CONSIDERATIONS ON THE DRAFT VBER 2022 AND GUIDELINES ON VERTICAL RESTRAINTS

1. INTRODUCTION

The **International Distribution Institute (IDI)** is the leading association dealing worldwide with legal aspects of international distribution. The Institute provides information about legislation and case law regarding distribution (agency distributorship, franchising, etc.) in around 140 countries and organises yearly conferences where topical issues are discussed with its members. IDI is currently updating its members about EU competition developments regarding distribution through its Report on EU Antitrust Law, available to IDI subscribers[1].

Members of IDI are mainly **in-house counsels** of companies operating international distribution networks and **lawyers in private practice** specialized in this field. Companies involved in IDI distribute their products and services through many different distribution models (e.g. commercial agents, exclusive/non-exclusive wholesale distributors; selective distributions networks; direct franchising; master franchising; area developers; etc.).

Our members are aware of the impact of competition rules on their networks and are engaged to organise distribution in conformity with such rules. However, when the application of such rules seriously affects the proper functioning of their distribution networks, suppliers/principals are put in a very difficult situation and may be forced to look for alternative solutions, which will not always be satisfactory for marketing efficiently their products and/or services.

The purpose of these observations is on the one hand, to evidence issues which may give rise to misunderstandings and on the other, to identify provisions which are not compatible with the proper functioning of distribution networks and which risk to unjustifiably deny the safe harbour of the block exemption to the relevant agreements and practices.

Especially in recent years, **the development of internet sales has seriously affected the operation of distribution networks.** While the internet has favoured an easier access of suppliers to the market, to the advantage of competition and, finally, to the benefit of

[1] Antitrust rules of the European Union applicable to distribution. Agency, distributorship, selective distribution and franchising, updated at June 2019.

consumers, it has at the same time opened the door to aggressive forms of competition, which may disrupt or seriously jeopardise the functioning of existing networks.

Our members believe that it is necessary to find a **reasonable compromise** between the need to warrant the maximum freedom of competition and the need of suppliers to market their products through an efficient distribution network, by admitting restrictive practices which are necessary for obtaining an equitable balance between these two requirements. This is especially the case for SME's which need to be put in the condition to maintain a certain level of protection of their distribution networks, in order to preserve the value of their products and services.

In our view, the block exemption system plays an essential role in this context. Its function as a safe harbour and as a guideline for companies is of paramount importance for business and should be further be developed, taking into account the actual needs of distribution networks.

IDI would like to share some of the preoccupations of its members with regard to the present and future policies in this field.

2. THE APPROACH TO HARDCORE RESTRICTIONS

Regulation 330/2010 defines in Article 4 a number of "hardcore restrictions" which exclude the benefit of the block exemption. The distinction between the category of "hardcore restrictions" and that of "restrictions by object" is of the utmost importance and should be maintained, or even strengthened. We strongly support the decision to maintain in Article 4 VBER **specifically listed restrictions** and to avoid the recourse to a **general notion of restrictions by object** (as has been done in the revised the *de minimis* notice) which would not have warranted clarity and foreseeability to stakeholders.

We believe that a **precise and unambiguous definition** of the hardcore restrictions listed in Article 4 is of utmost importance: the VBER must warrant that restrictions which do not substantially harm competition and which are necessary for a correct functioning of distribution networks **cannot be brought under the hardcore clauses**, because this would amount to preventing a closer examination of their pro-competitive aspects.

Regarding the actual application of the hardcore provisions, we consider that by introducing more flexible criteria for determining the existence of a hardcore restriction, especially with respect to online restrictions, the draft has made important step towards a more realistic application of the competition rules. In particular we strongly support the approach contained in Article 1(1)(n) of the draft VBER, which introduces the principle that **restrictions on line** are hardcore only where **their object** is to prevent buyers from

effectively using the Internet for the purposes of selling their goods or services online or from **effectively** using one or more online advertising channels.

With respect to the specific hardcore provisions, the Commission made a very substantial attempt to take into account the differences between the various distribution systems and the possible relations between them. However, in our opinion this attempt should be further developed with a view of providing clear and understandable directions to stakeholders. We understand the difficulty of the Commission has faced, especially in regulating the relations between different kinds of networks, but it remains necessary to "streamline" the system of rules and make it easily understandable to stakeholders.

3. COMBINING EXCLUSIVE AND SELECTIVE DISTRIBUTION

One of the basic principles established by the Commission and restated in the draft Guidelines is to **consider any combination between exclusive and selective distribution systems as a hardcore restriction.**

In particular, the Commission states, in § 222 of the draft Guidelines, that:

> « ... A selective distribution system cannot be combined with an exclusive distribution system, as defined in Article 1(1)(g) VBER, within the same territory, as this would lead to a hardcore restriction of active or passive sales to end users by the authorised distributors pursuant to Article 4(c)(i) VBER.»

This consideration would be acceptable if we limit such principle to the **resellers/retailers, which are selected on the basis of specified criteria** regarding the conditions of resale of the goods. Since the prohibition to sell to non-authorised resellers gives rise to a closed network, in which the contractual products are distributed only by a limited number outlets, it is reasonable to require the freedom of cross-selling between the members of the network in order to maintain a minimum amount of (intra-brand) competition within the network.

However, this rule should apply **only to the selected distributors** operating at the retail level, i.e. the "actual members" of the selective network, who have been selected on the basis of specified criteria - as defined in Article 1(f) - and **should not include the wholesalers who supply the resellers.** These wholesalers **are in the same position of the supplier** and operate like a master franchisee does within a franchising network.

As we will specify later, when the supplier of a selective network appoints an exclusive distributor to establish and manage his selective network in a given territory, there will be no hardcore restriction, provided the distributor remains free to sell passively to members of the network outside his territory. And it should be possible to impose upon these

wholesale distributors the obligation not to actively sell to authorised distributors/retailers in the territories of the other distributors.

We can therefore conclude that a combination between exclusive and selective distribution should be admitted, provided the two systems operate at different levels of distribution.

4. EXCLUSIVE DISTRIBUTION

4.1 Shared exclusivity

The definition of Article 1(g) of the draft VBER clarifies an issue that was disputable under the previous VBER, i.e. the possibility to appoint more «exclusive distributors» for the same territory or customer group, by providing that a **«shared exclusivity»** to a limited number of distributors can be qualified nevertheless as exclusive, provided a proportionality requirement is respected.

This is certainly a **positive improvement** with respect to the previous VBER, considering the quite numerous situations where this shared exclusivity is used in distribution.

The notion of shared exclusivity means that two or more distributors are protected against active sales by other suppliers, but it does not define the relationship between them. In particular, it must be clarified whether the supplier is entitled to limit competition between them, by allocating different roles or customers.

When approaching this issue, we should make a distinction between two substantially different situations, i.e. wholesale and retail distribution.

Where a supplier appoints several **retailers** in the same exclusive territory (like for instance automobile dealers) the situation is very near to selective distribution and could become a means to circumvent the rules applicable to selective distribution agreements. This is probably the reason why the draft provides that **active and passive sales** should remain free between the distributors who benefit of the shared exclusivity.

For the same reason Article 1(g), states that the shared exclusivity is admissible only where the **number of buyers** who benefit from the protection against active sales is « ...determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts».

On the contrary, if we look at the situation of typical distribution contracts at the **wholesale level,** where the distributor manages **supplies to the customers of his territory**, the decision to appoint more than one distributor for the same territory implies necessarily an allocation of roles between them. This may regard different categories of customers

(traditional shops + modern distribution; sale of spare parts to producers or to retailers of parts)

Another solution may be that of recognising an exclusive right on the customers acquired by each distributor, i.e. to prohibit the distributors to sell to customers which are already supplied by their colleagues.

In other words, suppliers **must be free to restrict competition** between wholesale distributors who share the exclusivity, by allocating different roles or categories of customers, or simply by granting an exclusive right to supply the customers acquired by each of them, provided these distributors remain free to sell actively or passively between them.

4.2 Restriction of active sales by distributors and their customers

As regards the **restriction on active sales** that can be imposed upon distributors, Article 4(b)(i) extends this possibility also to the **"distributor's customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier"**.

When reading the comment in § 206 of the Guidelines, it would seem that the VBER refers to all customers of an exclusive distributor, and that the supplier is entitled to **impose territorial restrictions upon all his customers,** although **limited to active sales.**

However, the provision in question is **ambiguous**. When the draft refers to the:

> « ...restriction of active sales by the exclusive distributor, or the exclusive distributor and its customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier, into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to one or a limited number of other buyers,

it is not clear whether the reference to the "customers which have entered into a distribution agreement, or with a party that was given distribution rights by the supplier", is to be considered as a further requirement, or a simple additional clarification.

In other words, the sentence can have two very different meanings, i.e. that:

> the exclusive distributor can impose restrictions on active sales upon his customers, **to the extent** such customers have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier ...

or that:

> the exclusive distributor can impose restrictions on active sales upon his customers, **including** customers who have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier,... etc.

It is very important that the Commission makes clear which is the right interpretation. In particular, if the first interpretation were right, **we would absolutely need to understand the meaning** of the words « ...customers have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier», which cannot be understood without a clarification by those who have drafted it.

4.3 Restriction on active/passive sales to unauthorised distributors of a selective network located in another territory

Article 4(b)(ii) exempts:

> « ... the restriction of active or passive sales by the exclusive distributor, or the exclusive distributor and its customers to unauthorised distributors located in another territory where the supplier operates a selective distribution system for the contract goods or services»

The purpose of this provision is to **protect a selective distribution network against sales to non-authorised distributors made by exclusive distributors of another territory and their customers.** Since the same rule has been provided in Art. 4(1)(d)(ii) for other buyers-resellers, we shall analyse this issue with respect to both categories: exclusive distributors, non-exclusive distributors and buyers-resellers.

According to this new rule, where the supplier sells certain products to exclusive distributors (or other categories of buyers) in certain territories and operates at the same time a selective distribution system in other ones with the same products, **he may prohibit** the exclusive distributors and their customers (or other buyers) **to sell such products to unauthorised distributors** established in the territories of the selective network.

