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**IUCAB**  
**EUROPEAN**  
**DEPARTMENT**

**COMMENTS ON THE DRAFT**  
**EUROPEAN BLOCK EXEMPTION REGULATION FOR VERTICAL AGREEMENTS**  
**AND**  
**RELATED DRAFT GUIDELINES ON VERTICAL AGREEMENTS**  
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Introduction

The International Union of Commercial Agents and Brokers (IUCAB) is the International Umbrella Organisation of 20 National Associations of independent/self-employed commercial agents and brokers throughout the European Union, North- and South America. Through IUCAB, the interests of approximately 470,000 commercial agency firms are represented by IUCAB. These commercial agency firms are independent professional providers of field sales and marketing services to manufacturers and suppliers. They typically handle a portfolio of related but non-competitive product lines, working under a contractual arrangement within a defined geographic territory on an exclusive basis. The EU-wide sales realised through the intermediary and on commission remuneration based activities are considerable and at an estimated 1500 billion Euro annually.

General Observations

The comments of IUCAB to be submitted in this paper will focus on the Draft Guidelines, Chapter II, Section 2 which deals with Agency Agreements. However, IUCAB also wishes to submit some general comments on the new market share cap introduced in the Draft Regulation according to which Vertical Agreements will only benefit from the Block Exemption on the condition that the market share held by each of the undertakings party to the Agreement does not exceed 30% on any of the relevant markets affected by the Agreement.

With respect to the above, IUCAB is of the opinion that adoption of the proposed change would add complexity and uncertainty with no obviously explicable benefit. Moreover the proposed higher hurdle for undertakings wishing to rely on the Block Exemption would lead to undesirable results in the field of exclusive supply agreements. The current Block Exemption provides that it is only the buyer's market share which has to fall below 30% in order to fall within the Block Exemption. Introduction of a new market share cap requiring that both the buyer and supplier must have a market share below 30% in order to fall within the Block Exemption will impede or even make impossible the conclusion of Agreements which provide geographical- or customer- base protection, between buyers who fall below a 30% market share and suppliers which have a market share of over 30%. Thus the possibilities for opening new markets and for introducing new product lines in the home markets of the buyers will be impeded.

Taking the above into consideration, IUCAB advocates to keep in place Art. 3 (2) of the current Block Exemption.

#### Comments on Chapter II, Section 2 of the Draft Guidelines

IUCAB appreciates and welcomes the renewed effort made by the Commission to establish Guidelines as to the definition of Agency Agreements for the application of Art. 81 (1) of the EC Treaty.

It has been duly noted that in the assessment of whether an Agreement is an Agency Agreement and therefore falls outside Art. 81 (1), or an independent distributor agreement and therefore falls within the scope of Art. 81 (1), the Draft Guidelines now specifically distinguish as a separate category of risks, risks related to other activities include risks related to other activities such as after sales or repair services as one of the considerations. The current Guidelines only consider contract-specific and market-specific risks. The inclusion in the Draft Guidelines of a category of risks related to other activities is clearly inspired by the Judgments of the European Court of Justice (ECJ) in the Daimler Chrysler and the CEPSA Cases<sup>1</sup>.

Already in the current Guidelines, the Commission's approach is that the financial or commercial risk borne by the agent in relation to the activities for which he has been appointed as an agent is the determining factor in defining an Agency Agreement for the application of Art. 81 (1). This chosen line of approach is maintained in the Draft Guidelines be it that two of the risks listed in Chapter II, Section 2 (16) of the current Guidelines are further defined and a new category of risks is included in the Draft Guidelines.

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<sup>1</sup> Case T-325/01, 15 September 2005, Daimler Chrysler v. Commission; Case C-217/05, 14 December 2006, Case v. CEPSA; Case 279/06, 11 September 2008, CEPSA v. Tobar e Hijos

An eye-catching change in the Commission's approach lies in it being stated in the Draft Guidelines 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."*<sup>2</sup> This is a radical change to the text of the current Guidelines which state that *"where the agent incurs one or more of the above risks or costs, then Art. 81 (1) **may** apply as with any other Vertical Agreement."*<sup>3</sup> This radical change of approach is further reflected in the Draft Guidelines where it is stated that *"if contract-specific risks are incurred by the agent, this will be enough to conclude that the agent is an independent distributor"*<sup>4</sup>.

Finally this change of approach is reflected in the Draft Guidelines where it is stated that *"where the agent bears some or all of the relevant risks as described in §16, the Agreement between agent and principal will not be qualified as an Agency Agreement for the purpose of applying Art. 81 (1)"*<sup>5</sup>.

IUCAB strongly urges the Commission to abandon this change of approach according to which the Agreement between agent and principal will not be qualified as an Agency Agreement and will therefore not fall outside Art. 81 (1), if one or more of the listed risks are incurred by the agent.

