

The company should therefore include an express clause in the contract stating that indemnity shall apply on a termination, which will be agreed upon by the parties at the outset.

Some practical points:

Reg 17(5) states that just because indemnity is given doesn't prevent a contractual damages claim.

Reg 17(9) – in order to claim compensation or indemnity under the Regs, the agent must make a written claim to the principal **within one year** of the termination of the agency agreement. There is no prescribed form.

Indemnity is completely based on performance of the agent and benefit to the principal whereas **compensation** just reflects on loss suffered/about to be suffered.

REGULATION 18: 'GROUNDS FOR EXCLUDING COMPENSATION/INDEMNITY PAYMENT'

The Agent is not entitled to a payment where-

- principal terminates due to default of agent; or,
- agent himself terminates, unless termination due to default of principal, or.....due to age, or ill health of agent
- agent has assigned his agency, with the consent of the principal
- claim not notified to principal within one year of termination

REGULATION 19: THIS PROHIBITS CONTRACTING OUT OF REGS 17 AND 18

REGULATION 20: RESTRAINT OF TRADE CLAUSE

A restraint of trade clause is valid provided the conditions in Reg 20 are satisfied.

However, **Reg 20(3)** specifically states that even if the clause does comply with Reg 20, common law rules still have to be taken into account.

Any restraint of trade clause must therefore:

- Must protect a legit business interest
- Reasonable in terms of duration and geographical extent

THE COMMON LAW GUIDANCE ON AGENCY AGREEMENTS

Duties of agent

- To **obey instructions** - Agent will be in breach if he does not follow contract
- To exercise all **reasonable care and skill**
- To **perform personally** - Chosen for his expertise/market/goods so cannot delegate unless authorised by the principal

- To **avoid conflicts of interest** - Must not let personal interests conflict with principal – if breached, P can rescind contract
- Not to make a **secret profit** from his position - Must account to all profits made – keeping commission etc depends on agreement
- Not to accept a **bribe** - P can rescind agreement
- To **account** - Account for all property he gets throughout contract and keep his money separate from principal

Rights of agent

- **Remuneration** – if nothing agreed under common law he is entitled to a reasonable sum but most agreements have payment provisions anyway
- **Indemnity** – for any expenses incurred when acting within his authority but this will be covered as a provision e.g. hotel/meals/transport. Common law right to recover reasonable expenses
- **Lien** – if principal owes money then agent has common law right of lien over principals property.

Part 2 Revision Notes

Acquiring a company (Share and Business Sale)

Company (share purchase)	Asset Acquisition (business sale)
• You buy the shares, getting everything (between shareholder and purchaser) • The transfer of shares is sufficient to pass ownership (must use stock transfer forms) • Target company will approve the share transfer at board meeting, and agree on other formalities e.g. service contracts of directors • All contracts remain with the Target company e.g. clients, suppliers • No assignment needed for the property • However, check for change of control provision in key contracts- these provide that in the event of a change of control in the target. i.e. over 50% of shares get sold, the other party	• The company itself it bought, you get to pick and choose (between vendor company and purchaser) • Nothing goes automatically e.g. liabilities • Employees do stay due to TUPE • Will require various documents to transfer property e.g. assignment of goodwill, IP, transfer of title in land. Assignment of leasehold assignment/novation of contracts • Assignment: can assign the benefit but can't assign the burden at common law; Legal assignment under s 136: in writing, absolute (ie the whole benefit and burden to be assigned), written notice to third party. Contractual prohibitions on assignments may exist. May be a

- a) Disclosure Letter- the purchaser won't be able to bring a claim for something that was disclosed. Usually has: An introductory clause + general disclosures + specific disclosures
- b) Specific restrictions on claims- like having a cap/time limit/minimum or maximum thresholds or limits

Forms of consideration:

- Cash
- Non-cash: shares in buyer, loan notes
- Deferred payments and retention funds

Taxation implications:

Share sales:

- Seller of shares will make a gain or loss. Usually will be treated as capital gains or losses. Individuals will be charged CGT. Companies will be charged to corporation tax on their capital gains.

