



March 2021

## Commercial Agency Agreements in EU Competition Law

Commercial agency agreements in the European Union apply where a legal or actual person (the agent) is vested with the power to negotiate and/or conclude contracts on behalf of another legal or actual person (the principal), either in the agent's own name or in the name of the principal, for the purchase or sale of goods and services by the principal. This GT Advisory reviews commercial agency agreements in EU competition law.

### Exemption by Definition

1. In the Notice of the European Commission of 24 December 1962<sup>1</sup>, commonly referred to as the Christmas Message, the Commission indicated that agency agreements generally do not fall within the prohibition of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). This privilege, however, applied only where the agent did not engage in activities that are proper to an independent trader. The Christmas Message stated that the decisive criterion to distinguish an agent from an independent trader was the extent of the agent's responsibility for financial risks connected with the agent's performance. This approach towards agency agreements was confirmed by the European Court of Justice (ECJ) in the *Suiker Unie* case<sup>2</sup> where the Court ruled that Article 101(1) TFEU only did not apply to clauses in an agreement between an agent and a principal in

<sup>1</sup> Commission notice on exclusive agency contracts made with commercial agents, O.J., 1962, p. 2921.

<sup>2</sup> Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, *Suiker Unie and Others v. Commission* [1975] ECR 1663.

circumstances where the agent is to be regarded merely as an auxiliary, forming an integral part of the principal's undertaking.

### No Dual Role

2. In *Pittsburgh Corning*<sup>3</sup> the Commission held that an agent could not be regarded as a true auxiliary if the agent also carried on business as an independent manufacturer or distributor of products unconnected with the agency.

### Multiple Principals and Auxiliary Function

3. As to whether an agent would qualify as a being a true auxiliary if it acted for more than one principal, the Court stated in *Vlaamse Reisbureaus* that where travel agents regularly acted for many principals rather than a single one, the travel agents should not be considered true agents since they could not be regarded as an integral part of an individual tour operator's undertaking; rather, they were operating on an entirely independent basis.<sup>4</sup>

### The Vertical Block Exemption Regulation (VBER) Commercial Agency Rules

4. The current Guidelines to the VBER<sup>5</sup> replace the Notice of 1962 and seem to apply the same decisive criterium, i.e., the degree of risk imposed on the agent, in assessing whether Article 101(1) TFEU is applicable. However, the Guidelines introduced in lieu of the integration criterium the new notion of "genuine" and "non-genuine" agents. In some respects the new test deviates from previously mentioned case law, as according to the Commission a commercial agency agreement is genuine if the agent does not bear any, or only insignificant, risks in relation to the contracts concluded or negotiated on behalf of the principal and in relation to the market-specific investments for that field of activity. In such situation the selling or purchasing function forms part of the principals' activities, notwithstanding that the commercial agent is a separate undertaking. Deviating from *Pittsburgh Corning*, the Commission expressed in the Guidelines that the fact that an agent carries on considerable business on its own account or acts for a number of other principals is not a material factor in determining the applicability of Article 101(1) TFEU to the agency agreement with such party.<sup>6</sup>
5. The ECJ had already ruled, in *Daimler Chrysler*<sup>7</sup>, that the fact that a commercial agency agreement contains provisions that oblige the commercial agent (i) to bear some financial risks (such as limited transport risks) or (ii) perform some related activities (such as warranty services) does not detract from the commercial agency agreement falling outside the scope of Article 101(1) TFEU. Consequently, the determining factor seems to be whether there is financial or commercial risk to be borne by the commercial agent in relation to the activities for which he has been appointed as a commercial agent. This refers to risks which (i) are directly related to the contracts concluded and/or negotiated by the commercial agent on behalf of the principal, such as financing and stocks and (ii)

---

<sup>3</sup> Case 72/403 EEC, *Pittsburgh Corning Europe*, OJ [1972] L 272/35, [1973] CMLR D2 45.

<sup>4</sup> Case 311/85, *Vlaamse Reisbureaus v. Sociale Dienst*, [1987] ECR 3801.

<sup>5</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices.

