MARUBENI INTERNATIONAL (EUROPE) GMBH

Policy No. 903

Competition Law Compliance Policy

GM in charge: General Manager of DSS BA Team
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Section 1. Policy Statement of the President

It is the policy of Marubeni International (Europe) GmbH ("**MEG**") to comply with the competition laws of the European Union and of any country in Europe in which MEG does business. Infringements (i.e. breaches) of EU and/or national competition laws may cause serious harm to both MEG, its employees and the wider Marubeni group. Consider the following:

- The European Commission ("**EC**") and/or any relevant domestic authorities (please see Annexes 2-5) may impose fines of up to 10% of MEG's global *group* turnover for infringements of competition laws.

- Where any infringement involves an existing MEG commercial agreement, the agreement may be unenforceable, and those harmed by the agreement may succeed in a lawsuit for damages against MEG.

- If MEG is investigated by any competition authority, the mere *fact* of investigation would be a drain on MEG's human and financial resources, generate adverse publicity and cause potential damage to MEG's reputation, the reputation of the wider group and also the share price of Marubeni Corporation.

- In certain countries, MEG employees could face criminal liability, i.e. fines or imprisonment or both, when they are directly involved in anti-competitive behaviour.

- Where an illegal scheme operates in more than one jurisdiction, for example in both the UK and Germany, MEG may incur liability under each jurisdiction's competition laws. In this event, MEG (and the employees involved) could face criminal liability in each jurisdiction, resulting potentially in stiff fines and damages awards against MEG and prison terms for its executives. If an illegal scheme were to involve the US, Marubeni's employees may even face extradition to the US.

For the above reasons, MEG intends to conduct its business and affairs in ways that do not infringe competition laws. It has therefore adopted a "zero tolerance" policy with regard to infringements of competition laws: it is a condition of your employment with MEG that you comply with its competition law policy. Any action in breach of this policy will be treated as a disciplinary offence under your contract of employment and, depending on its seriousness, may be treated as serious or gross misconduct.

The purpose of this Policy is to inform you of those acts which may constitute an infringement of competition laws in order to enable you to avoid engaging in such conduct, and to provide guidance to you as to when you should contact the legal team of Marubeni Europe plc ("EURLGAL") for assistance.

EU competition law is currently in force throughout the European Economic Area ("EEA")[1]. EU competition law overrides the competition law of any EEA country (and may even supersede other national laws in conflict with it). The standards or benchmarks of EU competition law are also found in the competition laws of numerous EU Member States, including Germany, France and Italy.

We insist, as part of our European competition law compliance programme, that you read this Policy carefully. In addition, you may be requested to attend competition training programmes to ensure that you fully understand the competition rules and are updated on a regular basis.

Terumasa Watanabe
President

[1] As from January 2021, the EEA is comprised of the following countries: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

Section 2. Introduction

This Policy does not cover issues relating to merger control.

Competition law (or "antitrust" law, as it is termed in the United States) is intended to provide a framework to promote fair play in commercial dealings so that competition in the market is protected, for the benefit of consumers. Competition laws can be seen as a form of regulation that seeks to promote innovation, sources of supply, consumer choice and lower prices.

EU competition law has all of the above objectives. But in addition, it seeks to ensure that goods may flow throughout the EEA without artificial barriers.

The basic provisions of EU competition law are contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**").

Article 101 TFEU prohibits anti-competitive "agreements and concerted practices" among independent undertakings. A "concerted practice" could be described as being an implicit agreement between two independent entities. In this regard, this Policy examines the potential anti-competitive behaviour that we need to guard against in our business relations with the following categories of counterparty:

- Relations with Competitors (Section 3);
- Relations with Customers and Suppliers (Section 4); and
- Relations with Agents (Section 5).

Article 102 TFEU prohibits the abuse of a dominant position and does not require any agreement whatsoever – in fact, the abuse is unilateral in character and is carried out by the dominant entity. In Section 6 we look at the position of entities that are in a dominant position and what would constitute "abusive" behaviour by such entities.

In Section 7 we look at various issues relating to documentation and the relevance of competition law.

Additionally, in Annex 1 we provide a practical list of DO's and DON'Ts in relation to issues which may arise in daily business and in Annexes 2 to 5 we detail the important national competition aspects for France, Germany, Italy and the United Kingdom, to the extent that they differ from EU law.

Section 3. Relations with Competitors

The EC (and the national competition authorities) reserve their highest fines for cartels. EC fines can be particularly severe, often involving hundreds of millions of Euros. The EC has made cartel enforcement their top priority. Accordingly, MEG's top priority is to avoid participation in any cartel.

You have undoubtedly heard of the term "cartel". A "cartel" conjures up a meeting of competitors, sitting in a dark, smoke-filled room, fixing prices. This stereotype is accurate in only one respect: a cartel always involves a meeting or communications between competitors. However, cartels are almost never formed in dark, smoke-filled rooms, and the *subject matter* of a cartel may involve other things besides fixing prices. For example, on 30 June 2010, the Commission imposed fines totalling €269 million against steel producers for having not only fixed prices, but also for having fixed quotas, allocated customers, exchanged commercially important and confidential information, and monitored those arrangements.

To clarify any uncertainties, a cartel is established when two or more competitors are in agreement to engage in one or more courses of action which are considered anti-competitive. Although implementation of the common plan certainly adds to its seriousness, the plan to do something anti-competitive is all that is necessary to implicate MEG (and possibly the individuals concerned) in a potentially costly investigation which may result in burdensome penalties.

3.1 What is an unlawful "agreement"?

When a competition authority investigates a cartel, it usually finds an "agreement" circumstantially by weaving together various emails, telephone records, agenda notes, internal memos and the like. Unlawful agreements may often be the result of tacit understandings (such as where X tells Y that X will raise prices by 10% next week, and hopefully that "Y will do the same" - and Y indeed raises its prices by 10% at the same time).

The place/venue in which the agreement is concluded is of no consequence. The agreement may be concluded, for example, in a restaurant or country club. The means of communicating the agreement are also of no consequence. An agreement may be formed by the giving of a "wink or nod" or it may be concluded over the telephone or by email - and it may still breach competition laws.

It is worth repeating that MEG may be penalised for having entered into such an agreement even where the agreement is in fact never implemented. Depending on the severity of the anti-competitive restriction in the agreement, its anti-competitive *intent* may be sufficient to trigger liability even when it has no effect in the market.

In addition to agreements, employees need to be very careful in their *communications with competitors*. The mere exchange of information that might give the receiving party a competitive advantage can be penalised severely under competition laws. We will return to this point later.

3.2 Types of agreements among competitors to be avoided

What then, are the types of agreements among competitors that are always considered illegal and which you must avoid?

- **Agreements on prices and other sales terms**

The EC tends to impose the highest fines for price fixing agreements. This prohibition extends to fixing actual or future prices, profit margins, minimum or maximum prices, price ranges, as well as to fixing discounts, rebates, and terms and conditions and to setting up monitoring mechanisms to facilitate fixing any of the above.

As regards the fixing of terms and conditions, it would be illegal for competitors, for example, to agree to a common policy on product warranty coverage, consumer financing terms or standard terms of business.

Of the above, price agreements are the most common. For these purposes, an "agreement" may be inferred from parallel price movements by competitors, assuming that there is no other reasonable explanation for the parallel movements. If the parallel price movements are coupled with proof of contacts between the companies concerned, this is usually enough to result in liability, even in the absence of a formal "agreement" as such.

- **Market sharing**

Market sharing, another form of serious infringement, may involve the allocation of separate *geographic territories* by competitors, so that for example, cement manufacturers from Belgium and Hungary agree to stay out of each other's home market or to avoid certain third country markets.

