

European Guide on Selective Distribution

White Paper

December - 2020

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My thanks also go to **Clémence Heiter**, Master degree in Business Law (DJCE of Lyon), and **Jacqueline Brunelet**, trainee lawyer, for their involvement in the redaction of the guide.

thanks




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Introductory Remarks





Introductory Remarks

1 E-commerce has experienced uninterrupted growth since its emergence. Such evolution should continue in the future, driven both by the power of the major platforms and the emergence of alternative platforms (more local or more vertical), but also by the possible recurrence of social distancing measures to avoid commercial distancing.

The European Commission's efforts to promote e-commerce between European countries (banning geo-blocking, fighting against the compartmentalization of distribution, etc.) should also gradually remove new barriers.

However, many brands want to establish a high-quality dialogue with consumers. They cannot be well-served by a disorganized distribution system that can allow low-cost brokers with little concern for product image and value to interfere with their promotion, service and advice efforts.

Moreover, they often need to rely on resellers with physical points of sale that are not limited to showrooms but constitute local relays.

2 In this context, selective distribution systems are probably one of the most suitable tools to ensure a certain control of the distribution framework and articulate a network of stores.

They allow a supplier not to be dependent on an uncontrolled circulation of products within undesired networks.

They allow, under certain conditions imposed by competition law, not only to select distributors who meet the requirements of the brand, but also to claim an integrity of the distribution network to prevent free-riders or platforms from interfering.

Nevertheless, the relevance of a Europe-wide network presupposes to ensure its consistency. Indeed, this appears essential to avoid unreasonable adaptation costs and "leaks" to the tightness of the network in areas where selectivity would not meet legal requirements.

3 However, suppliers may find themselves helpless towards this effort to achieve consistency. Indeed, although the fundamental conditions to use selective distribution essentially result from European competition law, the practical application methods, but also and above all the conditions for an effective protection of the network against free-riders and platforms, appear to be relatively heterogeneous between countries.

This guide, produced thanks to the contribution and the expertise of the distribution law teams of the Advoc network law firms, proposes a mapping of the legal framework of selective distribution in twelve European countries to help build an effective network by ensuring equally effective protection against parallel networks.

4 It emerges, in particular, that in the event of unauthorized parallel resale, the supplier's response is based on two legal proceedings:

i. An action against the offending member: the legal action is generally likely to succeed, especially if the contract has provided for this possibility.

ii. An action against the unauthorized third-party reseller: few countries offer solutions, whether legal or case based, which are directly effective against third party resellers.

Only France and Belgium offer strong and effective guarantees against free-riders. In most other European countries, legal grounds, generally based on misleading information or intellectual property, can be sought, but the success of legal proceeding often remains dependent on the particular circumstances in six of the twelve countries explored (Croatia, Italy, Lithuania, Malta, the Netherlands, Romania). In other countries, protection against free-riders is almost hopeless.

However, suppliers should not give in: contract stipulations, network management and marketing conditions can often, without providing absolute guarantees, make it possible to maintain a strong interest in selective distribution.

5 The protection of a network and its image is also facing new challenges with the growth of marketplaces. After the ECJ's Coty decision at the end of 2017, the first national decisions seem to validate, under certain conditions, clauses prohibiting sales on certain marketplaces. However, as these are recent judicial conflicts, it is important not to draw hasty conclusions and to follow developments in case law closely.

We hope that this work, resulting from the collaboration of the firms of the Advoc network, will enable you to have a first approach that is sufficiently relevant to make the most appropriate choices.

Obviously, it is only by adapting the strategy and characteristics of each network and each product on a case-by-case basis that a distribution system can be fully effective. The lawyers in the distribution law teams of the Advoc network firms are, of course, available to assist you in these projects.

*Luc-Marie
Augagneur*

Golden Rules to Optimize Network Protection across Several European Countries



1. Sign a **written contract**.

Even if it is not necessary in most countries, it will secure the relationship.



2. Include **selective criteria** that are precise enough to avoid application of distributors who do not meet the spirit of your network.

In most countries, it will be very difficult to refuse a distributor who meets all of the selective criteria. Therefore, it is important to think in advance about the type of distributors you want to be part of the network (or not!).



3. Include in **the contract strong clauses** prohibiting the distributor to resell the products to an unauthorized reseller.

The prohibition must be stipulated, but also the consequences of a breach of contract: penalties, termination...



4. **Protect** your mark.

If products are sold by an unauthorized reseller, most countries allow, under conditions, an action based on IP rights, especially in case of unauthorized use of a trademark. Make sure that you completed the necessary formalities to register your trademarks in all the countries involved and/or at a European level.



5. If you plan to restrict sales on market places, **exclude market places** that do not meet defined criteria (no association with low quality products...) instead of simply prohibiting the sales on any market place.

Some national jurisdiction check for the justification of market places ban and/or refuse general ban of sale on market places.



6. Online sale on authorized resellers' website **cannot be prohibited**

Stipulate rules for the presentation of products or services that corresponds to the expected quality and advice criteria, and define the conditions of articulation of such online sales with physical sales.

PART ONE // **Structuring** a Selective Distribution Network



Structuring a Selective Distribution Network

I. Definitions, Conditions and Formalism

Structuring a selective distribution network implies, first, assessing its lawfulness under EU law, understood as primary sources (Article 101 of the Treaty on the Functioning of the European Union), secondary legislation (Vertical Block Exemption Regulation; Guidelines on Vertical Restraints) and case law (CJEC, 25 October 1977, case 72-76, Metro).

> To get started, are there specific definitions adopted by national laws to be considered?

NO (10/11)

YES (1/11)

- In strict compliance with the principle of primacy, national laws do not retain proper definitions of the notions set up by EU law. Many national laws directly refer to or transpose EU law in their statutes (e.g. Competition Act, Chapter 379 of the Laws of Malta; Dutch Competition Act; Lithuanian Law on Competition).
- Some national law provide literature and preparatory materials offering some guidance on how the regulation should be applied (e.g. Sweden).
- In addition, case law tends to construe notions in accordance with EU precedents (e.g. in Italy, Tribunale di Milano, ordinance 3 July 2019, Sysley/Amazon).



ITALY

Case law adopts a specific understanding of the condition of the “application of objective criteria in a discriminatory fashion”: the application of selective criteria is not regarded as discriminatory when the supplier raises “**contingent causes**” with a reseller, to be assessed in each concrete case.

Tribunale di Torino, ordinance R.G. 8814/2017, International Auto/FCA Italy



MALTA

According to Article 8 of the Competition Act, Chapter 510 of the Laws of Malta, the Minister responsible for competition matters may, after consulting the Board of Governors, issue further regulations **allowing exemption**.

> Are there additional conditions required by national laws to the lawfulness of selective distribution network?

NO (7/11)

YES (4/11)

- Pursuant to EU law, agreements establishing a selective distribution network are exempted provided that such network is justified by the characteristics of the product, that the agreement is based on objective criteria applied in a uniform and non-discriminatory manner and that the restriction of competition does not go beyond what is strictly necessary, following a principle of proportionality.
- In none of the national laws covered by the present Guide is imperviousness a condition to establish or defend a selective distribution network.
- In addition, formal requirements are sometimes needed (see next question).



GERMANY

While German law does not textually restrict selective distribution to luxury goods or technically sophisticated products, some court decisions seem to require certain standards. According to the Higher Regional Court of Hamburg, in a ruling dated 22 March 2018, selective distribution can be used to market high-quality products requiring additional presentation and consulting services to convey a high-quality image and brand the positive characteristics of such products.



LITHUANIA

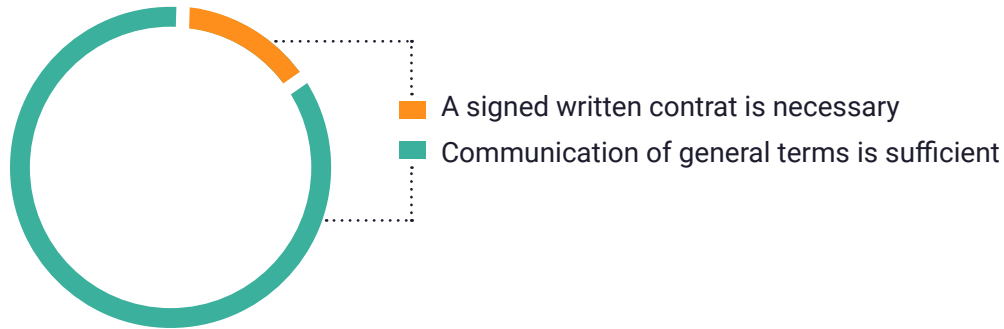
Likewise, Lithuanian law does not textually restrict selective distribution to luxury goods or technically sophisticated products. Still, in a ruling dated 28th of May 2020, the Lithuanian Court of Appeal deems unnecessary due to the nature of the goods the requirement to sell innovative cosmetic in pharmacies or online with the advice of a pharmacist.



ROMANIA

Romanian Competition Law n°21/1996 provides for a stricter condition by establishing a **lower market share threshold** over which agreements cannot be automatically exempted. As such, exemption is granted if the market share held by each of the parties to the agreement does not exceed **15%** on any of the relevant market affected by the agreement.

