EUROPEAN COMMISSION
Competition DG

CASE AT. 40436 - ANCILLARY SPORTS MERCHANDISE

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 25/03/2019

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EUROPEAN
COMMISSION

Brussels, 25.3.2019
C(2019) 2172 final

PUBLIC VERSION

COMMISSION DECISION

of 25.3.2019

relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area

Case AT.40436 - Ancillary sports merchandise

(Text with EEA relevance)

(Only the English text is authentic)

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COMMISSION DECISION

of 25.3.2019

relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area

Case AT.40436 - Ancillary sports merchandise

(Text with EEA relevance)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decisions of 14 June 2017 and 14 February 2019 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty[2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

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1 OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("the Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the Treaty will be used throughout this Decision.

2 OJ L 123, 27.4.2004, p. 18.

1. INTRODUCTION

(1) This Decision issued pursuant to Article 7(1) of Council Regulation (EC) No 1/2003 is addressed to Nike, Inc., Nike European Operations Netherlands B.V., F.C. Internazionale Merchandising S.r.l., French Football Merchandising SASU, Nike Barcelona Merchandising, S.L. (previously known as Futbol Club Barcelona Merchandising, S.L.), and North West Merchandising Limited (previously known as Manchester United Merchandising Limited). Those addressees are referred to in this Decision as "the addressees".

(2) This Decision concerns direct and indirect restrictions on cross-border sales of licensed merchandise products sold both offline and online within the European Economic Area ("EEA").

(3) The Commission finds that the undertaking comprising the addressees participated in a single and continuous infringement of Article 101 of the Treaty and Article 53 of the Agreement on the European Economic Area ("the EEA Agreement"), spanning the period from 1 July 2004 to 27 October 2017 ("the relevant period"). The infringement involved the implementation and enforcement within the EEA of a series of agreements and practices aimed at restricting active and passive cross-border sales of licensed merchandise. Such behaviour constitutes conduct which has as its object the restriction of competition within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

2. THE UNDERTAKING CONCERNED

(4) Nike, Inc. is a designer, developer and seller of athletic footwear, apparel, equipment and accessory products worldwide. Headquartered in Beaverton, Oregon, United States of America, Nike, Inc. also markets sports-inspired products and products for various competitive and recreational activities. Nike, Inc. sells its products through owned retail stores worldwide, on an e-commerce site and to retail accounts and independent distributors, including in the EEA.

(5) Nike European Operations Netherlands B.V. ("NEON") is a subsidiary of Nike, Inc. based in Hilversum, the Netherlands.[3] NEON operates as Nike, Inc.'s sales and distribution principal company and headquarters of the Nike group for the EEA. In this capacity, NEON purchases products from third party manufacturers and markets, sells and distributes the Nike products with the assistance of branches and related commission agents and distributors within European, Middle Eastern and African countries. As part of its principal function, NEON performs back office and support functions and provides services to group companies.[4]

(6) NEON has entered into agreements with high profile European football clubs and federations under which it agrees to pay a sponsorship / licensing fee to the football club in return for club merchandising rights (the rights to certain merchandising, promotional and retail rights in relation to the club's brands and products) obtained directly from the club or federation. NEON in turn assigns or licenses some or all of these rights to dedicated Nike subsidiaries set up to centralise and manage the activities deriving from certain clubs' sponsorship and licensing agreements.

3 Nike Inc.'s Annual Report 2017, p. 131.
4 […].

(7) Futbol Club Barcelona Merchandising, S.L. ("FCBM"), a Spanish limited liability company headquartered in Barcelona, Spain, and wholly owned by the Nike group of companies, is in charge of licensing the Futbol Club Barcelona ("FC Barcelona" or "FCB") intellectual property rights to different licensees for the manufacturing and sale of FCB merchandising products.[5] FCBM obtains its licensing rights over FCB's intellectual property through NEON. The sponsorship relationship between Nike and FC Barcelona has been in existence since 1998, albeit under different agreements.[6] On 16 July 2018, Futbol Club Barcelona Merchandising, S.L. changed its name to Nike Barcelona Merchandising, S.L. For convenience, the label "FCBM" will be used in this Decision to refer to the company despite the name change.

(8) Manchester United Merchandising Limited ("MUML"), based in Manchester, United Kingdom, was the fully-owned Nike subsidiary managing the intellectual property rights of Manchester United Football Club ("ManU") for the manufacturing and sale of merchandising products. The sponsorship relationship between the club and Nike went on from 2002 until those rights expired in 2015.[7] Following the end of the relationship with the club, MUML ceased trading. The entity remains incorporated under the laws of the United Kingdom, albeit under the name North West Merchandising Limited. For convenience, the label "MUML" will be used in this Decision to refer to the entity despite the name change.

(9) Juventus Merchandising S.r.l. ("JM"), based in Turin, Italy, was the fully-owned Nike subsidiary managing the intellectual property rights of Juventus Football Club S.p.A. ("Juventus") for the manufacturing and sale of merchandising products. The sponsorship relationship between the club and Nike continued uninterruptedly from mid-2003 until 2015.[8] With the end of the relationship, JM was renamed Piemonte Merchandising S.r.l. and has subsequently gone into liquidation and been dissolved.

(10) F.C. Internazionale Merchandising S.r.1. ("FCIM"), a fully-owned Nike subsidiary headquartered in Milan, Italy, has a licence to further sub-license the intellectual property rights of F.C. Internazionale Milano football club (F.C. Internazionale Milano S.p.A., referred to in this Decision as "Inter") for the manufacturing and sale of merchandising products. The sponsorship relationship between the club and Nike has been in existence since 1998, albeit under different agreements.[9]

(11) A.S. Roma Merchandising S.r.l. ("ASRM"), headquartered in Rome, Italy, was throughout the period of the infringement a fully-owned Nike subsidiary and sub-licensor of the intellectual property rights of the A.S. Roma football club (A.S. Roma S.p.A., referred to in this Decision as "AS Roma") for the manufacturing and sale of merchandising products. Although it had a separate legal personality, ASRM was a small entity, with only two employees of its own, and operated under the control of NEON. In addition, given the substantial financial obligations that NEON directly

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5 […].

6 FC Barcelona and Nike, Inc. Extend Relationship, 20 May 2016, https://news.nike.com/news/fc-barcelona-and-nike-inc-extend-relationship.

7 Manchester United investor presentation, page 21: http://ir.manutd.com/~/media/Files/M/Manutd-IR/About%20Manchester%20United/manu-presentation-v2.pdf.

8 Reports and Financial Statement at 30 June 2004, pages 42-43: http://www.juventus.com/media/native/investor-relations-docs/english/financial-statemet-and-reports/2003-2004/26_ott_2004_eng.pdf.

9 Inter and Nike announce historic deal, 26 August 2013, http://www.inter.it/en/news/43544/inter-and-nike-announce-historic-deal.

owed to AS Roma in relation to the performance of the merchandising business, NEON actively managed ASRM's business. For both those reasons, ASRM did not decide independently upon its own conduct in the market.[10] The sponsorship relationship between Nike and AS Roma has been in existence since the 2014-2015 football season.[11]

(12) French Football Merchandising SASU ("FFM"), headquartered in Saint-Ouen-L'Aumône, France, is the fully-owned Nike subsidiary managing the intellectual property rights of the French Football Federation (*Fédération Française de Football* or "FFF") for the design, manufacture, marketing and sale of merchandising products. The sponsorship relationship between Nike and the French Football Federation has been in existence since 2011.[12]

(13) Throughout this Decision, a reference to "Nike" on its own is to the undertaking comprising Nike, Inc. and those of its subsidiaries that are involved in the licensing and distribution of licensed merchandise in the EEA.

3. THE PRODUCTS CONCERNED

(14) The products concerned by this Decision are licensed merchandise products. These are products of an extremely varied nature, such as clothes, shoes, phone accessories, bags or toys, onto which an image or text is applied during the manufacturing process. The aim of applying these images or texts, which are typically subject to intellectual property rights, onto the products is to increase the products' attractiveness for consumers. The manufacturer (licensee) may only use such images or text if it has signed a licensing agreement with the owner of the relevant intellectual property rights (licensor). The products concerned by this Decision are further described in Section 5.1 and 5.2.

(15) The products concerned by this Decision are distributed in the territories of all the Contracting Parties to the EEA Agreement.

4. PROCEDURE

(16) In September 2016, the Commission conducted unannounced inspections at Nike, Inc.'s European Headquarters in Hilversum, in the Netherlands. A decision was sent in parallel to FCBM, in accordance with Article 18(3) of Regulation (EC) No 1/2003, to request information on the company's licensing agreements.[13]

(17) By decision of 14 June 2017[14], the Commission initiated proceedings in accordance with Article 2(1) of Commission Regulation (EC) 773/2004[15] against Nike, Inc. and

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10 […].

11 AS Roma Teams up with Nike, 13 March 2013, https://news.nike.com/news/as-roma-team-up-with-nike.

12 Nike Announces Partnership with the French National Team, 22 February 2008, https://news.nike.com/news/nike-announces-partnership-with-the-french-national-team.

13 […].

14 Commission decision of 14 June 2017 in Case AT.40436 – Ancillary sports merchandise. See also Antitrust: Commission opens formal investigations into Nike's, Sanrio's and Universal Studios' licensing and distribution practices, European Commission, press release, 14 June 2017, http://europa.eu/rapid/press-release_IP-17-1646_en.htm, […].

all legal entities directly or indirectly controlled by it, and in particular against NEON and FCBM in order to further investigate whether Nike had in place agreements and/or applied practices preventing or restricting the sale of licensed merchandise in the EEA. On 14 February 2019, the Commission adopted a further decision to initiate proceedings in accordance with Article 2(1) of that Regulation against FCIM, FFM and MUML.

(18) On […], the addressees submitted a formal offer to cooperate in Case AT.40436 in view of the adoption of a decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 ("the settlement submission").[16] The settlement submission contained the following:

(1) an acknowledgement, in clear and unequivocal terms, by the addressees of their joint and several liability for the infringement described in the settlement submission, including facts, legal caveats, the addressees' roles in the infringement and the duration of their participation in the infringement;

(2) an indication of the maximum fine that the addressees would accept in the context of a cooperation procedure;

(3) confirmation that the addressees had been sufficiently informed of the objections the Commission envisaged raising against them and that they had been given sufficient opportunity to make their views known to the Commission;

(4) confirmation that the addressees had been granted sufficient opportunity to access the evidence supporting the potential objections and all other documents in the Commission's file, and that they did not envisage requesting further access to the file or to be heard again in an oral hearing, unless the Commission did not reflect the settlement submission in the Statement of Objections ("SO") and the Decision; and

(5) the addressees' agreement to receive the SO and the Decision adopted pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English.