This is an important step towards an actual approach to the problems which arise when exclusive distribution and selective distribution systems coexist within the EU.

It is not clear whether this provision implies that exclusive distributors or buyers of the supplier **must be free to sell to authorised distributors** belonging to a selective distribution system operated by the supplier outside their territory.

Possible sales from an exclusive distribution network to authorised members of a selective network could have a **negative impact** on the management of the selective network, based on a strict control by its actual supplier. In fact, if the authorised resellers would be able to purchase the products from a supplier belonging to an exclusive network established outside their territory, these parallel sales could disrupt the proper functioning of the selective network, based on the assumption that the contractual products would be supplied only by the supplier of the network and other sellers authorised by him.

We believe that, in order to avoid problems, sales to authorised resellers by suppliers belonging to exclusive distribution networks should not be admitted or should at least be limited to passive sales.

4.4 Dual distribution

With the term "dual distribution" the Commission refers to situations:

> « ... in which a supplier not only sells its goods or services through independent distributors but also directly to end customers in direct competition with its independent distributors[2]».

This situation, where the supplier competes with his distributor, is becoming very common in all cases where the supplier decides to sell directly online in parallel with his exclusive or selective distributors. In this context it is obviously necessary to apportion their respective roles in order to avoid possible conflicts between the two distribution channels. This critical issue can be dealt with in different ways (e.g. by developing multi-channel strategies which involve retailers in the performance of the supplier's online sales; or (in case of exclusive distribution) by granting a remuneration to the distributor on sales made by the supplier in the distributor's territory), but **there can be no doubt that an allocation of roles is unavoidable**.

Since in this case supplier and distributor become competitors, at least in theory, the VBER provides that dual distribution cannot benefit of the block exemption, except when its impact on the market remains under a certain threshold.

Thus Article 2(4)(a) and (b) of the draft VBER state that the exemption shall not apply to:

> « ... all aspects of a non-reciprocal vertical agreement between competing undertakings where the supplier is a manufacturer, wholesaler, or importer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing, wholesale or import level, and their aggregate market share in the relevant market at retail level does not exceed [10]%, or the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services, and their aggregate market share in the relevant market at retail level does not exceed [10]%.

Furthermore, Article 2(5) provides that the exception applies also where the aggregate market share exceeds 10%, provided the threshold of Article 3 is not exceeded, **except for any exchange of information** between the parties, which has to be assessed under the rules applicable to horizontal agreements.

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[2] Explanatory note of the Commission on the Revision of the Vertical Block Exemption Regulation.

The position of the Commissions is quite **surprising**, considering that we are **dealing with intrabrand competition between the supplier and the network he has established** where actual competition should be excluded by the very nature of the relationship between different channels of the same supplier. It is obvious that the two /or more) networks must not harm each other and must be coordinated appropriately in their common interest

Actually, the approach of the draft VBER to dual distribution seems more an **academic debate** on the relationship between vertical and horizontal restraints, than an attempt to prevent actual restrictions to competition. If we consider the issue in actual terms, it is evident that no supplier can manage two channels for the same products without coordinating the respective policies and assessing the respective roles.

This is true especially for the exchange of information between the supplier and its off-line network. **The exchange of information** which would certainly be an issue in the context of inter-brand competition **is not harmful, but, on the contrary, necessary, between the supplier and its brick & mortar distributors**.

Before intervening in this crucial question regarding the relations between the supplier's online sales and its traditional network, the Commission should make an in-depth analysis of the recent trends aiming at establishing coordination between the brick & mortar channel and the supplier's online channel, which are developing with very positive effects on consumer satisfaction, in order to verify whether the issue of horizontal competition within dual distribution is a real issue.

And, if – as we believe – the answer is no, **the new rules on dual competition should not be introduces in the VBER 2022.**

4.5 Dual distribution and horizontal restrictions by object

The draft regulation provides in Article 2(6) that:

> « ... the exceptions of Article 2(4)(a) and (b) and Article 2(5) shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object to restrict competition between the competing supplier and buyer».

The actual meaning of this statement is **difficult to understand.**

It is obvious, as explained before, that a supplier and a distributor selling on the same market must limit competition between them: they would never be able to manage distribution without apportioning in some way the respective roles. This inevitably implies a restriction of competition between them, although in the context of a common goal, i.e. to satisfy in the best possible way their respective customers.

The Guidelines explain at § 90(c) that the dual distribution agreement must not include «horizontal restrictions **by object**», but **the actual meaning of this statement is unclear**.

Actually, all dual distribution agreements **imply by their very nature horizontal restrictions,** and the recourse to the magic formula of «restriction by object» does not help us to identify which are the prohibited restrictions.

Should we conclude that some of these restrictions are restrictions «by object» and other not? And in case of a positive answer, which ones should be considered restrictions by object?

Or should we conclude that any allocation of roles between supplier and distributor amounts to a restriction by object? If this were true, dual distribution should be abandoned and manufacturers would be forced to make a choice between selling online or through the traditional brick & mortar network, without being able to maintain two parallel channels, which would obviously make no sense.

In our opinion **this whole story is the fruit of a theoretical debate**, that does not consider the actual relations between the two channels managed by the supplier. **The real issue is not to consider in abstract terms the relationship between the supplier and his brick & mortar network, but to identify the actual restrictive practices that could arise and their likely impact (if any) on competition.**

4.6 Providers of online intermediation services who sell competing goods

Article 2(7) excludes from the benefit of the VBER the situation where:

> « ...a provider of online intermediation services that also sells goods or services in competition with undertakings to which it provides online intermediation services enters into a non-reciprocal vertical agreement with such a competing undertaking».

This means, apparently, that a provider who offers intermediation services to an undertaking and is at the same time (re)selling competing products on the same platform, cannot benefit of the block exception, and the agreement must be assessed on a case by case basis, in order to take into account possible restrictions at the horizontal level.

In fact, if the provider of online intermediation services is free to determine the price of the competing products he is distributing as reseller, this may give rise to abuses at the detriment of the undertaking using its intermediation services.

However, the issue which remains open is that of assessing **in which cases this restriction** of competition between the provider of intermediation services and the undertaking benefiting of such services might benefit of an individual exemption. According to the Commission, the answer should be found in the revised Horizontal Guidelines.

Since the above situation is likely to arise frequently, the Commission should not escape the problem by referring to the Horizontal Guidelines, but **should give clear indications in the Vertical Guidelines about the criteria to be observed in this context.**

5. SELECTIVE DISTRIBUTION

Article 1(f) defines the selective distribution system as:

> "a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system"

5.1 The restriction of active sales into territories allocated exclusively to other buyers

Article 4(c)(i), first indent, exempts:

> « ... the restriction of active sales by the members of the selective distribution system, or the members of the selective distribution system and their customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier, into another territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to one or a limited number of buyers.»

This clause constitutes the other side of the provision intended to warrant a protection against active sales between exclusive distribution and selective distribution networks (above, § 4.3).

This means that in principle the members of a selective network can be prevented from selling actively to customers of exclusive or non-exclusive distributors appointed by the supplier in other territories.

This prohibition can also be extended to their «... customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier», but this category of customers **cannot be clearly identified, due to the obscure wording of this definition**, already considered in § 4.2 above.

5.2 The limitation of the territory where the supplier can prohibit his distributors to sell to unauthorised distributors

According to Article 4(c)(i), second indent, of the VBER the prohibition to sell to non-authorized distributors, which may be imposed on the members of a selective distribution network, **is only valid for territories «where the selective distribution system is operated»**.

This means that members of the network are in principle free to sell the contractual products to third parties in territories which are not covered by the system, and these buyers will be able to resell them to unauthorised distributors in the territories covered by the selective distribution system.

This situation, which would make it impossible to protect the selective network from free riders who would supply unauthorised retailers, is irrational and has induced companies to look for impossible or ambiguous solutions, such as:

- to cover all the territories of the EU,
- to reserve territories not covered by the network to the supplier for future developments, or
- to draft the prohibition to sell to non-authorised retailers without specifying the limitation to territories covered by the network.

The draft VBER has apparently **attempted to answer this problem** by granting the possibility to **restrict active sales by members of the selective distribution network into territories granted by the supplier to exclusive distributors or reserved to himself.**

Thus, Article 4(c)(i), first indent, exempts:

> " ... the restriction of active sales by the members of the selective distribution system, or the members of the selective distribution system and their customers that have entered into a distribution agreement with the supplier or with a party that was given distribution rights by the supplier, into another territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to one or a limited number of buyers."

The purpose of this provision seems to be that of **precluding sales by members of a selective distribution network into territories reserved by the supplier to himself or granted to exclusive distributors.** Thus, members of the selective network **could be prevented from selling to third parties in territories where an exclusive distribution system is in force, with the effect that the products could not be purchased by third parties who could resell them to non-authorised distributors.**

Where the two parallel networks (exclusive and selective) cover the whole EU, there would be in theory no space for sales by members of the selective system to traders not belonging to the network[3], i.e. those who would be able to sell to non-authorised distributors.

It should be noted that this solution **would not be effective where the two parallel distribution systems do not cover the whole EU territory,** because the members of the

[3] Except for traders outside the EU. But in this case the supplier might prohibit sales to third countries and might oppose to their import into the EU.

selective network would remain free to sell to traders not belonging to the selective network in EU territories not covered by exclusive distribution.

However, the main objection is that **this intricate solution is unnecessarily complicated and almost incomprehensible to stakeholders. It contradicts the need to offer an unambiguous clear guidance** to undertakings wishing to benefit from the safe harbour of the VBER.

At this point we should ask ourself **whether it is really necessary to limit the prohibition of sales to non-authorised distributors to the territory where the system is operated**[4].

In fact, this limitation was **not provided in Regulation 2790/1999** where Article 4(b), third indent mentioned only:

> « ... the restriction of sales to unauthorised distributors by the members of a selective distribution system".