> Which formalism is required by national laws to ensure proper enforceability of a selective distribution network?



- When the selective distribution system can rely on general terms or intern charts, it is advisable to ensure evidence of proper communication and acceptance of the latter by each distributor operating in the network.
- In any case, signing written contracts with selected distributors remains the best option for evidentiary purposes, which makes it easier to enforce terms and conditions agreed on by suppliers and distributors and to prove their extent in case of litigation.



BELGIUM

Under the Belgian Code of Economic Law, some selective distribution contracts are subject to precontractual information obligations. In such cases, the supplier is required to communicate a written draft contract, which can take the form of general conditions if the draft contract is standard, to any distributor applicant.



FRANCE

Likewise, the French Commercial Code sets out the obligation to provide potential trade partners with an informative document and a draft contract whenever total or partial exclusivity is required from on party to the trade relation.



LITHUANIA

In a ruling dated 28th of May 2020, the Lithuanian Court of Appeal challenged the enforceability of a selective distribution network in the national territory considering that selective criteria were not provided for in the supply agreement but on Internal Guidelines of which the supplier could not guarantee the uniform application by all distributors.

Therefore, we can consider that:

- (i) a written supply agreement specifying the selective criteria is needed, and
- (ii) such policy should be **publicly** available.



POLAND

Pursuant the Polish Vertical Exemption Regulation of 30 March 2011, **written contracts between a supplier and its distributors** are necessary to establish a selective distribution system benefiting from the exemption. Moreover, selective criteria are to be specified in such agreements. Professionals advise to sign at least a short written contract which can expressly refer to more elaborate general terms.

II. Network management: Admission, Renewal & Exclusion

> As a supplier, are there grounds to deny admission to a distributor complying with all selective criteria?



NON-DISCRIMINATORY APPLICATION OF SELECTIVE CRITERIA

Principle set out in the ECJ decision *Metro v. Commission*, 25 October 1977 and recalled in the Guidelines on Vertical Restraints.



FRANCE // RECENT LIBERAL CASE-LAW

Discrimination of a potential distributor does **not constitute in itself a civil fault**. In addition, the supplier has **no obligation to justify** a refusal. Recent case-law charges the distributor with establishing a fault distinct from discrimination related to an abuse of rights or an anti-competitive practice.

Court of Cassation, Commercial chamber, 13 September 2017, n°16-15.067, Caudalie

Consecutively applied by Appeal Court of Paris, 13 juillet 2018, n°17/20787

Court of Cassation, Commercial chamber, 27 March 2019, n°17-22.083



GERMANY // FREEDOM TO CONTRACT UNDER COMPETITION LAW

A manufacturer is free to decide in principle which products it wishes to sell within the context of a selective distribution system and may also **define who is allowed to sell** these products if this selection of sales partners is made in accordance with competition law.

German Federal Cartel Office, 6 May 2014, B2-52/14, WALA



ITALY // PRIMACY OF FREEDOM TO CONTRACT

Case law notes that the principle of freedom to contract is not expressly disregarded by EU law nor regulation. It states that *"the possibility to integrate the network open to all resellers who demonstrate that they satisfy the standards required by the supplier does not imply a legal obligation for the supplier to conclude a distribution contract with any reseller"*.

However, once a distribution contract has been in bargains, the refusal to contract must be justified by a contingent reason (case-based appreciation).

Tribunale di Torino, ordinance R.G. 8814/2017, International Auto/FCA Italy

In other national laws, various grounds can be successfully raised to deny admission to a distributor for a specific cause. In any case, the margin of appreciation usually granted to the supplier by case-law and the legal risks (i.e. contract, distribution, competition law) shall be factored in when such argumentation is considered.



FRANCE

The refusal due to the **loss of confidence** caused by **recurring conflicts** between the candidate reseller and the supplier is valid as it bears no anti-competitive object.

Appeal Court of Paris, 12 December 2018, Sony



ROMANIA

A supplier can invoke commercial reasons to deny admission to a distributor (e.g. in case of a competitor buyout).

Low margin of appreciation



NETHERLANDS

A distributor meeting all criteria can be denied admission if **special circumstances or compelling reasons** require otherwise. Case-law specify that the supplier's future plans is not sufficient. Distributors that are not accepted to the selective distribution system may bring an action for unfair competition (the outcome of such action depends heavily on the specific facts).

Low margin of appreciation – may evolve to be less strict when the market share < 30%

Finally, some countries do not give a supplier any margin of appreciation, or strongly limit the right for a supplier to choose its reseller. This is especially the case of:



..... **POLAND** // The only alternative is to **establish a quantitative selective distribution network**, covered by the Polish Vertical Exemption Regulation.



..... **UNITED KINGDOM** // Under the Resale Prices Act 1976, refusal to supply a distributor for being a price-cutter is prohibited. Therefore, the right for a supplier to choose where its goods are distributed is not absolute and can depend on the importance of market power.

Monopolies & Mergers Commission Investigation of Bicycles, 1981



..... **LITHUANIA** // The Lithuanian Court of Appeal, in a decision dated 28 May 2020, seems to impose to the supplier to accept any distributor which meet the defined selective criteria.

> Thereafter admission of a distributor in a selective distribution network, can a supplier deny renewal of such distributorship?



- Except from the case of Italy (see hereinabove), it seems common practice to treat similarly admission and renewal into a selective distribution network. Some shared techniques can be wisely used to adapt such network as long as competition law is not infringed.

- Subject to national positions held in the last question, renewal refusal is, in most cases, impossible if the distributor meets all the selective criteria. Renewal refusal is therefore conceivable whenever criteria are not met. As head of selective distribution system, the supplier can change its selective criteria.




However, in all events, criteria must be objective and justified by the nature of goods and the decision must not be regarded as part of an anti-competitive plan.

Summary

No Discretion (yet) Left to the Supplier

-  • Malta
-  • Poland

Small Margin of Appreciation

-  • Croatia
-  • The Netherlands
-  • Romania

Case-based Appreciation

-  • Belgium
-  • France
-  • Italy

Significant Discretion

-  • Sweden

> Under which motives can a supplier exclude a distributor from the selective distribution network?

- National laws provide for few if any specific rules for distribution contracts. As a result, contract laws are the basis for distribution contract management, after adapting to actual concerns in selective distribution (e.g. delay in supplies payment as breach of contract; selling outside the network seen as breach of contract or gross negligence).
- Termination clauses or notices will only be effective if justifiable towards competition law.
- Please note the following overview is not exhaustive

BREACH OF CONTRACT



TERMINATION CLAUSE



UPON NOTICE



GROSS NEGLIGENCE



III. Selective Distribution Network Management: Legal Risks

1. Arbitrary/Discriminatory Denial of Admission/Renewal or Exclusion

Such claims are based on abuse of dominant power, or unfair competition.



Art. 102, TFEU

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

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



POLAND

Polish competition law sets the market share threshold for the rebuttable presumption of dominant position at **40%**.

2. Abusive Denial of Admission of a Distributor

A risk based on commercial ground, refusal to sell:



BELGIUM

Belgian Code of Economic Law prohibits some market practices as the refusal to sell or to enter into a contract when the supplier's abuse of rights can be established (e.g. by a harmful intention).



GERMANY

The refusal to supply certain distributors in position of dependence may be qualified as discriminatory and therefore as abusive behaviour under section 20(1) and (2) GWB, even if the supplier is not dominant but only has a strong position in the relevant market.

A risk based on a contract law ground, wrongful termination of negotiations:



FRANCE

Following Article 1112 of the French Civil Code and case-law, late decision to break-off negotiations can be regarded as a breach of the duty of good faith and lead to civil liability.



ITALY

Refusal to contract after leading negotiations must be justified in order for the distributor to comply with his duty of good faith. The distributor facing an unjustified refusal can claim compensation pursuant to Article 1337 of the Italian Civil Code.

3. Exclusion of a Distributor

The excluded distributor could take an action against the supplier for abrupt termination of established trade relation.



FINLAND

Reasonable notice is to be followed before termination. Otherwise, damages calculated on the basis of the actual economic losses will be awarded to the distributor.



FRANCE

The supplier can be held liable if he terminates abruptly, meaning without reasonable notice, an established relation with a distributor under Article L.442-1 of the Commercial Code.



UNITED KINGDOM

Reasonable notice is to be followed. Otherwise, the supplier exposes itself to civil liability and punitive damages.

AND ALSO



PART TWO // **Protecting** a Selective Distribution Network



I. Sales Outside the Selective Distribution Network

> How does national law protect selective distribution networks from outside sales?

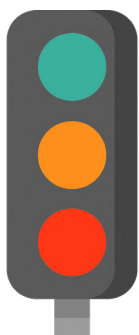
- According to the global feedback, national laws appear more protective of distributors when it comes to getting an authorization than suppliers trying to defend the imperviousness of their selective distribution networks.
- Few laws provide specifically for the prohibition of selling outside such networks, while the vast majority rely on judicial appreciation of the commercial and contractual situation.
- Securing the supplier's interests requires specific provisions in the distribution contract, such as obligations (a distributor will be liable if it does not respect the contract prohibiting him to sell outside of the selective distribution network) and penalty clauses.

