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Agency under EU Competition Law

Produced in partnership with K&L Gates LLP

There are several ways in which a supplier can get its product to the market. A supplier may:

- distribute products or services itself
- use a distributor, or
- use an agent.

In making this decision, a supplier will inevitably be influenced by a variety of commercial considerations. Alongside such commercial considerations, a supplier will also have to consider EU and/or national competition law issues potentially impacting the proposed commercial arrangement. See further, An overview of competition issues impacting vertical commercial agreements.

There are particular competition law considerations to be taken into account depending on whether a supplier opts to use an agent or a distributor to get its products to the market.

In order to avoid infringing Article 101 TFEU (or equivalent local law rules), it is important to consider carefully whether the agreement would be regarded as a 'genuine agency agreement' for the purposes of competition law, taking into account all the facts and circumstances.

References:
Article 101 TFEU

Where an agreement is a genuine agency agreement, certain restrictions under Article 101(1) TFEU will not apply.

This is because, as articulated in the seminal case of DaimlerChrysler AG, a genuine agent working for the benefit of his principal 'may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with his undertaking'.

References:
Case T-325/01 DaimlerChrysler AG v Commission

In other words, the agreement is not an agreement between different undertakings for the purposes of Article 101(1) TFEU; the principal and agent are effectively regarded as one economic entity.

Accordingly, the Vertical Guidelines make it clear that certain obligations, which would normally run the risk of breaching Article 101(1) TFEU, will fall outside of its scope where the relationship is one of genuine agency. These restrictions are outlined under the section 'Potentially problematic provisions' below.

References:
Guidelines on Vertical Restraints, para 18

By contrast, if the 'agent' is in reality more akin to a distributor, certain provisions risk being regarded as prohibited hardcore restrictions or excluded restrictions of competition, thus exposing the parties to competition liability.

Distinguishing between an agent and distributor

Under the Vertical Guidelines:

References:
Commission Guidelines on Vertical Restraints, para 12

An agent is a legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of anoth-er person (the principal), either in the agent's own name or in the name of the principal, for the purchase of goods or services by the principal, or the sale of goods or services supplied by the principal.

An agent should be distinguished from a distributor, which buys products from the supplier and then resells them to third parties in its own name.

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Agent	Distributor
Does not buy the product from the supplier or take ownership of the product	Buys the product from the supplier and thereby takes ownership of the product
Represents the principal and contracts on behalf of the principal (deals directly with both principal and customer)	Represents itself and contracts on its own behalf
Has no liability towards the customer in relation to the product (the principal retains risk and liability)	Takes on the product risk and is liable towards the customer in respect of the product
Is normally paid a commission for its services	Normally adds a margin to its resale price to make profit and cover expenses
Is under fiduciary duties to act in the best interests of the principal	Does not owe fiduciary duties to the supplier
May have a right to compensation on termination under the Commercial Agents (Council Directive) Regulations 1993 (and equivalent regulations in other Member States)	Normally has no statutory right to compensation, however check local law (eg distributors in Belgium and France benefit from equivalent protection)

Advantages of agency

Agency can be attractive to both the principal and the agent for a number of reasons.

The advantages for the principal include that it:

- can retain greater control over the sale of the product, including specifying the price at which it is sold and where it is sold. As discussed further below, genuine agency agreements are subject to fewer competition law risks and therefore permit greater restrictions on the agent
- can manage or increase its sales without the need to create new distribution systems or employ its own staff to get the goods or services to market, and
- creates a direct relationship between the supplier and the end customer, which may be important or valuable in terms of brand recognition, after-sales service etc.

The advantages for the agent include that it:

- does not take on risk in relation to the product
- has no liability towards the customer in relation to the product
- usually requires substantially less investment (in particular fixed costs such as premises and marketing) compared with being a distributor, and
- when the agency concerns the sale of goods, will normally benefit from a right to compensation on termination under the Commercial Agents (Council Directive) Regulations 1993.

There may also be tax implications in deciding whether to use a distributor or agent.

When will there be genuine agency?

An agreement will generally constitute a genuine agency agreement where:

- the property in the contract goods or services does not vest in the agent, or the agent does not himself supply the contract services, and
- the agent does not bear any, or bears only insignificant, commercial or financial risk in relation to the contract negotiated or concluded on behalf of the principal. Where the agent bears some risk, it is likely to be seen as acting independently rather than as an agent.

