

# Papers

di diritto europeo



UNIVERSITÀ  
di **VERONA**  
Dipartimento  
di **SCIENZE GIURIDICHE**



**Centro di documentazione europea – Università degli Studi di Verona – *Papers di diritto europeo*, Anno 2016, Edizione speciale n. 2  
*The fashion industry in the European Union***

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URL: [http://europa.univr.it/rivista\\_cde\\_verona.htm](http://europa.univr.it/rivista_cde_verona.htm)

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**ISSN 2038-0461**

**Registrazione al Tribunale di Verona numero 1875 del 22/07/2010**

**Referee:** Gli scritti contenuti nella rivista sono valutati attraverso un sistema peer-review.

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# The fashion industry in the European Union

## Foreword

The publication of the two issues of the 2016 special edition of the journal *Papers di diritto europeo* (for issue No 1 click [here](#)) is envisaged among the scientific activities of the project «Univr Fashion Week», co-funded by the European Union as Jean Monnet Module 2015-2018 within the Erasmus+ Programme. More precisely, it follows the delivery of the Summer School on the fashion industry in the European Union, which was held at the Law Department of the University of Verona from 20 to 25 June 2016, and allows to further deepen the research on such topics, as well as to provide a wider dissemination of the project's results.

The issue is structured in two parts, «Lectures» and «Workshops». The first one in fact collects the articles drafted by the Teaching Staff members of the Summer School, while the second one is dedicated to the brief interventions of the professionals working in the fashion industry who were in charge of the workshops organised in addition to the teaching activities. Each paper analyses selected subject matters that formed part of the programme of the course with the aim of fostering the academic value of the project.





*PART I*  
*LECTURES*





# Corporate Social Responsibility and antitrust compliance in the fashion industry

Fabrizio Di Benedetto

## Abstract

This paper tries to give a general overview of the importance of Corporate Social Responsibility (CSR) and antitrust compliance for the fashion companies using both a theoretical and a pragmatic approach. Although the great differences between CSR and antitrust – mainly those related to their objectives and to their legal value –, it will be argued that these two areas of law have something in common, especially from the point of view of enterprises that *de facto* use the same implementing tools for CSR and antitrust compliance. In conclusion, it will be underlined that a principle of antitrust law could be adopted in the field of CSR in order to ensure a more effective human rights protection.

# Corporate Social Responsibility and antitrust compliance in the fashion industry

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Fabrizio Di Benedetto\*

CONTENTS: 1. It's a matter of reputation. – 2. International principles of CSR and their impact on the fashion industry. – 2.1. Cases of human rights violations in the fashion industry and CSR compliance. – 3. Competition law in the fashion industry. – 3.1. Recent cases of competition concerns in the fashion industry and antitrust compliance. – 4. How antitrust law can inspire CSR.

## 1. It's a matter of reputation.

Apparently, Corporate Social Responsibility (CSR) and antitrust (or competition) have nothing in common. On the one hand, according to the European Commission, CSR consists in «the responsibility of enterprises for their impacts on society»<sup>1</sup>, and it mainly deals with human rights, especially with the protection of workers and of the environment. On the other, competition law is a set of rules adopted – although with some differences – by the most part of countries in the world, and that prescribes to enterprises how to behave on the market with the aim of protecting fair competition and consumers' rights. It could be said that antitrust compliance is a part of the wider concept of CSR. However, beyond the distinct objectives pursued, there is another important difference between CSR and antitrust, which is related to their ability of being effective at national and international level. In effect, while competition law is almost able to be effectively applied at national and international level, CSR can be effective only in countries where national law and courts guarantee a sufficient level of human rights protection.

Indeed, competition rules are not only binding provisions at national level, but they are also more and more respected around the globe basically because of their extraterritorial application. In fact, competition authorities prosecute each and every behaviour that has an anti-competitive effect on their jurisdiction, irrespectively of the nationality of the company which is responsible of the conduct.

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My sincere thanks go to Marta Bordignon, PhD, and to the Human Rights International Corner ([www.humanrightsic.com](http://www.humanrightsic.com)) for their support for the second paragraph of this paper. Needless to say that errors are only mine.

<sup>1</sup> European Commission, Communication *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, 25 October 2011, COM(2011) 681 final, p. 6.

Moreover, there are international agreements<sup>2</sup> and international organizations<sup>3</sup> which aim at facilitating the exchange of information among antitrust authorities so as to tackle anti-competitive conducts at the international level.

By contrast, CSR is deeply linked with the existence of rules that prescribe to enterprises to comply with human rights. Thus, in countries where the respect of human rights by private actors is well-established – *i.e.* the most part of the developed countries – CSR is likely to be effective. Conversely, in some emerging or developing countries – where national laws do not provide for a sufficient level of human rights or where national courts do not enforce these rights – CSR can be hardly effective. So, it could happen that the same multinational company that acts responsibly in its (developed) home State, does not the same in other (emerging) countries where it operates. For this reason, the international community has taken initiatives on CSR, in order to provide corporations mainly with non-binding principles and guidelines that should help them to comply with human rights. Conversely, there is a lack of binding international rules that require corporations to respect human rights<sup>4</sup>.

However, notwithstanding the differences among them, both CSR and antitrust play a fundamental role in the protection of a company reputation, which can be considered as an intangible asset even though it is not registered in the balance sheet. In fact, in order to protect their name, companies are getting used to adopt compliance programs in both the fields of CSR and antitrust. These programs aim at preventing and tackling violations of human rights, on the one hand, and of competition law, on the other. The following analysis will briefly focus on the international principles of CSR (para. 2) and on European competition law (para. 3), and especially with regard to their impact in the fashion industry. In conclusion, it will be argued that a principle of competition law could be used to ensure a more effective CSR at the international level (para. 4).

## 2. International principles of CSR and their impact on the fashion industry.

A large number of initiatives have been taken at the international level on CSR both within and outside the United Nations (UN). To begin with, the UN Global Compact of 1999 which included the so-called Ten Principles on Human Rights, labour, environment and corruption. Moreover, in 2011 the UN Human Rights Council (UNHRC) adopted the «UN Guiding Principles on Business and Human Rights» (UNGPs)<sup>5</sup> which are founded on three pillars: protect, respect, and remedy, that were already

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<sup>2</sup> *Ex multis*, Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States of America, OJ L 95 of 27 April 1995, pp. 47-52.

<sup>3</sup> The main international organisation on competition matters is the International Competition Network ([www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)).

<sup>4</sup> In this regard see para. 2, *infra*.

<sup>5</sup> See [www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

encompassed in the UN «Protect, Respect and Remedy Framework» of 2008. Outside the UN, the Organisation for Economic Co-operation and Development (OECD) released the Guidelines for Multinational Enterprises already in 1976, while the International Labour Organization (ILO) adopted the so-called eight ILO Core Conventions and the ILO Multinational Enterprise (MNE) Declaration in 1977. Then, the International Organization for Standardization (ISO) launched in 2010 the ISO, an international unified guidance to foster an ethical approach to business. Beyond the international initiatives, the European Union (EU) started to focus on CSR only in 2011 when the European Commission released its Communication on a Renewed CSR Strategy for 2011-2014<sup>6</sup>. In conclusion, the most recent document on CSR is the Commission Staff Working Document on «Implementing the UN Guiding Principles on Business and Human Rights - State of Play»<sup>7</sup>.

The UNGPs are a set of 31 non-binding rules based on the already mentioned three pillars: protect, respect and remedy. Indeed, any State has the duty to protect individuals against human rights abuses; enterprises, on their side, have the responsibility to respect human rights in conducting their activities; finally, victims of human rights violations must be granted with access to judicial and non-judicial remedies. In short, the first 10 principles clearly provide that States should take all appropriate actions to prevent, identify and punish human rights infringements on their territories, also providing guidance to enterprises. Obviously, States must also protect people against human rights abuses committed by State-controlled enterprises and they have to exercise adequate supervision when they negotiate with undertakings, especially applying public procurement rules. Furthermore, States have to support enterprises in respecting human rights in areas with ongoing conflicts, and this could include the refusal of public support to enterprises involved in relevant human rights violations occurring in those areas. UNGPs from 11 to 24 regard the duty of enterprises to respect human rights. Indeed, all enterprises should «seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts»<sup>8</sup>. The last part of the UNGPs (from 25 to 31) is devoted to the duty of the State to grant access to remedies to the victims of human rights abuses. The UNGPs refers both to judicial and non-judicial remedies. In other words, States should ensure that individuals who suffered an abuse can easily sue a national court (judicial remedies) and activate alternative mechanism such as mediation (non-judicial remedies). In any case, non-judicial remedies, which are complementary and not substitute of the judicial ones, must be legitimate, accessible, predictable, equitable, transparent and they must

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<sup>6</sup> European Commission, COM(2011) 681 final, cited above.

<sup>7</sup> [Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play](#), 14 July 2015, SWD(2015) 144 final.

<sup>8</sup> UNGPs no. 13.

comply with international law rules and standards<sup>9</sup>. The UNGPs also provide for non-State remedies, such as mediation mechanisms governed by private organisations like industry associations.

However, concerning CSR, the international rules that must be taken into account are not only soft-law provisions. Indeed, there is a minority of international rules on human rights which contain provisions that are binding to enterprises. It is the case, for example, of the International Covenant on Civil and Political Rights, of the International Covenant on Economic, Social and Cultural Rights, of the Convention on the Rights of the Child and of the Convention on the Elimination of All Forms of Discrimination against Women<sup>10</sup>. However, these treaties cannot be effectively enforced at the international level unless the signatory States have also ratified their optional protocols. So, without international dispute settlement mechanisms, only national courts have the power to enforce these international provisions. In this regard, there are countries that play a fundamental role in the global economy (and also in the fashion industry) which have not ratified the optional protocols of the mentioned treaties: Laos, Pakistan, India, Bangladesh and China<sup>11</sup>. Notwithstanding the efforts made by these States to establish independent and transparent judicial systems, it is still hard to consider their national courts as effectively independent. It follows that even in the case of international binding rules on human rights for enterprises, their lack of enforceability at international and national level has made CSR a difficult goal to achieve in countries where the respect of human rights is not well-established. In this regard, some authors have analysed the opportunity to allow victims of human rights violations occurred in emerging countries to access to justice in developed countries on the basis of private international law provisions<sup>12</sup>.

## 2.1. Cases of human rights violations in the fashion industry and CSR compliance.

Therefore, nowadays the bigger issue for CSR in fashion industry is the respect of human rights in emerging and developing countries which are more and more involved in the international trade, especially as exporting countries of raw material and manufactured goods. Indeed, after the end of the Multi-Fibre Agreement in 2005, the production of garments shifted from developed to emerging countries<sup>13</sup>. Given that the most labour-intensive part of the value chain of the garment industry is now located in developing countries, one of the most controversial aspect of CSR in the fashion industry is the level of respect of workers' rights in those countries.

Several studies show that in countries like India, China, Bangladesh, Vietnam and Cambodia, violations of human rights still persist. Evidences of forced labour have been found in India, where

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<sup>9</sup> UNGPs no. 31.

<sup>10</sup> L. STOTZ, G. KANE, [Global Garment Industry Factsheet. Facts on The Global Garment Industry](#), February 2015, Clean clothes campaign, pp. 13-14.

<sup>11</sup> *Ibidem*.

<sup>12</sup> In this regard see para. 4, *infra*.

<sup>13</sup> L. STOTZ, G. KANE, [Global Garment Industry Factsheet](#), cited above, pp. 4-5.

under the «sumangali» system women, and most often girls, are not permitted to leave the factory also after the end of the working hours<sup>14</sup>. Child labour is also one of the major concerns in emerging countries; for example in China internships often disguise child labour<sup>15</sup>. Moreover, in many developing countries safe working conditions are not ensured within garment factories; in this regard, the collapse of the Rana Plaza in Savar (Bangladesh) in 2013 has shown the real level of safety on working places in developing countries. Even freedom of association, *i.e.* the freedom to establish trade unions, is not guaranteed in many emerging countries; for example, in 1998 in Bogor (Indonesia) garment employers acknowledged a newly established trade union, but then sacked the union chairman and other union members<sup>16</sup>. Furthermore, sexual discrimination is another big issue in the fashion industry, since women are the majority of workers in garment factories, at least in Asia<sup>17</sup>. For example, in Indonesia a clothing firm refused maternity leave despite the fact that the 97% of its employees were women<sup>18</sup>. Moreover, the right to a minimum and equal wage is not recognised in a lot of developing countries; indeed, employers often arbitrarily reduce or delay payments, as it happens in many Asian countries<sup>19</sup>.

In order to prevent and tackle abuses of human rights, fashion companies often adopt CSR compliance programs. These programs contain guidelines for the management and for the employees of a group (the holding company and its subsidiaries) to conduct business activity without violating human rights and thus promoting a sustainable and responsible way of doing business. Compliance programs are often managed by CSR teams which are directly accountable to the top management of the company<sup>20</sup>. In case of violation, an effective CSR compliance policy must also allow both to identify the responsibility at the appropriate level and to sanction abuses; indeed, the adoption of a CSR compliance program is not by itself sufficient to comply with human rights<sup>21</sup>. Moreover, companies must communicate externally their CSR policy, so as to inform all their actual or potential stakeholders. A CSR compliance program, thus, must be effective and transparent.

It follows that only those CSR programs that encompass commitments from the top management and that provide for an effective supervision mechanism on the entire value chain are able to prevent and reduce the risk of violations of human rights. In other words, fashion companies should extend their CSR compliance programs not only to subsidiaries, but also to commercial partners, first of all their suppliers which however are not part of the company. Indeed, today the fashion industry outsources a large portion of its value chain, especially the most labour-intensive one, which, as already

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<sup>14</sup> L. STOTZ, G. KANE, *Global Garment Industry Factsheet*, cited above, p. 15.

<sup>15</sup> L. STOTZ, G. KANE, *Global Garment Industry Factsheet*, cited above, p. 16.

<sup>16</sup> L. STOTZ, G. KANE, *Global Garment Industry Factsheet*, cited above, p. 11.

<sup>17</sup> L. STOTZ, G. KANE, *Global Garment Industry Factsheet*, cited above, p. 12.

<sup>18</sup> L. STOTZ, G. KANE, *Global Garment Industry Factsheet*, cited above, p. 12.

<sup>19</sup> L. STOTZ, G. KANE, *Global Garment Industry Factsheet*, cited above, p. 18.

<sup>20</sup> In this regard see H&M, *Conscious Actions Sustainability Report 2015*, p. 11.

<sup>21</sup> In this regard see L. STOTZ, G. KANE, *Global Garment Industry Factsheet*, cited above, p. 7 with reference to Mango which has nevertheless adopted a [CSR compliance program](#).

said, is almost completely located in developing and emerging countries. However, beyond the difficulties that undertakings may meet in forcing suppliers to be compliant with human rights, CSR activities usually entail extra costs to the suppliers<sup>22</sup>. Indeed, it is incontestable that CSR compliance increases procedures and costs for enterprises; however the returns in terms of reputation can be high. Therefore, only those companies that really understand the value of reputation on the market have sufficient incentives to apply effective CSR compliance programs. Although the respect of human rights should be considered as a return in itself for companies, a lot of companies (as well as many employees) still need some economic reasons to understand the importance of CSR.

### 3. Competition law in the fashion industry.

EU competition law, as well as other Western antitrust regimes, prohibits companies to collude on the market through horizontal (*i.e.* among direct competitors) or vertical (*i.e.* among companies operating at a different stage of the value chain) agreements or concerted practices that are able to reduce competition. With these agreements enterprises can fix prices, share markets and obstacle competitors to enter the market. However an enterprise is able to restrict competition also on its own; indeed, a company with a big market share can limit competition by using commercial strategies that would not be anti-competitive if adopted by smaller competitors (the so-called abuse of dominant position). Moreover, antitrust law intervenes on merger and acquisitions that can put at risk competition. That is why every competition regime provides for an assessment of mergers and takeovers. In fact, acquisitions often need some remedies in order not to jeopardise the economic environment. For example, an antitrust authority could condition the authorisation of a merger to the divestment of assets such as brands.

In the past, the fashion sector has faced the application of rules on horizontal and vertical cartels (Article 101 TFEU), as well as of merger control regime (Regulation No 139/2004<sup>23</sup>). For what concerns the risk of cartels, given that fashion companies are less and less vertically integrated, they increasingly need to recourse to suppliers (on the production side) and to distributors and retailers (on the distribution side). Therefore, while horizontal cartels in fashion industry are uncommon (but not impossible<sup>24</sup>), risks of vertical restraints can be high in this industry. Vertical restrictions, which usually take the form of non-compete or exclusivity clauses, are regulated by the Regulation of the European

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<sup>22</sup> See F. COOKE, Q. HE, *Corporate social responsibility and HRM in China: a study of textile and apparel enterprises*, in *Asia pacific business rev.*, 2010, pp. 355–376.

<sup>23</sup> Council [Regulation \(EC\) No 139/2004](#) of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), *OJ L* 24 of 29 January 2004, pp. 1-22.

<sup>24</sup> In this regard see para. 3.1, *infra*.

Commission No 330/2010<sup>25</sup> (the so-called vertical agreements block exemption Regulation) that provides for the requirements that a distribution agreement must meet in order to comply with the prohibition of cartels. This act also regulates the so-called selective distribution that is an essential system for the fashion sector<sup>26</sup>. According to Article 1(1)(e) of Regulation No 330/2010 «selective distribution system’ means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system». It follows that, according to selective distribution system, a fashion company can legitimately select its distributors on the basis of qualitative requirements. Moreover, the fashion company has the right to prohibit the selected distributors to sell goods of all its competing brands. Indeed, according to Article 5(1)(c) of the vertical agreements block exemption Regulation, it is deemed to be anti-competitive only the prohibition of a specific competitor. Furthermore, a selective distribution system allows enterprises to recommend prices to distributors and retailers, even though it is forbidden to impose a minimum price (Article 4(a) Regulation No 330/2010), given that distributors and retailers should be free to determine resale prices.

While anti-competitive agreements can be common, at least theoretically, in the fashion industry, it is not likely that a fashion company commits an abuse of dominant position (Article 102 TFEU). Indeed, a market share of the 40%, which could be the proof of the existence of a dominant position, is almost impossible to reach in this economic sector, where the supply side is composed by many players. By contrast, during the last years merger control has become an increasingly important issue for the fashion industry. Consider, for example, the creation of LVMH Moët Hennessy Louis Vuitton, the new group that – thanks to worldwide acquisitions – now includes brands such as Dior, Louis Vuitton, Fendi, Givenchy, Kenzo, Marc Jacobs, Bulgari and Loro Piana.

### 3.1. Recent cases of competition concerns in the fashion industry and antitrust compliance.

Although horizontal cartels among fashion companies are uncommon, a recent Italian case demonstrates that horizontal anti-competitive agreements are not impossible in the wider fashion

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<sup>25</sup> Commission [Regulation \(EU\) No 330/2010](#) of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, *OJ L* 102 of 23 April 2010, pp. 1-7.

<sup>26</sup> Decision de la Commission du 28 octobre 1970 relative à des procédures au titre de l'article 85 du traité C.E.E. (IV/ 10.498, 11.546, 12.992, 17.394, 17.395 , 17.971 , 18.772, 18.888 et ex 3.213 - Omega), *OJ L* 242 of 5 November 1970, pp. 22-30; Notice pursuant to Article 19 (3) of Council Regulation No 17 concerning Case No IV/33242 - Yves Saint-Laurent Parfums, *OJ C* 320 of 20 December 1990, pp. 11–13; Commission Notice pursuant to Article 19 (3) of Regulation No 17 (Chanel), *OJ C* 334 of 30 November 1994, pp. 11-12.



sector. Indeed, in 2015 the Italian antitrust authority (Autorità Garante della Concorrenza e del Mercato, AGCM) opened investigations against several Italian modelling agencies. The latter are alleged of having coordinated their commercial strategies regarding prices and other terms and conditions of their contracts with the fashion houses<sup>27</sup>, which remunerate the services provided them by the modelling agencies paying a price that includes the remuneration of the model and a fee for the agency. The AGCM believes that the main Italian modelling agencies have constituted an horizontal cartel during the period 2010-2014 both within and outside the Italian association of modelling agencies (Associazione Servizi di Moda, ASSEM). It is worth noting that the AGCM opened investigation after that some of these agencies filed a request for the admission to a leniency program, therefore admitting of having violated antitrust law. Leniency programs recognise to enterprises that acknowledge of having participated in a cartel the immunity from sanctions or a reduction of fines. The conclusion of the investigations is expected by the end of October 2016. In 2015, also the Competition and Markets Authority (CMA), *i.e.* the British antitrust authority, opened an investigation into suspected anti-competitive arrangements in the modelling sector with regard to clothing, footwear and fashion<sup>28</sup>. There are not many information in this regard and some updates on the case are expected for September 2016. Like the Italian case, investigations regard alleged horizontal concerted practises among competitors.

At the EU level, some consequences for the fashion industry are likely to derive from the competition inquiry in the e-commerce sector launched by the European Commission in May 2015. Indeed, fashion goods are part of the increasing range of products sold on the internet, and e-commerce has become no less important than traditional commerce. First findings of the inquiry have revealed that geo-blocking is widespread all over the EU. Geo-blocking is the commercial strategy that prevents consumers domiciled in a certain EU country from buying goods online from another EU country, and «[i]n some cases, geo-blocking appears to be linked to agreements between suppliers and distributors. Such agreements may restrict competition in the Single Market in breach of EU antitrust rules. This however needs to be assessed on a case-by-case basis». By contrast, «if geo-blocking is based on unilateral business decisions by a company not to sell abroad, such behaviour by a non-dominant company falls clearly outside the scope of EU competition law»<sup>29</sup>. Geo-blocking is likely to affect also the fashion industry and the sale of fashion goods through the world wide web; thus all the future regulatory measures concerning geo-blocking will produce effects also on the fashion sector.

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<sup>27</sup> Autorità Garante della Concorrenza e del Mercato, case I789 - Agenzie di Moda, Provvedimento n. 25381, 18 March 2015.

<sup>28</sup> Competition and Markets Authority, case CE/9859-14, 24 March 2015.

<sup>29</sup> European Commission, press release [Antitrust: e-commerce sector inquiry finds geo-blocking is widespread throughout EU](#), Brussels, 18 March 2016, IP-16-922.

Companies which are active in the fashion sector can handle old and new anticompetitive risks by adopting an effective antitrust compliance program. As already said with regard to CSR compliance program, an effective antitrust policy must receive the support of the top management and must be managed by a dedicated team. Moreover, a permanent due diligence is needed in order to mitigate competition risks. In particular, this is essential for fashion companies that very often conclude vertical agreements. For example every selective distribution agreement must comply with Regulation No 330/2010, and only an effective (and speedy) antitrust assessment process can ensure the compatibility of these contracts with competition law. Furthermore, for an antitrust compliance program a «top-down» approach is natural. Indeed, enterprises must inform and educate their employees on what to do and what not to do in order to respect competition rules. The same applies among a holding company and its subsidiaries. In fact, according to the «single economic entity rule» the holding company is liable for all the antitrust infringements committed by its daughter company, on which it exercises control<sup>30</sup>. The «single economic entity rule» exists in almost all national competition regimes and it has now become a well-established standard. In conclusion, the adoption of an antitrust compliance program is not only an advantage in terms of reputation, but it is also an indispensable tool to avoid violations and prevent sanctions that in antitrust regimes can be very high; *e.g.* in the EU fines can amount to the 10% of the entire turnover of a group. Moreover, some antitrust authorities consider the adoption of an effective antitrust compliance program as a mitigating factor for sanctions in case of antitrust breaches<sup>31</sup>.

#### 4. How antitrust law can inspire CSR.

As already said, some authors have argued that people who suffered violations of their human rights – whose protection is at the heart of CSR – in developing countries should be allowed to seek judicial remedies in certain developed countries (*e.g.* the EU and the United States), according to their private international law rules. Indeed, this would be possible for violations perpetrated by subsidiaries of multinational companies established in emerging countries where the human rights abuses occurred, provided that their holding companies have their seats in developed countries. By contrast, this would not be possible for violations caused by suppliers domiciled in emerging countries and that are not part of an undertaking established in a developed country. It follows that the daughter entity (domiciled in a developing country) of a fashion company (established in a developed country) could be sued before the courts of its mother company for violations of human rights that occurred in the emerging country where the subsidiary operates.

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<sup>30</sup> *Ex multis*, [Court of Justice, 10 September 2009, case C-97/08 P, Akzo Nobel v Commission](#), EU:C:2009:536.

<sup>31</sup> See Autorità Garante della Concorrenza e del Mercato, [Guidelines on sanctions](#), 31 October 2014, p. 6.

However, despite the possibility for courts in some developed countries to have jurisdiction on violations of human rights committed abroad<sup>32</sup>, three questions remain open. First, the high costs for introducing litigations abroad. Second, the identification of the law that applies to the abuses at issue. Third, the actual possibility for the holding company of being considered liable for the actions of its controlled undertakings, since the two entities have a different legal personality (the so-called parental liability). Indeed, it is often difficult that the mother company is considered responsible for acts of their daughter companies<sup>33</sup>.

For what concerns litigation costs, a key role could be played by the non-governmental organisations that are able to provide legal and economic support to complainants from developing countries.

Regarding the applicable law; for instance, in the EU the applicable law will almost certainly be the law of the country where the damage occurred<sup>34</sup>, given that – according to EU private international law – as a general rule the applicable law for non-contractual obligation is the *lex loci damni*<sup>35</sup>. This entails the possibility for an EU court to apply laws of countries weakly committed to human rights<sup>36</sup>. However, not only in countries other than EU Member States the applicable law could be different, but also EU private international law rules provide for (although limited) exceptions to the general rule<sup>37</sup>. Thus the application of the *lex loci damni* is likely (especially in the EU), but it is not certain (especially outside the EU).

Concerning the allocation of the responsibility for the acts of the daughter to the parent company, this would be possible by applying some form of piercing of the corporate veil, which is «generally required to lead to successful pursuit of international holding companies on the basis of activities of their subsidiaries carried out in less CSR active jurisdictions»<sup>38</sup>. In this regard, one of the most proper form of lifting of the corporate veil in cases of violations of human rights could be the application of the already mentioned «single economic entity rule». Indeed, in competition law, the conduct of a subsidiary may be imputed «to the parent company particularly where, although having

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<sup>32</sup> In this regard see, for examples, the [Regulation \(EU\) No 1215/2012](#) of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351 of 20 December 2012, pp. 1-32. See G. VAN CALSTER, [The Role of Private International Law in Corporate Social Responsibility](#), in *Erasmus L. Rev.*, November 2014, No. 3, pp. 125-133, at 125-131. With regard to the EU, according to the author «it is relatively straightforward in the case of acts committed abroad, to sue a [non-EU] corporation in the EU, in the case of that corporation having a corporate bridgehead in the EU» (at 131).

<sup>33</sup> In this regard see the so-called *Shell* case in G. VAN CALSTER, *The Role of Private International Law*, cited above, p. 131.

<sup>34</sup> G. VAN CALSTER, *The Role of Private International Law*, cited above, p. 131.

<sup>35</sup> Art. 4 of [Regulation \(EC\) No 864/2007](#) of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199 of 31 July 2007, pp. 40-49.

<sup>36</sup> In this regard see the application of Nigerian law to the so-called *Shell* case in G. VAN CALSTER, *The Role of Private International Law*, cited above, p. 131.

<sup>37</sup> G. VAN CALSTER, *The Role of Private International Law*, cited above, p. 130.

<sup>38</sup> G. VAN CALSTER, *The Role of Private International Law*, cited above, p. 131.

separate legal personality, that subsidiary does not autonomously determine its conduct on the market but mostly applies the instructions given to it by the parent company»<sup>39</sup>. However, the piercing of the corporate veil is a very limited principle that has been applied – so far – only to competition, tax and foreign investment control regimes. In any case, the application of the lifting of the corporate veil – through legislative or jurisdictional decision – to human rights abuses committed by subsidiaries of companies should not depend on the applicable law, as it happens for overriding mandatory provisions in private international law<sup>40</sup>, since the application of the piercing of the corporate veil would ensure a more effective protection of human rights.

In conclusion, the application of an antitrust principle to human rights protection and CSR is not devoid of difficulties, but it can be a path to follow in order to ensure the allocation of responsibilities of human rights abuses at the appropriate level. Moreover, a wide concept of parental liability in human rights law could strengthen the CSR commitment of enterprises so as to foster a more effective internal due diligence. That shows that, notwithstanding the differences between antitrust and CSR, there could be positive interactions among these two fields of law.

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<sup>39</sup> G. VAN CALSTER, *The Role of Private International Law*, cited above, p. 131.

<sup>40</sup> For a different opinion see G. VAN CALSTER, *The Role of Private International Law*, cited above, pp. 132-133.

EU competition law and the fashion industry:  
the specific case of vertical agreements

Caterina Fratea

Abstract

The paper focuses on the aspects of the EU competition law that are mostly connected to the fashion industry, *i.e.* the provisions on vertical agreements. The 2010 European Commission's regulatory package, made up of the block exemption Regulation and the Guidelines on vertical restraints, is analysed in order to outline the most significant rules that must be followed both by the undertakings and the administrative authorities in the assessment of this type of agreements. On the one hand the requirements that an agreement must meet in order to qualify for the so called «safe harbour» exemption are described. On the other, the main conditions for an agreement not falling within the scope of the Regulation in order to be considered nonetheless compatible with Art. 101 TFEU are investigated. Particular attention is also paid to the internet sales, which represent the newest dimension of the fashion industry.

# EU competition law and the fashion industry: the specific case of vertical agreements

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Caterina Fratea\*

CONTENTS: 1. The possible positive effects of vertical agreements. – 2. The Regulation No 330/2010 on the block exemption for certain categories of vertical agreements. – 3. The Guidelines on vertical restraints of 2010 and the individual assessment. – 4. E-commerce. – 5. Final remarks.

## 1. The possible positive effects of vertical agreements.

When it comes to fashion industry it emerges that the aspects of EU competition law that are mostly connected to the commercial field at stake can be identified with the rules on vertical agreements or concerted practices between two or more undertakings. According to Art. 1(1)(a) of the Commission Regulation No 330/2010 (and for the purposes of the Regulation) «vertical agreement means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services»<sup>1</sup>. Besides the agreements between manufacturers, wholesalers and retailers, also those concluded between manufacturers must be considered if one produces the materials that are necessary to produce the goods that are necessary to the other.

Several reasons may lead to the vertical economic and commercial integration: the reduction of transaction costs, the need of an uninterrupted supply of goods, the reduction of taxes, the weakening of a competitor's market power and the consequent acquisition of a stronger position in the market. Moreover, these agreements can represent an alternative to mergers when they are particularly difficult to implement or can turn out to be ineffective.

In the absence of a specific distinction between horizontal and vertical agreements enshrined in Art. 101 TFEU<sup>2</sup>, the European Court of Justice (hereinafter ECJ), from the beginning of the European integration, has admitted that that this provision prohibits any kind of anticompetitive agreements

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<sup>1</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, *iOJ* L 102 of 23 April 2010, p. 1 ff. and at <http://eur-lex.europa.eu>.

<sup>2</sup> On the Art. 101 TFEU see in general, *ex multis*, A. JONES and B. SUFRIN, *EU Competition Law*, 4<sup>th</sup> ed., Oxford 2011, p. 118 ff.; V. ROSE, D. BAILEY (edited by), *Bellamy & Child European Union Law of Competition*, 7<sup>th</sup> ed., Oxford 2013, p. 81 ff.

provided that they have an inter-State dimension, because both can restrict competition and create unjustified disadvantages for consumers<sup>3</sup>.