(19) The settlement submission was made conditional upon the imposition by the Commission of a fine not exceeding the amount specified in the settlement submission.

(20) On 14 February 2019, the Commission adopted an SO concerning the addresses' participation in the anticompetitive conduct that is the object of this Decision.

(21) On 28 February 2019, the addressees submitted their joint reply to the Statement of Objections. All addressees reiterated their commitment to follow the cooperation procedure and confirmed that the Statement of Objections reflected the content of their settlement submission and that they did not wish to be heard again by the Commission.

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[15] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18).

[16] […].

5. CONDUCT UNDER INVESTIGATION

5.1. Overview of Nike's activities

(22) Nike's core business is the design, development and worldwide marketing and selling of athletic footwear, apparel, equipment, accessories and services. Those products generally feature one or more of Nike's registered trade marks, including the "Nike" word or Nike's Swoosh logo.

(23) Similarly, in connection with sports clubs and federations, Nike's core business is the design, development, and marketing and sale of so-called "co-branded products". Co-branded products feature Nike branding alongside the branding of the club or federation.[17] Co-branded products include, for example, a club's official replica kits or the footballs including both the club's and Nike's branding.

(24) In order for Nike to be able to design and manufacture co-branded products, as explained above, a number of clubs and sports federations license their intellectual property rights to Nike under (sponsorship) agreements often spanning several years and which govern Nike's relationship with the club or federation.

(25) Exceptionally, Nike exploits broader exclusive rights spanning not only co-branded products but also allowing Nike to further sub-license for manufacture other product categories featuring only the brands of the club or federation and not the Nike trade marks.[18]

(26) Nike has obtained broader rights of that kind from FC Barcelona, AS Roma, Inter Milan and the FFF.[19] Similar bundles of rights have been acquired in the past by Nike, but are no longer in force, for clubs such as ManU and Juventus as well as for federations like the Dutch Football Federation (*Koninklijke Nederlandse Voetbal Bond*).

(27) Table 1 provides a graphic overview of periods during which Nike managed the licensing rights for the licensed merchandise products concerned by this Decision.[20]

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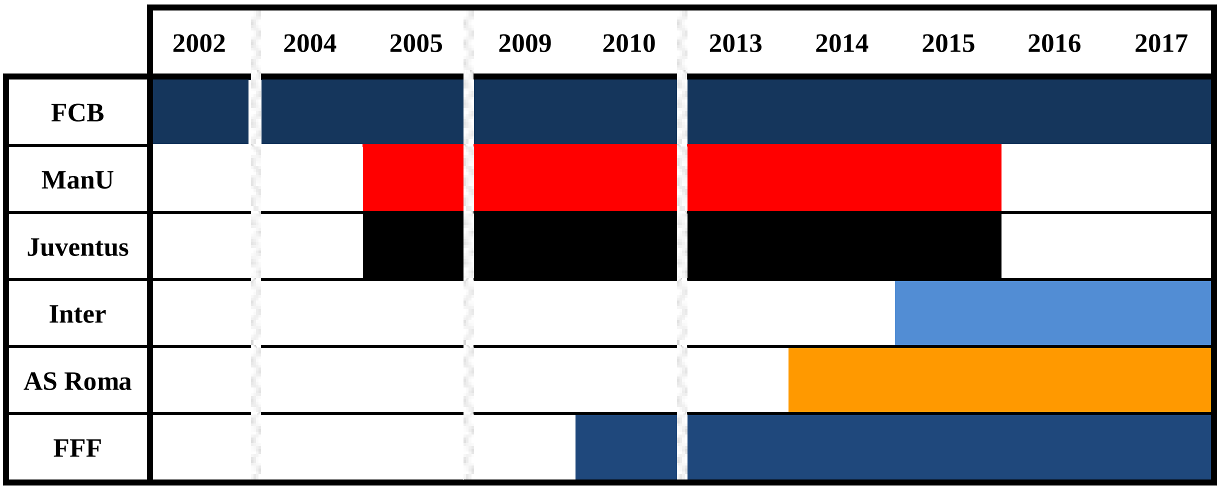
[17] Co-branded products are produced [Description of supply chain process for cobranded products] and are sold at wholesale by Nike together with Nike's other products. These products are then sold by NEON (or other Nike group entities), both at wholesale and retail. […].

[18] These product categories are broad. For example, [Direct quote from license agreement]. See in this respect Section […].

[19] […]. Nike also has worldwide licensing rights for the Brazilian Football Federation (*Confederação Brasileira de Futebol*), but these are exploited to a very limited extent in the EEA.

[20] Although the merchandising relationship between Nike and ManU commenced in 2002, […]. Similarly, although the relationship between Nike and Juventus commenced in 2003, […].

Table 1 - Overview of Nike's management of intellectual property rights for licensed merchandise



5.2. Nike's licensing business for football clubs and federations

(28) In general, when Nike exploits the industrial and intellectual property rights to operate the merchandising business of a club or federation (jointly referred to as "clubs"), Nike will also create a separate football business unit ("FBU"). FBUs, such as the ones mentioned in recitals (7) to (12) of this Decision (*i.e.*, FCBM, MUML, JM, FCIM, ASRM and FFM), are often separate legal entities linked to NEON and responsible for the management of merchandising rights and the granting of licences over those rights for the manufacture and sale of products bearing the club's logo, brands or colours. These merchandising products are of a varied nature, for example toys, clothing, shoes or bags, and are sold throughout the territories of all Contracting Parties to the EEA Agreement.[21]

(29) In order to enable the manufacturing and sale of the merchandising products, Nike, generally by means of one of its FBUs, grants a manufacturing and distribution licence for these rights either directly or indirectly as follows:

(1) Direct licensing: whereby Nike grants a direct licence over a club's intellectual property rights to a third party for the manufacture and sale of certain products bearing one or more of that club's intellectual property rights. Although the licensing contracts often indicate a list of territories in which the licensee should focus its marketing efforts, the licences granted are normally non-exclusive. A common form of wording in such licensing agreements reads as follows:

[Direct quote from license agreement][22]

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21 Co-branded products and other products featuring one or more of Nike's registered trade marks, including the Nike word or Nike's Swoosh logo, do not form part of these merchandising products and are, in fact, sold by means of a selective distribution system [Description of supply chain process for cobranded products]. For the purposes of this case, co-branded products and other products including the Nike word or Nike's Swoosh logo are not deemed to be licensed merchandise and are thus not part of the scope of this Decision.

22 See […] agreement […], Section […]. A particular example of this clause can be found in […].

(2) Indirect licensing: at times instead of licensing the rights directly, Nike grants a licence over the relevant intellectual property rights to a third party which entitles that party to further sub-license the rights granted to it. This party, often referred to as a "master licensee", will in turn grant sub-licences to third parties for the use of the concerned intellectual property rights in the manufacture and sale of certain products bearing one or more of that club's intellectual property rights. Nike's agreements with the master licensees explicitly establish that "*nothing in this Contract shall render one party the agent of the other*".[23] As with direct licensing agreements, master licence agreements are also usually non-exclusive and contain a list of territories in which the sub-licences may be granted. The agreements for the sub-licences in turn establish as their territory a part or the entirety of the territory allocated to the master licensee as its territory. Agreements with master licensees are at times used for the licensing of rights by FCBM, and were also used by MUML and JM in the past.[24] Master licence agreements are used […] frequently than direct licensing agreements.[25]

(30) Regardless of the system used for the granting of licences, the conditions for the licence are typically included in an agreement also governing the distribution of the products on which the licensed intellectual property right will be applied.

(31) As such, while granting a licence to use the intellectual property rights, Nike's merchandising agreements at the same time also set out the terms and conditions to be followed by the final licensee when selling and distributing the products to the wholesalers and retailers of its choice, subject to certain limitations as regards territory, quality, etc. Pricing decisions are left to retailers and licensees.[26]

(32) In other words, the licensee both manufactures (or further sub-contracts the manufacture of) the licensed products and distributes such products.

(33) Other elements consistently included in Nike's merchandising agreements are the following:

(1) <u>Type of product(s) concerned</u>: Nike's agreements for merchandising often specify the types of products or categories of products on which the licensee will be able to apply the licensed intellectual property rights for its subsequent manufacture and/or sale of the licensed merchandise products. The types of products or categories of products covered by licensing agreements are broad.[27] The agreements also typically provide that the licensee shall apply certain security labels to each product in accordance with certain brand guides issued by Nike. These security labels constitute a method to protect the licensed intellectual property and to differentiate official licensed products from

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23 […].

24 On […], Nike confirmed that at that time ASRM, FCIM and FFM had no master licensees in the EEA. [Details of Nike's licensing strategy].

25 By the end of 2016, FCBM had […] Master Licences in place worldwide, but only […] covered the sale or manufacture of products in the EEA. […].

26 […].

27 By means of illustration of such categories, as of September 2017 FCBM had […] categories of products for which licences had been granted. […].

unlicensed and counterfeit products. Examples of security labels are security hologram labels and back neck labels.[28]

(2) Territorial scope: Nike generally grants all licences in the EEA on a non-exclusive basis.[29] Licensing agreements generally specify certain territories where the licensee will enjoy "*the non-exclusive right to market, distribute and sell the Products*" and further state that "*all rights that are not expressly granted to the Licensee in this Contract are reserved to [Nike]*".[30]

(3) Channels for distribution of the products: Nike's licensing agreements often include […].[31] Contrary to co-branded and Nike-branded products, the distribution of licensed merchandise products does not follow a selective distribution system.[32]

(4) Duration of the agreement: Nike's licensing agreements are often concluded for [0-5] years, although agreements would also be concluded for shorter[33] or longer[34] periods of time.