Business sales:

- Tax on any gain made on selling each asset.

Seller's position for share transfers:

- a) **If an individual:** CGT at (10% or 20%) on **Consideration for disposal Less Allowable expenditure** (initial expenditure, subsequent expenditure, incidental costs of disposal)- if pre 31 March 1982, market value at that date. Annual exemption- £11,700

✚ May get **Entrepreneurs' Relief (CGT charged at 10% on first £10 million)**- if for the last one year ending with the date of disposal:

- The company is a trading company or a holding company of a trading group.
- The individual holds at least 5% of the company's ordinary share capital and is entitled to exercise at least 5% of the voting rights in that company.

✚ **S 135 TCGA 1992- share for share exchange/ securities exchange**

- the corporate buyer satisfies the consideration by issuing its own shares or loan notes to the seller(s).
- Payment of tax is deferred until the new shares are sold or the loan notes are redeemed.
- If the conditions are satisfied, the seller isn't treated as having sold the "old" shares – the old and new shares are treated as the same asset. The new shares inherit the base cost of the old shares

Article 1(1)(e) – defines ‘selective distribution system’ as where the supplier appoints distributors on the basis of certain criteria and those distributors cannot sell to other unauthorised distributors.

Article **5(1)(a)** – A non-compete clause that lasts for more than 5 years would mean the BE does not apply (check Paragraph 66 of the Comm Guidelines) but...

Although these restrictions fall outside the BE, they can be severed allowing the remainder of the agreement to benefit from the BE.

Legal Exemption under Article 101(3) TFEU

Article 101(3) TFEU sets out an exception rule to Article 101(1) TFEU. If the agreement, decision or concerted practice satisfies the requirements of Article 101(3) TFEU, then it is not prohibited under Article 101(1) TFEU.

Article 101(3) TFEU recognises that co-operation between competitors may be desirable because overall it may result in positive benefits e.g. economies of scale, research and development, restriction of intra-brand competition to promote inter-brand competition.

All 4 of the following conditions must be satisfied:

- Benefits production, distribution of goods, promoting technical/economic progress
- Benefit to consumers
- No unnecessary restrictions
- Competition must not be eliminated in respect of a substantial part of the products

Agreements between SMEs

The Notice on Agreements of Minor Importance quantifies de minimis in relation to the criterion of effect on competition but does not quantify what constitutes an appreciable effect on trade between Member States.

The **Commission Notice – Guidelines on the effect on trade concept** does acknowledge that agreements between small and medium-sized undertakings are not capable of appreciably affecting trade between Member States.

The definition of small and medium-sized undertakings is now to be found in Commission Recommendation 2003/361/EC. This defines small and medium-sized undertakings as those which:

- have fewer than 250 employees and

Satisfy at least one of two further criteria, namely:

- an annual turnover not exceeding €50,000,000 and/or

- balance sheet total not exceeding €43,000,000

Definition of the 'market' and 'market shares' Why is this important?

Article 101 TFEU - market share is important in deciding whether certain exemptions are available. E.g.-Block exemption for vertical agreements not available if the suppliers' or buyer's share of the relevant market exceeds 30%.

The 'de minimis' exception is not available if the combined market share of the parties to a horizontal agreement exceeds 10% of the relevant market, or if the shares of each of the parties to a vertical agreement exceed 15% of the relevant market.

A market is 'all those products which are regarded as interchangeable or substitutable by the consumer by reason of the products characteristics, prices and intended use'

In essence: Substitutability (c.f.-United Brands v. Commission-'is there a substitute readily available at a similar price?').

Commission Notice sets out a '**SSNIP**' test: What is the effect of 'small but significant non-transitory increase in price' on the hypothetical consumer? Can they (or significant numbers of them) switch to another brand, or do they feel that they have little choice but to pay the increased price?