Should it be impossible to get back to solution mentioned above, the Guidelines should at least extend to selective distribution the comment provided in § 105 with reference to exclusive distribution, where it is said, that:

> " ... When a territory or a customer group has not yet been exclusively allocated to one or more distributors, the supplier can reserve such a territory or customer group for itself and should inform its other distributors. This does not require the supplier to be commercially active in the reserved territory or towards the reserved customer group since the supplier may wish to reserve them for the purpose of allocating them to other distributors in the future".

This compromise solution would make it possible to save the general principle that sales to non-members can only be prohibited where the system is operated, while preventing at the same time such sales in territories not actually covered, which would be considered nevertheless as part of the territory covered by the selective network.

5.3 The rules applicable to exclusive distributors who establish and supply a selective distribution network within their territory

A commonly used solution within selective distribution consists in **appointing exclusive distributors at the wholesale level who supply the retailers of the supplier's selective network in their territory.** In most cases these exclusive distributors will develop the selective distribution network of the supplier within their territory (like a master franchisee); and the contracts with the selected retailers will normally be concluded by the exclusive

[4] In order to avoid a purely theoretical approach, we should ask ourselves what actual harm to competition would arise if members of a selective distribution network were prohibited to sell to non-authorised resellers in territories not covered by the system.

distributor on behalf of the supplier, or in his own name, as agreed case by case with the supplier.

This kind of organisation is **frequently adopted by SMEs** who lack the resources for establishing on their own a network covering the whole EU. These distributors, who agree to make the necessary investment for the development of a selective distribution network in their territory, need to be protected from active sales by other distributors managing the selective network in neighbouring territories, like any exclusive distributor.

We attach as Annex A some examples of exclusive distribution agreements for resale to a selective distribution network developed by the distributor in his country. These examples show that this type of organisation is frequently used (successfully) and should not be excluded from the benefit of the safe harbour granted by the VBER.

Now, unfortunately, this type of organisation apparently conflicts with the provision of Article 4(c)(ii) which qualifies as hardcore:

> « ... the restriction of cross-supplies between the members of the selective distribution system operating at the same or different levels of trade»,

and thus seems to require an unlimited freedom of cross-supplies between members of the network, **including those who operate as suppliers at the wholesale level**[5].

However, the idea that the exclusive distributor who supplies the members of a selective network is to be considered at all effects as a member of such network, is contradicted by the very definition of selective distribution which expressly refers to a network of distributors **selected on the basis of specified criteria**. In fact, these criteria, regarding the requirements of selected retailers, do not apply to wholesalers, whose function is to select and supply the retailers belonging to the network.

We therefore believe that **the restriction of cross-supplies should not apply to distributors operating at the wholesale level who are granted the exclusive right to establish and manage the selective network in their country.** These distributors are making important investments in their exclusive territory, and must be protected against active sales by his "colleagues" operating other territories. Therefore, in our view, a preferable solution would be to allow the application to such wholesale distributors the same type of limitations to active sales provided for exclusive distributors.

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[5] This is the position of the Commission, expressed in particular in the Guess case, which case however refers to a situation where several more severe restrictions of competition had been imposed by the supplier. This situation cannot be compared with e mere limitation on active sales by an exclusive supplier of a selective network to members of a network managed by another supplier. Moreover, the position expressed by the Commission in this case has not been tested by the Court of justice, since Guess has accepted to settle the case.

Within this type of organization the selected retailers should be free to sell to final users wherever (in conformity with Article 4(c)(iii)), **but the wholesalers should be prevented from active sales to selected retailers of the territory granted to other wholesalers.** This is a **necessary condition for the survival of this kind of organisation,** which constitutes an essential tool for SME's in developing sales within the EU.

5.4 The restriction of the place of establishment of selected distributors (Article 4(c)(i), third indent)

The restriction of the place of establishment is an important issue within selective distribution systems where buyer-resellers **are mainly retailers selling from a specific outlet.**

In the period before the development of online sales, a limitation of the place of establishment of the selected outlets was a means to restrict *de facto* the sales area of a retailer, since he could only sell to customers who were willing to access his sales outlet. It was thus possible to grant a minimum territorial protection to the members of the network, which was necessary for retailers who were to assume costly obligations, like minimum purchase obligations, full range of products, etc.

Now that online sales are becoming a common practice, the restriction of the place of establishment has become much less effective, since retailers can easily reach customers through his website, independently of his location. Considering that it would be fair to continue granting to selected distributors the same level of protection that was warranted in the past by the location clause, it would be appropriate to keep a flexible approach with respect to reasonable limitations of promotion through Internet.

6. FRANCHISING AGREEMENTS

As the Court of Justice has evidenced in the *Pronuptia* case, franchising agreements **deserve specific treatment** under EU competition rules. Under the VBER 2790/1999 and the 330/2010 franchising agreements have been subjected to the general rules of the VBER and in particular to the special rules regarding selective distribution, at least for those franchising agreements which include an obligation of the franchisees to refrain from selling to traders not belonging to the franchising network.

Considering the substantial differences between franchising and selective distribution agreements, the VBER should provide a number of specific rules for franchising agreements.

Actually, **the decision to extend the rules regarding selective distribution to franchising agreements,** and to cancel the rules specifically tailored for these agreements, contained in Regulation 4087/88, which had been drafted after a thorough examination of their

specific characteristics, **is not at all satisfactory.** The fact of applying the rules on selective distribution to franchising agreements (all of which imply *de facto* the prohibition to supply non-members of the network) conflicts with the need to take into account the **substantial differences between these two distribution systems**, especially with reference to the issues examined in the following paragraphs.

6.1 Exclusive franchising agreements

The franchisor may in certain cases grant the franchisee an exclusive territory, where he agrees not to appoint other franchisees and not to sell directly in competition with the franchisee. This exclusivity normally implies an obligation of other franchisees not to actively sell into this exclusive territory.

If the rules on selective distribution were to be applied to franchising agreements, this solution, which is rather common in certain industries, would conflict with the distributor's freedom to sell to end users wherever they are established.

6.2 The 1 year's post-contractual non-compete obligation

The 1 year's post-contractual non-compete obligation should be reconsidered with respect to Article 5(3)(c) according to which it must be limited to "premises and land". With respect to franchising agreements it should cover a **wider territory** where competition by the former franchisee might be relevant.

6.3 Franchising and RPM

One of the main characteristics of franchising is the uniformity of the retail outlets. The customers expect the same (or a similar) presentation within the whole network, including prices. This means that price competition between franchisees must be limited, at least to the extent necessary for safeguarding the uniform image of the network, e.g. by prohibiting any advertising below certain levels, or by inducing franchisees to respect recommended prices in their own interest.

7. ONLINE SALES AND HARDCORE RESTRICTIONS

The substantial growth of online sales has substantially changed the actual impact of certain practices, by facilitating aggressive forms of promotion which were less available in the past. This explains the attempts of suppliers to impose such limitations on online sales as are deemed necessary to warrant a fair balance between free access to the internet and safeguarding workable distribution networks.

7.1 Active and passive sales before and after the advent of internet sales

A critical issue, which has been debated from the very beginning of the implementation of the antitrust rules of the Rome treaty, regards the traditional distinction between active and passive sales.

The original purpose of permitting to impose upon distributors a limitation of active sales outside their contractual territory, while leaving them free to make passive sales was (and is still) a compromise between the need to protect the distributor against intra-brand competition of other distributors, and at the same time to warrant a sufficient level of free circulation through parallel imports. This balance, which grants a limited protection to exclusive distributors (by prohibiting the members of the network to actively promote sales to exclusive territories of other distributors), while leaving sufficient space for parallel exports through passive sales, has been substantially changed by the massive development of internet sales.

In fact, the promotion of sales through Internet **is by far more effective in reaching customers outside the contractual territory**, which means that the possibility of restricting active sales does no longer offer the same degree of protection available in the past.

This is why suppliers must be granted the right to **impose such limitations as are necessary to prevent internet sales which would *de facto* have the same impact of active sales,** and which would consequently imply an excessive reduction of the distributors' exclusivity. It is in this perspective that the suppliers' attempts to limit access to Internet of their buyers must be read.

7.2 Hardcore territorial and customer restrictions in the context of online sales

The **application to online sales of the hardcore provisions** of the VBER on territorial and customer restrictions has been strongly debated in the past years.

In particular the German Bundeskartellamt and several German courts have held that limitations to access the Internet were to be considered in general terms as hardcore territorial or customer restrictions, with the consequence that the agreements in question would be deprived of the benefit of the block exemption, without leaving space for an in-depth examination of their actual effects on competition. This attempt to "force" the interpretation of Article 4 of the VBER has been attenuated by the Court of Justice, especially in the Coty case.

The draft VBER tries to establish a compromise between the expectations of suppliers and distributors by stating in Article 1(1)(n) that:

> « ... a restriction that, directly or indirectly, in isolation or combination with other factors, has as its object to prevent the buyers or their customers from effectively using the Internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels is a restriction of active or passive sales, which, directly or indirectly, in isolation or in combination with other factors controlled by either party, has as its object to restrict the territory into which or the customer group to whom the buyers may sell the contract goods or services or, in the case of selective distribution, to restrict active or passive sales to end users by members of the selective distribution system operating at the retail level of trade.

This general statement is very important because it opens more space for distinguishing between **admissible and non-admissible restrictions of online sales, by introducing additional conditions for online sales to be qualified as hardcore.**

In fact, under this new definition of active and passive sales, in order to assess whether a restriction can be qualified as hardcore, it must be ascertained whether its object/purpose is to prevent buyers or their customers **from effectively using the Internet for the purposes of selling their goods or services online** or from **effectively using one or more online advertising channels.**

It would seem that this definition opens the door to a more flexible evaluation of online territorial and customer restrictions, requiring the previous assessment that:

(a) the restriction has **as its object** to prevent access to the Internet; the existence of other justifiable reasons and a balance between pro and cons of the possible effects must be taken into account when applying the hardcore rule;

(b) the restriction prevents an **effective use of the Internet** in view of selling and/or advertising the products or services: restrictions which leave sufficient space to the buyers to access internet, are not caught by the prohibition and will benefit of the VBER.