IUCAB considers it vital for the very existence of the commercial agency profession that at least the approach as it is described in the current Guidelines is maintained and according to which the question of risk must be assessed on a case-by-case basis taking into consideration all aspects of the Agreement between the agent and the principal<sup>6</sup>. If the approach chosen in the Draft Guidelines were to be maintained, it would bring along the risk of the very extinction of the commercial agency profession. With respect thereto it should be mentioned that the vast majority of commercial agents incurs to a more or less insignificant extent one or more of the risks or costs referred to. This, however, does not justify the conclusion that the commercial agent is therefore to be considered equivalent to an independent distributor.

In relation to the above it is hereby explicitly stated by IUCAB that the demarcation criteria as defined by the Commission in the current and also the Draft Guidelines neither reflect an adequate understanding of nor relate to the vast majority of traditional Agency Agreements.

Accordingly caution must be observed when starting a risk analysis along the criteria listed under §16 of the Draft Guidelines. For the purpose of explanation, §16 and each of the criteria listed therein shall be commented upon hereunder.

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<sup>2</sup> Chapter II, Section 2, (17) Draft Guidelines

<sup>3</sup> Chapter II, Section 2 (17) current Guidelines

<sup>4</sup> Chapter II, Section 2 (17) Draft Guidelines

<sup>5</sup> Chapter II, Section 2 (21) Draft Guidelines

<sup>6</sup> Chapter II, Section 2 (16) and (17) of the current Guidelines

1. *Contribution to the costs relating to the supply/purchase of the contract goods or services, including the costs of transporting the goods.*

Agents may indirectly contribute to such costs through the fact that the calculation basis for the commission entitlement is usually the sales value of the transaction between the principal and the customer minus shipment-, packaging-, custom- and tax costs. It should be clearly confirmed that such an indirect contribution to supply/purchase costs is not material.

Next to the above, it must also be made explicitly clear that the agent's contribution to the costs may also be covered by the principal through payment of a higher commission to the agent.

Finally it should also be made explicitly clear that where the agent takes care of the shipment of the contract goods (e.g. from a consignment stock of the contract goods owned by the principal) the fact that the agent may bear the costs of transportation is not material when the impact of such contribution to the costs of transportation is insignificant<sup>7</sup>.

2. *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).*

With regard to the above, it should be noted that it is common practice that agents provide stock facilities at their premises for consignment stocks of the contract goods owned by the principal. This is done to facilitate speedy deliveries of the products to the customers. The costs related to such a consignment stock facility may sometime be wholly or partially reimbursed by the principal through the payment of an increased commission ("Lagerhaltungskommission") or not. Whatever the case may be, this is not a material factor that could justify the conclusion that the agent is to be considered equivalent to an independent distributor.

The same applies to the common situation of agents holding stocks of relatively little importance with respect to the Agency Agreement (e.g. an insignificant quantity of contract goods in stock for additional sales at the end of a sale-season or of spare parts for after-sales-service or for providing them to the customers)<sup>8</sup>.

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<sup>7</sup> Case T-325/01, 15 September 2005, Daimler Chrysler v. Commission

<sup>8</sup> Case T-325/01, 15 September 2005, Daimler Chrysler v. Commission

3. *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.*

Whereas an agent is not the seller of the contract goods but the agent's principal, the product liability risk is for the principal and not the agent. In view thereof, it does not make sense to have this product liability risk in the Guidelines as a criterium in the risk-analysis.

4. *The agent does not take responsibility for customer's 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 communicate to the principal all necessary information available to him on the customer's financial reliability).*

It is unclear what the meaning is of the references to "reasonable security or anti-theft measures" and "reasonable measures to report theft to the principal or police". Those references should therefore be deleted or in any case be clarified in order to avoid unnecessary misunderstanding.

The text of this provision fails to explicitly state that a Del Credere Obligation according to which the agent may become liable towards the principal for a small part of the value of the transaction between the principal and the customer if left unpaid by the customer, is not inconsistent with an Agency Agreement and does therefore not justify the conclusion that the agent is therefore to be considered equivalent to an independent distributor. In relation thereto, IUCAB points at the fact that many of the national laws of the EU-Member States contain provisions which limit the Del Credere risk of the agent to the commission which would have been earned by the agent in case the customer had performed the contract.

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

This provision fully disregards the fact that sales promotion is one of the essential elements of the business of an agent.

Sales promotion is one of the important tools of an agent to promote and increase the sales of the contract goods and thereby to increase the commission income. In relation thereto, it must be kept in mind that an agent, although being integrated into the business organisation of the principal, is an independent self-employed entrepreneur whose task it is to carry out intermediary activities for the promotion of the contract goods and thus that sales promotion is one of the essential parts of the agent's business.