Generally speaking, vertical agreements have the objective to make the buyer develop some activities that can be useful but expensive for the supplier (principal-agent relationship)<sup>4</sup>. Every undertaking needs its products to be distributed and the quality and efficiency of the distribution system are pivotal factors in the competitive game to gain the favour of the clients. There are only very few manufacturers that directly sell to the final consumers, being the choice to rely upon specialized distributors the usual one. In certain commercial fields strong economies can be created thanks to the cooperation of different operators of the commercial chain and this cooperation has been facilitated and strengthened by the so called «just-in-time manufacturing»<sup>5</sup>.

Vertical agreements are considered less harmful for the maintenance of a competitive structure than the horizontal ones because, alongside some possible anticompetitive restraints, they are recognized to produce also some positive effects. It is true that negative effects are likely to arise from a vertical agreement, like the anticompetitive foreclosure of the market for other suppliers or other buyers by raising barriers to entry or expansion; the softening of competition between the supplier and its competitors and/or facilitation of collusion amongst these suppliers, often referred to as reduction of *inter-brand competition*; the softening of competition between the buyer and its competitors and/or facilitation of collusion amongst these competitors, often referred to as reduction of *intra-brand competition* if it concerns distributors' competition on the basis of the brand or product of the same supplier; the creation of obstacles to market integration, including, above all, limitations on the possibilities for consumers to purchase goods or services in any Member State they may choose<sup>6</sup>.

However, they can also produce some possible positive effects as, in particular, promoting non-price competition and improved quality of services (as in the cases of selective distribution and

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<sup>3</sup> [Court of Justice, 13 July 1966, joined cases 56 and 58/64, \*Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community\*](#), EU:C:1966:41 (on Art. 86 TEEC). Cp. E. CANNIZZARO, L.F. PACE, *Capitolo VI. Le politiche di concorrenza*, Torino 2010, pp. 293-349, at p. 300; A. JONES and B. SUFRIN, *EU Competition Law*, cited above, pp. 143-145 (for the difference between vertical agreements and unilateral conduct see p. 147 ff.).

<sup>4</sup> P. MARSDEN, P. WHELAN, *Selective distribution in the age of online retail*, in *Eur. Comp. L. Rev.*, 2010, p. 27. When referred to vertical agreements, the terms «supplier» and «buyer» just mean two operators at a different level of the commercial chain, not being synonyms of «retailer» and «final purchaser» respectively.

<sup>5</sup> The «just-in-time manufacturing» (JIT) originally referred to the production of goods to meet customer demand exactly, in time, quality and quantity, whether the customer is the final purchaser of the product or another process further along the production line. It has now come to mean producing with minimum waste: see T.C.E. CHENG and S. PODOLSKY, *Just-in-Time Manufacturing. An Introduction*, 2<sup>nd</sup> ed., London 1996, p. 9 ff.

<sup>6</sup> Commission notice – Guidelines on Vertical Restraints, SEC(2010) 411, at <http://eur-lex.europa.eu>, para. 100.

franchising that require to the distributor a certain standard of quality of the service connected the image of the trade mark), opening up or entering new markets and promoting investments<sup>7</sup>.

The positive effects generally connected to a vertical agreement must be linked to the so called «rule of reason», which means that these agreements must be assessed by taking into account not only their object but also their possible effects in the light of the economic context in which they are implemented<sup>8</sup>. The theoretical starting point is that a supplier that for example concludes an exclusive distribution agreement cannot be driven by an anticompetitive search of profits at the expenses of the buyer since the possible price increase deriving from the agreement (besides being forfeited by the distributor and not by the supplier) would result in a sales' contraction. An exclusive distribution agreement, that might cause an economic prejudice to the supplier due to the consequent price increase, is therefore justified by the possibility that the distributor can offer, together with the goods that are the object of the contract, additional services that result in an increase in the quality of goods and, consequently, in demand and profits. This scenario, protecting both the supplier and the distributor and bringing higher quality goods to the consumers, is considered far from being harmful to competition.

However, in order to assess whether a given vertical agreement brings these positive effects also in practice it would be too simple to look only at the increase in the volumes of products sold since other crucial variables must be taken into account, as the purchasers' behaviour. It is therefore necessary to look first at the object of the agreement and, then, at its effects as Art. 101 TFEU requires<sup>9</sup>. This analysis is supported by the Regulation No 330/2010 listing the conditions under which vertical restraints are exempt from the prohibition on anticompetitive agreements defined by Art. 101(1) TFEU, as well as the new Guidelines on vertical restraints, both adopted by the European

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<sup>7</sup> Guidelines on Vertical Restraints, cited above, para. 106. See F. WIJCKMANS, F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford 2011, para. 9.10 ff.

<sup>8</sup> P. MANZINI, *Capitolo I. Le intese*, in B. Cortese, F. Ferraro, P. Manzini, *Il diritto antitrust dell'Unione europea*, Torino 2014, pp. 1-43, at p. 22.

<sup>9</sup> On the distinction between restriction by object and by effect see, *ex plurimis*, C. LEMAIRE, *Object vs. Effect After the Modernisation of EU Law: What Has (or Should Have) Changed?*, in *New Frontiers of Antitrust 2012*, Brussels 2013, pp. 163-182; D. WAELBROECK and D. SLATER, *The Scope of Object vs Effect Under Article 101 TFEU*, in *Ten years of effects-based approach in EU competition law. State of play and perspectives*, eds. J. Bourgeois, D. Waelbroeck, Brussels 2013, pp. 131-157; J. KILLICK and J. JOURDAN, *Cartes Bancaires: A Revolution or a Remainder of Old Principles We Should Never Have Forgotten?*, 2014, available at [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com); G. BRUZZONE, S. CAPOZZI, *Restrictions by Object in the Case Law of the Court of Justice: in search of a Systematic Approach*, in G.A. BENACCHIO, M. CARPAGNANO (a cura di), *L'applicazione delle regole di concorrenza in Italia e nell'Unione europea. Atti del V Convegno biennale Antitrust, Trento, 16-18 aprile 2015*, Napoli 2015, pp. 217-236; P. FATTORI, *The Impact of Groupement des Cartes Bancaires on Competition Law Enforcement*, in *Italian Antitrust Rev.*, 2015, 2, pp. 22-28; J. RUIZ CALZADO and A. SCORDAMAGLIA-TOUSIS, *Groupement des Cartes Bancaires v Commission: Shedding Light on What is not a 'by object' Restriction of Competition*, in *J. Eur. Competition L. & Practice*, 2015, pp. 495-498; R. SCHÜTZE, *European Union Law*, Cambridge 2015, p. 701 ff.; L. ZAMPA, A. DI GIÒ, *The Conundrum of Restrictions "by Object": Rationale, Scope, Impact and a Proposal*, in *Italian Antitrust Rev.*, 2015, 3, pp. 13-44.



Commission on 20 April 2010. These rules replaced Regulation No 2790/1999<sup>10</sup> and the previous Guidelines<sup>11</sup> as of June 2010 and will remain in force until May 2022. While the 2010 Regulation does not contain other significant changes compared to 1999 Regulation, the new Guidelines contain a great number of adjustments and changes to the rules for how vertical restraints need to be assessed, from the Commission's perspective, in light of Art. 101 TFEU.

## 2. The Regulation No 330/2010 on the block exemption for certain categories of vertical agreements.

The EU regulatory package of 2010 is intended to create a system that enables to assess the vertical agreements in a market context according to the previously described rule of reason by considering more the economic aspects than the formal definition of the agreement.

Based on the positive experience of Regulation No 2790/1999, the 2010 Regulation recognizes that «certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels»<sup>12</sup>.

Nonetheless, at the same time it must be admitted that the «likelihood that such efficiency-enhancing effects will outweigh any anti-competitive effects (...) depends on the degree of market power of the parties to the agreement and, therefore, on the extent to which those undertakings face competition from other suppliers of goods or services regarded by their customers as interchangeable or substitutable for one another, by reason of the products' characteristics, their prices and their intended use»<sup>13</sup>.

Even though it can be inferred that in order to take into account all these elements a case-by-case analysis is required, since 1999 the Commission decided to avail itself of the instrument of the block exemption regulation for certain categories of vertical agreements and concerted practices which, by declaring inapplicable the prohibition of Art. 101(1) TFEU to the vertical agreements that meet certain conditions, provides guidance to firms on how to self-assess their behaviour.

As it is possible to infer from definition given by Art. 1 of the Regulation, the vertical agreements that only determine the resale price or the quantity of goods for a transaction are generally deemed compatible with the EU competition law, unlike the agreements that set certain conditions for

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<sup>10</sup> OJ L 336 of 29 December 1999, p. 21 ff.

<sup>11</sup> OJ C 291 of 13 October 2000, p. 1 ff.

<sup>12</sup> Recital 6 of the Regulation.

<sup>13</sup> Recital 7 of the Regulation.

the seller or the buyer<sup>14</sup>. From the Regulation it is possible to identify three categories of requirements that must be met by a vertical agreement to be exempted from the prohibition of Art. 101(1) of the Regulation and they are laid down in Arts. 3-5 of the Regulation.

The first requirement regards the new market share thresholds necessary to qualify for the so called «safe harbour» exemption, which represents one of the most significant novelties introduced by the 2010 Regulation. As did Regulation No 2790/1999, also Regulation No 330/2010 provides an exemption for vertical restraints if the market share of the supplier does not exceed 30 percent in the market in which it sells the contract goods or services. For this safe harbour to apply, however, Regulation No 330/2010 also requires that also the market share of the buyer not exceed 30 percent in the relevant market, introducing then a double market threshold<sup>15</sup>. Following the Commission's publication of a draft version of the Regulation in July 2009, the definition of relevant buyer market was debated. Based on the 2009 draft, the market share of the buyer would have had to be calculated, according to the rules laid down in Art. 7, in relation to «any of the relevant markets affected by the agreement»<sup>16</sup>, which would have raised the concern that this provision could result in a significant loss of legal certainty and would be inconsistent with other EU instruments. Therefore, the final text of the new Regulation relates the relevant market share of the buyer to the market «on which it purchases the contract goods or services». This market share test is considered sufficient to ensure that the Commission achieves its objective of not applying the safe harbour to restrictions of competition resulting from buyer power, while maintaining an adequate level of legal certainty for the businesses involved.

In addition to this, Art. 3(2) specifies that where in a multi party agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party, the market share of the first undertaking must respect the market share threshold both as a buyer and a supplier in order for the exemption to apply.

The second category of requirements to be met by an agreement to fall within the scope of application of the Regulation attains to the so called hardcore restrictions, which are considered so harmful for competition that, no matter what the market share is, make the agreement *per se* incompatible with Art. 101 TFEU. According to Art. 4 of Regulation No 330/2010 (substantially

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<sup>14</sup> See also SLAUGHTER AND MAY, *The EU competition rules on vertical agreements. A guide to the assessment of vertical agreements*, June 2016, p. 4, at [www.slaughterandmay.com](http://www.slaughterandmay.com).

<sup>15</sup> R. MAGRÌ, *Le intese verticali. Il regolamento di esenzione UE 330/10*, Catania 2013, p. 59 ff. Art. 3 of the Regulation No 2790/99 established that «1. Subject to paragraph 2 of this Article, the exemption provided for in Article 2 shall apply on condition that the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services. 2. In the case of vertical agreements containing exclusive supply obligations, the exemption provided for in Article 2 shall apply on condition that the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services».

<sup>16</sup> Available at the DG Competition website, <http://ec.europa.eu/competition/antitrust/legislation/vertical.html>.

identical to Art. 4 of the previous Regulation), an agreement containing hardcore restraints cannot benefit from the exemption. The following restraints are considered hardcore: resale price maintenance; territorial and customer restrictions (with some exceptions); restrictions on selling to end-users imposed on authorized retailers in a selective distribution system; restrictions on cross supplies within a selective distribution system; and restrictions on component suppliers to sell the components they produce to independent repairers or service providers<sup>17</sup>.

The 2010 Guidelines adopt a much harsher approach towards hardcore restraints than the previous Guidelines by establishing a non-rebuttable presumption of incompatibility with Art. 101(1) TFEU of any vertical agreement containing these restraints<sup>18</sup>. It must be underlined that a non-rebuttable presumption of violation of Art. 101(1) TFEU established by means of a soft law act, like the Guidelines, seems to be incompatible with the burden of proof laid down in Art. 2 of the Regulation No 1/2003<sup>19</sup>, according to which «[i]n any national or Community proceedings for the application of [Article 101 TFEU], the burden of proving an infringement of [Article 101(1) TFEU] shall rest on the party or the authority alleging the infringement»<sup>20</sup>.

This presumption also appears inconsistent with other sections of the new Guidelines, which – in line with the Commission’s generally more economic-oriented approach to competition law – recognize that certain hardcore restraints, such as absolute territorial restrictions (restrictions of active and passive sales imposed by a supplier upon its distributors), may be compatible with Art. 101(1) TFEU<sup>21</sup>.

Last but not least, a presumption of incompatibility with Art. 101(1) TFEU of certain vertical agreements also appears contrary to the ECJ case law, which stated that also agreements containing resale price maintenance are caught by the prohibition set out in [Article 101(1)] only where all the other conditions for applying that provision are met<sup>22</sup>.

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<sup>17</sup> *Amplius* on the single types of restriction F. WIJCKMANS, F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, cited above, para. 9.38 ff.

<sup>18</sup> Para. 47 and 223 of the Guidelines.

<sup>19</sup> OJ L 1 of 4 January 2003, p. 1 ff.

<sup>20</sup> *Amplius* B. NASCIMBENE, *Art. 2 – Onere della prova*, in *L'applicazione del diritto comunitario della concorrenza. Commentario al regolamento (CE) n. 1/2003 del Consiglio del 16 dicembre 2002*, a cura di A. Adinolfi, L. Daniele, B. Nascimbene e Stefano Amadeo, Milano 2007, pp. 28-35.

<sup>21</sup> Para. 61 of the Guidelines.

<sup>22</sup> [Court of Justice, 2 April 2009, case C-260/07, \*Pedro IV Servicios v Total España SA\*](#), EU:C:2009:215, para. 82. See also [Court of Justice, 19 April 1988, case 27/87, \*SPRL Louis Eramm-Jacquery v La Hesbignonne SC\*](#), EU:C:1988:183, para. 10-11, where the Court found that even absolute territorial protection can fall outside the scope of the present Art. 101(1); [20 November 2008, case C-209/07, \*Competition Authority v Beef Industry Development Society Ltd and Barry Brothers \(Carrigmore\) Meats Ltd\*](#), EU:C:2008:643, para 16, where the Court did not apply the Commission’s categorisation of object and effect cases, and it stated that to decide whether an arrangement is an anticompetitive restriction by object, the agreement’s content and the economic context are to be examined; 13 October 2011, case C-439/09, [Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi](#), EU:C:2011:649, where the Court for the first time

It is true that the new Guidelines state that the parties to vertical agreements containing hardcore restraints can always plead an efficiency defence under Article 101(3) in an individual case<sup>23</sup>. However, by introducing a non-rebuttable presumption that these agreements are incompatible with Article 101(1) TFEU the new Guidelines greatly limit, rather than increase, the rights of defence, since (1) the parties to an agreement will generally find it difficult to show that all four conditions of Article 101(3) TFEU are satisfied<sup>24</sup>; (2) it was already established case law that «in principle, no anticompetitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article [101(3)] are satisfied»<sup>25</sup>; and (3) the Guidelines provide very little guidance on what type of evidence should be provided to show that the conditions of Article 101(3) TFEU are satisfied in real situations. In light of the above, it is submitted that with regard to vertical agreements containing hardcore restraints, the new Guidelines not only do not bring about significant improvements in terms of legal certainty but also depart from the Commission's predicated more economic-oriented approach in the area of competition law.

It follows that the Regulation No 330/2010 exempts vertical agreements on condition that no hardcore restriction, as set out in Article 4 of that Regulation, is contained in or practised with the vertical agreement. However, even when the vertical agreement is not identifiable with a hardcore restriction – and here comes the third category of requirements –, according to Art. 5 of the Regulation the exemption shall not apply to the following obligations: a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five year<sup>26</sup>; b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or service<sup>27</sup>; c) any direct or indirect obligation causing the members of a selective distribution system

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saw an objective justifiability for a restriction by object. This is the reason why some authors call the new ECJ approach to EU competition law a «more analytical approach» rather than effects-based: D. BAILEY, *Restrictions of Competition by Object under Article 101 TFEU*, in *Comm. Mark. L. Rev.*, 2012, pp. 559-600, at p. 580.

<sup>23</sup> Para. 60 of the Guidelines.

<sup>24</sup> On these four conditions see R. SCHÜTZE, *European Union Law*, cited above, p. 710: two positive (the agreement must generate productive or dynamic efficiencies which outweigh the economic inefficiencies identified in Art. 101(1); the consumers must get a fair share in the resulting overall benefit) and two negative conditions (related to the indispensability of a restriction: assessing if there are no other economically practicable and less restrictive means of achieving the efficiencies – global test – and assessing the indispensability of each individual restriction of competition to see whether all of them are reasonably necessary for the attainment of the efficiencies – individual test) must in fact be met in order to exempt an agreement.

<sup>25</sup> General Court, 15 July 1994, case T-17/93, *Matra Hachette SA v Commission*, EU:T:1994:89, para. 85.

<sup>26</sup> By virtue of Art. 5(1) of the Regulation a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration.

<sup>27</sup> According to Art. 5(3), «[b]y way of derogation from para. 1(b), the exemption provided for in Art. 2 shall apply to any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled: (a) the obligation relates to goods or services which compete with the contract goods or services; (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period; (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer; (d) the duration of the obligation

not to sell the brands of particular competing suppliers. This specific individual restrictions are excluded from the scope of application of the block exemption, but this does not affect the application of the block exemption to other vertical restraints contained in the agreement.

As said, if there are one or more hardcore restrictions, the benefit of the block exemption is lost for the entire vertical agreement since there is no severability for these ones. The rule of severability does apply, however, to the excluded restrictions set out in Article 5 of the block exemption Regulation. Therefore, the benefit of the block exemption is only lost in relation to that part of the vertical agreement which does not comply with the conditions set out in Article 5<sup>28</sup>.

### 3. The Guidelines on vertical restraints of 2010 and the individual assessment.

The Guidelines represent the second pillar of the 2010 Commission package. On the one hand, they are a tool that helps in the interpretation and application of the Regulation (especially in relation of the market definition and the market share calculation<sup>29</sup>); on the other, they provide guidance to firms on how to self-assess the compatibility with Art. 101 of vertical agreements falling outside the scope of application of the Regulation.

In fact, besides the cases of hardcore restrictions, the Regulation does not apply if the market share of the supplier and the buyer exceeds the 30 percent of the relevant market. Nonetheless, the overcome of this double threshold does not imply the incompatibility of the agreement. The meaning of the market share threshold indeed is to distinguish the agreements that enjoy a presumption of compatibility from those that require an individual assessment. The Guidelines help both the undertakings and the administrative authorities (European Commission and national competition authorities) in this analysis by establishing general rules for the assessment of vertical agreements<sup>30</sup> and specific rules for the evaluation of the most common types of possible vertical restraints.

According to the Guidelines<sup>31</sup> among the latter stand the single branding, the exclusive distribution, the exclusive customer allocation, the selective distribution, the franchising and the exclusive supply.

When it comes to the fashion industry – both high-end and smaller companies – the single branding, the exclusive and selective distribution and the franchising can be considered the most common cases of vertical agreements.

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is limited to a period of one year after termination of the agreement». The Italian version of Art. 5(3) of the Regulation contained a material error corrected in 2012 (see *OJ L* 71 of 9 March 2012, p. 55).

<sup>28</sup> Para. 70-71 of the Guidelines.

<sup>29</sup> Para. 86 ff.

<sup>30</sup> Para. 96 ff.

<sup>31</sup> Para. 128 ff.

Under the heading of single branding fall those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier. The possible competition risks of single branding are foreclosure of the market to competing suppliers and potential suppliers, softening of competition and facilitation of collusion between suppliers in case of cumulative use and, where the buyer is a retailer selling to final consumers, a loss of in-store inter-brand competition.

In an exclusive distribution agreement, the supplier 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. The possible competition risks are mainly reduced intra-brand competition and market partitioning, which may facilitate price discrimination in particular. When most or all of the suppliers apply exclusive distribution, it may soften competition and facilitate collusion, both at the suppliers' and distributors' level. Lastly, exclusive distribution may lead to foreclosure of other distributors and therewith reduce competition at that level.

Selective distribution agreements, like exclusive distribution agreements, restrict the number of authorised distributors on the one hand and the possibilities of resale on the other. One of the main novelties of the 2010 package is the modification of the definition of selective distribution. According to the Regulation No 2790/1999 a distribution system was selective if the supplier selected its distributors on the basis of specified criteria and prevented them from reselling to any unauthorized (*i.e.* non-selected) distributor across the EU. Under Regulation No 330/2010, suppliers will be able to prevent the members of a selective distribution network from selling to unauthorized distributors only «within the territory reserved by the supplier to operate that system» (Arts. 1(1)(e) and 4(b), *i.e.* the territory «where the system is currently operated or where the supplier does not yet sell the contract products»<sup>32</sup>). This new rule, the rationale of which seems related to objective of enticing the adoption of EU-wide selective distribution networks, may have a chilling effect on the suppliers' ability to establish a selective distribution system in certain EU countries while using other forms of distribution (for instance exclusive distribution) in other EU countries.

The difference with exclusive distribution is that the restriction of the number of dealers does not depend on the number of territories but on the selection criteria linked in the first place to the nature of the product. Another difference with exclusive distribution is that the restriction on resale is not a restriction on active selling to a territory but a restriction on any sales to non-authorised distributors, leaving only appointed dealers and final customers as possible buyers. Selective distribution is almost always used to distribute branded final products. The possible competition risks are a reduction in intra-brand competition and, especially in case of cumulative effect, foreclosure of

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<sup>32</sup> Para. 55 of the Guidelines.

certain types of distributors and softening of competition and facilitation of collusion between suppliers or buyers.

To assess the possible anticompetitive effects of selective distribution under Art. 101(1), a distinction needs to be made between purely qualitative selective distribution and quantitative selective distribution. Purely qualitative selective distribution selects dealers only on the basis of objective criteria required by the nature of the product such as training of sales personnel, the service provided at the point of sale, a certain range of the products being sold, etc. The application of such criteria does not put a direct limit on the number of dealers. Purely qualitative selective distribution is in general considered to fall outside Article 101(1) for lack of anticompetitive effects, provided that three conditions are satisfied. First, the nature of the product in question must necessitate a selective distribution system, in the sense that such a system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use. Secondly, resellers must be chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all and made available to all potential resellers and are not applied in a discriminatory manner. Thirdly, the criteria laid down must not go beyond what is necessary<sup>33</sup>. Quantitative selective distribution adds further criteria for selection that more directly limit the potential number of dealers by, for instance, requiring minimum or maximum sales, by fixing the number of dealers, etc.

Franchise agreements contain licences of intellectual property rights relating in particular to trade marks or signs and know-how for the use and distribution of goods or services. In addition to the licence of intellectual property rights, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance. The guidance provided in respect of other types of restraints (*i.e.* selective distribution, non-compete obligations or exclusive distribution) applies also to franchising, subject to the following two specific remarks: (a) the more important the transfer of know-how, the more likely it is that the restraints create efficiencies and/or are indispensable to protect the know-how and that the vertical restraints fulfil the conditions of Art. 101(3); (b) a non-compete obligation on the goods or services purchased by the franchisee falls outside the scope of Art. 101(1) where the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases, the duration of the non-compete obligation is also irrelevant under Art. 101(1), as long as it does not exceed the duration of the franchise agreement itself<sup>34</sup>.

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<sup>33</sup> Court of Justice, 11 December 1980, case 31/80, *L'Oréal v PVB NV L'Oréal e SA L'Oréal v PVBA "De Nieuwe AMCK"*, EU:C:1980:289, para. 15-16; General Court, 27 February 1992, case T-19/91, *Société d'hygiène dermatologique de Vichy v Commission*, EU:T:1992:28, para. 65.

<sup>34</sup> See V. ROSE, D. BAILEY (edited by), *Bellamy & Child European Union Law of Competition*, cited above, p. 492 ff.

#### 4. E-commerce.

The modern reality of the fashion industry cannot be properly described without focusing also to the internet sales and the clarification of the admissible restrictions to these represents another important change of the 2010 package. After all, one of the reason of the revision of the vertical agreements legislation was the need to adapt the European legal framework to the technological development and, in particular, the electronic commerce<sup>35</sup>, which introduced significant changes in the dynamics of the commercial distribution.

Under this respect it must previously clarified the difference between active and passive sales. The internet can reach a far bigger number of customers than traditional forms of sale. Therefore, restrictions of the use of internet usually regard resale. The active sales require the single customers or groups of customers located in a certain territory to be reached by the suppliers thanks to a specific and targeted behaviour of the latter, for example by means of targeted mail or e-mail. On the contrary, a sale stemming from an unsolicited client order (*e.g.* if a customer visits a distributor's website and purchases a product) or from the general commercial advertising and marketing strategy of an undertaking is considered a passive sale. The Commission considers certain restrictions of passive sales as hardcore restrictions. One example is an agreement where an exclusive distributor is obliged to re-route customers from areas that are exclusive to other distributors to their websites or the manufacturer's website. Moreover, distributors must not be asked to limit their amount of overall sales over the internet or to pay a higher price for products to be sold online<sup>36</sup>.

A restriction of active sales over the internet is also possible. For instance, a supplier may prevent a distributor from actively soliciting customers of areas allocated to other distributors over the internet by putting advertisements on the websites of local newspapers in those other areas<sup>37</sup>. Furthermore, a supplier may require the distributor to observe certain quality standards for an online shop where their products are sold.

With regard to internet sales, the 2010 Guidelines strike a compromise between the opposing interests of online commercial platforms and luxury goods producers. On the one hand, given the criterion of the so called «overall equivalence» between the traditional and electronic commerce<sup>38</sup>, they confirm that an outright prohibition to sell or advertise a product over the internet is a hardcore restraint that would deprive the agreement of the safe harbour granted by the Regulation<sup>39</sup>. Similarly,

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<sup>35</sup> On these aspects see also Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *OJ L* 178 of 17 July 2000, p. 1 ff.

<sup>36</sup> M. LORENZ, *An Introduction to EU Competition Law*, Cambridge 2013, p. 173.

<sup>37</sup> *Ibidem*.

<sup>38</sup> R. MAGRÌ, *Le intese verticali*, cited above, pp. 117-118.

<sup>39</sup> Para. 52.



they clarify that restrictions on how a distributor can sell through the internet are hardcore restraints if they limit the distributor's ability to make passive sales. The following examples are provided of internet sales restrictions that are considered hardcore: requiring the distributor to make its website inaccessible, or transactions through its website impossible, to customers depending on their place of residence; requiring a distributor to limit the proportion of overall sales made over the internet (without excluding, however, the possibility for the supplier to require the buyer to sell at least a certain absolute amount, in value or volume, of the products offline to ensure an efficient operation of its brick and mortar shop); requiring a distributor to pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline<sup>40</sup>.

On the other hand, the Guidelines state that an outright ban on internet sales may be objectively justified in exceptional circumstances (such as when necessary to align on a public ban on selling dangerous substances to certain customers for reasons of safety or health), and that undertakings have always the possibility to plead an efficiency defense of internet sales hardcore restrictions<sup>41</sup>. For instance, requiring a distributor to pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline may be justified if the sales online lead to substantially higher costs for the manufacturer than sales made offline<sup>42</sup>. Finally and most importantly, the Guidelines clarify that a supplier may impose quality standards for the use of an internet site and, in particular, «require its distributors to have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system»<sup>43</sup>. The quality standards, however, must be proportionate, that is, they should be «overall equivalent to the criteria imposed for the sales from the brick and mortar shop» and should not consist of obligations that «dissuade appointed dealers from using the internet to reach more and different customers»<sup>44</sup>.

However in relation to the internet sale of cosmetics and personal care products, this last principle has been well established also by the ECJ according to which, following the general principle of proportionality, «in the context of a selective distribution system, a contractual clause requiring sales (...) to be made in a physical space where a qualified [person] must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified»<sup>45</sup>.

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<sup>40</sup> Para. 50.

<sup>41</sup> Para. 60.

<sup>42</sup> Para. 64.

<sup>43</sup> Para. 54.

<sup>44</sup> Para. 56.

<sup>45</sup> Court of Justice, 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, cited above, para. 47.

## 5. Final remarks.

The most significant novelties introduced by the 2010 European Commission's regulatory package consist of the addition of a new market share thresholds necessary to qualify for the block exemption; the Commission's view about the legal effects arising from the inclusion of hardcore restrictions in distribution agreements; the modification of the definition of selective distribution; and the clarification of the admissible restrictions to internet sales. Although the other two changes appear in line with the Commission's more economic-oriented approach in the area of competition law and with the need to ensure an adequate degree of legal certainty, the changes concerning selective distribution and hardcore restraints do not appear entirely consistent with these objectives. In particular, the non-rebuttable presumption of incompatibility with Art. 101(1) TFEU of any vertical agreement containing these restraints seems incompatible with the Art. 2 of the Regulation No 1/2003.

Under this respect, there is another aspect that must be taken into consideration in addition to what outlined in the previous paragraphs. The approach of the Commission in the 2010 package, in fact, must be also seen in relation to the provision first contained in Art. 6 of the 1999 Regulation and now enshrined in Art. 29 of the Regulation No 1/2003 according to which the Commission can withdraw the benefit of the block exemption where it finds in any particular case that vertical agreements nevertheless have effects which are incompatible with the conditions laid down in the former Article 81(3) TEC<sup>46</sup>. It follows that the stricter approach arising from the 2010 package can have even harsher effects if put together with this provision of the 2003 Regulation according to which the block exemption has no permanent nature.

In addition, as mentioned in second paragraph, the Commission and the ECJ do not fully agree on the approach EU competition law should have. In the ECJ's judgments, hardcore restrictions do not occupy the role that the Commission represents in its 2010 Guidelines since the Court applies its analytical approach in any anticompetitive case, included the hardcore restrictions. But if the ECJ does not follow the Commission's views within its Guidelines in the future, which has occasionally occurred in the past, the effectiveness of the Guidelines and the Regulations would seriously be in doubt. Secondly, most anticompetitive agreements fall outside Art. 101(1) because block exemptions presume, not prove by evidence, that companies with a market share below 30 percent are unlikely to affect competition on the European market and that their distribution policy allows consumers a fair share of

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<sup>46</sup> On these aspects see V. ROSE, D. BAILEY (edited by), *Bellamy & Child European Union Law of Competition*, cited above, pp. 437-438; R. MAGRÌ, *Le intese verticali*, cited above, p. 104 ff. The same can do the national competition authorities where in any particular case vertical agreements to which the block exemption applies have effects incompatible with the conditions laid down in the present Art. 101(3) TFEU in the territory of a Member State, or in a part thereof, which had all the characteristics of a distinct geographic market.

the resulting benefits<sup>47</sup>. The minority with a market share above 30 percent may escape infringement of Art. 101(1) either by objective justification, which must not be economic as the ECJ confirms in its cases, or may convince that their anticompetitive behaviour is essential for product marketing.