References:
Commission Guidelines on Vertical Restraints, para 13

The case law of the Court of Justice has made it clear that the requirement that agents not bear risk will be interpreted strictly, although in practice it will be very difficult to determine the limits of what constitutes acceptable risk. While negligible financial and commercial risk will not preclude the possibility of genuine agency , what will amount to more than negligible risk will necessarily turn on the particular facts.

References:
Case C-279/06 CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL

The following guidance can be drawn from the case law:

- a genuine agent will act for the benefit of the principal, obey instructions and behave in the way an employee might act

References:
Case 40/73 Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission

- an agent that bore the risk relating to the supplies (in that case, for fuel) from the moment of delivery and was obliged to pay the supplier principal for the deliveries within nine days of delivery, irrespective of whether the fuel had been sold, was found to bear too much risk to be a genuine agent

References:
Case C-279/06 CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL

- an agent that had no authority to sell the principal's products (vehicles), but rather only to pass on orders to the principal, was held to be a genuine agent. In that case, there were strict guidelines for negotiating deals and the agreement of prices, and contracts were only concluded when the principal accepted the order

References:
Case T-325/01 DaimlerChrysler AG v Commission

- in VAG Leasing, the Court of Justice considered it relevant to the assessment that the 'principal business and after-sales service [was] carried on, largely independently, in [the agent's] own name and for [its] own account'. It concluded

that the agent was not a genuine agent for the purposes of competition law. However, it now appears from the definition of agency in the Vertical Guidelines that an agreement need not necessarily be made in the name of the principal to be regarded as a genuine agency. This re-emphasises that it is the economic reality that will determine whether a genuine agency relationship exists as opposed to the legal form of contracts concluded by the agent.

References:
Case C-266/93 Bundeskartellamt v Volkswagen AG and VAG Leasing Commission Guidelines on Vertical Restraints, para 12

- situation where the agent works for several principals. The Vertical Guidelines make clear that it is not material to the assessment of genuine agency if the agent acts for more than one prin-cipal. This is in contradiction to earlier decided case law, such as Vlaamse Reisbureaus, which concerned travel agents. In this case, the Court of Justice determined that a travel agent sells travel packages organised by a large number of different tour operators and that a tour operator sells its tours through a large number of travel agents. For this reason, the Court decided that there could be no agency relationship, stating that a genuine agent 'works only on behalf of one principal.' This case has been heavily criticised and it appears from the more recent Vertical Guidelines that an agent need not be an exclusive agent in order for there to be a genuine agency relationship.

References:
Commission Guidelines on Vertical Restraints, para 14 Case 311/85 VZW Vereniging van Vlaamse Reisbureaus v VZW Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten

A step by step guide on identifying risk

The question of risk for the agent must be assessed on a case-by-case basis, taking into account the economic reality of the situation. The Vertical Guidelines state that the purported legal form of the contract is irrelevant to this assessment.

References:
Commission Guidelines on Vertical Restraints, para 19

A practical method of assessing whether an agent could be seen as bearing risk is to ask the questions set out in the steps below, which reflect the non-exhaustive principles laid down in the Vertical Guidelines.

Step 1 – can any contract-specific risks be established?

Contract-specific risks are those risks which are directly related to the contracts concluded or negotiated by the agent on behalf of the principal.

Examples of contract-specific risks include where the agent:

- contributes to the costs relating to the supply or purchase of the products or services (including transportation costs)
- maintains (at his own cost or risk) stocks of the contract products
- undertakes responsibility towards third parties for damage caused by the products (unless in relation to the agent's own fault)
- takes responsibility for a customer's non-performance of the contract (unless in relation to the agent's own fault), or
- is obliged to invest in sales promotions, such as to contribute to the advertising budget of the principal.

Following decided case law of the Court of Justice of the European Union, where an agent bears even one contract-specific risk, there will be no genuine agency (see VAG Leasing).

References:
Case C-266/93 Bundeskartellamt v Volkswagen AG and VAG Leasing

Step 2 – where no contract-specific risks are established, can any risks relating to market-specific investments be established?

This question is concerned with identifying investments by the agent relating to the particular activity which the agent is appointed by the principal to carry out.

The investments are usually sunk, which means that if the agent ceases to carry out that particular activity the investment could not be used for other activities or sold other than at a significant loss.