Market sharing may also involve the allocation of *particular customers*. For instance, it would be illegal for the Belgian and Hungarian cement makers of the previous example to agree not to sell to certain customers of the other producer.

- **Restrictions on output, capacity or quality**

When competitors agree to reduce their output or to shut down certain capacity, it is usually with the intention of supporting price levels. Such agreements are almost always illegal because they are, in effect, agreements to raise prices. Such agreements may be permitted in rare instances in order to save an

industry in crisis, but such action requires close regulatory supervision and approval. All such arrangements, or invitations to adopt such arrangements, must be reported to EURLGAL.

An agreement by competitors on quality levels is also a means of reducing competition. An example would be where all the European producers of a certain chemical product agree to use a lower quality raw material (for example, as a means of reducing costs). The producers would also be acting illegally by agreeing to use only a higher quality component in order to justify an increased price.

- **Bid rigging/tendering**

When bids are invited by any public authority, competitors are prohibited from agreeing on price or other elements of the bid, coordinating their bids on different projects to avoid competing with each other (e.g. that A will refrain from bidding on Project X if B refrains from bidding on Project Y), or reaching any other understanding that would limit their competition on any particular bid.

- **Joint boycotts**

It is illegal for competitors to take a joint decision not to supply to, or not to purchase from, a particular third party.

- **Joint standards**

It is not uncommon for competitors to jointly adopt (de facto) standards that apply in their industry. However, it is important that standard setters avoid falling into certain well-known traps that may give rise to liability:

  - First, the patent holders controlling the standard cannot refuse third party competitors access to the standard, and they must provide access to it on fair, reasonable and non-discriminatory terms.

  - Second, standard setting cannot become a pretext for jointly setting the prices (or other terms and conditions) for the products incorporating the standard.

  - Third, the patent owners cannot limit competition from competing technologies by including non-essential, complementary patents in the standard because this forecloses competition from competing technologies.

3.3 Information exchanges

One of the more subtle forms of cartel, which is an increasing concern to the EC and domestic authorities, is the so-called "information exchange" between competitors. Serious fines are being imposed by the EC and domestic authorities simply on the basis of information exchanged directly or indirectly by competitors, even without any agreements or understandings being reached.

This form of infringement does not require an agreement of any kind. It only requires certain types of information to be transmitted, either directly or indirectly, from a company to one or more of its competitors. In other words, you could expose MEG to risk by either providing such information to competitors or by receiving such information from them.

The rules governing information exchanges are complex, but the following is what you need to know in order to avoid creating risk for MEG and yourself. If you have any doubts when such circumstances arise, you should report the incident to EURLGAL.

- **The risk applies only to certain types of information specific to a particular company or companies**

There is potential competition law risk only if the company-specific information is deemed "strategic" information. This means that competition law risk arises only when the information is of a kind that its exchange may lessen the incentive to compete. The types of information considered strategic include:

actual, future or proposed prices, discounts and rebates; dealings/negotiations with customers; customer lists; production costs; turnover; sales volume; profit margin; production capacity; marketing plans; investments; and R&D programs. Even discussions among competitors about the so-called "need", for example, to reduce dealer commissions or rebates, or to limit production in order to reduce an "oversupply" of the product (thereby raising prices) could be considered an illegal information exchange.

Accordingly, due to the ambiguity of the rules and to avoid arousing any unwarranted suspicion with the EC and/or domestic authorities, MEG has taken the position that you must not transmit to competitors any information whatsoever that is specific to any of MEG's businesses, unless it has been previously authorised by EURLGAL. This rule also applies to the transmission of strategic information in the course of any acquisition or joint venture involving a competitor. If you receive any company-specific information or data directly from a competitor or via a trade association or other third party, you should report it immediately to EURLGAL. Remember that the communication of strategic information to a competitor often begins with a casual, seemingly harmless exchange of gossip about "life" in the company.

This prohibition on the communication of such Marubeni-specific information to competitors also applies to information that has appeared on Marubeni's websites, in press releases or as reported in the mass media (e.g. television, newspapers and magazines).

The concern of the authorities is that the giving of strategic information facilitates co-operation between competitors rather than competition and the behaviour in the marketplace of the parties involved is likely to be affected and lead to a lessening of competition.

- **Dealings with independent third parties who are non-competitors**

It is an infringement of Article 101 for independent third parties, such as trade associations, market consultants and analysts, to collect and disseminate company-specific strategic data to companies that compete with each other. In these instances, the third parties as well as the competitors involved are also deemed liable for the infringement.

- **The exchange of historical data is not safe**

It used to be that MEG and its competitors could, for example, through their trade associations, share their non-public competitive data when the information was purely historical and therefore could be said to be no longer capable of influencing the competitive behaviour of those to whom the information is disclosed. "Purely historical" information was regarded as being any information that was at least one year old.

However the EC clarified that there is no predetermined date/age at which information becomes historic, i.e. at which it is old enough not to pose risks to competition. Accordingly, you must not make any assumptions as to whether any particular information is capable of being shared with competitors but should consult with EURLGAL.

Under the current rules, the risk of infringement exists even when the company-specific information is - say six months or one year old. Therefore, all direct and indirect communications between yourself and MEG's competitors involving company-specific information should be avoided even when you think that the age of the data may render it useless to competitors.

- **The exchange of aggregated data is problematic if it can be reverse-engineered**

The exchange of aggregated data/statistics, which is normally prepared by trade associations and market analysts/consultations, should be viewed as non-problematic even when it aggregates (and makes anonymous) a company's strategic data, provided that the aggregated information is accessible (in terms of cost) to all competitors and customers alike. However, it is important that the data cannot be disaggregated (i.e. reverse engineered) - otherwise, the exchange is deemed to be an exchange of company-specific strategic data.

- **Discussions with customers, suppliers and distributors intended to illicit information on competitors may be illegal**

You must not seek to obtain from any of our customers, suppliers or distributors, nor from those of our competitors, any information concerning prices, rebates/discounts, terms and conditions of one or more of our competitors or any other aspect of the competitor's commercial policy or dealings.

- **Information/data reported by so-called independent industry experts and specialized media sources may constitute a form of illegal information exchange**

Almost every company, including MEG, looks for market intelligence to help it ascertain the direction of the market and the likely success of our products and services. By "market intelligence," we are referring here to potentially valuable information/data that is made available specifically from so-called experts, such as industry consultants and analysts, or from specialized media sources, such as financial/business news channels, industry newsletters and studies. These sources provide a veneer of legitimacy, but their provision of information to us is not always compatible with EU competition law, particularly when it includes company-specific information relating to any of our competitors.

MEG does not wish to prohibit your access to all such market intelligence but rather provide helpful guidance as to when the collection/receipt of such intelligence may in fact be considered anti-competitive and therefore, an illegal information exchange. All employees must therefore abide by the following guidelines with regard to market intelligence.

These guidelines apply only to "market intelligence" concerning MEG's individual competitors (rather than market trends or aggregated data):

- If the market intelligence is transmitted to you, or made available to you, by a so-called expert such as an industry consultant, market analyst or industry reporter, it must be reported immediately to EURLGAL.

- If the market intelligence is made available to you from a specialized media/news source, as described above, and your access to the information requires payment of any kind, such as a fee for the download or a subscription, it must be reported immediately to EURLGAL before the purchase takes place. But if this is no longer possible, then it must be reported immediately after you obtain access to the intelligence.

- You should be suspicious of any market intelligence, as described above, which is made available to you as part of a "select" group, or to you exclusively. All such incidents must be reported immediately to EURLGAL.