Nevertheless, it cannot be denied that Commission's 2010 package has to be welcomed under other respects since it undeniably aims at giving higher certainty than the previous rules to the vertical integration trying at the same time to focus more on an economic approach, based on the actual effects of an agreement and of the rule of reason, than a formalistic approach based on the mere definition of a contract or a clause<sup>48</sup>.

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<sup>47</sup> See R. WISH and D. BAILEY, *Competition Law*, 7<sup>th</sup> ed., Oxford 2012, p. 776.

<sup>48</sup> R. WISH and D. BAILEY, *Regulation 330/2010: The Commission's New Block Exemption for Vertical Agreements*, in *Comm. Mark. L. Rev.*, 2010, pp. 1757-1791, at p. 1790.



# Peculiarità dei rapporti contrattuali nel settore del *fashion* e rischi di abuso di dipendenza economica

Maria Margherita Parini

## Abstract

La vicenda giudiziaria che ha interessato una nota impresa del *fashion* ha contribuito ad assicurare un rinnovato interesse verso l'art. 9, *Abuso di dipendenza economica*, della legge 18 giugno 1998, n. 192, *Disciplina della subfornitura nelle attività produttive*, disposizione che ha avuto il merito di attribuire giuridica rilevanza alla condizione di «debolezza relativa» nell'ambito dei rapporti contrattuali tra imprese. Proprio a fronte delle recenti pronunce giurisprudenziali è emerso, infatti, che anche nel settore del *fashion* sono frequenti gli abusi dell'altrui condizione di dipendenza economica attuati dal contraente «forte» ai danni di quello «debole», in particolare interrompendo arbitrariamente i rapporti in atto o riducendo le commesse. Appare, pertanto, d'interesse soffermarsi sulle ragioni che determinano, nell'ambito della catena della produzione e della distribuzione di prodotti riconducibili al *fashion*, asimmetrie di potere contrattuale talmente marcate da integrare gli estremi della «dipendenza economica» e sugli strumenti previsti dal legislatore a tutela della parte debole.

# Peculiarità dei rapporti contrattuali nel settore del *fashion* e rischi di abuso di dipendenza economica

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Maria Margherita Parini\*

**SOMMARIO:** 1. La vicenda *Diesel*. – 2. La dipendenza economica nel settore del *fashion*. – 3. Sull'abuso di dipendenza economica: l'interruzione arbitraria dei rapporti contrattuali e la riduzione delle commesse. – 4. Rimedi contro i comportamenti abusivi di fatto.

## 1. La vicenda *Diesel*.

Recenti vicende giudiziali che hanno visto come protagoniste importanti imprese del *fashion* confermano che, in questo ambito, i rapporti contrattuali, sia nella fase della produzione che in quella della distribuzione, sono spesso connotati da un'asimmetria di potere contrattuale tra le parti tale da integrare addirittura gli estremi della c.d. dipendenza economica della quale il contraente forte frequentemente abusa, imponendo alla controparte condizioni gravemente discriminatorie o inique oppure interrompendo arbitrariamente i rapporti in atto o riducendo drasticamente le commesse.

In proposito, piuttosto nota è sicuramente la vicenda che ha visto contrapposti il C.S.M. Consorzio siciliano manifatturiero e la società Diesel S.p.a.: a fronte di una riduzione tra il 2008 e il 2009 delle commesse di circa l'80% da parte della Diesel<sup>1</sup>, il Consorzio, che da molti anni svolgeva lavorazioni per conto della stessa su pantaloni denim cinque tasche (jeans) in regime di sostanziale mono-committenza<sup>2</sup>, presentava ricorso *ex art. 700 c.p.c.* avanti al Tribunale di Bronte affinché inibisse la riduzione delle commesse lamentando che tale condotta avrebbe integrato un abuso della condizione di dipendenza economica venutasi a creare in considerazione della durata del rapporto, nel corso del quale si era strutturato per rispondere alle esigenze specifiche della committente, sostenendo anche importanti investimenti per l'acquisto di macchinari.

Il Tribunale di Bronte, ravvisata la sussistenza di un abuso di dipendenza economica nella decisione della nota società di ridurre sensibilmente gli ordini di jeans, con ordinanza del 9 luglio 2009 accoglieva parzialmente le domande del Consorzio, condannando Diesel a mantenere in vita il rapporto per i successivi cinque anni sulla base di determinate condizioni contrattuali<sup>3</sup>.

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<sup>1</sup> Nello specifico, tra il 2008 e il 2009, Diesel ha ridotto le commesse di circa l'80 %, nonché interrotto la richiesta di alcuni servizi.

<sup>2</sup> Il Consorzio, che intratteneva rapporti con Renzo Rosso, *patron* della società Diesel S.p.a., addirittura dal 1978, dal 1998 ha dedicato, a fronte dell'aumento della domanda, tre linee di produzione alla Diesel, con la conseguenza che detta società assorbiva il 70% della capacità produttiva del Consorzio.

<sup>3</sup> Trib. Bronte, ord., 9 luglio 2009, in *Foro it.*, 2009, I, c. 2813.

Avverso detto provvedimento entrambe le parti spiegavano reclamo avanti al Tribunale di Catania, il quale revocava la precedente ordinanza, escludendo che la riduzione delle commesse potesse intendersi abusiva, in quanto giustificata «a fronte della sensibile riduzione della domanda e delle vendite dei prodotti fabbricati dal subfornitore»<sup>4</sup>.

Il Consorzio decideva, quindi, di promuovere un nuovo procedimento cautelare – questa volta avanti al Tribunale di Bassano –, lamentando che la riduzione delle commesse non era stata proporzionale alla riduzione della domanda sul mercato e che, pertanto, il comportamento della Diesel doveva in ogni caso intendersi privo di giustificazione e abusivo; ma, anche in questo caso, il Tribunale rigettava le domande formulate dal Consorzio<sup>5</sup>.

Successivamente, Diesel, che nel frattempo aveva interrotto i rapporti contrattuali con il Consorzio, promuoveva avanti al Tribunale di Bassano un procedimento volto ad accertare l'assenza di violazione da parte della stessa di norme contrattuali e dell'art. 9 della l. n. 192/98, in considerazione del fatto che la riduzione delle commesse e, poi, l'interruzione del rapporto erano dipese da una contrazione della domanda del prodotto sul mercato.

Al termine del giudizio il Tribunale di Bassano evidenziava la sussistenza di una condizione di «dipendenza economica», posto che, a fronte dell'elevata percentuale di fatturato della fornitrice (Consorzio) per lavori svolti a favore della committente (Diesel), doveva escludersi la sussistenza di reali alternative di mercato anche sulla base del fatto che la riduzione degli ordini era avvenuta in «un periodo di crisi conclamata» e che «il mercato dell'abbigliamento Made in Italy si è fortemente ridotto» e che, pertanto, in tale contesto non «fosse concretamente possibile per CSM reperire una alternativa soddisfacente, considerato che le capacità produttive generali sopravanzano largamente la domanda di simili beni, venuta drasticamente meno»<sup>6</sup>. Al contempo, il Tribunale escludeva la sussistenza di ragioni oggettive che potessero giustificare la drastica riduzione delle commesse e, poi, l'interruzione dei rapporti e, conseguentemente, con sentenza del 2 maggio 2013 accoglieva in parte le domande del Consorzio, condannando Diesel a ripristinare le commesse e al risarcimento del danno<sup>7</sup>.

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<sup>4</sup> Trib. Catania, 2 settembre 2009, in *Giur. it.*, 2010, p. 2560, secondo il quale «[n]on può accordarsi la tutela cautelare ex art. 9 legge n. 192/98 al subfornitore che lamenti l'abuso del proprio stato di dipendenza economica ogni qualvolta l'interruzione delle relazioni commerciali da parte del suo unico committente non abbia natura arbitraria».

<sup>5</sup> Il riferimento è a Trib. Bassano del Grappa, 9 febbraio 2010, in *Giur. it.*, 2010, p. 2560, secondo il quale «[n]on può accordarsi la tutela cautelare ex art. 9 legge n. 192/98 al subfornitore che lamenti l'abuso del proprio stato di dipendenza economica ogni qualvolta l'interruzione delle relazioni commerciali da parte del suo unico committente non abbia natura arbitraria».

<sup>6</sup> Trib. Bassano del Grappa, 2 maggio 2013, in *Giur. comm.*, 2015, p. 786, che ha solo parzialmente definito la vertenza, rimettendo in istruttoria per quanto attiene ai profili attinenti ai quantitativi delle commesse e ai danni patiti.

<sup>7</sup> La menzionata sentenza è stata poi oggetto di gravame e, nelle more dell'appello, la vertenza è stata definita in via bonaria, come si desume dal fatto che il Comune di Bronte, anch'esso parte del procedimento a fronte di intervento volontario *ad adiuvandum* ex art. 105 c.p.c., con delibera della giunta comunale del 15 luglio 2015 n. 51 ha autorizzato il sindaco *pro tempore* alla sottoscrizione della rinuncia agli atti del giudizio.

## 2. La dipendenza economica nel settore del *fashion*.

Anche alla luce di tale vicenda pare opportuno soffermarsi sulla disposizione invocata a tutela dell'imprenditore debole, ovvero l'art. 9, *Abuso di dipendenza economica*, della legge 18 giugno 1998, n. 192, *Disciplina della subfornitura nelle attività produttive*, al fine di verificare quali sono le ragioni che determinano nell'ambito del *fashion* lo squilibrio di potere contrattuale e gli strumenti forniti dal legislatore a tutela della parte debole, con specifico riferimento a ipotesi di abuso che sembrerebbero particolarmente frequenti. A tal fine si ricorda che l'art. 9 della l. n. 192/98, collocandosi in una nuova linea di tendenza del diritto dei contratti<sup>8</sup>, vieta «(...) l'abuso da parte di una o più imprese dello stato di dipendenza economica nel quale si trova, nei suoi o nei loro riguardi, una impresa cliente o fornitrice» attribuendo giuridica rilevanza allo stato di debolezza «relativa» nei rapporti tra imprese<sup>9</sup>.

La menzionata disposizione, nonostante sia stata inserita nell'ambito della legge n. 192/98, secondo l'orientamento ormai predominante, trova in realtà applicazione con riferimento, oltre che ai rapporti di subfornitura, a qualsiasi rapporto contrattuale che veda come parte un'impresa in una condizione di debolezza relativa<sup>10</sup>: ne consegue che non solo il subfornitore, ma anche il *franchisee* o il

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<sup>8</sup> Sull'evoluzione che ha portato il legislatore a prestare attenzione alle esigenze di protezione dell'imprenditore debole, v. F. RUSCELLO, *Introduzione*, in *Contratti tra imprese e tutela dell'imprenditore debole*, a cura di F. Ruscello, Roma 2012, p. 155 ss. Da ultimo, sia consentito un rinvio a M.M. PARINI, *"Forza contrattuale" e rapporti tra imprese*, Roma 2013, p. 17 ss.

<sup>9</sup> In tema di abuso di dipendenza economica v., tra gli altri: A. ALBANESE, *Abuso di dipendenza economica: nullità del contratto e riequilibrio del rapporto*, in *Eur. dir. priv.*, 1999, p. 1179 ss.; F. PROSPERI, *Subfornitura industriale, abuso di dipendenza economica e tutela del contraente debole: i nuovi orizzonti della buona fede contrattuale*, in *Rassegna di diritto civile*, 1999, p. 641 ss.; G. AGRIFOGLIO, *Abuso di dipendenza economica e l'asimmetria nei contratti di impresa*, in *Contratto e impresa*, 2008, p. 1347; M.M. PARINI, *Abuso di dipendenza economica: predisposizione di clausole inique o discriminatorie e potere «integrativo» del giudice*, in *Vita not.*, 2011, p. 1135 ss.

<sup>10</sup> Seguono la concezione «estensiva», ormai reputata maggioritaria: Trib. Taranto, 17 settembre 2003, in *Foro it.*, 2003, I, c. 3441; Trib. Roma, 5 novembre 2003, in *Foro it.*, 2003, I, c. 3440; Trib. Catania, 5 gennaio 2004, in *Nuova giur. civ. comm.*, 2005, I, p. 976 ss.; Trib. Bari, 22 ottobre 2004, in *Danno resp.*, 2005, p. 750; Trib. Isernia, 12 aprile 2006, in *Giur. merito*, 2006, p. 2149; Trib. Trieste, 21 settembre 2006, in *Nuova giur. civ. comm.*, 2007, I, p. 899; Trib. Torre Annunziata, 30 marzo 2007, in *Giur. merito*, 2007, p. 341 ss. La questione è stata anche trattata dalla Corte di Cassazione a sezioni unite, sent. 25 novembre 2011, n. 24906, in *Giur. it.*, 2012, p. 2054, la quale si è pronunciata nel senso che «[l]abuso di dipendenza economica, disciplinato nel contesto della legge sulla subfornitura nelle attività produttive, è fattispecie di applicazione generale, come tale invocabile in ogni rapporto contrattuale nel quale sia ravvisabile un significativo squilibrio tra i diritti e gli obblighi delle parti». In dottrina, seguono la teoria estensiva, tra gli altri: R. CASO e R. PARDOLESI, *La nuova disciplina del contratto di subfornitura (industriale): scampolo di fine millennio o prodromo di tempi migliori?*, in *Riv. dir. priv.*, 1998, p. 725; A. ALBANESE, *Abuso di dipendenza economica: nullità del contratto e riequilibrio del rapporto*, cit., p. 1182; A. FRIGNANI, *Disciplina della subfornitura nella legge 192/98: problemi di diritto sostanziale*, in *Contratti*, 1999, p. 196 ss.; F. PROSPERI, *Subfornitura industriale, abuso di dipendenza economica e tutela del contraente debole: i nuovi orizzonti della buona fede contrattuale*, cit., p. 641; F. BORTOLOTTI, *I contratti di subfornitura*, Padova 1999, p. 143 ss.; G. NICOLINI, *Subfornitura e attività produttive*, Milano 1999, p. 121 ss.; A. MARIANI, *Note in tema di subfornitura nelle attività produttive*, in *Nuova giur. civ. comm.*, 2000, p. 115; A. CERIDONO, *Sub art. 9*, in *Commentario alla legge 18 giugno 1998, n. 192, disciplina della subfornitura nelle attività produttive*, a cura di N. Lipari, in *Nuove leggi civ. comm.*, 2000, p. 429; T. LONGU, *Il divieto di abuso di dipendenza economica nei rapporti tra le imprese*, in *Rass. dir. civ.*, 2000, p. 345; P. FRANZINA, *Considerazioni sulla legge applicabile all'abuso di dipendenza economica*, in *Nuova giur. civ. comm.*, 2002, II, p. 230; S. BENUCCI, *La dipendenza economica nei contratti tra imprese*, in *Squilibrio e usura nei contratti*, a cura di G. Vettori, Padova 2002, p. 220; F.L. GAMBARO e A. MARTINI, *La subfornitura cinque anni dopo*, in *Contratto e impresa. Eur.*, 2003, p. 528; T. CAPURRO, *Abuso di dipendenza economica e rifiuto di contrarre*, in *Nuova giur. civ. comm.*, 2004, I, p. 987; G. COLANGELO, *L'abuso di dipendenza economica*



concessionario, che distribuiscono prodotti di imprese del *fashion*, al verificarsi dei presupposti richiesti, potrebbero avvalersi degli incisivi strumenti di protezione previsti dalla norma<sup>11</sup>.

Per poter invocare l'art. 9 è necessario, prima di tutto, che una delle parti sia in posizione di «dipendenza economica» rispetto all'altra, ovvero in una condizione di debolezza non assoluta, ma relativa, che si realizza quando «un'impresa sia in grado di determinare, nei rapporti contrattuali con un'altra impresa, un eccessivo squilibrio di diritti ed obblighi, avuto riguardo anche alla reale possibilità di reperire sul mercato alternative soddisfacenti»<sup>12</sup>. A ben vedere, la norma non fornisce alcuna definizione della «dipendenza economica»<sup>13</sup>, ma si limita a offrire all'interprete il criterio della presenza di soddisfacenti e reali alternative sul mercato, alla luce del quale la dipendenza economica potrebbe essere esclusa solamente laddove il «contraente debole» disponga di alternative idonee a soddisfare il proprio interesse e concretamente fruibili<sup>14</sup>.

L'elaborazione dottrinale d'oltralpe ha evidenziato che la mancanza di alternative può derivare da condizioni «oggettive» ed esterne alle parti, ricollegate, ad esempio, a particolari condizioni di mercato (monopolio od oligopolio) o a particolari congiunture economiche (c.d. dipendenza economica oggettiva), oppure a circostanze «soggettive» in cui il contraente si è venuto a trovare al termine di un rapporto continuativo, laddove nel corso del tempo si sia strutturato per rispondere alle esigenze

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*tra disciplina della concorrenza e diritto dei contratti*, Torino 2004, p. 75 ss.; L. DELLI PRISCOLI, *Il divieto di abuso di dipendenza economica nel franchising, fra principio di buona fede e tutela del mercato*, in *Giur. merito*, 2006, p. 2153 ss.; P. FABBIO, *Osservazioni sull'ambito di applicazione del divieto di abuso di dipendenza economica sul controllo contenutistico delle condizioni generali di contratto tra imprese*, in *Nuova giur. civ. comm.*, 2007, II, p. 902 ss.; P. QUARTICELLI, *Abuso di dipendenza economica ed "estorsione" post-contrattuale*, in *Contratti*, 2007, p. 115 ss.; A. BOSO CARETTA, *Interruzione del rapporto di distribuzione integrata e abuso di dipendenza economica*, in *Giur. merito*, 2008, p. 351.

<sup>11</sup> L'applicabilità dell'art. 9 della l. n. 192/98 prescinde, inoltre, dal fatto che l'eventuale contratto sia stato stipulato a seguito di trattative individuali. Come evidenziato, tra gli altri, da E. RUSSO, *Imprenditore debole, imprenditore-persona, abuso di dipendenza economica, «terzo contratto»*, in *Contratto e impresa*, 2009, p. 132 ss., le trattative individuali non bastano a escludere che il regolamento di interessi sia frutto di un abuso di potere contrattuale di una parte ai danni dell'altra.

<sup>12</sup> La dipendenza economica, a differenza della «posizione dominante» di cui all'art 3 della l. 10 ottobre 1990, n. 287, è una condizione «relativa» in cui un'impresa si viene a trovare rispetto ad un'altra impresa. In materia di abuso di posizione dominante v. S. BASTIANON, *L'abuso di posizione dominante*, Milano 2001, p. 199 ss. In particolare, F. VOLPE, *La rilevanza dello squilibrio contrattuale nel diritto dei contratti*, in *Riv. dir. priv.*, 2002, p. 314, sottolinea che la norma sulla dipendenza economica non va considerata alla stregua di un'applicazione all'interno del singolo rapporto contrattuale della norma sull'abuso di posizione dominante, dal momento che, in questo modo, si finirebbe con lo svuotare di contenuto e di funzioni la disposizione in questione.

<sup>13</sup> La disposizione, infatti, descrive un'ipotesi di abuso e non chiarisce quando possa dirsi sussistente una condizione di dipendenza economica. Di questo avviso, tra gli altri, A. PALMIERI, *Rifiuto (tardivo) di fornitura, vessazione del proponente ed eliminazione delle alternative: un caso limite di dipendenza economica*, in *Foro it.*, 2002, I, c. 2179.

<sup>14</sup> Parte della dottrina (in particolare, A. BARBA, *L'abuso di dipendenza economica: profili generali*, in AA.VV., *La subfornitura nelle attività produttive*, a cura di V. Cuffaro, Napoli 1998, p. 329 ss.; S. BENUCCI, *La dipendenza economica nei contratti tra imprese*, cit., p. 220 ss.) ritiene che tale valutazione possa essere distinta in tre momenti, dovendosi accertare, *in primis*, la sussistenza della possibilità dell'alternativa, per poi verificare, da un lato, la realtà di tale possibilità e, dall'altro, l'attitudine soddisfattiva della stessa. Anche la giurisprudenza sul punto ha evidenziato che le alternative devono essere «reali», nel senso che non devono essere mere possibilità ipotetiche e astratte, ma opportunità che nel caso concreto il mercato offre (sul punto, v. Trib. Catania, 5 gennaio 2004, cit., p. 976) e devono essere «soddisfacenti» nel senso che devono essere idonee a soddisfare l'interesse dell'imprenditore (sul punto v. Trib. Bari, 6 maggio 2002, in *Giur. it.*, 2003, p. 724).

specifiche di un unico cliente o di un numero estremamente ridotto di clienti (c.d. dipendenza economica soggettiva o relativa). Tale condizione si verifica soprattutto a fronte di rapporti che hanno comportato una stretta integrazione tra le parti, magari svolti in regime di esclusiva o comunque di sostanziale mono-committenza, specie laddove per eseguire la prestazione la parte si sia vista costretta ad acquistare macchinari e impianti costosi oppure a effettuare investimenti non facilmente riconvertibili a modalità di sfruttamento alternative<sup>15</sup>.

La dipendenza economica può, quindi, anche sopravvenire proprio a fronte dello svolgimento di rapporti contrattuali tra le parti a fronte del livello d'integrazione raggiunto, del particolare assetto produttivo e commerciale assunto nel tempo, dell'affidamento ingenerato dalla continuità temporale dei rapporti e del tempo necessario per la riconversione.

Non di rado, peraltro, la mancanza di alternative è correlata a un insieme di fattori «oggettivi» e «soggettivi» che di fatto impediscono alla parte di poter trovare alternative in tempi adeguati: ad esempio, come si è visto con riferimento alla vicenda Diesel, tale condizione era in parte ricollegata a circostanze soggettive correlate all'assetto che il Consorzio aveva assunto nel corso del tempo per rispondere alle richieste della committente e in parte a circostanze oggettive correlate alla contrazione del mercato dell'abbigliamento Made in Italy.

Volgendo l'attenzione all'ambito del *fashion*, si deve evidenziare che il verificarsi di situazioni di questo tipo è purtroppo molto frequente: con riferimento alla fase della produzione, del resto, le imprese produttrici, in particolare se di grandi dimensioni, commissionano ad altre imprese lavorazioni su prodotti semilavorati o su materie prime, destinati a essere incorporati o comunque utilizzati

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<sup>15</sup> Per verificare se sussiste una condizione di dipendenza economica soggettiva possono essere tenuti in considerazione particolari fattori. Ad esempio, L. PRATI e A. CARDINI, *I rapporti di subfornitura*, Milano 1999, p. 159, evidenziano che devono essere tenuti in considerazione aspetti, quali la pattuizione di reiterate esclusive contrattuali o di minimi di acquisto particolarmente elevati, che di fatto possano aver limitato nel tempo la facoltà di un'impresa di sviluppare nuova clientela o di approvvigionarsi da terzi; l'affidamento ingenerato dalla continuità nel tempo dei rapporti commerciali, da cui siano derivati investimenti non ammortizzabili altrimenti; la titolarità delle macchine, delle attrezzature e degli impianti di cui si serve l'impresa in posizione di presunta dipendenza. Secondo A. BARBA, *L'abuso di dipendenza economica: profili generali*, cit., p. 335, la dipendenza economica soggettiva si verifica quando un'impresa ha effettuato significativi e specifici investimenti difficilmente riconvertibili, oppure quando una parte significativa del fatturato viene realizzata con la controparte relativamente dominante. In particolare, G. CERIDONO, *I contratti di distribuzione*, in *Trattato di diritto privato europeo*, a cura di N. Lipari, Padova 2003, IV, p. 398, si sofferma sugli investimenti non recuperabili, evidenziando che certamente la parte che abbia acquistato attrezzature specifiche per far fronte agli impegni che derivano dal contratto, si verrebbe a trovare in una condizione di minor potere contrattuale rispetto all'altra, dal momento che in caso di interruzione dei rapporti contrattuali subirebbe una notevole perdita. Sul punto v. anche G. COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti*, cit., p. 42, il quale rileva che «assumono rilevanza innanzitutto i costi di commutazione (switching costs) che un'impresa è chiamata a sopportare in caso di interruzione del rapporto contrattuale, ossia i “costi aggiuntivi che dovrebbe sostenere o i benefici ai quali dovrebbe rinunciare se si spostasse su un altro fornitore, al netto dei vantaggi risultanti dallo scambio”». Sul punto in giurisprudenza Trib. Trieste, 21 settembre 2006, cit., p. 899, che ha escluso l'esistenza di alternative reali e soddisfacenti in virtù del fatto che il rivolgersi a un operatore diverso avrebbe costretto l'impresa a sostenere costi eccessivamente onerosi.

nell'ambito della loro attività economica o nella produzione di un bene complesso, intrattenendo, quindi, rapporti spesso riconducibili al «fenomeno» della subfornitura<sup>16</sup>.

Il subfornitore rappresenta il tipico esempio di contraente che si trova in una condizione di dipendenza economica soggettiva, posto che svolge, spesso addirittura in regime di mono-committenza, prestazioni destinate a integrarsi in un determinato processo produttivo<sup>17</sup> e, addirittura, per eseguire la propria prestazione deve acquisire conoscenze e acquistare macchinari, spesso molto costosi, non suscettibili di agevole riconversione a modalità di sfruttamento alternative in caso di interruzione dei rapporti contrattuali<sup>18</sup>.

Con riferimento alla fase della distribuzione, frequentemente le imprese del *fashion*, anche per questioni correlate all'importanza del richiamo dei marchi e, più in generale, dei segni distintivi, decidono di distribuire i propri prodotti avvalendosi di reti commerciali attraverso *franchisee*<sup>19</sup>. Anche

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<sup>16</sup> Si ricorda che con la l. n. 192/98, *Disciplina della subfornitura nelle attività produttive*, il legislatore ha regolato il fenomeno della subfornitura, prevedendo una disciplina trasversale, che va ad aggiungersi, senza sostituirla, alla disciplina «base» prevista per le singole fattispecie contrattuali che in concreto vengono a realizzarsi. Sul tema della subfornitura, v. G. IUDICA, *Commento alla legge n. 192/98*, in *Contratti*, 1998, p. 411; L. PRATI e A. CARDINI, *I rapporti di subfornitura*, cit., p. 159; A. BERTELOTTI, *Il contratto di subfornitura*, Torino 2000, *passim*; F. PROSPERI, *Il contratto di subfornitura e l'abuso di dipendenza economica*, Napoli 2002, *passim*. In proposito, si evidenzia che, nonostante il riferimento al «contratto di subfornitura» contenuto nell'art. 1, pare preferibile ritenere che il legislatore, lungi dall'aver tipizzato il contratto di subfornitura, si sia limitato a fornire una disciplina trasversale, che va ad aggiungersi, senza sostituirla, alla disciplina «base» prevista per le singole fattispecie contrattuali che in concreto vengono a realizzarsi. In tal senso: G. IUDICA, *Commento alla legge n. 192/98*, cit., p. 411; R. CASO e R. PARDOLESI, *La nuova disciplina della subfornitura (industriale): scampolo di fine millennio o prodromo di tempi migliori?*, cit., p. 724, i quali ritengono che il legislatore ha innescato un procedimento di tipizzazione a metà, che non sembra ovviare all'attuale incertezza sullo statuto giuridico della subfornitura. *Contra*, ritengono che la l. n. 192/98 abbia introdotto una nuova fattispecie contrattuale tipica, tra gli altri, V. FRANCESCHELLI, *Subfornitura: un nuovo contratto commerciale*, in *Subfornitura*, a cura di V. Franceschelli, Milano 1999, p. 9 ss.; A. TULLIO, *La subfornitura industriale: considerazioni in merito all'ambito di applicazione e alla forma del contratto di subfornitura*, cit., p. 260; A. MARIANI, *Note in tema di subfornitura nelle attività produttive*, cit., p. 110.

<sup>17</sup> Le prestazioni svolte dal subfornitore non hanno mercato e risultano «dedicate» alle particolari esigenze della committente. Individuano nella produzione dedicata la ragione della debolezza del subfornitore: F. BORTOLOTTI, *I contratti di subfornitura*, cit., p. 60 ss.; A. BERTELOTTI, *Il contratto di subfornitura*, cit., p. 13; F. PROSPERI, *Il contratto di subfornitura e l'abuso di dipendenza economica*, cit., p. 15; A. MUSSO, *La subfornitura*, Bologna 2003, p. 23.

<sup>18</sup> Sul punto Trib. Vercelli, 14 novembre 2014, in *Foro it.*, 2015, 10, I, c. 3344, secondo il quale «l'elemento massimamente in grado di disvelare una situazione di dipendenza economica è rappresentato dall'esecuzione, da parte dell'imprenditore «debole», di investimenti specifici per far fronte agli obblighi derivanti dal rapporto contrattuale; c) altri indici rilevanti sono costituiti dalla concentrazione del fatturato verso pochi committenti, dall'entità dei costi di commutazione o riconversione per spostarsi verso altra relazione contrattuale e dall'asimmetria informativa tra i contraenti».

<sup>19</sup> Si ricorda che il legislatore con la l. 6 maggio 2004, n. 129, in tema di affiliazione commerciale – o, volendo utilizzare la terminologia anglosassone, *franchising* – ha tipizzato tale fattispecie e introdotto specifici strumenti di protezione a favore del *franchisee*. Sul tema, tra gli altri, G. DE NOVA, *La nuova legge sul franchising*, in *Contratti*, 2004, p. 764; D. FRISANI, *Il franchising*, in *I contratti di distribuzione*, a cura di G. Cassano, Milano 2006, p. 597. Il legislatore ha introdotto specifici strumenti di protezione in forza della menzionata legge, che però non forniscono, come nel caso della disposizione di cui all'art. 9 della l. n. 192/98, strumenti di controllo contenutistico del regolamento contrattuale, né vietano comportamenti abusivi di fatto, ma si limitano a garantire al *franchisee* maggiore *disclosure*, in considerazione del fatto che il *franchisee* si trova rispetto al *franchisor* in una condizione di asimmetria informativa, dovuta alla circostanza che, di regola, prima di concludere il contratto, non esercita ancora un'attività imprenditoriale, rivestendo una posizione del tutto peculiare, per certi versi intermedia

detti soggetti, come i subfornitori, versano in una condizione di debolezza rispetto alla controparte che non di rado integra gli estremi della dipendenza economica, in considerazione non tanto di ragioni di carattere dimensionale<sup>20</sup>, ma del fatto che, per poter svolgere la prestazione, il *franchisee* è chiamato a sostenere investimenti «idiosincrici», non suscettibili di rapida e indolore riconversione a modalità di sfruttamento alternative, prospettandosi così all'orizzonte un rischio di soggiogazione, rappresentato dalla semplice minaccia dell'improvvisa interruzione del rapporto, la quale produrrebbe l'effetto di trasformare automaticamente gli investimenti in *sunk costs*<sup>21</sup>.

A rendere ancora più stretto il legame tra le parti e, quindi, più critica la posizione dei *franchisees*, sono le clausole che di frequente vengono previste, come quella di esclusiva; senza contare poi che non solo il *franchisee* è sottoposto a un potere di controllo molto più incisivo rispetto a quanto accade negli altri contratti di distribuzione<sup>22</sup>, ma i marchi e le insegne di cui può usufruire risultano condizione determinante per poter mantenere la sua clientela<sup>23</sup>.

