IDI PROJECT S.R.L.
Via Alfieri 19
10121 Torino, (Italy).

USER ID NUMBER: 05926152333-21

OBSERVATIONS OF THE INTERNATIONAL DISTRIBUTION INSTITUTE (IDI) ON THE DRAFT GUIDELINES REGARDING AGENCY AGREEMENTS.

The International Distribution Institute, deals since several years with issues regarding cross-border commercial agency contracts. The Institute avails itself of the collaboration of qualified experts and has worked out a set of model contracts for international trade, based on the prevailing practice in international trade.

It is on the basis of its specific experience in this field that IDI believes to be particularly qualified to present the following observations.

1. General considerations

In paragraphs 12-21 the Guidelines attempt to define the borderline between «genuine» agency agreements which are in principle not caught by Article 81 and «non genuine» agency agreements which on the contrary fall under the prohibition of Article 81.

This is certainly a very difficult task, since it is almost impossible to «translate» into general rules principles established in particular cases.

IDI appreciates the effort made by the Commission in order to establish general guidelines on this rather complicated issue, and hopes that these observations can be used for bringing the guidelines closer to the reality of international agency contracts.

2. The risk of basing general rules on «abnormal» situations

A first consideration that the Commission should keep in mind when trying to set out general indications is that most of the cases where the problem has arisen do not relate to the «normal» relationship between principal and agent, but – on the contrary – to very special situations which have little to do with the great majority of commercial agency agreements.

In fact, several critical cases where the question has arisen regard agents:

- who provide products (or services) to consumers: petrol (CEPSA, etc.), travel packages (Vlaamse Reibureaus), cars (Mercedes), and
- who directly deliver the products to the customer and cash the price.

These situations are far away from the great majority of «normal» agency contracts.

The «normal» commercial agent promotes sales towards resellers or industrial end-users, not towards consumers at the retail level. He does not deliver the products and cash the price: he simply collects an order and transmits it to the principal who will deliver the goods to the customer, obtain payment, and who will some months later pay the commission to the agent.

When establishing criteria for distinguishing between «genuine» and «non genuine» agents the Commission should remember that these criteria must be applied also to these «normal» agents, which probably represent 95% of the category.

3. The agent's integration in the principal's network

Since the «Christmas notice» of 1962 the Commission has concentrated only on one distinctive criterion (the financial or commercial risk) without considering the issue of integration in the principal's network.

This approach does not take into account the fact that the «genuine» agent is an auxiliary of the principal, «integrated into the business organisation» of the latter who acts as the *longa manus* of the principal and carries out the principal's marketing strategies. The analysis of the jurisprudence of the Court of Justice shows that agents who are not integrated in the principal's network and who are free to determine their action in full independence must be considered as independent traders and consequently submitted to Article 81, **even when they bear the typical risks of an agent**.

In other words, contracts with commercial agents (and, more generally, with intermediaries) remain outside the scope of Article 81 provided the following conditions are met:

(a) the agent must not bear financial and commercial risks which are typical of a reseller;

(b) the agent must be actually integrated in the principal's sales network;

This means that it is not correct to focus upon one of the distinctive criteria only alone, without considering the other one. So, for example, an agent who does not take any risks which are typical of a reseller may nevertheless fall under Article 81 if he is not integrated within the principal's sales network while, on the other side, an integrated agent will need to respect Article 81 if he takes risks which bring him closer to a distributor.

4. The criterion of the financial and commercial risk in general

The Guidelines, instead of attempting to make the point of the criteria emerging from the existing case law, tend to simply **widen the criterion of the financial and commercial ris**k, on the basis of reasons which are often purely theoretical and not always in line with the principles established by the Court of justice.

Moreover, by listing a large number of situations which are said to be inconsistent with a «genuine» agency, and by adding in the paragraph which comes after the list that

> « .... where the agent incurs one or more of the above risks or costs, the agreement between agent and principal will not be qualified as an agency agreement.»

the Guidelines give the (wrong) impression that the category of the «non-genuine» agency agreements is much broader than it actually is.

This is clearly unacceptable and does in no way reflect existing case law.

If taken seriously by the users of the Guidelines, it would leave practically no space for «genuine» agency contracts.

5. The distinctive criteria listed in § 16 of the Guidelines

The Guidelines list in § 16 a number of situations which are considered to be inconsistent with «genuine» agency agreements.

This type of approach is first of all **unsatisfactory** because it looks at each single aspect, which may not all be conclusive on its own, instead of analysing the situation in its whole.

Moreover, the various statements contained in the list are expressed in absolute terms, which are inconsistent with reality.