When considering market definition you need to consider the following:

- Product Market – from consumers and suppliers perspective – interchangeability (elasticity)
- Geographical market – area in which consumers shop around for the product and in which suppliers are willing to supply the product given similar conditions of competition
- Temporal market – competitive conditions may vary season to season, for example due to weather conditions or consumer habits

INTELLECTUAL PROPERTY AND COMPETITION LAW

There is tension between IP and Competition principles. Why?

- **IP rights create monopolies rights to companies etc whereas comp authorities seek to prevent monopolies BUT IP is essential**
- **Conflicts with the concept of a single European market and free movement of goods**

Resolutions?

- **Block exemption** (eg block exemption for 'Technology Transfer' agreements)

Rationale for Block Exemption?

If IP holder has monopoly therefore any IP license is good – Commission appreciates this as sharing is occurring. Monopoly is reduced. BUT IP holder will restrict rights of license holder

- Example: Supplier sells 100k goods to Distributor who sells goods on credit to retailer. Retailer goes insolvent and cannot pay – again this does not concern supplier
- Legal Risk passes to Distributor
 - The third party who buys from the Distributor has a claim against that Distributor, not the supplier
- Profit Margins
 - A distributor can make more money than an agent i.e. the return reflects the risk
 - This makes this kind of relationship more attractive as Distributors are more willing to take the risk
- Motivation of the Distributor
 - A distributor is more motivated to sell the stock since he purchases since he takes on greater risk
- No costs for 'setting up base'
 - A distributor can sell in a country where the manufacturer would have no experience but since the distributor has experience they can sell there themselves
- Simplicity regarding contractual relationships
 - The only contract for the supplier is with the distributor – this is administratively easier
- Compensation
 - There is none needed to be paid under distributorship as opposed to agency agreements

DISADVANTAGES OF DISTRIBUTORSHIP FROM THE SUPPLIERS PERSPECTIVE (THUS MAKING IT ADVANTAGEOUS FOR DISTRIBUTOR)

- Loss of control for the supplier
 - For taking on a lot of risk, they need freedom in return e.g. fixing their own prices
 - Therefore, appointing a distributor may not be suitable where:
 - The supplier wants close contact with the customer e.g. for research/development purposes
 - The supplier wants control over marketing/pricing
- Supplier places all risk with the product with one party
 - There is an obvious commercial risk here – you need to choose your distributors well. If they are poor then you lose money so incentivise performance with targets?
 - Failure of the distributor to do well may damage the brand

- This is crucial as they are buying into an existing brand, whose goodwill and market presence are very valuable

2. Control by franchisor:

- Franchisor wants all Franchisees to run in a particular way i.e. as far as legally possible what they can do
- Franchise agreement stipulates how business is to be run. If franchisee strays= breach of contract
- Experience for the customer must be the same e.g. what if it tastes differently, looks or is priced differently?
- If not consistent= damages the brand, goodwill and value of the franchise

3. Assistance by franchisor:

- This is done with the use of the 'Operator's Manual': this will both assist the Franchise at running the business, but it also puts on obligation on them to follow it, meaning the brand is protected

4. Payment:

To franchisor

- Franchise fee- up front, one-off payment
- Royalty fee- based on turnover (not profit)

Additionally: the cost for franchisee to acquire the premises and fitting out. This is usually a substantial sum

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Types of Franchises:

1. Retail franchises- e.g. Body Shop- must have the same service, premises, fittings, advertising, similarly trained staff
2. Man and Van Franchise- e.g. oven cleaning companies

Issues for the Parties:

Things the Franchisee will ensure in their due diligence:

1. It is a **proven product**- that they are getting their money's worth, be particularly careful where the franchise fee is very high
2. **Licence over IP**- this is essential and will usually be contained in the franchise agreement
3. **Guaranteed business**- this is unusual for retail franchises but sometimes a franchisor may provide a guarantee of level of business if they control the business