There are several specific situations which justify a flexible approach when evaluating possible restrictions, in order to take into consideration their possible actual impact on competition, such as in particular the following ones:

- Reasonable limitations on advertising in particular restrictions regarding the use of ad-words by members of the distribution network
- Use of languages other than the usual in the country of the site
- Restricting access to third party platforms
- Imposing conditions regarding the presentation and content of the buyer's website

8. THE FIVE YEARS' LIMITATION OF DISTRIBUTORS' NON-COMPETE OBLIGATIONS

The five years' limitation provided by Art. 5(1)(a) of the VBER for the non-compete obligation has given rise to problems with respect to exclusive distribution agreements.

This time limit actually makes little sense within typical «integrated» distribution agreements, in the context of which the obligation not to deal with products of competitors of the supplier is an essential element of the agreement, which should have the same duration as the contract itself. It would indeed be inconsistent with the distributor's primary function, i.e. to promote the supplier's products «against» his competitors, that he could at the same time act for such competitors.

Moreover, the foreclosure effect is almost inexistent for this type of agreements - at least in normal situations - since alternative distributors are easily available.

In the past years, this provision in fact forced most suppliers to conclude distribution contracts for a limited duration of 5 years (rather than for an indefinite period of time), in order to avoid the abovementioned risk. This has given rise to suspicion and negative reactions on the side of distributors, who did not understand that such limitation was not at their detriment, but was made only in view of complying with the VBER.

Now the situation has been sensibly improved by providing the possibility of a tacit renewal, which was previously excluded. Now the draft Guidelines state at § 234 that:

> « ...Non-compete obligations that are tacitly renewable beyond a period of five years are covered by the block exemption, provided that the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the five-year period».

It is now possible to stipulate distributorship agreements having a duration not exceeding five years, tacitly renewable at their term, provided the conditions of such renewal (usually an obligation to inform the other party within a fixed term of the decision to terminate the agreement) do not prevent the distributor from exercising his right to terminate.

This solution, which conforms to the needs of suppliers and distributors, is to be welcomed.

In order to clearly evidence this important modification, it would be appropriate to include this clarification as well **in the text of the VBER**, for instance by redrafting Article 5 (1)(a) as follows:

(a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years, except for tacitly renewable agreements, provided the conditions of such renewal do not prevent the distributor from exercising his right to terminate.

9. RESALE PRICE MAINTENANCE

RPM still remains a crucial issue, since the Commission is unwilling to effectively attenuate its traditional rigid approach, which is likely to be excessive if we consider that we are dealing with intra-brand competition.

9.1 The need to limit aggressive pricing policies

It is important to underline that, within the context of online promotion of sales, retailers can put forward very aggressive forms of price competition, which may substantially impair the proper functioning of the distribution network. Suppliers feel strongly the necessity of limiting in some way aggressive pricing practices which can be favoured through online promotion.

It should in particular be underlined that the simple fact of **advertising aggressive prices** may disrupt the network and force its members to abandon selling products at a non-sustainable price level.

This is why suppliers should have at least the right to prohibit distributors from advertising prices that are below a certain amount (Minimum Advertised Price polices – "MAPs").

The Commission has dealt this issue in the Vertical Guidelines (§ 174), affirming that MAPs may amount to RPM, for instance, in cases where:

> « ... the suppliers sanction retailers for ultimately selling below the respective MAPs, require them not to offer discounts or prevent them from communicating that the final price could differ from the respective MAP».

We believe that this is an important statement in favour of a **reasonable use of MAPs,** which can be legitimately imposed by suppliers, provided the supplier clearly states that this prohibition regards only the advertising and **does not limit the distributor's right to sell at whatever price he decides.** In fact, this kind of solution is not purely theoretical if we consider that suppliers fear more the online advertising of excessively low prices, which has a disruptive effect on the network, than low prices granted by single distributors.

9.2 The problem of recommended prices

Another critical issue is that of price recommendations, which, according to the Guidelines, do not amount as such to RPM, provided the supplier does not encourage their observance through additional measures. Actually, the fact of recommending a price must have a meaning, at least in the sense that the recommended price corresponds to a standard resale price which is considered fair by the supplier and which should guide

the distributor when deciding possible discounts or increases. In particular for certain products, suppliers should have the right to require distributors to respect certain price ranges and to avoid low price promotions that could negatively affect the image of the brand.

10. THE RULES APPLICABLE TO INTERNET PLATFORMS

The draft VBER introduces specific rules regarding internet platforms which take into account the market developments in this field.

Thus Article 1(d) extends the notion of "supplier" to:

> « ... an undertaking that provides online intermediation services irrespective of whether it is a party to the transaction it facilitates; 'online intermediation services' means services that allow undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded, and that constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council;»

The fact of considering the internet platform provider as a "supplier" apparently means that he **must respect the hardcore prohibitions applicable** under the VBER **to suppliers in his relations with the buyer**.

But **who is the "buyer"** in this context?

Is it the undertaking requesting the intermediation services, i.e. **the supplier of the intermediated goods** or services, or the **"intermediated" customer**?

The draft Guidelines state (at § 58) that:

> « ... Vertical agreements in the online platform economy, including those entered into with providers of online intermediation services as referred to in Article 1(1)(d) VBER, are covered by Article 1(1)(a) VBER. Both the provision of online intermediation services and the goods or services subject to the transactions it facilitates are considered contract goods or services for the purpose of applying the VBER to the agreement on the basis of which online intermediation services are provided and the agreement on the basis of which the intermediated goods or services are supplied.»

Does this mean that the hardcore restrictions under Article 4 apply at the same time:

- to the agreement between the seller of the goods and the provider of internet services (who assumes the role of supplier in this context), and

- to the agreement between the supplier and the customer (who could be the intermediation services provider himself or the customer "intermediated" by the provider)?

It appears almost impossible to "translate" these abstract principles from theory to practice.

Undertakings need a list of practical examples showing how the Commission imagines that these principles should actually apply to the relations between sellers, internet intermediaries and customers.

11. THE APPLICATION OF ARTICLE 101 TO AGENCY AGREEMENTS

In the draft Guidelines, the Commission recognizes the well-established principle that agency agreements in principle do not fall under the prohibition of Article 101(1), except in cases of "non-genuine" agency agreements which are closer to distribution agreements with resellers.

11.1 The Commission has based the distinctive criteria between "genuine" and "non-genuine" agency agreements on borderline situations which do not correspond to the normal practice

The Commission has developed criteria for distinguishing between "genuine" and "non-genuine "agency agreements, based mainly on the **assumption by the intermediary of risks which are actually more appropriate for an independent counterpart** (buyer-reseller). However, unfortunately, the criteria developed by the Commission during the years are based on a number of **atypical situations**, which have little to do with the agency agreements commonly used in the field of distribution, where:

(i) the agent collects an order;

(ii) transmits the order to the principal;

(iii) the principal accepts the order and delivers the goods to the customer;

iv) the customer pays the principal, and

(v) finally, the principal pays a commission to the agent.

On the contrary, almost all the cases examined by the Commission, which have been the basis for the elaboration of the guidelines, regard **borderline situations** where the agency agreement is used for purposes other than the usual ones.

This is why the **distinctive criteria** listed in the Guidelines (at § 31) **are inappropriate** to guide the reader. They create unnecessary confusion because, if taken seriously, most

"normal" agency agreements should be considered to be "non-genuine", without any actual reason.

If we look at the cases on which the Commission based its list, we can note that most of them refer to agreements where the **agent actually delivers goods to the customer and cashes the price on behalf of the principal**: see, for instance sale of petrol (*Cepsa*), sale of travel packages (case *Vlaamse Reisbureaus*), or cars (*Mercedes* case). In these cases **the agent's role is very close to that of a reseller,** with the only difference that the sales agreement is formally concluded between the supplier and the customer: but the agent, who cashes the price is able to grant discounts by reducing his commission; the agent can agree with his agents-competitors not to grant discounts[6].

It should furthermore be considered that it would be impossible to apply the rules regarding distribution agreements (with resellers) to "normal" agents who do not deliver the goods and cash the price. A very clear example of this impossibility can be found in § 177 of the Guidelines where it is stated that in case of a "non-genuine" agency agreement subject to art. 101:

> « ...an obligation preventing or restricting the agent from sharing its commission with the customer, irrespective of whether the commission is fixed or variable, is a hardcore restriction under Article 4(a) VBER. To avoid the use of such a hardcore restriction, the agent should be left free to reduce the effective price paid by the customer without reducing the income for the principal.»

Now, it is evident that an agent who transmits orders to the principal **without delivering the goods and cashing the price,** or at least having the right to negotiate the price of the product or service[7], **has no actual possibility to grant a discount to the customer**.

We strongly believe that the Commission should proceed to an **in-depth analysis of the actual way agency agreements are drafted and managed**, without being influenced by borderline situations which have nothing in common with the current commercial reality. Our association would be happy to provide all necessary information about the actual practice of cross-border commercial agency agreements.

The Commission should substantially **revise the list** of § 31 of the Guidelines and make clear that the criteria indicated in such list mainly regard **situations where the agent deals with the customers in a way that is closer to a reseller by delivering the goods and cashing**

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[6] See Court of Justice, 1 October 1987, Vereeniging van Vlaamse Reisbureaus. The Court decided that a regulation of a member state based on an agreement between travel agents to respect prices and tariffs set by tour operators was contrary to Article 85 (now 101). In this case the restriction of competition was agreed between the travel agents who were able to negotiate possible discounts as any reseller of a service.

[7] The Commission mentions in the Guidelines the Eirpage decision of 18-10-1991 (Case No IV/32.737), but this case (as most of the cases considered by the Commission) deals with a rather exceptional situation where the agent was entitled to negotiate the price with the prospective customer.

the price. These are in fact the main cases where the agent is *de facto* acting as a reseller, with the only difference that he is formally selling on behalf of the principal.