3.4 Trade association meetings

You must be particularly careful to avoid illicit information exchanges if you or your division participates in any trade association activities on behalf of MEG. After all, trade associations are organisations comprised of competitors. This is not to say that trade associations are "bad". They are in fact an important "positive" means for competitors to discuss common industry problems, such as, how best to tackle toxic emissions, manage waste disposal or how to educate consumers on a particular product. In trade association meetings, competitors may legitimately discuss how the industry is performing and the obstacles it must overcome, and such discussions may become the subject of legitimate industry studies and reports.

However, trade association meetings become illegal when the subject matter discussed or shared with members involves non-public corporate data and information which, in the hands of a competitor, may affect its competitive behaviour in the market. To guide you as to the types of information which must not be discussed or exchanged at trade association meetings, please refer to Section 3.3 on what constitutes an illegal information exchange - those rules apply with equal force to your participation in trade associations, as well as to "side" discussions that you may have with competitors before, after or during breaks at the meeting.

MEG's mere attendance of a trade association meeting at which illegal discussions are taking place may give rise to costly competition investigations and liability. The repercussions could be severe: It is not only the association which may be fined severely for infringements, but also its members (i.e. MEG).

Legitimate trade association activity may easily drift into illegal subject matter. The following hypothetical example will illustrate this point:

*The European Plastics Federation ("**EPF**"), in which MEG participates, is meeting in Paris. No lawyers are present. The attendees are discussing the EPF's annual report on the "state of the industry". On page 5 of the draft in circulation, there is a graph indicating that European demand for a certain plastic has fallen off in the last year. Producers X and Y, who account for 60% of the EU market, blurt out that they plan to shut down certain key plants in about six months, even though this is confidential, non-public information. In six months, all producers in attendance of the EPF meeting simultaneously raise their prices.*

There is only one circumstance in which non-public "competitive" data concerning a company may possibly be permitted to be shared with competitor members of a trade association (but not at the trade association meeting itself) and that is where the data in question is provided directly to the trade association itself for the sole purpose of preparing industry reports or compilations of industry statistics that will be published only in an aggregate form (meaning that it is impossible to attribute any statistics to a particular competitor).

Given the difficulty of this area we would suggest that any Marubeni-specific information be provided by the business department concerned to EURLGAL before it is tendered to the trade association. If EURLGAL approves the disclosure of the information, the business department should then liaise with the trade association's Chair or other association employee (who is not affiliated with a competitor), but not directly with all the trade association members themselves.

To avoid even the appearance of impropriety, MEG requires that you follow these simple rules:

- ✓ Every trade association in which MEG participates must retain independent counsel who attends every association meeting or function. The sole purpose of the lawyer's attendance is to ensure that attendees adhere to a meeting agenda and to report instances of suspect activity to the Chairman of the association.

- ✓ MEG's representatives in trade associations must obtain in advance of every meeting a copy of the agenda for the meeting, which must be vetted, in advance, by EURLGAL.

- ✓ MEG attendees of association meetings must ensure that the agenda is strictly adhered to and that minutes of the meeting are taken. These minutes must be circulated in draft form to all attendees of the meeting. MEG's representative at such meeting must provide a copy of the draft minutes to EURLGAL for clearance.

- ✓ If the discussion at the meeting departs from the agenda, and in particular, involves a discussion of company-specific information, MEG's representatives must (1) object vocally, (2) request that their opposition be reflected in the minutes of the meeting, (3) leave the meeting immediately, and (4) request that their departure also be reflected in the minutes. They must then notify EURLGAL of these events.

- ✓ MEG's representatives at such meetings must rigorously avoid all disclosure or discussion of non-public information about Marubeni.

- ✓ If attendees of the meeting gather informally before, during or after the meeting, MEG's attendees must be vigilant as to any illicit discussion and avoid it clearly and totally. Any such discussion must then be reported immediately to EURLGAL.

- ✓ Any non-public information about Marubeni may only be disclosed by MEG after having been approved by EURLGAL (see the earlier discussion of this issue).

3.5 Other competition law "sensitive" dealings with competitors

There are some dealings among competitors whose legitimacy depends on a variety of economic and factual circumstances. In other words, these dealings are not necessarily illegal, but they must be approached with the greatest caution and care - meaning that they must be vetted in advance by EURLGAL. These potentially problematic dealings include the following:

- **"Strategic alliances" and "joint ventures".** The terms "strategic alliance" and "joint venture" are often applied to cooperation of one kind or another between competitors. Such cooperation is common in various industries, and it is usually publicised as a means of promoting the companies involved, their share price, or both. Strategic alliances and joint ventures, if properly tailored, may result in certain efficiencies that benefit consumers. However, alliances may be used as a pretext for illicit information exchanges, dividing markets or customers, or facilitating joint pricing.

- **R&D agreements.** Collaboration among competitors on research and development is often viewed positively as enhancing technology and making its benefits available to consumers. However, joint R&D amounts to a disguised cartel when the parties fix prices or output, or allocate markets for the products to be exploited pursuant to the R&D programme. Joint R&D may also be prohibited when it places anti-competitive restrictions on the parent companies, such as by: precluding independent research; restricting access to the results of the research; or by precluding manufacture of products incorporating the results of the research.

- **Specialisation agreements.** These are agreements between parties who are actual or potential competitors only to manufacture certain products (often requiring as a consequence that one or the other party cease production of certain products), and often, with an additional commitment to obtain supplies of the product that a party no longer manufactures from the other party. Such agreements may be permitted due to the efficiencies they generate, but they are competition law sensitive.

- **Joint selling.** In these situations, competitors may form a joint venture or joint selling agency which takes over the distribution of certain products of the parent companies. These situations are problematic because collaborative selling may facilitate price fixing, output limitations or the allocation of markets and customers.

- **Joint purchasing.** In these situations, competitors agree to purchase their inputs or raw materials from a single source. Although such arrangements may be helpful, particularly to smaller companies for the purpose of reducing the price of raw materials, there is usually no commercial justification for larger companies with market power to engage in such collaboration, and such arrangements may be viewed as disguised cartels.

- **Joint marketing.** Within the umbrella of this heading, suspect arrangements include joint brand advertising, joint promotion (e.g. through jointly funded rebates or discounts) and the use of joint quality marks (in this last instance, certain competitors adopt a common quality mark for products satisfying particular specifications, but they refuse to allow the use of the mark by other competitors whose products comply with these specifications).

- **Technology licences.** Technology licences are common in the chemicals, petrochemicals and plastics businesses. Although technology licences are generally viewed by the EC as benefiting innovation, it is possible that such licences provide a pretext for cartel activity. Also, the presence of certain clauses in the licence may have the effect of rendering the licence unenforceable. For these reasons, all such licences must be approached with great caution, and you are urged to bring all planned licences to the attention of EURLGAL.

3.6 To summarise…

- ✓ Communications with MEG's competitors should be kept to a minimum, and limited strictly to what is plainly permitted under the competition laws. All contacts with or by competitors should be documented in writing and brought to the attention of EURLGAL.

- ✓ All events at which you will come in contact with MEG's competitors, such as at trade shows, industry sporting events, trade association meetings, or formal dinners, must be cleared in advance with EURLGAL. All observed instances of suspect behaviour prior, during or following such events must be reported to EURLGAL.