References:
Commission Guidelines on Vertical Restraints, para 14

Examples of market-specific investments would include investments by the agent in equipment, premises or training of personnel (unless fully reimbursed by the principal). The Vertical Guidelines give the examples of paying for a petrol storage tank in the case of petrol retail agents or specific software to sell insurance policies in the case of insurance agents.

References:
Commission Guidelines on Vertical Restraints, para 16

Market-specific investments would not normally include general costs such as payment for generic premises or the employment of staff; these are not themselves specific to the activity for which the agent is appointed.

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Step 3 — where no contract-specific risks and no market-specific investments can be established, can any risks related to other required activities within the same market be established?

This question is concerned with identifying other activities undertaken by the agent on the same product market, at the agent's own risk.

Where an intermediary acts as both an agent and an independent distributor of products on the same market, Article 101(1) TFEU will apply to both agreements. In other words, the intermediary will not be treated as a genuine agent for the purposes of the agency agreement, *(see Suiker Unie)*.

References:
Case 40/73 Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission of the European Communities

Only those risks taken by the agent in the same product market are relevant; risks taken by the agent in a different product market will not be relevant to this assessment.

For example, in DaimlerChrysler AG, despite the fact that Mercedes Benz's agents undertook some risk in the form of after-sales repairs for the vehicles they sold on behalf of Mercedes Benz, this was not considered to be a contract-specific risk because the market for after-sales repair was distinct from the relevant market in the proceedings. The General Court rejected the idea that 'carrying-on of business as a commercial agent and the provision of after-sales services lead to a double-sided relationship, thereby excluding any right to preferential treatment under the law...' Therefore, the fact that a genuine agent does not take on risk on the relevant market may not necessarily prevent it from taking on risk in a different market, even if these are inter-related.

References:
Case T-325/01 DaimlerChrysler AG v Commission

When might a genuine agency breach Article 101(1) TFEU?

While an agency agreement will, on the one hand, govern the terms on which an agent sells to or purchases products or services from a third party, it will on the other hand also govern the relationship between the principal and the agent.

If the agreement is a genuine agency, the former terms (ie concerning the relationship with third parties) will not be subject to Article 101 TFEU, because the agent and principal will be regarded as forming part of the same undertaking.

References:
Article 101 TFEU

Therefore, restrictions that would otherwise be prohibited in a vertical agreement may be imposed on a gen-uine agent. These include:

- restrictions on the territory/ies in which the agent may sell the products or services, either actively or passively
- restrictions on the customers to whom the agent may sell the products or services, and
- restrictions regarding the price or conditions at which the agent must sell or purchase the products or services (including minimum or fixed prices).

However, the Vertical Guidelines make clear that for the purposes of the latter relationship (ie between the agent and the principal), the agent is a separate undertaking from the principal. Therefore, this relationship will be subject to Article 101 TFEU and the provisions should be carefully reviewed to ensure these do not infringe competition law.

References:
Commission Guidelines on Vertical Restraints, para 19

Non-exclusive agency agreements are not likely to raise competition concerns. Exclusive agency provisions will not normally lead to anti-competitive effects for the purposes of Article 101(1) TFEU except where they lead to foreclosure on the relevant market, or where their cumulative effect would lead to such foreclosure. In particular, the Vertical Guidelines identify the following provisions as potentially anti-competitive:

References:
Commission Guidelines on Vertical Restraints, para 19

- single branding provisions — where a buyer is restricted or induced to deal with one supplier, and
- post-term non-compete provisions — where a party to the agreement is prevented from compet-ing with the counter-party even after the expiration of that agreement.

The risk of foreclosure is most likely to arise where the principal (or principals) have market power. For example, in a decision of the European Commission relating to a Dutch plywood trade association, provisions restricting the ability of non-members to engage agents who were members of the association was said to lead to foreclosure on the relevant market and were thus contrary to Article 101(1) TFEU. While this case involved a larger trade association, should similar provisions in an agency agreement contribute to foreclosure, that agreement could potentially infringe Article 101(1) TFEU.

References:
Commission Decision 80/1071/EEC

The Vertical Guidelines also make clear that an agency agreement may infringe Article 101(1) TFEU where it facilitates collusion between competitors, such as the sharing of marketing strategy or sensitive market in-formation. This risk was identified in the European Commission's recent investigation regarding the sale of e-books in the EEA by Apple (Apple, Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Penguin (E-books) (COMP/39.847)). This could also be the case where a number of principals use the same agents while collaboratively preventing others from using those agents, as in the Dutch plywood case above.