(5) Financial compensation to be paid by the licensee: Nike's licensing agreements provide for licensees to pay Nike a certain amount in consideration for the grant of the licence for the intellectual property rights. Licensees often submit these payments to [Details of financial compensation to be paid by the licensee], or to [Details of financial compensation to be paid by the licensee]. [Details of financial compensation to be paid by the licensee].[35] The compensation paid by licensees to Nike is made up of two elements:

– Royalties: Nike licensing agreements typically provide for licensees to pay royalties to Nike as compensation for the licence of the club's intellectual property rights. The amount of royalties to be paid is normally calculated as a percentage of the products' net sales[36] during a certain period ([Details concerning calculation of royalties]), which also represents the frequency for the payment of royalties.[37] [Details concerning calculation of royalties].[38] Licensees would typically be required to report the sales and corresponding royalties periodically by means of so-called royalty reports.

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28 […], clauses […].

29 […].

30 […], clauses […]. The non-exclusive character of the agreements is also confirmed by clause […], where it is established that the following clause should be included in exclusive agreements "*[w]here any of the rights granted in clause A (a) are stated to be exclusive, [Nike] shall not itself exercise or grant any third party the right to exercise such rights in the Territory during the Contract Period in respect of Products…*". By establishing an exception to the general rule and *a contrario*, the sentence "*[w]here any of the rights granted in clause A (a) are stated to be exclusive*" implies that the contract in itself is not-exclusive.

31 See, for example, clause […].

32 […].

33 See, e.g., […].

34 See, e.g., […].

35 […].

36 [Details concerning calculation of royalties].

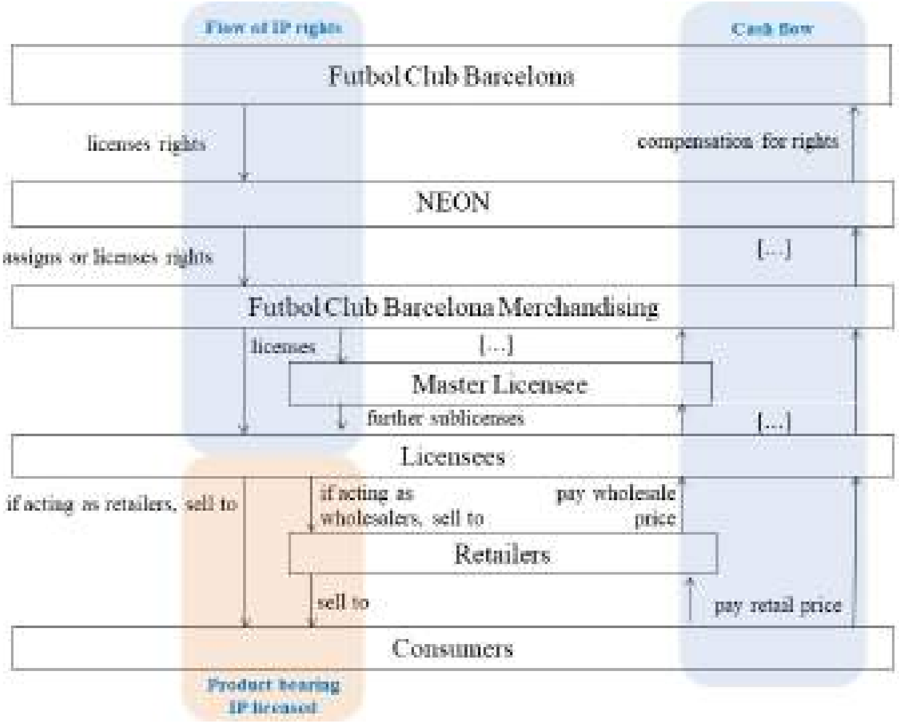
37 Clause […].

38 […].

– Minimum guarantee: Nike licence agreements generally also include a minimum royalty guarantee. This minimum guarantee (often referred to simply as "MG") is an upfront payment calculated on the basis of the forecasted royalties to be paid by the licensee for its sales within the territory throughout the contract duration. On the basis of those numbers, the minimum guarantee for the territory will then be set at […], or in the case of a master licensee, at […]. The minimum guarantee is normally progressive, increasing every year of the agreement. Where agreements include a minimum guarantee, it is often the case that the licensee will not need to pay royalties on sales in the contract territory until the sum of the royalties on the products sold, exceeds the amount of the minimum guarantee. Once that threshold is reached, the usual royalties on each product will need to be paid.[39]

(34) Figure 1 provides by way of example an overview of the different parties involved in the agreements governing the licensing of the FC Barcelona intellectual property, as well as of the monetary and contractual relationship between them.

Figure 1. Illustrative overview of the licensing of the FC Barcelona brands



(35) In connection with the contractual relationship as set in Nike's merchandising agreements and the royalty reporting and payments, Nike and its FBUs also maintain frequent contacts with its licensees by other means. These contacts occur naturally in relation to any and all matters of the development of a licence agreement, including invoicing and debt collection, product approval, changes to the market situation, the existence of counterfeit products, and new commercial opportunities.

(36) The first step for the distribution of the products normally consists in the product approval process. Once an agreement is concluded, Nike and the licensee normally

39 […].

engage in a discussion process regarding different aspects of the products to be manufactured and sold. These discussions typically cover the physical characteristics of the product, such as its style, its colours or its quality. The licensee also needs to submit a physical sample in order to obtain Nike's final approval for the commercialisation of the product.[40]

(37) Once approved, the licensee becomes entitled to manufacture and distribute the product in the market as established in the agreement signed with Nike. Nike's licensees often distribute the products at a wholesale level, although at times they also retail directly to consumers.

(38) It is also common for Nike to remain in contact with licensees throughout the duration of the agreement. The purpose of these contacts is varied, but often relates to the interpretation or modification of certain aspects of the agreements, such as, for example, questions regarding the launch of certain products, extension of territories, payment of royalties or to better understand potential licensing opportunities outside their domestic territories.

(39) Nike often retains a right to audit licensees as regards the licensee's compliance with its agreements. If applied, audits would be conducted by external parties, their main aim being to detect breaches of the licensee's contractual obligations, as well as to more broadly assess the efficiency of the business operations of the licensee.

5.3. Practices restricting out-of-territory sales of licensed merchandise

(40) During the relevant period, a series of practices restricting active and passive cross-border sales of licensed merchandise were put in place throughout Nike's football merchandising business. These practices concerned both offline and online sales of licensed merchandise products throughout the EEA.

(41) To varying degrees, these types of practices were present in all six of Nike's merchandising businesses throughout the relevant period. They were, however, more prominent for FC Barcelona, consistent with the larger size of the club's merchandising business and with the fact that its outreach and fanbase go far beyond its domestic territory.

(42) These practices were developed and implemented by contractual and non-contractual means discouraging, and at times explicitly preventing, licensees from distributing the licensed merchandise products to customers outside the territory.[41] Delivery of licensed products to customers who are established within the licensee's territory, but could eventually sell the products outside the territory, was also at times prevented by Nike.

(43) In addition to the explicit contractual restrictions, Nike would at times request licensees to limit their activities to the territories assigned to them in their licensing agreements. For example, at least FCBM could become aware of a licensee's sales (or attempts to sell) out of the contractual territory by different means: complaints by other licensees or distributors about sales of products in their territory, licensees'

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40 […].

41 Throughout this decision, references to "out-of-territory", "outside the territory" or similar terms are to be understood as referring to transactions between a licensee or master licensee and a third party who is located in the territory of one of the Contracting Parties to the EEA Agreement, but outside the territory(ies) allocated to the licensee or master licensee in the licence agreement(s).

requests to sell out of the territory, or direct observation in the market. Nike was then able to react to these situations and would at times request licensees to cease or avoid any cross-border sales of licensed products to the territories of EEA Contracting Parties that would not fall within the territory assigned to them.

5.3.1. Direct measures restricting out-of-territory sales by licensees

(44) During the relevant period a series of practices restricting active, passive and online cross-border sales of licensed merchandise were at times implemented throughout Nike's football merchandising business.

5.3.1.1. Prohibition of out-of-territory passive sales

(45) Throughout the relevant period, Nike at times included in its licensing agreements clauses explicitly prohibiting licensees from supplying their licensed merchandise products outside the territory allocated to them in their agreements. The prohibition in this clause applied regardless of whether the sale was solicited by an out-of-territory customer or if it was unsolicited, and its most common wording was typically as follows:

"The Licensee shall not, either directly or indirectly, sell or otherwise make available Products to any person, firm or corporation in any place or country outside the Territory […]."[42]

(46) A similar wording, albeit adding the words "*without [Nike's] consent*" at the end of the clause was included in the Nike template agreement deployed in 2011 throughout all FBUs.[43]

(47) Despite the fact that the 2011 template agreement mentions that these types of clauses are to only be included in agreements […],[44] evidence confirms that the prohibitions were also at times included in agreements signed after 2011 and concerning the EEA.[45]

(48) In addition to these contractual provisions, Nike employees at times also called licensees' attention when finding Nike's products outside their domestic territories and asked them to stop sales of such products outside their domestic territories.[46]

5.3.1.2. Prohibition of out-of-territory active sales

(49) As explained in the preceding recitals, Nike's agreements at times explicitly prohibited licensees from "*directly or indirectly, sell[ing] or otherwise mak[ing] available Products to any person, firm or corporation in any place or country outside the Territory […]*."

(50) In addition to this contractual clause, there is also evidence of several complaints by licensees to Nike about active sales into their allocated territories and of Nike's intervention to stop such sales. At times, Nike employees would also actively approach licensees to inquire about the reasons why their products were being found in other territories. Both solicited and unsolicited requests for purchasing products

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42 See, e.g., Clause […] the agreement […] comprising a territory limited to Spain. […].

43 […].

44 […].

45 See, e.g., Clauses […] the agreement […] with a territory comprising France, Luxembourg, […]. Agreements with these clauses remained in force until the end of the relevant period. […].