Da ultimo, bisogna comunque evidenziare che, una volta accertata la sussistenza di una condizione di dipendenza economica, al fine di non attribuire una tutela eccessiva alla parte debole, il giudice dovrà vagliare le «cause» per le quali si è venuta a trovare in tale condizione ed escludere la

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tra un vero e proprio imprenditore e un consumatore. Non a caso, prima dell'entrata in vigore della l. n. 129/04, al fine tutelare il *franchisee*, era stata proposta la soluzione di applicare anche a favore di tale soggetto le disposizioni previste a favore dei consumatori, sulla base del fatto che il legislatore, definendo il consumatore come ciascuna persona fisica che agisce per scopi estranei all'attività imprenditoriale, commerciale, artigianale o professionale eventualmente svolta, sembrerebbe escludere la qualifica di consumatore solamente laddove il soggetto agisca per una finalità concernente un'attività professionale già avviata e non, invece, come nel caso del *franchisee*, laddove il soggetto ponga in essere atti prodromici allo svolgimento di un'attività imprenditoriale. Nondimeno, tale lettura della disposizione è stata disattesa da un consolidato orientamento secondo il quale deve essere considerata attività imprenditoriale anche quella meramente preparatoria. Così Corte giust., 3 luglio 1997, causa C-269/95, *Francesco Benincasa c. Dentalkit s.r.l.*, EU:C:1997:337. Sul punto, per maggiori considerazioni e riferimenti, si rinvia all'Introduzione, note 11 e 12. In ordine agli strumenti di protezione introdotti a favore del franchisee, sia consentito un rinvio a M.M. PARINI, *Franchising e obblighi di disclosure*, in *Nuova giur. civ. comm.*, 2012, p. 783 ss.

<sup>20</sup> Va comunque detto che di regola il *franchisor* risulta un'impresa di dimensioni notevolmente più ampie, come rimarcato, tra gli altri, da: L. DELLI PRISCOLI, *Franchising e tutela dell'affiliato*, Milano 2000, p. 2.

<sup>21</sup> In tal senso G. COLANGELO, *Prime note di commento alla normativa in materia di franchising*, cit., p. 855, secondo il quale: «[l]'immagine di un contraente privo di alternative soddisfacenti e, per questo, imprigionato nel contratto ed esposto all'abuso di controparte si profila, infatti, in modo paradigmatico nel franchising, dove il franchisee, a fronte dei capitali investiti (senza possibilità di riconversione) per poter esercitare l'attività commerciale, verte in una situazione di endemica debolezza, che presenta tutte le caratteristiche della dipendenza economica». Del medesimo avviso anche C. CAMARDI, *Contratti di consumo e contratti tra imprese. Riflessioni sull'asimmetria contrattuale nei rapporti di scambio e nei rapporti "reticolari"*, in *Rivista critica del diritto privato*, 2005, p. 565, secondo la quale: «[l]'asimmetria si annida fisiologicamente tra i nodi della rete, anzi governa la tessitura della rete, tutte le volte in cui le singole imprese accedono alla rete con investimenti, inevitabilmente "dedicati", specifici o "idiosincrici" e in ragione di questi investimenti si trovano poi costrette a procedere in flotta: esse lavorano per la rete e non per il mercato, e fuori rete non hanno mercato».

<sup>22</sup> Di questo avviso, L. DELLI PRISCOLI, *Patto di esclusiva e rapporti tra franchisees*, in *Giur. comm.*, 2011, I, p. 586.

<sup>23</sup> In particolare, L. DELLI PRISCOLI, *Franchising, contratti di integrazione e obblighi precontrattuali di informazione*, in *Rivista del diritto commerciale*, 2004, p. 1167, sottolinea che il *franchisee* viene stabilmente inserito nel ciclo economico del *franchisor*, subendo, di conseguenza, una notevole ingerenza da parte della controparte, pur essendo un soggetto giuridicamente autonomo, che si assume il rischio di impresa.

tutela laddove siano riconducibili alla negligenza della stessa<sup>24</sup>. Bisogna, però, tenere presente che una simile verifica risulta spesso assai complessa: si pensi al caso, per certi versi emblematico, della parte che, pur in mancanza di un espresso obbligo di esclusiva, operi in regime di sostanziale mono-committenza, riservando a un unico soggetto tutta la capacità produttiva. Anche se ciò potrebbe *prima facie* apparire frutto di una scelta strategica che indica una negligenza dell'impresa, molto spesso rappresenta una scelta «obbligata» per la prosecuzione dei rapporti con la controparte forte.

### 3. Sull'abuso di dipendenza economica: l'interruzione arbitraria dei rapporti contrattuali e la riduzione delle commesse.

La dipendenza economica è di per sé una situazione pienamente lecita, giacché fisiologica nei rapporti tra imprese, quello che l'ordinamento sanziona è l'abuso che di tale condizione faccia la parte forte. In questa sede, trascurando la prima ipotesi di comportamento abusivo che viene presa in considerazione dalla disposizione<sup>25</sup>, ci si vorrebbe soffermare sull'interruzione arbitraria delle relazioni commerciali in atto e sulla riduzione delle commesse<sup>26</sup>, «comportamenti abusivi di fatto» che parrebbero particolarmente ricorrenti nel settore del *fashion*.

Tali ipotesi di abuso, che presuppongono la sussistenza di un rapporto contrattuale tra le parti, si verificano laddove il contraente forte decida, senza alcuna causa giustificativa meritevole, di recedere unilateralmente o di non rinnovare il contratto, oppure di diminuire notevolmente gli ordini. Affinché si possa ricorrere all'art. 9, è necessario che tali comportamenti siano legittimi alla stregua delle norme generali, dal momento che in caso contrario si dovrebbe far riferimento alle norme in tema di inadempimento contrattuale<sup>27</sup>: laddove uno dei contraenti risulti inadempiente, infatti, al fine di ottenere tutela alla parte fedele basterà richiamare la disciplina «contrattuale» per chiedere, in alternativa all'adempimento, la risoluzione del contratto unitamente al risarcimento dei danni patiti.

Laddove, invece, tali comportamenti non possano essere riconducibili a un inadempimento o comunque siano legittimi alla stregua della disciplina generale sui contratti, per stabilire in che casi possano essere considerati arbitrari *ex art. 9* della l. n. 192/98, *in primis*, si deve valutare se vi sono delle valide ragioni giustificative che possono aver indotto una delle parti ad assumere tali determinazioni,

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<sup>24</sup> Di questo avviso A. BARBA, *L'abuso di dipendenza economica: profili generali*, cit., p. 336, il quale afferma che, diversamente, si correrebbe il rischio di determinare una sorta di immunità dell'imprenditore debole ai danni della concorrenza.

<sup>25</sup> La prima ipotesi di abuso presa in considerazione dal legislatore è quella che si verifica quando una parte, sfruttando l'asimmetria di potere contrattuale, impone all'altra una regolamentazione iniqua, caratterizzata da condizioni contrattuali eccessivamente gravose o discriminatorie.

<sup>26</sup> Sul punto v. F. BORTOLOTTI, *I contratti di subfornitura*, cit., p. 146; A. MUSSO, *La subfornitura*, cit., p. 517; F. PROSPERI, *Il contratto di subfornitura e l'abuso di dipendenza economica*, cit., p. 288.

<sup>27</sup> In tal senso, Trib. Bari, 22 ottobre 2004, cit.

come ad esempio, reiterate inadempienze della controparte<sup>28</sup> oppure una contrazione della domanda del prodotto sul mercato.

Proprio con riferimento alla menzionata vicenda Diesel si è visto come i giudici interessati della questione abbiano assunto diversi orientamenti in merito alla sussistenza di ragioni che potessero giustificare la scelta di ridurre, in un primo momento, le commesse e di interrompere, poi, i rapporti contrattuali con il Consorzio: in particolare, disattendendo quanto in precedenza affermato dal Tribunale di Catania e Bassano, proprio quest'ultimo Tribunale, con la sentenza del 2 maggio 2013, rilevata la mancanza di proporzionalità tra la riduzione delle commesse e il calo delle vendite<sup>29</sup>, ha escluso la legittimità del comportamento della Diesel.

Si dovranno, inoltre, vagliare circostanze ulteriori quali l'assenza di alternative percorribili – ed eventualmente, i costi legati al loro reperimento –, l'affidamento ingenerato in ordine alla prosecuzione dei rapporti<sup>30</sup> e, soprattutto, il profilo temporale, dal momento che, come si è detto, la cessazione del rapporto contrattuale o, comunque, la drastica riduzione degli ordini, implicano di regola la necessità per la parte che le subisce di riorganizzare la propria attività<sup>31</sup>.

Pertanto, anche laddove sussista una giusta causa<sup>32</sup>, pare doversi evidenziare che la legittimità dei menzionati comportamenti, ai sensi dell'art. 9 della l. n. 192/98, presuppone anche il rispetto di un certo termine di preavviso, proporzionale alla durata dei pregressi rapporti contrattuali<sup>33</sup>.

Di sicuro interesse in proposito appare la sentenza, sempre del Tribunale di Bassano, del 16 gennaio 2013, relativa al procedimento promosso dalla società Sire S.n.c. nei confronti della società Dainese S.p.a.: nello specifico, a fronte dell'interruzione dei rapporti contrattuali, attuata dalla società Dainese nel 2004, Sire, che dal 1987 svolgeva lavorazioni alla stregua di una subfornitrice a favore di Danese, ha promosso nei confronti di quest'ultima, un procedimento per sentirla condannare al risarcimento dei danni patiti in considerazione dell'accaduto. In particolare, a fronte della lunga durata del rapporto contrattuale e dell'esclusiva prevista esclusivamente a carico della stessa, Sire lamentava che il preavviso di soli quattro mesi dato da Dainese dovesse essere considerato del tutto inadeguato a

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<sup>28</sup> Di questo avviso Trib. Bari, 17 gennaio 2005, in *Foro it.*, 2005, I, c. 1603.

<sup>29</sup> Trib. Bassano del Grappa, 2 maggio 2013, cit.

<sup>30</sup> Tale affidamento potrebbe sussistere laddove tra le parti si siano instaurati una serie di rapporti contrattuali successivi, sistematicamente disciplinati in base alle intese normative tra essi intervenute, oppure laddove la parte, per l'esecuzione della prestazione, abbia dovuto dotarsi di specifici macchinari il cui costo non viene smaltito nel corso dell'esecuzione del rapporto commerciale. Di questa opinione G. NICOLINI, *Subfornitura e attività produttive*, cit., p. 131. Sul punto, di particolare interesse è una questione decisa dal Trib. Bari con ordinanza del 22 ottobre 2004, in *Resp. civ.*, 2005, p. 605, il quale ha escluso che vi potesse essere un legittimo affidamento in un caso in cui gli investimenti erano stati effettuati in un'epoca lontana dalla scadenza del contratto e vi era già stato l'ammortamento delle spese.

<sup>31</sup> Ciò vale particolarmente laddove il contratto prevedeva una clausola di esclusiva oppure sono stati sostenuti importanti investimenti non riutilizzabili in rapporti con diverse parti contrattuali. Sul punto v. M. TRECCANI, *Subfornitura e abuso di dipendenza economica: i presupposti ed i rimedi*, in *Riv. dir. priv.*, 2005, p. 716.

<sup>32</sup> Ciò purché la giusta causa non sia riconducibile a un inadempimento grave della parte che subisce tali comportamenti.

<sup>33</sup> Sottolinea tale aspetto A. BARBA, *L'abuso di dipendenza economica: profili generali*, cit., p. 349.

consentirle di poter rinvenire delle alternative sul mercato e che, pertanto, il comportamento di Dainese dovesse essere considerato, oltre che contrario alla disciplina generale in materia di contratti, abusivo e in violazione dell'art. 9 della l. n. 192/98.

In accoglimento alle domande formulate da Sire, il Tribunale di Bassano, rilevato che «Dainese S.p.a. ha interrotto le relazioni commerciali in modo repentino, senza adeguato preavviso, con la consapevolezza che il recesso avrebbe creato difficoltà alla fornitrice stante il rapporto di esclusiva protrattosi per 17 anni» e ritenendo sussistente un abuso di dipendenza economica in considerazione dello scarso preavviso con il quale è stata comunicata la volontà di recedere dal contratto, ha condannato Dainese a risarcire a Sire i danni patiti<sup>34</sup>.

#### 4. Rimedi contro i comportamenti abusivi di fatto.

Non resta che meglio riflettere sui rimedi introdotti dall'ordinamento a fronte dei menzionati comportamenti abusivi di fatto, ricordando che la formulazione originaria dell'art. 9, della l. n. 192/98, prevedeva unicamente la sanzione della nullità<sup>35</sup> e che solo con la riforma del 2001, al fine di colmare la precedente lacuna, sono stati espressamente introdotti anche i rimedi dell'inibitoria e quello del risarcimento del danno.

In linea generale si deve evidenziare che la nullità e il risarcimento del danno presuppongono lo svolgimento di un procedimento ordinario di cognizione e, pertanto, non garantiscono una tutela «tempestiva», a contrario dell'inibitoria che è l'unica forma immediata di protezione, dal momento che può essere chiesta non solo nell'ambito di un procedimento ordinario, ma anche in via cautelare d'urgenza *ex art. 700 c.p.c.*

Ne consegue che – come confermato dal fatto che la maggioranza delle pronunce in materia sono state rese proprio nell'ambito di procedimenti cautelari d'urgenza – l'inibitoria appare nella maggioranza dei casi l'unico strumento idoneo a «scongiurare», per quanto possibile, le conseguenze pregiudizievoli di un rifiuto di vendere o di comprare o di una interruzione arbitraria delle relazioni

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<sup>34</sup> Trib. Bassano del Grappa, 13 gennaio 2013, inedita.

<sup>35</sup> A fronte della formulazione originaria della disposizione si osservava l'inidoneità di questo strumento a tutelare gli interessi della parte debole in caso di comportamenti abusivi di fatto, come il rifiuto di vendere o di comprare e l'interruzione arbitraria delle relazioni commerciali in atto. In tal senso A. PALMIERI, *Abuso di dipendenza economica: dal "caso limite" alla (drastica) limitazione dei casi di applicazione del divieto?*, in *Foro it.*, 2002, I, c. 3209 ss. In particolare, B. GRAZZINI, *Sub art. 9, Abuso di dipendenza economica*, in *La disciplina della subfornitura nelle attività produttive*, a cura di C. Berti e B. Grazzini, Milano 2005, p. 193, sottolineava che «la condotta abusiva che non si fosse tradotta in clausola negoziale (ad esempio l'interruzione arbitraria delle trattative o il rifiuto di contrarre) aveva modo di trovare rimedio di natura risarcitoria nell'art. 1337 c.c. e 2043 c.c., o, al massimo – e ricorrendone tutti i presupposti – di carattere inibitorio ai sensi dell'art. 2599 c.c., nei limiti di un possibile illecito concorrenziale (ad esempio se il rifiuto di contrarre fosse venuto ad assumere i profili del boicottaggio, contrario ai principi di correttezza professionale ai sensi dell'art. 2598 c.c.)».

commerciali in atto, ovvero di comportamenti che rischiano di mettere fuori mercato l'impresa che li subisce<sup>36</sup>.

Quanto alle «inibitorie», la dottrina e la giurisprudenza ormai maggioritarie sono dell'avviso che, anche nell'ambito dei procedimenti cautelari d'urgenza, possano essere volte a ottenere provvedimenti sia negativi (inibitoria negativa), che si sostanziano in un ordine di *non facere* e quindi di cessare la condotta abusiva, sia positivi (inibitoria positiva), che si sostanziano in un ordine giudiziale di *facere*<sup>37</sup> e, addirittura, di contrarre<sup>38</sup>.

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<sup>36</sup> In tal senso F. VESSIA, *Tutela cautelare d'urgenza, obblighi di contrarre e competenza giurisdizionale nell'abuso di dipendenza economica*, in *Contratto e impresa*, 2013, p. 1294; G. GITTI, *La determinazione del contenuto*, in *Il terzo contratto*, a cura di G. Gitti e G. Villa, Bologna 2008, p. 93.

<sup>37</sup> In passato vi era un dibattito in merito all'ammissibilità delle inibitorie positive in via d'urgenza. In senso contrario sul punto, Trib. Bari, 11 ottobre 2004, cit., secondo il quale: «[n]ell'art. 9 l. 18 giugno 1998 n. 192, è stabilito il divieto dell'interruzione arbitraria delle relazioni commerciali, così come del rifiuto di vendere o acquistare, la cui violazione costituisce fonte di obbligazione risarcitoria a carico del contraente "forte", ma non prevede affatto alcun obbligo specifico a contrarre, che, una volta costituito per ordine del giudice, possa essere eseguito coattivamente, né tanto meno che possa essere addirittura anticipato coattivamente negli effetti mediante la richiesta cautela. Invero, appare arduo trasformare un provvedimento inibitorio, che per definizione comporta l'imposizione di un obbligo di non fare, in un provvedimento che, in spregio a quanto disposto dall'art. 2908 c.c., costituisca un rapporto giuridico al di fuori dei casi espressamente previsti dalla legge (2932 c.c., 2597 c.c.) ovvero che imponga in via cautelare un obbligo di fare, quale è quello di prestare il proprio consenso per la conclusione di un contratto che, per il suo carattere di infungibilità, non è peraltro coercibile e quindi suscettibile di esecuzione forzata». Sull'ammissibilità delle inibitorie positive in caso di abuso di dipendenza economica, in dottrina, tra gli altri: F. VESSIA, *Tutela cautelare d'urgenza, obblighi di contrarre e competenza giurisdizionale nell'abuso di dipendenza economica*, cit. p. 1302. In giurisprudenza, in senso favorevole: Trib. Taranto, 17 settembre 2003, cit., c. 3440; Trib. Trieste, ord., 21 settembre 2006, in *Foro it.*, 2006, c. 3513.

<sup>38</sup> Nel caso di specie il dibattito verteva anche sulla possibilità di ricostruire, in determinati casi, un obbligo di contrarre in forza dell'art. 9 della l. n. 192/98. Un primo orientamento negava tale possibilità in considerazione del fatto che, al di fuori dei casi di rifiuto di rinnovare il contratto, non vi era alcuno schema di contratto al quale far riferimento. Di questa opinione A. BERTELOTTI, *Il contratto di subfornitura*, cit., p. 188 ss., secondo il quale la norma in questione non può essere ritenuta complementare all'art. 2597 c.c. che disciplina l'obbligo di contrarre del monopolista legale, dal momento che, non prevedendo la disposizione il contenuto del contratto negato, non potrebbe considerarsi una forma di esecuzione in forma specifica dal momento che non esisterebbe alcuno schema di contratto al quale far riferimento. In realtà, tale impostazione deve essere criticata, non risultando le argomentazioni richiamate sufficienti a escludere che in presenza di un comportamento abusivo di fatto possa sorgere un obbligo di rinnovare oppure di concludere il contratto: basti pensare che nell'ambito del diritto *antitrust* gli obblighi di contrarre risultano ormai uno strumento molto diffuso e non sempre presuppongono la sussistenza di precedenti rapporti contrattuali. In tal senso G. COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti*, cit., p. 1002, il quale sottolinea che: «gli obblighi di contrarre rappresentano una realtà nel nostro ordinamento, uno strumento già ampiamente utilizzato nel diritto *antitrust* per il soggetto egemone sul mercato e non vi è alcun motivo per limitarne l'espansione anche laddove sia in gioco l'attività determinativa-integrativa del contenuto del contratto da parte del giudice». La soluzione preferibile, soprattutto in una logica di tutela del contraente debole, parrebbe, infatti, quella di riconoscere la sussistenza di un siffatto obbligo – in presenza di determinate circostanze – anche laddove tra le parti non vi siano stati precedenti rapporti contrattuali, lasciando in questi casi al giudice il compito di intervenire per integrare la volontà dei contraenti. Sul punto G. GITTI, *La determinazione del contenuto*, cit., p. 97 ss., rileva che: «[i]n ogni caso, al sussistere dei presupposti che rendano abusivo, e, pertanto illegittimo, il rifiuto di contrarre, la norma dell'art. 9 dovrebbe consentire al giudice di integrare la volontà delle parti espressa in direzione dell'accordo non formalizzato, con elementi estrinseci, desumibili dal complesso dei rapporti intercorrenti tra le stesse o comunque, nelle ipotesi limite dell'assenza di relazioni commerciali pregresse, dalle condizioni abitualmente praticate nel mercato di riferimento, con conseguente riconoscimento di un'ipotesi di determinazione *ex lege*, mediante intervento del giudice, del contenuto del contratto».



Con riferimento alla vicenda menzionata in precedenza, si ricorda che, a fronte di ricorso *ex art.* 700 c.p.c., il Tribunale di Bronte aveva accolto in parte le domande formulate dal Consorzio ordinando a Diesel di mantenere le commesse a determinate condizioni per ulteriori 5 anni, quindi, inibendo, da un lato, alla Diesel un determinato comportamento considerato abusivo – la riduzione delle commesse – ma, dall’altro, anche ordinandole di tenere un determinato comportamento, ovvero la prosecuzione dei rapporti a determinate condizioni per un certo lasso di tempo.

L’altro rimedio, concesso in caso di comportamenti abusivi di fatto, è quello del risarcimento dei danni causati alla parte debole, sulla natura del quale in passato dottrina e giurisprudenza hanno dato vita a un acceso dibattito, anche in considerazione delle importanti ricadute pratiche, in termini di ripartizione dell’onere della prova, durata della prescrizione, criteri di quantificazione del danno e competenza<sup>39</sup>. Soprassedendo in questa sede, per esigenze di brevità, sulle diverse argomentazioni avanzate all’interno di tale disputa, si può evidenziare che, con riferimento all’interruzione arbitraria dei rapporti contrattuali e alla riduzione degli ordini, l’eventuale responsabilità per violazione dell’art. 9 della l. n. 192/98 si configurerebbe come contrattuale.

Quanto ai danni risarcibili, trovando applicazione la disciplina generale di cui agli artt. 1223 c.c. e seguenti, potranno ovviamente formare oggetto di risarcimento tutti i pregiudizi che siano conseguenza diretta e immediata del comportamento abusivo: sotto questo aspetto, particolarmente delicata risulterà la quantificazione dei danni laddove l’interruzione o la riduzione abbiano determinato conseguenze irreversibili – si pensi addirittura a una situazione di dissesto – dal momento che si dovrà attentamente vagliare la sussistenza di un nesso causale tra il comportamento abusivo e i pregiudizi patiti dall’impresa.

Per quanto attiene, invece, alle voci di danno risarcibile, sotto il profilo del danno emergente, in caso di interruzione dei rapporti contrattuali o drastica riduzione delle commesse, potranno, a titolo esemplificativo, essere risarciti i costi correlati a investimenti specifici non ammortizzati oppure necessari per la conversione.

Decisamente più delicata risulta la quantificazione dei danni risarcibili a titolo di lucro cessante, specie laddove in sede cautelare non sia stato posto rimedio al comportamento abusivo, dal momento che ciò impone di ricostruire, sul piano probabilistico, le future «evoluzioni» del rapporto contrattuale e le «utilità» delle quali l’impresa avrebbe beneficiato per il tempo di ragionevole prosecuzione dello stesso.

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<sup>39</sup> La questione pare essere, in parte, stata definita dalla Cass., sez. un., 25 novembre 2011, n. 24906, cit. Chiaramente la conclusione in ordine alla natura di detta responsabilità dipende strettamente anche ai criteri distintivi adottati per distinguere la responsabilità contrattuale da quella extra-contrattuale. Sulla natura contrattuale della responsabilità, F. PROSPERI, *Il contratto di subfornitura e l’abuso di dipendenza economica*, cit., p. 250; M. LIBERTINI, *Ancora sui rimedi civili conseguenti ad illeciti antitrust (II)*, in *Danno e resp.*, 2005, p. 242. Diversamente, vi è chi tenta di ricostruirla in termini di responsabilità precontrattuale o, a seconda delle circostanze, extra-contrattuale (in tal senso, tra gli altri, V.C. ROMANO, *La natura della responsabilità da abuso di dipendenza economica tra contratto, illecito aquiliano e culpa in contrahendo*, in *Nuova giur. civ. comm.*, 2012, p. 302 ss.).

Ne consegue che si dovrà considerare quali erano i profitti che derivavano all'impresa in considerazione dei rapporti con la controparte e, soprattutto, individuare per quanto tempo tali profitti avrebbero potuto continuare a prodursi. Evidentemente, in mancanza di espresse indicazioni, per individuare la «ragionevole» durata di prosecuzione del rapporto, si dovrà tenere in particolare considerazione il tempo necessario per la riconversione, anche a fronte degli investimenti effettuati<sup>40</sup>.

Sul punto particolarmente esemplificativa appare la sentenza del Tribunale di Bassano del 16 gennaio 2013: in proposito si ricorda che Sire, a fronte dell'improvvisa interruzione da parte di Dainese del rapporto contrattuale, che proseguiva dal 1987 in regime di esclusiva, non aveva potuto rinvenire in tempi adeguati alcuna alternativa soddisfacente sul mercato e si era vista costretta addirittura a licenziare tutti i dipendenti. Il Tribunale, ravvisato che Dainese avrebbe dovuto fornire un preavviso di almeno un anno a Sire, ha riconosciuto a quest'ultima una somma pari all'utile che la stessa avrebbe percepito in caso di prosecuzione del rapporto per un anno.

Da ultimo, va detto che la quantificazione del danno dovrà tenere in particolare considerazione, ai fini dell'applicazione dell'art. 1227 c.c., il comportamento attuato dalla parte che ha subito l'interruzione del rapporto o la riduzione degli ordini, al fine di vagliare se la stessa avrebbe in qualche modo potuto se non escludere almeno attenuare le conseguenze pregiudizievoli. Pur in presenza di una condotta abusiva, si dovrà quindi verificare se la parte che ha subito tali comportamenti si sia diligentemente e tempestivamente attivata – per quanto possibile e in conformità con il particolare assetto assunto nel tempo – per poter approfittare di ulteriori occasioni sul mercato, oppure, al contrario, sia rimasta inerte nella convinzione di poter in questo modo aumentare le pretese verso la controparte.

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<sup>40</sup> Del resto, proprio a fronte del fatto che la quantificazione dei danni e l'attribuzione di contenuto alle singole voci di danno risultano, in questo caso, particolarmente complesse – implicando competenze molto eterogenee – la giurisprudenza sul punto ha fatto ampiamente ricorso alla valutazione equitativa.

The private international regime of fashion contracts:  
the distribution of goods abroad

Francesca Ragno

*Abstract*

Since globalization has turned our world into a global marketplace, fashion companies are constantly facing the challenge to expand their business into a foreign territory. The task to penetrate the targeted overseas market is normally pursued through a local partner, that often acts as a distributor or a commercial agent. The international dimension of commercial agency/distribution contracts raises a number of private international issues, that are explored and discussed in this paper.

# The private international regime of fashion contracts: the distribution of goods abroad

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Francesca Ragno\*

CONTENTS: 1. Introduction. – 2. The private international regime of commercial agency and distribution contracts in Europe: the jurisdictional issue. – 3. The private international regime of commercial agency and distribution contracts in Europe: the applicable law. – 4. The private international regime of commercial agency and distribution contracts outside Europe.

## 1. Introduction.

Since globalization has turned our world into a global marketplace, fashion companies are constantly facing the challenge to expand their business into a foreign territory. The task to penetrate the targeted overseas market is normally pursued through a local partner, that often acts as a distributor or a commercial agent. By using the services of an agent/distributor, the principal/supplier can take advantage of his/her closeness to customers and market knowledge and can avoid the financial burden required by the establishment of a branch or subsidiary. It follows that agency contracts and distribution contracts are commercial contractual schemes that are commonly used by fashion companies to effectively organize their distribution network abroad<sup>1</sup>.

Given the increasing recourse of those contracts, it is very important to take into consideration the specific legal issues that may arise in connection with the international dimension of those relationships. When fashion goods are promoted or distributed in the context of a specific and only one State, it will be quite easy to predict that the legal framework governing the transaction will be likely the domestic system of the State at stake and that the possible disputes arising in relation to the transaction will be likely heard by the domestic courts of the aforementioned State. Conversely, when business is conducted trans-border, it is not always clear what is the law applicable to the contract and which courts are competent to resolve disputes arising from the contract.

Let's assume that a France-based distributor had entered into an Italian clothing producer to purchase their excess inventory and then sell it in France. The distributor failed to comply with the minimum purchase requirements set forth in the contract and to employ competent and experienced

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<sup>1</sup> On the various commercial agreements that can be relied on in order to pursue the objective to expand the business in fashion markets see G.C. JIMENEZ, B. KOLSUN (eds.), *Fashion Law: A Guide for Designers, Fashion Executives, and Attorney*, New York 2010, p. 167 ff.

sales and support personnel so as to render prompt and adequate service to the customers in France. After unsuccessful attempts to negotiate the termination of the contract, in May 2016 the Italian supplier decides to bring an action against the French company. Where can the Italian producer bring the proceeding? Which is the amount of damages that the plaintiff can claim in the proceedings?

These types of issues are addressed by a specific area of law, the so called private international law, which aims precisely to define (*inter alia*)<sup>2</sup> 1) which state court has jurisdiction in private matters having cross-border implication and 2) which law is to be applied by the competent court to solve the dispute at stake.

Given the kind of questions that are solved by private international rules, one may think that these rules are only relevant at the litigation stage, *i.e.* when a dispute has already arisen between the contractual parties. Although it cannot be denied that private international law is precisely designed to be resorted to by national courts when faced with a legal dispute which contains a foreign element, or a foreign connection, it cannot be underestimated that the questions addressed by those rules need necessarily to be considered also at the stage of the negotiation of the contract.

In particular, the identification of the competent court in the case of a dispute and the determination of the law governing the contract are crucial aspects that are to be taken into account before entering any international contract<sup>3</sup>. On the one hand, litigation abroad may bear major inconveniences and costs. On the other hand, the applicability to a contract of the law of particular State (let's say Italian law) rather than the law of different State (let's say Saudi Arabia law) may affect the possibility to effectively enforce a specific right or to make a specific claim

## 2. The private international regime of commercial agency and distribution contracts in Europe: the jurisdictional issue.

One of the main features of private international law is that it's incorporated in the legal system of every State. That means that every State has its own private international law rules, which may diverge consistently<sup>4</sup>. The inhomogeneity of the private international law rules of the various legal systems affects the predictability as to the proper jurisdiction and governing law and of course constitutes an incentive to the so called *forum shopping*<sup>5</sup>, which occurs when a party takes the initiative of

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<sup>2</sup> The third issue dealt with by private international rules – that cannot be explored here – refers to the conditions to recognize and enforce foreign decisions in a specific legal system.

<sup>3</sup> On this issue see the analysis of R. BRAND, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments*, Leiden 2014.

<sup>4</sup> For further details see M. BOGDAN, *Private international law as component of the law of the forum: general course on private international law*, in *Rec. cours*, 2011, p. 348 ff.

<sup>5</sup> On this notion see F. FERRARI, *Forum Shopping et Droit matériel uniforme*, in *Journ. dr. int.* 2002, p. 383 ff.; ID., *Forum shopping despite international uniform contract law conventions*, in *Int. Comp. L. Q.*, 2002, p. 689 ff.

bringing a court action in a specific forum not because is the most appropriate forum, but because the conflict of laws rules that it applies will prompt the application of the law that he or she prefers<sup>6</sup>.

This situation of uncertainty has been perceived in Europe as a clear and obstacle or obstruction to the smooth functioning of the market and has led to a process of unification of the private international rules to be applied to contractual disputes<sup>7</sup>.

