International Distribution Institute

Complying with rules on “untrue agents” in retail agreements

CHAIR: Silvia Bortolotti, Buffa Bortolotti & Mathis, Turin; Vice-Chair and Secretary General IDI, IDI country expert for Italy

Mattia Govi, Max Mara Group, Reggio Emilia

Peter E. P. Gregersen, Aumento Law Firm, Copenhagen; IDI agency and distribution country expert for Denmark

Karsten Metzlaff, Noerr Partnerschaftsgesellschaft mbB, Hamburg

2023 IDI Annual Conference – Bologna, 9-10 June 2023

Scenario

Franchise agreement for the sale of goods through a retail shop.

Pursuant to the franchise agreement, the franchisee undertakes the typical obligations to act in accordance with the franchise concept, and to spend and invest (e.g. initial fitting of the store, advertising fees etc.).

However, the franchisee does not purchase and resell the goods.

In fact, sales are regulated through a mechanism by which the franchisor remains the owner of the goods until they are sold to the final customer (e.g. commission agency contract); or it may be that the franchisee (retailer) acquires the ownership of the goods, but just for an instant before it passes to the final customer (”contratto estimatorio”).

Scenario

Thus, in fact, the franchisee (retailer) acts:

- As a **franchisee**, pursuant to the framework (franchise) agreement;
- As an **intermediary/commission agent** (or similar contractual status), as far as the sale of the products is concerned.

Issues

The franchisor wants to remain free to determine the resale price of the goods, owned by him and sold through the franchisee in the retail shop.

***

In this scenario, we assume that all contractual provisions concerning territorial restrictions, non compete etc. are in compliance with the applicable antitrust rules, and we will focus on the “price fixing issue”.

***

Relevance of the Scenario

A combination of franchising and agency is quite common (“**Agency-Franchise**”) e.g.:

- network of mobile phones companies
- automotive sector
- sale of fashion via department stores
- sale of fashion via franchising points of sale
- sale of goods via food retail chains

Question 1:

When is Resale Price Maintenance (RPM) allowed in an agency relationship between supplier and agent?

- Under EU Antitrust law, Resale Price Maintenance (RPM) is allowed in an agency relationship between supplier and agent provided that the agent is qualified as "true agent"
- An agent is qualified as "**true agent**" if he

  (i) does not purchase and resell (own) the goods and

  (ii) bears no significant financial or commercial risk in relation to the contracts concluded or negotiated on behalf of the supplier.

→ See Vertical Guidelines No. 30 ss.

Question 2:

If the supplier remains the owner until the moment the goods are sold to the consumer, can he determine the resale price?

- Yes, as long as the agent does **not bear significant financial or commercial risk** in relation to the contracts concluded or negotiated on behalf of the principal.

Ownership? (by agent)	Significant Risks? (assumed by agent)	= Result
no	no	= true agent
no	yes	= not true agent
yes	yes	= not true agent
yes	no	= ????

Question 3:

If the agent becomes the owner at the moment the goods are sold to the consumer, can the supplier still determine the resale price?

- Yes, if the agent acquires the title in the goods only **for a brief moment of time** while selling them on behalf of the supplier and as long as the agent does not bear significant financial or commercial risks. Crucial is that the agent does not incur costs or risks in relation to the property transfer.

In light of the above, an agreement will generally be categorised as an agency agreement that falls outside the scope of Article 101(1) of the Treaty where all of the following conditions apply:

(a) the agent does not acquire the property in the goods bought or sold under the agency agreement and does not itself supply the services bought or sold under the agency agreement. The fact that the agent may temporarily, for a very brief period of time, acquire the property in the contract goods while selling them on behalf of the principal, does not preclude the existence of an agency agreement that falls outside the scope of Article 101(1) of the Treaty, provided that the agent does not incur any costs or risks in relation to the transfer of property;

Evaluation based on the EU Antitrust case-law

Transfer of ownership of the goods plays and important role in the assessment made by the EU Commission and the ECJ:

- EU Commission decision of 18/12/1987 IV/31 017 (Fisher-Price /Quaker Oats Ltd – Toyco): it was not an agent because it was reselling products
- EU Commission Decision of 4/12/1991 IV/33.157 (Eco System/Peugeot): it was not an agent because it was reselling products
- Commission Decision of 26/5/2004 COPM/C-3/37.980 Souris /Topps

  "Topp'[s] assertion in this respect that Topps itself remains owner of the collectibles throughout the transaction is not supported by the distribution contract of 20 March 2000 which does not contain any such clause"
- **EU Court of Justice** 24/10/1995, C-266/93 Bundeskartellamt v. Volkswagen AG, **VAG Leasing** GmbH (VAG Leasing): The agent was under the obligation to purchase the vehicle after the end of the leasing contract; he was also performing a parallel resale activity. Therefore, he was an untrue agent

In fact, in this situation the intermediary normally does not bear costs or risks related to the sales intermediated by him

Question 4:

Which risks are considered relevant?

Three types of commercial and financial risks are considered relevant:

- **Contract specific risks** (directly related to the contracts concluded or negotiated by the agent on behalf of the supplier e.g. costs of transport of goods, financing of stock)
- **Market specific investments** (specifically required for the agent's activities for the supplier e.g. costs for specific equipment, costs for training of employees)
- **Risk related to the agent's other activities on the same products market** (that the supplier requires the agent to undertake at its own risk e.g. implementation of a tailor service)

→ See Vertical Guidelines No. 31.

Question 5:

Which risk are considered irrelevant?

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 agent, or
- general investments in for instance premises or personnel that could be used for any type of activity.

→ See Vertical Guidelines No. 32.