46 […].

coming from outside the licensee's territory would at times be refused by the licensees receiving such requests. Such refusals of out-of-territory sales would at times follow explicit instructions from certain Nike employees.[47]

(51) The prohibition to engage in out-of-territory active sales also applied at times to licensees whose agreements did not contain any explicit contractual restrictions of out-of-territory sales.[48]

5.3.1.3. Prohibition of out-of-territory online sales

(52) Online out-of-territory sales were also at times explicitly prohibited in Nike's licensing agreements. Such a prohibition appears first in Nike's 2011 template agreement[49] and is to be found in agreements from January 2012 onwards. The conventional wording of such clauses is as follows:

"Nothing […] shall prevent the Products being displayed or marketed on a website that is accessible outside of the Territory provided that such website does not allow any person, firm or corporation in any place or country outside the Territory to purchase such Products."[50]

(53) As with the clauses referenced in the two preceding Sections, despite the fact that the 2011 template agreement mentions that this prohibition on out-of-territory online sales is only to be included in agreements […], such clause was also at times included in agreements concerning the EEA.[51]

5.3.1.4. Obligation to refer orders for out-of-territory sales to Nike

(54) In addition to the aforementioned prohibitions of passive, active and online out-of-territory sales, Nike's merchandising agreements at times also included a clause requiring the licensee to refer to Nike all requests for the purchasing or delivery of products from outside the licensee's territory. The prevailing phrasing of this obligation in Nike's agreements is as follows:

"The Licensee shall refer to [Nike] all enquiries it receives for the Products for sale or ultimate delivery outside the Territory."

(55) Despite the fact that the 2011 template agreement mentions that this referral obligation is only […],[52] the clause was also at times included in agreements signed after 2011 and concerning the EEA.[53]

(56) The evidence confirms that licensees at times referred out-of-territory requests to Nike and requested Nike's permission to respond to unsolicited purchasing requests coming from outside their territories. Depending on the impact of out-of-territory

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47 […].

48 See, e.g., the conversation included in […], where Nike confirms having reprimanded a licensee for selling outside its allocated territories. The contract governing the licensee's relationship with Nike does not contain any territorial restrictions. […].

49 […].

50 See, e.g., Clause […] the agreement […], encompassing the territories of the Netherlands, Belgium, Luxembourg, Germany and Austria. […].

51 See, e.g., Clause […] the agreement […] with a territory comprising France, Luxembourg, […]. Agreements with this clause remained in force until the end of the relevant period. […].

52 […].

53 See, e.g., Clauses […] the agreement […] with a territory comprising France, Luxembourg, […]. Agreements with these clauses remained in force until the end of the relevant period. […].

sales on the licensees from other territories, Nike would assess whether to grant its approval. Those requests to sell outside the domestic territories were often denied.[54]

5.3.1.5. Clawback of royalties and revenues deriving from out-of-territory sales

(57) Since at least 2011[55] Nike started introducing in some of its agreements clauses allowing it to claw back all revenues generated by licensees in breach of the prohibitions of out-of-territory sales. A common wording of such clause is shown in the excerpt below:

13. Sales outside the Territory

[…]

13(d).- If any Products are sold in breach of this clause 13 then, without prejudice to its other rights and remedies, FCBM may require the Licensee to pay to FCBM by way of liquidated damages all Net Sales generated by such transactions. The parties confirm that this sum represents a genuine pre-estimate of the loss that FCBM would suffer if the Licensee were to sell Products in breach of this clause 13."[56]

5.3.1.6. Double royalties for out-of-territory sales

(58) At times, Nike's licensing agreements would establish that the licensee would need to pay double royalties if it were in breach of its obligations regarding out-of-territory sales. This clause seems to have been for the first time included in licensing agreements in 2015 as shown in the agreement quoted:

"13.- Sales outside the Territory

[…]

13(e).- If a product is sold in breach of this clause 13, [and as] pre-established compensation for damages, FCBM may ask the Licensee double the royalties [applicable to inside-territory sales] on such Net Sales. […]"[57]

(59) At times, licensees would become liable for these double royalties when they would not comply with the referral obligation, with the out-of-territory online restriction or where it would sell its products to territories allocated to exclusive licensees.[58]

(60) Contrary to the clawback clauses described in Section 5.3.1.5 which can be found in the agreements for several of the FBUs, the double-royalty clauses seem to have only been utilised in the agreements concerning FCBM.[59]

(61) Both the clawback and the double-royalty clauses would be triggered when the licensee would engage in non-permitted out-of-territory sales. Although these non-permitted out-of-territory sales would originally be designed to encompass […], they would at times also be included in agreements for EEA territories.[60]

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[54] […].

[55] Clawback clauses are found in the merchandising agreements of the different clubs since the beginning of their relationship with Nike. See, e.g., […].

[56] See, e.g., Clause […] the agreement […] with a territory comprising Spain, Portugal, and […].

[57] See, e.g., Clause […] the agreement […] with a territory comprising Spain, Portugal and […].

[58] This is the wording of all double royalties clauses identified by Nike. […].

[59] […].

[60] In a sample of […] agreements entered into by FCBM, Nike found that there is no penalty under any of the agreements for out-of-territory sales permitted by the licence agreements. As to penalties for non-

5.3.2. Indirect measures restricting out-of-territory sales by licensees

(62) In addition to explicitly prohibiting out-of-territory sales, a series of both contractual and non-contractual practices were also at times implemented throughout Nike's football licensing business as an indirect way to implement the out-of-territory restrictions.

(63) When enforced in such a way, these practices were aimed at monitoring and implementing compliance with the restrictions regarding out-of-territory sales within the EEA.

(64) Most measures described in this Section represent tools generally used by companies in the normal course of their activities. The evidence on file, however, confirms that Nike used those tools to also ensure compliance with the restrictions concerning out-of-territory sales presented in Section 5.3.1.

5.3.2.1. Threats of contract termination for out-of-territory sales

(65) In addition to the explicit clawback or double-royalty clauses, Nike's licensing agreements also grant a termination right in favour of either party if "*the other party breaches this Contract provided that if the breach is capable of remedy (being actual remedy as opposed to remedy by payment of damages or compensation) the notice shall only be given if the other party has failed to remedy the same within 30 days of having been given notice specifying the breach and requiring it to be remedied.*"[61]

(66) On the basis of this clause, at times Nike would refuse to renew or terminate the agreements for those licensees selling outside their allocated territories.[62]

(67) Although out-of-territory sales would at times not suffice in and of themselves to refuse the renewal of or to terminate an agreement,[63] from the evidence available Nike considered out-of-territory sales as a relevant reason not to renew the agreements with certain of its licensees who were allegedly selling outside their territories. Falling short of exercising its right to terminate or not renew the merchandising agreements, Nike would at times use the threat of termination or non-renewal of the agreement in order to establish compliance with the prohibitions on out-of-territory sales.[64]

(68) This non-renewal policy was also known by at least some of Nike's licensees.[65]

5.3.2.2. Limitation of the amount of security labels for out-of-territory sales

(69) Nike would at times limit the number of security labels (holograms) that licensees required in order to guarantee the "official" character of their products. As explained in point (1) of recital (33), during the normal conduct of its business, licensees would need to request from Nike the security labels that it would require in order to make

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permitted out-of-territory sales (including some of the sales flagged in Section 5.3.1), out of the […] agreements, […] do not provide for any specific economic consequence, whereas only […] provide for double royalties and […] contain clawback clauses. During the review of these agreements, Nike also uncovered materials indicating that FCBM would have waived the application of such penalties in relation to […] licensees. […].

61 See, e.g., Clause […].

62 […].

63 […].

64 […].

65 […].

all of its products "official". In addition, these security labels would allow Nike to control the number of products that each licensee would intend to put in the market and permit it to, among others, have an estimate of the royalties that it would receive in the future from the licensee in question.

(70) Despite the legitimate purpose for which security labels are typically intended, the evidence on file also suggests that Nike at times went beyond such legitimate purpose and used security labels as a tool to monitor if licensees were engaging in out-of-territory sales.[66] Nike would also use security labels as a means to establish compliance with such prohibition by refusing to supply the security labels requested by a licensee if Nike feared that sales could be going towards other territories in the EEA.[67]

5.3.2.3. Conduct of audits to ensure compliance with out-of-territory sales restrictions

(71) The evidence also confirms that Nike would at times implement the practices presented in Section 5.3.1 by conducting audits into the business dealings of licensees selling outside their allocated territories. In its licensing agreements Nike would often reserve itself the right to audit licensees in order to ensure an appropriate use of its brands. Although the main objective of audits would not be to monitor licensees engaging in out-of-territory sales, Nike would at times use audits or the threat thereof in order to ensure that licensees would limit their activities to the territories contractually allocated to them.[68]

(72) The evidence on file also reveals that the conduct of audits or the threat thereof was indeed used at times as a tool to obtain compliance with out-of-territory restrictions throughout Nike's network of licensees.[69]

5.3.3. Restrictive practices implemented vis-à-vis master licensees

(73) As described in point (2) of recital (29), Nike also works with a limited number of master licensees who are entrusted with the search of potential licensees and the conclusion of agreements with them on behalf of Nike.

(74) Master licensees play two main roles. First, master licensees act as licensees, insofar as they can "*apply the Licensed Intellectual Property in the design and manufacture of* [Direct quote from license agreement] *products*" in order "*to distribute, market and sell the Products in the Territory only*." The same restrictive clauses presented in Section 5.3.1 also apply at times to master licensees.[70] Secondly, master licensees are also entitled to sub-license the rights granted to them by Nike.[71]

(75) In the discharge of this latter role, master licensees carried out an important role in the enforcement of the restrictions outlined in this Section. As a matter of fact,

66 […].
67 […].
68 […].
69 […].
70 See, e.g., Clause […] the Agreement […], comprising the EEA territories of Bulgaria, Croatia, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. […].
71 See, e.g., Clause […]. Master licensees are also prevented by contract from entering into [Direct quote from license agreement].

master licensees were often the ones detecting non-compliance and were often involved in disciplining non-complying licensees.[72]

(76) In addition to their monitoring role as contact points with some licensees, Nike's agreements with master licensees at times contained clauses aimed at disincentivising or preventing sales outside the territories allocated to the respective master licensee.

(77) These clauses, described immediately below, often mimicked the clauses included in Nike's licensing agreements and presented in Section 5.3.1. In fact, Nike's agreements with its master licensees follow a similar structure to those entered into by Nike with licensees.

