



International Distribution Institute

# Commercial Agency Agreements Article 101 (1) TFEU

Jaap van Till

Loyal Lawyers, Amsterdam, The Netherlands

T:+ 31 20 347 37 33

E: [jaap.vantill@loyal.nl](mailto:jaap.vantill@loyal.nl)

# Commission's 1962 Notice on Exclusive Dealing Contracts with Commercial Agents (OJ 1962, 139/2921)

Distinction between (i) the effect on the market for agency services and (ii) the effect on the market for the goods of the principal.

As to (i): acts only as an auxiliary integrated in the business of the principal and not as an independent trader.

Criterion for escaping Article 85 (1) EU Treaty:  
Integration / function as auxiliary

ECJ  
Consten / Grundig  
[1966] ECR 419

Commission's "integration" policy supported by the  
ECJ:

*“pointless to compare the situation of a producer bound by a sole distributorship agreement with that of a producer who includes within his undertaking the distribution by commercial representatives”*

# Commission: Pittsburg Corning Europe OJ 1972 L 272/35

Integration criterion:

Economic reality of a commercial relationship is decisive, not the designation given to it by the parties.

*Absence of economic dependency and integration. Consequently:  
agreement was considered to fall within the scope of Article 81 (1) EU  
Treaty*

ECJ  
Suiker Unie / Commission  
[1975] ECR-1663

The degree of autonomy of the commercial agent is determined by the economic dependency.

*In relation thereto the “allocation of risks” is relevant for distinguishing between commercial agent and independent trader*

# ECJ, Flemish Travel Agents [1987] ECR 3801

A travel agent cannot be treated as an auxiliary organ forming an integral part of a tour operator's undertaking because he sells travels by a large number of different tour operators and a tour operator sells travel through a very large number of agents.

???

*Prohibiting travel agents to pass commissions on to customers is incompatible with Article 81 (1) EU Treaty.*

Move towards the “allocation of risks” defining  
the existence of integration  
1990’s

ECJ, Bundeskartellamt / Volkswagen  
[1995] ECR I-3477

*Focus no longer on economic dependence and working exclusively for Volkswagen but entirely on whether “at least in part, financial risks are assumed linked to the transactions” while reaffirming that the agent must be “an auxiliary organ forming an integral part of the principal’s undertaking.*

# New approach to Commercial Agency Agreements by Commission's Vertical Restraints Guidelines

“Genuine or non-genuine” that is the question!

Only “genuine agency agreements” escape the application of Article 101 (1) TFEU.

*Decisive factor 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”*



## Three kind of risks

- Risks related to the contracts concluded and/or negotiated by the agent (e.g. financing of stocks);
- Risks related to market-specific investments (e.g. showrooms);
- Risks related to other activities undertaken in the same product market, to the extent that the principal requires the agent to undertake such activities, but not as an agent on behalf of the principal but for its own risk.

# Checklist of “examples” of such risks Paragraph 16 of the Guidelines

Non exhaustive list of risks which are all more or less common and reflected in the commission level, such as:

- Transport costs;
- Promotional costs;
- After sales-service;
- Del Credere.

# Do the Guidelines result in greater clarity?

An agency agreement will not be caught by Article 101 (1) TFEU if the agent does not bear any or only “insignificant” risks in relation to the three kind of risks.

- No guidance as to when investments can be considered “insignificant”;
- Assessment on a case-by-case basis.

## Does ECJ case law result in greater clarity?

- Daimler Chrysler / Commission [2005] ECR II-3319
- Spanish Petrol Preliminary Rulings CEEES abd CEPESA [2006 and 2008]

## How to deal with the Guidelines and ECJ case law in practice?

- Commission's 2014 Notice on Agreements of Minor Importance (threshold 15%);
- Gives no help as regards "hardcore restrictions";
- Review existing or draft new contracts while observing the Guidelines and ECJ case law;
- Be careful to make a thorough assessment when market shares exceed 15%;
- Practice hasn't shown major accidents until now but clouds continue to remain when dealing with commercial agency agreements. Risk of unnecessary damage can be limited if the Commission considers the classic agency relationships as opposed to the exceptional agency relationships in the review of BER 330/2010



International Distribution Institute

Thank you for your attention

Jaap van Till