<sup>6</sup> Guidelines on Vertical Restraints, Article 13: In the case of genuine agency agreements, the obligations imposed on the agent as to the contracts negotiated and/or concluded on behalf of the principal do not fall within the scope of application of Article 81(1). The determining factor in assessing whether Article 81(1) is applicable is the financial or commercial risk borne by the agent in relation to the activities for which he has been appointed as an agent by the principal. In this respect it is not material for the assessment whether the agent acts for one or several principals. Non-genuine agency agreements may be caught by Article 81(1), in which case the Block Exemption Regulation and the other sections of these Guidelines will apply.

<sup>7</sup> Case T-325/01, *DaimlerChrysler AG v Commission of the European Communities*, [2005] ECR II 3319.

are related to making or being obliged to make market specific investments. Consequently, article 101(1) TFEU will generally not be applicable to obligations imposed on the commercial agent as to the contracts negotiated and/or concluded on behalf of the principal where the title to the goods bought or sold does not vest in the commercial agent or where the commercial agent does not itself (is not obliged to) supply the contract services.

### Absence of Risk Is an Economic Assessment

6. The exemption follows the function but not the name of the relationship. In *Cepsa I* the ECJ decided that if a party defined as a distributor and party to a distribution agreement in fact did not carry any economic risk in relation to its function as distributor (as was found to be the case as regards these resellers of petrol in Spain), the relationship between the principal and the distributor would be deemed identical to that between an agent and his principal for competition law purposes.<sup>8</sup> This logic may also allow for some so-called limited responsibility distributors, as used in many intragroup distribution models (also with a third-party distributor, outside of the group of the principal) to be classified as commercial agents for competition law purposes, if the limited risk can be aligned with the requirements for finding a genuine agency.
7. The following obligations, as they relate to the ability to fix the commercial agent's activity scope (essential if the principal is to take the related risks), will generally be considered to form an inherent (and indispensable) part of a commercial agency agreement, and be exempted (not as ancillary restraints, as there it is deemed there is no competition between a principal and an integrated agent):
  - limitations regarding the territory where and/or customers to whom the commercial agent may sell its goods;
  - the prices and conditions at which the commercial agent must sell or purchase these goods or services.

### Not Everything Is Exempted in an Agency

8. Non-genuine commercial agency agreements, as well as the provisions on exclusivity of the agency<sup>9</sup> and or non-compete<sup>10</sup> provisions included in a genuine commercial agency agreement, may be covered by Article 101(1) TFEU. In the ECJ's *CEPSA II* decision<sup>11</sup>, the Court held that even in the absence of an agreement between independent undertakings, exclusive agency and non-compete provisions concern the relationship between agent and principal and, according to the ECJ, "in the context of such relationships, agents are, in principle, independent economic operators and such clauses are capable of infringing the competition rules so far as they entail locking up the market concerned." Therefore, also in case of a genuine agency agreement, the prohibition of Article 101(1) TFEU may apply to both exclusive agency provisions and non-compete provisions. In that case such provisions, as well as other vertical agreements, may profit from the safe harbors provided by the VBER.

---

<sup>8</sup> See Case C-217/05, 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA*, paragraph 43 (CEPSA I)

<sup>9</sup> Provisions preventing the principal from appointing other commercial agents in respect of a given type of transaction, customer, or territory.

<sup>10</sup> Provisions preventing the commercial agent from acting as a commercial agent or distributor of undertakings that compete with the principal.

<sup>11</sup> Case C-279/06, 11 September 2008, *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL*. (CEPSA II)