(78) At least since 2009[73] the agreements with master licensees at times contained clauses prohibiting the master licensee from granting sub-licences allowing for the sale of products outside their allocated territories. A common wording of such a prohibition is the following:

"The Master Licensee shall not grant to any third party the right to market, advertise, sell, offer for sale or otherwise make available Products to any person (including, for the avoidance of doubt, any firm or corporation) in any place or country outside the Territory, or to any person (including, for the avoidance of doubt, any firm or corporation) which the Master Licensee (or Sub Licensee, as if relevant) knows or ought reasonably to know, intends to sell or otherwise make available the Products outside the Territory in contravention of clauses 15 (b) and (c)." [74]

(79) In relation to this clause, Nike's licensing agreements with master licensees at times contained a contradiction: whereas clause 15(a) – quoted immediately above – precludes the master licensee from granting any third party distribution and marketing rights outside the territory, it does so adding the words "*in contravention of clause 15(b) and (c)*". First, from the contractual wording it is not clear whether this condition would apply to both premises of clause 15(a), or only to the second premise. Second, whereas clause 15(b) restricts only active sales into exclusive territories and clause 15(c) concerns sales […], agreements containing this clause often are accompanied by a Schedule stating that the master licensee shall include in sub-licence agreements an obligation on the sub-licensee not to sell directly or indirectly outside the territory. This Schedule is phrased as shown:

"Each sub-licence agreement shall require the Sub Licensee not to directly or indirectly market, advertise, sell or otherwise make Products available to any person, firm or corporation in any place or country outside of the Territory (save to the extent that sales take place from retail outlets within the Territory to consumers, outside of the control of the Sub Licensee), or to any person, firm or corporation which the Sub Licensee knows or ought reasonably to know, intends to sell or otherwise make available the Products outside of the Territory."[75]

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72 […].

73 See, e.g., Clause […] the agreement […] with a territory comprising Denmark, Finland, Iceland, Norway and Sweden. […].

74 *Ibid*.

75 See, e.g., Clause […] the agreement […] with a territory comprising Denmark, Finland, Iceland, Norway and Sweden. […].

(80) Additionally as shown in the next recital, Nike's agreements with master licensees at times established a referral obligation similar to the one described in Section 5.3.1.4:

"[Nike] may consent on a case-by-case basis to the Master Licensee sublicensing the rights in clauses A 1 (a), (b) and (c) in relation to a "direct -to - retail" deal with a retailer head-quartered within the Territory but which will exercise the rights granted outside the Territory subject to this Contract. […]"[76]

(81) Regarding the restrictions on out-of-territory sales, it must also be noted that even if Nike's agreements present clauses that formally might be interpreted as not limiting passive or online sales, the agreements entered into by the master licensees with their respective sub-licensees at times explicitly prohibited such types of sales. In fact, the agreements between master licensees and licensees follow a similar structure and are largely similar to those entered into by Nike directly with licensees. As shown in the excerpt below, the clauses establishing such prohibitions reproduced the restrictions on out-of-territory sales outlined in Section 5.3.1.

"13(a).- The Licensee shall not, either directly or indirectly, sell or otherwise make available (including marketing) Products to any person, firm or corporation in any place or country outside the Territory, or to any person, firm or corporation which the Licensee knows or ought reasonably to know, intends to sell or otherwise make available the Products outside the Territory without Master Licensee's written consent.

13(b).- The Licensee shall refer to Master Licensee all enquiries it receives for the Products for sale or ultimate delivery outside the Territory.

13(c).- Nothing in this clause 13 shall prevent the Products being displayed or marketed on a website that is accessible outside of the Territory provided that such website does not allow any person, firm or corporation in any place or country outside the Territory to purchase such Products.

13(d).- If any Products are sold in breach of this clause 13 then, without prejudice to its other rights and remedies, Master Licensee may require the Licensee to pay to Master Licensee by way of liquidated damages all Net Sales generated by such transactions. The parties confirm that this sum represents a genuine pre-estimate of the loss that Master Licensee would suffer if the Licensee were to sell Products in breach of this clause 13."[77]

(82) Although these clauses were initially intended to be used […], evidence confirms that they were also used at times for agreements within the EEA.[78]

(83) As with licensees, Nike's relationships with the sub-licensees of its master licensees also involved frequent contact. In addition to the contractual restrictions on out-of-territory sales, the obligation on master licensees to refer all out-of-territory requests to Nike is also confirmed by the correspondence available.[79]

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[76] See, e.g., Clause […] the agreement […] with a territory comprising Denmark, Finland, Iceland, Norway and Sweden. ID443. In this clause, the use of the term "consent" seems to require a previous notification / referral from the licensee since, otherwise, Nike would not be able to consent to these out-of-territory sales.

[77] See, e.g., Clause […] the agreement […] with a territory comprising only Poland. […].

[78] *Ibid.*

[79] […].

5.3.4. Obligation to pass on the restrictions regarding out-of-territory sales

(84) Supplementing the prohibitions on active and passive sales included in its agreements, throughout the relevant period Nike also at times included clauses explicitly prohibiting licensees from supplying their licensed merchandise products to customers who could be selling or intending to sell those outside the allocated territories. The wording of such pass-on obligations was typically as follows:

"The Licensee shall not, either directly or indirectly, sell or otherwise make available Products to […] any person, firm or corporation which the Licensee knows or ought reasonably to know, intends to sell or otherwise make available the Products outside the Territory."[80]

(85) A similar wording, albeit adding the words "*without [Nike's] consent*" at the end of the clause is included in the Nike template agreement deployed in 2011 throughout all FBUs.[81] Although this template agreement mentions that this clause is to only be included in agreements for […],[82] evidence confirms at times the inclusion of such clause in agreements signed after 2011 and concerning the EEA.[83]

(86) This obligation to pass on the restrictions down in the chain of agreements is also evidenced at times in Nike's communications with its master licensees and licensees.[84]

(87) In addition to calling the licensee's attention to the issue and rather than relying on master licensees, Nike would at times also intervene in order to ensure that customers would stop purchasing products from licensees in other EEA territories.[85]

(88) An obligation on licensees to inform its customers about the restrictions seems to have also been imposed at times throughout the relevant period.[86]

6. LEGAL ASSESSMENT

6.1. Legal context of licensing agreements

(89) Merchandising is a tool that is widely used in order to increase the attractiveness of a product or service. By means of a licensing agreement, one party (the licensor) allows another party (the licensee) to use one or more of its intellectual property rights in a certain product or service. The intellectual property rights most commonly used on merchandising products are trade marks, but other rights such as copyright, design rights or image rights may also be involved.

(90) Licences are often granted on a non-exclusive basis in order to increase the number of merchandising products in circulation in the market and to increase territorial coverage.

(91) Exclusive licences are at times also granted, but would normally be accompanied by a large minimum guarantee. Despite the use of non-exclusive licences, licensors

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80 See, e.g., Clause […] the agreement […], with a territory comprising only Spain. […].
81 […].
82 […].
83 See, e.g., Clause […] the agreement […] with a territory comprising France, Luxembourg, […].
84 […].
85 […].
86 […].

often try to avoid overlaps between different territories. However, this attempt to avoid overlaps falls short of creating a *de facto* exclusive environment both because some overlaps still remain (albeit only a limited number) and because the licensor still retains the ability to appoint additional licensees in the territory.

(92) The Commission finds that the practices investigated in this case, including the restrictive clauses in agreements for the licensing and distribution of merchandising products, amount to restrictions prohibiting or limiting the cross-border supply of goods. Irrespective of whether intellectual property rights are exhausted,[87] such restrictions fall under Union competition law.

(93) In particular, Union courts have acknowledged their competence to assess the legality of such clauses under Union competition law and have found that a misuse of intellectual property rights may amount to an infringement of competition rules.[88] By reference to earlier case-law concerning the distribution of pharmaceutical products, the Court of Justice has also found that restrictions on cross-border sales of broadcasting services constitute by object infringements, on the basis that they allow "*all competition between [licensees] in the field of those services to be eliminated*".[89]

6.2. Application of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement

6.2.1. The Treaty and the EEA Agreement

(94) Article 101(1) of the Treaty prohibits as incompatible with the internal market agreements between undertakings, decisions by associations of undertakings and concerted practices that (i) may affect trade between Member States and (ii) have as their object or effect the prevention, restriction or distortion of competition within the internal market, unless they meet the conditions for an exemption set out in Article 101(3) of the Treaty.

(95) Article 53(1) of the EEA Agreement prohibits as incompatible with the functioning of the EEA Agreement agreements between undertakings, decisions by associations of undertakings and concerted practices that (i) may affect trade between Contracting Parties to the EEA and (ii) have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement, unless they meet the conditions for an exemption set out in Article 53(3) of the EEA Agreement.

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87 The doctrine of regional exhaustion establishes that once products or services bearing a certain intellectual property right have been placed in the EEA by or with the consent of the rightholder, rightholders can no longer use their intellectual property rights to prevent a further distribution of those goods within the Area. EU Courts have a long standing tradition of recognising the exhaustion of trade mark rights. See in this respect Judgment of the Court of 16 July 1998, C-355-96, *Silhouette International Schmied v Hartlauer Handelsgesellschaft*, EU:C:1998:374. EU Courts have also acknowledged that the distribution right enjoyed by the copyright holder is also exhausted with the first sale in the EEA of the original of a work or copies thereof by the rightholder or with his consent. See in this respect, Judgment of the Court of 3 July 2012, *UsedSoft GmbH v Oracle International Corp*, C-128/11, EU:C:2012:407.

88 Judgment of 23 May 1978, *Case 102/77 Hoffman-La Roche v Centrafarm*, ECLI: EU:C:1978:108.

89 Judgment of 4 October 2011, *Football Association Premier League and Others v QC Leisure and Others*, C-403/08, and *Karen Murphy v Media Protection Services Ltd*, C-429/08, EU:C:2011:631, paragraph 142, Judgment of 12 December 2018, *Groupe Canal + v Commission*, T-873/16 ECLI:EU:T:2018:904, paragraph 50.

(96) The conduct described in Section 5 of this Decision concerns the territory of the Union and the EEA. Insofar as the conduct affected trade between Member States, Article 101 of the Treaty is applicable. As regards operation of those agreements and concerted practices in Norway, Iceland and Liechtenstein and its effect on trade between the Union and those countries, it falls within Article 53 of the EEA Agreement.

(97) In this case, the Commission is the competent authority to apply both Article 101 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the conduct had an appreciable effect on trade between Member States.

(98) References in the succeeding recitals of this Section to Article 101 of the Treaty, to effect on trade between Member States, or to competition within the internal market are to be taken to include, respectively, Article 53 of the EEA Agreement, effect on trade between Contracting Parties to the EEA Agreement, and competition within the territory covered by the EEA Agreement.