- ✓ When company-specific information concerning a competitor is communicated to you by that particular competitor, you must NOT:

  - o reciprocate by providing MEG information of any kind to the competitor;

  - o discuss the competitor's information with your commercial colleagues at Marubeni; or

  - o take any measures in the market in reaction to the information obtained (especially by raising or lowering prices!);

  BUT INSTEAD…

  - o forward any company-specific information concerning our competitor that you have received by email or in physical form to EURLGAL immediately (i.e. time is of the essence);

  - o telephone EURLGAL immediately to report any such company-specific information that you have received orally (i.e. time is of the essence).

- ✓ Keep in mind that unless MEG rejects the transmission to you of company-specific strategic information very soon after your receipt of it, MEG is presumed to have acted upon it to its own advantage, thereby unnecessarily generating competition law risk.

- ✓ Whenever you are involved in planning a commercial arrangement or agreement with a competitor, you must clear it in advance with EURLGAL and proceed under its direct supervision.

Section 4. Relations with Customers and Suppliers

Competition law enforcement is focussed not only on cartels (agreements and concerted practices between competitors), but also on various kinds of agreements that a company maintains with its customers and suppliers. These so-called "vertical" agreements (agreements between businesses operating at different levels of the supply chain (e.g. manufacturer and distributor)), may be anti-competitive when they unduly restrict MEG's distributors and other resellers or when they unduly restrict MEG as a purchaser of raw materials or finished goods. When such conditions exist, the agreement may result in significant fines and/or unenforceability of the agreement. This section of the Policy will provide you with guidelines on how to deal with situations which may give rise to liability, and make you aware of situations where vertical agreements may be 'block exempted'.

4.1 Influencing resale prices

In MEG's dealings with customers, whether they are distributors, wholesalers or retailers, it is essential that customers have complete freedom to set their own prices. This means that MEG employees cannot fix resale prices, fix profit margins, impose rebate or discount schemes, impose on the customer a binding price range, or penalise customers who "undercharge".

However, it is permissible to: (1) impose a maximum price, provided that it does not operate as a fixed price; or (2) provide "suggested prices", provided that there is no attempt to influence the reseller's actual prices.

Influencing resale prices is a highly sensitive area of concern and the EC has imposed heavy fines for such behaviour. MEG employees must contact EURLGAL before suggesting or imposing any pricing related scheme on customers.

Note: The issue of influencing resale prices may also arise when MEG is the customer and our non-group company supplier is seeking to influence MEG's prices. Here as well, when you become aware that a supplier is seeking to influence MEG's resale prices, you should immediately contact EURLGAL.

It should also be noted that it is perfectly permissible for a distributor to refuse to provide the supplier data relating to the distributor's sales price and profit margins and the supplier would not be permitted to coerce the distributor into providing such information. However, unless the supplier is dominant (see Section 6 below), it could lawfully refuse to extend the existing contract with the distributor as a result.

4.2 Restrictions on parallel imports

Behaviour that discourages innovation, restricts sources of supply or consumer choice, imposes barriers on "parallel imports" (i.e. imports of products from one EEA country to another, as well as from one defined territory within the EEA to another – please see Section 4 below) or has the effect of raising prices, depending on the circumstances, may be deemed "anti-competitive" and could be the target of EC or domestic enforcement.

It is a very serious infringement of EU competition law for a company to restrict parallel imports, i.e. imports of products from one EEA country to another, as well as from one defined territory within the EEA to another (currently, this includes parallel imports from the EEA to the UK due to the UK participating in the EEA regime). Such restrictions are normally placed on distributors in order to maintain price equilibrium in certain territories, that is, to prevent products which are priced lower in certain parts of the EEA from being marketed in other parts of the EEA in which prices are generally higher.

The rules against restrictions on parallel imports apply not only to direct import bans, but also to other indirect measures designed to discourage such imports, such as:

- the refusal or reduction of bonuses or discounts;
- the refusal to supply to a distributor or the threatened termination of the distributorship agreement;
- the implementation of a system for "tracking" parallel imports (for example, by placing a label on the product to indicate where it was first marketed); or
- the refusal to honour a consumer warranty outside the country in which the product is first marketed.

Due to the high sensitivity of such restrictions, it is particularly important that you contact EURLGAL before placing any direct or indirect restrictions on transshipments within or between EEA countries (and the UK).

Note: The rule against restrictions on parallel imports applies also to situations in which MEG is the distributor of products that are subject to the restriction. Whenever a supplier seeks to influence MEG's trading behaviour in this way, you must contact EURLGAL immediately.

4.3 Restrictions on customers

It is prohibited for MEG employees, without previous EURLGAL approval, to require or encourage MEG's distributors to refuse to supply to certain customers or certain types of customers. This prohibition applies to allocations of customers between MEG's distributors as well as between MEG itself and its distributors.

Note: This rule applies also to situations in which MEG is the distributor of products that are subject to the restriction. Whenever a supplier seeks to influence MEG's trading behaviour in this way, EURLGAL must be contacted immediately.

4.4 Exclusive supply agreements

Exclusive supply agreements specify that there is only one buyer inside the country to which the supplier may sell a particular final product for resale. The main competition risk of such agreements is that they cut off the availability of supply of such product to other potential buyers. Thus, the larger the individual market shares of each of the supplier and the buyer, the more likely it is that alternative buyers will not be able to obtain supplies. The "foreclosure effect" is exacerbated when the exclusive dealing is for a long duration (say five years).

Therefore, whenever MEG employees are contemplating entering into exclusive supply arrangements, they must notify, in advance, EURLGAL.

4.5 Exclusive purchasing agreements

An exclusive purchasing obligation is just what it implies: the buyer agrees to purchase all, or nearly all, of its requirements of a particular product (often a raw material or component) from a single supplier. The main competition risk posed by such agreements is that they may foreclose market access of other suppliers to the buyer(s) affected. Thus, the larger the individual market shares of each of the supplier and the buyer, the more likely it is that alternative suppliers will be cut off. Such risks are particularly likely when the exclusive purchasing obligation is for a long duration (say five years).

Exclusive purchasing arrangements (whether MEG is the purchaser or the supplier) are considered sensitive by MEG. Therefore, whenever MEG employees are contemplating such arrangements, they must notify EURLGAL in advance.

4.6 Tying restrictions

A "tie" occurs when the seller is willing to sell a particular product to the purchaser only on the condition that the latter also purchases a separate "distinct" product – for example, where MEG agrees to sell PVC to a buyer, provided that the latter also agrees to purchase VCM from MEG. Another form of tying occurs when two products are sold to a customer subject to a discount or rebate that applies only when both products are sold together.

As a common form of tying, the supplier may seek to persuade the buyer to purchase a "full range" of the supplier's products. In competition law language, this is known as "full line forcing".

MEG considers the tying of products and/or services to be a sensitive activity, especially when the supplier is dominant (as to dominance, see Section 6). You should communicate all proposed instances of tying to EURLGAL in advance.

4.7 Vertical Block Exemptions

On 1 June 2022, the Vertical Block Exemption Regulation (**VBER**) was revised. Alongside the VBER revisions, new vertical agreement guidelines were issued. The updated VBER (and guidelines) will be in force for ten years.

A "block exemption" is a "safe harbour" (being a provision of statute or regulation that specifies that certain conduct will be deemed not to violate a given rule). In this instance it would be a safe harbour from EU prohibitions on anti-competitive agreements. To benefit from a block exemption, each party to the vertical agreement must have a market share of less than 30% in their respective markets. Furthermore, the vertical agreement must not contain any hardcore competition restrictions.

It is important to note that any arrangement between two or more Marubeni entities (companies owned 50% or more by Marubeni) would not fall into this category (as Marubeni entities are not separate "undertakings").

For more information on VBER or if you feel that an agreement you are entering into may not be block exempted, please speak to EURLGAL.

