certain spare part distribution restrictions. If there are one or more hardcore restrictions, the benefit of the vertical block exemption 330/2010 is lost for the entire vertical agreement. There is no severability for hardcore restrictions.[374]

Excluded restrictions: Article 5 vertical block exemption 330/2010 stipulates that the general exemption of Article 2 shall not apply to certain non-compete obligations (including certain purchase obligations) which are listed in Article 5 vertical block exemption 330/2010 (*graue Klauseln*). Where a vertical agreement between the principal and the distributor violates Article 5 vertical block exemption 330/2010, the benefit of the block exemption is lost only in relation to that part of the vertical agreement which does not comply with the conditions set out in Article 5 vertical block exemption 330/2010. The rule of severability therefore applies in these cases.[375]

Withdrawal and disapplication: The presumption of legality conferred by the vertical block exemption 330/2010 can be withdrawn by the European Commission. The conditions of Article 101 (3) AEUV may, in particular, not be fulfilled when access to the relevant market or competition therein is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements practiced by competing suppliers or buyers. This may be the case, in particular, where suppliers exercise purely selective distribution.[376] Where parallel networks of similar vertical restraints cover more than 50% of a relevant market, the European Commission shall have the right to declare that the vertical block exemption 330/2010 does not apply to vertical agreements containing specific restraints relating to that market.

Vertical agreements outside the scope: Where the market share threshold is exceeded or vertical block exemption 330/2010 does not apply for any other reason, a restraint of competition may be exempted only pursuant to the case-by-case application of Article 101 (3) AEUV.

c) Check Sequence in Practice

The Guidelines on Vertical Restraints recommend a four-step analysis (No. 110) for the assessment of a vertical restraint. First, one needs to establish the market shares of the buyer and the supplier on the respective markets on which they sell and purchase the contract products. If the relevant market share of each of the parties involved does not exceed the 30% threshold, the vertical agreement is covered by vertical block exemption 330/2010 and therefore generally exempted except where the hardcore restrictions, or excluded restrictions or any other disapplication set out in the vertical block exemption 330/2010 apply. If, however, the relevant market share is above the 30% threshold for the supplier and/or the buyer, it is necessary to assess whether the respective vertical agreement falls within Article 101 (1) AEUV. Only if the vertical agreement falls within Art 101 (1) AEUV is it necessary to examine whether it fulfills the conditions for an individual exemption under Article 101 (3). Despite the recommendation of the European Commission, it might be reasonable to deviate from this analysis procedure where it is difficult and complex to assess the market share of one or both parties. In

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374 Guidelines on Vertical Restraints no. 70.
375 Guidelines on Vertical Restraints no. 71.
376 Guidelines on Vertical Restraints no. 75.

such a case, it is advisable to first assess whether there actually is a restraint of competition pursuant to Article 101 (1) AEUV. The parties to vertical agreements are well advised to ensure that the preconditions of vertical block exemption 330/2010 are met. This may be achieved by drafting contract clauses that clearly steer clear of the hardcore restrictions contained in Article 4.[377]

5. Particular Cases

The following situations are of practical relevance in contractual relationships between a principal and its distributors (intermediaries) and are therefore discussed briefly.

Commercial agency agreements: In general, commercial agents do not fall under the restraints of Article 101 AEUV. They are considered to be the extended arm of the principal and are therefore not acting at a different level of the production or distribution chain. However, this is only true for sales intermediaries actually acting as commercial agents. Where the parties conclude a commercial agency agreement but in fact exercise their contractual relationship as a distributor relationship, this contractual relationship is governed by antitrust law.[378] Whether an intermediary is actually a commercial agent must be determined according to the types of financial and commercial risks that are material to the definition of an agency agreement.[379] With regard to the three criteria described below, the commercial agent must not bear any – or may only bear insignificant – risks in relation to the agreement concluded. Otherwise, Article 101 AEUV applies to the contractual relationship (with regard to restraints, possible exemptions and all legal consequences).[380]

- Firstly, there are **contract-specific risks** which are directly related to the contracts concluded and/or negotiated by the commercial agent on behalf of the principal, such as financing of stocks, payment risks and risk of loss when transporting or storing the goods.
- Secondly, there are **risks related to market-specific investments**. These are investments specifically required for the type of activity for which the commercial agent has been appointed by the principal, that is, which are required to enable the agent to conclude and/or negotiate this type of contract. An example of such investments is the purchase of specific repair tools or clothing with logos.[381]
- Thirdly, there are **risks related to other activities undertaken on the same product market**, to the extent that the principal requires the commercial agent to undertake such activities at his own risk – and not as an agent on behalf of the principal. This criterion might be of relevance where the commercial agent also acts as a distributor for certain types of products in the same market (*e.g.* fashion, gas, automotive).