This is why the following criteria, which will be commented one by one, must be considered with extreme caution without implying necessarily - as wrongly stated in § 17 - that each of them is sufficient for denying the existence of a «genuine» agency agreement.

1. *The agent acquires the ownership of the contract goods or supplies himself the contract services*

   This is a well-established principle, according to which a buyer-reseller relationship brings the agreement under Article 81. The reference to the «contract goods» should make it clear that it does not matter if the agent acts as buyer-reseller in the context of contracts with other parties.

   However, the present wording of the Guidelines seems to imply that it also applies to contracts where the agent's activity as reseller has a merely accessory character. It is doubtful whether this attitude, which appears stricter than the position taken in the Christmas notice[1], is justified. In cases where the activity as reseller is merely accessory and does not modify the overall role of the agent, like for example a practice commonly used in the fashion industry, where the agent, after having promoted the sale of the seasonal collection to the customers, purchases a small stock for direct supply to customers who need additional products during the season, there is no reason to submit the agreement to Article 81.

   This is also confirmed by the jurisprudence of the Court of First Instance which denied that an obligation of the agent to purchase a number of demonstration cars (which could be resold as used cars after having accumulated 3.000 kilometres) could be considered as a reason for qualifying the agent as non-genuine[2].

2. *The agent contributes to the costs relating to the supply/purchase of the contract goods or services, including the costs of transporting the goods.*

   This apparently means that the «true» agent should not bear the costs of supplying the goods to the customers, e.g. by shipping to the customer the

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[1] Where the Commission said that the «true» agent should not keep, as his own property, a considerable stock of the products covered by the contract.

[2] Court of First Instance, 15 September 2005, case T-325/01, *DaimlerChrysler AG v. Commission,* ECR 2005, II-3319, § 108-109.

goods sent to him by the principal. In fact, the «normal» situation is that the goods are shipped directly by the principal to the customers and so the problem will not arise frequently.

However, where the agent has to ship himself the goods (e.g. because he has a consignment stock of products owned by the principal), the simple fact that he may bear the costs of transportation should not be decisive, if the impact of such activity is limited[3].

3. *The agent maintains at his own cost or risk stocks of the contract goods, including the costs of financing the stocks and the costs of loss of stocks and cannot return unsold goods to the principal without charge, unless the agent is liable for fault (for example, by failing to comply with reasonable security measures to avoid loss of stocks).*

   This means that the «genuine» agent should not keep a stock of contract products of his own, but that he may keep a consignment stock of products owned by the principal, provided the costs relating to such products (such as insurance for the risk of loss) are borne by the principal.

   The above consideration seems reasonable if the agent is contractually bound to keep a consistent stock of products purchased from the principal implying a financial risk which is disproportionate with respect to his activity as intermediary. However, if the stock is of little importance with respect to the agency contract (e.g. a limited quantity of products for additional sales at the end of the season), it is doubtful whether the ownership of a stock as such would justify the conclusion that the agent is not a «genuine» agent.

   As regards the further problem of a possible stock of spare parts, which may be necessary for after sale service or for providing them to customers, this should be normally admitted according to the judgment of the Court of First Instance in the Daimler-Chrysler case.

4. *The agent undertakes responsibility towards third parties for damage caused by the product sold (product liability), unless, as agent, he is liable for fault in this respect.*

   This refers to the situation where the agent takes upon himself the risk for possible damages arising out of product liability, a rather unlikely situation (since the principal, and not the agent, is the seller of the goods). The inclusion of this paragraph may be due to the aim to take into account the particular situation of service station operators who sell fuel as agents of the supplier.

   It would probably be better to delete this sentence which is of little use in normal situations and risks only to create confusion.

5. *The agent takes responsibility for customers' non-performance of the contract, with the exception of the loss of the agent's commission, unless the agent is liable for fault (for example, by failing to comply with reasonable security or anti-theft measures or failing to comply with reasonable measures to report theft to the principal or police or to*

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[3] The Guidelines expressly state that the agent may carry out the transport service, provided that the costs are covered by the principal. In the Mercedes Benz case the Commission considered as relevant the fact that the agents were to deliver the cars to the customers, thus bearing the transport costs. However, the Court of First Instance (15 September 2005, case T-325/01, *DaimlerChrysler AG v. Commission,* ECR 2005, II-3319, § 104-105) took a different view, arguing that the agent could charge the cost of transport to the purchaser.

communicate to the principal all necessary information available to him on the customer's financial reliability).

Apart from the incomprehensible statements on security and anti-theft measures (which should possibly be deleted), the above statement seems to imply that a «genuine» agent cannot undertake a del credere obligation.