Section 5. Relations with Agents

MEG maintains a number of relationships with so-called "agents". Whether these purported agents are true agents may be important to MEG strategically. This is because agreements between MEG and its true agents are not considered agreements by two separate entities - they are considered part of the same entity, MEG. Why is this important to MEG? If MEG has an agreement with a true agent, MEG may act with much greater commercial freedom in its dealings with the agent. Among other things, MEG may determine the agent's prices without fear of falling foul of competition laws.

However, under EU and domestic competition law, whether or not someone is a true agent is more than a mere question of labels. The factors considered by the EC in determining whether an agent is independent are extensive and complex, and best left to EURLGAL to evaluate in any given case.

Additionally, you should keep this in mind when deciding whether to refer to such a party as an agent, when perhaps they would more accurately be described as a distributor or service provider – that under EU and domestic law, "true" agents are entitled to compensation on the expiry or termination (without cause) of agency agreements or arrangements. For the purposes of both competition law and contract law, MEG employees act at MEG's risk by assuming that a so-called agent is indeed a "true" agent - to call them an agent may build up some expectation on their part of an entitlement to compensation. It is therefore important to try to understand the exact nature of your relationship with your counterparties.

It is also important to remember, when reading Section 4.7 above, that in a genuine agency arrangement, the agent no longer acts as an independent economic operator and therefore the relationship between such an agent and its principal would not be regarded as a relationship between two separate undertakings.

For the above reasons, we require that all proposed agency and distribution arrangements be brought to the attention of EURLGAL.

Section 6. Dominance issues

Competition law creates a special regime for companies that are dominant in particular "product markets" or for our purposes, product lines. These rules are designed to protect customers and even competitors from "abusive" behaviour carried out by dominant firms, *whether they are manufacturers or traders*. Put another way, dominant firms, due to their market power, are already dealing in a market in which competition has been weakened; they might even be capable of eliminating their competitors. They therefore have a special responsibility not to engage in conduct that might further weaken competition. This means that non-dominant firms are ***not*** subject to these rules, and therefore enjoy greater commercial freedom, because they need effective tools to compete with the market leaders.

Although MEG is active in highly competitive markets – and while we do not consider ourselves dominant in any market – we cannot ignore the possibility that MEG might, rightly or wrongly, be considered dominant by competition authorities with regard to one or more of our products. For our internal purposes, we have established as a benchmark that if MEG, at its level of trade (as a trader or distributor), has a market share of 40% or higher for any product, we must avoid all conduct that might be perceived as "abusive". Attainment of this benchmark market share would be of concern to us whether it exists in any geographic market, no matter how big or small.

There may also be some markets in which MEG is one of a handful of competing traders/distributors. If such markets are transparent due, for example, to them involving a commodity product such as a metal or a chemical, then the EC (or domestic authorities) might find that the entire group of competitors is *"collectively dominant".* This might be the case, for example, with a group of 7-10 competitors, none of which has a market share greater than 20%. In such cases, each member of the group, including MEG, may owe a duty not to engage in abusive conduct. All such markets which may fall within this category must be reported to EURLGAL.

Consequently, if your work activities relate to a product line or market segment where MEG has a market share of 40% or more, or to a market on which MEG (and its competitors) might be collectively dominant (which should be verified with EURLGAL), you must:

- notify EURLGAL of these circumstances; and
- adhere to the provisions of this Clause 6 'do's and dont's at Annex 1.

What is considered "abusive" behaviour?

6.1 Loyalty rebates and discounts

The only rebates and discounts allowed under competition law are those linked to the volume (i.e. quantity) purchased, and such incentives must be based on cost savings. For example, a dominant supplier could legally offer a discount of 5% for each metric tonne of a particular metal that is purchased on the basis that such a quantity results in certain cost efficiencies.

However, dominant firms cannot offer rebates or discounts that are based on achievement of a particular market share, volume or revenue targets, or on progressive quantity schemes (as explained below). Competition authorities consider that such schemes can only serve one objective: to persuade the purchaser to obtain all, or nearly all, of its business from the supplier. The problem is: if the supplier is dominant, these are considered abusive sales tactics.

An example of a progressive quantity scheme would be where a seller gives a buyer a 5% discount for the first metric tonne purchased, 10% discount for each metric tonne when the purchase exceeds 5 metric tonnes; 20% discount for over 10 metric tonnes. However, this arrangement may be permissible if the discount rate was, for instance, 5% for the first metric tonne purchased, 10% for each metric tonne over 5 metric tonnes; 15% for each metric tonne over 10 metric tonnes because the rate increases by a flat rate of 5% and the volume similarly increases at a flat rate.

6.2 Predatory pricing

It may be considered abusive for a dominant supplier to sell products below its own costs. If you suspect that your sales price falls into this situation, you must contact EURLGAL immediately.

6.3 Discrimination

You cannot discriminate by treating equivalent transactions differently, that is by treating customers differently when there is no objective reason for doing so. This means, for example, that you cannot discriminate among customers on grounds of nationality. Likewise, prices, rebates and discounts, and other terms and conditions must be applied equally to all buyers at the same level of trade. Obviously, wholesalers and retailers may be treated differently because they are at different levels of trade.

Equally, you cannot discriminate against certain customers in times of product shortage - for example, because they are not your "primary" customers for a given product. When facing such market conditions, you must contact EURLGAL to establish internal guidelines to meet such shortages.

6.4 Refusal to supply

You cannot refuse to supply any existing or prospective customer unless there is valid justification for the refusal. For example, it may be an abuse of dominant position to discontinue supplies to a customer who has acquired one of your competitors in a different market, particularly when the customer has no commercially reasonable alternative source of supply. However, it would not be considered abusive to refuse to supply a customer whose payment is overdue, or who has a record of credit unworthiness.

Section 7. Documentation issues

MEG is not immune from so-called "dawn raids". These are surprise investigations conducted by the EC (and potentially domestic authorities) at business and/or domestic premises, usually at the start of the business day, for the purpose of obtaining evidence in support of a breach of competition law. The Commission (and potentially domestic authorities) may also order MEG to respond to written requests for information. The documentation that MEG must produce during an on-site investigation or in

response to a "Request for Information" could be critical in determining whether MEG is held liable for an infringement of competition laws, and in this event, how much its fine shall be. How we manage documentation of this nature could therefore be critical for the mitigation of risk.

For more details please see MEG's (208) Rules on Dawn Raids Procedure.

There are a number of actions that MEG employees should take:

- **Be aware that everything you write down or input into your computer may be used against MEG (and possibly even against you).** Proof of cartel activity is usually based upon circumstantial evidence, and the search for such evidence is not limited to MEG premises - competition regulators may search employees' homes, other private premises and even vehicles. During a search, competition regulators may seize computers and search hard drives for emails and files that seek to link us to competitors engaged in cartel activity. There is no such thing as a "complete deletion" from your computer. Notes found in e.g. drawers, diaries and smartphones/tablets may be critical for establishing illicit contacts. It is therefore important for you to be careful about what you say in an email or memorandum, as well as in comments that you make in diaries and informal notes because what you say may be interpreted incorrectly by regulators and create a false impression that MEG has engaged in illegal conduct. The following are by way of example:

    - You are reading a newspaper article about how demand for one of our plastics products has increased lately. You write an email to your supervisor suggesting that "the industry needs a price increase" while in fact, without your knowledge, several of our competitors are discussing a price increase. Such an email could be erroneously interpreted by regulators as meaning, "MEG has agreed a price increase with competitors".