6.2.2. Agreements and/or concerted practices between undertakings

6.2.2.1. Principles

(99) In order for there to be an agreement for the purposes of Article 101(1) of the Treaty, it is sufficient that at least two undertakings have expressed their joint intention to conduct themselves on the market in a specific way.[90] Although Article 101(1) of the Treaty draws a distinction between the concept of concerted practices and agreements between undertakings, the object is to bring within the prohibition of that Article a form of co-ordination between undertakings by which, without having reached the stage where an agreement has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.[91]

(100) The concepts of an agreement and a concerted practice are fluid and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other.[92]

6.2.2.2. Application to this case

(101) The conduct described in Section 5 presents all the characteristics of agreements and/or concerted practices entered into between undertakings, namely between Nike, on the one hand, and licensees and master licensees on the other. Nike enforced the out-of-territory restrictions by means of contractual agreements spanning the whole duration of the infringement. Moreover, as explained in recital (51) for instance, even in the absence of explicit contractual clauses Nike and its licensees and master licensees agreed to behave in such a manner as to restrict out-of-territory sales.

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90 Judgment of 11 January 1990, *Sandoz Prodotti Farmaceutici v Commission*, C-277/87, EU:C:1990:6, paragraph 13; Judgment of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242, paragraphs 67 and 173.

91 Judgment of 14 July 1972, *ICI v Commission*, C-48/69, EU:C:1972:70, paragraph 64; Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 26.

92 Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 81.

6.3. Restrictions of out-of-territory active and passive sales as restrictions of competition by object

6.3.1. Principles

(102) Certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.[93] Such reasoning derives from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.[94]

(103) Consequently, certain types of conduct such as those limiting parallel trade or partitioning the EEA along national markets,[95] may be considered so likely to have negative effects, in particular on the price, choice, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) of the Treaty, to prove that they have actual effects on the market.[96]

(104) In *Consten and Grundig*[97], the Court established a distinction between the existence and the exercise of intellectual property rights with regard to an agreement for the assignment of a trade mark aimed at partitioning the internal market. The Court held that rights under national trade mark law, such as the right to assign the trade mark, cannot be exercised so as "to frustrate the Community's law on cartels".

(105) In the same case the Court held that agreements restricting out-of-territory active and passive sales make it possible for undertakings to charge for the products in question prices which are sheltered from all effective competition by artificially maintaining separate national markets within the EEA.[98]

(106) Union Courts have held that agreements aimed at partitioning national markets along national borders or making the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) of the Treaty.[99] Moreover, the fact that the clauses are not strictly enforced is irrelevant since the very existence of those clauses may create a "*visual and psychological*" background contributing to the division of the markets.[100]

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93 Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 113.

94 Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 114.

95 Judgment of 4 October 2011, *Football Association Premier League and Others v QC Leisure and Others*, C-403/08, and *Karen Murphy v Media Protection Services Ltd*, C-429/08, EU:C:2011:631, paragraph 139.

96 Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 115.

97 Judgment of 13 July 1966, *Consten and Grundig v Commission of the EEC*, Joined cases 56 and 58-64.

98 Judgment of the Court of 13 July 1966, *Consten and Grundig v Commission of the EEC*, Joined cases 56 and 58-64, p.343.

99 Judgment of 4 October 2011, *Football Association Premier League and Others v QC Leisure and Others*, C-403/08, and *Karen Murphy v Media Protection Services Ltd*, C-429/08, EU:C:2011-631, paragraph 139.

100 Judgment of 1 February 1978, *Miller v Commission*, Case 19/77, EU:C:1978:19, paragraph 7.

(107) Even an agreement which does not explicitly contain an export ban or confer absolute territorial protection on a distributor may be found to restrict competition if such is its purpose or if it makes parallel imports more difficult by subjecting them to treatment less favourable than that reserved for official imports or by restricting the buyer's freedom to use the goods supplied in accordance with his own economic interests.[101] In this respect, Union Courts and the Commission's case-practice have found that certain types of conduct falling short of an outright prohibition on out-of-territory sales also constitute anticompetitive infringements. These include situations where letters are sent discouraging or prohibiting exports,[102] where export is permitted only if the consent of the producer is obtained,[103] where the producer must be contacted before exporting via the internet,[104] where an agreement requires a distributor to pass on any customer enquiries coming from outside the contract territory to the producer,[105] where discounts are reduced or additional fees charged in the event of sales outside the destination territory,[106] or where a producer threatens to terminate or actually terminates contractual arrangements with distributors or dealers which sell outside their allocated territory.[107]

6.3.2. Application to this case

(108) Through the set of practices restricting out-of-territory sales described in Sections 5.3.1 to 5.3.4, Nike restricted the ability of its licensees and master licensees to sell licensed merchandise cross-border, thereby restoring the divisions between national markets.

(109) Nike engaged in that restrictive behaviour by different direct means, including putting into practice different measures prohibiting or preventing licensees of its licensed merchandise products from concluding active and passive out-of-territory sales, both online and offline. In addition, Nike also required its master licensees to enforce and apply those restrictions vis-à-vis their sub-licensees on behalf of Nike. The system also required licensees to keep a tight grip on their customers in order to guarantee that the restrictions on out-of-territory sales would be respected by third parties too, whether or not they had a licensing agreement with Nike. Such practices, by their very nature, have as their object the restriction of competition within the meaning of Article 101(1) of the Treaty.

(110) Through those direct measures, both when implemented vis-à-vis licensees or master licensees and, when passed on to their customers, Nike aimed at ensuring a

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101 Opinion of Advocate General Tizzano delivered on 25 October 2005, *General Motors BV v Commission of the European Communities*, C-551/03 P, EU:C:2005:639, paragraph 72, quoting Joined Cases 96/82 to 102/82, 104/82, 105/82 and 110/82 *IAZ and Others v Commission*, EU:C:1983:310, paragraph 6.

102 Judgment of 26 October 2000, *Bayer AG v Commission*, T-41/96, EU:T:2000:242.

103 Judgment of 14 July 1994, *Parker Pen v. Commission*, T-77/92, EU:T:1994:85, paragraphs 37 and 44, and Judgment of 14 December 1983, *Société de Vente de Ciments v Kerpen & Kerpen*, C-319/82, EU:C:1983:374, paragraph 6.

104 Commission Decision of 16.07.2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement in Case No COMP/37.975 PO/Yamaha.

105 Judgment of 19 May 1999, *BASF Lacke + Farben AG v Commission*, T-175/95, EU:T:1999:99, paragraph 87.

106 Judgment of 9 July 2009, *Peugeot Nederland v Commission*, Case T-450/05, EU:T:2009:262, paragraph 47.

107 Judgment of 6 July 2000, *Volkswagen v Commission*, T-62/98, EU:T:2000:180, paragraph 44.

compartmentalisation of its licensing network so as to prevent cross-border sales between territories and customers within the EEA. All these practices are liable to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market.

(111) In addition to those direct measures restricting out-of-territory sales, Nike at times used a series of indirect measures to support the out-of-territory restrictions, as described in Section 5.3.2. Nike's use of these tools as an indirect means to support and reinforce the direct measures restricting out-of-territory sales, constitutes conduct that, by its very nature, in the context of the underlying territorial restrictions, has as its object the restriction of competition within the meaning of Article 101(1) of the Treaty.

6.4. Single and continuous infringement

6.4.1. Principles

(112) An infringement of Article 101 of the Treaty can result not only from an isolated act, but also from a series of acts or from a course of conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that Article. It follows from the express terms of Article 101 of the Treaty that an agreement may consist of a series of acts or a course of conduct[108].

(113) The Court has also held that when: "[…] *the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole*".[109] It also held that the existence of an "overall plan" (and thus a single infringement) can be established by a finding that the participants in a series of practices and/or agreements collusively aimed at restricting competition between them.[110]

(114) Accordingly, if the different actions form part of an "overall plan" because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[111] Furthermore, a complex infringement may properly be viewed as a single and continuous infringement for the time during which it existed.[112]

6.4.2. Application to this case

(115) The Commission concludes that the conduct described in Section 5 constitutes a single and continuous infringement of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement throughout the EEA.

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108 Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92P, EU:C:1999:356, paragraph 81.

109 Judgments of 7 January 2004, *Aalborg and others v Commission*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 258; Judgment of 21 September 2006, *Technische Unie v Commission*, C-113/04 P, EU:C:2006:593, paragraph 178.

110 See Judgment of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, EU:C:2006:592, paragraphs 162-163.

111 Judgment of 24 June 2015, *Fresh Del Monte Produce v. Commission*, Joined Cases C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 156.

112 See Judgment of 15 March 2000, *Cimenteries CBR v Commission*, Joined Cases T-25/95 and others, EU:T:2000:77, paragraph 3699.

(116) The restrictions implemented by Nike were all adopted in pursuit of an overall anti-competitive objective, namely to ensure a compartmentalisation of its licensing network in order to prevent cross-border sales to territories and customers of different EEA Contracting Parties.

(117) The evidence demonstrates that those practices formed part of an overall business strategy by Nike aimed at controlling the territories in which licensees could sell the products, to the detriment of competition. Those practices also led to a reduction in the choice available to consumers and, potentially, increased prices for certain products as a direct result from the lower level of competition.

(118) The existence of a single and continuous infringement in this case is further supported by the fact that Nike's conduct followed a similar pattern throughout the whole infringement and throughout the territories of all EEA Contracting Parties.

(119) Moreover, the individuals involved were essentially the same, and there was continuity and similarity in the types of conduct used to ensure compliance with those anti-competitive restrictions.[113]

(120) Additionally, despite the fact that each club was linked to a particular FBU, between 2011 and 2016 Nike created a centralised international licensing team based at the Nike European Headquarters in Hilversum, in the Netherlands, to provide support to the FBUs. This support included, to varying degrees, centralised financial, legal and management support.[114] The centralised team also included international licensing managers who were given the responsibility to sell rights and manage accounts in the non-domestic territories for the various FBUs.

(121) Furthermore, the types of contractual practice implemented throughout the different FBUs were largely similar, to the point of having common template agreements. Enforcement of the contractual restrictions was also carried out using the same means, as described in Section 5. Moreover, merchandising agreements were not always signed by the relevant FBUs. In some cases, agreements were signed by NEON itself instead.[115]

6.5. Effect on trade between Member States and between Contracting Parties to the EEA Agreement

6.5.1. Principles

(122) Article 101(1) of the Treaty is aimed at agreements and concerted practices which might harm the attainment of an internal market between Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market.[116] Article 53(1) of the EEA Agreement is similarly aimed at agreements and concerted practices which might harm the attainment of an internal market between Contracting Parties to the EEA Agreement.