Exclusive purchase obligation: An exclusive purchase obligation (*Alleinbezugsverpflichtung*) is an obligation of the distributor to meet its demand for a specific

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[377] *Cf. Baron*, in: Loewenheim/Meessen/Riesenkampff, Kartellrecht, 2nd ed., 2009, preliminary note Vertikal-GVO no. 15.

[378] Originally, the commission distinguished between genuine (*echte*) and false (*unechte*) commercial agents, see *S. Mäger*, in: T. Mäger, Europäisches Kartellrecht, 2nd ed., 2011, Chapter IV no. 98.

[379] Guidelines on Vertical Restraints dated 10 May 2010 no. 14.

[380] Guidelines on Vertical Restraints no. 15 and 17.

[381] *Malec/von Bodungen*, BB 2010, pp. 2383, 2384. These costs are called "sunk costs".

product, product group or service for a certain period of time by purchasing exclusively from the manufacturer (principal). It is related to single branding. Such an exclusive purchase obligation falls under the non-compete obligation (*Wettbewerbsverbot*) of Article 1 (1) (d) vertical block exemption 330/2010. An exclusive purchase obligation impedes market access of competitors and could therefore be problematic from an antitrust law perspective. An exclusive purchase obligation that obliges the distributor to purchase more than 80% of its overall volume from the principal is permissible for a duration of 5 years only, Article 5 (1) (a) vertical block exemption 330/2010. A purchase obligation that obliges the distributor to purchase from the principal 80% or less of its overall volume is permissible irrespective of the duration.

Exclusive distribution right: An exclusive distribution right (*Alleinvertriebsrecht*) is given where the supplier (principal) agrees to sell its products to only one distributor for resale in a particular territory. At the same time, the distributor is usually limited in its *active* selling into other (exclusively allocated) territories. Exclusive distribution is permitted where neither the supplier's nor the buyer's market share exceeds 30%, even if combined with other non-hardcore vertical restraints, such as *e.g.* a non-compete obligation limited to five years, quantity forcing or exclusive purchasing.[382] Pursuant to Article 4 (b) (i) vertical block exemption 330/2010, the distributor's restrictions of active sales may be exempted only if the principal reserves the excluded territory or customer group for himself or assigns it exclusively to another distributor. The principal must therefore be aware that where he grants exclusivity to one distributor, this may affect agreements with other distributors and vice versa. The block exemption remains even where the principal – in addition to the exclusive distributor – reserves the right to carry out direct sales in the territory. Passive sales (*i.e.* where customers approach the distributor on their own initiative) may not be restrained.[383]

Maximum price maintenance: Whereas retail prices may not be subject to arrangements, this prohibition does not apply to a capping of the distributor's maximum resale price, as a cap on the resale prices is effectively favorable for the customers. This, however, is true only where the maximum price maintenance agreement is not the consequence of pressure by the principal and effectively turns out to be a fixed price.

Non-competition clause: Pursuant to Article 5 (1) (a) vertical block exemption 330/2010, any direct or indirect non-compete obligation of the distributor may only be exempted only for a maximum duration of 5 years. Such non-compete obligation includes exclusive purchase obligations, buyer's purchase commitments (exceeding 80%), obligations causing the buyer not to manufacture, sell or resell products or services that compete with the contract products or services. The aforementioned principle also applies to post-contractual non-compete obligations, Article 5 (1) (b) vertical block exemption 330/2010. An indefinite term of the contract or an evergreen clause is considered to exceed the period of five years stipulated pursuant to Article 5 (1) vertical block exemption 330/2010. However, the parties may well conclude a non-compete obligation of up to five years with the parties being obliged to renegotiate the agreement thereafter. The party under the non-compete obligation must have the opportunity to actually decide whether

[382] Guidelines on Vertical Restraints no. 152.

[383] *Cf.* Guidelines on Vertical Restraints no. 50; this also applies to online sales. For the very limited exceptions (new product introduction, ban on sale of dangerous substances to certain customers for reasons of safety or health), see nos. 60, 61.