    - You are at home one evening watching TV. One of your competitors, Acme, has put its CEO on a TV news programme, and he is claiming that thanks to new process technology that it owns, Acme has "revolutionised" a certain product that we sell (i.e. threatening all those making the "old" product). This development therefore threatens Acme's competitors, including MEG, even though Acme has a relatively small market share. Wanting to protect MEG, you write in your diary, "Reminder: Eliminate Acme". You bring your diary to work, but you forget all about the note that you made in it the night before and take no action on it. A few months later, the industry leaders implement a "price initiative": They drop their prices simultaneously at a fixed percentage in order to eliminate Acme as a competitor. If your note were retrieved in an on-site investigation, it could be interpreted as meaning, "MEG participated in the fixing of prices".

- **Do not destroy competition "sensitive" documents without prior EURLGAL authorisation.** If you believe that a document in your possession, whether a memo, agreement, letter or email could pose a risk, it must not be destroyed or discarded. Rather, the document must be handed over to EURLGAL immediately.

- **Documenting prohibited conduct.** If you suspect that any MEG employee has engaged in, or is contemplating, anti-competitive conduct, you should report it to EURLGAL immediately. This applies to all colleagues, regardless of position. If disciplinary action is taken promptly this could have the effect of reducing MEG's liability.

- **MEG (203) Rules on Information Asset Management.** This document and its Guidance document (G203) contain guidelines for the systematic retention (and disposal) of documents. Following such a document retention policy is good administrative practice because doing so saves MEG valuable storage and IT costs and forces us to organise our documentation so that the things that matter to MEG can be found easily and efficiently.

  Document retention schemes are ***not*** for the purpose of destroying evidence that may be used against MEG in an investigation (or in any on-going or contemplated litigation or other dispute resolution procedure). Particular attention should be given to clause 12 of the MEG (203) Rules on Information Asset Management because the destruction of documents in any such circumstance can result in serious fines. *Therefore, to repeat what we have said earlier, if you are aware of any documents that may give rise to liability, you should provide copies of such documents to EURLGAL.*

Annex 1 – Do's and Don'ts

Introduction

Competition laws apply to MEG and to all of its business activities. The most relevant sets of competition laws for MEG are those of the European Union and of each European country in which MEG operates (including the UK). It is MEG's policy to ensure that its business practices comply at all times with competition laws.

Set out below are practical lists of DO'S and DON'TS in relation to issues that might arise in the normal course of business. These include relations with competitors, customers and suppliers, information exchanges, documentation issues and issues relevant to markets in which MEG has a significant market share and/or relatively few competitors.

If you have any questions regarding competition law in general or the Do's and Don'ts, please contact EURLGAL.

Relations with Competitors

Each provider of goods and services should act independently and competitively on the market and not coordinate its behaviour with that of its competitors. When dealing with competitors, the guidelines below should be followed:

DON'T Discuss, recommend or agree with competitors, whether at trade association meetings or in any other context, the following matters:

- Costs.
- Restrictions on output, capacity or quality.
- Purchasing or sales prices, rebates or discounts, profit margins, or intended prices.
- Division or allocation of geographic territories.
- Division or allocation of customers.
- Standard terms of business, or other terms.
- Any plan to refuse to deal with customers or suppliers.
- Any plan to coordinate bid tendering.
- Marketing or promotional plans.
- Any other Marubeni-specific information.

DON'T Attend trade association meetings unless all of the following conditions are fulfilled:

- An agenda for the meeting has been prepared in advance.
- You have given a copy of the agenda to EURLGAL.
- EURLGAL has authorised the meeting, approved the agenda, and you have ensured that an independent lawyer will be present at the meeting.
- Minutes of the meeting are taken, and such minutes, in draft form, are submitted to EURLGAL for approval.

- The members at the meeting strictly adhere to the prepared agenda, which should be limited to industry-wide concerns, such as finding environmental solutions, improving health and safety standards, or improving consumer knowledge of the product.

- In the event that any illicit subject matter is discussed, you must leave the room and insist that the minutes reflect that you did not participate in this discussion and that you left the meeting immediately.

DON'T Provide or agree to receive any company-specific data (such as prices, output levels and sales) unless approved by EURLGAL.

DON'T Assume that because company-specific data is no longer current that its exchange would be legal.

DON'T Assume that because MEG or any of its competitors have published company-specific information on their website or in other public media that you can circulate such information to your competitors.

DON'T Assume that all so-called "market intelligence" is legal, especially when it concerns specific MEG competitors.

DON'T Seek market intelligence regarding our competitors from our or their customers.

DON'T Assume that because you are concluding a commercial agreement with competitors which appears legal, such as a joint venture or a strategic alliance, that it poses no competition risks. Even joint ventures that appear legal could involve illegal objectives or terms that need to be checked, in advance, with EURLGAL.

DO Report to EURLGAL any contacts that you have had with competitors and the nature of the discussion, if any.

DO Immediately report to EURLGAL all instances in which a competitor, supplier or customer has orally transmitted to you company-specific information regarding one of our competitors;

DO Immediately forward to EURLGAL all written or electronic communications that you receive from a competitor, supplier or customer containing company-specific information regarding one of our competitors.

DO Report to EURLGAL all suspected instances in which a colleague of yours, or even a supervisor, may have had an unauthorised contact with a competitor.

DO Report to EURLGAL all instances in which an analyst, consultant or other independent third party seeks to provide you with market intelligence regarding any of our competitors.

DO Report to EURLGAL all instances in which market intelligence is made accessible to you for payment of a price or when the intelligence is made available only to a select group.

DO Contact EURLGAL if you have any doubts or questions as to the legality of dealings with competitors.

Relations with Customers and Suppliers

DON'T As a supplier, do anything to discourage your distributors or retailers from selling products or services to "parallel importers" or to customers who plan to use the products in another EEA country (including the UK).

DON'T Seek to influence the resale prices of your customers. However, you may suggest a resale price, but with no threat or compulsion, and you may set a maximum price, provided that it does not operate as a fixed price.

DON'T As a customer, accept fixed resale prices or sales margins from your non-group company suppliers. However, you may accept a maximum resale price from such suppliers, provided that it does not operate as a fixed price.

DON'T **"**Tie" the sale of one product or service to the obligation to purchase a separate product or service. This is a sensitive area for MEG, particularly with regard to those products in which MEG has a high market share. You must inform EURLGAL of all instances in which MEG is considering imposing or accepting a tying arrangement.

DON'T Enter into agreements with suppliers by which that supplier agrees to sell a given product exclusively to MEG, without the prior authorisation of EURLGAL. This same obligation applies when MEG is the supplier imposing an exclusive supply arrangement.

DON'T Enter into agreements with suppliers by which MEG agrees to purchase all, or nearly all, of its requirements of a given product exclusively from a single supplier, without the prior authorisation of EURLGAL. This same obligation applies when MEG is the supplier imposing an exclusive purchasing arrangement.

DON'T Impose on your distributors and retailers an obligation not to sell to particular customers, or to certain types of customers, without the prior authorisation of EURLGAL. This same obligation applies when MEG is being restricted from selling to particular customers or types of customers.

DO Speak to EURLGAL if you think your agreement may not be "block exempted".

Dominance issues

MEG has an obligation to avoid engaging in so-called "abusive" market conduct if it is dominant in any product market. For our purposes, we undertake the duty of dominant firms with regard to any product line for which we have a market share of 40% or more, or where we are one of a number of small companies selling a commodity product, such as a metal or coffee, where the market is transparent. The following are the do's and don'ts applicable to conduct relating to these product lines:

DON'T Provide any rebates and discounts except quantity related ones which are linked to cost savings for MEG. All promotional schemes of this nature should be cleared in advance with EURLGAL.