International Distribution Institute

“Market Specific Investments” and investments related to the provision of agency service in general

Investments	
Market Specific Investments	**Investments for agency service in general (not be deemed “Market Specific Investments”)**
Principal (required to be covered by the principal or need to be reimbursed to the agent)	**Agent** (not required to be covered by the principal)
• Dedicated furniture (e.g. windows-kit, mannequin); • Personnel training; • Specific storage equipment; • Dedicated devices (e.g. tablet) / computing appliances (e.g. cash softwares); • Customized/branded adaptation of websites and/or online stores; • Branded loyalty programme / fidelity programme • Brand advertising	• General advertising of agent activities; • General investments on websites and/or online stores functionalities; • Common costs for managing and running the agent activities (taxes, duties etc.) • General furniture and fittings (cash register) • Facilities (air conditioning, lighting, cleaning etc.) • Personnel/staff remuneration

Question 6:

What methods exist for the supplier to cover the relevant risk or costs?

- The supplier reimburses the precise cost incurred.
- The supplier pays the agent a fixed lump sum to cover the costs.
- The supplier pays the agent a percentage of the revenues generated by the sale of goods or services fixed lump sum to cover the costs.

Important: The method used by the supplier must easily allow the agent to identify the relevant amount!

→ see Vertical Guidelines No. 35.

Assessment made by the EU Court of Justice (1)

The risks involved must be "significant" (see Guidelines, § 30)

Court Judgment of 14/12/2006, C-217/05 **CEPSA**

"Article 85 of the EEC Treaty (subsequently Article 85 of the EC Treaty and now Article 81 EC) applies to an agreement for the exclusive distribution of motor-vehicle and other fuels, such as that at issue in the main proceedings, concluded between a supplier and a service-station operator where that operator assumes, ***to a non-negligible extent****, one or more financial and commercial risks linked to the sale to third parties."*

Assessment made by the EU Court of Justice (2)

Court of First Instance, 15 September 2005, case T-325/01, *DaimlerChrysler AG v. Commission,* ECR 2005, II-3319. (**Mercedes-Benz**)

- Contrary to the Commission (Decision of 10 October 2001, *Mercedes Benz* (OJ 2002 L 257, 1).), the Court regarded the intermediary as a true agent notwithstanding that:
  - The agent was required to deliver the car, against payment, when the customer did not collect it at the factory gate;
  - The agent had to purchase demonstration vehicles (low risk)
  - The agent had to carry out repair works under manufacturer's guarantee (genuine financial risk);
  - The agent had to set up a workshop for his own account (no sufficient evidence provided by the Commission of a significant economic risk);
  - The agent had to provide after-sales services (no sufficient evidence provided by the Commission of a significant economic risk);
  - The agent had to keep a stock of spare parts (no sufficient evidence provided by the Commission of a significant economic risk).

Question 7:

Does the de-minimis rule help the franchisor to determine the resale price (if the agent is not a true agent)?

- Agreements may fall outside Article 101(1) of the Treaty because they are not capable of appreciably affecting competition if the aggregate market share held by the parties to the agreement does **not exceed 15%** on any of the relevant markets affected by the agreement (vertical agreement made between non-competitors)
- However, agreements which have as their object the prevention, restriction or distortion of competition within the internal market do not fall under the de-minimis rule.
- RPM is considered as restriction of competition **by object**.

Question 8:
In case of application of Article 101(1) to the described scenario, what would be the consequences for the supplier?

Where the agent bears one or more of the relevant risks to a significant extent, the agreement between agent and supplier does not constitute an agency agreement that falls outside the scope of Article 101(1) of the Treaty.

In that situation, the agent will be treated as an independent undertaking and the agreement between agent and supplier will be subject to Article 101(1) of the Treaty, like any other vertical agreement.

- **Consequence for RPM:** exemption unlikely

A decision of the French Antitrust Authority

Decision n. 09-D-23 of June 30, 2009 (Punto Fa SL – Mango brand)

Unknown contract *(«Contrat de dépôt commercial gratuit et gestion de vente»)*, with typical contents of a franchise agreement, for the sale of fashion goods through retail points of sale

- The brand owner retains the ownership of the goods until they are sold to the final customer
- No risks or costs related to the resale of products and stock on the "agent"
- Managing of the stock, promotion, prices etc. decided by the brand owner
- Other costs and investments borne by the "agent" :
  - Entry fee
  - Bank guarantee covering the stock value (€ 3,000.00 per year)
  - Financing transport of goods from Spain to France (0-5% sale revenues)
  - Insurance covering the goods
  - Market Specific investments
  - Initial costs: furnishing etc. (5-10% sale revenues): (retrievable)

CONCLUSIONS: not significant investments and risks: true agent

Possible solutions?

Guidelines, § 192

Under an agency agreement, the principal generally sets the sale price, as it bears the commercial and financial risks relating to the sale. However, where the agreement does not meet the conditions to be categorised as an agency agreement that falls outside the scope of Article 101(1) of the Treaty (see in particular paragraphs (30) to (34) of these Guidelines), any direct or indirect obligation preventing or restricting the agent from sharing its remuneration with the customer, irrespective of whether the remuneration is fixed or variable, is a hardcore restriction within the meaning of Article 4, point (a) of Regulation (EU) 2022/720(107). The agent should therefore be left free to reduce the effective price paid by the customer without reducing the income due to the principal (108).

Thanks for your kind attention!

Silvia Bortolotti, Buffa Bortolotti & Mathis, Turin; Vice-Chair and Secretary General IDI, IDI country expert for Italy

Mattia Govi, Max Mara Group, Reggio Emilia

Peter E.P. Gregersen, Aumento Law Firm, Copenhagen; IDI agency and distribution country expert for Denmark

Karsten Metzlaff, Noerr Partnerschaftsgesellschaft mbB, Berlin