As far as jurisdiction is concerned, the uniform instrument that every Member State court<sup>8</sup> seized in relation to a dispute arising out a commercial agency or a distribution relationship should take into consideration is the [Regulation \(EU\) No 1215/2012](#) of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so called Brussels I Recast Regulation)<sup>9</sup>. The aforementioned instrument applies only insofar as specific requirements are satisfied.

*Ratione temporis*, the Brussels I Recast Regulation is applicable to all suits brought on or after the day it entered into force (10 January 2015) in the EU Member State whose courts are seized (Art. 88)<sup>10</sup>. The only factor that triggers the application (*inter alia*) of the rules on jurisdiction of the new Regulation is the date of the institution of the proceedings, being not relevant the moment of the occurrence of the material facts of such proceedings. As Art. 66 Brussels I Recast Regulation does not contain any specific reference on when a proceeding can be considered to have been instituted, it can be argued that resort should be made to the criteria laid down by Art. 32 Brussels I Recast Regulation in order to define the date on which an action is «pending» for the purposes of the provisions on concurrent

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<sup>6</sup> For this definition see the glossary available at [http://ec.europa.eu/civiljustice/glossary/glossary\\_en.htm](http://ec.europa.eu/civiljustice/glossary/glossary_en.htm).

<sup>7</sup> On the features of this unification see J. BASEDOW, *The communitarization of the conflict of laws under the Treaty of Amsterdam*, in *Comm. Mark. L. Rev.*, 2000, p. 687 ff.; A. BORRÁS, *Le droit international privé communautaire: réalités, problèmes et perspectives d'avenir*, in *Rec. cours*, 2005, p. 317; 313 ff.; F. POCAR, *La comunitarizzazione del diritto internazionale privato: una "European conflict of laws revolution"?*, in *Riv. dir. int. priv. proc.*, 2000, p. 873 ff.

<sup>8</sup> The territorial scope of application mirrors the scope of application of EU secondary law [Art. 288(2) TFEU]. Thus, the Brussels I Recast Regulation, as an EU Regulation, is directly applicable (and binding in its entirety) in all EU Member States, subjected to the exceptions provided for by Art. 355 TFEU. In this regard it should be noted that, despite the peculiar position of the UK, Ireland and Denmark with respect to the measures adopted pursuant to Title V of Part Three of the TFEU (respectively, Protocol No 21 on the position of Denmark and Protocol No 22 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU), the Brussels I Recast Regulation is binding also on these three countries. The United Kingdom and Ireland have decided to opt into the Brussels I Recast Regulation. Denmark, on the other hand, is bound on different grounds. Since the Protocol on the position of Denmark does not provide this State with the chance to participate in particular legal instruments, the relevance of the Brussels I Recast Regulation for Denmark is derived from the 2005 Agreement concluded between Denmark and the EC (and entered into force on 1 July 2007) which extended the provisions of the Brussels I Regulation to that country. Art. 3(2) of that agreement granted Denmark the possibility of notifying the Commission of its decision whether or not to implement the amendments of the Brussels I Regulation adopted at EU level. On 20 December 2012 Denmark exercised this option, notifying the Commission of its decision to implement the contents of the Brussels I Recast Regulation.

<sup>9</sup> OJ L 351 of 20 December 2012, p. 1 ff.

<sup>10</sup> For the proceeding instituted before that date, the relevant instrument is to be found in the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16 January 2001, p. 1 ff. (so called Brussels I Regulation).

proceedings. However, this solution seems not convincing. Given that the criteria laid down in Art. 32 have been expressly provided in relation to the mechanism of *lis pendens*, it seems at odds with the intention of the legislator to stretch the scope of application beyond its original purpose. It follows that the (procedural) law to be applied in order to establish when a proceeding can be deemed instituted for the purpose of Art. 66 Brussels I Recast Regulation can only be the *lex fori*<sup>11</sup>.

*Ratione personae*, the Brussels regime's jurisdictional rules normally apply provided that the defendant is domiciled in a Member State, but some head of jurisdictions follow a different approach<sup>12</sup>.

*Ratione materiae*, the Brussels I Recast Regulation require that dispute must to a civil or commercial matter<sup>13</sup> and exclude from their respective scope of application the matters regarding the status or legal capacity of natural persons,<sup>14</sup> rights in property arising out a matrimonial relationship,<sup>15</sup> wills and successions<sup>16</sup>, bankruptcy,<sup>17</sup> arbitration,<sup>18</sup> maintenance,<sup>19</sup> and social security<sup>20</sup>.

While a comprehensive overview of the contents and rules set forth in the Brussels I Recast is clearly beyond the scope of this paper, it's worth focusing on the heads of jurisdiction that may be relevant in the context of a commercial agency/distribution dispute. Since the instrument at stake is characterized by a hierarchical structure, we should first examine the jurisdictional rules that prevail over the others.

For our purpose, the first rule that a national court should look at in order to verify its jurisdiction over the dispute is Art. 25<sup>21</sup>, which strongly recognizes the role of party autonomy in the

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<sup>11</sup> For similar statements see A. DICKINSON, *sub Article 66*, in *The Brussels I Regulation Recast*, edited by A. Dickinson, E. Lein, Oxford 2015, p. 58-59, para. 16.04. On the Brussels I Regulation see H. GAUDEMÉTALLON, *Compétence et exécution des jugements en Europe*, Issy-les-Moulineaux 2002, p. 49; A. STAUDINGER, *sub Article 66*, in *Europäisches Zivilprozess- und Kollisionsrecht, Brüssel I-VO*, herausgegeben von T. Rauscher, Köln 2011, p. 487, para. 2.

<sup>12</sup> See Arts. 18(1), 21(2), 24 and 25 of the Brussels I Recast Regulation.

<sup>13</sup> According to the settled case-law of the European Court of Justice the concept of civil and commercial matter embraced in the Brussels regime is to be understood as an independent concept to be interpreted by referring, first, to the objectives and scheme of the regulation and, second, to the general principles which stem from the corpus of the national legal systems: Court of Justice, 28 April 2009, case C-420/07, *Meletis Apostolides v David Charles Orams e Linda Elizabeth Orams*, EU:C:2009:271, para. 41; 18 May 2006, case C-343/04, *Land Oberösterreich v ČEZ*, EU:C:2006:330, para. 22; 15 February 2007, case C-292/05, *Eirini Lechouritou and others v Dimosio tis Omospondiakis Dimokratias tis Germanias*, EU:C:2007:102, para. 29; 15 May 2003, case C-266/01, *Préservatrice foncière TLARD SA v Staat der Nederlanden*, EU:C:2003:282 para. 20; 21 April 1993, case C-172/91, *Volker Sonntag v Hans Waidmann and others*, EU:C:1993:144, para. 18; 16 December 1980, case 814/79, *Netherland v Reinhold Rijffer*, EU:C:1980:291, para. 7; 14 October 1976, case 29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, EU:C:1976:137, para. 3.

<sup>14</sup> See Art. 1(2)(a) Brussels I Recast Regulation.

<sup>15</sup> See Art. 1(2)(a) Brussels I Recast Regulation.

<sup>16</sup> See Art. 1(2)(f) Brussels I Recast Regulation.

<sup>17</sup> See Art. 1(2)(b) Brussels I Recast Regulation.

<sup>18</sup> See Art. 1(2)(d) Brussels I Recast Regulation.

<sup>19</sup> See Art. 1(2)(e) Brussels I Recast Regulation.

<sup>20</sup> See Art. 1(2)(c) Brussels I Recast Regulation.

<sup>21</sup> Our analysis is based on the assumption that the defendant does not enter an appearance without contesting the court's jurisdiction. According to Art. 26 of the Brussels I Recast Regulation such a behaviour should lead the court to declare its jurisdiction, since entering an appearance in that way amounts to a tacit

allocation of the jurisdiction in contractual matters<sup>22</sup>. According to the first paragraph of this provision «(i)f the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise». The first element that can be noted in the wording of the provision is that the enforceability of the jurisdiction agreement according to the instrument at stake depend on the fact that the parties, by way of their agreement, confer jurisdiction on a court or courts of an EU Member State<sup>23</sup>. The location in a Member State of the court chosen is the only factor that matters in relation to the territorial scope of application of the rule at stake. No other connections are required, neither based on the domicile/residence of the parties<sup>24</sup>, nor based on a possible link between the dispute and the court chosen<sup>25</sup>. The choice of a neutral forum is therefore entirely possible

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prorogation of jurisdiction. On the tacit prorogation of jurisdiction see, in the case law, Court of Justice, 20 May 2010, case C-111/09, *Česká podnikatelská pojišťovna as, Vienna Insurance Group v Michal Bilas*, EU:C:2010:290.

<sup>22</sup> For further details on this provision see S.M. CARBONE, *Gli accordi di proroga della giurisdizione e le convenzioni arbitrali nella nuova disciplina del Regolamento (UE) 1215/2012*, in *Dir. comm. int.*, 2013, p. 651 ff.; M.E. DE MAESTRI, *La proroga di giurisdizione nel nuovo Regolamento Ue n. 1215/2012 (Bruxelles I Bis)*, in *Dir. comm. int.*, 2014, p. 607 ff.; P. MANKOWSKI, *The role of party autonomy in the allocation of jurisdiction in contractual matters*, in *The Brussels I Recast Regulation as a panacea?*, eds. F. Ferrari, F. Ragno, Padova 2015, p. 97 ff.; I. QUEIROLO, *Choice of Court in the New Brussels I-bis Regulation*, in *Yearbook of Private International L.*, 2013/2014, p. 113 ff.; F. POCAR, *Brevi riflessioni in tema di revisione del Regolamento Bruxelles I e clausole di scelta del foro*, in *Dir. comm. int.*, 2012, p. 327 ff.

<sup>23</sup> Art. 25 Brussels I Recast Regulation. On the regime of third-States choice-of-court agreement see C. KOHLER, *Agreements Conferring Jurisdiction on Courts of Third States in Recasting Brussels I*, edited by F. Pocar, I. Viarengo, F.C. Villata, Padova 2012, p. 199 ff.; F.C. VILLATA, *Choice-of-Court Agreements in Favour of Third States in Light of the Suggestions by Members of the European Parliament*, *ibidem*, p. 219 ff.; J. WEBER, *Universal Jurisdiction and third States in the reform of the Brussels I Regulation*, in *Rabels Zeitschr.*, 2011, p. 619 ff.

<sup>24</sup> The irrelevance of the domicile of the parties for the purpose of the application of the Brussels I Recast Regulation's rule on choice-of-court agreements represents one of the major novelty of the new instrument in comparison with the old Brussels I Regulation and is precisely aimed to an alignment with the Hague Convention on choice-of-court agreements (U. MAGNUS, *Gerichtsstandsvereinbarungen unter der reformierten EuGVO*, in *Festschrift für Dieter Martiny zum 70. Geburtstag*, herausgegeben von N. Witzleb, R. Ellger, P. Mankowski, H. Merkt, O. Remien, Tübingen 2014, at pp. 788-789. The novelty has to be welcomed for a number of reasons. First of all it amounts to a broader recognition of party autonomy which could benefit the litigation industry of the EU countries that are able to attract international disputes before their own courts. Secondly, it prevents the shortcomings related to the need of identifying the domicile/residence of the parties, in particular in light of the fact that, under the Brussels I regime, it was not clear whether this connection needs to be ascertained at the time of the conclusion of the choice-of-court agreements or at the time of the institution of the proceedings (for the view that the relevant moment should be the time for the institution of the proceedings as a matter of coherence with the solution of intertemporal problems embraced by the Regulation see U. MAGNUS, *sub Article 23*, in *Brussels I Regulation*, edited by U. Magnus, P. Mankowski, Munich 2012, at p. 463, para. 52). Finally it seems consistent with the Brussels I regime in so far as it does not require a significant connection between the transaction and the court chosen (F. SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (Rifusione). Evoluzione e continuità del "sistema Bruxelles-I" nel quadro della cooperazione giudiziaria in materia civile*, Padova 2015, p. 202).

<sup>25</sup> In the European Court of Justice case law on the Brussels Convention see, *inter alia*, 16 March 1999, case C-159/97, *Trasporti Castelletti v Hugo Trumpy*, EU:C:1999:142, para. 49-50; 3 July 1997, C-269/95, *Francesco Benincasa v Dentalkit*, EU:C:1997:337, para. 28; 20 February 1997, case C-106/95, *Mainschiffahrts-Genossenschaft v Les Gravières Rhénanes*, EU:C:1997:70, para. 34; 17 January 1980, case 56/79, *Siegfried Zelger v Sebastiano Salinitri*, EU:C:1980:15, para. 4.



under the Brussels regime. The second element to be underlined relates to the rebuttable presumption that a choice-of-court agreement is exclusive,<sup>26</sup> unless parties expressly indicate otherwise<sup>27</sup>. Every exclusive choice-of-court agreement is capable of producing effects, which can be differentiated between prerogative and derogative effects. These effects don't arise *ipso jure*, but are subject to the pre-requisite that the validity and the effectiveness requirements set forth in the Art. 25 are fulfilled. In this regard, the first condition to be met, under the Brussels I Recast Regulation,<sup>28</sup> is that the parties have actually agreed on the selection of the forum. However, there is no express indication in the instrument under consideration in how to conduct the analysis of the so-called formal consent<sup>29</sup>. According to the case law of the European Court of Justice (hereinafter ECJ) on the Brussels Convention and the Brussels Regulation<sup>30</sup>, this ascertainment should be made favouring, insofar as possible, an autonomous interpretation of the consent pre-requisite, detached from any national law<sup>31</sup>. In this regard, the ECJ has often resorted to the satisfaction of the formal requirements in order to derive (*rectius* to presume)<sup>32</sup> the existence of the consent of the parties. In more complex cases, however, the formal consent of the parties had been inferred by the ECJ not by the fulfilment of the formal requirement<sup>33</sup> but, in application of a kind of *fiction legis*, by what the relevant national law applicable to the relationship to which the choice-of-court agreement refers provides on the binding effects of the contract on the parties<sup>34</sup>.

Provided that parties have agreed on a court, the Brussels I Recast Regulation provides that the choice-of-court agreement has to comply with specific requirements in order to be formally valid and

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<sup>26</sup> See, on the Brussels I Recast Regulation F. GARCIMARTÍN ALFÉREZ, *sub Article 25 Brussels I Recast Regulation*, in *The Brussels I Regulation Recast*, cited above, p. 301, para. 9.82.

<sup>27</sup> At common law, the contrary presumption applies: see A. SCHULZ, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, in *Yearbook of Private International L.*, 2005, p. 9. In the US case law see, for example, *K & Scientific Co. v Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 496 (11<sup>th</sup> Cir., 6 September 2001).

<sup>28</sup> See, in the European Court of Justice case law on the Brussels I Regulation, 7 February 2013, case C-543/10, *Refcomp v Axa Corporate and Others*, EU:C:2013:62, para. 27-28; 9 November 2000, case C-387/98, *Coreck Maritime v Handelsveem and Others*, EU:C:2000:606, para. 13; 20 February 1997, *Mainschiffahrts-Genossenschaft*, cited above, para. 15; 24 June 1981, case 150/80, *Elefanten Schuh v Jacqmain*, EU:C:1981:148, para. 24; 14 December 1976, case 24/76, *Estasis Salotti v Ruena*, EU:C:1976:177, para. 7-9; 14 December 1976, case 25/76, *Segoura v Bonakdarian*, EU:C:1976:178, para. 6.

<sup>29</sup> For a distinction between formal and material consent see S. CAMILLERI, *Article 23: Formal Validity, Material Validity or Both?*, in *J. Priv. Int. L.*, 2011, p. 302.

<sup>30</sup> See, *inter alia*, Court of Justice, 14 December 1976, *Estasis*, cited above, para. 7; 14 December 1976, *Segoura*, cited above, para. 6.

<sup>31</sup> I. QUEIROLO, *Choice of Court in the New Brussels I-bis Regulation*, cited above, p. 119-120.

<sup>32</sup> F.C. VILLATA, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, Padova 2012, p. 53-55.

<sup>33</sup> For this approach in relation to the Brussels regime, see Court of Justice, 16 March 1999, *Trasporti Castelletti*, cited above, 49-51; 20 February 1997, *Mainschiffahrts-Genossenschaft*, cited above, para. 15; 24 June 1981, *Elefanten Schuh*, cited above, para. 25; 14 December 1976, *Estasis*, cited above, para. 6; 14 December 1976, *Segoura*, cited above, para. 7.

<sup>34</sup> Court of Justice, 9 November 2000, *Coreck Maritime*, cited above, para. 23; 10 March 1992, case C-214/89, *Powell Duffryn v Wolfgang Petereit*, EU:C:1992:115, para. 19; 11 November 1986, case 313/85, *Iveco Fiat v Van Hool*, EU:C:1986:423, para. 7 ff.; 19 June 1984, case 71/83, *Tilly Russ v NV Haven*, EU:C:1984:217, para. 24. For a different solution, however, see Court of Justice, 7 February 2013, *Refcomp*, cited above, para. 39-41.

to produce its effects. On one hand, the European regime provides for uniform substantive rules on formal requirements that have an exhaustive nature and, thus, a minimum and maximum harmonization effect. Insofar as its formal requirements are satisfied, there is no room for stricter standards provided for under national laws. On the other hand, in order to be valid from a formal point of view, the Brussels I Recast Regulation requires an agreement to be a) in writing or evidenced in writing; b) in a form which accords with practices which the parties have established between themselves; or c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. The compliance of the forum selection agreement with the formal requirements set out in the relevant instruments is just one of the conditions that should be satisfied in order to enforce the choice-of-court agreement. The other relates to the so called «substantive validity» of the agreement, a term which excludes the question of formal consent, but encompasses, for example, factors that vitiate the genuineness of the consent, such as fraud, mistake, duress, misrepresentation or questions related to the capacity to enter into the agreement<sup>35</sup>. In this field one is confronted with what is likely to constitute one of the most novelties introduced by the Brussels I Recast Regulation. Under the new European regime the question of substantive validity<sup>36</sup> is now addressed by making applicable the law of the chosen court, including – as stated by a Recital<sup>37</sup> – its conflict of law rules<sup>38</sup>.

Given the precedence of the prorogation rule over the other jurisdictional rules of the Recast, the court seized in relation to a commercial agency/distribution dispute should verify first whether the presence (or the lack) of its jurisdiction could be assessed in the light of an effective and valid choice-of-court agreement. If not, the other relevant grounds of jurisdiction provided by Art. 4 or Art. 7(1)(b) should be relied on.

The first residual jurisdictional rule to be examined, absent a valid and effective exclusive choice-of-court agreement, refers to the so called *forum rei*, which grants jurisdiction to the court of the

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<sup>35</sup> T. RATKOVIC, D. ZGRABLJICROTAR, *Choice-of-Court agreements under the Brussels I Regulation (Recast)*, in *J. Priv. Int. L.*, 2013, p. 255.

<sup>36</sup> On the various solutions proposed in relation to the question of the law governing the substantive validity of a choice-of-court agreement under the Brussels I Regulation see I. QUEIROLO, *Choice of Court in the New Brussels I-bis Regulation*, cited above, p. 124 ff.

<sup>37</sup> See Recital 20: «(w)here a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of- laws rules of that Member State».

<sup>38</sup> For a negative appraisal of this solution see M.E. DE MAESTRI, *La proroga di giurisdizione*, cited above, p. 616-617; P. HAY, *Notes on the European Union's Brussels I "Recast" Regulation. An American Perspective*, in *Eur. Legal Forum*, 2013, p. 3; F. POCAR, *Brevi riflessioni*, cited above, p. 333; F.C. VILLATA, *L'attuazione degli accordi di scelta del foro*, cited above, pp. 97-98.

Member State where the defendant is domiciled (Art. 4). This is the default rule of the Brussels regime<sup>39</sup> and is based on the assumption that a defendant is generally better placed to conduct his defence before the courts of his domicile and would be unable reasonably to foresee before which other court he might be sued<sup>40</sup>. Given the crucial role of the notion of the domicile in the allocation of the jurisdiction, it should be specified which are the legal criteria to be applied in order to localize the domicile of one party. While Art. 62 provides that the question of whether a party is domiciled in a Member State is determined by reference to the internal law of that Member State, Art. 63 give an autonomous definition of that concept for companies, other legal person and associations. According to this provision the aforementioned entities can be deemed domiciled (alternatively) in the State where they have their where it has its statutory seat (for UK their registered office), their central administration or their principal place of business.

Having in mind that the general principle of the Brussels regime is that the courts of the Member State in which the defendant is domiciled are to have jurisdiction over the dispute, it should be noted that the general rule does coexist with alternative grounds of jurisdiction based on a close link between the court and the action pursued in order to facilitate the sound administration of justice<sup>41</sup>. In contractual matters<sup>42</sup>, notably, Art. 7(1) Brussels I Recast Regulation<sup>43</sup> provides plaintiffs with the options to sue defendants in the Member State courts of the place of performance of the obligation in question [Art. 7(1)(a)]. In order to remedy the shortcomings of identifying the obligation in question and then applying the rules of private international law of the State whose courts are seized in order to localize it, this linking factor is given an autonomous definition for two categories of contracts: the sale of goods and the provision of service. For the purposes of determining the court with jurisdiction in relation to contracts for the sale of goods or the provision of services, Art. 7(1)(b) of the Brussels I

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<sup>39</sup> For this remark see, in the European Court of Justice case law, 3 May 2007, case C-386/05, *Color Drack GmbH v Lexx International Vertriebs GmbH*, EU:C:2007:262, para. 20; 13 July 2006, case C-103/05, *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH*, EU:C:2006:471, para. 24-25; 13 July 2000, case C-412/98, *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)*, EU:C:2000:399, para. 35.

<sup>40</sup> Court of Justice, 1 March 2005, case C-281/02, *Onvsu v Jackson and others*, EU:C:2005:120, para. 42.

<sup>41</sup> Recital 16 of the Brussels Recast Regulation: «in addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen».

<sup>42</sup> According to the settled case-law of the European Court of Justice the concept of matters relating to a contract in Art. 5(1) of the Brussels Convention is to be understood as covering every situation in which there is an obligation freely assumed by one party towards another (Court of Justice, 5 February 2004, case C-265/02, *Frabuil SA v Assitalia SpA*, EU:C:2004:77, para. 24; 17 September 2002, case C-334/00, *Fonderie Officine Meccaniche Tacconi v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, EU:C:2002:499, para. 23; 27 October 1998, case C-51/97, *Réunion européenne v Spliethoff's Bevrachtungskantoor*, EU:C:1998:509, para. 17; 17 June 1992, case C-26/91, *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA Handte*, EU:C:1992:268, para. 15).

<sup>43</sup> *Amplius* on this provision see A. DE FRANCESCHI, *Il locus destinatae solutionis nella disciplina comunitaria della competenza giurisdizionale*, in *Contratto e impresa/Eur.*, 2008, p. 637 ff.; P. FRANZINA, *La giurisdizione in materia contrattuale. L'art. 5 n. 1 del regolamento n. 44/2001/CE nella prospettiva della armonia delle decisioni*, Padova 2006; M.A. LUPOI, *Il «nuovo» foro per le controversie contrattuali*, in *Riv. trim. dir. proc. civ.*, 2007, p. 495 ff.

Recast Regulation identifies as a connecting factor the obligation which characterises the contract in question<sup>44</sup>, *i.e.* the delivery of goods and the provision of the services. This pragmatic determination of the place of enforcement reinforces the Regulation's objectives of unifying the rules of jurisdiction and ensuring predictability<sup>45</sup>, since it establishes that the court of the Member State where, under the contract, the goods were delivered or should have been delivered and the court of the Member State where, under the contract, the services were provided or should have been provided have jurisdiction to hear all the claims arising out of the contract, regardless of the obligation which forms the basis of the legal proceedings<sup>46</sup>.

The special criterion of jurisdiction provided for in the aforementioned provision seems to be particularly relevant for the questions related to the allocation of the jurisdiction in relation to commercial agency/distribution disputes and triggers the question whether those type of contracts constitute «contracts for the provision of services»<sup>47</sup> within the meaning of Art. 7(1)(b) of the Regulation. The question seems quite straightforward for commercial agency contracts<sup>48</sup>. By concluding those contracts, an agent assumes obligations that are clearly to be characterized as services: the obligation to negotiate the sale or the purchase of goods on behalf of the principal, and, where appropriate, to negotiate and conclude such transactions on behalf of and in the name of that principal<sup>49</sup>, as also, the obligation to make proper efforts to negotiate and, where appropriate, to conclude the transactions he is instructed to take care of, the obligation to communicate to his principal all the necessary information available to him and to comply with reasonable instructions given by his principal<sup>50</sup>. Things seems quite a bit more difficult for distribution agreements, which are normally characterised by a framework agreement, the aim of which is an undertaking for supply and provision concluded for the future by two economic operators, including specific contractual provisions

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<sup>44</sup> See, to that effect, Court of Justice, 25 February 2010, case C-381/08, *Car Trim GmbH v KeySafety Systems Srl*, ECLI:EU:C:2010:90, para. 31; 23 April 2008, case C-533/07, *Falco Privatstiftung, Thomas Rabitsch v Gisela Weller-Lindhorst*, EU:C:2009:257, para. 54.

<sup>45</sup> See, to that effect, Court of Justice, 11 March 2010, case C-19/09, *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA*, EU:C:2010:137, para. 23 and 26; 9 July 2009, case C-204/08, *Peter Rehder v Air Baltic Corporation*, EU:C:2009:439, para. 33 and 36.

<sup>46</sup> It should be borne in mind that if the autonomous criterion set forth in Art. 7(1)(b) designates as competent the court of a non-member State, Art. 7(1)(c) provides that Art. 7(1)(a) applies rather than Art. 7(1)(b). It follows that the court seized will need, first, to identify the obligation in question and, second, to localize it under the *lex causae*.

<sup>47</sup> In this regard, it should be noted that according to European Court of Justice, case-law, the concept of service implies, at the least, that the party who provides the service carries out a particular activity in return for remuneration (Court of Justice, 14 November 2013, case C-469/12, *Krejci Lager & Umschlagbetriebs GmbH v Olbrich Transport und Logistik GmbH*, EU:C:2013:788, para. 26; 23 April 2008, *Falco Privatstiftung*, cited above, para. 29).

<sup>48</sup> See Court of Justice, 11 March 2010, *Wood Floor Solutions*, cited above.

<sup>49</sup> Art. 1(2) of Council [Directive 86/653/EEC](#) of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (so called Commercial Agency Directive), OJ L 382 of 31 December 1986, p. 17 ff.

<sup>50</sup> Art. 3 of the Commercial Agency Directive.

regarding the distribution by the distributor of goods sold by the grantor. However, very recently the ECJ has had an opportunity to shed some light on the topic and had classified this contract as a contract for the ‘supply of services’ within the meaning of the second indent of Art. 7(1)(b) of the Regulation<sup>51</sup>.

### 3. The private international regime of commercial agency and distribution contracts in Europe: the applicable law.

After having described the legal framework that governs the allocation of jurisdiction in the courts of Member State in relation to commercial agency/distribution contracts, the attention should be shifted to the issue of the applicable law. Also in this area resort can be made to an EU instrument, namely the [Regulation \(EC\) No 593/2008](#) of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (so called Rome I Regulation<sup>52</sup>), which set forth

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<sup>51</sup> [Court of Justice, 19 December 2013, case C-9/12, \*Corman Collins SA c. La Maison du Whisky SA\*](#), EU:C:2013:860, para. 37-41: «(a)s to whether an exclusive distribution agreement may be classified as a contract for the ‘supply of services’ within the meaning of the second indent of Article 5(1)(b) of the Regulation, it must be recalled that, according to the definition given by the Court, the concept of ‘services’ within the meaning of that provision requires at least that the party who provides the service carries out a particular activity in return for remuneration (...). As far as the first criterion in that definition, namely, the existence of an activity, it is clear from the case-law of the Court that it requires the performance of positive acts, rather than mere omissions (...). That criterion corresponds, in the case of an exclusive distribution agreement, to the characteristic service provided by the distributor which, by distributing the grantor’s products, is involved in increasing their distribution. As a result of the supply guarantee it enjoys under the exclusive distribution agreement and, as the case may be, its involvement in the grantor’s commercial planning, in particular with respect to marketing operations, factors in respect of which the national court has jurisdiction to make a ruling, the distributor is able to offer clients services and benefits that a mere reseller cannot and thereby acquire, for the benefit of the grantor’s products, a larger share of the local market. As to the second criterion, namely the remuneration paid as consideration for an activity, it must be stated that it is not to be understood strictly as the payment of a sum of money. Such a restriction is neither stipulated by the very general wording of the second indent of Article 5(1)(b) of the Regulation nor consistent with the objectives of proximity and standardisation, set out in paragraphs 30 to 32 of the present judgment, pursued by that provision. In that connection, account must be taken of the fact that the distribution agreement is based on a selection of the distributor by the grantor. That selection, which is a characteristic element of that type of agreement, confers a competitive advantage on the distributor in that the latter has the sole right to sell the grantor’s products in a particular territory or, at the very least, that a limited number of distributors enjoy that right. Moreover, the distribution agreement often provides assistance to the distributor regarding access to advertising, communicating know-how by means of training or yet even payment facilities. All those advantages, whose existence it is for the court adjudicating on the substantive action to ascertain, represent an economic value for the distributor that may be regarded as constituting remuneration. It follows that a distribution agreement containing the typical obligations set out in paragraphs 27 and 28 above may be classified as a contract for the supply of services for the purpose of applying the rule of jurisdiction in the second indent of Article 5(1)(b) of the Regulation. That classification excludes the application to a distribution agreement of the rule of jurisdiction laid down in Article 5(1)(a) of the Regulation. Taking account of the hierarchy established between points (a) and (b) by point (c) of that provision, the rules of jurisdiction laid down in Article 5(1)(a) of the Regulation is intended to apply only in the alternative and by default with respect to the other rules of jurisdiction in Article 5(1)(b) thereof».

<sup>52</sup> OJ L 177 of 4 July 2008, p. 6 ff. For a commentary on the Rome I Regulation, see F. FERRARI, *Rome I Regulation. Pocket Commentary*, Munich 2015; F. FERRARI, S. LEIBLE (edited by), *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, Munich 2009; P. LAGARDE, A. TENENBAUM, *De la Convention de Rome au Règlement Rome I*, in *Rev. crit. dr. int. privé*, 2008, p. 727 ff.; O. LANDO, P. NIELSEN, *The Rome I Regulation*, in

rules for determining which national law should apply to contractual obligations in civil and commercial matters involving more than one country.

This Regulation applies to all contracts concluded as from 17 December 2009<sup>53</sup> and is characterized by its universal reach, since it aims, not unlike its predecessor<sup>54</sup>, at proving uniform conflict of laws rules applicable on the sole basis of the *forum* called upon to adjudicate the international dispute being located in a Member State of the European Union (within the meaning of Art. 1(4) Rome I Regulation). More specifically, the Regulation applies, whether or not the law designated by its conflict of laws rules is the law of a Member State. This suggests that the Rome I Regulation avoids the coexistence of two different sets of applicable conflict of laws rules<sup>55</sup>, as it identifies the law applicable not only to contractual matters presenting factual elements connecting the transaction with one (or more) European Member State(s), but also with respect to «extra-European» cases, that is to say, where no other elements exist, other than the location of the *forum*, which could connect the transaction to a European Member State (so called «applicability *erga omnes*»)<sup>56</sup>.