References:
Commission Guidelines on Vertical Restraints, para 20

Where the terms of an agency agreement breach Article 101(1) TFEU, they may potentially give rise to sufficient customer benefits and efficiencies to be justified under Article 101(3) TFEU. In the absence of such justification (and if the agreement is not covered by the vertical agreements block exemption), the parties may be exposed to the risk of unenforceability and sanctions.

References:
Regulation 330/2010

Recent trends and investigations

Recent European Commission and national competition investigations have highlighted that a genuine agency agreement will not necessarily be automatically exempted from Article 101(1) TFEU, even in relation to provisions governing how the agent can contract with third parties on behalf of the principal.

In the Apple e-books investigation, the European Commission investigated agency agreements concluded between Apple and five major publishers. The publishers and Apple were accused of colluding to jointly switch the sale of e-books from a wholesale model, in which the retail price of e-books is determined by the retailer, to an agency model, whereby all the agency agreements contained the same key terms for retail prices (including a Most Favoured Nation clause maximum retail price grids and the same 30% commission payable to Apple). The European Commission was concerned that the joint switch to the agency agreements may have been co-ordinated between the publishers and Apple as part of a common strategy aimed at raising retail prices for e-books or preventing the introduction of lower retail prices for e-books on a global scale, which would infringe Article 101 TFEU. The Commission closed its investigation after the parties offered commitments to terminate the agency agreements.

Similarly, in the Hotel online booking investigations by the UK Competition and Markets Authority and other national competition authorities, certain provisions in the agency agreements between the online travel agents (OTAs), Booking.com and Expedia, and hotels were accused of being anti-competitive. In particular, Booking.com and Expedia allegedly sought to control and increase prices of room only hotel accommodation through the use of contractual provisions such as Most Favoured Nation clauses, which restricted smaller OTAs from offering discounted hotel rooms on their websites. What these recent cases illustrate is that, even though agency agreements normally allow for more control over resale prices than distribution agreements, the supplier cannot have absolute control over prices in either scenario; an agent must be left with certain freedom to provide discounts from their commission in order to retain a degree of price competition in the market.

For an exploration of MFN clauses and E-books and Hotel online booking investigations, see further, Most-favoured nation clauses.

Potentially problematic provisions

From the above, it is possible to summarise the potentially problematic provisions in genuine agency and non-genuine agency agreements as follows:

Genuine agency	Non-genuine agency
Single branding provisions	Territorial restrictions
Post-term non compete clauses	Customer restrictions
Restrictions on using commission to offer price reductions	Price and other resale conditions
Most Favoured Nation clauses	Single branding provisions
Provisions facilitating collusion between competitors	Post-term non compete clauses
	Restrictions on using commission to offer price re-ductions
	Most Favoured Nation clauses
	Provisions facilitating collusion between competitors

Other considerations

While an agency agreement will, on the one hand, govern the terms on which an agent sells to or purchases products or services from a third party, it will on the other hand also govern the relationship between the principal and the agent.

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Article 102 TFEU

While Article 101(1) TFEU will generally not apply to genuine agency agreements (subject to the limited exceptions outlined above), Article 102 TFEU should be considered if either the principal or agent occupies a dominant position in a relevant market.

Article 102 TFEU prohibits the abuse of a dominant market position where this may affect trade in the EU. If either party to an agency agreement has market power, it should be assessed whether the provisions of the agreement may have the effect of restricting competition, for example by foreclosing competitors.

References:
Article 102 TFEU

See further, An overview of the prohibition on abuse of dominance.

Commercial Agents Regulations

Finally, it should also be borne in mind that in the EU, agency agreements involving 'commercial agents' must comply with the EU Commercial Agents (Council Directive) Regulations 1993:

References:
Commercial Agents (Council Directive) Regulations 1993, reg 2(1)

A 'commercial agent' is defined 'a self-employed intermediary who has continuing authority to negotiate the sale or purchase of products on behalf of another person (the 'principal'), or to negotiate and conclude the sale or purchase of products on behalf of and in the name of that principal

The Regulations imposed rights and obligations on both principals and commercial agents (including com-pensation rights for agents on termination of the agreement, where certain conditions are met). They should therefore be carefully considered in assessing the possible financial risks of termination.