If products are sold outside of the selective distribution system, the supplier may rely on several legal provisions in order to put an end to such situation (please find details below).

However, not all legislations allow direct and effective action **against an unauthorized reseller**. As the latter is not part of the selective distribution system, therefore not breaching any contract to the supplier, it may be harder to bring an action against such free-rider.

> In which countries are there legal grounds for an action against unauthorized resellers?

Please note that the hereunder lists only expose the most suitable legal ground for an action against an unauthorized reseller. All of the possible legal grounds are described hereafter.



- There is a strong legal ground for an action against the unauthorized reseller.
- There is a legal ground, but additional conditions are required. The success of such action will highly depend on the facts of the case.
- Even if general legal grounds can be invoked, the action against an unauthorized reseller will probably fail.



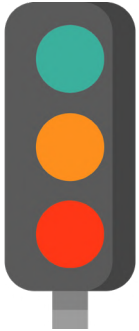
BELGIUM

An action could be taken for **fraud** or **misuse of quality of an agreed distributor**. In addition, an action can be taken on the basis of the third-party complicity principle.



FRANCE

Article L.442-2 of the French Commercial Code reads that the author of a direct or indirect **participation in the violation of the prohibition of off-grid resale** made to the distributor bound by a selective distribution is liable for damages.



CROATIA

Article 63 of the Croatian Trade Act prohibits any behavior on the part of the dealer that **violates good commercial practice in view of competing on a market**. Fines ranging from around 650€ to 40 000€ are incurred, non-including damages that can be claimed, but it seems that the unauthorized reseller must be aware of the existence of the distribution network.



ITALY

The fact that a reseller does not belong to the selective distribution network will allow the supplier to obtain protection, **but only if an effective prejudice to the brand image is proved**. In such circumstances, an action of non-contractual liability or counterfeiting is opened to the supplier so as to ask for seizure of the goods, urgent inhibition of further marketing and compensation.

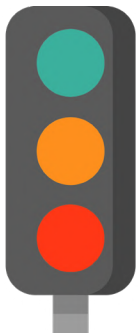
Tribunale di Milano, 11 January 2016, Chantecler-Gens Aurea; 18 December 2018, Landoll-Mecs ; 19 November 2018 ; 3 July 2019, SI SRL-AECS SRL.; Sysley-Amazon

💡 // Drafting Tips

It is not always easy to prove an effective prejudice to the brand image. Such proof can be facilitated if the supplier can demonstrate that it made investments to promote its brand image. The first step is to keep records of the financial investments. But contract stipulations can also be a clue of the importance of the brand image, even if it will not be sufficient to demonstrate **a prejudice**.

The following stipulations can be added in a selective distribution contract to strengthen the product's brand image:

1. Restrictions relating to the products placed nearby: the products cannot be presented with low cost and/or low-quality products;
2. Obligations relating to the promotion or highlighting of the product.



LITHUANIA

An action could be taken on the ground of **unfair competition**, but the supplier has to prove the **bad faith** of the reseller.



MALTA

An action could be taken on the basis of **article 32 of the Malta Commercial Code**, which prohibits use of a name or mark creating **confusion** with another name or mark, and prohibits the use of any firm name or fictitious name capable of **misleading** others as to the real importance of the firm.



NETHERLANDS

An action could be taken, considering that the unauthorized reseller committed an **unlawful act**.

However, additional conditions (such as awareness) are required.



ROMANIA

The behavior of the unauthorized reseller could be considered as **contravening honest practices** and the general principle of **good faith**, but it is necessary to prove that such behavior caused or may cause harm to any market participant.

💡 // Drafting Tips

In several countries, such as Lithuania or Romania, the unauthorized reseller cannot be sanctioned if the supplier cannot prove the **bad faith** of such free rider. Therefore, to improve the protection of a selective distribution network, it is necessary to be able to prove that the unauthorized reseller is of bad faith.

The following rules can be applied:

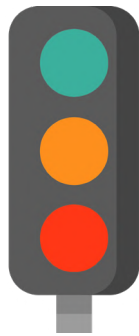
1. The packaging must mention that the product can only be sold by an agreed distributor. The contract between the supplier and its authorized distributors must include a clause that prohibits the distributors from removing such indication.

2. The advertisement also must specify that the product can only be sold by an agreed distributor. The contract between the supplier and its authorized distributors must include a clause that obliges the latter to mention this in any advert or promotion.



POLAND

An action could be considered on the ground of **misleading information** given by the unauthorized reseller, but it is not yet confirmed by any relevant case law.



GERMANY

An action could be envisaged on the basis of **unfairness**, but it is not yet confirmed by any relevant case law.



SWEDEN

An action could be considered on the ground of **misleading information** given by the unauthorized reseller, but it is not yet confirmed by any relevant case law.



UNITED KINGDOM

An action could be envisaged on the basis of **unfair commercial practice**, but it is not yet confirmed by any relevant case law.



DENMARK

An action could be considered on the ground of contravention to honest commercial practices, but this is not confirmed by any case law.

Additionally, in most countries, an action could be taken with regard to IP law, as the free-rider used the supplier trade mark without authorization. However, those actions are subject to the rule of exhaustion.

In the following pages [26 to 39](#), you will find details of each legal basis that could be invoked if your products are sold by an unauthorized reseller. As much as possible, we provided details on the chances of success of such action. However, please consider that most of those legal basis are case-based, and will therefore highly depends of the particular facts of the case.

💡 // Drafting Tips

To improve the integrity of your selective distribution network, a supplier can deter the consumers from buying its products from an unauthorized reseller. This may be done by offering special services that are excluded if the product has not been purchased from an agreed distributor.

In particular, the ECJ ruled that **reserving the supplier's contractual warranty only to products sold by an authorized reseller** (and accompanied by a certificate signed by the latter) was lawful (ECJ, Metro c/ Cartier, 13/01/1994, C-376/92, §32 and 33).

To achieve such limitation, the contractual documents relating to the contractual warranty and given to consumer (general terms and conditions, warranty certificate, eventually your website if it mentions such warranty...), must specify that this warranty will only apply under presentation of a warranty certificate signed by an authorized reseller.

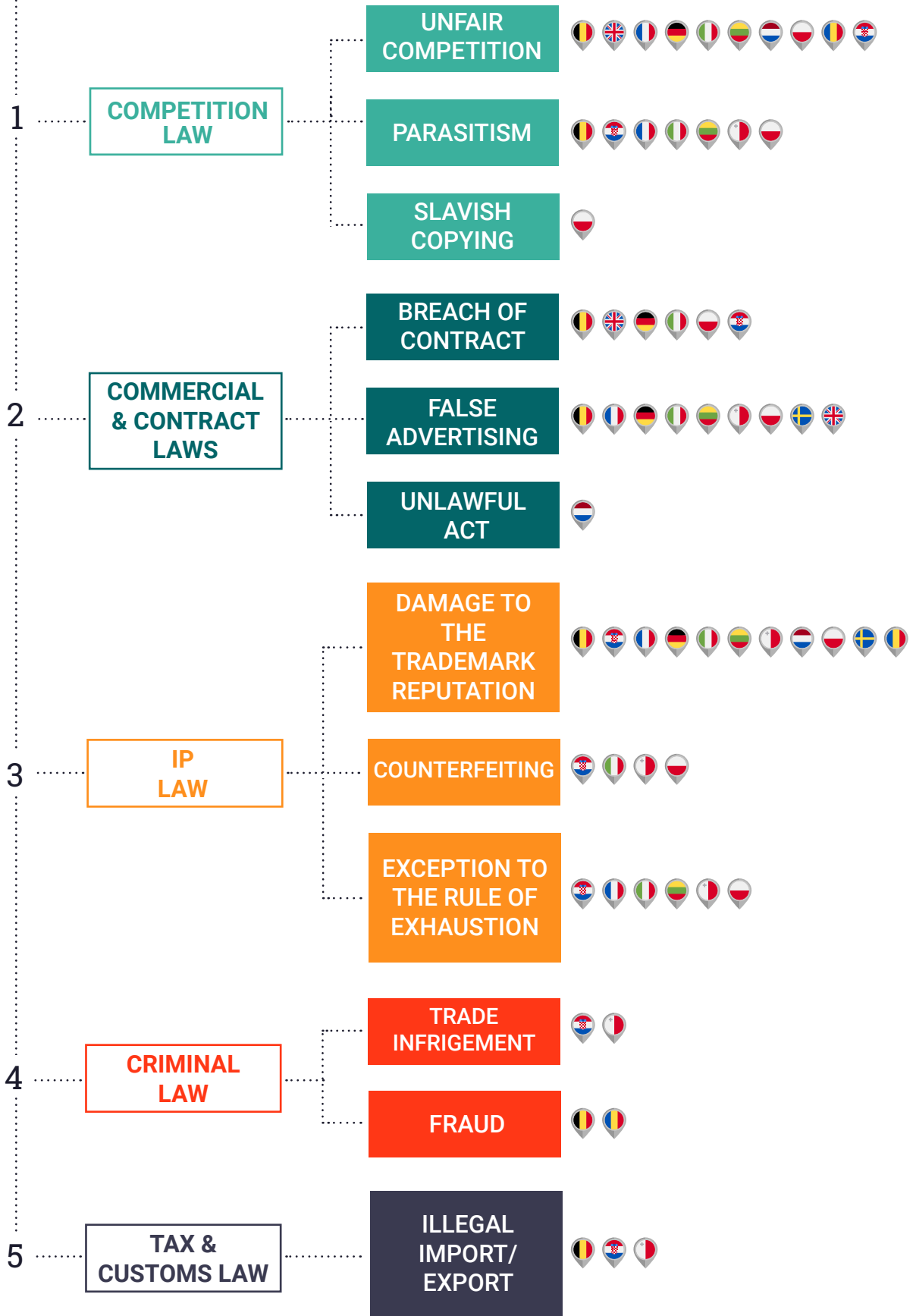
To avoid the production of fake warranty certificates, it is necessary ensure that the supplier can verify the authenticity of the documents.