The cornerstone of the European system of conflict-of-law rules in matters of contractual obligations<sup>57</sup> (but progressively also in other areas<sup>58</sup>) is the so called principle of «party autonomy»<sup>59</sup>, which recognizes the freedom of the parties to choose the law governing their contractual obligations. Pursuant to Art. 3 Rome I Regulation<sup>60</sup>, the parties are allowed to choose a law of a State that is not geographically connected to the transaction, they may split the law applicable to the obligations under

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*Comm. Mark. L. Rev.*, 2008, p. 1687 ff.; F. MARRELLA, *The New (Rome I) European Regulation on the Law Applicable to Contractual Obligations: What has Changed?*, in *ICC International Court of Arbitration Bulletin*, 2008, p. 87 ff.

<sup>53</sup> Corrigendum to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L* 309 of 24 November 2009, p. 87.

<sup>54</sup> Convention on the law applicable to contractual obligations (so called Rome Convention). According to the *Giuliano/Lagarde Report* (*OJ C* 282 of 31 October 1980, p. 8), the Rome Convention contains uniform rules which «would apply not only to the nationals of Member States and to persons domiciled or resident within the Community but also to the nationals of third States and to persons domiciled or resident therein. The provisions of Article 2 specify the universal application of the convention».

<sup>55</sup> A. BONOMI, *The Rome I Regulation on the Law Applicable to Contractual Obligations. Some General Remarks*, in *Yearbook of Private International Law*, 2008, p. 165, 168.

<sup>56</sup> U. MAGNUS, *Art. 2 Rom I Verordnung*, in *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einföhrungsgesetz und Nebengesetzen*, Munich 2012, para. 1.

<sup>57</sup> Recital 10 of the Rome I Regulation .

<sup>58</sup> See Art. 22 of the Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *OJ L* 201 of 27 July 2012, p. 107 ff.; Art. 5 of the Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ L* 343 of 29 December 2010, p. 10 ff.; Art. 14 of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, *OJ L* 199 of 31 July 2007, p. 40 ff. (so called Rome II Regulation).

<sup>59</sup> This principle is perceived as an essential component of the liberal model of market regulation: see H. MUIR WATT, *'Party Autonomy' in international contracts: from the makings of a myth to the requirements of global governance*, in *Eur. Rev. Contract Law*, 2010, p. 254.

<sup>60</sup> For a detailed analysis of this provision see F. RAGNO, *sub Art. 3 Rome I*, in *Rome I Regulation. Pocket Commentary*, cited above, p. 73 ff.

their agreement, they may agree on the choice of law before or after the conclusion of the contract and they may subsequently change the *lex contractus*. The text of the Regulation partly departs from the previous Rome Convention. The Regulation contains some minor amendments and one new paragraph which basically analogizes the EU territory to that of a single country<sup>61</sup>.

The first amendment relates to the requirements for an implicit choice of law, which seem to have been strengthened. The Rome I Regulation dictates that an implicit choice must be demonstrated clearly instead of reasonably<sup>62</sup>. This change brings the English and German text in line with the French version of Art. 3(1) of the Rome Convention<sup>63</sup>, but also adds certainty to the finding of the tacit choice as it stresses the «guiding role» of the will of the parties for the judge<sup>64</sup>.

Also the second amendment regards the implicit choice of law. The Regulation, unlike the Rome Convention, classifies an exclusive choice of (Member States) court clause as one of the factors that a judge may take into account in considering whether a choice of law is clearly demonstrated (Recital 12). The Commission's initial proposal, actually, introduced an authentic presumption according to which, if the parties had agreed to confer jurisdiction to one or more courts or tribunals of a Member State, they should also be presumed to have chosen the law of that Member State. However, the criticism to the outcome of the proposed presumption has echoed back to the EU lawmaker, leading to its rejection during the negotiations and to the compromise solution now embraced in the Regulation<sup>65</sup>. The clarification embraced in Recital 12 offers to the courts a strong hint as how to interpret choice of court but, given the universal character of the Regulation, it has been held quite arbitrary and illogical in so far as it refers only to the selection of courts of a Member State<sup>66</sup>.

Another modification can be traced in the wording of Art. 3(3) Rome I Regulation which, like the corresponding provision of the Rome Convention, limits the derogative effect of choosing a foreign law if the situation at the moment of choice does not involve another foreign element. The new rule does not refer to the case in which choosing a foreign law is accompanied by the selection of a foreign forum, but this does not amount to a substantial change, as spelled out in Recital 15 of the

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<sup>61</sup> N. BOSCHIERO, *Norme inderogabili, «disposizioni imperative del diritto comunitario» e «leggi di polizia» nella proposta di regolamento «Roma I»*, in *Il nuovo diritto europeo dei contratti: dalla Convenzione di Roma al Regolamento «Roma I»*, Milano 2007, p. 120; P. MANKOWSKI, *Die Rom I-Verordnung - Änderungen im europäischen IPR für Schuldverträge*, in *Internationales Handelsrecht*, 2008, p. 135; G. ROSSOLILLO, *Territorio comunitario, situazione interna all'ordinamento comunitario e diritto internazionale privato*, in *Riv. dir. int.*, 2004, p. 708.

<sup>62</sup> The Rome Convention's standard instead is still to be found in Art. 14(1) Rome II Regulation.

<sup>63</sup> H. HEISS, *Party Autonomy*, in *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, cited above, p. 1.

<sup>64</sup> C. KESSEDJIAN, *Party autonomy and Characteristic Performance in the Rome Convention and in the Rome I Proposal*, in *Japanese and European Private International Law in Comparative Perspective*, edited by J. Basedow, H. Baum, J. Nishitani, Tübingen 2008, p. 105, 110; S. LEIBLE, M. LEHMANN, *Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht («Rom I»)*, in *Recht der Internationalen Wirtschaft*, 2008, p. 532.

<sup>65</sup> F. GARCIMARTÍN ALFÉREZ, *The Rome I Regulation: Much ado about nothing?*, in *Eur. Legal Forum*, 2008, I, 67.

<sup>66</sup> V. BEHR, *Rome I Regulation. A-Mostly-Unified Private International Law of Contractual Relationships within-Most-of the European Union*, in *J. Law & Commerce*, 2011, 243.

Regulation<sup>67</sup>. Undoubtedly, the most significant novelty of Art. 3 Rome I Regulation is embraced in paragraph<sup>68</sup> 4. This provision extends the principle affirmed in Art. 3(3) to mandatory provisions of EU law and, thus, prevents the circumvention of non dispositive rules of EU law by choosing the law of a third country in situations which are connected to Member States only.

Under the Rome I Regulation, as under the Rome Convention, the will of the parties is the primary connecting factor. In fact, the objective connecting factors laid down in the Regulation come into play only when the parties have failed to make a choice of law in accordance with Art. 3. The supremacy of the *lex voluntatis*, however, does not amount to an «absolute unrestricted freedom to choose the applicable law»<sup>69</sup>. In effect, the Rome I Regulation (like the Rome Convention) provides several limitations to the parties' private autonomy<sup>70</sup>.

First of all, the European law-maker restricts the freedom of choice in the context of contracts concluded with parties regarded as being weaker (passengers, consumers, employees and insurance policy holders).

Secondly, following in the footsteps of the Rome Convention, it prevents the fraudulent evasion of the law by providing that the choice of law could not, in a purely domestic situation, prejudice the (internally) mandatory provisions of the State where all other elements relevant to the situation at the time of the choice are located [Art. 3(3)]. In this regard, as already mentioned, there is one more party autonomy limitation provision in Rome I. Indeed, according to Art. 3(4), when all the contract's elements are located in the European Union, choosing the law of a non-member country<sup>71</sup> shall not prejudice the application of mandatory Community law provisions.

Thirdly, Rome I Regulation (like the Rome Convention) imposes another restriction on the freedom of the parties to choose the law governing their contracts, since it limits the parties' choice of law only to national laws.

Finally, the effectiveness of the parties' choice is limited by the classic *ordre public* exception, which prevents the application of the chosen law if it is 'manifestly incompatible' with the forum's

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<sup>67</sup> H H. HEISS, *Party Autonomy*; cited above; U. MAGNUS, *Art. 3 Rom I Verordnung*, in J von Staudingers *Kommentar*, cited above, para. 9.

<sup>68</sup> M. BOGDAN, *The Rome I Regulation on the Law Applicable to Contractual Obligations and the Choice of Law by the parties*, in *Nederlands Internationaal Privaatrecht*, 2009, 408.

<sup>69</sup> J. RINZE, *The Scope of Party Autonomy Under the 1980 Rome Convention on the Law Applicable to Contractual Obligations*, in *J. Business L.*, 1994, p. 413

<sup>70</sup> On this issue see, *amplius*, N. BOSCHIERO, *I limiti al principio d'autonomia posti dalle norme generali del regolamento Roma I. Considerazioni sulla "conflict involution" europea in materia contrattuale*, in *La nuova disciplina comunitaria della legge applicabile ai contratti*, a cura di N. Boschiero, Torino 2009, p. 67, at p. 70 ff.

<sup>71</sup> The fact that the European legislator, departing from the solution adopted in the Rome I Proposal and in the Rome II Regulation, includes Denmark among the Member States to which the Regulation applies for the purpose of Art. 3(4) is welcomed by S. LEIBLE, M. LEHMANN, *Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht*, cited above, p. 534. For similar remarks P. MANKOWSKI, *Die Rom I-Verordnung*, in *Zeitschrift für Europarecht*, 2009, p. 14, who however notices that a reference to the EEA States would also have been appropriate.



public policy (Art. 21), and by the applicability of the overriding mandatory rules of a different legal system than the one chosen (Art. 9).

The role of overriding mandatory provisions as a possible limit to the principle of party autonomy needs to be carefully considered when inserting a choice of law in a commercial agency contract (and, ostensibly, in a distribution contract when the distributor operates in specific countries<sup>72</sup>), given the position held by the ECJ in the famous *Ingmar* decision<sup>73</sup>. In the aforementioned decision the European judges had affirmed that, when a commercial agent carries out his activity in a Member State, the parties cannot exclude the application of the mandatory EU provision on indemnity upon termination by choosing the law of a non-EU country. The provisions of the Member State implementing the rule set forth in the Directive are therefore given the standing of overriding mandatory rules, to be applied as such by an EU Member State court irrespective of the choice of law made by the parties<sup>74</sup>.

The topic of the overriding nature of (some of) the provisions which protect the commercial agents had been explored by the EJC also in the *Unamar*<sup>75</sup>. *Unamar* involved a scenario in which the

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<sup>72</sup> In this regard, it should be noted that some European countries, as Spain, Portugal, Germany, Belgium, grant also to distributors the post-termination indemnity that EU law recognizes to commercial agents.

<sup>73</sup> [Court of Justice, 9 November 2000, case C-381/98, \*Ingmar GB Ltd v Eaton Leonard Technologies Inc.\*](#), EU:C:2000:605. On this crucial decision see E. ADOBATI, I. GIANGROSSI, *Necessaria applicabilità della normativa comunitaria in tema di contratto di agenzia indipendentemente dalla legge che regola il contratto*, in *Dir. comm. int.*, 2001, p. 725 ff.; R. FREITAG, S. LEIBLE, *Internationaler Anwendungsbereich der Handelsvertreterrichtlinie: Europäisches Handelsvertreterrecht weltweit?*, in *Recht der Internationalen Wirtschaft*, 2001, p. 287 ff.; E. JAYME, *Zum internationalen Geltungswillen der europäischen Regeln über den Handelsvertreterausgleich*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2001, p. 190 ff.; O. LANDO, *The territorial scope of application of the EU directive on self-employed commercial agents*, in *Estudos em homenagem à professora doutora Isabel de Magalhães Collaço*, Coordenação R.M. de Moura Ramos, I, Coimbra 2002, p. 249 ff.; K. SCHURIG, *'Ingmar' und die 'international zwingende' Handelsvertreter-Richtlinie oder: Die Urzeugung einer Kollisionsnorm*, in *Festschrift für Erik Jayme*, herausgegeben von H.P. Mansel, T. Pfeiffer, H. Kronke, C. Kohler, R. Hausmann, München 2004, I, p. 837 ff.; A. VENEZIA, *L'applicazione necessaria degli artt. 17 e 18 della direttiva n. 86/653 sui contratti di agenzia ed il trattamento di fine rapporto nella legge inglese di attuazione*, in *Dir. com.*, 2001, p. 303 ff.; H.L.E. VERHAGEN, *The tension between party autonomy and European Union law: some observations on *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.**, in *Int. Comp. L. Q.*, 2002, p. 135 ff.

<sup>74</sup> Court of Justice, 9 November 2000, *Ingmar GB*, cited above, para. 24-26: «[t]he purpose of the regime established in Articles 17 to 19 of the Directive is thus to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market. Those provisions must therefore be observed throughout the Community if those Treaty objectives are to be attained. It must therefore be held that it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed. In the light of those considerations, the answer to the question must be that Articles 17 and 18 of the Directive, which guarantee certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country».

<sup>75</sup> [Court of Justice, 17 October 2013, case C-184/12, \*United Antwerp Maritime Agencies \(UNAMAR\) NV v. Navigation Maritime Bulgare\*](#), EU:C:2013:663. For comments on this decision, see O. CACHARD, *Les lois de police communautaires n'existent pas, ce n'est qu'une illusion...*, in *Le droit maritime français*, 2014, p. 299 ff.; P. DALMAZIR,

parties to an agency contract had chosen the law of a Member State, which meets the minimum requirements laid down by the Directive. The question brought before the ECJ was whether the court of an EU Member State may apply to the contract, as overriding mandatory rules, the national provisions (the Belgian provisions) that offer to commercial agents wider protection than the minimum laid down by the Commercial Agency Directive, even if it appears that the law applicable to the contract is the law of another Member State of the European Union in which the minimum protection provided by the Commercial Agency Directive has also been implemented. The ECJ answered this question in the affirmative, ruling that «(t)he law of a Member State of the European Union which meets the minimum protection requirements laid down by Directive 86/653 and which has been chosen by the parties to a commercial agency contract may be rejected by the court of another Member State before which the case has been brought in favour of the law of the forum, owing to the mandatory nature, in the legal order of that Member State, of the rules governing the situation of self-employed commercial agents only if the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of that transposition, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by the directive, taking account in that regard of the nature and of the objective of such mandatory provisions».

As noted in the literature, the ECJ seems not only to grant a broad discretion to the national courts in inferring the overriding mandatory character of the *lex fori*, but suggests clearly that national provisions that overextend the Directive in protecting individual interests (and that are not, as in the *Ingmar* case, directly connected with the aim to protect freedom of establishment and the operation of undistorted competition in the internal market), may be counted among the overriding mandatory provisions. Even though the ECJ did not address the issue of the influence of an overriding mandatory statute on the enforceability of a choice-of-court agreement (or an arbitration agreement), it is possible

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*Lorsque la Cour a ses raisons que la raison ignore: à propos de l'arrêt Unamar*, in *Revue Lamy droit des affaires*, 2014, no. 92, p. 56 ff.; L. D'AVOUT, *Les directives européennes, les lois de police de transposition et leur application aux contrats internationaux*, in *Rec. Dalloz*, 2014, pp. 60-64; P. DEUMIER, *Les lois de transposition, lois de police*, in *Revue des contrats*, 2014, p. 80 ff.; P. HOLLANDER, *L'arrêt Unamar de la Cour de justice: une bombe atomique sur le droit belge de la distribution commerciale?*, in *Journal des tribunaux*, 2014, p. 297 ff.; L. IDOT, *Statut des agents commerciaux et qualification de lois de police*, in *Europe*, Décembre 2013, Comm. no. 12, pp. 54-55; J.-M. JACQUET, *Conflits de lois*, in *Journ. dr. int.*, 2014, p. 625 ff.; J.D. LÜTTRINGHAUS, *Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2014, p. 146 ff.; P. MANKOWSKI, *Zur Nichtanwendung des von den Parteien eines Handelsvertretervertrags gewählten Rechts zu Gunsten zwingender Vorschriften der lex fori ('Unamar')*, in *Entscheidungen zum Wirtschaftsrecht*, 2014, pp. 11-12; C. NOURISSAT, *De l'art délicat de manier les lois de police en présence d'un contrat d'agence commerciale intra-européen...*, in *La Semaine Juridique. Edition générale*, 2013, no. 49, p. 2222 ff.; J. SCHILLING, *Eingriffsnormen im europäischen Richtlinienrecht - Urteil des EuGH vom 17. Oktober 2013*, in *Zeitschrift für Europäisches Privatrecht*, 2014, p. 843 ff.; A.A.H. VAN HOEK, *Beëindigingsvergoedingen voor handelsagenten en algemeen belang*, in *Ars aequi*, 2014, p. 466 ff.; T. VON BODUNGEN, *Rechtswahl hilft nicht immer*, in *Betriebs-Berater*, 2014, p. 403 ss.

that the fact that the *Kirchberg* judges explicitly (and regrettably<sup>76</sup>) admitted to the possibility of knocking out the law of a Member State in order to favour the (overriding mandatory rules of the) *lex fori* may bear a significant relevance at the jurisdictional stage. If the court seized is persuaded that denying the effectiveness of a choice-of-court agreement is necessary to prevent the circumvention of the domestic *loi de police*<sup>77</sup>, after *Unamar* the same court may feel authorized to adopt the same approach even in relation to agreements selecting a EU Member State court and choosing the law of a EU Member State<sup>78</sup>.

Having underlined the boundaries of a choice-of-law agreement, it's time to examine how a court should ascertain the applicable law, absent a (valid) choice of law. As far as the contracts at stake are concerned, the relevant provision can be found in Art. 4 Rome I Regulation.

Art. 4(1) contains special conflict of laws for eight types of contracts. In particular, this paragraph provides that «a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence» [Art. 4(1)(b)], while «a distribution contract shall be governed by the law of the country where the distributor has his habitual residence» [Art. 4(1)(f)].

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<sup>76</sup> As correctly pointed out by J. SCHILLING, *Eingriffsnormen im europäischen Richtlinienrecht*, cited above, p. 850: «würde nun ein Mitgliedstaat die im Zuge der Richtlinienumsetzung vorgenommene graduelle Verstärkung dieses sekundärrechtlich determinierten Schutzniveaus gegenüber anderen Mitgliedstaaten im Wege von Art. 7 Abs. 2 EVÜ durchsetzen können, würde dies die durch die Richtlinie angestrebte Harmonisierung konterkarieren». For a similar criticism, see also J.D. LÜTTRINGHAUS, *Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht*, cited above, p. 149 [«(h)ier besteht die Gefahr, dass künftig überschießend umgesetztes bzw. rein nationales Sonderprivatrecht nach Belieben in den Stand von Eingriffsrecht gehoben und ungeachtet der einheitlichen Verweisungsregeln des internationalen Unionsprivatrechts angewendet wird. Damit droht nicht nur eine Aushöhlung des elementaren Grundsatzes der Parteiautonomie, sondern es wird auch der mit der Rom I-VO bezweckte innerunionale Entscheidungseinklang gefährdet»], and P. MANKOWSKI, *Zur Nichtanwendung des von den Parteien eines Handelsvertretervertrags gewählten Rechts*, cited above, p. 12 [«(n)egativ ist anzukreiden, dass der EuGH im konkreten Fall die letzte Konsequenz nicht walten lässt. Er lässt vielmehr ein viel zu großes Schlupfloch für die *lex fori*. Indem er – zudem in einem durch Richtlinie harmonisierten Bereich! – der *lex fori* besondere Schutzüberlegungen im Prinzip zugesteht (...), erhöht er nur den Begründungsaufwand, der für ein Deklarieren von Normen als Eingriffsnormen zu treiben ist, ohne die prinzipielle Legitimation wirklich in Frage zu stellen»].

<sup>77</sup> As questionable as this approach can be, it should be noted that a similar rationale can be found in a case decided by the German Supreme Court which invalidated a choice-of-court agreement between a company based in the USA and its Germany-based sales agent providing for the exclusive jurisdiction of the Virginia courts, since the choice of forum, coupled with the choice of Virginia law as the law applicable to the dispute, would have prevented the agent from the possibility to enforce his right to a post-termination indemnity according to the German provision implementing the 86/653 Directive (German Supreme Court, 5 September 2012, in *Internationales Handelsrecht*, 2013, p. 35 ff.; for a comment, see J. ANTONIO, *Zum Verhältnis zwischen § 89b HGB sowie anderen Eingriffsnormen und Gerichtsstands- oder Schiedsvereinbarungen zu Gunsten ausländischer Gerichte - Zugleich Anmerkung zu BGH, Beschluss vom 05.09.2012 – VII ZR 25/12*, in *Internationales Handelsrecht*, 2013, p. 225 ff.; P. AYAD, S. SCHNELL, *Anmerkung zum BGH-Urteil vom 05.09.2012 (VII ZR 25/12, BB 2012, 3103) – Zur Frage der Zuständigkeit nationaler Gerichte bei der Durchsetzung international zwingender Regeln*, in *Betriebs-Berater*, 2012, p. 3104 ff.).

<sup>78</sup> On the problem of admitting the possibility of evaluate the lawfulness of choice-of-court agreements in the light of the overriding mandatory provisions of the *lex fori derogati*, see J. BASEDOW, *Exclusive choice-of-court agreements as a derogation from imperative norms*, in *Essays in Honour of Michael Bogdan*, edited by P. Lindskoug, U. Manusbach, G. Millqvist, P. Samuelsson, H.-H. Vogel, Lund 2013, p. 15 ff.; P. MANKOWSKI, *The role of party autonomy*, cited above, pp. 105-106.

On the other hand, Art. 4(2) dictates that contracts not listed in Art. 4(1) or contracts covered by more than one of points (a) to (h) are governed by the law of the country in which the party required to effect the characteristic performance of the contract has his habitual residence. If the law applicable cannot be determined pursuant to Art. 4(1) or (2), Art. 4(4) points out to the law of the country with which the contract is most closely connected.

Moreover, it should be noted that the characteristic performance rule set forth in Art. 4(1) and Art. 4(2) is subject to the get-out clause of Art. 4(3), which states that «[w]here it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than [country], the law of that other country shall apply». Consequently, as under Art. 4 of the Rome Convention, under the Rome I Regulation a court must always – *ex officio* – look into whether the get-out clause’s – rather strict – requirements for the application of a law different from that identified by virtue of the special rules or the characteristic performance rule are met<sup>79</sup>. Only where this is not the case, will the law identified pursuant to Art. 4(1) or (2) apply.

It follows that, to determine the applicable law to a commercial agency/distribution contract, one will have first to look to the special rules provided by Art. 4(1). On the hand, since the commercial agent is a service provider, the commercial agency contract seems to fall within the sphere of application of Art. 4(1)(b) Rome I Regulation. Hence, the law of the country in which the commercial agent has his habitual residence generally apply. On the other hand the distribution contract, *i.e.* the framework agreement focusing on the implementation of a distribution concept, and the fixing of overall obligations of supplying and accepting goods among the parties, is expressed referred to in Art. 4(1)(f) Rome I, according to which distribution contracts are governed by the law of the State where the distributor has his habitual residence<sup>80</sup>.

Provided that resort to either of the special rules or the characteristic performance rule leads to the law of a the residence of the agent or the distributor, that country’s law is applicable but only absent a manifestly closer connection to a different country. Thus, *vis-à-vis* the Rome Convention what has changed is the threshold for the application of a different law, but not the way the get-out clause relates to the «autonomous» conflict of laws rules set forth in Art. 4(1) and 4(2)<sup>81</sup>.

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<sup>79</sup> See F. FERRARI, *From Rome to Rome via Brussels: Remarks on the Law Applicable to Contractual Obligations Absent a Choice by the Parties (Art. 4 of the Rome I Regulation)*, in *Rabels Zeitschr*, 2009, p. 765.

<sup>80</sup> In this regard, it should be observed that «it is not always easy to determine whether an agreement containing elements that are covered by two or more points of paragraph 1 is one contract under paragraph 2, or whether it is in fact two contracts, which are to be governed by different laws. Some distributorship contracts contain provisions on the individual sales from the supplier to the distributor. If the terms relating to the distributorship are severable from the sales terms, it would seem that under point (f) the law of the habitual residence of the distributor should govern the terms of the distributorship and the law of the habitual residence of the seller each sale of goods under point (a). If they are not severable, the guideline in Article 4(2) should decide which law governs the entire contract» (O. LANDO, P.A. NIELSEN, *The Rome I Regulation*, cited above, pp. 1701-1702).

<sup>81</sup> F. FERRARI, *From Rome to Rome via Brussels*, cited above, p. 765.

#### 4. The private international regime of commercial agency and distribution contracts outside Europe.

The above described legal rules on jurisdiction and choice of law in force in EU are undoubtedly crucial in predicting which will be the competent court and the applicable law in the case a dispute in a matter related to a commercial agency/distribution contract is brought before a Member State court. As mentioned before, however, the reference to the European legal instruments is possible, as far as the jurisdiction is concerned, only insofar as the dispute bears a specific connection to a Member State<sup>82</sup>. Conversely, when the aforementioned connection is not to be found, the Brussels regime cannot be applied and the issue of jurisdiction needs to be examined in the light of the internal private international rules of the *lex fori*, which may diverge quite considerably. As far as Italy is concerned, the relevant rules on jurisdiction are set forth in the [Italian Statute of Private International Law of 31 May 1995](#). According to this Statute, Italian courts have jurisdiction over a defendant if Italian courts have been selected as the competent courts in a jurisdiction agreement (Art. 4) or if that defendant is domiciled or resident in Italy or has a representative with the power to represent the defendant in Italian courts [(Art. 3(1)]. If the Italian court seized cannot ascertain its jurisdiction on the basis of these provision, resort needs to be made to Art. 3(2) of the Statute. This provision clearly extends the jurisdiction of Italian courts to situations where the defendant is not located in Italy and does not have a representative there when it states, in the relevant part, that «Italian courts also have jurisdiction on the basis of the criteria set forth in sections 2, 3, and 4 of title II of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and the protocol, signed in Brussels on 27 September 1968, rendered executive by means of Statute n. 804 of 21 June 1971, and later modifications in force in Italy, even if the defendant is not domiciled in the territory of a Contracting State, provided that the issues relate to matters falling within the sphere of application of the Convention<sup>83</sup>».

As regards the disputes at hand, the relevant criterion on which to base the jurisdiction of Italian Court is that set forth in Art. 5(1) of the Brussels Convention<sup>84</sup>, made applicable to relationships

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<sup>82</sup> As noted above, this connection relates generally to the domicile of the defendant being located in a Member State.

<sup>83</sup> On this provision see, *amplius*, F. POCAR, *Le rôle des critères de compétence judiciaire de la Convention de Bruxelles dans le nouveau droit international privé italien*, in *E pluribus unum. Liber amicorum Georges A.L. Droz. On the Progressive Unification of Private International Law*, Editors A. Borrás, A. Bucher, T. Struycken, M. Verwilghen, The Hague-Boston-London 1996, p. 358 ff.

<sup>84</sup> It is worth pointing out that the Italian Supreme Court stated that the reference in Art. 3(2) of the Statute to the Brussels Convention must be understood as a reference to that Convention, and that Convention alone, in the sense that resort is to be had to the grounds of jurisdiction set forth in that Convention even after the coming into force of the Brussels I Regulation and the Brussels I Recast Regulation: see Italian Supreme Court, 21 October 1999, n. 22239. For the opposite view see M. DE CRISTOFARO, *Convenzione di Bruxelles: modifiche ai criteri di competenza apportate dal regolamento 44/2001*, in *Int'l Lis*, 1, 2002, p. 49; P. FRANZINA *La*

with a non-EU party by Art. 3(2) of the Statute, pursuant to which a party can be sued «in matters relating to a contract, in the courts for the place of performance of the obligation in question». As case law regarding the Brussels Convention rendered by the ECJ shows, its Art. 5(1) requires courts to first determine the obligation which *in concreto* forms the basis of the claim<sup>85</sup>, and to then identify the place of the performance of the obligation in question by resorting to the conflict of laws rules of the court seized<sup>86</sup>.

The analysis of the aforementioned legal sources and the primacy recognized to the principle of party autonomy in all the aforementioned instruments may lead to assert that an Italian fashion company which intends to enter into a commercial agency contract or a distribution contract with a foreign partner may effectively govern the choice of law issues arising out the transaction by inserting in the contract a choice-of-court agreement (*e.g.* in favour of an Italian court), coupled with a choice of law clause (pointing out, namely, to Italian law). This conclusion, however, is too simplistic and does not take into account the possibility that the dispute may actually be brought before a non Italian (nor EU Member State) court despite the existence of an exclusive jurisdiction agreement. If this is the case, the court seized (likely the court of the State where the commercial agent or the distributor is resident or is active) will answer the question of its jurisdiction (and, if the case, of the applicable law) on the basis of the private international law in force in its legal system. This means that, if the court seized seats in a State (as Saudi Arabia, Qatar, United Emirates), that does not recognize or does limit the enforceability of a foreign choice-of-court/choice-of-law agreement in matters related to commercial agency and distribution contracts, the selection of the Italian court and the designation of Italian law will be disregarded.

In the light of what has been said hitherto, it seems essential that Italian (but in general European) fashion companies wishing to export their products abroad carefully consider the legal framework and in particular the private international law regime of the foreign country in which they are preparing to expand their business, not only in order to foresee which will be the court vested with jurisdiction and the law governing the contract if a dispute arises, but also in order to possibly examine alternative contractual schemes or different commercial strategies for penetrating the targeted market.

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*giurisdizione in materia contrattuale*, cited above, p. 12 ff.; M.A. LUPOI, *Conflitti transnazionali di giurisdizioni. Policies, metodi, criteri di collegamento*, Milano 2002, pp. 315-316.

<sup>85</sup> See Court of Justice, 19 February 2002, case C-256/00, *Besix SA/Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG)*, EU:C:2002:99, para. 44; 5 October 1999, case C-420/97, *Leathertex Divisione Sintetici SpA v Bodetex BVBA*, EU:C:1999:483, para. 31; 29 June 1994, case C-288/92, *Custom Made Commercial Ltd v Stawa Metallbau GmbH*, EU:C:1994:268, para 13; 15 January 1987, case 266/85 *Shenavai v Kreischer*, EU:C:1987:11, para. 9; 6 October 1976, case 14/76, *A. De Bloos, SPRL./Société en commandite par actions Bouyer*, EU:C:1976:134, para. 13.

<sup>86</sup> See Court of Justice, 19 February 2002, *Besix*, cited above, para. 33; 28 September 1999, case C-440/97, *GIE Groupe Concorde v The Master of the vessel "Suhadimarno Panjan" and Others*, EU:C:1999:456, para. 13; 5 October 1999, *Leathertex*, cited above, para. 33; 29 June 1994, *Custom Made Commercial Ltd*, cited above, para. 26; 6 October 1976, case 12/76, *Industrie Tessili Italiana Como v Dunlop AG*, EU:C:1976:133, para. 13.