## VBER Revisited

9. The European Commission is currently reviewing the Commission Notice providing Guidelines on Vertical Restraints (Vertical Guidelines), within the broader context of the review of the VBER<sup>12</sup>. In the context of that review, stakeholders are reported to have indicated that the Vertical Guidelines are not sufficiently clear as to whether an undertaking active on a downstream market may act both as a genuine agent and as an independent distributor for different products of the same supplier (so-called “dual role” agents). In addition, Directorate-General Competition has noted a trend towards the increased use of models combining agency and distribution in consumer goods markets, under which a single undertaking combines the functions of agent and independent distributor for the same principal/supplier.
10. Against that background, the European Commission presented in February 2021 a working paper<sup>13</sup> (Working Paper) in which it discusses how Article 101(1)2 TFEU may be applied to situations where a distributor of certain supplier also acts as agent on behalf of that same supplier (the “principal”). It is restated that an agency relationship will only fall outside the scope of Article 101(1) TFEU if the agent does not bear any of the risks associated with the contracts negotiated on behalf of the principal and operates as an auxiliary organ forming an integral part of the principal’s undertaking.<sup>14</sup>
11. Where a genuine agent undertakes other activities for the same or other suppliers at its own risk, there is, however, a risk that the conditions imposed on the agent for its agency activity will influence its incentives and limit its decision-making freedom when it sells products as an independent activity, in particular where the products covered by the agency relationship and those distributed independently by the agent belong to the same product market. In those circumstances it is to be expected that that the pricing policy of the principal for the products sold under the agency agreement will influence the incentives of the agent/distributor to price independently the products that it sells as an independent distributor.
12. Also, a dual system – combining agency and independent distribution for the same supplier – makes it difficult to distinguish between investments and costs that relate to the agency function, including market-specific investments, and those only related to the independent activity. That complicates the assessment of whether an agency relationship meets the conditions set out in paragraphs 12-21 of the VBER Guidelines to be considered genuine and to fall outside the scope of Article 101 TFEU.<sup>15</sup> In paragraph 16(g) of the VBER Guidelines, it is assumed that an agreement will generally be considered a genuine agency agreement where the agent “does not undertake other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal”. This provision may be held to cover cases where the principal requires the genuine agent to carry out other activities in the same product market, which are, by definition, of a more limited nature compared to the main task of the agent.<sup>16</sup>
13. The analysis made in the Working Paper clearly indicates that the exemption for commercial agents from 101(1) TFEU will remain, but that in order to assess whether an agency agreement falls outside

<sup>12</sup> Commission’s Staff Working Document, *Evaluation of the Vertical Block Exemption Regulation*, 8 September 2020, SWD(2020) 173 final.

<sup>13</sup> Working paper: *Distributors that also act as agents for certain products for the same supplier*

<sup>14</sup> See Case C-217/05, 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA*, paragraph 43; Case 311/85, 1 October 1987, *ASBL Vereniging van Vlaamse Reisbureaus contre ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, para.20.

<sup>15</sup> See joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, 16 December 1975, *Coöperatieve Vereniging “Suiker Unie” UA and others v Commission of the European Communities*, paragraphs 537-557.

<sup>16</sup> As per Case T-325/01, *DaimlerChrysler AG v Commission*, paragraphs 100 and 113.

the scope of Article 101(1) TFEU in instances where an agent has a dual role within the same product market, it is important to be able to effectively delineate the activities covered by the agency agreement and the risks associated to them.

14. Such a dual role may cause coordination and/or information exchanges on actual prices, and as such, may require more measure than merely having a clear delineation as regards the allocation of costs. This is not the topic of this note, however.
15. The Working Paper makes it clear that for the qualification of a relationship for competition law purposes, the guidance as per paragraphs 12-21 of the VBER Guidelines continues to provide instruction on the factors that define genuine agency agreements for the purposes of Article 101(1) TFEU. That guidance is based on case law.<sup>17</sup> The decisive factor for the purposes of determining whether an intermediary is an independent economic operator is to be found in the agreement concluded with the principal and, in particular, in the clauses of that agreement, implied or express, relating to the assumption of financial and commercial risks linked to sales of goods to third parties, to be assessed on a case-by-case basis, taking account of the economic reality of the situation.<sup>18</sup>
16. There are three types of financial or commercial risk that are material to the definition of a genuine agency agreement, namely (i) contract-specific risks which are directly related to the contracts concluded and/or negotiated by the agent on behalf of the principal, such as the financing of stock; (ii) risks related to market-specific investments, which are investments specifically required for the type of activity for which the agent has been appointed by the principal; and (iii) risks related to other activities undertaken in the same product market, to the extent the principal requires the agent to undertake such activities, not as an agent on behalf of the principal but for its own risk.<sup>19</sup>
17. Compliance with such requirements must be assessed in a strict manner, however, to avoid abuse of the concept of agency in scenarios where the supplier does not actually become active at the retail level (i.e., the supplier itself takes all associated distribution decisions, assuming all related risks in accordance with the principles set out below), but rather establishes an easy way to control retail prices for those products that allow high resale margins. Since resale price maintenance is a fixed restriction under the current VBER, the agency concept may not be used to escape application of Article 101(1) TFEU.
18. As set out in paragraph 16(g) of the VBER Guidelines, a genuine agency agreement is not per se incompatible with the agent also acting as an independent distributor within the same product market, provided that the principal fully reimburses the activities that it contractually requires the agent to engage in. This example concerns scenarios where the distributor's main activity is the distribution of agency products on behalf of a principal, whereas the distributor is required to carry out independently limited other activities. According to the Working Paper and based on experience gathered by DG Competition to date, in all other scenarios of agents acting in a dual role, the agency agreement may only fall outside Article 101(1) TFEU if (i) the distributor is genuinely free to enter into the agency agreement (i.e., this is not de facto imposed by the principal through, for example, a threat to terminate or worsen the terms of the distribution relationship) and (ii) all relevant risks linked to

