

Notice on exclusive dealing contracts with commercial agents

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Only the published text is authentic. The following version in English is an unofficial translation.

I. The Commission considers that contracts made with commercial agents in which those agents undertake, for a specified part of the territory of the common market,

- to negotiate transactions on behalf on an enterprise,

or

- to conclude transactions in the name and on behalf on an enterprise,

or

- to conclude transactions in their own name and on behalf of this enterprise,

do not fall under the prohibition in Article 85(1) of the Treaty.

It is essential in this case that the contracting party, described as a commercial agent, should, in fact, be such, by the nature of his functions, and that he should neither undertake nor engage in activities proper to an independent trader in the course of commercial operations. The Commission regards as the decisive criterion which distinguishes the commercial agent from the independent trader, the agreement - express or implied - which deals with responsibility for the financial risks bound up with the sale or with the performance of the contract. Thus the Commission's assessment is not governed by the name used to describe the representative. Except for the usual del credere guarantee, a commercial agent must not by the nature of his functions assume any risk resulting from the transaction. If he does assume such risks, his function becomes economically akin to that of an independent trader and he must therefore be treated as such for the purposes of the rules of competition. In such a situation, the exclusive dealing contracts must be regarded as agreements made with independent traders.

The Commission considers that there is particular reason to assume that the function performed is that of an independent trader where the contracting party described as a commercial agent:

- is required to keep or does in fact keep, as his own property, a considerable stock of the products covered by the contract, or

- is required to organize, maintain or ensure at his own expense a substantial service to customers free of charge, or does in fact organize, maintain or ensure such a service, or

- can determine or does in fact determine prices or terms of business.

II. Unlike the contracts with commercial agents covered here, exclusive dealing contracts with independent traders may well fall within Article 85(1). In the case of such exclusive contracts the restriction of competition lies either in the limitation of supply, when the vendor undertakes to supply a given product to one purchaser only, or in the limitation of demand, when the purchaser undertakes to obtain a given product from only one vendor. Where there are reciprocal undertakings competition is being restricted by both parties. The question

whether a restriction of competition of this nature may affect trade between Member States depends on the circumstances of the particular case.

On the other hand, the Commission takes the view that the test for prohibition under Article 85(1) is not met by exclusive dealing contracts with commercial agents, since these contracts have neither the object nor the effect of preventing, restricting or distorting competition within the common market. The commercial agent only performs an auxiliary function in the market for goods. In that market he acts on the instructions and in the interest of the enterprise on whose behalf he is operating. Unlike the independent trader, he himself is neither a purchaser nor a vendor, but seeks purchasers or vendors in the interest of the other party to the contract, who is the person doing the buying or selling. In this type of exclusive dealing contract, the selling or buying enterprise does not cease to be a competitor; it merely uses an auxiliary, i.e. the commercial agent, to distribute or acquire products on the market.

The legal status of commercial agents is determined, more or less uniformly, by statute law in most of the Member States and by case law in others. The characteristic feature which all commercial agents have in common is their function as auxiliaries in the transaction of business. The powers of commercial agents are subject to the civil law provisions of agency. Within the limits of these provisions, the other party to the contract - who is the person selling or buying - is free to decide the product and the territory in respect of which he is willing to give these powers to his agent.

In addition to the competitive situation on the markets where the commercial agent functions as an auxiliary for the other party to the contract, the particular market on which the commercial agents offer their services for the negotiation or conclusion of transactions has to be considered. The obligation assumed by the agent - to work exclusively for one principal for a certain period of time - entails a limitation of supply on that market; the obligation assumed by the other party to the contract - to appoint him sole agent for a given territory - involves a limitation of demand on the market. Nevertheless, the Commission views these restrictions as a result of the special obligation between the commercial agent and his principal to protect each other's interests and therefore considers that they involve no restriction of competition.

The object of this Notice is to give enterprises some indication of the considerations by which the Commission will be guided when interpreting Article 85(1) of the Treaty and applying it to exclusive dealing contracts with commercial agents. The situation having thus been clarified, it will as a general rule no longer be useful for enterprises to obtain negative clearance for the agreements mentioned, nor will it be necessary to have the legal position established through a Commission decision on an individual case; this also means that notification will no longer be necessary for agreements of this type. This Notice is without prejudice to any interpretation that may be given by other competent authorities and in particular by the courts