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113 See, .e.g., e-mail threads contained in […].

114 […].

115 See, e.g., licensing agreement […], with a territory comprising only Spain. […].

116 Judgment of 15 March 2000, *Cimenteries CBR v Commission*, Joined Cases T-25/95 and others, EU:T:2000:77, paragraph 3930; Judgment of 28 April 1998, *Javico v Yves Saint Laurent Parfums*, Case C-306/96, EU:C:1998:173, paragraphs 16 and 17. See also Judgment of 13 July 1966, *Consten S.à.R.L. and Grundig v Commission of the EEC*, Joined Cases 56 and 58-64, pp.341-342.

(123) The Court of Justice has held that an agreement affecting trade between Member States and having an anticompetitive object by its nature constitutes an appreciable restriction of competition in violation of Article 101(1) of the Treaty, independently of any concrete effect that it may have.[117]

6.5.2. Application to this case

(124) Notwithstanding the non-exclusive nature of Nike's licensing agreements, by implementing a series of prohibitions on out-of-territory sales during the relevant period Nike prevented its licensees and master licensees from selling licensed merchandise products to customers outside their allocated territories, even if those sales were geared towards the territories of other EEA Contracting Parties.

(125) In addition to the outright prohibitions, a series of other practices were implemented in order to monitor and discipline licensees not complying with those limitations.

(126) The Commission concludes that Nike's conduct affected trade between Member States and had an anticompetitive object. Therefore, by its nature and independently of any concrete effect that it may have had, the conduct constituted an appreciable restriction of competition in violation of Article 101(1) of the Treaty.

6.6. Application of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement

6.6.1. Principles

(127) Article 101(1) of the Treaty may be declared inapplicable pursuant to Article 101(3) of the Treaty where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and the agreement or concerted practice does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, and (b) afford those undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(128) The Commission is empowered to apply Article 101(3) of the Treaty by regulation to certain categories of agreement falling within Article 101(1) of the Treaty, which can be regarded as normally satisfying all the conditions laid down in Article 101(3) of the Treaty. Commission Regulation (EU) No 330/2010[118] ("the Vertical Block Exemption Regulation") and Commission Regulation (EU) No 316/2014[119] ("the Technology Transfer Block Exemption Regulation") were adopted under that empowerment.

(129) Even where a restriction by object pursuant to Article 101(1) of the Treaty is established and the Vertical Block Exemption Regulation and the Technology Transfer Block Exemption Regulation are not applicable, there is in principle the possibility of an exemption from the prohibition in Article 101(1) if the parties prove

[117] Judgment of 13 December 2012, *Expedia Inc*, C-226/11, EU:C:2012:795 paragraph 37.

[118] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1–7.

[119] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ L 93, 28.3.2014, p. 17–23.

that the agreement fulfils the four conditions for exemption set out in Article 101(3) of the Treaty.[120]

6.6.2. Application to this case

(130) Given that the agreements governing Nike’s licensed merchandise products govern both the licensing of intellectual property rights and distribution of products using those rights, the Vertical Block Exemption Regulation and the Technology Transfer Block Exemption Regulation could provide guidance on the assessment of the restrictions in this case. However, the hardcore nature of these restrictions means that the exemptions in the Vertical Block Exemption Regulation[121] and in the Technology Transfer Block Exemption Regulation[122] would not apply in this case.

(131) The Commission also concludes that Nike’s conduct does not meet the conditions for exemption set out in Article 101(3) of the Treaty itself.

(132) Not only has Nike not advanced any arguments in this respect, but also there are no indications that Nike’s conduct was indispensable to induce retailer investment in certain territories or to alleviate the repercussions of free-riding between licensees. Moreover, as shown in Section 5, the restrictions implemented by Nike throughout its distribution network resulted in reduced competition between licensees and distributors of Nike’s products, reducing the possibility of wider choice and lower prices for consumers.

7. DURATION OF THE INFRINGEMENT

(133) The first agreement containing the territorial restrictions outlined in Section 5 was entered into on 1 July 2004 by FCBM.[123] Since, as explained in Section 2, Nike, Inc. is the ultimate parent company of NEON and all FBUs including FCBM, the start date of the infringement for Nike, Inc. is 1 July 2004 as well.

(134) Of its own initiative, on 5 July 2017, during the State of Play meeting following the opening of the investigation and prior to engaging in the cooperative process, Nike informed the Commission that it had sent […] letters to all its current FCBM master licensees and licensees with the aim of clarifying certain clauses that could be

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[120] Judgment of 15 July 1994, *Matra Hachette v Commission*, T-17/93, EU:T:1994:89 and Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraph 59.

[121] In accordance with Article 2(3) of the Vertical Block Exemption Regulation, the block exemption applies to vertical agreements containing provisions which relate to the use of intellectual property rights provided the licensing of intellectual property rights is not the 'primary object' of the agreement. Article 4 of that Regulation provides that, in the absence of an exclusive distribution agreement, restrictions of both active and passive sales are 'hardcore' restrictions. Where such hardcore restrictions are included in an agreement, the agreement is presumed to fall within Article 101(1) of the Treaty. See paragraph (47) of the Guidelines on Vertical Restraints (OJ C 130, 19.5.2010, p. 1).

[122] The licensing agreements in this case do not fall under the Technology Transfer Block Exemption Regulation as they concern the licensing of trade marks and other intellectual property rights and distribution of related contract products. Paragraph (48) of the Technology Transfer Guidelines ("TTGL") provides that “in general” only the licensing of copyright for the production of contract products is to be assessed under the principles set out in the Technology Transfer Block Exemption Regulation. Moreover, restrictions of passive sales fall under the list of 'hardcore' restrictions in Article 4 of that Regulation. According to paragraph (96) of the TTGL, the mere presence of these hardcore restrictions in an agreement results in the whole agreement falling outside the scope of the block exemption and constitutes a presumption that the restriction falls under Article 101(1) of the Treaty.

[123] Agreement […], with a territory comprising only Spain. […].

understood as being territorial, online […] restrictions. These letters were sent between 20 March 2017 and 25 May 2017.[124]

(135) Additionally, on 3 November 2017, also of its own initiative, Nike provided the Commission with copies of […] further letters sent to licensees of all other important clubs with whom merchandising agreements were still in place, namely AS Roma, Inter and FFF, again with the aim of clarifying clauses of that kind. These letters were sent between 27 July and 27 October 2017.[125]

(136) These two sets of letters in essence established that Nike would waive and would not enforce certain territorial, online […] clauses, […].

(137) Following the sending of the second set of letters, all territorial restrictions therefore ceased to apply, hence bringing the infringement to an end on 27 October 2017.

8. ADDRESSEES OF THIS DECISION

8.1. Principles

(138) Union competition law applies to the activities of undertakings. The notion of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status or the way in which it is financed.[126]

(139) When an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. However, the infringement must be imputed unequivocally to a legal person on whom fines may be imposed, and the statement of objections must be addressed to that person. Where several legal persons may be held liable for an infringement committed by one and the same undertaking, they must be regarded as jointly and severally liable for the infringement.

(140) The conduct of a subsidiary may be imputed to the parent company, even though the parent company does not participate directly in the infringement, if the parent company and the subsidiary form a “single economic unit” and therefore form a single “undertaking” for the purposes of Union competition law. In particular, that may be the case where a subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities.[127]

(141) In the specific case, however, in which a parent holds all or almost all of the capital in a subsidiary that has committed an infringement of Union competition rules, there is a rebuttable presumption that that parent company in fact exercises a decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission

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124 […].

125 […].

126 Judgment of 13 June 2013, *Versalis v Commission*, C-511/11 P, EU:C:2013:386, paragraph 51.

127 Judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 54.

to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies.[128]

8.2. Application to this case

(142) Having regard to the conduct restricting out-of-territory sales in Nike's non-exclusive agreements as described in Section 5, the Commission concludes that liability for the infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement should be imputed to the addressees as follows:

(1) to Nike European Operations Netherlands B.V. for its direct participation in the infringement for the whole period of infringement since 1 July 2004, the date of the first agreement containing out-of-territory restrictions, until the end of the infringement on 27 October 2017 (and including also its active management of the business of ASRM since 1 June 2014);

(2) to Nike Barcelona Merchandising, S.L., formerly known as Futbol Club Barcelona Merchandising, S.L., for its direct participation in the infringement for the whole period of the infringement since 1 July 2004, the date of its first agreement containing out-of-territory restrictions, until the end of the infringement on 27 October 2017;

(3) to North West Merchandising Limited, formerly known as Manchester United Merchandising Limited, for its direct participation in the infringement since 1 January 2009, the date of its first agreement containing out-of-territory restrictions, until 31 December 2015, the end of the year in which Nike ceased to be the sponsor for the ManU football club;[129]

(4) to F.C. Internazionale Merchandising S.r.1. for its direct participation in the infringement since 1 January 2015, the date on which Nike started managing Inter's merchandising business and the date of FCIM's first agreement containing out-of-territory restrictions, until the end of the infringement on 27 October 2017;

(5) to French Football Merchandising SASU for its direct participation in the infringement since 1 April 2011, the date when the centralised team at the NEON headquarters started managing FFF's business, until the end of the infringement on 27 October 2017;

(6) to Nike, Inc. for its participation in the infringement for the whole period of infringement since 1 July 2004, the date of the first agreement containing out-of-territory restrictions, until the end of the infringement on 27 October 2017, in its capacity as the ultimate parent company holding directly or indirectly 100% of the shares of all the legal entities listed in points (1) to (5) and also of Juventus Merchandising S.r.l.[130]

128 Judgment of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 60.

129 Although Nike's sponsorship relationships with ManU and Juventus ended when the 2014 - 2015 football season came to an end (30 June 2015), licensed merchandise products are commonly subject to [Details of licensed rights].

130 *Ibid*.

9. REMEDIES AND FINES

9.1. Remedies under Article 7 of Regulation (EC) No 1/2003

(143) Where the Commission finds that there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003. For this purpose, it may also impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

(144) The requirement that a remedy has to be effective also empowers the Commission to require the undertaking concerned to refrain from repeating the act or conduct in question and to refrain from any act or conduct having the same or a similar object or effect.[131]

(145) As explained in Section 7, by 28 October 2017 Nike had already brought the infringement to an end. However, it is necessary for the Commission to require Nike to refrain from any agreement or concerted practice which might have the same or a similar object or effect.