11.2 Almost all the distinctive criteria mentioned in the Guidelines are not appropriate for "normal" agency agreements

If one reads the criteria listed in § 31 of the draft Guidelines which identify "non genuine" agency agreements, it appears that a substantial part of the agreements currently entered into with "normal" agents within the EU, who take the usual risks of an intermediary, should be qualified as non-agents.

This situation creates confusion between stakeholders and gives rise to unnecessary discussions about agreements which should actually not be qualified as "non genuine", since the risks actually taken by the respective agents are compatible with their role of intermediaries. As we have tried to show in Annex B («Examples of situations where a "normal" agency agreement could be considered as "non-genuine" under the considered as "non-genuine" under the Guidelines on vertical restraints») a great number of clauses currently included in cross-border agency contracts, would have the surprising effect of subjecting these agreements to the prohibition of Article 101.

The Commission should revise the Guidelines after having considered more closely the current practice of agency agreements, in in view of an actual understanding of the commercial reality. Our association would be happy to submit any information about the actual commercial practice and its practical implications which could be helpful for this purpose.

Turin, September 15, 2021

Fabio Bortolotti

Chair IDI

ANNEX A
EXAMPLES OF EXCLUSIVE DISTRIBUTION AGREEMENTS FOR RESALE TO A SELECTIVE DISTRIBUTION NETWORK DEVELOPED BY THE DISTRIBUTOR IN HIS COUNTRY

We have collected a number of agreements between manufacturers and wholesale distributors of luxury perfumes, cosmetics, etc., which imply exclusive distribution at the wholesale level and selective distribution at the retail level.

A common characteristic of these agreements is that the manufacturer appoints an exclusive distributor for a given territory, who will sell only to points of sale selected by himself in conformity with qualitative criteria established by the supplier. This type of agreement enables a producer to enter a foreign market with a selective distribution network, through an exclusive distributor who will create and manage the local network.

In some cases the distributor will sign a (selective distribution) contract with the retailer, the contents of which are provided by the supplier. We do not know whether in some cases the contract is made in the name of the supplier. However, the distributor will normally appoint the retailer as "authorised distributor" of the supplier's brand, which would imply the image of a common selective network in different territories, although managed by different distributors in each of them.

The basic issue in this kind of agreements is the protection of each distributor against active sales of his "colleagues", in conformity with the rules applicable generally to exclusive distribution. This minimum protection is considered by the parties to be a necessary condition for developing and managing the selective distribution network in their territory.

Another crucial issue regards the pricing policies, since too aggressive strategies (especially at the promotional level) endanger the luxury image of the brand and the proper functioning of the network. We have been informed of cases where members of the network have terminated their selective distribution agreements, because they were unable to follow the reduction of prices imposed by actions of members of the same network. This of course an extreme situation, but the problem of warranting certain minimum price levels, at least on advertising through the internet (which could be limited through MAP) certainly exists.

There are many clauses between those shown hereunder that do not conform to the VBER. This is due in part to a conflict between the needs of the distribution network and the competition rules, but also to the difficulty of understanding the rules on selective distribution.

Suppliers fail to understand what is exempted and what is not under the VBER and don't imagine that solutions which seem obvious to them could be contrary to the block exemption regulation. This is the case in particular for the prohibition of active sales by distributors operating at the wholesale level, who supply only selected retailers. Also the principle according to which the prohibition to sell to non-authorised resellers would apply only to territories covered by the network, appears surprising and non-credible to most of the suppliers.

This being said, in this context the main purpose is to evidence what happens in practice, in order to facilitate a more in-depth understanding of the reasons which guide the parties in organising and managing selective distribution networks.

CONTRACT N. 1
FRENCH SUPPLIER - ITALIAN DISTRIBUTOR

This contract appoints the counterpart as exclusive distributor for sale to selected outlets only. It is the distributor who chooses the retailers under the control of the supplier, in compliance with his criteria.

See, hereunder, extracts of some relevant clauses:

Critères requis pour le choix d'un point de vente

Le concessionnaire s'engage à faire en sorte que la commercialisation des «Produits» réponde scrupuleusement aux critères de qualité et à la philosophie de la marque.

Pour proposer un point de vente à l'ouverture, le concessionnaire devra s'assurer d'une part, de la conformité du point de vente à la philosophie générale de la marque. Le concessionnaire devra remettre au concédant toute information lui permettant de le vérifier.

Ainsi, le concessionnaire n'envisagera de proposer que des revendeurs répondant aux critères qualitatifs exigés du concédant, comme la compétence du personnel de vente, l'aménagement du point de vente, sa localisation, la mise à disposition des produits dans un environnement de qualité ...

Le concessionnaire devra veiller au respect continu par le point de vente des critères d'image et de politique commerciale du concédant. Le point de vente qui ne serait pas en conformité avec la philosophie générale de la marque établi par le concédant pourra être fermé par le concédant, sans indemnité pour le concessionnaire dès lors que des critères objectifs

sont mentionnés (par exemple assortiment produits «grand public», du point de vente; exposition faible de la marque par le point de vente, non respect des règles de vente, etc..), Le concessionnaire fera son affaire de reprendre l'ensemble des produits du point de vente et s'engage à ne plus livrer ce même point de vente.

Clientèle

Le concessionnaire s'engage à ne vendre les « Produits » qu'à des revendeurs au détail qui vendent à des consommateurs directs et s'interdit donc de les céder sous quelque forme que ce soit à toute collectivité, â tout négociant français ou étranger, grossiste ou détaillant.

Respect de l'exclusivité territoriale

Sauf autorisation expresse du concédant donnée par avenant, le concessionnaire s'interdit expressément d'exercer les droits concédés, directement ou indirectement en dehors du Territoire.

En conséquence, le Concessionnaire s'interdit expressément, à titre de disposition déterminante de l'engagement du concédant dans le cadre du présent contrat, de, en dehors du Territoire:

- vendre les «Produits»,
- mener une politique active de prospection de clients, à quelque titre et sous quelque qualité que ce soit, directement ou Indirectement,
- se livrer â une quelconque action active de promotion ou de publicité,
- constituer une filiale ou un entrepôt de distribution.

Le Concessionnaire s'engage expressément à faire respecter par ses sous distributeurs l'exclusivité territoriale qui lui a été concédé et à leur interdire, en conséquence, de se livrer à une politique active de vente hors du territoire.

En conséquence, le concessionnaire s'engage à résilier tout contrat avec des distributeurs ayant une politique active de vente hors du Territoire et à communiquer au concédant toute Information relative à la violation de l'exclusivité territoriale concédée dans la cadre de la présente licence,

CONTRACT N. 2
EXCLUSIVE DISTRIBUTOR FOR ITALY FOR SALE TO SELECTED MULTIBRAND RETAILERS

Extracts of relevant clauses

Par les présentes, AA accorde au Distributeur, qui accepte, aux conditions ci-après exposées; le droit exclusif de distribuer et commercialiser les produits dans le Territoire au sein de points de vente multimarques.

Les Parties s'accordent à reconnaître que pour préserver la notoriété et le prestige international attachés aux produits il est impératif que la stratégie et la politique de commercialisation des Produits par le Distributeur dans le Territoire soient conformes et complémentaires à celles poursuivies par AA en Europe et dans le monde. A ce titre, le Distributeur s'engage à commercialiser les Produits dans le Territoire uniquement par l'intermédiaire de détaillants multimarques spécialisés dans le domaine de la parfumerie et de la cosmétique haut de gamme (distributeurs indépendants ou rayons spécialisés des grands magasins auxquels le Distributeur revend les Produits, ci-après désignés «Détaillants dépositaires»).

Il résulte des dispositions du paragraphe 6.l. ci-dessus que le Distributeur s'engage à ce que les Détaillants dépositaires présentent les critères objectifs et qualifications nécessaires pour vendre les Produits dans le Territoire. A ce titre, le Distributeur devra s'assurer avant tout référencement des Produits dans chaque point de vente des Détaillants dépositaires que ledit point de vente présente des critères de localisation, de présentation, de décoration intérieure et extérieure compatibles ....

Les Parties conviennent expressément que si AA décide qu'un des points de vente des Détaillants dépositaires ne remplit pas les conditions et critères nécessaires pour que les Produits y soient vendus, le Distributeur s'engage, à ses frais et sous sa propre responsabilité, à faire cesser par le Détaillant dépositaires la vente des Produits dans le point de vente en question, et à résilier toute relation commerciale avec le Détaillant dépositaire concerné.

Exclusivité

Sans préjudice des dispositions des articles 9.4, 9.5 et 11.3 du Contrat, AA s'engage, pendant la durée du Contrat, à ne distribuer et commercialiser les Produits destinés à la revente au sein de points de vente multimarques dans le Territoire que par l'intermédiaire du Distributeur, et s'interdit par conséquent de nommer tout autre

distributeur dans le Territoire pour la vente des Produits au sein de points de vente multimarques.

En contrepartie de l'exclusivité qui lui est concédée à l'article 9.1. ci-dessus, le Distributeur s'engage, pendant la durée du Contrat, à ne pas promouvoir la vente et/ou solliciter des commandes et/ou détenir des stocks de Produits en dehors du Territoire.

Dans l'hypothèse où le Distributeur et/ou les Détaillants dépositaires souhaiteraient promouvoir et/ou commercialiser les Produits sur leur site internet, le Distributeur s'engage à respecter et à faire respecter par ses Détaillants dépositaires les Conditions Générales de Vente sur Internet jointes en **Annexe 3**.

Conditions Générales de vente sur Internet pour les détaillants agrées

Les présentes conditions générales de vente sur Internet (« CGV Internet») définissent la politique de la société AA concernant le développement et l'utilisation de sites Internet par les détaillants agréés («Détaillants») en vue de promouvoir et de commercialiser sur leur site internet des produits de parfumerie et de cosmétique sous la marque« AA »(«Produits»).