The current provision should therefore be deleted or at least amended in such a way that only if the agent is obliged to invest in sales promotion to such an extent that it is disproportionate to the sales value that is generated through the agent's intermediary activities, this can be a factor which can be considered in the risk analysis.

6. *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.*

This provision again disregards the independent self-employed character of an agent. In view of this character, the agent should be free to decide on how he organises his business, on which investments he makes for optimising his business and on the number of persons he employs for that same purpose. Accordingly it should be clearly stated that this provision relates to situations where the agent makes investments exclusively with a view to his intermediary activities for the contract goods and which are not partially or wholly recoverable in the event of a termination of the Agency Agreement.

7. *The agent 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.*

Again, this provision disregards the independent self-employed character of the agent. In cross-border Agency Agreements relating to products which require a repair and after-sale-service, it is common that the agent creates and operates such services and that he is (i) not reimbursed for these costs in view of their insignificance considering the general context of the Agency Agreement or (ii) receives payment of an increased commission as a result whereof these costs are partially or wholly reimbursed. There is no valid reason to automatically qualify an agent equivalent to an independent distributor for the purpose of Art. 81 (1) if the costs referred to are insignificant and therefore not reimbursed by the principal or are reimbursed in the form of an increased commission or of a flat rate.

Hence, IUCAB calls for a deletion of the words "...fully reimbursed" and to replace them by the words "adequately reimbursed". Such an alternative wording will allow for the assessment that reimbursement in the form of an increased commission or in the form of a flat fee can be considered adequate for falling outside Art. 81 (1). Next, IUCAB calls for an addition to this provision in which it is explicitly stated that this provision will not apply if the costs of the services referred to are insignificant considering the general context of the Agency Agreement.

8. *The agent 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.*

IUCAB strongly advocates to delete this provision whereas its purpose and meaning is unclear and will therefore cause confusion instead of clarity about the Commission's position.

If the present criterion in the draft were to be left unchanged, the "*modus operandi*" of agents would become endangered without any justified reason. For the purpose of clarification and by way of example, IUCAB refers to the very common situation that an agent carries out his activities for various different product ranges of his principal. In such situations the agent operates in several (product) markets without this constituting an additional business whereas it simply is his obligation under the Agency Agreement to do so. Following the present wording of criterion 8 of the draft, this common type of agreement would no longer be considered as an Agency Agreement. As a consequence this would mean that agent and principal will have to conclude separate agency agreements for each separate individual product (range) or to limit their cooperation to one single product (range) only.

The present wording of criterion 8 would furthermore, for no reason, cause problems to Agency Agreements whereby the agent negotiates the sales of contract goods and also takes care of the installation of such contract goods ( example: agents operating in the field of windows and/ or doors not only negotiate the sales of those contract goods but will often also take care of the necessary measuring and installation thereof). For such activities the agent is usually reimbursed in the form of an increased commission.

Taking the above into consideration and if a criterion 8 were to be maintained, IUCAB then in any case calls for a change of the present wording of the current text of provision 8 as follows:

*" The agent does not operate in other (product) markets, unless the principal reimburses the related expenses adequately (for example in the form of an increased commission or a flat rate) or this activity in other (product) markets is not indispensable to engage in selling or purchasing the contract goods or services on behalf of the principal."*

## Resale Price Maintenance

As to the hardcore restriction concerning resale price maintenance, the Commission has considered in the Draft Guidelines that:

*"..... where an Agency Agreement falls within Art. 81 (1) (see §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 Art. 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, the application of this consideration is merely hypothetical. As a rule the traditional agent does not have the authority to conclude sales on behalf of, and therefore no possibility to grant discounts without the approval of, his principal whereas the latter is the party who sells and invoices the contract goods to the customer. Thus the last part of the sentence cited above<sup>9</sup>

*"..... without reducing the income for the principal",*

should be deleted.

## Conclusion

IUCAB urges the Commission to carefully reconsider Chapter II, Section 2 (17) and (18) and maintain the approach taken in the current Guidelines which allows for flexibility in the carrying out of the analysis of risks and costs. If the proposed change of approach as contained in the Draft Guidelines would find its way through to a final version of the Guidelines, this would materially endanger the very existence of the commercial agency profession simply because a vast part of the commercial agents in Europe would then be considered equivalent to independent distributors without this actually being the case at all.

Furthermore the Commission is urgently requested to carefully reconsider the (wording of the) list of risks and costs as contained in Chapter II, Section II (16) of the Draft Guidelines and to amend those provisions as recommended by IUCAB so as to ensure that they are in line with the actual operations of the vast majority of traditional Agency Agreements.

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<sup>9</sup> Chapter III, Section 3 (49) of the Draft Guidelines