DON'T Sell a product at below our costs without the express prior authorisation of EURLGAL.

DON'T Discriminate against certain customers on grounds of nationality, offer any customer better prices or other terms and conditions than are offered to other purchasers at the same level of trade, or discriminate in favour of any customer when you are experiencing a product shortage.

DON'T Refuse to supply any actual or potential customer without obtaining prior clearance from EURLGAL.

DO Consult EURLGAL to determine whether we are dominant in any particular product market, and if we are, whether the measures you are contemplating might be considered abusive.

Documentation issues

DON'T Destroy or discard any document which may be considered evidence of liability for anti-competitive activity. Rather, bring the document immediately to the attention of EURLGAL.

DON'T Write memos, notes or emails which may create the false impression that MEG is engaged in anti-competitive activity. Examples of such careless notes are "destroy after reading" or "the industry should raise its prices" or "we need price stability".

DON'T Destroy business records unless permitted under the Document Retention Policy.

DO Be aware that everything you write down and leave on company premises or at home, whether it is documents, memoranda, notes, your diary, emails or smartphones/tablets, can be discovered by regulators in an investigation. You should be careful because the evidence obtained can be used against MEG or even against you.

DO Seek to address instances of anti-competitive conduct immediately and effectively with the assistance of EURLGAL, rather than to hide such activity or destroy evidence of it.

Annex 2 – Competition Law in Germany

Quick Facts: Germany

Regulator	Bundeskartellamt (Federal Cartel Office)
Legislation	Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition) 10th amendment effective 19 January 2021 ("**GWB**")

1. Background

The tenth amendment of the GWB is considered the most substantial overhaul of German competition law in some time and includes special rules for digital platform 'companies with overwhelming importance for competition across multiple markets.' Whilst Germany is the among the first major jurisdictions to adopt special competition rules for digital platforms, we expect this trend to continue (the EC and the UK both considering new regulations at the present time).

2. Jurisdiction

The Federal Cartel office and the German courts are fully empowered to apply Article 101 and Article 102 TFEU either alone or in combination with the GWB (which operates in much the same way but with German application).

3. Similarities/Differences between EU competition law and German competition law

German competition law now virtually mirrors EU competition law in most respects. This is to say, there are no longer any significant differences in the way cartels, or agreements with suppliers and customers, are dealt with.

Moreover, the Federal Cartel Office is in line with the EC in defining which forms of anti-competitive conduct are considered the most serious. Cartels of all kinds are viewed as the most serious form of infringement. The Federal Cartel Office are also strongly opposed to resale price maintenance.

However, there are a few important differences between EU competition law and German competition law. For example, in the event that a supplier and its Frankfurt distributor agree that the latter will not sell to merchants who plan to resell the products in Berlin, German competition law would not oppose this. It could only be prohibited under EU competition law if there were an actual or potential effect on trade between EU Member States, which is not likely in this example. On the other hand, a ban on exports from Germany to another EU Member State would be caught by EU competition law, which is enforced by the Federal Cartel Office.

There is another important difference between EU and German competition law with regard to dominance. Under German competition law, there is a concept called "relative market dominance" (otherwise known as abuse of a position of economic dependency) which is designed to protect the availability of supplies for small and medium-sized buyers without sufficient alternatives to dominant firms. Thus, for example, a supplier with a market share of only 10% has been held liable for abuse of dominant position for cutting off supplies to a retailer who had grown dependent on its supplier, where there is no acceptable alternative due to the prestige of the supplier's brand. In Germany, therefore, at least with regard to refusals to supply existing customers, MEG employees should contact EURLGAL before engaging in such conduct.

4. Comparison of penalties

The GWB provides that the Federal Cartel Office may impose fines on companies and individuals of up to EURO 1 million, or in excess of this amount up to 10% of their worldwide group turnover. These fines are applicable both to infringements of EU competition law and of the GWB, although fines imposed on companies are likely to be much higher than those imposed on individuals.

Bid-rigging, in principle, is the only form of anti-competitive behaviour which may be penalised in Germany by imprisonment. Prison terms are for a maximum of five years.

Annex 3 – Competition Law in France

Quick Facts: France

Regulator	Autorité de la concurrence (Competition Authority)
Legislation	Code de Commerce – Livre IV (Commercial Code – Book IV)

1. Background

The French government has both acknowledged and responded to the modernisation of EU competition law, with the result that the Competition Authority and the French courts may apply both EU and French competition law (the French Ministry of economy also has residual powers for minor breaches of competition law and specific consumer law infringements). In 2020 the Competition Authority imposed huge fines, amounting to EURO 1.8 billion for abuse of dominance. The Competition Authority is expected to continue to focus on the digital economy (including public procurement) and has a fully functional "digital unit", expecting to increase the pace of investigations in the digital sphere.

2. Jurisdiction

Whereas the EU competition rules may be enforced in respect of agreements or practices aimed at, or having a potential effect on, the territory of any one or more EEA countries (including the UK), the French Competition Authority and French Courts may apply French competition law to such agreements or practices only to the extent that they are aimed at, or have a potential effect on, the French domestic territory.

3. Similarities/Differences between EU competition law and French competition law

French competition law has increasingly converged with the principles and application of EU competition law. French law also prohibits the abuse of a situation of so-called "economic dependency", a concept which does not exist under EU law.

A state of economic dependency is deemed to exist where a buyer has no alternative to dealing with its supplier. Specifically, the determination of the existence of a state of economic dependency of a distributor with regard to a supplier is based on an evaluation of several criteria including:

(1) the extent of the supplier's share in the distributor's turnover;
(2) the reputation of the supplier's trademark;
(3) the supplier's share of the relevant market; and
(4) the distributor's ability to obtain equivalent products from other suppliers.

Therefore, for example, a state of economic dependency may exist where a distributor relies heavily on supplies from the supplier as a proportion of all of the distributor's purchases of the product concerned; the supplier's trademark is highly valued; the supplier's market share is substantial; and the distributor cannot obtain equivalent goods from other suppliers. In these situations, the abuse of economic dependency may consist in particular in a refusal to supply the distributor or in the imposition of unfair or discriminatory terms and conditions.

Also, unlike the provisions governing the abuse of a dominant position under EU competition law (Article 102 TFEU), the French Commercial Code (Article L 420-4) provides for a specific exemption from the prohibition of abuses of dominance or economic dependency where the practice concerned (1) results from the application of a legislative text or regulations promulgated in application thereof, or (2) will result in economic progress, provided that consumers will receive an equitable share of the claimed benefits, without giving the undertaking concerned the opportunity to eliminate competition for a substantial portion of the products in question.

To benefit from the Article L. 420-4 exemption, the practice concerned must be indispensable to achieve the efficiencies claimed. However, Article L. 420-4 defences are rarely successful.

It should be noted however that according to settled European case law, a potentially abusive practice may nevertheless be exempted from the prohibition of Article 102 TFEU if is objectively justified (although this defence is successful only in limited circumstances). There is therefore no divergence between French and EU competition laws on the substance, as they both provide for the possibility to objectively justify a potentially abusive conduct, but only on the legal basis for this exemption (which relies on a specific legal provision under French law but not under EU law).

4. Comparison of Penalties

Consistent with EU competition law, infringements of French competition law are subject to maximum fines of 10% of global turnover if the offender is an undertaking. In France however, the maximum fine is capped at EURO 3 million if the offender is an individual.

Unlike EU law, French law also provides for criminal penalties against companies and individuals if they have fraudulently played a personal and leading role in the conception, organisation or implementation of anti-competitive practices.