Les présentes CGV Internet constituent des conditions annexes et complémentaires aux conditions générales de vente selon lesquelles un Détaillant s'approvisionne et commercialise les Produits an sein de son point de vente physique, Le strict respect, par le Détaillant, de ces conditions générales de vente conditionne l'application des présentes CGV Internet.

.....

Afin de s'assurer de la qualité des prestations offertes aux consommateurs, seul le Détaillant exploitant au moins un point de vente physique peut être habilité par AA à commercialiser les produits au sein d'un site internet propre, respectant les présentes CGV Internet.

De détaillant s'engage à ne satisfaire que les commandes émanant de consommateurs finals, ou d'autres distributeurs agrées par AA situés en France et au sein de l'UE, à l'exception des territoires de l'Allemagne, de l'Espagne, du BENELUX, da la Suisse de l'Autriche, de l'Italie, du Royaume Uni et des Pays Bas pour lesquels AA a mis en place un système de distribution exclusive interdisant au Détaillant de réaliser des ventes actives à l'intention des consommateurs de ces pays (par «ventes actives», on entend le fait de prospecter une clientèle déterminée ou des clients à l'intérieur d'un territoire donné par le biais d'annonces publicitaires dans les médias, sur internet ou d'autres actions de promotion ciblées sur cette clientèle ou sur les clients situés dans ce territoire),

Le Détaillant s'interdit de vendre les Produits dont la livraison serait demandée pour un pays situé à l'extérieur de l'UE. Il ne peut, en aucun cas, vendre les Produits à un détaillant non membre du réseau de distribution sélective auquel il appartient. Il s'interdit de participer directement ou indirectement, de quelque manière que ce soit, à l'organisation d'un marché parallèle.

S'agissant de la vente à un consommateur final, le Détaillant doit être particulièrement vigilant et s'engage à ne satisfaire que des demandes correspondant à une demande normale de la part de ce dernier.

CONTRACT N. 3
EXCLUSIVE DISTRIBUTOR FOR SALE TO SELECTED MULTIBRAND RETAILERS

Internet

The Distributor shall be authorised to maintain an internet web site but unless otherwise expressly agreed in writing by the Supplier there shall be no sales of the Products executed through this internet site. The Distributor may only authorise its retailers lo sell the Products through internet sites if the retailers' internet sites fully comply with the internet criteria and conditions set by the Supplier and if the Distributor obtains a signed Agreement concerning the Internet from the retailer in the form set forth in Exhibit D5. All visual images of the Products and/or the Trademarks used on such sites, as well as the layout and format of the sites, shall either be supplied by or preapproved by the Supplier

Any changes lo the contents of the Distributor's existing internet site or any approved site operated by the retailers selling the Products shall be subject lo the Supplier's express written preapproval.

Distribution within the Territory

The Distributor agrees to sell the Products in the Territory applying a sales policy taking into account the "de luxe" character of the Products. The Distributor agrees to use for the distribution of the Products in the Territory a distribution system which insures that the Products shall be sold by the Distributor exclusively to end users only through selected retailers The Distributor shall not sell the Products by mail order, catalog, Internet or in a manner which is incompatible with the "de luxe" character of the Products and of the Brand. The retailers may sell the Products exclusively to consumers for final consumption. In order to determine whether a retailer has the appropriate qualities to be appointed as an authorized retailer of the Products, the Distributor shall follow the qualitative selection criteria in Exhibit D3 attached hereto. If it appears to the Supplier that a retailer appointed by the Distributor does not have the appropriate qualities, the Supplier shall so notify the Distributor and the Distributor shall cease to provide such retailer with the Products and take all appropriate measures to remedy the situation (as reasonably directed by the Supplier).

The Distributor shall not actively seek customers for the Products outside the Territory. Furthermore, in order to protect the high quality of distribution of the Products, the

Distributor agrees not to sell the Products to retailers or dealers inside the Territory who do not meet the appropriate criteria defined in Exhibit D3. The Distributor agrees in relation to the Products not to actively seek or supply customers, not to establish any branch and not to maintain any distribution facility outside the Territory.

The Distributor shall only sell the Products to retailers who undertake lo sell the Products exclusively at the retail level lo final customers in consumer-like quantities. The Distributor agrees to take whatever steps are necessary to be certain that the retailers do not sell the Products outside the Territory or to non authorized outlets inside the Territory. Should any of the retailers be found to be offering or selling the Products outside the Territory or inside the Territory to non authorized outlets or to dealers, the Distributor agrees to immediately cease to deliver the Products to such retailers and lo take any additional actions necessary as directed by the Supplier to insure the unauthorized sales cease.

CONTRACT N. 4
EXCLUSIVE DISTRIBUTOR FOR SALE TO SELECTED POINTS OF SALE

Purpose of the agreement

Under the terms and conditions hereafter specified, the Supplier grants the Distributor the distribution rights for the Products in the Territory, in consideration of which, the Distributor shall exercise his skills for the distribution of the Products solely in the points of sale which strictly comply with the qualitative selection criteria for approval of any Authorized Outlet (as defined herein).

Notwithstanding the above, after consultation with the Distributor the Supplier shall be free to open and operate directly or indirectly through a wholly owned affiliate a maximum of two flagship retail stores intended to build the brand and bring increased exposure to it in the Territory, and/or an internet site bearing the name "DD" and selling the Products throughout the Territory, without violating this Agreement. The Supplier also retains the right to serve directly a limited number of private customers who either exist already or may establish themselves in the Territory in the future far reasons of their fame and notoriety (such as actors or actresses, fashion creators, etc.) provided that the Supplier gives the Distributor a list of such private customers who are served directly by the Supplier each year.

AGREEMENT WITH RETAILERS

The distributorship contract provides a standard agreement to be entered into between the distributor and the selected retailers, drafted as follows:

Distributor of DD hereby appoints the Retailer as an authorized retail stockist of DD Products at the outlet address listed above.

This appointment is made on the condition that the Retailer and the outlet comply on a continual basis with DD'S Selection Criteria for an Authorized DD Retailer and DD's General Conditions of Sale and Delivery, as set forth in the Schedule hereto (as amended by Distributer of DD and notified to the Retailer by Distributer of DD from time to time). By signing below, the Retailer agrees to comply with all such requirements.

Internet

The Distributor shall be authorized to maintain an internet web site including the Products subject to the express authorization of the Supplier and provided that the Distributor's internet web site complies fully with the criteria elaborated by the Supplier for internet sales

(the "Internet criteria") which aim at ensuring that the trademark image of the Supplier is preserved at all times.

Similarly, the Distributor may only authorize its retailers to sell the Products through internet sites if the retailers' internet sites fully comply with the Internet Criteria and conditions set by the Supplier and if the Distributor obtains a signed Agreement Concerning the Internet from the retailer in the form set forth in Exhibit D.

Territory

The Distributor shall only sell the Products to retailers who undertake to sell the Products exclusively at the retail level and to final customers in consumer-like quantities. Notwithstanding the above, the retailers authorized to sell the Products must be allowed to respond to supply orders from other authorized retailers located in the Territory or in the European Economic Area, The Distributor therefore agrees to take whatever steps are necessary to be certain that the authorized retailers do not sell the Products to non authorized retailers. Should any of the authorized retailers be found to be offering or selling the Products inside the European Economic Area to non authorized retailers or dealers or outside the European Economic Area, the Distributor agrees to immediately cease to deliver the Products to such retailers and to take such additional actions (as directed by the Supplier) which may be necessary to insure the unauthorized sales cease.

CONTRACT N. 5
EXCLUSIVE DISTRIBUTOR FOR SALE TO SELECTED POINTS OF SALE

Le présent contrat a pour but d'accroître les ventes de Produits sur le Territoire, tout en maintenant un niveau satisfaisant de rentabilité et en protégeant le prestige et l'image de la marque CC.

Le DISTRIBUTEUR s'engage à préserver le haut standing du nom CC et des marques attachées aux Produits, *et* dans ce but, ne vendra pas à des grossistes, et, dans les limites autorisées par la loi, restreindra la vente des produits à des détaillants sélectionnés, spécialisés dans la parfumerie de grand luxe et les produits de toilette.

Le DISTRIBUTEUR devra de plus garder le contrôle de sa distribution en application de l'article 8 ci-après, notamment en ce qui concerne la commercialisation non autorisée de Produits sur le marché gris (Importations ou exportations parallèles, contrebande) et devra s'assurer que les produits livrés à ses clients sont exclusivement destinés à la vente aux consommateurs finaux.

Les ventes aux détaillants sont toujours fermes et définitives ; les ventes à l'essai, les ventes sur consignation (sauf autorisation expresse de CC), la distribution de porte à porte, les ventes par correspondance, les ventes en gros ou la réexportation des produits par les détaillants agréés sont expressément interdites.

Le DISTRIBUTEUR s'engage par ailleurs à ne pas vendre et /ou promouvoir les produits via le réseau Internet sans l'accord préalable et écrit de CC_et devra prendre toutes dispositions pour faire appliquer cette règle par ses détaillants.

Le DISTRIBUTEUR présentera, à tout moment, à la demande de CC, la liste à jour et complète des points de vente sur le Territoire; CC se réserve le droit de faire visiter, de temps à autre, ces points de vente par ses propres représentants. En cas de litige sur l'adéquation d'un point de vente, la décision définitive sera prise par CC.

CONTRACT N. 6
DISTRIBUTION AGREEMENT
(SELECTED POINTS OF SALE)

This agreement has apparently be drafted with the intent to respect the VBER, except for the prohibition of active sales

Purpose of the Agreement

Under the terms and conditions hereafter specified, the Supplier grants the Distributor the distribution rights for the Products in the Territory, in consideration of which, the Distributor shall exercise his skills for the distribution of the Products solely in the points of sale which strictly comply with the qualitative selection criteria for approval of any Authorized Outlet (as defined herein).