The following recommendations can be applied:

1. The signature of the authorized reseller must allow its immediate and certain **identification** (e.g.: the signature must mention the company registration number and contact details such as phone number and/or email address);
2. The authorized reseller must be contractually bound to keep **a copy of the certificate** until the end of the warranty period. This certificate must be send to the supplier under simple request of the latter.

Please note that this will not exclude warranties that are **legally due** by the supplier.

GROUNDS



1 - COMPETITION LAW

> UNFAIR COMPETITION



CROATIA // UNFAIR TRADING

Article 63 of the Croatian Trade Act prohibits unfair trading. Unfair trading is described as behavior violating good commercial practice with the purpose of competing on the market. The case law on unfair competition does not yet enable a certain conclusion that trading outside the established distribution network itself is sufficient to be regarded as unfair trading. Trading outside the established distribution network while being aware of the existence of such network could possibly be found as unfair trading.

When combined with actions aimed at the termination of or hindering the business relationship between the supplier and its authorized distributor thus violating good commercial practice, trading outside the distribution network is likely to be found as unfair trading.



GERMANY

Under Section 3 of the Act Against Unfair Competition : *“Unfairness shall have occurred where a person violates a statutory provision which is also intended to regulate market conduct in the interest of market participants and the breach of law is suited to appreciably harming the interests of consumers, other market participants and competitors.”*

Each time the supplier can establish that its selective distribution network is applied without loopholes, it is assumed that the outsider reseller has obtained the relevant products by means of unfair competition. The burden of proof thus bears on the outsider.



BELGIUM

Case-law considers that distributing products outside the network is not in itself a fault as necessary for **an action in unfair competition** to be successful. However, according to the **third-party complicity principle**, the supplier can bring a **liability action** against the unauthorised reseller who bought from a selected distributor.



FRANCE

The outsider reseller is likely to be held liable under Article L.442-2 of the Commercial Code. The general claim for unfair competition is based on Article 1240 of the Civil Code and can be successful if distinct faults can be identified by the supplier. In all events, damages are limited to the strict assessment of damages, excluding any punitive damages.



LITHUANIA

In order to establish unfair competition, the unauthorized reseller's **bad faith** must be proved by factual circumstances. Otherwise, even though the existence of the selective distribution network is admitted, such claim could be dismissed.



ROMANIA

The act of an unauthorized distributor could be considered a **commercial practice that contravenes honest practices and the general principle of good faith** and which cause or may cause harm to any market participant (Article 2 of Romanian Law no. 11/1991 on combating unfair competition). However, the success rate is highly dependent on the specific circumstances of each case.



UNITED KINGDOM

In a general way, *“a commercial practice is unfair if (a) it contravenes the requirements of professional diligence; and (b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.”*

Article 3 of the Consumer Protection from Unfair Trading Regulations 2008



AND ALSO // ITALY

(medium to high chances of success, depending on the circumstances)

1 - COMPETITION LAW

> PARASITISM



FRANCE

Paratism is a comprehensive notion that includes all behaviours by which an economic agent tries to take advantage of efforts, know-how or notoriety of another agent. Prone to the concrete circumstances of each case, such notion can be invoked by an agreed distributor against an outsider reseller to seek compensation and cessation of the practices.



MALTA

Although the term parasitism does not find itself under Maltese Law, action can be taken on the basis of Article 32 of the Commercial Code, in cases where any name, mark or distinctive device is used by an unauthorized reseller. Moreover, action can also be taken against an unauthorized reseller that makes use of any firm name or fictitious name capable of misleading others as to the real importance of the firm.



POLAND

Parasitism is an act of unfair competition but is not defined in Polish suppression of unfair competition act. It is said that parasitism is the unauthorized use of another entrepreneur's reputation, e.g. using someone else's trademark or similar product packaging. Such use must be contrary to law or good practice and must threaten or infringe the interest of another entrepreneur or customer.

Parasitism is a broad concept, it involves especially using a famous trademark of similar for any other kind of goods, using someone else's famous trade mark in a slogan popularizing one's own product, presenting one's own goods as 'equivalents', 'substitutes' of famous trademarks.

The chances of success depend on each reseller's market behaviour. For example, if an unofficial reseller creates the impression that he is an official representative of the supplier's brand or uses its reputation to sell other products, such practice may be classified as parasitism.

AND ALSO //



BELGIUM (reasonable chances of success),



CROATIA (advertising and selling products/services by listing information and using terms usually linked with a competitor thus taking advantage of its reputation is unfair trading, **but** it is unlikely that trading outside the established distribution network on its own would be found as parasitism and therefore unfair trading),



GERMANY (offering replicas of goods and "unreasonably exploiting or impairing the assessment of the replicated goods or services" is considered as unfairness under Section 4 §3 of the Act Against Unfair Competition, **but** it only applies to replicas, and not to original products obtained out of the selective network).

1 - COMPETITION LAW



SLAVISH COPYING



POLAND

The imitation of a ready-made product by the method of copying the external appearance of the product with technical means of reproduction which may mislead the customer as to the identity of the producer or the product is an act of unfair competition (Article 13 part. 1 of the Polish suppression of unfair competition act). In such case trademark will probably also be imitated.

Definition of this act covers the producer of counterfeited goods, so it will **not apply to resellers buying products from a legal source.**

2 - COMMERCIAL & CONTRACT LAW

> BREACH OF CONTRACT



CROATIA

If trading outside the network would arise following the sale made by the authorized distributor to an unauthorized one thus breaching the distribution agreement, the supplier would have the civil claim for breach of contract under Civil Obligations Act and ensuing damages at its disposal (Art 342-349). Such remedy is likely to result in an indemnification thereby sought.



FRANCE

Contractual action against the agreed distributor selling outside the network is always open, but it can be even more dissuasive to provide for penalties in the contract.



GERMANY

There is a general obligation, on part of the distributor, to “Safeguard the supplier’s business interests”. In addition, the authorized distributor will be held liable if, by supplying an unauthorized distributor, he is violating the provisions of its contract with the supplier.



NETHERLANDS

There will be actions against the distributor who supplies the unauthorized reseller, but the latter will rarely be held accountable in the Netherlands on the basis of breach of contract.



ROMANIA

Action for breach of contract is opened against an agreed distributor who supplies unauthorized resellers, but not against the unauthorized reseller, who is not part of a selective distribution contract, so cannot be liable for breaching a contract.

AND ALSO //



BELGIUM (high chances of success),



UNITED KINGDOM

💡 // Drafting Tips

The simplest way to limit unauthorized distribution is to prevent the agreed distributor to sell the products to a non-agreed reseller. Therefore, a penalty clause is an absolute necessity.

The supplier must ensure that such clause:

1. Defines the obligation: the distributor agrees to sell the products only to consumers and other agreed distributors. It can be strengthened by an obligation made on the distributor to make inquiries as to the agreement of the professional purchaser.
2. Defines the sanctions if the distributor does not respect this prohibition. The sanction must be deterrent, and can result in financial damages or exclusion of the network. However, please note that some countries, such as France, allow the judge to reduce an excessive penalty clause.

2 - COMMERCIAL & CONTRACT LAW

> FALSE OR MISLEADING ADVERTISING



FRANCE

Both the French Commercial Code and Consumer Code ban unfair business practices carried out in the detriment of business partners or consumers. Administrative fines are applicable, not including potential compensation claim.



LITHUANIA

Article 5 of the Law on Advertising states that when judging whether or not an advertising is misleading, attention should be paid to information regarding the supplier of advertised goods. Article 28 gives the person whose rights and interests protected by law are violated while using the advertising prohibited by law to claim termination of the use of advertising and compensation for the damage incurred.

AND ALSO //



BELGIUM (low chances of success),



MALTA (before the Commercial section of the Civil Court, on the basis of Article 32B of the Commercial Code),



UNITED KINGDOM (misleading action is an unfair commercial practice under article 5 of the Consumer Protection from Unfair Trading Regulations 2008).



GERMANY

Act against unfair competition, section 5, prohibits “misleading commercial practices” as unfairness, especially if such misleading commercial practice “is suited to causing the consumer or other market participant to take a transactional decision which he would not have taken otherwise. A commercial practice shall be regarded as misleading if it contains false statements or other information suited to deception regarding the following circumstances:

1. The main characteristics of the goods or services, such as [...] commercial origin, [...]
4. Any statement or symbol in relation to direct or indirect sponsorship or approval of the entrepreneur or of the goods or services.”



POLAND

If there is sufficient evidence showing that:

- (i) there was false/misleading advertising,
- (ii) this advertising could have affected the customers’ purchasing decisions,

and (iii) the supplier’s interest was undermined or at least threatened by such practice, the supplier can pursue civil law claims, including for damages.

Chances of success depend on factual circumstances of a given case but generally such claims should be regarded as legitimate.

> UNLAWFUL ACT



NETHERLANDS

Benefitting from the default of another party in a contractual relationship is considered an unlawful act, if you have knowledge of the fact that the act you are benefitting from causes default in a contractual relationship. A supplier can have an action based on unlawful act against an unauthorized reseller purchasing products from an authorized reseller, if the unauthorized reseller is aware that a selective distribution network is in place and the authorized reseller is not allowed to supply products to him.

Appeal Court of Amsterdam, 10 October 2004, *Lancôme & cie* ruled that **benefitting from a breach of contract of an authorized reseller cannot in itself constitute an unlawful act. For this, additional circumstances, such as awareness, are required.**

In addition thereto, the Dutch Supreme Court ruled in 2010 that **an unauthorized reseller can commit an unlawful act toward authorized resellers, if:**

- the unauthorized reseller sells products that he has purchased by **deliberately** compromising the contractual obligation of an authorized reseller not to sell outside the selective distribution network;
- by selling these products, the unauthorized reseller **competes** with resellers that are bound to the selective distribution network; and
- the company of the unauthorized reseller **profits** from the fact that the authorized resellers are bound to comply with their contractual obligation towards the distributor.

The circumstances abovementioned can also constitute an **unlawful act towards the distributor**, if the selective distribution **network is undermined** (e.g. if authorized resellers evade the selective distribution network or terminate the distributor-reseller relationship or if third parties refuse to apply to the selective distribution system for that reason).

3 - INTELLECTUAL PROPERTY LAW

> DAMAGE TO TRADEMARK REPUTATION



EUROPEAN UNION // RECENT CASE LAW

“A person who, on behalf of a third party, stores goods which infringe trade mark rights, without being aware of that infringement, must be regarded as not stocking those goods in order to offer them or put them on the market for the purposes of those provisions, if that person does not itself pursue those aims.”

ECJ, 2nd of April 2020, *Coty Germany c/ Amazon*, C-567/18

Amazon is not liable as a perpetrator of an infringement of trademark rights for stocking, under the ‘Fulfilment by Amazon’ scheme, Coty’s products that an unauthorized distributor is selling on Amazon’s market place.



CROATIA

It is yet unclear whether trading outside the distribution network on its own presents the infringement of the trademark since no case law indicating so is available.

If that would be the case, legal remedies provided by the Croatian Trademark Act proved to be an efficient and rapid mean of combating trademark infringers (trademark infringement proceedings are urgent according to Art 135 of the Trademark Act).

Article 126 of the Trademark Act enables the proprietor to file a claim seeking declaration of the infringement, termination of the infringement and prohibition of any further infringement. Moreover, Art 128 of the Trademark Act allows the proprietor to claim damages incurred as a result of the infringement.



FRANCE

Article L.716-4 of the Intellectual Property Code provides for the civil liability of the unauthorized use of a trademark.



LITHUANIA

Courts directly refer to CJEU case-law stating that a trademark owner may oppose the use of his trademark if commercialization by a reseller **undermines seriously the trademark’s reputation**. However, even for a well-known cosmetic brand, specific explanation regarding the infringement of trademark’s reputation must be given.



MALTA

Action relating to trademark infringement, in the case of registered trademarks, is to be instituted in the First Hall of the Civil Court, as provided under the Trademarks Act. In terms of the Enforcement of Intellectual Property Rights (Regulation), action may also be taken with a purpose to inhibit a third-party from infringing intellectual property through the filing of warrants, such as the warrant of prohibitory injunction.



POLAND

Infringement of trademark protection consists in unlawful use in the course of trade of:

- 1) any sign which is identical to a registered trade mark in relation to goods which are identical to those for which the trade mark is registered;
- 2) any sign which is identical or similar to a registered trade mark in relation to goods which are identical or similar if there is a likelihood of confusion on the part of the public (including the likelihood of association between the sign and the registered trade mark);
- 3) a sign identical or similar to a reputable trade mark registered for goods of any type where use of such sign without due cause brings the user unfair advantage or is detrimental to the distinctive character or repute of the earlier mark.

So, **with the exception of reputable trademarks there is no need to demonstrate damage to the reputation of trademark in situation when third party is using that trademark unlawfully.** If such party is using trademark in relation to protected goods without authorization, then it is infringing it.

The chances of success in such case are rather high if the abovementioned conditions are met (e.g. identical trademark for identical goods). Please note that in order to pursue such claim in particular case the rule of exhaustion must not apply.



ROMANIA

It is the common legal action regarding the establishment and award of compensation for the damages caused.

GERMANY

The Court of Appeal of Düsseldorf sanctioned an unauthorized distributor because its presentation of the products (in this case luxury products) did not meet the qualitative criteria of the selective network, so it damaged the trademark reputation.

LG Düsseldorf, 6 März 2018, n°I-20 U 113/17

AND ALSO //



BELGIUM (low chances of success),



NETHERLANDS (claim technically opened, but no example of it).

3 - INTELLECTUAL PROPERTY LAW

> EXCEPTION TO THE RULE OF EXHAUSTION



CROATIA

Article 17 of the Trademark Act prescribes the exception to the rule of exhaustion for legitimate reasons (deterioration mentioned as the particular example of a legitimate reason). However, it is yet unclear whether the luxury property of the product presents such legitimate reason since no applicable case law is available.



FRANCE

Article L.713-4 of the Intellectual Property Code transposes for French trademarks provisions of the EU Regulation on the EU Trademarks.



LITHUANIA

Under Article 40(2) of the Law on Trade Marks, the trademark owner has the right to prohibit a person from affixing goods if there are reasonable grounds to oppose further commercialization. Selling conditions as justified reasons for opposing further commercialization of the goods, are lawful only if they comply with Article 101(3) of the TFEU. **Still, claim for full prohibition of trade is contrary to competition rules.**



MALTA

An action following an exhaustion of trademarks related rights may be entertained by the Courts of Malta on the basis of article 17(2) of the Trademarks Act, Chapter 597 of the Laws of Malta.



POLAND

Protection do not apply if there are legitimate reasons that allow the trademark holder to object to further distribution of the goods, particularly if the condition of the goods is changed or impaired after they have been put on the market (Article 155 par. 3 of the Polish industrial property law act).

In this context, **the form of the distribution of goods can be treated as the one of the “legitimate reasons”** which enables to oppose the further distribution (resale) of those goods. However, the abovementioned form has to **deteriorate the trademark reputation**. Chances of success then depend on the business model of the reseller (e.q. small prestigious shop or discount store). Still, in most cases “legitimate reasons” are connected with changes in packaging.

3 - INTELLECTUAL PROPERTY LAW

> COUNTERFEITING



CROATIA

If the act of counterfeiting indeed happened, the trademark proprietor would have claim for trademark infringement under Art 11 of the Trademark Act (including criminal prosecution for the crime of trademark infringement under Art 288 of the Croatian Criminal Act). Such claims are likely to be successful.



MALTA

In terms of the Intellectual Property Rights (Cross-Border Measures) Act, the holder of an intellectual property right may lodge an application with the Comptroller of Customs who may suspend the release of, or detain, infringing goods.



ROMANIA // WIPO COMPLAINT

The supplier may file a complaint with the World Intellectual Property Organization Arbitration and Mediation Center against a distributor (authorized or **unauthorized**) whose registration and use of the domain name violates the supplier's rights in its own registered trademark.

However, it has been decided that an **authorized distributor** can use such domain name in order to promote only goods and services of the supplier, considering that the distributor prominently disclosed that it was merely a repair center, not the supplier itself (WIPO Case No. D2001-0903).



POLAND

According to Polish regulations, counterfeit trademarks are "*unlawfully used identical trademarks or such trademarks which cannot be distinguished under normal market conditions from trademarks registered for goods covered by protective law*" (art. 120 par 3 of industrial property law). In such case the owner of the trademark can start **both civil and criminal action** against producer of counterfeited goods

Marking a counterfeited good with a trademark is a criminal offence. According to art. 305 of the Industrial Property Law:

1. Anyone who, for the purpose of placing on the market, marks counterfeit goods with a trade mark, a registered trade mark, while not being entitled to use or distribute goods bearing such marks, will be subject to a fine, restriction of freedom or imprisonment for up to 2 years.

2. In less serious cases, the perpetrator of an offence specified in section 1 will be subject to a fine.

3. If the perpetrator makes himself, by committing an offence specified in section 1, a permanent source of income or commits the offence in relation to a good of significant value, he will be subject to imprisonment for between 6 months and 5 years.

In principle industrial property claims are based on the implementation of the enforcement directive, and thus are similar to those present in other EU countries.

In case of the risk that etiquettes, tags, safeguards, elements or utilities with purpose of verification of the authenticity, on which the trademark is placed, could be used with the goods, and such a use could be a violation of the trademark, party entitled to a trademark **may demand cease** from:

1. placing a mark identical with the trademark or similar to it on etiquettes, tags, safeguards, elements or utilities with purpose of verification and other means, on which this mark is placed,

2. offering, marketing, importing or exporting as well storing etiquettes, tags, safeguards, elements or utilities with purpose of verification and other means, on which this mark is placed.

4 - CRIMINAL LAW

> TRADEMARK INFRINGEMENT



CROATIA

If trading outside the established distribution network is to be found as trademark infringement, such behavior would be subject to criminal prosecution provided that **substantive financial gains were obtained, or substantive damage caused**, (Article 288 of the Croatian Criminal Act).



MALTA

A complaint may be filed with the Maltese Executive Police who may then pursue a further investigation on the matter.

> FRAUD



BELGIUM

For offences of fraud or **misuse of quality of agreed distributor, chances of success are considered high.**



ROMANIA

In principle, depending on the specific circumstances of each case, there could be grounds for promoting a criminal action for fraud, namely for misleading a person by presenting as a true a false fact or as false a true fact, in order to obtain for himself or for another an unfair patrimonial use and if a loss has been caused (Article 244 of the Romanian Criminal Code).

5 - TAX & CUSTOMS LAW

> ILLEGAL IMPORTS / EXPORTS



CROATIA

Prohibition of the import of the products concerned would be one of the measures imposed against the interloper in case its behavior is to be found as unfair competition and/or trademark infringement.



MALTA

In terms of the Intellectual Property Rights (Cross-Border Measures) Act, the holder of an intellectual property right may lodge an application with the Comptroller of Customs who may suspend the release or detain infringing goods.

AND ALSO // BELGIUM

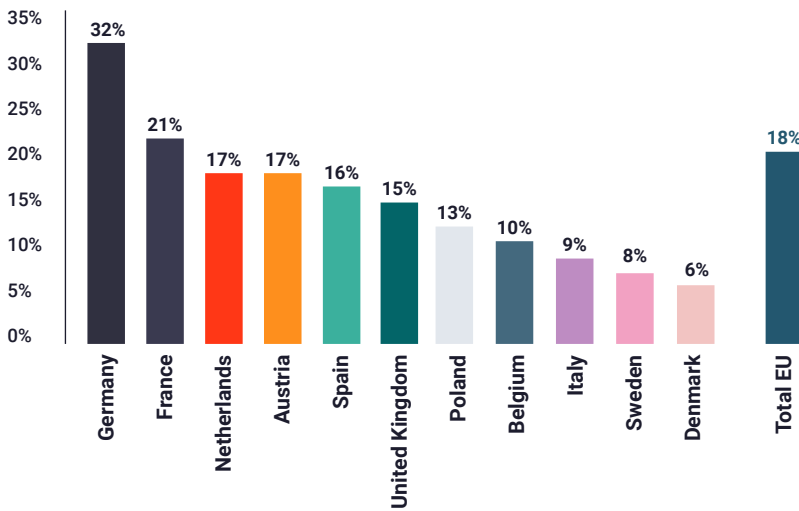
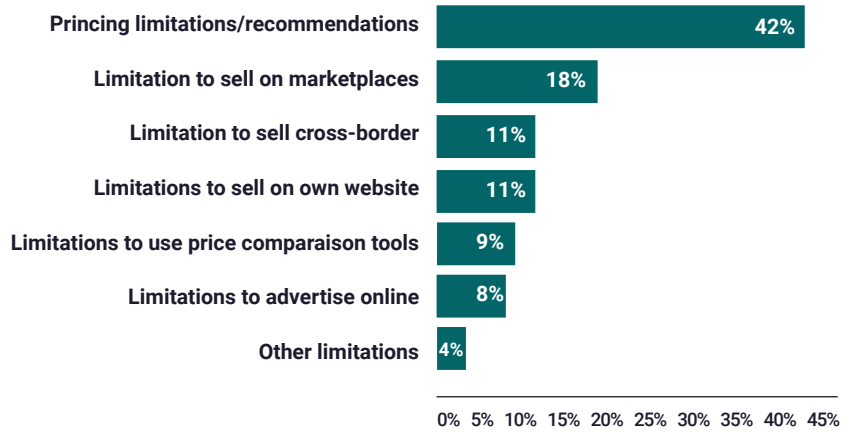


(low chances of success)

II. Bans on Marketplaces

PROPORTION OF RETAILERS WITH CONTRACTUAL RESTRICTIONS, PER TYPE OF RESTRICTION

source
Final report on the E-commerce Sector Inquiry, COM(2017) 229 final

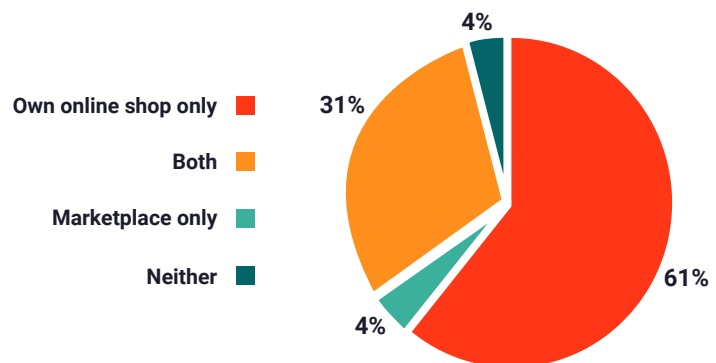


PROPORTION OF RETAILERS IN EACH MEMBER STATE WHOSE AGREEMENTS CONTAIN MARKETPLACE RESTRICTIONS

source
Competition Policy Brief, Competition Directorate-General, European Commission, April 2018

PROPORTION OF RETAILERS USING DIFFERENT SALES CHANNELS FOR SELLING ONLINE

source
Competition Policy Brief, Competition Directorate-General, European Commission, April 2018



- **Prohibiting authorized distributors from selling goods through third-party platforms does not constitute a hardcore restriction** excluding the selective distribution network from the benefits in the Vertical Block Exemption Regulation.
- Such prohibition can constitute a legitimate criterion if it is **necessary in the light of the objective pursued and applied in a uniform and non-discriminatory manner**.
- **Scope:** The Coty case refers to luxury goods, defined as goods where **“the quality [...] is not just the result of their material characteristics, but also the allure and prestigious image which bestow on them on them an aura of luxury”**.



GERMANY

Prohibition on distributors in selective distribution systems to participate in **online price comparison tools** amounts to a hardcore restriction.

Federal Court of Justice, 12 December 2017, KVZ 41/17, ASICS

A ban on selling products through eBay and comparable sales platforms **can be justified** if its objective is to preserve the product image and enable skilled consultation, as well as to prevent liability for distributors' illegal business practices. This ban is not a definitive prohibition of distribution through third-party platforms; concrete appreciation on whether or not each marketplace meet the supplier's high quality standards shall be led.

Scope: Not only luxury products and technically high-quality products can be subject to qualitative selective distribution, but also other products, provided that they are of high quality and destined to be accompanied by skilled consultation aimed at emphasising the product's quality and preserving and strengthening its image.

Higher Regional Court of Hamburg, 22 March 2018, 3 U 250/16, Aloe2Go

Banning sales on Amazon is legal as the supplier of branded goods is allowed to decide how and under which conditions its products may be sold.

Higher Regional Court of Frankfurt, 22 December 2015, 11 U 84/14, Deuter



UNITED KINGDOM

Attempts by manufacturers to impose absolute bans on selling their products online are not permitted by law.

Decision of the Competition and Markets Authority, 24th of August, 2017, Case 50230 Ping Europe Limited. The decision has been upheld by the Court of Appeal on the 20th of January, 2020.



ITALY

Torino Court ruled that sales, **by a third-party**, of luxury products belonging to a selective distribution network on dedicated websites is lawful, whereas such sales carried out through generalist websites (e.g. Amazon) where luxury products are associated to low quality products could cause damage to the brand reputation and therefore is illegal.

Tribunale di Torino, ordinance, 18 January 2019, Olfattorio-Notino

Advertising and marketing luxury products by Amazon causes harm to the prestige and image of the supplier, leading the Court to prohibit such practices.

Tribunale di Milano, ordinance, 3 July 2019, Sisley-Amazon



NETHERLANDS

Nike products being considered as luxury goods, Nike can prohibit its selective distributors from selling via third-party platforms.

Amsterdam District Court, 4 October 2015, C/13/615474, Nike v. Action Sport



PART THREE // **Enforcing**
a Selective Distribution
Network

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Enforcing a Selective Distribution Network

I. Proceedings

> Do national procedure laws provide for summary proceedings to request suspension or termination of sales outside the selective distribution network?

YES (9/11)

NO (2/11)

COUNTRIES

ACCELERATED OR SUMMARY PROCEEDINGS



BELGIUM

When an unfair commercial practice is perpetrated, the president of the company court may establish its existence and order its cessation.

Article XVII.1 of the Code of Economic Law

The action is brought by an application to the court and is heard in **summary proceedings**.

Article XVII.6 of the Code of Economic Law

If the court finds that an unfair practice exists, it is obliged to order its cessation. Nevertheless, the judge may grant the offender a period of time to cease the practice concerned when the nature of the practice so requires. This may be the case of a company that has to change the packaging of a product containing misleading information.



CROATIA

According to Article 68 of the Croatian Trade Act, market inspector may prohibit the interloper from engaging in commercial activity regarding the concerned product (or commercial activity in general) for no less than **30 days from rendering the decision on unfair trading**. Possible appeal does not suspend the effect of the inspector's decision. The procedure against the interloper shall be terminated upon proving that found behavior has been discontinued. Therefore, providing that trading outside the established distribution network in itself is sufficient to amount to unfair trading, such behaviour may be **suspended by the market inspector**.

According to Article 132 of the Croatian Trademark Act, interim measures prohibiting the interloper from engaging in activities that infringe the trademark may be issued by the Commercial Court with the territorial jurisdiction upon proving the likelihood of trademark infringement or the threat of infringement. Since trademark infringement proceedings are regarded by the Trademark Act as urgent, the decision on interim measures has to be rendered within **30 days following the request**.

Therefore, providing that trading outside the established distribution network is sufficient to amount to trademark infringement and the likelihood of such infringement or the threat thereof in the particular case is proven, such behavior shall be **suspended by the Commercial Court**.

COUNTRIES

ACCELERATED OR SUMMARY PROCEEDINGS



FRANCE

The Code of Civil Procedure gives jurisdiction to the president of the court to issue in summary proceedings the necessary protective or remedial measures, either to prevent imminent damage or to put an end to a manifestly unlawful disturbance. According to case-law, the sole commercialization of goods outside the selective distribution network does not in itself constitute a manifestly unlawful disturbance. In order to justify the pronouncement of precautionary measures, intended to ensure the protection of the network, it must be shown that the supply by the third party distributor is illicit or fraudulent or that it has acted unfairly.

Thus, it is up to the unauthorized reseller to demonstrate, by revealing the identity of its sources of supply, that it has acquired the goods under regular conditions, in particular on a parallel network outside the selective distribution network, the unlawfulness or fraudulent nature of the supply being revealed by its refusal to justify their origin.

Appeal Court of Versailles, 17 May 2018, RG n°17/06387, L'Oreal



GERMANY

Act against restraints of competition, §33 reads "A right to apply for injunction already exists if an infringement is impending". As a rule, **preliminary injunctions** can be presented to the presiding judge.



ITALY

The court can be asked to adopt an urgent precautionary measure to suspend and cease the resale according to articles 700 of the Italian Code of Civil Procedure and to articles 129 and 131 of the Italian Intellectual and Industrial Propriety Code. Case-law has recognized the applicability of these urgent remedies in some Court decisions.

Tribunale di Milano Chantecler-Gens Aurea, ordinance 11 January 2016;
Tribunale di Milano, Landoll-Mecs, ordinance 18 December 2018;
Tribunale di Milano, ordinance 19 November 2018;
Tribunale di Milano, SI S.r.l.-AECS S.r.l., ordinance 3 July 2019;
Tribunale di Milano, Sysley-Amazon, ordinance 3 July 2019.



MALTA

The enforcement of Intellectual Property Rights (Regulation) Act provides the possibility of filing a **precautionary warrant** in cases related to intellectual property infringement.



NETHERLANDS

It is possible to demand suspension or termination of sales outside the network by authorized resellers by way of a 'normal' provisional judgment via **preliminary relief proceedings**. Important in that respect is that a party needs to have a **pressing interest to claim suspension or termination** via such proceedings.

The judgment in preliminary relief proceedings is not final. It is possible that the court in the main proceedings (proceedings on the merits) decides otherwise.

COUNTRIES

ACCELERATED OR SUMMARY PROCEEDINGS



POLAND

The Code of Civil Procedure provides for a possibility of obtaining **interim measures, so called 'security of claims'**. Such measures can be requested before the commencement of the main proceedings or afterwards. The applicant must justify his claim and **legal interest** in obtaining the security (i.e. prima facie show the lack of security would prevent or significantly hinder the enforcement of a ruling issued in a given case or otherwise prevent or seriously hinder satisfying the purpose of the main proceedings).

It would be possible to obtain an interim measure in the form of suspension of sales of particular goods by the defendant, if the plaintiff could demonstrate that such interim measure is necessary to reverse the likelihood of damage or other adverse effects on his interests (e.g. in case the sale of those goods infringed the plaintiff's intellectual property rights).

.....

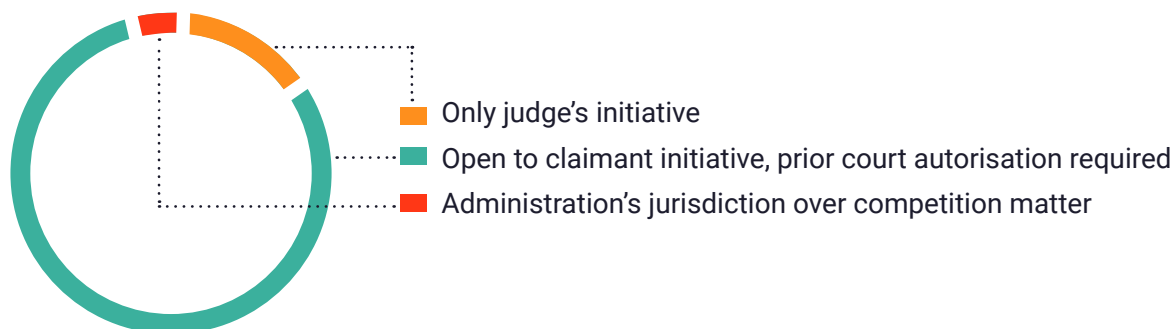


ROMANIA

The supplier could file against the authorized distributor who sells outside the selective distribution network a **request for a presidential order**. In this case, the court, finding that the claimant has a **legal appearance** in favor of the plaintiff, will be able to order **provisional measures** in urgent cases, in order to preserve a right that would be delayed, to prevent an imminent damage and which could not be repaired, as well as for removing the obstacles that would occur during an execution.

II. Evidence

> From an evidentiary viewpoint, do national procedure laws provide for, fast and efficient means of investigation?



BELGIUM

At any stage of the proceedings, the judge may, before ruling, order an interim measure intended either to examine the application or to settle an incident relating to such a measure, or to provisionally settle the situation of the parties.

Article 19, paragraph 3, of the Judicial Code



FRANCE

Article 145 of the Code of Civil Procedure allows the claimant to use accelerated proceedings and unilateral requests to get the court to order investigative measures.



GERMANY

Following article 935 of the Code of Civil Procedure, injunctions can be asked for if *"a change of the status quo might frustrate the realisation of the right enjoyed by a party, or might make its realisation significantly more difficult."*



ITALY

Relating to the accelerated and summary proceedings, applicable to violation of the selective distribution network, the judge can proceed, according to article 669-sexies of the Italian Code of Civil Procedure and articles 129 and 131 of the Italian Intellectual and Industrial Propriety Code *"in the way he considers most appropriate to the necessary means of proof"* and can also decide *"assuming summary information"*.

According to these provisions the judge can order, also ex officio, typical and atypical means of investigation and proofs (such as, for example, writings of third parties, extrajudicial reports, etc.).

Furthermore, according to Article 129 of the Italian Intellectual and Industrial Propriety Code, it is possible to request the **"description"** of some or all of the items constituting an infringement of that right as well as of the means used for their production and the elements of proofs concerning the reported infringement and its entity. If granted, the judge shall authorize the description and, in case, the collection of the items and proofs with the bailiff support and related operations shall be properly recorded.

The judge, ex officio, can also always request the acquisition of evidence to supplement those proposed by the parties and to eliminate any gaps and uncertainties. For example, the judge can use the non-formal interrogation of the parties, the inspection of people or things, the hearing of new witnesses.

Obtaining and producing such evidence in court therefore depends both on the ability of the parties and on the conviction of the judge.

Pursuant to article 115 of the Code of Civil Procedure, the parties have the burden of proof and they have the burden to produce evidentiary material.

Authorization of the judge is always required to produce evidence. Authorization by means of an accelerated an summary proceeding, according

to articles 669-sexies and 700 of the Italian Civil Code of Procedure and articles 129 and 131 of the Italian Intellectual and Industrial propriety Code and authorization in the judgement on the ground **are quite complex to be granted**. The admission of means of investigation and proofs is always left to the discretion of the judge and it is usually granted if the application appears to be well founded to the Court.



NETHERLANDS

Seizure of evidence is a mean of securing data in the run-up to court proceedings. In that manner, the claimant can ensure that the defendant will not destroy the particular evidence or find evidence to base its claim on. Proceedings relating to seizure of evidence only apply to the seizure and keeping of the evidence. The claimant does not automatically have access to such evidence and cannot automatically require a copy of the evidence. For this, separate proceedings for access should be initiated.

Prior court authorization can be obtained by means of an application to the court.

Such application should include the following:

- information on the specific evidence on which the applicant wishes to rely;
- the legal relationship between the applicant and the defendant and the (company) data of the defendant;
- interest for seizure;

- necessity of seizure: there must be reasonable fear that the evidence will be lost and/or destroyed and that it cannot be obtained through a less far-reaching measure.

Court authorization will usually be given without hearing the defendant, so that he cannot destroy the particular evidence. Such authorization will not be given if the applicant does not/cannot ensure that the evidence will remain confidential.

After prior court authorization has been obtained, one can order the bailiff to start the seizure procedure.



POLAND

Article 248 of the Polish Code of Civil Procedure allows a party to a lawsuit to request a **court order** obliging the opponent or a third party to present a document which is in that party's possession and which constitutes proof of a fact of vital importance for the adjudication of a case. This provision can be used by the plaintiff to obtain otherwise inaccessible documentary evidence.

> Obtaining this court order requires persuading the court that the requested document is necessary to determine important facts of a given case. Furthermore, it must be an existing document, sufficiently specified in the request. Courts generally allow such requests, unless in the court's opinion, a lawsuit can be dismissed

without admitting the requested document as evidence (e.g. because the claim is groundless in principle). Article 310 of the same code also regulates the possibility to request security of evidence both on the preliminary phase and during the proceedings.

> Evidence can be secured if there is an apprehension that its use in the later stage of the proceedings will be impossible, too difficult or there are other grounds for the necessity of finding the facts of the case – a condition similar as mentioned above.

Moreover, Article 286(1) also regulates the possibility to secure evidence of violation of IP laws and provides an open catalogue of possible

methods of preserving evidence.

> Evidence can be secured if an entitled person shows a probability of a claim against infringement of right or danger of such infringement. It should also be precised, how exactly the evidence should be secured – the statute gives an open catalogue of possible means, e.g. securing reasonable amount and quantity of goods samples, materials or tools used to produce or distribute those goods and documents connected with them. Accordingly, security of evidence can also be description of secured items.

Article 286(2) introduces the effective way of gaining evidence specific to the intellectual property law. It gives the entitled party a possibility to request a court to oblige the person who violated industrial property right to provide information about the business names and addresses of producers, manufacturers, distributors, suppliers and other former holders of the goods or providers of the services that infringe a trademark, and also expected wholesale recipients or persons carrying on the retail sale of such goods or services; the quantity of goods or services produced, manufactured, sold, received or ordered that infringe a trademark, and also the prices paid for these goods or services.

Abovementioned claim can be also made against persons :

- 1) who were found in possession of goods infringing the trademark,
- 2) who were found using the services infringing the trademark,
- 3) who were found providing services used in actions infringing the trademark, or
- 4) who were pointed out as a person taking part in production, creation or distribution of goods or providing the services infringing the trademark – and the possession, use of services or their providing, or taking part in production, creation or distribution of goods or providing the services is aimed for direct or indirect profit or other economic benefit.

> In order to use the art. 286(2) of the Polish Industrial Property Law Act, the entitled party can prove reliable circumstances indicating the violation of trademark – which is a requirement more demanding than those abovementioned.



ROMANIA

The judicial seizure is a mean of preserving of a right, when there is a trial over the property or another main real right, over the possession of a movable or immovable property or the use of a common good property. It consists in making unavailable the assets forming the object of the dispute or, under the legal conditions, of other assets, by entrusting their guard to a seizure administrator (including the owner).

The judicial seizure can be approved without the prior existence of a trial, on a good on which the interested party has good reasons to fear that it will be stolen, destroyed or altered by the current owner.

Prior court authorization can be obtained by means of an application to the competent court. The application for approval of the judicial seizure is judged urgently, with the parties summoned. In case of admission, the court will be able to compel the applicant to pay a bail. The court's decision is subject only to the appeal, within 5 days from the ruling, to the hierarchically superior court. After the party obtained the approval of the judicial seizure, it is obliged to bring the action to the competent court, to initiate the proceedings for the establishment of the arbitral tribunal or to request the enforcement of the enforceable title, within a maximum of 20 days from the date of the approval of such specific measure.



CROATIA

The Croatian Trademark Act provides the possibility of issuing interim measures (seizing concerned products or their samples, seizing relevant documentation etc.) with the purpose of securing known evidence upon proving the likelihood of trademark infringement or the threat of infringement (Article 133).

The Croatian Civil Procedure Act, as the general statute on civil procedure, also provides the possibility of securing known evidence by presenting them before the court even before the claim was brought if there is a threat that presenting concerned evidence at a later stage would be impossible or excessively difficult (Article 272).



MALTA

There are no specific fast and efficient means of investigations. However, Article 6(1) of the Enforcement Intellectual Property Rights, provides that the competent Court may, even before the commencement of proceedings on the merits of the case and upon an application containing sufficient evidence: *“Order such prompt and effective provisional measures as it considers appropriate to preserve relevant evidence”*.

Moreover, the competent Court may also, if it considers necessary, order that such measures be taken without hearing the other party, in particular where:

- The delay is likely to cause irreparable harm to the rightholders; or
- The court considers that there is evident risk of the evidence being destroyed.



SWEDEN

The Swedish special state authority, named *“konkurrensverket”*, is responsible to investigate and handle issues regarding competition law. This authority can make companies that are under investigation to submit documents needed for the investigation and to participate. The purpose is to involve the companies and to save money and time.

If the “competition authority” decides that the company has made wrong according to Swedish and EU law, it can take it to court which decides the remedy.

III. Sanctions

> How frequent and effective are judicial sanctions for trading outside of a selective distribution network?

- Legal practitioners report the limited number of court rulings on the enforceability and punishment of breaches of selective distribution networks.
- Where national case-law specific to selective distribution networks is quasi-inexistent, case assessment is based on European rulings and regulations as well as national commercial and contract laws (e.g. **Croatia, Malta, Sweden**).
- Nevertheless, sanctions are generally assessed as rather effective (e.g. **Belgium, France, the Netherlands, Poland and Romania**).
- It is also interesting to notice that some national systems follow a separation between the State's mission to protect fair competition in the free market and the parties' duty to protect their own interests in the distribution contract (e.g. the **Netherlands, Romania, and Sweden**). As a result, contractual sanctions are the only dissuasive tools towards outside resellers in situations where no violation of competition law can raise the interest of competition authorities.

In addition, we can highlight the following national specificities:



CROATIA

Even though statutory law in its vagueness seems to provide the means for protection and enforcement of the established selective distribution network (e.g. using general contract rules stated in the Croatian Civil Obligations Act), national case law so far did not affirm such a conclusion.

Highly limited case law concerning selective distribution predominantly relates to the disputes before the Croatian High Administrative Court following the decisions of the Croatian Competition Agency on the compliance of the established selective distribution networks in the motor vehicle sector.



ITALY

Sanctions for trading outside a selective distribution network are not so easy to be obtained. Nevertheless, when granted, they are effective because the seizure of goods in possession of the reseller and the inhibition of further marketing outside the selective distribution network can be obtained with an urgent precautionary procedure according to article 700 of the Italian Civil Procedure Code and to articles 129 and 131 of the Italian Intellectual and Industrial Propriety Code.

In addition to the sanctions of seizure and the inhibition, which are the result of the precautionary procedure, with the judgement on the ground, compensation for damage can be obtained. The latter remedy is quite easy to be obtained if the judicial application is well founded and it is an effective remedy.



NETHERLANDS

There is **no real government sanction** for trading outside a distribution network. The 'sanctions' will mostly be of a **contractual** nature, e.g. penalties and/or damages due to breach of contract or unlawful act, meaning the success rate is highly dependent on the specific circumstances of each case.

Dutch law does not have legal provisions relating to (selective) distribution. From a government point of view, sanctions are only possible if the parties to a selective distribution system do not comply with the competition law. Interparty discussions mainly take place within general contract law with actions for damages and performance as a consequence.



POLAND

Polish law does not provide for specifically designed sanctions that could be imposed on an unauthorised reseller solely because it sells goods without a supplier's authorisation. The most effective sanctions can be applied in cases of infringement of the supplier's intellectual property rights. Outside this scope, there is no developed case law that would allow to predict the effectiveness of a particular legal measure used by a supplier against an unauthorised reseller.

Starting from 1st of July 2020, the pursuit of intellectual property rights claims in Poland may be more efficient and effective, because specialized IP courts will then be set up. Secondly, the amended procedural rules for obtaining information on infringements of intellectual property rights and for securing evidence, will enter into force.



ROMANIA

Sanctions will mostly be a contractual nature or for unfair competition, so that the success rate is highly dependent on the specific circumstances of each case.

From the Romanian Competition Council point of view, sanctions are only possible if the parties to a selective distribution system do not comply with the competition law. As regards the misunderstandings between the parties, it takes the form of contractual liability for the damages caused.

CORNET VINCENT SEGUREL

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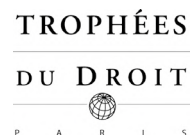
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