---

<sup>17</sup> See in particular the judgments in Case T-325/01, 15 September 2005, *Daimler Chrysler v. Commission*; Case C-217/05, 14 December 2006, *Confederación Espanola de Empresarios de Estaciones de Servicio v CEPSA* and Case C-279/06, 11 September 2008, *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL*.

<sup>18</sup> See Case C-217/05, 14 December 2006, *Confederación Espanola de Empresarios de Estaciones de Servicio v CEPSA*, paragraph 46.

<sup>19</sup> See Case C-217/05, 14 December 2006, *Confederación Espanola de Empresarios de Estaciones de Servicio v CEPSA*, paragraph 50-62; Case C-279/06, 11 September 2008, *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL*, paragraphs 37-41.

the sale of goods as covered by the agency agreement to third parties are borne by the principal, but provided these activities and risks can be effectively delineated to avoid affecting the risks and incentives associated to the distribution of services that the agent distributes independently on its own behalf. All three types of financial or commercial risk material to the definition of an agency agreement, as referred to in paragraph 15 of the VBER Guidelines, should be considered. Not relevant to this assessment are the investments common to agency activities in general. These include costs, such as the renting of a shop or staff salaries, which can in principle be considered general investments in premises or personnel, as long as they can also be used for the sale of different goods unrelated to the agency agreement.

19. Where an undertaking acts in a dual role as agent and independent distributor for the same supplier, defining market-specific investments is of particular importance. If a supplier enters into an agency agreement with independent distributors that are already active in the relevant market, it is likely that many of the relevant costs will have already been incurred, thus raising questions about whether and to what extent the principal should cover such costs. Market-specific investments are defined in paragraph 16 of the Vertical Guidelines as “investments specifically required for the type of activity for which the agent has been appointed by the principal, i.e. which are required to enable the agent to conclude and/or negotiate this type of contract. Such investments are usually sunk, which means that upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at a significant loss”. As set out in paragraph 14 of the VBER Guidelines, where an undertaking on a downstream market acts in a dual role as genuine agent and independent distributor for the same supplier, market-specific investments should be understood as covering all investments necessary to enable an agent to negotiate or conclude contracts in the relevant market, including sunk investments that would be lost if the agent were to cease all activity in the relevant market (i.e., as agent or independent distributor). This includes, for example, investments in furnishing a shop or in training sales staff who are specifically required for selling products in the relevant market and who cannot be used commercially for activities in other product markets, or only at a significant loss.
20. Where genuine agency agreements are entered into with existing independent distributors, according to the Working Paper it would be DG Competition’s current position that the fact that some of the market-specific investments may already have been incurred by the agent when acting as an independent distributor does not mean they do not have to be covered by the principal. In order for the agency agreement to fall outside the scope of Article 101(1) TFEU, all investments required for a genuine agent to negotiate or conclude contracts with third parties on the relevant market should be reimbursed, including market-specific investments, whether or not the agent is also acting as an independent distributor. To the extent the relevant investments have already been depreciated (e.g., investments in activity-specific furniture), the reimbursement may be adjusted proportionately. DG Competition proposes that in practice, to establish the level of reimbursement, the principal should consider the hypothetical situation of a distributor not yet active in the relevant market (either as agent or independent distributor) in order to assess which investments are relevant to the type of activity for which the genuine agent will be appointed.
21. As per paragraph 15 of the VBER Guidelines, market-specific investments, which have to be covered by the principal for the agency agreement to be considered genuine, must be distinguished from investments related to the provision of agency services in general, which do not need to be covered by the principal. That said, some investments are likely to be partly common to the provision of agency services in general and partly specifically required for the type of activity for which the genuine agent has been appointed by the principal. This is the case, for example, for investments in a website or