Distribution within the Territory

The Distributor agrees to sell the Products in the Territory applying a sales policy taking into account the "de luxe" character of the Products. The Distributor therefore agrees to select the retailers in the Territory authorized to sell the Products. In order to determine whether a retailer combines the appropriate qualities to be appointed as an authorized retailer, the Distributor shall consider the qualitative selection criteria in Exhibit D attached hereto. If it appears to the Supplier that an authorized retailer appointed by the Distributor does not combine the appropriate qualities, it shall so notify the Distributor and the Distributor shall take all appropriate measures to remedy the situation as directed by the Supplier.

The Distributor shall not sell the Products by mail order, catalog, Internet or in a manner which is incompatible with the luxury character of the Products and the Brand unless the criteria set by the Supplier are met.

The Distributor shall keep the Supplier informed at all times of the names and addresses of the retail outlets where the Products are offered for sale ("the Authorized Outlets"). In order to assist the Supplier, the Distributor shall supply photographs as well as detailed information about the location, size, prestige (including but not limited to the names of the other brands carried), proposed location of the Products within the outlet and footfall of any outlet the Distributor puts forward for approval as an Authorized Outlet. The Distributor shall use best efforts to obtain a signed Authorized Retailer Agreement as set forth in Exhibit D hereto for each Authorized Outlet and, unless the Supplier has agreed to the contrary, no outlet shall be permitted to sell the Products unless the Distributor has a signed Authorized Retailer Agreement for said outlet, a copy of which shall be provided to the Supplier

Pricing policy

The Distributor shall develop and propose a sales and marketing policy and strategy for the Distributor's Territory which shall follow and be consistent with the Supplier's overall marketing plan for the Brand and the Products. The Distributor shall also utilize a pricing structure which takes into account the luxury image of the Brand and the price of competitive products. The Distributor shall communicate regularly with the Supplier and shall at all times ensure that the Supplier is aware of the prices set by the Distributor. The Supplier shall provide to the Distributor a Recommended Retail Price List for the Distributor's reference, it being understood that the Distributor retains the freedom to set its prices so long as they are fully consistent with the requirements of this Article. However, if the Supplier elects to set a maximum retail price for any of the Products, the Distributor shall not authorize the sale of the Products at a higher price.

Territorial limitations

The Distributor shall not actively offer to sell the Products outside the Territory. Furthermore, in order to protect the high quality of distribution of the Products, the Distributor agrees not to sell the Products to retailers or dealers inside the Territory, who do not meet the appropriate criteria defined in Exhibit D. The Distributor agrees in relation to the Products not to actively seek orders from customers, not to establish any branch and not to maintain any distribution facility outside the Territory.

The Distributor shall only sell the Products to retailers who undertake to sell -, the Products exclusively at the retail leve! and to final customers in consumer-like quantities. Notwithstanding the above, the retailers authorized to sell the Products must be allowed to respond to supply orders from other authorized retailers located in the Territory or in the European Economic Area, The Distributor therefore agrees to7 take whatever steps are necessary to be certain that the authorized retailers do not sell the Products to non-authorized retailers. Should any of the authorized retailers be found to be offering or selling the Products inside the European Economic Area to non-authorized retailers or dealers or outside the European Economie Area, the Distributor agrees to immediately cease to deliver the Products to such retailers and to take such additional actions (as directed by the Supplier) which may be necessary to insure the unauthorized sales cease.

Internet

The Distributor shall be authorized to maintain an internet web site· including the Products subject to the express authorization of the Supplier and provided that the Distributor's internet web site complies fully with the criteria elaborated by the Supplier for internet sales (the "Internet criteria") which aim at ensuring that the trademark image of the Supplier is preserved at all times.

Similarly, the Distributor may only authorize its retailers to sell the Products through internet sites ift he retailers' internet sites fully comply with the Internet Criteria and conditions set by

the Supplier and if the Distributor obtains a signed Agreement Concerning the Internet from the retailer in the form set forth in Exhibit D.

Authorised Retailer Agreement between Distributor and retailer (Contracting Party)

Whereas Distributor is responsible for the organization of a selective distribution network for the products bearing the DD Trademark as listed in Exhibit 1 (as may be amended by DD from time to time), (hereinafter the "DD Products") in .... (country).

Whereas the Contracting Party operates a point of sale satisfying the criteria which permit the entry of a retailer into the DD selective distribution system (hereinafter the "Sales Outlet").

Whereas Distributor grants to the Contracting Party, who accepts, the status of Authorized DD Retailer.

***

It is understood and agreed, however, that if the Authorized DD Retailer is located within a Member State of the European Union, it may obtain DD Products from any Authorized DD distributor or Authorized DD Retailer who is also located within a Member State of the European Union.

The Authorized DD Retailer also undertakes to sell the DD Products only at retail to final customers within its national market.

Notwithstanding the above, if the Authorized DD Retailer is located in a Member State of the European Union, it may resell the DD Products to any other authorized DD retailer who is also located in a Member State of the European Union.

ANNEX B
EXAMPLES OF SITUATIONS WHERE A "NORMAL" AGENCY AGREEMENT COULD BE CONSIDERED AS "NON-GENUINE" UNDER THE GUIDELINES ON VERTICAL RESTRAINTS

1. THE DISTINCTIVE CRITERIA LISTED IN § 31 OF THE DRAFT GUIDELINES ARE NOT APPROPRIATE FOR NORMAL AGENCY CONTRACTS

The Guidelines provide a list of situations which the Commission considers to be inconsistent with a «genuine» agency agreement. Furthermore, it is said (§ 32) that:

> *« .... where the agent incurs one or more of the above risks or costs», then the prohibition of Article 81(1) (now 101(1)) may apply as with any other vertical agreement».*

These criteria have apparently been developed on the basis of a number of "borderline" cases, considered by the Commission, where the "agent" was delivering the goods to the customer and cashing the price, which situations are actually closer to agreements with resellers, formally vested as intermediaries.

The criteria listed in § 31 of the draft Guidelines are in many cases inappropriate, when applied to **"normal" agency agreements**, where:

- the agent **transmits orders** (contract proposals) collected from a customer to the principal,
- the principal **accepts the order and delivers the goods** to the customer,
- the **customer pays the price to the principal**, and
- the **principal pays a commission** to the agent.

Actually, under most of the criteria listed in § 31, a "normal" commercial agent could be considered as being "non-genuine" and thus subject to the prohibition of Article 101(1).

We will show hereunder a number of situations where a strict interpretation of the Guidelines, may create unjustified preoccupations with respect to clauses which are normally used in the context of "normal" agency agreements. This creates unjustified uncertainty about the nature of commonly used agreements, which may be used by the contracting parties in case of disputes between them.

2. THE AGENT DOES ACQUIRE AND RESELL THE GOODS

This is an obvious distinctive criterion, which is not disputable as such.

However, problems may arise when where the agent's activity as reseller has a merely accessory character, like in situations where it appears appropriate that the agent also acts as a buyer-reseller, e.g. when he owns a shop of his own or when he needs to make limited supplies of products at the end of the season (for distribution of clothes). Where the activity as buyer-

reseller is material, or prevailing, the agreement should be considered as distributorship, and would obviously fall under the prohibition of Art. 101. If, on the contrary, the activity as reseller is of a secondary character, such activity does not change the substance of the role of the agent, as mere intermediary.

EXAMPLE 2-1
AGENT ACTING AS BUYER-RESELLER (IDI MODEL CONTRACT).

The parties may agree, when appropriate, that the Agent will buy a certain amount of Products from the Principal for resale, in his own name, in the Territory. Unless otherwise agreed in writing, the Agent is not entitled to commission on such sales. It is expressly agreed that such activity as buyer-reseller, to the extent it remains of an accessory character, does not modify the legal status of the Agent, as a self-employed commercial intermediary. Moreover, this accessory activity shall not be considered when calculating the goodwill indemnity according to Article 21 of this Contract.

This type of solution is frequent 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.

3. THE AGENT KEEPS A STOCK OF PRODUCTS

The principle 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, is reasonable, except where this activity is merely accessory. (§ 31(c))

This may be in particular the case where the agent keeps a **stock of spare parts** in order to provide an after-sale service to customers.

In fact, the alternative of supplying the spare-parts on a consignment basis, is not always appropriate, considering administrative obligations regarding VAT, etc.. For small amounts, it is much simpler to sell the spare parts to the agent with an obligation to repurchase, as in the following example.

EXAMPLE 3-1
SPARE PARTS

L'Agente si impegna a mantenere, a proprie spese, uno stock di pezzi di ricambio di sua proprietà, e di dimensioni adeguate per far fronte alle normali necessità della clientela del Territorio. Il Preponente si impegna a riacquistare lo stock esistente alla fine del contratto, al prezzo pagato dall'Agente.

4. THE AGENT TAKES RESPONSIBILITY FOR CUSTOMERS' NON-PERFORMANCE (§ 31(d))

The above statement apparently implies that agents who agree *star del credere* (like in the clause provided in the IDI model hereunder) should be considered as "non-genuine" agents.

ANNEX E

DEL CREDERE (Article 9.3)

In choosing the options parties should pay attention to the legal rules of the country where the agent is established. In some jurisdictions (e.g. Great Britain, France) there are no limitations; in others (e.g. Germany) the del credere obligation must be limited to specific business or customers and a special commission must be paid; in other countries (e.g. Belgium, The Netherlands) del credere cannot exceed the amount of commission, unless it is agreed with respect to a specific business. In Italy del credere cannot exceed the commission and must be agreed case by case for specific business (please, read the relevant country reports for further information).

The Agent undertakes a del credere obligation according to the terms and conditions hereunder.

E-1 With respect to business transmitted by the Agent, the latter undertakes in case of non-payment by the customer to pay to the Principal the following amounts:

E-1.A ☐ the total amount of the sums not recovered

E-1.B ☐ no more than ..... % of the sums not recovered

E-1.C ☐ no more than the commission which would be due on such business

E-1.D ☐ no more than ..... times the commission which would be due on such business

Options E-1.B and E-1.C (or E-1.A and E-1.D) may be used together: e.g. not more than 15% of the sums not recovered and not more than three times the agreed commission.

