Is software a good or a service?

The classification of software has long been a thorny issue for software companies who employ agents to sell their programs. The importance of the classification is that it may determine whether the Commercial Agents Regulations 1993 apply in the UK. These regulations are based on the EU Commercial Agents Directive 86/653/EC. The Regulations could significantly increase the costs of selling through agents by dictating mandatory termination payments for agents.

The industry has long clung to dated case law which erred on the side of finding software a service as long as it wasn’t sold on a physical medium such as a CD. There are recent signs that the status quo may be swinging towards the consideration of software as a good.

In the draft Consumer Rights Bill, the Department of Business, Innovation and Skills wrestled with the concept of software as a good or a service, recommending at one stage that certain rules are instigated when goods and services are sold together.

Further, the European Court and the UK High Court have both deliberated over the classification of software as a good for policy reasons. In the 2014 case
Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc, the issue was considered. Although the Court did not have to make a finding on that particular issue, obiter dicta remarks in the judgment suggest that were this issue to come before the courts it is likely that the selling of the software on any physical medium is likely to be considered a good and come under the Regulations.

The Fern case also confirms that UK Regulations will have effect even if the contract is not governed by English law provided that the services are in whole or in part performed in the UK.

Whilst no concrete change has yet been made to the law, software suppliers and their agents alike should continue to monitor the case law closely. It would not be surprising if a sea change did come about leading to added protection for commercial agents selling software.

The arm-wrestling intensifies between Uber and the French government

Across the world, taxi and chauffeured car trade associations have mounted legal attacks and organized protests against Uber Technologies Inc. (Uber), the US personal transport service launched in 2009 (see our previous December 2014 and January 2015 editions of the EU Competition Law Update).

In support of licensed taxis, French lawmakers passed legislation (the Thévenoud law), which entered into force on 2 October 2014, banning Uber and other chauffeured car services (VTC) from using GPS technology to display the locations of cars and potential customers - a key feature of their apps. The Thévenoud law also requires VTCs to return to their place of dispatch between fares if they are not booked by a client for a ride.

Uber has insisted the law should be overturned. To this end, Uber has filed two formal complaints with the European Commission (EC), arguing that the French government did not correctly notify the EC before passing the law and also questioning the merits of such law, claiming that it contravenes EU fundamental principles such as the freedom to provide services.

The aim of the second complaint, filed on 30 January 2015, is clearly to incite the EC to initiate a formal infringement procedure against France, which may ultimately lead to the case being brought before the European Court of Justice.

On 17 December 2014, Uber already had the satisfaction of benefitting from the Council of State’s striking down of a government decree, which had imposed a minimum 15-minute waiting period between the booking time of VTCs and the time passengers could actually get on board.

The most controversial service offered by Uber is UberPop, an application connecting passengers with drivers who do not have professional licenses, offering to save money by sharing rides with strangers who have similar routes. The French General Directorate for Competition Policy (DGCCRF) brought charges against Uber before the Paris Criminal Court where it argued that UberPop is a for-profit taxi service that masquerades as a ride-sharing service. On 16 October 2014, the Paris criminal court agreed with this analysis and ordered Uber to pay a €100,000 fine for “deceptive
business practices”, a criminal offense under Article L.121-1 of the French Consumer Code. Pending its appeal against this decision, Uber has continued operating UberPop.

Uber is also under attack from VTC competitors which had sued to block UberPop on grounds of unfair competition in a case heard on 21 November 2014 by the Paris Commercial Court. On 12 December 2014, the Commercial Court declined to ban Uber from operating UberPop, and granted Uber’s request to ask the highest French constitutional authority, the Constitutional Council, to judge the constitutionality of certain provisions of the Thévenoud law, which Uber argues are in violation of the freedom of entrepreneurship and of the principle of equality on the market. The Court therefore suspended its ruling while awaiting the Constitutional Council’s decision. This decision is not expected until the end of 2015, supposing that the French Supreme Court (which must pre-clear the submission of the constitutional questions to the Constitutional Council) will in fact submit such questions to the Constitutional Council.

Nonetheless, the Commercial Court, in accordance with the Thévenoud law, ordered Uber to withdraw from its applications “all mention suggesting it is legal” for Uber’s French drivers to stop, park or circulate on public roads while waiting for a potential client, a measure with which Uber has complied. An appeal in this matter was heard on 23 February 2015, and a decision is expected on 31 March 2015.

All in all, Uber has bought time during which it will continue to operate its UberPop service. It has also shown it is not afraid to put pressure on the French government to have the Thévenoud law repealed, both at the national level and at the EU level.

Imminent shakeup for Italian competition law?

