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Comments

on the draft Regulation on the application of Art 81 (3) EC to categories of vertical agreements and concerted practices (Vertical BER) and draft Notice of the EU Commission “Guidelines on Vertical Restraints” (Vertical Guidelines)

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The German Insurance Association (Gesamtverband der Deutschen Versicherungswirtschaft e. V. - GDV) agrees with the EU Commission that the Vertical BER has basically proven its value and should be prolonged beyond May 2010. The same applies to the Vertical Guidelines.

In the following it is commented on the published draft Vertical Guidelines, limited to the aspect of agency agreements.

In particular, GDV welcomes that, as before, according to the draft Vertical Guidelines, classification as an agent is to be made according to whether or not the distribution of risks is typical of agents. However, from our point of view, there are doubts as to whether the evaluation criteria laid down in paragraphs 15 and 16 of the draft Vertical Guidelines are in line with the decision practice of the Court of First Instance quoted by the EU Commission in footnote 11. Therefore, it is suggested that these rules be revised and adjusted accordingly.

In any case, there is need for modification of the last two indents of paragraph 16 of the draft Vertical Guidelines. Apart from a translation error in the German version, which distorts the meaning, the concept of indispensability laid down in paragraph 15 of the draft Vertical Guidelines has been implemented only incompletely in the last indent.

1. As before, the draft new Vertical Guidelines rightly highlight the limited applicability of the cartel ban to agency agreements.
2. Regarding the question as to whether Article 81 (1) EC is applicable, it is once again referred to the risk borne by the agent with regard to the activities assigned to him by his principal (cf. paragraph 13 of the draft Vertical Guidelines). GDV suggests that, in line with the *DaimlerChrysler* decision of the Court of First Instance (there paragraph 111) quoted in footnote 11 of the draft Vertical Guidelines, it be made clear in paragraphs 15 and 16 of the draft Vertical Guidelines that not every not only insignificant risk will entail a loss of the privilege, but only “exceptional” or “economically appreciable risks”.
3. As an innovation, three instead of two types of risks are stated, which have to be taken into account in classifying an agreement as an agency agreement (cf. paragraph 14 of the draft Vertical Guidelines). In addition to the types of risks stated before (risks which are directly connected with the activity/risks related to market-specific investments), the risks to be examined are now also to include risks related to other activities, such as after sales or repair services or activities undertaken in other relevant product markets. This innovation is made with reference to the above-mentioned *DaimlerChrysler* judgment of the Court of First Instance. However, it seems questionable whether this correctly reflects court practice. For instance, in paragraph 113 of the judgment of the Court of First Instance, activities in other markets have been expressly referred to as being irrelevant for the qualification of the agency relationship. Any divergent evaluation for the case that the third-market activities are indispensable for the activity as an agent cannot be found there. Therefore, it is suggested that this third risk category in paragraph 15 of the draft Vertical Guidelines and the last two indents of paragraph 16 of the draft Vertical Guidelines be deleted.
4. But in any case the last two indents of paragraph 16 of the draft Vertical Guidelines in their German version should be aligned with the English version, so as to implement the concept of indispensability, as laid down in paragraph 15 of the draft Vertical Guidelines, consistently:

The English version reads (emphasis added):

- *does not create and/or operate an after-sales service, repair service or a warranty service required by the principal **unless** these services are fully reimbursed by the principal **or unless** these services are not indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal;*
- *does not operate in other (product) markets **unless** this is not indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal.*

In the German version, the term “unless” has been translated incorrectly and in a way which distorts the meaning with the term “sofern”.

Correctly, the German version would have to read as follows (modifications have been underlined or crossed out):

- *keine After-Sales-Serviceleistungen, Reparaturdienste oder vom Auftraggeber geforderte Garantieleistungen ausführt ~~oder~~, es sei denn, dass der Auftraggeber die Kosten hierfür in vollem Umfang übernimmt ~~bzw. sofern~~ oder dass die Dienstleistungen nicht unerlässlich sind, um die Vertragswaren oder -dienstleistungen im Namen des Auftraggebers ankaufen oder verkaufen zu können;*
- *nicht auf anderen (sachlich relevanten) Märkten tätig ist, ~~sofern es sei denn, dies ist nicht unerlässlich ist~~, um die Vertragswaren oder -dienstleistungen im Namen des Auftraggebers ankaufen oder verkaufen zu können.*

From the point of view of GDV, it is imperative that the German version be corrected accordingly.

5. Moreover, in the last indent of paragraph 16 of the draft Vertical Guidelines, it would have to be made clear that the third-market activities of the agent are required by the principal, but that in this respect the agent is not allowed to act on behalf of the principal and assumes risks which are not evened out by the principal, for instance, by bearing the costs.

6. Also, given recent decision practice, particularly of the Court of First Instance in *DaimlerChrysler*, there is need for revision of the present rules of paragraph 16 of the draft Vertical Guidelines as well. In the opinion of the court, none of the risks stated there leads per se to the denial of an agency contract. Rather, each individual risk has to be weighted with regard to its significance, so as to decide whether or not the agent bears an actual financial risk which justifies a qualification as an independent economic operator. In the opinion of GDV, this should also be allowed for with regard to the catalogue of examples in paragraph 16 of the draft Vertical Guidelines.

Berlin, 1 October 2009