



International Distribution Institute

# Converting distributors into commission agents

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# Introduction

- A distributor acts in his own name, and *for his own risk and account*.
- A commission agent (*'commissionair'*, art. 7:414 DCC) acts in his own name, but *for risk and account of* the principal.
- Widely used in tax-driven structures, but e.g. also in trade in raw materials.

# Agency?

- A commission agent is *not* a commercial agent as meant in the 1986 Directive on commercial agency.
- A commission agent legally only binds *himself* when he enters into agreements with third parties.
- Commercial agency laws do not apply.

# Issues during crisis

- Distributors had trouble financing stock, minimum stock requirements were often practically unenforceable.
- Increased insolvency risk of distributors, suppliers wished to reduce outstanding claims on distributors.
- First step: consignment agreements



# More grip on distributors?

- Frequently, suppliers wished to have more grip on distributors with consignment stock (*i.e.* resale prices).
- More general questions about pricing, sales channels, territories, e-commerce (freeriding, online sales), etc. arose.
- Limited possibilities with independent distributors, no problems with agents.



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## Preliminary report on the E-Commerce Sector Enquiry

(233) An agent is a legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either *in the agent's own name* or *in the name of the principal*, for the sales of the goods/services of the principal.



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## Preliminary report on the E-Commerce Sector Enquiry

(241) Entering into an agency relationship gives principals stronger control over the agent as compared to independent distributors. For instance, restrictions regarding *prices* or the *geographic scope* of the agent's sales activities are not caught by Article 101(1) TFEU when they occur *within a genuine agency relationship*.

Agents are not mentioned in the final report.

# 'Genuine agency'

- Integration in seller's sales operation  
(Judgment of 1 October 1987 - Vlaamse Reisbureaus, EU:C:1987:418)
- No financial or commercial risk: *i.e.*
  - No contractspecific/marketspecific risks
  - No investments in marketing or equipment



# Conversion?

- Existing distributors may be converted into commission agents, without any third parties being aware.
- Freedom of contract: no mandatory laws that must be complied with.

# Main rewards:

- Complete control over:
  - Prices: maintenance/dual pricing
  - Territories: incl. passive sales
  - Marketing activities, priorities
  - Customers
  - E-commerce sales, exclusion of webshops
  - Investments
- No insolvency risks distributors

# Downside?

- All risks lie with supplier, cost increase?  
(In practice: often cost decreases)
- Monitoring sales channels is more burdensome for suppliers
- Sometimes local law issues
- More complex tax compliance issues  
(transfer pricing, OECD 'BEPS' project)

# Conclusions

- Depending on the goals to be achieved, commission agents may be an effective alternative for classic distribution or commercial agency structures.
- More complex from an operational and legal perspective, but rewards may be worth the effort.