On 20th February 2015, the Italian Government proposed its annual Antitrust Draft Law (the “Draft”), containing provisions aimed to drive certain Italian markets towards free competition. This Draft follows recommendations by the Italian Competition Authority (the “ICA”), in July 2014.

The legislative provisions contained in the Draft can be summarised as follows:

(i) “RC” Auto Insurance

The Draft requires insurance companies to apply serious discounts to drivers accepting certain contractual clauses aimed at saving costs and fighting fraud and related crimes. In return for their lower insurance, the drivers will have to install a ‘black box’ system and a blood-alcohol level detector on the insured vehicle, consent to inspections relating to those items and go to selected repairers after a car accident.

Further, the Draft introduces the right for the drivers to terminate the ancillary insurance on the vehicle once the principal policy is terminated.
(ii) Pension Funds

The Draft makes workers’ pension fund fully portable and eliminates the possibility to insert in national labour contracts, obstacles impeding workers to decide freely where to invest their own pension assurance contributions.

(iii) Mobile Contracts

The Draft simplifies the procedure for client identification in order to facilitate a change of mobile operators and make early termination clauses more transparent.

(iv) Public Postal Service

The Draft intends to eliminate the monopoly enjoyed by Poste Italiane S.p.A., the national incumbent, regarding the delivery of judicial documents.

(v) Energy Markets

As of the year 2018, the standard contractual agreement used to supply energy to household shall be eliminated, in the hope of encouraging new energy companies to enter the relevant market.

(vi) Banking Sector

The new provisions shall make it easier to close a consumer bank account and the costs for telephone calls for assistance will not be higher than those applied to consumer for local calls. Further, banks will have to create a website able to guarantee transparency about ancillary insurance agreements.

(vii) Lawyers

The Draft will allow the setting up of multi-professional companies for providing legal services. Further, lawyers shall be obliged to give a cost estimate to their clients at the beginning of the professional relationship.

(viii) Notary

The number of occasions requiring legal deeds to be drafted by a public Notary will be reduced. In particular, lawyers and accountants will be able to draw up real estate transactions having a value up to €100,000 as long as they are not for residential use.

(ix) Engineering Companies

Engineering Companies will be able to enter into agreements with private clients, repealing old Italian legislation.

(x) Pharmacies
The Draft permits one individual to hold more than four licenses and pharmacy businesses will be able to have equity shareholders.

In our view, the Draft is welcome as (if enacted by the Italian Parliament) it can help render more competitive some Italian sectors which have been very close to open over the last twenty years, such as the energy market. However, as history has proved so far, the current provisions of the law are very unlikely to be approved by the Parliament in their current state.

**Key Changes in Public Procurement Regulations**

On 26 February 2015, the Public Contracts Regulations (“PCRs”) 2015 will come into force. These regulations implement the provisions of the new Public Sector Directive No. 2014/14 into English law. Separate regulations will be introduced for Scotland. We reported this time last year how the EU had adopted new Directives on public procurement. The PCRs replace the Public Contract Regulations 2006 as amended and will govern all public sector procurements commenced after the commencement date.

These represent a significant modernisation of the UK public procurement regime and will affect all public bodies and those who supply the public sector. This article sets out some key tips contracting parties should be thinking of in advance of the new rules coming into force.

Some of the key changes are as follows:

- **Services contracts**: The Part A and Part B Services distinction is abolished. All services are now covered above the relevant services threshold of €111,000 for Central Government and €141,000 for non central Government.

- **New light touch regime**: There is an exception for most but not all former Part B services defined in Schedule 3. This include health and social services. They will be subject to a new light touch regime which must be advertised in the OJEU notice if the contract value exceeds €750,000. Concern has been expressed at the new wide power contracting authorities have under Regulation 76(4) of the Regulations to alter how the procurement is conducted and awarded notwithstanding that it is at variance with how the procurement was initially advertised to be run.

- **Greater SME participation**: Often referred to as the Young Reforms, they were a late addition to the PCRs. It is not often you see the UK Government gold plating the implementation of EU Directives but this appears to be an exception. They are designed to grant more access to public procurement contracts for SMEs. They require contracting authorities to also publish on Contracts Finder, the Governments new contract opportunity website, any contract notice or contract award notice which it publishes in the Official Journal of the European Union. It also requires that sub-threshold procurements (over £10,000 for central government or over £25,000 for sub central Government including NHS Trusts) are also placed on Contract Finder. The reforms ban all relevant sub threshold procurements from using a PQQ stage. All contracts must be subject to minimum selection criteria to further enhance the likelihood of the contracts being won by SME bidders. In addition there is an obligation that these procurements must
follow any guidance issued by the Cabinet office. It remains to be seen whether these requirements will have a lasting effect on the way the public sector procures or whether the force of the courts will be required to challenge larger contracts to be broken up.