Now, it is true that in case of a del credere obligation covering 100% of the loss[4] on all the business, the agent would bear a responsibility which brings him closer to a reseller. However, to say that any assumption of responsibility in case of non performance of the customers (including del credere limited to a small percentage of the loss or agreed upon case by case with reference to specific customers) is inconsistent with a «true» agency, is contrary to logic and is not supported by any case law.

It should furthermore be emphasized that del credere limited to a small percentage of the loss (e.g. 15%) does not have the purpose of shifting the risk to the agent (since the greatest part remains with the principal) but is meant to induce the agent to pay a greater attention when selecting the customers.

It should therefore be expressly stated in the Guidelines that a del credere obligation which does not exceed reasonable limits (as required by most national laws on agency in Europe) is not inconsistent with a «genuine» agency agreement.

6. *The agent is, directly or indirectly, obliged to invest in sales promotion, such as contributions to the advertising budgets of the principal.*

   A literal application of this principle could bring under the prohibition of Article 81 all contracts where the agent agrees to bear (in whole or in part) advertising expenses or to participate at his expense to fairs and exhibitions, which are common clauses within agency agreements[5]. If the above were true, most cross-border commercial agency agreements should be considered as non-genuine agency contracts, falling under Article 81.

   It is unlikely that the position expressed on this point can be considered as justified. In fact, since the promotion of sales is the main contractual obligation of an agent, his undertaking to bear the costs of promotional activities (like advertising and participation to fairs) cannot be considered as implying the assumption of risks which are abnormal for an intermediary, unless they are clearly out of proportion with respect to the agent's role as intermediary.

7. *The agent makes market-specific investments in equipment, premises or training of personnel, such as for example the petrol storage tank in the case of petrol retailing or specific software to sell insurance policies in case of insurance agents.*

   If taken literally, the above statement would mean that any investment in equipment, premises or training of personnel, made by the agent for the exercise of his activity in favour of principals belonging to a certain market (and not for his activity in general terms), would put the agreement under

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[4] Which would be unlawful under many national laws containing rules protecting the agent.

[5] See, for instance, Articles 4.1 (Advertising) and 3.4 (Fairs and exhibitions) of the Principal-friendly IDI model. In the balanced model costs are shared by the parties as agreed between them from time to time: thus also in this case, the agent would bear some expenses of this type.

the prohibition of Article 81. Now, all agents make investments which are market-specific (and which are recoverable where the agent changes principal but remains in the same type of business), like the setting up of a show-room (in the fashion industry), the acquisition of specific technical know-how or trained personnel (for the promotion of highly technical products), etc.

It should consequently be expressly said that the above applies only where the investments are exceptionally high[6] or not at all recoverable in case of change of principal.

8. *The agent creates and/or operates 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 in selling or purchasing the contract goods or services on behalf of the principal.*

   This means that the assumption of tasks of this kind (which are in fact more typical of distribution agreements) can be admitted for «genuine agents» only if the principal bears all respective costs.

   In this case the same arguments made in the comment to the previous number apply. The principle established by the Commission is certainly justified in some cases, but it would be excessive to apply it literally[7]. So, in many cross-border contracts for goods needing repair and after sale service it is normal that the agent creates and operates an after sales or repair service which may not always be fully reimbursed by the principal. If the burden of such obligations is not out of proportion considering the overall context of the agency agreement, this fact alone should not modify the agent's characteristics[8].

   Finally, as regards the last part of the sentence, which has been introduced in the draft Guidelines, it is very difficult to understand what it actually means, and it would consequently be better to delete it.

9. *The agent operates 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.*

   Also this sentence, which has been added in the draft, is difficult to understand and risks to give rise to confusion. It is strongly recommended to delete it.

6. Conclusions on the distinctive criteria of § 16.

As already said before, the list contained in §16 of the Guidelines should be radically modified in order to make clear that the distinctive criteria provided in

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[6] This seems confirmed by the fact that the examples given by the Commission regard rather exceptional situations which have little to do with normal commercial agency agreements.

[7] Thus, in the Mercedes Benz case - § 159 (a) and (b) of the Commission's decision - the Commission considered that the fact of having to carry out a consistent after-sale activity, although reimbursed under certain conditions by the principal, implied the assumption of risks which were not compatible with a «true» agency. The Court of First Instance (§ 112) on the contrary, decided that such obligations did not «represent a commercial risk which would justify the Mercedes-Benz agent being categorised as an independent operator».

[8] This is why the wording of the Christmas notice was more flexible, since it referred to the situation where the agent « ... 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 ...».

such list are only indications of critical situations which may (but need not necessarily) imply that the agreement is not a «genuine» agency contract.

It should in particular be considered that most of the cases considered by the Commission and the Court in the past regard borderline situations which are far away from a normal agency relationship, and that it would consequently be dangerous to establish general rules, applicable to all agency contracts, on the basis of such situations.