*Made in* labelling, origin of products and free circulation of goods  
in the European Union

Marco Torsello

Abstract

The notion of *Made in* labelling refers to the possibility, or duty, that the manufacturer or distributor of certain products indicates the geographical origin thereof, thus including on the label of the product, or on accompanying leaflets, markings or indications of the country where the product was manufactured, or from where it otherwise originates. The labelling may serve very different purposes, including the determination of customs duties applicable to imported goods, the enhancement of the attractiveness of products because of the added value attached to their origin, the protection of consumers' safety and full information about the products that they may be willing to purchase and the protectionist safeguard of domestic production by means of the limitation of the import of foreign products. The effectiveness of origin labelling as a tool to pursue the said goals is questionable, as is the compatibility of mandatory regimes of origin markings with the principle of global free trade and of market integration at the European level. The foregoing justifies the frequent tension between the call of national businesses for the enactment of a more stringent regulation of origin markings and the skepticism of supranational institutions, including EU institutions, concerned about the possible anti-competitive impact of a mandatory regulation. This paper provides an overview of the different positions based on the distinction of the goals, the pursuance of which is often invoked by supporters of a new *Made in* labelling system in European business law.

# Made in labelling, origin of products and free circulation of goods in the European Union

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Marco Torsello\*

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## 1. Notion and function of *Made in* labelling.

The notion of ‘*Made in*’ labelling refers to the possibility, or duty, that the manufacturer or distributor of certain products indicates the geographical origin thereof, thus including on the label of the product or on accompanying leaflets markings or indications of the country where the product was manufactured, or from where it otherwise originates.

The recent economic crisis has led to a renovated attention being paid to the possibility of labelling products with an indication of origin that evokes in the general public an attractive idea of quality. *Made in Italy*, for example, is amongst the most valuable indications of origin, due to its capacity to convey an idea of quality, manufacturing care and fashionable style. This is particularly the case with respect to the so-called «4 A», indicating the sectors (i.e. «*Abbigliamento e moda*», «*Alimentare*», «*Arredamento*», «*Automazione e meccanica*», that is: «Clothing and fashion», «Food», «Furnishing», «Automation and machineries»), which not surprisingly were the only ones that, even during the worst phase of the crisis, were able to resist, thanks to a significant capability of Italian businesses in those sectors to reach excellent standards of quality and to export a large share of their production.

Qualifying the *Made in* labelling as a mere indication of geographical origin, however, wouldn’t provide a comprehensive description of the relevance of that marking for manufacturers. Indeed, the *Made in* labelling doesn’t merely indicate the origin of a product, but rather it adds to the product a value consisting of a symbolic and evocative factor that makes the product more attractive and desirable. Only this added value and attractiveness can explain the choice made by some manufactures in the fashion business to re-localize in Italy the manufacture of their products, which had previously been de-localized in countries with lower costs of labor (so-called: *re-shoring*)<sup>1</sup>.

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<sup>1</sup> The best known example in this respect is that of *Gucci*.



The foregoing suggests that origin markings may serve different purposes, which in turn makes it problematic to provide a clear answer to the question of the function served by those markings. The main function in cross-border transaction is the one served under customs law, according to which the notion of origin of products is used to determine the duties applicable upon import of the product in question. As indicated above, however, origin markings serve also the purpose of adding value and attractiveness to products, thus bringing to the business that can lawfully use that marking a benefit comparable to the one obtainable by the use of a famous trademark. Moreover, origin markings serve also an informative function, which is often considered critical for the purpose of effective consumer protection and effective competition in the market. Finally, origin markings may also serve the purpose of signaling the non-domestic origin of certain products, thus limiting the import of foreign products so as to protect local production and businesses, which would otherwise be negatively affected by the uncontrolled entry in the market of foreign products that benefit from lower labor costs and other competitive advantages, which are often described as «unfair» in political debates.

The multitude of purposes served by *Made in* labelling may be deemed to be the main reason for the difficulties in addressing the issue with satisfactory legislation. The multitude of interests served causes inevitable conflicts between those interests and most legislative instruments in force and proposals for reform have failed to clearly identify the differences between the various objectives and to make clear policy choices. It is posited here that only clarity in the identification of the multiple objectives and in the consequent policy choices can lead to a satisfactory regulation of the matter at hand.

## 2. *Made in* labelling and transnational free trade.

Global political economy is increasingly based on the opening to free trade, which is regarded as the wealth-maximizing economic approach based on David Ricardo's theory of comparative advantages<sup>2</sup>, according to which if countries specialize in producing goods where they have a lower opportunity cost, then there will be an increase in overall economic welfare<sup>3</sup>. The necessary requirement for free trade to operate smoothly and to produce the aforementioned benefits is that trade be effectively free and that no costs or other obstacles are imposed on the cross-border exchange of goods and of other production factors (including capitals, services, labor, etc.).

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<sup>2</sup> Following R. TORRENS, *Essay on the External Corn Trade*, 1815, Ricardo formalized the theory in D. RICARDO, *On the Principles of Political Economy and Taxation*, 1817.

<sup>3</sup> Maybe the most striking result of Ricardo's comparative advantages theory is that even when one country is technologically superior to another in all industries under comparison, one or more of these industries would go out of business when opening to free trade because of the comparative advantage of buying the relevant product from another country and specialize only in the sectors where the technologically superior country has the greater comparative advantage.

The foregoing is clearly reflected in the policy choices and text of the Agreements establishing the World Trade Organization (WTO), including the General Agreement on Trade and Tariffs (GATT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

If one were to focus only on the function of *Made in* labelling as a sign comparable to a trademark in that it adds value and attractiveness to products, one would expect to find a reference to origin markings in the TRIPS, which in identifying the purpose of the agreement, maintain that: «[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations».

The TRIPS, however, do not address the issue of origin markings. They address, among other IP rights, Geographical Indications<sup>4</sup>, but this is unanimously regarded as applying only to foodstuff and cannot be deemed to include origin markings generally applicable to products other than food, wine and spirits<sup>5</sup>.

Conversely, consequences on the possible regulation of origin markings and *Made in* labelling are often drawn from Art. IX GATT, according to which: «(1.) Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country. (2.) The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications. (...) (6.) The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each

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<sup>4</sup> TRIPS, Part II, Section III, Arts. 22 ff.; Art. 22 states the following: «1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. 2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967). 3. A Member shall, ex officio if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin. 4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory».

<sup>5</sup> Indeed, a special provision applicable to wine and spirits is provided in Art. 23 TRIPS.

contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.»

Accordingly, not only does the GATT establish the Most-Favored Nation principle with respect to «marking requirements» (Art. XI(2))<sup>6</sup>, but it also imposes to reduce to a minimum the inevitable difficulties and inconveniences that marks of origin cause to the commerce and industry of exporting countries. In other words, the GATT agreement acknowledges and stigmatizes the harsh anti-competitive effects arising from the introduction in a single legal system of laws or regulations allowing or imposing marks of origin.

The foregoing, however, should not be read as a total ban of origin markings by the GATT. In fact, Art. IX(6) GATT excludes the possibility of a total ban in that it acknowledges the need to prevent an unlawful use of trade names so as to misrepresent the real origin of a product. Therefore, it is safe to affirm that the GATT considers positively the value-enhancer function of origin markings, but at the same time it requires that the anti-competitive impact of origin markings be limited to a minimum.

The conclusion that has just been reached is also confirmed by the Agreement on Rules of Origin attached to the GATT. Indeed, under Art. 2 of the said Agreement, States shall insure that «(b) notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objectives directly or indirectly», and «(c) rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose unduly strict requirements or require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin».

The approach adopted under the GATT would seem to suggest that a system of mandatory marking requirements should not be allowed due to the relevant protectionist and anti-competitive impact that it may produce. Notwithstanding the clear drawbacks, however, several countries that are WTO Members provide for mandatory labelling of products containing the indication of the origin thereof. These countries include very important players in global trade, such as the United States<sup>7</sup>, Canada, China, Japan and others.

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<sup>6</sup> As regards the application of the Most-Favored Nation principles, the WTO Panel in charge of the «Dolphin-Safe» case in 1991 clarified that Art. IX GATT doesn't provide for the National Treatment rule, but only for the principle of the Most-Favored Nation.

<sup>7</sup> Cf. Section 304 of the US *Tariff Act*, requiring that all products manufactured outside the USA must bear on the label the marking of origin.

### 3. Importance of origin markings in international business transactions.

The acknowledgment of the importance of origin markings contained in the GATT is of great relevance in that it indicates that *Made in* labelling has an important role to play in cross-border transaction, provided that it is regulated so as to limit the negative impact on competition.

The main and most relevant role that *Made in* labelling can play relates to the origin marking's capacity to add value and attractiveness to products based on the information that the marking conveys about where the product was manufactured or from where it otherwise originates.

However, the importance of origin markings in international business transactions goes beyond the signaling capabilities that have just been described. In order to mention but a few of the additional roles played by origin markings in international business transactions, one can refer to the quality standards that products must meet in order for the seller in an international sale of goods to duly fulfil his obligations, as well as to the documentation that the buyer must submit in order to obtain payment under a documentary credit scheme in international transactions.

As far as the quality of products is concerned, it is worth mentioning here the provision set forth in Art. 35 of the 1980 United Nation Convention on Contracts for the International Sale of Goods (CISG), an international instrument that provides a set of default rules applicable to international contracts for the sale of goods whenever the parties have not excluded the application of the Convention and have not made different contractual arrangements that derogate from the CISG's rules.<sup>8</sup>

Quality standards that the goods must meet in order for the seller to be discharged from his contractual obligations are often set by the parties in their contractual arrangements<sup>9</sup>. When this is not the case, however, and if the CISG applies, the Convention provides the default rules according to which the level of quality required can be determined. Pursuant to Art. 35(2)(a), the goods must be fit for all purposes for which goods of the same description would ordinarily be used. Under Art. 35(2)(b), goods must be fit for a particular purpose, provided that the said «purpose [was] expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment».

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<sup>8</sup> Cf. C.P. GILLETTE and S.D. WALT, *Sales Law. Domestic and International*, St. Paul 2016, p. 9.

<sup>9</sup> Cf. Art. 35(1) CISG, according to which there is a lack of conformity primarily where the goods do not conform with contract specifications requiring (either expressly or implicitly) that the goods have certain characteristics that, pursuant to the non-exhaustive list contained in Art. 35(1) CISG, may relate to the quality, quantity, description and packaging of the goods sold. Whether the contract requires goods of a particular quantity, quality or description, or requires that the goods be contained or packaged in a particular manner, is to be determined on the basis of the general rules for determining the content of the parties' agreement, such as Art. 8 CISG. For further details, see, among others, F. FERRARI and M. TORSELLO, *International Sales Law – CISG in a Nutshell*, St. Paul 2014, p. 195 ff.

The notion of quality of goods, for the purpose under discussion, requires both quantitative and qualitative aspects to be assessed. Most importantly here, it may also include non-easily-detectable, inherent qualities of a technical, chemical or biological nature. Some of the most obvious of these inherent qualities include the very origin of the products, quality certifications and the like<sup>10</sup>. Accordingly, it is safe to say that the origin of products and related origin markings are to be regarded as relevant factors in the overall assessment of the quality of products in international sales transactions.

Another aspect of international business transactions with respect to which the origin of products and related origin markings play a relevant role is documentary credit. Under letters of credit<sup>11</sup>, documentary credit and other similar payment schemes<sup>12</sup>, the process of payment commences with the exporting seller and the importing buyer agreeing in their contract of sale the documentary nature of the payment, which in turn requires the parties to specify carefully the list of documents that need to be presented in order to obtain payment under the agreed payment scheme. In accordance with the said agreement, the importing buyer will operate as «applicant» *vis-à-vis* the «collecting bank», which, in turn, will instruct the «remitting bank» («advising» or «confirming» bank in letter of credit schemes). The remitting bank will make the funds available to the seller upon presentation of a bill of exchange along with the documents specified in the agreement for issuance. The relevant documents typically include transportation documents (*e.g.*, a negotiable bill of lading or a non-negotiable sea waybill), the invoice, a packing list, the certificate of insurance, etc. Most importantly here, the relevant documents often include also a (third-party's) certificate of origin of the products, which the buyer requires in order to be sure of the place where the products were manufactured and to benefit from the added market attractiveness that the origin bears in the specific field. The conformity of the certificate of origin with what was provided for in the sales agreement determine the documentary compliance of the presentation and, ultimately, the beneficiary's possibility to obtain payment from the issuing bank.

Accordingly, the assessment of the origin of products and the rules according to which the origin can be determined play an extremely relevant role in international business transactions, both as regards the delivery obligation of the one party and the payment obligation of the other party.

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<sup>10</sup> In one case (*Oberlandesgericht* Munich, Germany, 13 November 2002, in *Neue jur. Wochenschr.-Rechtsprechungs-Report*, 2003, No 12, pp. 849-850, also at <http://www.unilex.info/case.cfm?pid=1&do=case&id=922&step=FullText>) the non-conformity of the barley delivered by the seller for the buyer's production of beer was affirmed on the grounds that, irrespective of its «fitness» to be used for the production of beer, the barley did not conform to the contract in that it could not be qualified as «organic» barley in accordance with the then relevant EC regulation.

<sup>11</sup> Cf. E. ADODO, *Letters of Credit: The Law and Practice of Compliance*, Oxford 2014, p. 7.20.

<sup>12</sup> Cf. B. BISHOP, *European Union Law for International Business: An Introduction*, Cambridge 2009, p. 91 ff.

#### 4. *Made in* labelling and European integration.

Not unlike at global level, also at the regional European level the process of integration of the Member States is based on the economic assumption of the benefits of free trade in light of the theory of comparative advantages<sup>13</sup>. Unlike the system envisaged under the WTO and other systems of regional integration (*e.g.* NAFTA), however, the European Union's goals are not limited to the creation of a «free trade area» (requiring the free circulation of goods<sup>14</sup>), but include also a «customs union» (requiring a common external policy with respect to non-Member States<sup>15</sup>) and the establishment of a «common market» (requiring free circulation non only of goods, but also of production factors, including persons<sup>16</sup>, services<sup>17</sup> and capitals<sup>18</sup>, as well as freedom of establishment<sup>19</sup>). Overall, the goal of the Union is to eliminate: «all obstacles to intra-[Union] trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market»<sup>20</sup>.

In light of the foregoing, the European approach to the issue of *Made in* labelling has been at least twofold. On the one hand, the notion of «Origin» of products has been constantly used under the European «Customs Code» in order to enforce the common external policy. Accordingly, the notion of «Origin» was developed so as to serve the goal of identifying the country of physical provenance of the product in order to apply the appropriate customs duties. Given the specific goal pursued, it is apparent that the notion of «Origin» developed under customs law focuses on the country of last physical provenance, that is, the country of last substantial transformation of the product, from where it is imported into the European Union. Conversely, for customs purposes it is irrelevant to assess whether the product is the result of multiple transformations that took place in different countries and whether multiple components or ingredients were used, each one originating from a different country. For, the over-simplified notion of «Origin» adopted for customs purposes is largely inadequate to serve different purposes, such as the proper and complete information offered to consumers about the «Origin» of the product.

On the other hand, origin markings have been regarded with great skepticism by European institutions and, in particular, by the European Court of Justice, which has addressed the issue primarily to limit the use of such tools in the internal market. The reason for such skepticism lays in that origin

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<sup>13</sup> See *supra*, par. 1.

<sup>14</sup> Cf. Arts. 34 and 35 TFEU.

<sup>15</sup> Cf. Arts. 28-29 and 206-207 TFEU.

<sup>16</sup> Cf. Art. 45 TFEU.

<sup>17</sup> Cf. Arts. 56 and 57 TFEU.

<sup>18</sup> Cf. Art. 63 TFEU.

<sup>19</sup> Cf. Art. 49 TFEU.

<sup>20</sup> [Court of Justice, 5 May 1982, case 15/81, \*Gaston Schul Donane Expéditeur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendal\*](#), EU:C:1982:135.

markings are regarded as a threat to the creation of the single market, due to their anti-competitive effects and their capacity to partition national markets.

In particular, in a decision rendered as early as 17 June 1981<sup>21</sup>, dealing with Irish legislation imposing that non-Irish souvenirs be marked as «*foreign*», the court held that: «it is important to note that the interests of consumers and fair trading would be adequately safeguarded if it were left to domestic manufacturers to take appropriate steps such as affixing, if they so wished, their mark of origin to their own products or packaging. Thus by granting souvenirs imported from other Member States access to the domestic market solely on condition that they bear a statement of origin, whilst no such statement is required in the case of domestic products, the provisions contained in the Sale Order and the Importation Order indisputably constitute a discriminatory measure».

Only a few years later, in a decision rendered on 25 April 1985<sup>22</sup>, dealing with a UK Order of 1981 imposing the «Origin Marking» on certain types of products whether manufactured in the UK or abroad, the court was faced with a situation that, although similar to the Irish case, could not be solved on the basis of the «discriminatory» nature of the measure, in that the duty imposing the «Origin Marking» applied to domestic and foreign products alike. Nonetheless, the court held that: «it has to be recognized that the purpose of indications of origin or origin-marking is to enable consumers to distinguish between domestic and imported products and that this enables them to assert any prejudices which they may have against foreign products. As the Court has had occasion to emphasize in various contexts, the Treaty, by establishing a common market and progressively approximating the economic policies of the Member States seeks to unite national markets in a single market having the characteristics of a domestic market. Within such a market, the origin-marking requirement not only makes the marketing in a Member State of goods produced in other Member States in the sectors in question more difficult; it also has the effect of slowing down economic interpenetration in the Community by handicapping the sale of goods produced as the result of a division of labour between Member States».

Parallel to the development of the case-law summarized above, a more flexible attempt by the Commission took place to introduce a directive providing for a system of mandatory indication of origin at the stage of the placing of products in the market<sup>23</sup>. The proposal, however, was unsuccessful and this was primarily due to the firm opposition of the European Economic and Social Committee, that expressed the view that the proposed legislation didn't serve a real need of European consumers.

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<sup>21</sup> [Court of Justice, 17 June 1981, 113/80, \*Commission of the European Communities v Ireland\*, EU:C:1981:139](#), para. 16-17.

<sup>22</sup> [Court of Justice, 25 April 1985, 207/83, \*Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland\*](#), EU:C:1985:161, para. 17.

<sup>23</sup> Commission of the European Communities, [Proposal for a Council Directive on the approximation of laws of the Member States relating to the indication of the origin of certain textile and clothing products](#), 7 October 1980, OJ C 294 of 13 November 1980, p. 3 ff.

The position expressed by the European Economic and Social Committee reflects the terms of an on-going debate about the extent to which origin markings serve the purpose of informing consumers. A largely accepted view, in this respect, is that the indication of origin – the more so if based on the aforementioned customs-oriented criteria focused only on the last substantial transformation of the product – does not contribute to the traceability of products or to safer products for consumers. Accordingly, the General Product Safety Directive<sup>24</sup> addresses the issue of consumer products' safety requirements without relying on any mechanism of obligatory indication of origin of the products. Consistently, the 2005 Unfair Commercial Practices Directive<sup>25</sup> contains a revealing difference in the description of «Misleading Actions» (Art. 6) and «Misleading Omissions» (Art. 7). Indeed, while the notion of misleading actions includes the supply of false or deceptive information with respect, among others, to the products' «geographical or commercial origin», the notion of misleading omission does not include the geographical or commercial origin among the information that «shall be regarded as material», thus confirming that the origin of products is not considered by the European legislator as an indispensable piece of information.

In light of the foregoing, it was somewhat surprising that the 2013 Proposal for a new Product Safety and Market Surveillance Package<sup>26</sup> contained an articulated provision on «Indications of the origin», providing as follows: «(1) Manufacturers and importers shall ensure that products bear an indication of the country of origin of the product or, where the size or nature of the product does not allow it, that indication is to be provided on the packaging or in a document accompanying the product. (2) For the purpose of determination of the country of origin within the meaning of paragraph 1, non-preferential origin rules set out in Articles 23 to 25 of Council Regulation (EEC) No 2913/92 establishing a Community Customs Code shall apply. (3) Where the country of origin determined in accordance with paragraph 2 is a Member State of the Union, manufacturers and importers may refer to the Union or to a particular Member State».

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<sup>24</sup> [Directive 2001/95/EC](#) of the European Parliament and of the Council of 3 December 2001 on general product safety, *OJ L 11* of 15 January 2002, p. 4 ff., which applies in the absence of specific European regulations on safety of certain product categories and complements the provisions of sector legislation, which do not cover certain matters, for instance in relation to producers' obligations and the authorities' powers and tasks.

<sup>25</sup> [Directive 2005/29/EC](#) of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), *OJ L 149* of 11 June 2005, p. 22 ff.

<sup>26</sup> European Commission, [Proposal for a Regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC](#), 13 February 2013, COM(2013) 78 final.



Less surprisingly, the aforementioned proposal – introducing a system of mandatory origin markings based on the rules of origin established in the Customs Code<sup>27</sup> – was received with much criticism<sup>28</sup> and, at present, the proposal has been withdrawn and it is unlikely to be presented again in the same form.

## 5. *Made in* labelling in Italian domestic law.

To a large extent, the contents of the proposed provision introduced in Art. 7 of the Product Safety and Market Surveillance Package can be understood in light of the pressure exercised by some Member States in order to obtain at the European level a system of protection of *Made in* labelling, possibly based on a mandatory regime of origin markings.

Italy was among the most active Member States supporting the adoption of a European legislation on *Made in* labelling. This is coherent with the attention paid at domestic level to the issue at hand and compliant with the competence of the Union, both as regards the exclusive competence in matters related to customs union, competition rules and common commercial policy<sup>29</sup>, and as regards the concurrent competence in matters related to the internal market and consumer protection<sup>30</sup>. In other words, it was apparent that any attempt at introducing a system of mandatory origin markings could not but be pursued at the European level.

In fact, in Italian domestic law the regulation of the issue of *Made in* labelling dates back at least to the Law No 676 of 4 July 1967, by means of which Italy ratified the Madrid Convention of 14 April 1891 for the Repression of False or Deceptive Indications of Source of Goods<sup>31</sup>. Not unlike the Convention, Italian law provides for the seizure of goods bearing false or deceptive indication of the place of origin<sup>32</sup>. Moreover – according to the Convention as well as to the Italian 1967 legislation – although the regulation at hand would not prevent the vendor from indicating his name or address upon goods coming from a country other than that in which the sale takes place, in such case the address or the name had to be accompanied by an exact indication in clear characters of the country or place of manufacture or production, or by some other indication sufficient to avoid any error as to the true source of the goods<sup>33</sup>.

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<sup>27</sup> Council Regulation (EEC) No 2913/92 and subsequent amendments, now repealed by [Regulation \(EU\) No 952/2013](#) of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), *OJ L* 269 of 10 October 2013, p. 1 ff.

<sup>28</sup> See, for instance, the [Position Paper](#) of 18 July 2013 issued by EuroCommerce – The Retail, Wholesale and International Trade Representation to the EU.

<sup>29</sup> Art. 3, lett. a), b) and e), TFEU.

<sup>30</sup> Art. 4, lett. a) and f), TFEU.

<sup>31</sup> The Madrid Convention was reviewed several times after its original adoption, in Washington D.C. on 2 June 1911, in the Hague on 6 November 1925, in London on 2 June 1924, in Lisbon on 31 October 1958 and in Stockholm on 14 September 1967.

<sup>32</sup> Cf. Art. 1 of the Madrid Convention.

<sup>33</sup> Cf. Art. 3 of the Madrid Convention.

By the unusual means of an Order issued by the Ministry of Finance in 1987<sup>34</sup>, the foregoing provision was declared inapplicable to goods manufactured inside the Community (now Union) due to its incompatibility with Art. 28 of the EC Treaty (now Art. 34 TFEU).

In Italian domestic law the duties arising under the Madrid Convention have been reinforced by means of the criminal sanction of fraudulent marketing of products bearing false or deceptive indication of origin, provided for under Art. 517 of the Italian Penal Code<sup>35</sup>. The scope of the criminal provision was explicitly extended by Art. 4(49) of the Law 24 December 2003 to «false indication of the label “Made in Italy” on products and goods whose origin is not Italy under the European legislation on origin».

The extension, however, caused much criticism in that the protection of origin markings was limited to *Made in Italy*, whereas the false indication that a product was made in France, in Japan, or elsewhere would not fall within the scope of application of the provision in question. Also case-law that applied the criminal provision in question interpreted the rule in a rather restrictive way so as to limit the cases that would actually lead to the positive assessment of criminal liability<sup>36</sup>.

The criminal approach to the protection of Italian domestic production proved largely ineffective. A similar conclusion can be drawn also as regards other domestic regulations, such as the one imposing sanctions on the purchaser of products bearing a false or deceptive indication of origin<sup>37</sup>. On the other hand, attempts at addressing the issue by means of domestic commercial law provisions imposing a mandatory origin markings, or amending the requirements for determining the Italian origin of certain products have also failed to reach the desired goals.

In particular, a mandatory system of indication of the country of origin of products was introduced in Italy by virtue of Art. 6, lett. C, of the Italian Consumer Code<sup>38</sup>. The system, however, was immediately halted because of its contrast with established principles of European law and because of the law-making competence of the European Union on this matter.

Similarly, a sector-specific proposal for textiles, leather goods and footwear products<sup>39</sup> was meant to limit the use of the *Made in Italy* labelling only to products, with respect to which at least two fundamental stages of manufacturing were done in Italy. Moreover, the same piece of legislation also introduced in Italy a mandatory regime of origin markings. Not surprisingly, once again the legislative

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<sup>34</sup> Order by the Ministry of Finances No 384/1987.

<sup>35</sup> Art. 517 of the Italian Penal Code, in its current text, provides as follows: «chiunque pone in vendita o mette altrimenti in circolazione opere dell'ingegno o prodotti industriali, con nomi, marchi o segni distintivi nazionali o esteri [2563-2574 c.c.], atti a indurre in inganno il compratore sull'origine, provenienza o qualità dell'opera o del prodotto, è punito, se il fatto non è preveduto come reato da altra disposizione di legge, con la reclusione fino a due anni e con la multa fino a ventimila euro».

<sup>36</sup> For an exhaustive overview of case-law in this regard, see F. DI GIANNI, *Il lungo viaggio alla ricerca dell'origine: norme e giurisprudenza relative al Made In*, in *Rivista di diritto industriale*, 2007, p. 43 ff.

<sup>37</sup> Art. 1(7) of the Legislative Decree 14 March 2005, No 35.

<sup>38</sup> Legislative Decree 6 September 2005, No 206.

<sup>39</sup> Law 8 April 2010, No 55 (so-called Law “Reguzzoni–Versace–Calero”).

initiative was considered incompatible with the European competence and basic principles and also the Italian Customs Agency issued an official Note<sup>40</sup>, whereby the domestic Law in question was declared inapplicable.

## 6. Final remarks.

In conclusion, it seems safe to affirm that the *Made in* labelling may serve very different purposes, including the determination of customs duties applicable to imported goods, the enhancement of the attractiveness of products because of the added value attached to their origin, the protection of consumers' safety and full information about the products that they may be willing to purchase and the protectionist foreclosure of the market to imported goods in order to grant a competitive advantage to domestic production.

The customs-based approach to the issue of origin markings has proved unsatisfactory with respect to other goals, due to the peculiar function of customs laws, which don't require any investigation backward in time beyond the last substantive transformation of the product. Therefore, the pursuance of any different goal is likely to require a different notion of «origin» of products and a different regulation. The question, however, is whether in fact the pursuance of any different goal is desirable.

The protectionist foreclosure of the market to imported goods (mainly obtained by imposing the indication of origin on imported goods) is largely undesirable and clearly incompatible with the basic principles of free trade. In particular, it is entirely incompatible with the creation of a single market in Europe. As such, the pursuance of the protectionist goal should be rejected and it cannot justify the adoption of legislation on *Made in* labelling.

As far as the protection of consumers is concerned, there is no convincing evidence that the introduction of a more stringent rules on origin markings would enhance the level of protection of consumers. To the contrary, given the very difficult traceability of products in contemporary complex manufacturing systems, any indication purporting to identifying one single country as the one «of origin» of the product would most likely prove to be over-simplistic and misleading, thus not serving the goal of consumer protection, safety and information.

In conclusion, the only goal that might to justify a reform of the law of *Made in* labelling is the pursuance of the enhancement of value and attractiveness of products due to their being manufactured in a given country.

This being the goal, however, it is questionable that it requires a system of mandatory origin markings. In other words, the stated justification for a regulation of *Made in* labelling suggests that only manufacturers who comply with the requirements for using the origin marking should be authorized to

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<sup>40</sup> Customs Agency, Note No 119919/RU of 22 September 2010.

affix it on their products, although that could be done on a merely voluntary basis. Conversely, the additional claim that all products should bear a mandatory indication of origin seems unlikely to serve any informative purpose for the benefit of consumers and, instead, it seems likely to produce an anti-competitive effect in that it implicitly stigmatizes the foreign origin of non-domestic products to the effect of artificially reducing the appeal of foreign goods competing with domestic production.

The fashion industry in the EU:  
challenges for the sustainable competitiveness  
of one of the most vibrant and creative sectors in Europe

Isolde Quadranti

The paper aims at providing a framework of the main challenges and actions supported by EU institutions to strengthen the long-term competitiveness and sustainable growth of the EU fashion industry.

Starting with the definition of fashion given by the European Commission, particular attention is paid to the meaning of creativity and innovation as crucial and distinctive resources for the EU fashion industry.

After outlining some of the most important issues that the sector has to face to obtain a regulatory framework favourable for entrepreneurship, innovation and internationalisation, the paper goes into the details of the «textile and clothing EU agenda» to ensure coherence between trade and industrial policies.

# The fashion industry in the EU: challenges for the sustainable competitiveness of one of the most vibrant and creative sectors in Europe

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Isolde Quadranti\*

CONTENTS: 1. Cultural heritage, creativity, innovation and entrepreneurship as essential resources for the EU fashion industry. – 2. The fashion and high-end industries inside the EU manufacturing sector. – 3. Textile and clothing agenda: coherence between EU trade and industrial policy.

## 1. Cultural heritage, creativity, innovation and entrepreneurship as essential resources for the EU fashion industry.

«Fashion belongs to the European way of life: it builds on European cultural heritage and creativity. A significant part of the creative economy, European fashion industries are at the crossroads where manufacturing meets creativity»<sup>1</sup>. These are the words used by the European Commission in its policy agenda for this sector.

The [action plan](#), adopted by the Commission in December 2013, and the previous working staff documents offer an analysis of the main challenges and actions needed to strengthen creativity and innovation within the industry and a statement of possible initiatives to stimulate its competitiveness<sup>2</sup>.

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<sup>1</sup> European Commission, [Policy options for the Competitiveness of the European Fashion Industries – “Where Manufacturing Meets Creativity](#), 5 October 2012, SWD(2012) 284 final 2. This staff working document, which nullifies and replaces the previous document, [Competitiveness of the European High-end Industries](#), 26 September 2012, SWD(2012)284, accompanied the communication [Promoting cultural and creative sectors for growth and jobs in the EU](#), 26 September 2012, COM(2012) 537 final. This last communication represents the first recognition of the economic, social and cultural significance of the creative sector in the EU.

<sup>2</sup> It is consistent with industrial policy objectives that aim to strengthen European industry and reinforce sectors with strong growth and employment creation potential. The action plan outlines the main characteristics of both the fashion and high-end industries, reports on what has been achieved since the publication of the staff working documents on the fashion ([SWD\(2012\) 284 final 2](#)) and high-end industries ([SWD\(2012\) 286](#)), and finally, puts forward new actions for their long-term sustainability. In order to verify the implementation of the Plan's actions and to identify future joint actions, a multi-stakeholder forum was established, which was led for

Cultural heritage and creativity recur frequently in the documents of the EU institutions as crucial resources for the European fashion industry to preserve its specificity in a global context<sup>3</sup>. Creativity is considered a «driver for innovation» and a key factor for the development of individual and social competences that requires an approach based on lifelong learning<sup>4</sup>.