- **Shorter timescales for procurements:** There are to be shorter timescales for most types of procurement and other efficiency gains.

- **Mandatory grounds for exclusion:** Regulation 57 includes certain additional offences to those which mandate contracting authorities to exclude bidders from the procurement process (offences under the Counter Terrorism Act 2008 and the Serious Crime Act 2007).

So what is it particularly important for contracting parties to address in advance of the new Regulations?

1. **Updating precedent documents:** As a contracting authority you may wish to consider updating precedent documents in light of the New Regulations. Here are some of the possible changes you need to consider:

   - Revised and expanded grounds for exclusion both mandatory and discretionary.
   - Carefully examine your selection criteria. There are now limits you can place on turnover requirements. Also the definition of MEAT (most economically advantageous tender) has changed and a new term has been introduced referred to as best price quality ratio.
   - If you are using life cycle costing you need to make sure you outline all the required information in Regulation 68.
   - Check you have included all information in your procurement documents which the new regulations require.

2. **Future contract amendments and extensions:** This is equally applicable to contracting authorities and public sector suppliers. Regulation 72 codifies recent European Court case law under Pressetext and other cases into the Regulations. There are now clear parameters on those changes to an existing contract which can be made without requiring a new procurement. When considering the scope and value of the procurement make sure you accurately estimate the scope and value to future proof the procurement allowing you to accommodate the need for variations and extensions during the procurements duration. In addition you may also want to add contractual terms to deal with change of control situations and provide for the assignment and novation of the contract to third parties.

3. **Termination provisions:** You should allow provisions relating to contract termination in the circumstances covered by Regulation 73. This regulation implies certain terms into the contract if they have not been included and therefore it is advisable to include your own provisions rather than to leave yourself at the mercy of the Court’s discretion in implying such terms.

4. **Be ready for the Lord Young reforms:** These reforms, whilst noble in aim, are sailing into unchartered territory. It is unclear how these reforms are going to work in practice but it is advisable to start planning and familiarising yourself with the new procedures.
Qualcomm pays $975m to Chinese authorities to settle competition law case

On 10 February 2015, it was reported that Qualcomm, a US NASDAQ listed manufacturer of mobile phone microchips, paid a $975m fine to the Chinese National Development and Reform Commission ("NDRC") to settle allegations of anti-competitive behaviour. The fine is equivalent to around 8% of Qualcomm’s 2013 Chinese turnover. The fine was reduced from 10% due to Qualcomm’s eventual co-operation in settlement (though they did initially challenge the NDRC’s case).

Despite the fine being the largest in Chinese corporate history, it was reported that Qualcomm’s share price rose as analysts believed the company had negotiated a fair settlement for itself and stabilised its Asian market. The details of the case offer insight into the continued development of Chinese competition law.

The case relates to accusations the NDRC made in 2013 against Qualcomm. Qualcomm were charged on several grounds. These grounds were that Qualcomm held a dominant position in certain mobile phone technologies and abused that position in the following ways:

- Qualcomm imposed ‘no challenge’ clauses on patentees, refusing to supply to those who challenged their IP. This was seen as a breach of Article 329 of the 2004 Contract Law.
- That Qualcomm licensed expired patents.
- That Qualcomm enforced terms where licensees would be forced to provide Qualcomm with any improved technology based on Qualcomm’s patents. This was an alleged breach of Article 329 of the 2004 contract law.
- That Qualcomm combined foreign and domestic patents in licenses, in violation of section 17(5) of the 2008 Anti-monopoly Law.
- That non-standard and standard essential patents were grouped together and that Qualcomm charged the higher (non-standard) fee in breach again of Article 17(5) of the 2008 Anti-monopoly law.

In light of these alleged breaches and in order to settle the case alongside the payment of the fine, Qualcomm agreed to undertakings to reverse the above alleged infringements, including agreement as to the percentage of royalties Qualcomm would charge for certain mobile phone technologies. The conclusion of the case represents the end of China’s first abuse of dominance case that has been through the investigatory process before regulators. Whilst the case offers vision in what commitments will be acceptable to the NDRC in future cases and knowledge of how the NDRC will calculate fines, the case does not strictly define how market dominance is defined in China, often the crucial and thorny issue. There is also the issue of the repercussions that the high level of the fine could have in deterring foreign investment into China. Further insight is advised for any companies who operate in China and enjoy a significant market share.
French discount fashion website escapes prosecution

In a decision of 28 November 2014, the French Competition Authority (FCA) offered comfort to France’s main online private sales shopping store (Private Sale Website), when a prosecution against the company failed on the basis of the FCA’s inability to define the relevant market, which is key to identifying the boundaries of competition between firms.