9.2. Article 23(2) of Regulation (EC) No 1/2003

(146) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty and/or Article 53 of the EEA Agreement. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.

(147) In this case, the Commission considers that, based on the facts described in this Decision, the infringement has been committed intentionally. The infringement consists of restrictions on out-of-territory sales of licensed merchandise products within the EEA. Moreover, as explained in recital (51) for instance, even in the absence of explicit contractual clauses Nike and its licensees and master licensees agreed to behave in such a manner as to restrict out-of-territory sales. Nike employees at times also brought the matter to licensees' attention when they found licensed merchandise products outside the licensee's domestic territory and asked the licensee to stop selling those products outside their domestic territory. If not intentionally, the infringement has been committed at least negligently.

9.3. Calculation of the fine

9.3.1. General methodology

(148) Under Article 23(3) of Regulation (EC) No 1/2003, in fixing the amount of a fine the Commission must have regard to a number of elements, in particular the gravity and the duration of the infringement. The Commission will also refer to the principles

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[131] See, e.g., Judgment of 6 October 1994, *Tetra Pak v Commission*, T-83/91, EU:T:1994:246, paragraph 220; Judgment of 27 October 1994, *Fiatagri and New Holland Ford v Commission*, T-34/92, EU:T:1994:258, paragraph 39; Judgment of 20 April 1999, *LVM v Commission*, Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 1254.

laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 ("the Guidelines on Fines").[132]

(149) In calculating the fine the Commission will first determine a basic amount. The basic amount of the fine is set by reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.[133] The basic amount consists of a percentage of the value of sales up to a maximum percentage of 30%,[134] depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement.[135] The Commission may also include in the basic amount an additional amount of up to 25% of the value of sales (an "entry fee") to deter undertakings from entering into anticompetitive agreements.[136]

(150) Second, the Commission may increase or decrease the basic amount to take into account any aggravating or mitigating circumstances in accordance with points 28 and 29 of the Guidelines on Fines. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.[137]

(151) Third, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect.[138]

9.3.2. Value of sales

(152) For calculating the value of sales, the Commission will normally take the sales made by the undertaking during the last full business year of the undertaking's participation in the infringement.[139] If the turnover of the undertaking during that year is not sufficiently representative of its annual turnover during the infringement, the Commission may use some other year for calculating the value of sales.

(153) In this case, given the nature of the merchandising business, the value of sales should be based on the royalties received by Nike from its licensees and master licensees for sales of licensed merchandise products in the EEA. These royalties (including minimum guarantees) represent Nike's revenues from its licensed merchandise business and are paid to Nike in exchange for the use of the intellectual property rights licensed.

(154) The basic principle for the calculation of a fine is that the fine should be based on the value of sales during the last full business year of the undertaking's participation in the infringement. On the basis of this principle, the value of sales generated by Nike's licensed merchandise business during the last full year of the infringement, namely 2016, should constitute the starting point for calculating the fine. However, that sum would not fully reflect the economic importance of the infringement. This is because, following expiry of the sponsorship agreements with ManU and Juventus at the end of 2015, Nike no longer controlled the merchandising rights for those clubs

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132 OJ C 210, 1.9.2006, p. 2.
133 Point 13 of the Guidelines on Fines.
134 Point 21 of the Guidelines on Fines.
135 Point 19 of the Guidelines on Fines.
136 Point 25 of the Guidelines on Fines.
137 Point 27 of the Guidelines on Fines.
138 Point 30 of the Guidelines on Fines.
139 Point 13 of the Guidelines on Fines.

in 2016. Accordingly, the value of sales for the last full business year of each Nike sponsorship agreement making up the infringement should be used instead.

(155) Based on the assessment in this Section, the value of sales to be taken into account in this case amounts to EUR [20 000 000 - 30 000 000].[140]

9.3.3. Gravity

(156) The gravity of the infringement determines the percentage of the value of sales to be taken into account in setting the fine. In assessing the gravity of the infringement, the Commission will have regard to a number of factors, such as the nature of the infringement, the market share of the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.[141]

(157) Out-of-territory restrictions by their very nature, restrict competition within the meaning of Article 101(1) of the Treaty. However, vertical restraints are generally less harmful than horizontal ones. Taking into account these factors and the EEA-wide impact of the restrictions on out-of-territory sales, the percentage of the value of sales to be used for calculating the fine in this case should therefore be set at 8%.

9.3.4. Duration

(158) The total duration of the infringement is set out in Section 7. In order to correctly reflect the economic importance of the infringement, the Commission will multiply the value of sales for the last full business year of each Nike sponsorship agreement making up the infringement by the period of time within that total duration during which the relevant restrictions were in place in connection with that sponsorship agreement.

9.3.5. Calculation of the basic amount

(159) Applying the criteria explained in recitals (148) to (158), the basic amount of the fine to be imposed in this case therefore amounts to EUR [10 000 000 - 20 000 000].

9.3.6. Additional amount

(160) The Commission considers that no additional amount should be included in the basic amount.

9.3.7. Aggravating or mitigating factors

(161) The Commission considers that there are no aggravating or mitigating circumstances applicable in this case.

9.3.8. Deterrence

(162) Point 30 of the Guidelines on Fines provides for the possibility of increasing the fine to ensure that fines have a sufficiently deterrent effect in the case of undertakings which have a particularly large turnover beyond the sales of goods and services to which the infringement relates.

(163) Given that the value of sales to be taken into account in this case amounts to EUR [20 000 000 - 30 000 000] and that this amount represents less than [0 - 1%] of the total turnover generated by Nike during the 2018 financial year (in other words, the

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140 See also Section 9.3.4 of this Decision.

141 Point 22 of the Guidelines on Fines.

business year preceding the date of adoption of this Decision), the Commission will apply a 1.1 deterrence multiplier.

9.3.9. Application of the 10% turnover limit

(164) The fine does not exceed 10% of Nike's total turnover relating to the business year preceding the date of adoption of this Decision in accordance with Article 23(2) of Regulation (EC) No 1/2003.

9.3.10. Reduction of the fine in view of cooperation

(165) Point 37 of the Guidelines on Fines allows the Commission to depart from the methodology set out in those Guidelines if the particularities of the case justify it. In view of the effective and timely cooperation provided by the addressees in this case, the basic amount of the fine should be reduced by 40% pursuant to point 37 of the Guidelines on Fines.

(166) As explained in Section 7, even before formal proceedings were opened and of its own initiative, Nike took steps to bring the infringement to an end by sending out letters of clarification to all its licensees and master licensees. Nike also provided additional evidence to extend the case beyond its initial scope.

9.3.11. Final amount of the fine

(167) The Commission concludes that the final amount of the fine to be imposed pursuant to point (a) of the first subparagraph of Article 23(2) of Regulation (EC) No 1/2003 should be EUR 12 555 000. Nike, Inc. should be held liable for the total amount of this fine, while the other addressees of this Decision should only be held liable up to the amount resulting from the calculation described in recitals (158) to (166). The amounts resulting from that calculation are set out in Article 2 of this Decision;

HAS ADOPTED THIS DECISION:

Article 1

The undertaking Nike has infringed Article 101(1) of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated below, in a single and continuous infringement regarding licensed merchandise. The infringement covered the whole of the European Economic Area, and consisted in the implementation and enforcement of a series of agreements and practices aimed at restricting cross-border sales of licensed merchandise, both offline and online, through the following legal entities:

(a) Nike European Operations Netherlands B.V., from 1 July 2004 until 27 October 2017;

(b) Nike Barcelona Merchandising, S.L., from 1 July 2004 until 27 October 2017;

(c) North West Merchandising Limited, from 1 January 2009 until 31 December 2015;

(d) F.C. Internazionale Merchandising S.r.1., from 1 January 2015 until 27 October 2017;

(e) French Football Merchandising SASU, from 1 April 2011 until 27 October 2017; and

(f) Nike, Inc., from 1 July 2004 until 27 October 2017.

Article 2

The following fines totalling EUR 12 555 000 are imposed for the participation of the undertaking Nike in the infringement referred to in Article 1:

(a) Nike, Inc. and Nike European Operations Netherlands B.V., jointly and severally liable: EUR 2 466 000;

(b) Nike, Inc. and Nike Barcelona Merchandising, S.L., jointly and severally liable: EUR 6 387 000;

(c) Nike, Inc. and North West Merchandising Limited, jointly and severally liable: EUR 1 771 000;

(d) Nike, Inc. and F.C. Internazionale Merchandising S.r.1., jointly and severally liable: EUR 290 000;

(e) Nike, Inc. and French Football Merchandising SASU, jointly and severally liable: EUR 609 000; and

(f) Nike, Inc., solely liable: EUR 1 032 000.

The fines shall be credited, in euro, within three months from the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI/AT.40436

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council[142].

Article 3

The undertaking referred to in Article 1 shall immediately bring to an end the infringement referred to in that Article, insofar as it has not already done so.

The undertaking referred to in Article 1 shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or a similar object or effect.

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[142] OJ L 193, 30.7.2018, p. 80.

Article 4

This Decision is addressed to:

Nike, Inc., One Bowerman Drive, Beaverton, OR 97005-6453, United States of America;

Nike European Operations Netherlands B.V., Colosseum 1, Hilversum, 1213 NL, The Netherlands;

Nike Barcelona Merchandising, S.L. (formerly known as Futbol Club Barcelona Merchandising S.L.), paseo de Sant Gervasi 51, 08022 Barcelona, Spain;

North West Merchandising Limited (formerly known as Manchester United Merchandising Limited), c/o Nike (UK) Limited, Camberwell Way, Doxford International Technology Park, Sunderland, Tyne And Wear, SR3 3XN, United Kingdom;

F.C. Internazionale Merchandising S.r.l., Piazza Gae Aulenti 6, Milano (MI) 20154, Italy; and

French Football Merchandising SASU, Zone Industrielle des Béthunes, Rue de l'Équerre, 95310 Saint-Ouen-L'Aumône, France.

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the Agreement on the European Economic Area.

Done at Brussels, 25.3.2019

For the Commission
Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION