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IS A TRUE AGENT

(in light of the new competition guidelines)

IN REALITY A NON-AGENT?[1]

- The type of agreements that may be of concern are those Agency agreements that ***do fall inside the scope*** of Article 101(1) of the Treaty

So, when does that happen?

- Article 101 of the Treaty applies to agreements between two or more undertakings. Although being between two undertakings, the relationship between an agent and its principal may be one in which the agent **no longer acts as an independent economic operator.**

- The agent shall not be considered as an independent undertaking where the ***agent bears no significant financial or commercial risks*** in relation to the contracts concluded or negotiated on behalf of the principal

    - In this case, the agency agreement falls wholly or partially **outside** the scope of Article 101(1) of the Treaty – the conditions to assess this should be interpreted narrowly.
    - risks that are related to the activity of providing agency services in general, such as the risk of the agent's income being dependent upon its success as an

[1] Notes of the address given at the IDI Annual Conference in Madrid 2022

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agent or general investments in for eg. premises or personnel that could be used for any type of activity, are not material to the assessment

- To assess if an agency agreement falls inside or outside the scope of Article 101(1) of the Treaty, the Commission analyses the presence or absence of **three types of financial or commercial risks** that are material to such assessment:

  - ***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 stocks
  - ***risks related to market-specific investments***. Those which are required to enable the agent to conclude and/or negotiate a specific type of contract.
    - Such investments are usually sunk i.e. cannot be used for other activities or sold other than at a significant loss.
  - ***risks related to other activities undertaken on the same product market***, to the extent that the principal requires, as part of the agency relationship, the agent to undertake such activities not as an agent on behalf of the principal, but at the agent's own risk. Eg: Del Credere obligations

- The significance of any such risks assumed by the agent is generally to be assessed by reference to ***commission of the agent***, rather than by reference to the revenues generated by the sale of the goods or services covered by the agency agreement

- ***The question of risk must be assessed on a case-by-case basis and with regard to the economic reality of the situation***

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- The Commission states that, for practical reasons, the risk analysis may start with the assessment of the contract-specific risks.

- If the agent incurs ***contract-specific risks*** which are not insignificant, that will be enough to conclude that the agent is an independent distributor.

- If the agent does not incur contract-specific risks, then it will be necessary to continue the analysis by assessing the ***risks relating to market-specific investments***.

- Finally, if the agent does not incur any contract-specific risks or any risks relating to market-specific investments, the ***risks related to other activities required as part of the agency relationship*** within the same product market may have to be considered.

    - ***DEL CREDERE obligation***: PT law is one of the laws that allows for the Agent to undertake "Del Credere" obligations:
        - In accordance with PT law, *an agent may guarantee, through an agreement in writing, the obligations of a third party, provided that they concern a contract negotiated or concluded by the agent. A del credere agreement shall only be valid when related to a certain agreement or certain persons. The agent in entitled to a special commission. The agent may demand the commissions due, once the contract is concluded (as opposed to what normally happens, where the Agent must wait for the Principal to get paid).*
        - The Agent will pay the price to the Principal (or a part therefore, in accordance with what has been agreed with the Principal as part of the Del Credere obligation) if that previously-identified certain Customer does not/ cannot pay.

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Now,

- Is there really a financial risk on the part of the Agent, knowing that, when Agent is a "Del Credere" agent:
  - I) the Agent is entitled to a special commission, that accrues to the regular commission, for EVERY contract entered into? And/or
  - II) The Agent is entitled to receive the commission independently from the fact that the Principal is paid, and therefore is entitled to receive the commission upon entering into the contract with Customer?

- How about in the cases where the parties to an Agency Agreement agree to establish a guarantee given by the Agent as to the attainment of a "***Minimum Turnover***" (see IDI model Agency Agreement) (even in the absence of a financial penalty), whereby the Agent accepts to bear a commercial risk of not attaining that Minimum Turnover and therefore suffer contractual consequences that can even mean contract termination for reasons attributable to the Agent?
- How about the ***risk of the Agent only being paid its commission after the Principal is paid***? Isn't there a financial risk borne by the Agent in this respect? A "true agent" (under competition light) cannot bear such a financial risk?
- How about, in those cases where the agent is a physical person, if the Principal is to cover and/or reimburse all relevant costs and expenses of the Agent – and therefore control his/her activity? Are we not here, before the danger of the agent being considered as a mere employee of the Principal, and not as an agent?

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- The methods used to cover the relevant risks and costs should allow the agent to **easily distinguish** between the amount(s) intended to cover the relevant risks and costs and any other amount(s) paid to the agent
    - A principal should also consider the fact that the agent may incur relevant market-specific investment costs ***even where it makes limited or no sales for a certain period***. Such costs have to be reimbursed by the principal.

- An agency agreement may also fall within the scope of Article 101(1),) of the Treaty even if the principal bears all the relevant financial and commercial risks, in cases ***where the agreement facilitates collusion***.
    - That could be the case, for instance, be the case where a number of principals use the same agents while collectively excluding other principals from using these agents, or where principals use the agents to collude on marketing strategy or to exchange sensitive market information

CONCLUSION:

As we have also seen in others Panel members intervention, the Commission seems to consider that a ***true agent cannot bear any significant financial or commercial risks*** in relation to the contracts concluded or negotiated on behalf of the principal, or such agent will otherwise be considered as an independent undertaking and therefore, in accordance with the Commission, the agency agreement shall fall inside the scope of article 101 of the Treaty and should be subject to further competition assessment.

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Well, one of the key characteristics and qualities of a commercial agent is its independence and autonomy – (to organize its strategies and activities, to choose which costs and expenses to incur in order to attain its goals and to bear the risks it considers fit to such finality).

If a "true agent" should not bear any commercial or financial risks nor bear any relevant expenses, are we still talking about an agent? or on the contrary, the Commission in its eagerness to assess non-competition, sort of has created a figure of a Non-Agent?

Thank you for your attention

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