If convicted, companies are subject to a fine of up to EURO 375,000, and individuals are subject to sanctions of up to four years of imprisonment and/or of a fine of up to EURO 75,000. Pursuant to Article L. 462-6 of the Commercial Code, the Competition Authority may defer the case to the public prosecutor, where the facts of a case seem to justify criminal proceedings (the public prosecutor will then decide whether or not to initiate such proceedings). Criminal proceedings may also be initiated by the victim of an anti-competitive practice, by filing a complaint with the public prosecutor's office (which will decide whether or not to initiate criminal proceedings).

Annex 4 – Competition Law in Italy

Quick Facts: Italy

Regulator	Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority)
Legislation	Legge 10 ottobre 1990, n. 287 (Competition Law (**287/90**))

1. Background

From its inception in 1990, the 287/90 has borrowed heavily from EU competition law. Indeed, Articles 2 and 3 of 287/90, prohibiting respectively anti-competitive agreements and abuses of dominant position, virtually mirror 101 and 102 TFEU.

2. Jurisdiction

Whereas the EU competition law may be enforced in respect of agreements or practices aimed at, or having a potential effect on, the territory of any one or more EEA countries (including the UK), the Italian Competition Authority and courts may apply Italian competition law to such agreements or practices only to the extent that they are aimed at, or have a potential effect on, the Italian domestic territory.

3. Similarities/Differences between EU competition law and Italian competition law

Article 1 of 287/90 states that 287/90 must be interpreted in accordance with the principles of EU competition law.

Italian competition law has increasingly converged with the principles and application of EU competition law. The concept of abuse of dominant position exists in Italian law. Italian law also prohibits the abuse of a situation of so-called "economic dependency", a concept which does not exist under EU law.

The proof of abuse of economic dependency, as it implies, takes as a starting point a position of economic dependency between two parties - normally a supplier and a distributor. It is not necessary for the supplier to be dominant. However, the supplier's products must figure prominently in the distributor's outlets, usually due to the importance of the supplier's brand name and the inability of distributor to obtain those goods from another legal source. Another issue often discussed in case-law is whether the abuse of economic dependency, because of its position within the framework of Law no. 192/1998 (regarding subcontracting in manufacturing activities ("**192/1998**")), can be generally applied, irrespective of the existing relationship between the economic operators concerned. In principle the economic dependency can be assessed only in particular economic relationships, namely when an undertaking is able to create disproportions in its economic relationship with another economic operator, as regards their respective rights and obligations. This is especially true when different enterprises coordinate with each other as to create a vertical integration between their activities.

Article 9 of 192/1998 empowers the Italian Competition Authority to grant compliance with this provision and the courts to impose injunction and/or compensation orders. However, this theory has never been applied by the Italian Competition Authority, which suggests that it is not an enforcement priority, rather being a courts' concern.

4. Comparison of Penalties

The Italian Competition Authority is empowered to impose fines of up to 10% of global turnover of the undertaking concerned. The Italian Competition Authority does not distinguish between product lines; hence, even if the infringement involves only one product, the Italian Competition Authority will take into account the sales of all of the undertaking's products and services in assessing the maximum cap of the fine to be imposed (consistent with the approach of the EC). The Italian Competition Authority has used its discretion to impose particularly severe fines. For example in an abuse of dominant position case

in 2006 involving ENI Trans-Tunisian Pipeline Company, the Italian Competition Authority imposed a fine of EURO 290 million.

In Italy, criminal penalties are not specifically provided for infringements of competition law. Nevertheless, serious infringements, such as bid-rigging, may be sanctioned under the general criminal law.

Annex 5 – Competition Law in the United Kingdom

Quick Facts: United Kingdom

Regulator	Competition and Markets Authority
Legislation	Competition Act 1998

1. Background

Brexit has had an influence on UK competition law.

On 24 December 2020, the EU and the UK agreed details for the Trade and Cooperation Agreement (TCA). The TCA includes arrangements in relation to competition law, but does is not detailed as regards competition law enforcement.

The TCA contains a commitment by the EU and the UK to maintain effective competition laws and to ensure enforcement of competition law in a transparent, fair and non-discriminatory manner.

The TCA also emphasises co-operation regarding competition policy and enforcement activities. The EC and EU member states may exchange information with the CMA to the extent permitted by law. The CMA may also exchange information with the EC and any individual EU member state in the same way.

The EC will no longer have jurisdiction to conduct dawn raids in the UK or request the CMA to do so on its behalf.

For further information, please take a look at Marubeni Europe plc's version of this policy.

2. Jurisdiction

As at 1 January 2021, the CMA is no longer able to investigate and enforce Article 101 and Article 102 TFEU.

Article 101 and Article 102 will however continue to apply to conduct of UK companies that is implemented or produces effects within the EU (this may even include UK conduct to the extent that it produces effects within the EU). Conduct of this nature will be investigated and enforced by the EC.

The EC will continue to have competence over the UK elements of certain cases that were initiated but not concluded by the EC before the end of the transition period (between 31 January 2020 and 31 December 2020).

We expect the CMA to become even more active as regards enforcement as it is now able to run an investigation under UK competition law in parallel with an investigation by the EC and to focus on the UK specifically. There is also the potential for higher costs for companies now that parallel investigations are possible.

The CMA is also expected to enact competition law reforms shortly.

3. Similarities/Differences between EU competition law and UK competition law

As at 1 January 2021, EU and UK competition law remains substantially similar.

This will likely change as the CMA and the English courts are no longer required to interpret UK competition law consistently with case law of the European Court of Justice, which is no longer binding.

It should be noted that the VBER (as described in Section 4.7) does not apply to the UK. The UK issued the Vertical Agreements Block Exemption Order (VABEO) at the same time that the EU updated the VBER, in June 2022. The VABEO is relatively similar to the VBER (with some minor differences). For further information on the VABEO, please read Marubeni Europe plc's version of this policy.

4. Comparison of penalties

For infringements of UK competition laws, the CMA is empowered to fine companies up to 10% of their worldwide group turnover.

Additionally, under the Enterprise Act 2002, the UK criminal courts may impose up to six months' imprisonment and/or a fine on individuals found guilty of having engaged in cartel offences. If the individual is indicted and convicted by the Crown Court, he/she may be imprisoned for up to five years (as well as a fine). Following amendments to the criminal cartel offence introduced by the Enterprise and Regulatory Reform Act 2013, it is no longer necessary to prove that an individual acted dishonestly in order to secure a criminal conviction. This is intended to make it easier to prosecute individuals for involvement in cartels, and the CMA has publicly stated that it intends to bring more prosecutions in the future.

Moreover, for serious infringements, the Enterprise Act 2002 provides that directors of UK companies may be disqualified from acting as a director for a maximum period of 15 years or from holding any management position in a UK company. It should be noted that such disqualification does not require that the director in question shall have participated in or authorised the prohibited activity - disqualification may arise where for example, the director knew that the company was involved in the breach and failed to take appropriate action to cease the infringement.

5. Post-Brexit Fines

In October 2021, the CMA fined Facebook GBP 50.5 million pounds due to its acquisition of Giphy (an online database of GIFs). The acquisition by Facebook of Giphy has no obvious UK nexus. It provides some insight into the potential direction of travel for the CMA post-Brexit. The CMA justified the fine (and its involvement and scrutiny in this deal) due to the fact that a lot of the UK population use GIFs. The fine was issued for failing to comply with the terms of an order to keep the 'Giphy' business separate whilst the CMA evaluated the deal. The previous fine for failing to comply with the terms of an order was GBP 325,000. This signals a serious change of stance. The CMA is likely to continue to evaluate big global deals of this nature whereas before this would have been reserved for the EC.