

SAP vs Diageo

Legal implications and further perspectives

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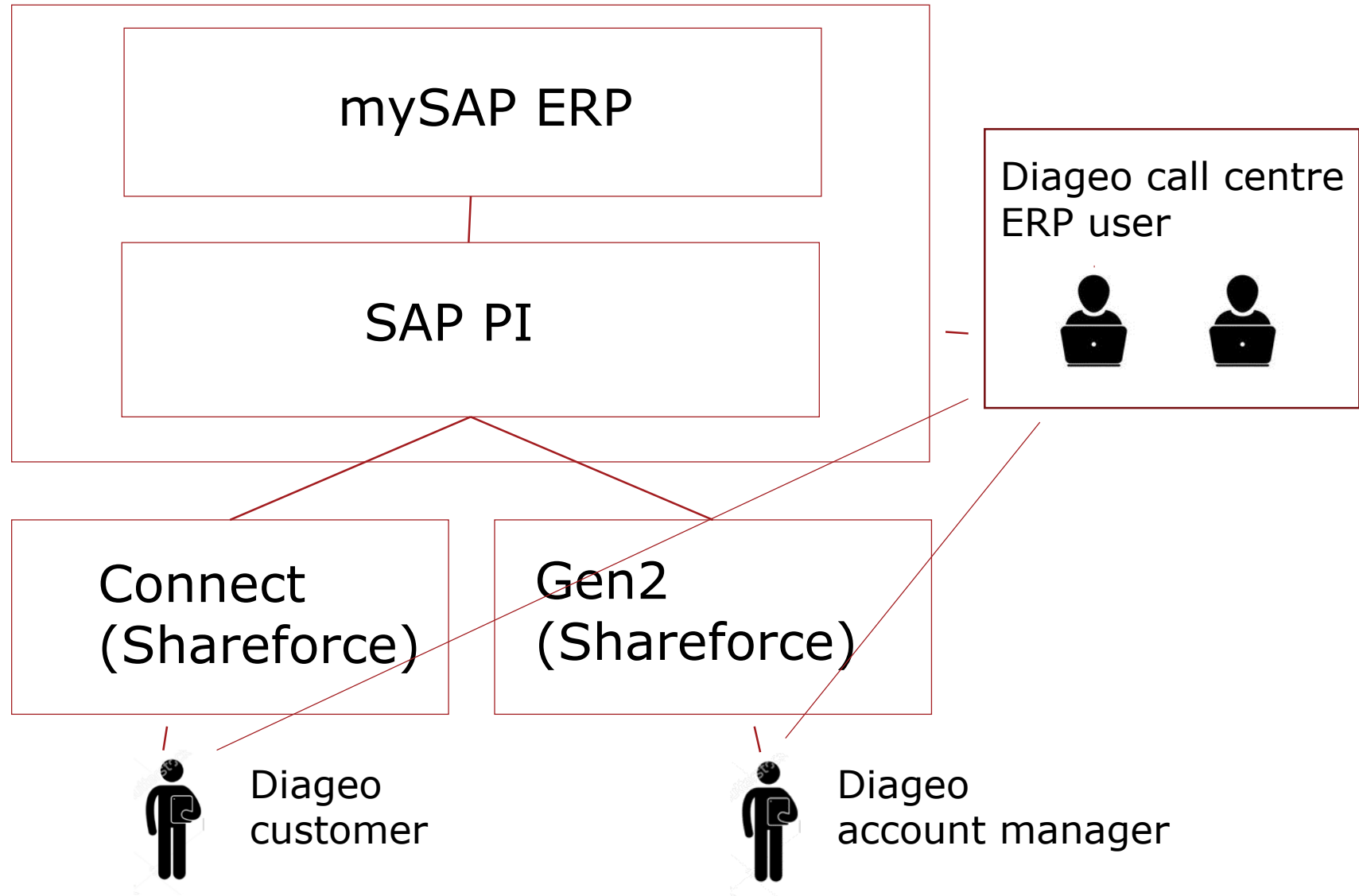


Background

- Diageo and SAP entered into a SAP Business Suite license in 2004 (including a license for mySAP ERP and SAP PI)
- The license agreement was amended a number of times over the years
- The license agreement provided a right to “use or access” the software “directly or indirectly”
- The license rights were granted to “Named Users”. The agreement included different types of “Named Users”. The licensee fee was based on the number of “Named Users”

Background

- In 2012 Diageo deployed a Salesforce cloud solution which provided Diageo's customers with the possibility to order products directly with Diageo (the "Connect" system) and Diageo's account managers with the possibility to check customer specific information directly in Diageo's database (the "Gen2" system)
- Connect and Gen2 communicated with mySAP ERP through SAP PI



Key questions

- Did the license agreement provide other users than “Named Users” with a right to use the SAP software?
- Did the SAP PI license provide an implicit right to use mySAP ERP?
- Do Connet and Gen2 users make a direct or indirect use of mySAP ERP in the terms of the license agreement?
- If so, which kind of payment may SAP claim?

Did the license agreement provide other users than “Named Users” with a right to use the SAP software?

- The Court: No
- The judgement par. 43: The plain and obvious meaning of the above is that only Named Users are authorised to use or access the mySAP ERP software

Did the SAP PI license provide an implicit right to use mySAP ERP?

- The Court: No, the SAP PI license is not a "gatekeeper" license

Do Connet and Gen2 users make a direct or indirect use of mySAP ERP in the terms of the license agreement?

- No definitions of the terms in the license agreement
- The Court: Yes

Which kind of payment may SAP claim?

- Three possibilities:
 - Payment of license fee according to the license agreement
 - Damages for breach of contract
 - Damages for copyright infringement

Payment of license fee according to the license agreement

- The Court:
 - Connect users and Diageo account managers (Gen2 users) are not Named Users under the license agreement
 - This does not mean that their use is not covered by the license agreement at all
 - License agreement: usage not corresponding to the license agreement is subject to payment in accordance with SAP's current price list
 - => payment based on SAP price list

Damages for breach of contract

- The Court:
 - Users are not Named Users => unauthorised usage => breach of contract
 - SAP in principle entitled to damages for breach of contract as an alternative to fees claimed under the agreement
 - Subject to limitation of liability clauses of the agreement

Damages for copyright infringement

- Not claimed by SAP
- Not covered by the judgement

Reflections

- Is it a legally correct judgement?
- Is it a fair judgement?
 - The general problem of the case: Use of software not taken into account when the license agreement was entered into
 - Three possible outcomes of the case:
 - Full payment to SAP (the result of the judgement)
 - No additional payment to SAP
 - A smaller additional payment

Implications

- The SAP license terms are used broadly
- UK judgement => not necessarily the same legal result in other jurisdictions
- Cases in other countries

- Broader implications?
 - Developments in technology - "indirect use"
 - Remedies: Payment under contract, breach of contract and/or copyright infringement

Lessons learned

- Be aware of the potential clash between old license terms and new types of usages (“over-deployment”)
- Be aware how the license agreement regulates unauthorised use of the software (payment)