Otherwise, there is the risk that the users who do not have a good knowledge of the existing case law, will believe – on the basis of the Guidelines – that almost all agency agreements are «non genuine» agency contracts.

7. The rules applicable to «non-genuine» agency agreements

A further problem which needs to be underlined regards the application of Article 81 to «non-genuine» agency agreements.

In fact, while it is quite simple to apply the prohibition of Article 81 to «borderline» agency contracts, such as those where the agent delivers the goods to the customer and cashes the price on behalf of the principal, this is not the case with respect to «normal agency agreements, where the agent's activity is limited to getting an order and transmitting it to the principal.

We will examine this aspect with respect to two crucial aspects: export prohibitions and resale price maintenance.

As regards **clauses prohibiting the agent to promote business outside the contractual territory**, these should in principle comply with Article 4 (b) of the Regulation. Thus, applying by analogy the principles governing distribution agreements it is possible to oblige the «non-genuine» agent to refrain from actively selling into territories reserved exclusively to the principal or to other agents and distributors of the principal, it being understood that the agent must in any case remain free to accept unsolicited orders from customers established outside his territory.

However, a problem arises when it comes to actually apply the rules recognizing the agent's right to «passively» promote business outside the contractual territory.

It should first of all be considered that the agent, unlike the distributor, does not sell products purchased from the principal which are already at his disposal when he decides to sell them (except in rather exceptional cases where the agency contract is used in a context - like petrol stations - which is much closer to that of a retailer selling to end-users); he promotes business (contract proposals) which the principal is free to accept or to refuse. Now, if the agent transmits an order which not agreeable to the principal, the latter may easily refuse it without needing to say that it is because the sale is outside the territory.

Second, the agent will (under the contract conditions normally practiced in trade) have no right to commission on business with customers established outside the contractual territory, which business remains outside the scope of the agency contract, and will therefore not be interested in promoting such sales.

Finally, even where the principal would be willing to pay a commission on such sales, there would be a problem of coordinating this payment with the right of the agent of the country of the customer to receive a commission.

As regards **resale price maintenance,** the following considerations are to be made.

Regulation 2790/1999 prohibits resale price maintenance. Within distribution agreements the actual meaning of the rule is clear: the supplier cannot impose upon the buyer/distributor an obligation to respect certain resale prices. But within agency agreements the product **is sold by the principal** through the agent**,** and the principal must of course have the right, in his quality of seller, to determine the price of his own goods.

This means that the prohibition of resale price maintenance can actually only apply to the agent's margin, or to be more precise, to his commission. In other words, while the «genuine» agent must respect without exception the price fixed by the principal (unless the principal himself authorizes him to modify it, e.g. by granting a discount) the «non-genuine» agent should in principle remain free to grant discounts on the part of the price corresponding to his commission, and such right cannot be limited by the principal.

This has been recognized by the Court of Justice in *Vereeniging Vlaamse Reisbureaus*[9] where the prohibition imposed upon the agent to share his commission with his customers was found to amount to a form of price fixing prohibited by Article 81.

The Commission has considered this aspect in § 49 of the Guidelines where it says, with respect to agency agreements, that

> « ... where an agency agreement falls within Article 81(1) (see paragraphs 12 to 20), an obligation preventing or restricting the agent from sharing his commission, fixed or variable, with the customer would be a hard-core restriction under Article 4(a) of the Block Exemption Regulation. The agent should thus be left free to lower the effective price paid by the customer without reducing the income for the principal».

However, also in this case, the practical application of the rule may cause problems. In fact, while granting a discount may be easy for more independent intermediaries, which have been granted the power to conclude the sale on behalf of the principal, to cash the price and then to retain the commission, this is absolutely not the case within «normal» agency agreements where the agent has no right to conclude contracts on behalf of the principal[10] and where the customer pays the full price to the principal and the agent receives some time later the commission from the principal. Now, in such a «normal» context the agent cannot materially «grant a discount», i.e. reduce the price on his initiative by deducting the discount from his commission: he should ask the principal to reduce the price (and his commission) before being able to propose such discounted price to the customer, which is obviously almost impracticable.

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9 Court of Justice, 1 October 1987, case 311/85, *Vereeniging Vlaamse Reibureaus v. Sociale Dienst,* ECR, 1987, 3801.

10 Which means that the price possibly negotiated with the customer (if the principal has authorized the agent to do so within a limited range) will be part of a contract proposal (order) transmitted to the principal, which may be accepted or refused by the latter.

These examples show that the antitrust rules applicable to distributors cannot be easily extended to «normal» agency agreements and confirms the view that the notion of «non-genuine» agents should be construed very narrowly.