general advertising for a shop rather than the principal's brand or specific products. DG Competition proposes that for this type of investments, the principal should cover a share of the costs, which are likely to be (at least in part) market-specific.

22. As per the Working Paper, DG Competition's current position is that the only market-specific investments the principal would not have to cover are those relating exclusively to the sale of differentiated products in the same product market that are not covered by the agency agreement and distributed independently. This is in contrast to market-specific investments needed to operate in the relevant product market that the principal would have to cover in all cases. This is because the agent would not incur the market-specific costs corresponding to these differentiated products if it did not also act as an independent distributor for those products in addition to the products it distributes as an agent, provided that it can operate on the relevant market without selling the former.
23. Another issue raised by stakeholders concerns the method for reimbursing the relevant costs incurred by the agent. Considering that there may be different ways to reimburse an agent, no particular method is required for an agreement to qualify as a genuine agency agreement, provided that the principal fully covers the relevant costs. For example, a principal may choose to reimburse the precise costs incurred. A principal may also choose to cover these costs by way of paying a fixed lump sum or paying the agent a share (fixed percentage) of the revenues from products sold under the agency agreement. All of these reimbursement methods are in principle acceptable, especially in situations where a principal may work with a large number of agents, as they may reduce the administrative burden for the principal and the agents concerned. However, DG Competition proposes that such methods of reimbursement should be designed to ensure that they always cover all relevant costs, so that the genuine agent bears no, or only insignificant, risks of the three types of financial or commercial risk referenced above. This may require a reimbursement system that allows the agent to easily declare and request reimbursement of any costs that exceed the lump sum or fixed percentage. It may also require the principal to monitor and review changes to the relevant costs and to adapt the lump sum or fixed percentage at regular intervals to account for any significant changes in cost in a way that does not burden the agent. Such a system aims to ensure that the genuine agent is in practice reimbursed for all relevant costs.
24. In addition, DG Competition proposes that when setting the lump sum or fixed percentage, the principal should ensure that the amount adequately reflects any cost variation that may exist between genuine agents operating in different Member States, or between genuine agents operating under different business models (e.g., agents that only operate a brick-and-mortar store, agents that only operate online without being an online platform, or hybrid agents operating in both ways). In particular, DG Competition's current position is that where the relevant costs are reimbursed by way of a percentage of the price of the product sold under the agency agreement, the principal should also take into account that the genuine agent may incur relevant market-specific investments, even where it makes no sales for a certain period of time. Such a reimbursement system would therefore need to include a method for calculating and reimbursing these costs in case the agent does not make any sales, even if only for a short period of time.
25. Although the Working Paper clarifies these cost-allocation principles in relation to dual-role distribution models, to prevent abuse of the agency model, the above analysis should help clarify how to allocate cost to achieve the no-risk setup required to qualify as a genuine agency in single-role commercial agency models, e.g., in relation to undisclosed agents.

*\* This GT Alert is limited to non-U.S. matters and law.*

## Author

This GT Advisory was prepared by:

- **Hans Urlus** | +31 20 301 7324 | [urlush@gtlaw.com](mailto:urlush@gtlaw.com)

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.~ Houston. Las Vegas. London.\* Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.\* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Advisory is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. \*Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ▫Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimbengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2021 Greenberg Traurig, LLP. All rights reserved.*