Vente-privee.com (Vente Privée) is a Private Sale Website present throughout the EU and available only to members registered free of charge. Private Sale Websites - enabling brands to clear some, if not all, of their stock of unsold goods and services at discount prices - have become increasingly popular with consumers.

Brandalley, one of Vente Privée’s competitors in France, seized the FCA, claiming that the existence of exclusivity clauses in most contracts entered into between Vente Privée and its suppliers was an abuse by Vente Privée of its dominant position, in violation of Article L.420-2 of the French Commercial Code. The exclusivity clauses in question provided for a commitment by suppliers not to sell the products in question to other Private Sale Websites, during periods that could be as short as the duration of the online sale or as long as two years, so as to safeguard the attractiveness of Vente Privée’s business model.

The FCA found that EU provisions on the abuse of a dominant position - i.e. Article 102 of the Treaty on the Functioning of the European Union (TFEU) - were applicable to the case at hand. The FCA considered that the potential anti-competitive behaviour of Vente Privée, whose business activity covers the entire French territory, could ultimately bar EU competitors from entering the French market.

Accordingly, the FCA applied EU Commission Notice 97/C 372/03 on the definition of relevant market (the Commission Notice) in its evaluation of the relevant market of Private Sale Websites.

As set out in the Commission Notice, the relevant market combines the product market and the geographic market.

i. A relevant geographic market is defined as the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

In the case at hand, although the Private Sale Websites grant access to foreign market consumers, the FCA established that the relevant geographic market was limited to France. This limitation is due to the fact that the FCA noted that Vente Privée provides different websites per country, in different languages, and with differing individual shipping conditions.

ii. A relevant product market includes all those products and/or services which are regarded as interchangeable or substitutable by the consumer due to the products’ characteristics, their prices and their intended use.
In the present case, the FCA conducted a detailed analysis based on the concept of product substitutability for consumers. The main question being whether - in response to a small but lasting price increase of the product under scrutiny - consumers would switch readily to another similar product.

To assess the relevant product market of Private Sale Websites, the FCA analysed a number of their purported characteristics such as price attractiveness, the high-end quality of the goods and services offered, and the breadth of their product offering. However, the FCA held that these features were not sufficient to properly establish a relevant market for Private Sale Websites. In fact, the FCA considered that most of the assumed distinctive characteristics can also be found in other businesses such as physical stores. The FCA further set aside the alleged exclusive nature of online, invitation-only sales as a distinctive feature, given that Private Sale Websites have in fact attracted millions of subscribed members.

The FCA thus concluded that, in the absence of a definable relevant market, no dominant position could be ascertained for Private Sale Websites. Consequently, no abuse of a dominant position by Vente Privée could potentially be found.

Nevertheless, the FCA pointed out that, had Vente Privée been found to be in a dominant position, the exclusivity clauses it stipulated for periods exceeding 4 months could have been considered abusive due to their excessive length. Furthermore, the FCA specified that its findings cover only the period from 2005 to 2011, suggesting that a different conclusion might be reached for other periods. Notably, the FCA decision alludes to the recent development of traditional online shopping stores offering discount prices on unsold merchandise, hinting that a relevant product market might now be capable of definition.

Baffled by the FCA’s hot-and-cold resolution to a five-year long procedure, Brandalley has openly criticized the FCA decision, arguing it was illogical, and has decided to challenge the decision before the Paris Court of Appeal.

Italian Finance Police and Competition Authority join forces once again

On 19th February 2015, the Italian Competition Authority (the “ICA”), represented by its President Mr. Giovanni Pitruzzella and the General Command of the Italian Finance Police (the “IFP”), namely General Saverio Capolupo, subscribed to the new memorandum of understanding (“MOU”) to improve cooperation between them for the protection of competition and consumers.

The new MOU, which renews the partnership between the two authorities, encompasses new areas of focus entrusted with the ICA over the last years. In particular, the reinforced cooperation will help fight unfair commercial practices and fraud in the trade of agricultural products.

The MOU shall also reinforce the operational synergies between the ICA and the IFP and provide specific training for the officers of both the ICA and the IFP.
The MOU pointed out the importance that free competition has in the economic development of the country and in the technological progress.

The ICA also announced that, because of the MOU, investigations on alleged anti-competitive practice shall be carried out more effectively.

In light of the above, the ICA is expected to increase its investigations on anti-competitive practices in the near future and this, along with subsequent enforcement action, can be considered a high profile step towards free competition in Italy. However, it is important that the MOU will not end up to encouraging investigation abuses.