In the fashion industry, there is an evident correlation, not only between creativity and innovation at all stages of the value chain<sup>5</sup>, but also between creativity and entrepreneurship. The latter refers to «an individual's ability to turn ideas into action' and therefore its value to society, especially in times of crisis, cannot be underestimated or dismissed. It includes creativity, innovation and risk taking, ability to plan and manage projects in order to achieve objectives»<sup>6</sup>. The Council for youth, education, culture and sport stressed in its [conclusions of 12 December 2014](#) that both entrepreneurship and education are priorities of the [Europe 2020 strategy](#) for smart, sustainable and inclusive growth<sup>7</sup>.

However, what is innovation, and why is an innovation management system so important? There are different definitions of this very expansive concept used in different contexts and disciplines that involve all of the stakeholders, in particular, the enterprises. In order to avoid the danger that the term innovation will become a «well-worn cliché», the European Parliament points out that innovation policy needs a «constant endeavor in the public and private sector» and that its success is dependent

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the first time on 16 June 2015 by the Commissioner for the Internal Market, Industry and Entrepreneurship, Elżbieta Bieńkowska.

<sup>3</sup> The fashion industry can be considered a cultural industry because it creates knowledge that connotes the fashion capitals. For this definition, as well as further references on the main distinctive features of the fashion industry, see E. ARRIGO, *Global supply chain management in fashion companies*, in *Papers di diritto europeo*, Special edition No. 1, pp. 5-10.

<sup>4</sup> Decision No 1350/2008/EC of the European Parliament and of the Council of 16 December 2008 concerning the European Year of Creativity and Innovation (2009), *OJ L* 348 of 24 December 2008, pp. 115-117.

<sup>5</sup> In order to strengthen creativity and innovation with the industry, the European Apparel and Textile Confederation (Euratex) considers it essential to preserve the manufacturing base, to facilitate access to innovation programmes for SMEs and to stimulate the internationalisation of SMEs (Euratex, *Annual report 2015*, p. 6). The [European Creative Industries Alliance](#) (ECIA) specifically aims to test new business support measures and provide more favourable conditions for innovation and growth supported by creative SMEs in Europe. One example that concerns the fashion sector is the [Creative Districts Initiative](#), which supports traditional industrial regions in the creation of a supportive ecosystem in which entrepreneurs can develop, innovate, grow and internationalise. In 2013, the «[Prato textile district](#)» aimed at transforming the traditional textile industry from a manufacturing district into a local system adding intangible activities, such as design, fashion, coordination, branding and marketing. For this purpose, the platform [Fashion Valley Industry](#) unites various textile production companies which work in the fashion industry covering the entire supply chain.

<sup>6</sup> [Opinion of the European Economic and Social Committee on Creativity and entrepreneurship: mechanisms for climbing out of the crisis](#), CESE 1165/2010, INT/519, *OJ C* 48, 15 December 2011, p. 45. The CESE opinion outlines ten recommendations to create «an enabling environment».

<sup>7</sup> Entrepreneurship education is defined as «a collection of formalized teachings that informs, trains, and educates anyone interested in participating in socioeconomic development through a project to promote entrepreneurship awareness, business creation, or small business development».

upon cohesive educational, research, industrial, social and environmental strategies actively supported by the EU and its Member States<sup>8</sup>.

If innovation means applying ideas and collective solutions successfully in practice in order to generate wide prosperity, we can understand why the commercialisation of all forms of technological and non-technological<sup>9</sup> innovation has been welcomed and supported by the European Commission in the [strategy for a European Industrial Renaissance](#)<sup>10</sup>. This «industrial compact» highlights the importance of the investments in research and innovation, above all, in the fast-growing and strategic areas, including advanced manufacturing.

For the fashion industry, innovation is not only fundamental to sustain its competitiveness and to permit the intrinsic and incessant transformation that characterises the sector, it is also focused on the end user, who is, at the same time, consumer and co-creator of innovative ideas. This trend is supported and increased by Information and Communication Technologies (ICT), whereby the consumers participate in the design and creation of their own fashion items<sup>11</sup>.

## 2. Challenges and opportunities faced by the EU Fashion Industry

The European fashion industry is formed by complicated and strongly interlinked value chains, including design and branding, the manufacturing processes of diversified materials and fashion goods – such as textiles, clothing, footwear, leather and fur products, jewellery and accessories<sup>12</sup> – as well as their distribution and retail to the final consumers.

The fashion and high-end industries continue to play an important role in the EU manufacturing sector, although this trend decreased during the years 2012-2014<sup>13</sup>. This sector accounts for 3% of the EU's Gross Domestic Product (GDP) and provides employment for over 5 million

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<sup>8</sup> European Parliament, [Resolution of 12 May 2011 on Innovation Union: transforming Europe for a post-crisis world](#), 2010/2245(INI), OJ C 377 of 7 December 2012, p. 10.

<sup>9</sup> Although, especially in the textile and clothing sector, non-technological innovation constitutes the more relevant form of innovation, and the interaction between technological and non-technological innovation is sensible, according to the research prepared for the European Commission, there is still not enough attention on supporting non-technological innovation. See M. R. SCHEFFER, [In depth assessment of the situation of the T&C sector in the EU and prospects. Task7: Synthesis report for the European textile and clothing](#). Final report ENTR/2010/16 prepared for European Commission Enterprise and Industry DG December 2012.

<sup>10</sup> See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, [For a European Industrial Renaissance](#), 22 January 2014, COM(2014) 14 final.

<sup>11</sup> For example, with the help of 3D visualisation and virtual try-on.

<sup>12</sup> Luxury beauty items, including perfumes and makeup, follow the specific EU cosmetic legislation and have to be dealt with separately.

<sup>13</sup> E. ARRIGO, *Global Supply Chain Management* cited above, p. 8 affirms that «during the years 2012-2014, the European area has suffered a loss of 3.1% in the global fashion market and this value has been completely absorbed by the Asian market that marked +3.8% in the same period».



people<sup>14</sup>. The vast majority of these companies are SMEs, and above all, micro-enterprises with less than 10 employees, among which there are a high share of women<sup>15</sup>.

Although the relocation of labour-intensive activities to low-cost countries has caused a considerable reduction in persons employed in fashion manufacturing in the past decades, this trend is reversed in fashion distribution, and according to the European Commission, «new opportunities for European-based companies are arising as a consequence of rising production and logistics costs in the emerging economies, their increasing focus on domestic markets, as well as the steadily increasing pace of fashion, which requires strict control of production and fast supply to the European market»<sup>16</sup>.

After a consultation process, the European Commission, in the staff working document on fashion<sup>17</sup>, identified four strategic policy fields to promote its competitiveness, and for each one, established challenges and proposed initiatives for both the short and long term. These main policy fields were the following: investing in knowledge, skills, creativity and innovation; protecting the creative efforts of fashion companies, while fostering the digital market; ensuring a level playing-field in international trade; and assuring the framework conditions necessary for sustainable growth in the fashion industries.

Whereas European fashion, as well as the creative industries in general, cannot compete with emerging economies on price, only innovation and the ability to find niche markets and new business models can support their competitiveness. The application of ICT fosters creativity and innovation<sup>18</sup>, as well as strengthens productivity, but this integration in the fashion industries is currently limited, especially in SMEs, which often do not have the necessary skills and financial resources. The action plan takes account of SMEs' difficulties in obtaining loans and suggests the use of financial instruments in the framework of the [COSME Programme](#)<sup>19</sup> to allow companies to access external creative and technical services for innovation, new products and market development.

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<sup>14</sup> According to the action plan cited above, p. 1.

<sup>15</sup> According to Eurostat data, women represent more than 70% of employees in the textile and clothing sector (see Euratex, *Annual report 2015* cited above, p. 30).

<sup>16</sup> See SWD(2012) 284 final 2 cited above, p. 2.

<sup>17</sup> *Ibidem*, p. 3 ff.

<sup>18</sup> The, originated and co-funded by the DG Grow of the European Commission and coordinated by EURATEX, offers an example of an initiative to support digital communications (*e-Business*) in the fashion industry that is also useful to companies that are delayed in the digital process.

<sup>19</sup> Action No 8 of the action plan cited above. Europe's programme for small and medium-sized enterprises (COSME 2014 – 2020) aims to make it easier for SMEs to access finance in all phases of their lifecycle through two financial instruments: the Equity Facility for Growth (EFG) and the Loan Guarantee Facility for Growth (LFSG). Furthermore, COSME helps businesses to access markets in the EU and beyond, and supports entrepreneurs by strengthening entrepreneurship education, mentoring, guidance and other support services. Also, the EU programme for research and innovation ([Horizon 2020](#)) supports industry competitiveness through the development of new materials, manufacturing technologies, and ICT. The implementation of the [European Strategy Forum on Research Infrastructures \(ESFRI\) roadmap](#) supports the creation of innovation clusters. At the Italian level, on 3 August 2016, the *Dipartimento per la Formazione Superiore e*

One of the most important matters for the sector has become the necessity of ensuring a workforce able to deal with the quality management of new technologies, but at the same time, to preserve the technical and traditional skills and know-how inherited from the past that are at the core of the European fashion industry. The ageing workforce in manufacturing and the estrangement of the younger generation from activities related to these specific skills is becoming a major problem that risks damaging the image of European fashion and its long-term sustainable competitiveness<sup>20</sup>. The development of the necessary skills for the fashion and high-end industries may be included in the aims of the key action 2 of the programme [Erasmus+](#), in particular in the «[knowledge alliances](#)», which are transnational, structured and result-driven projects, notably between higher education and business.

The long-term sustainable competitiveness of European fashion furthermore requires support at the European level to fight fake goods<sup>21</sup> and to give the industry better access to worldwide markets by dismantling tariffs and reducing non-tariff barriers with key trading partners. The fight against counterfeit goods, which especially represents a serious problem in the creative industries, currently involves the enforcement of intellectual property rights (IPR)<sup>22</sup> and an EU trade mark system that is effective, efficient, cheaper and suitable for the internet era and e-commerce<sup>23</sup>. These are the aims of [Regulation \(EU\) No. 2015/2424](#)<sup>24</sup> amending the previous trademark regulation.

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*per la Ricerca* published a call for the development and the strengthening of four new national technological clusters, also relating to the area of «technologies for the cultural patrimony» including design, creativity and made in Italy (see [decreto direttoriale 3 agosto 2016 n. 1610](#)).

<sup>20</sup> See SWD(2012) 284 final 2 cited above, p. 4. Improving the level of education, skills and employment in the textile, clothing, leather and footwear industries is the core objective of the [EU TCLF Skills Council](#).

<sup>21</sup> On the quantitative value, scope and trends of the illegal trade of counterfeit and pirated products, see the OECD/EUIPO report, *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*, Paris 2016. The study highlights an exponential growth of counterfeit and pirated goods worldwide (from \$250 billion in 2007, to up to \$441 billion in 2013, which represents approximately 2.5% of world imports) and into the EU (in the same year, nearly \$116 billion, which represents up to 5% of EU imports). According to [European Commission data](#), in 2013, in terms of value, counterfeit goods comprised over 50% of the products detained by European customs officials.

<sup>22</sup> Small businesses often lack the necessary means to protect their intellectual property rights (IPR). The [European IPR Helpdesk](#) offers first-line support to beneficiaries of EU-funded research projects and EU SMEs involved in transnational partnership agreements free of charge. In order to extend support to business, the IPR helpdesk network has been expanded to ASEAN and MERCOSUR (see COM(2014) 14 cited above, p. 17). The conclusions of the workshop, [Authentication and traceability solutions to fight the trade of fake products](#), supported by the European Commission, set forth the opportunities relating to promoting the use in design-based consumer goods, such as fashion and high-end products, of authentication, marking and traceability solutions to combat counterfeiting.

<sup>23</sup> E-commerce is increasingly important for the sale of fashion items, which, in fact, are amongst the top three product groups sold on the Internet, but it is also an important channel for the sale of counterfeit goods (see *Action plan* cited above, p. 5).

<sup>24</sup> Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), *OJ L* 341 of 24 December 2015, p. 21. The amending regulation

Other challenges, which are becoming ever more prominent, concern sustainability in terms of both environmental and social impact. There is a growing movement at the international level that is concerned with «ethical fashion»<sup>25</sup>. The action plan under [Horizon 2020](#)<sup>26</sup> proposed support for a sustainable approach to conceiving, developing, producing and recycling materials.

However, the environmental aspects are only a part of the issues that must be considered to achieve more sustainable behaviour. The other dimensions include human rights, labour practices, fair operating practices and consumer issues<sup>27</sup>. The Commission underlines the importance of supporting and promoting companies' corporate social responsibility (CSR) efforts in order to stimulate market rewards for responsible business, because promoting the responsibility of enterprises for their impact on society «helps to create conditions favourable to sustainable growth, responsible business behaviour and durable employment generation»<sup>28</sup>.

On the regulatory front, we will touch on issues concerning the labelling of textiles and leather products. To date, [Regulation \(EU\) No 1007/2011](#)<sup>29</sup> is the sole sector-specific EU legislation applicable to textile products related to the labelling and marking of fibre composition<sup>30</sup>. In order to improve the rights and obligations of citizens, businesses, and public authorities, «the textile regulation» establishes a general obligation to state the full fibre composition of textile products and the minimum technical requirements for applications for a new fibre name.

On 25 September 2013, according to article 24 of the regulation, the European Commission submitted to the European Parliament and to the Council a [report](#) accompanied by legislative proposals «regarding possible new labelling requirements to be introduced at [the] EU level with a view to

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entered into force on 23 March 2016 and is part of the EU trade mark reform legislative package that includes the replacement of the existing [EU Trade Mark Directive](#) (Directive 2008/95/EC of the European Parliament and the Council of 16 December 2015, *OJ L* 336 of 23 December 2015, p. 1).

<sup>25</sup> E.g. [Fashion revolution](#) is a global coalition of over 75 countries calling for systematic reform of the fashion supply chain, starting with more transparency and accountability for an awareness who is making the clothes and how they are made.

<sup>26</sup> E.g. the project [Resyntex](#), funded by the Horizon 2020 programme, works on the development of solutions to facilitate progress in recycling at the end of the textile product life cycle.

<sup>27</sup> SWD(2012) 284 final 2 cited above, p. 13. The European social partners of the textile and clothing industry, with the support of the European Commission, have developed a [central repository](#) to identify and manage the risks related to corporate social responsibility along the most important part of the supply chain.

<sup>28</sup> In this regard, see European Commission, Communication *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, 25 October 2011, COM(2011) 681 final, p. 6. For more information on the importance of corporate social responsibility and antitrust compliance for the fashion companies, see F. DI BENEDETTO, *Corporate Social Responsibility and antitrust*, in *Papers di diritto europeo*, Special edition No. 2, pp. 3-14.

<sup>29</sup> Regulation (EU) No 1007/2011 of the European Parliament and of the Council of 27 September 2011 on textile fibre names and related labelling and marking of the fibre composition of textile products and repealing Council Directive 73/44/EEC and Directives 96/73/EC and 2008/121/EC of the European Parliament and of the Council Text with EEA relevance, *OJ L* 272 of 18 October 2011, pp. 1-64.

<sup>30</sup> The «textile regulation» applies to all products containing at least 80% by weight of textile fibres, including raw, semi-worked, worked, semi-manufactured, semi-made, and made-up fibres.

providing consumers with accurate, relevant, intelligible and comparable information on the characteristics of textile products»<sup>31</sup>.

The issues examined in the report include the evaluation of the necessity of introducing an origin labelling system in the textile regulation<sup>32</sup>. Although the consumers' interest in origin labelling is undeniable, the report concluded that this addition is «at the moment not appropriate» because the Commission's proposal for a regulation on consumer product safety<sup>33</sup> provides a cross-sector solution to country of origin and traceability related aspects in its Article 7. Actually, the proposal is still under discussion before the Council<sup>34</sup>. In a letter dated 16 March 2016, Ministers from 11 Member States invited the Presidency and the Commission to renew their efforts to find a compromise to move the negotiations beyond the standoff and presented a compromise proposal based on the deletion of Article 7 and an introduction of the mandatory marking of origin (so-called "Made In") in a limited number of sectorial legislative acts, combined with a revision clause<sup>35</sup>.

With regard to leather labelling harmonisation, there is no specific EU legislation. In 2013, the Commission launched [an impact assessment process](#) to assess the costs and benefits of different policy options, including the legislative one, in the field of leather authenticity labelling. According to this study, although there is a general consensus concerning the desirability of an authenticity label, stakeholders are more divided on issues such as environmental labelling, country of origin labelling or the labelling of animal species. Based on the results of this impact assessment, the Commission decided that, at present, no action at the EU level should be put forward.

### 3. Textile and clothing agenda: coherence between EU trade and industrial policy.

The European Commission considers it fundamental to ensure greater coherence between the trade and industrial policies, and more generally, to enhance an integrated industrial policy approach

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<sup>31</sup> Report from the Commission to the European Parliament and the Council regarding possible new labelling requirements of textile products and on a study of allergenic substances in textile products, 25 September 2013, COM(2013) 656 final, p.2.

<sup>32</sup> The other issues specified in the introduction paragraph of the report concern a harmonised care labelling system, a Union wide uniform size labelling system, an indication of allergenic substances, electronic labelling and language independent symbols or codes for the identification of textile fibres (*ibidem*, p. 2).

<sup>33</sup> Proposal for a regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, 13 February 2013, COM(2013) 78 final. On the criticism expressed about the proposal introducing a system of mandatory origin markings based on the rules of origin established in the Customs Code see M. TORSELLO, *Made in labelling, origin of products and free circulation of goods in the European Union*, in *Papers di diritto europeo*, Special edition No. 2, pp. 65-80, especially p. 74 f.

<sup>34</sup> On the procedure 2013/0049/COD, see <http://eur-lex.europa.eu>.

<sup>35</sup> The note by 11 Member States (BG, CY, EL, ES, FR, HR, IT, MT, PT, RO, SI) to the Competitiveness Council on 26 May 2016 is contained in the [interinstitutional files 2013/0049 \(COD\) 2013/0048 \(COD\)](#) of 19 May 2016.

based on the numerous interactions and overlap between industrial policy and many other policy areas<sup>36</sup>.

In fact, the promotion of a competitive framework for EU industry cannot proceed without an integrated internal market in goods and services offering infrastructures and a regulatory framework favourable to entrepreneurship and innovation. Industry is furthermore dependent on access to energy and raw materials at affordable prices, and finally, the internationalisation of SMEs requires trade policy instruments that promote access to markets. Trade and investment barriers in third countries make it more difficult for European products to reach new markets and establish distribution networks. As we said in the previous paragraph, counterfeiting and piracy damage SMEs, as well as big brands, in the EU's fashion, textile and clothing industry, threatening the survival of those industries.

The domestic market, as well as the US and Switzerland, remain key markets for European fashion products. But third-countries' markets offer many new opportunities resulting from the rapid growth of the consumer base and even faster growth in demand in the emerging markets, such as Russia, Brazil, India and China<sup>37</sup>.

The latter, in particular, is becoming a growing market for European fashion and high-end products, but it is necessary to assure transparency, predictability and reciprocity, to enforce the anti-counterfeiting actions and to improve the trade defence instruments in order to more effectively tackle unfair trade practices<sup>38</sup>.

The European Parliament non-legislative resolution of 12 May 2016 opposes «unilateral concession of market economy status to China», because its overcapacity implicates «strong social, economic and environmental consequences in the EU», and it exhorts the European Commission to coordinate with other major trading partners to come to a joint interpretation of WTO law<sup>39</sup>. For this reason, the European Parliament affirms, in accordance with the [Regulation \(EU\) 2016/1036](#)<sup>40</sup> that «until

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<sup>36</sup> COM(2014) 14 final cited above, in particular, p. 17 ff.

<sup>37</sup> SWD(2012) 284 cited above, p. 2. In 2015, for the first time, investment from China in the EU exceeded the investment from the EU in China. See European Parliament, [Resolution on China's market economy status](#), 12 May 2016, 2016/2667(RSP).

<sup>38</sup> See Euratex *Annual report 2015* cited above, p. 8. The resolution on China's market economy status calls the Council to «rapidly seek agreement with Parliament on the modernisation of the Union's trade defence instruments» in order to guarantee a level playing field for EU industry with China and other trading partners in full compliance with WTO rules (see *Resolution on China's market economy status* cited above, point K7).

<sup>39</sup> *Ibidem*, points K2-3. The European Parliament asks the European Commission to come forward with a proposal that takes into account the concerns of EU industry, trade unions and stakeholders, on the one hand, and on the other, the EU's obligations in the WTO and the changes in how China is to be treated according to China's WTO Accession Protocol after 11 December 2016.

<sup>40</sup> Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, *OJ L* 176 of 30 Jun 2016, pp. 21-54 replaces the Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, *OJ L* 343 of 21 December 2009, pp. 21-54.

China meets all five criteria required to qualify as a market economy, the EU should use a non-standard methodology in anti-dumping and anti-subsidy investigations into China imports»<sup>41</sup> to assess, in accordance with section 15 of China's WTO Accession Protocol whether costs and prices are market-based.

Another relevant issue concerning the EU fashion industry, and in particular, the textile and clothing sector (T&C), is the negotiation of the Transatlantic Trade and Investment Partnership (TTIP).

The analysis requested by the European Parliament about the opportunities and challenges of TTIP for the EU in T&C recognises that this sector is not the main sector of trade between the EU and the US<sup>42</sup>. Furthermore, the emergence of new traders in the international markets after the end of the [Multifibre Agreement](#)<sup>43</sup> has reduced the importance of exports to the US and the exports from the EU Members to the US are traditionally highly concentrated in only four States, with a strong preponderance for Italian exports<sup>44</sup>. Although, according to the same study, as well as other interim technical reports<sup>45</sup>, the impact of the removal of trade barriers – which, in contrast to many other manufacturing sectors, are in this case relatively high – and the harmonisation of labelling or the mutual recognition of standards could favour EU-US exchanges in a non-negligible way, especially for the EU industry, and could have positive employment and social consequences<sup>46</sup>.

Throughout the 14<sup>th</sup> negotiating round (Brussels, 11-15 July 2016), the European Commission presented a [proposal for an annex on textiles](#)<sup>47</sup> concerning cooperation on the labelling of new fibre names and on care labelling instructions, as well as on standards of relevance for textile and clothing production<sup>48</sup>.

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<sup>41</sup> *Resolution on China's market economy status* cited above, point K6.

<sup>42</sup> E. BORGHI, R. HELG, L. TAJOLI, [TTIP: Challenges and Opportunities in the area of textiles and labelling](#). In-depth analysis requested by the European Parliament's Committee on the internal market and consumer protection, May 2015.

<sup>43</sup> Under the [Agreement on Textiles and Clothing](#) (ATC), WTO Members committed themselves to remove quotas by 1 January 2005 by integrating the sector fully into the GATT rules.

<sup>44</sup> In 2013, the EU28 was the second largest exporter of T&C after China. Of these exports, 10.6% were directed to the US market. Italy detained 35.6% of the total; Germany, France and the United Kingdom covered slightly above 10%, and all the remaining countries together less than 5%. The relevance of the T&C imports from the US to the EU28 was lower (1.6% of total extra-EU28 T&C imports) and slightly less concentrated. See Eurostat and COMEXT data reported on E. BORGHI, R. HELG, L. TAJOLI, *TTIP: Challenges and Opportunities* cited above p. 10 ff.

<sup>45</sup> See [Trade SIA on the Transatlantic Trade and Investment Partnership \(TTIP\) between EU and the USA](#). Interim technical report prepared by Ecorys for the European Commission, July 2016.

<sup>46</sup> On the expected sectoral economic impact and the employment effects of the TTIP, see [Trade SIA on the Transatlantic Trade and Investment Partnership \(TTIP\) between EU and the USA](#).

<sup>47</sup> See European Commission, [Public report of the 14<sup>th</sup> round of negotiations for the Transatlantic Trade and Investment Partnership](#), July 2016, p. 8 f.

<sup>48</sup> As regards fibre composition labelling, which is mandatory in both countries, EU «reiterated the interest for effective cooperation with the US Federal Trade Commission » to solve the problem of duplication

Lastly, although the European Commission outlines, in the part of the agreement concerning negotiations on textiles, that with respect to any issues that are especially sensitive and raise specific concerns in the civil society, the defensive interest in maintaining EU health and safety protection cannot be forgotten: for instance, the restriction of carcinogenic substances in clothing products under Article 68(2) of the «REACH regulation»<sup>49</sup>.

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of the procedures through simultaneous recognition. For the mutual recognition of care labelling, which is voluntary in the EU and mandatory in the US, the EU asked for “an update on the 2012 Federal Trade Commission proposal (*Public report of the 14th round of negotiations* cited above, p. 8). As regards as country of origin labelling, which is voluntary in the EU, but mandatory in the US, the negotiations should aim «at a simplification of regulation on the exact positioning of the label on a garment» (see BORGHI, R. HELG, L. TAJOLI, [TTIP: Challenges and Opportunities in the area of textiles and labelling](#)

<sup>49</sup> Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396 of 30 December 2006, pp. 1-849. Throughout the 14<sup>th</sup> negotiating round (Brussels, 11-15 July 2016), the European Commission responded to questions concerning its ongoing preparatory work on a proposed restriction of these substances in clothing products. See *Public report of the 14th round of negotiations* cited above, p. 9.





*PART II*  
*WORKSHOPS*



# Da dove vengono i trend?

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Patrizia Prencipe\*

Per comprendere come nascono le tendenze è necessario, innanzitutto, definire il concetto di moda.

Essa può essere spiegata come una forma di comunicazione, poiché, attraverso questa, l'uomo esprime un messaggio.

A differenza degli animali che, in molti casi, sfruttano piumaggi o pellicce sia per proteggersi, sia per comunicare tra membri della stessa o di altre specie, l'essere umano usa l'abbigliamento per rendere nota, in maniera più o meno consapevole, la propria condizione sociale, il proprio umore, le proprie intenzioni, la cultura alla quale appartiene, la propria religione, il suo credo politico e il tempo in cui vive.

Quando l'abbigliamento varca il confine tra l'essere una mera forma di protezione dalle intemperie, diventa un mezzo di espressione di sé e, come tale, può essere considerato una forma d'arte.

In particolare, per uno stilista, la moda è la forma in cui la propria sensibilità artistico-creativa si esprime. Le sue collezioni, infatti, sono sempre riconoscibili e distinguibili e divulgano il suo concetto di bellezza.

Il bisogno dell'uomo di comunicare ha fatto sì che la moda si tramutasse in un *business*, alternando nel corso della storia la necessità di introdurre leggi suntuarie per contenere lo sfoggio di sfarzo, a tendenze che, al contrario, spingono al conformismo o al rovesciamento di trend precedenti.

Uno dei casi emblematici che rappresenta proprio questa volontà di appiattimento dell'identità della persona è rappresentata dal recente trend denominato «Normcore». Esso può essere paragonato al Dadaismo per la sua natura nichilista: come, infatti, il movimento Dada si proclamava «anti-arte» per poi divenire una corrente artistica essa stessa; così il *Normcore* si proclama anti-moda, rendendo dei capi basilari, no-logo, spersonalizzati, parte del *dresscode* tra i più giovani.

Il termine *Normcore* è divenuto in voga a partire dal 2013 per descrivere, non solo un modo di vestire, ma soprattutto un modo di atteggiarsi che vuole esprimere la libertà di non essere nessuno di speciale.

Tale atteggiamento è stato fatto proprio da diversi personaggi famosi del mondo della politica, della religione, dell'industria. Si pensi, per esempio, a Mark Zuckerberg, creatore di Facebook che, con molto orgoglio, continua a vestire con t-shirt e pantaloncino corto, nonostante sia uno degli uomini più

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\* Fashion designer.

ricchi al mondo. Allo stesso modo, Papa Francesco, in netta opposizione con gli sfarzi dei suoi predecessori, si è fatto portatore di sobrietà.

Come Dada, quindi, rappresenta la ribellione contro le atrocità della guerra, idealmente *Normcore* si colloca come reazione alla saturazione del mercato consumistico della moda degli ultimi anni e come risposta al *fashion system* che negli anni precedenti ha imposto l'ostentazione di loghi su capi di abbigliamento e accessori.

Mentre da un lato, infatti, l'arrivo del nuovo millennio veniva salutato con esaltazione e da atteggiamenti positivisticici grazie alla crescita di tecnologia e di globalizzazione, a discapito delle tradizioni locali, dei rapporti umani *offline* e della valorizzazione delle differenze culturali, proprio questa svalutazione della personalità del singolo creava una nuova corrente di tendenza raccontata in film come *Matrix*, del 1999, facente parte di un filone artistico che include *Vanilla Sky* (2001), *The Truman Show* (1998), *The Island* (2005), *Shutter Island* (2010), *Minority Report* (2002) e il più recente *Inception* (2010). Tutti questi film mettono in dubbio la realtà così come la conosciamo e in molti casi viene trattata la tematica dell'identità. Negli stessi anni viene ripreso il termine «Grande Fratello» coniato da Orwell per il suo romanzo *1984* e nascono le omonime trasmissioni televisive in un format replicato in moltissime diverse nazioni, permettendo a chiunque di avere i famosi «15 minuti di celebrità» di warholiana memoria.

Il senso di alienazione e di solitudine dell'uomo del Duemila viene espresso anche tramite l'omaggio di *Cast away* al libro *Robinson Crusoe*, scritto nel 1719 da Daniel Defoe, mostrando tramite la settima arte un desiderio ricerca di contatto umano e sicurezza.

Nel 2001, l'attacco alle torri gemelle accentua questa comune sensazione di sfiducia e smarrimento.

Queste due tendenze parallele, quella positivisticica di omologazione e quella di ricerca dell'identità, fungono da esempio per quella che viene definita la diffusione delle mode «ad arcipelago». Questo tipo di meccanismo, che consiste nell'affermazione di mode diverse a seconda del gruppo sociale nel quale i seguaci si vogliono identificare, si affianca al tradizionale sistema di diffusione piramidale, secondo cui è un singolo *influencer*, o comunque un ristretto gruppo di persone di spicco, a determinare i nuovi gusti di un pubblico molto più vasto. Il sistema ad arcipelago è nato grazie all'ascesa della borghesia e alla democratizzazione della moda. Oggi non sono più solo i sovrani o gli aristocratici a dettare fogge poi scimmiettate dal popolo, ma le tendenze possono provenire anche «dal basso», possono essere raccolte per strada. Attualmente gli stilisti traggono forte ispirazione dallo *street style*, creato da persone carismatiche, leader in fatto di gusto, nella loro piccola cerchia o che si mettono in luce tramite il web. La differenza essenziale rispetto al passato è poi l'esistenza di un sempre maggiore numero di stili che sono spesso ripresi da epoche storiche più o meno lontane e che portano con sé tutti i valori della società di quel tempo: si pensi, per esempio, al ritorno dello stile *Hippie* degli anni

Settanta, ora definito *Bobo-chic* per il mix tra la tendenza *Grunge* e il romanticismo Preraffaelita.

In conclusione, si può affermare che le tendenze della moda sono sempre frutto del contesto sociale e del momento storico in cui nascono e sono strettamente collegate agli eventi del presente, alla cultura e al messaggio che l'individuo o la comunità vuole lanciare ai suoi simili. Anche il metodo di diffusione non è univoco, bensì in continua mutazione a seconda del periodo storico.

# Papers

di diritto europeo