2. The del credere obligation does not cover the expenses incurred by the Principal for recovering his credits.

3. The del credere undertaking shall apply to:

E-3.A ☐ any business transmitted by the agent where the customer has not paid when due

E-3.B ☐ only on transactions for which del credere has been agreed on a case by case basis.

4. The Agent shall be entitled to an extra commission of ___ % on all business on which he has granted del credere.

5. No del credere is due if the loss is due to reasons for which the Principal is clearly responsible.

The Principal ..... The Agent .....

Now, while it is obvious that an agent who would take the whole risk of non-payment by customers upon himself would bear the risk of a reseller. However, the del credere obligation (which is admitted in most domestic legislations only to a limited extent) refers to special situations, for instance where the agent expressly warrants the solvency of a specific customer or where his obligation is limited to a small percentage of the unpaid price.

Where del credere is subject to reasonable limitations, in compliance with the applicable law, it does not actually affect the nature of the agency agreement.

5. THE AGENT IS OBLIGED TO INVEST IN SALES PROMOTION, SUCH AS CONTRIBUTIONS TO THE ADVERTISING BUDGETS OF THE PRINCIPAL (§ 31(f))

A literal application of this principle could bring under the prohibition of Article 101 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 very common clauses within agency agreements.

See, for instance the following examples of clauses which are commonly used by agents, who would never imagine that they might not be considered as "true" agents:

EXAMPLE 5.1
IDI PRINCIPAL-FRIENDLY MODEL AGENCY CONTRACT

3.4 (Fairs or exhibitions). The Agent shall take part, at his own expense, in the most important fairs and exhibitions in the Territory. The Principal reserves however the option to participate directly to any fair or exhibition in the Territory: in such case the Principal will bear the respective expenses.

4.1 (Advertising). The Agent shall be responsible for all advertising necessary to adequately promote the Products within the Territory. He agrees to regularly advertise and publicise the Products as well as the Principal's name and trademarks in the Territory.

4.2 (Conformity to the Principal's indications). Any advertising and promotion regarding the Principal and the Products shall be in strict accordance with the indications given by the Principal, in order to warrant that it conforms in all respects to the Principal's image and marketing policies. Any advertisement materials regarding the Products issued by the Agent, including their presentation through Internet, shall strictly conform to the Principal's guidelines and must receive the prior approval of the Principal.

4.3 (Cost of Advertising). The costs of all advertising and sale promotion activities shall, unless otherwise agreed, be borne by the Agent. The Principal shall however reimburse, within three months following the end of each calendar year, a sum calculated according to Annex B. The above sum shall be invoiced to the Principal by the Agent together with suitable documentation supporting the expenses incurred.

EXAMPLE 5.2
FASHION INDUSTRY

4.3 L'Agente si impegna altresì a partecipare a proprie spese, alle più importanti fiere o esposizioni che interessano il Territorio, alle giornate di formazione e di presentazione delle collezioni.

4.4 Ai fini di promuovere le vendite sul Territorio, l'Agente s'impegna ad acquistare all'inizio di ogni stagione il campionario prodotti relativo scontato del 50% sul prezzo di vendita. Le parti concordano che il credito del Preponente relativo ai campionari verrà trattenuto dalle provvigioni spettanti all'Agente. Il Preponente non ha alcun obbligo di riacquisto del campionario medesimo.

EXAMPLE 5.3
CONTRACT BETWEEN AN ITALIAN PRINCIPAL AND A FOREIGN AGENT

5.4 L'Agente si impegna altresì a partecipare, su richiesta del Preponente, alle più importanti fiere, open houses o esposizioni in genere (di seguito denominate "Esposizioni") in cui il Preponente intenda esporre e promuovere i Prodotti contrattuali. A tale scopo, il Preponente potrà predisporre un programma annuale di partecipazione alle Esposizioni (di seguito denominato "Programma di Esposizioni") cui intenda partecipare, comunicandolo tempestivamente all'Agente. Per gli affari conclusi o avviati durante le Esposizioni l'Agente avrà diritto alla provvigione ridotta indicata nell'Allegato 1, § 8. La ripartizione delle spese tra le parti verrà invece concordata caso per caso. In mancanza di accordo sulle spese, esse saranno così ripartite:

- affitto dello spazio espositivo ed allestimento dello stesso: 60 (sessanta) % a carico del Preponente e 40 (quaranta) % a carico dell'Agente;
- spese per il personale inviato dal Preponente: trasferimenti e costo orario a carico del Preponente; vitto, alloggio-noleggio autovettura e altre spese vive a carico dell'Agente;
- altre spese: a carico dell'Agente.

EXAMPLE 5-4
REIMBURSEMENT OF ADVERTISING EXPENSES

The Principal shall reimburse the Agent within three months following the end of each calendar year a sum equal to .....% of the advertising expenses which stand against advertising actions previously agreed upon between the parties but only up to ..... % of the turnover made by the Principal with the Products in the Territory in the year concerned.

The above examples show that, although it is unlikely that the agent would take upon himself all promotional costs, it is normal to share such costs between the parties. In fact, **the promotion of sales is one of the main obligations of the agent**, and the fact that he bears the respective costs in whole or in part does not as such change his nature as mere intermediary. Of course, the position expressed in the Guidelines is more justified for agents who deliver the goods and cash the price (see for instance the Mercedes case or Spanish petrol stations cases), who are in fact closer to resellers, but this is a borderline situation, which does not justify a general statement applicable to "normal" commercial agents.

6. THE AGENT MAKES MARKET-SPECIFIC INVESTMENTS IN EQUIPMENT, PREMISES OR TRAINING OF PERSONNEL (§ 31(g))

This statement, if taken seriously, 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 the prohibition of Article 101.

It should be considered that almost 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

EXAMPLE 6-1
TRAINING OF AGENT'S PERSONNEL

3.1 L'Agente si impegna a frequentare, presso la sede del Preponente, i corsi tecnici di aggiornamento sulla produzione, con frequenza almeno bi-annuale, sia per sé sia per i suoi eventuali collaboratori. Eventuali spese di vitto, alloggio (ad esclusione di spese telefoniche, servizio mini-bar, altri servizi extra usufruiti dall'agente in albergo), servizi di trasporto da o verso la sede del Preponente saranno a carico di quest'ultimo, dietro presentazione di regolare fattura e relativi giustificativi.

3.2 Inoltre, il Preponente si impegna a formare presso la propria sede l'Agente, nei casi in cui quest'ultimo faccia richiesta di corsi tecnici di aggiornamento sulla produzione. Anche in tali casi, eventuali spese di vitto, alloggio (ad esclusione di spese telefoniche, servizio mini-bar, altri servizi extra usufruiti dall'agente in albergo), servizi di trasporto da o verso la sede del Preponente saranno a carico di quest'ultimo, dietro presentazione di regolare fattura e relativi giustificativi.

EXAMPLE 6-2
TECHNICAL ASSISTANCE AND WARRANTY (MACHINE TOOL INDUSTRY)

9.1 L'Agente si impegna a fornire, a proprie spese, con il proprio personale ed i propri mezzi, per tutti i Prodotti contrattuali per i quali tale assistenza venga richiesta nel Territorio, un servizio di assistenza e garanzia dei Prodotti Contrattuali e/o di sostegno ai tecnici del Preponente che prestino servizio di assistenza ai clienti, secondo quanto specificato più dettagliatamente nell'Allegato F-1.

9.2 Egli si impegna a far partecipare, a proprie spese, il suo personale tecnico ai corsi di formazione o di aggiornamento che il Preponente decida di organizzare.

9.3 L'Agente si impegna a mantenere, a proprie spese, uno stock di pezzi di ricambio di sua proprietà, e di dimensioni adeguate per far fronte alle normali necessità della clientela del Territorio, secondo quanto indicato nell'Allegato F-2. Il Preponente si impegna a riacquistare lo stock esistente alla fine del contratto, al prezzo pagato dall'Agente.

EXAMPLE 6-3
SERVICE D'ASSISTANCE ET DE GARANTIE

14.1. L'Agent s'engage à fournir, à ses frais, avec son personnel et ses moyens, un service approprié d'assistance à la clientèle, s'appliquant à tous les Produits contractuels pour lesquels une telle assistance est demandée sur le Territoire, et à ce but l'Agent se servira, en particulier, d'une personne spécialisée à l'assistance aux clients. Cette personne spécialisée devra être toujours présente à la livraison des Produits contractuels dans le territoire de Paris, pendant que pour le restant territoire de la France il devra être toujours présent à la livraison dans le cas où les fournitures sont supérieures aux ..... Cette personne expliquera exhaustivement et en temps utile aux clients les modalités de fonctionnement et d'utilisation des Produits contractuels, il se rendra, le plus tôt possible, à réaliser les réparations demandées par les clients, et assistera les clients au mieux de ses possibilités. Tout cé-là il est essentiel pour éviter que le bon nom et la réputation du Fabricant soient compromis.

14.2. L'Agent s'engage à faire participer, à ses frais, son personnel technique aux cours de formation ou de mise à jour que le Fabricant décide d'organiser.

14.3. L'Agent s'engage en outre à effectuer gratuitement et à ses frais, toutes les réparations et/ou remplacements prévus par les conditions de garantie du Fabricant. Ce dernier fournira gratuitement à l'Agent les pièces de rechange nécessaires pour remplacer les pièces défectueses, à condition que le remplacement ait eu lieu conformément aux conditions de garantie du Fabricant.

EXAMPLE 6-4
AFTER SALES SERVICE

14.1. The Agent agrees to provide, with his own personnel, technical means and expense, a suitable after sales service which shall extend to all the Products installed in the Territory, including products sold by third parties. Such after sales service shall be provided to respect, with the utmost care, the standards stated by the Principal.

14.2. Save as otherwise agreed with reference to a specific contract, the above after sales service shall also extend to the installation, acceptance test and training courses for the customer's personnel, unless the Principal prefers to have his own personnel participating. However, in case of extraordinary service calls, the Principal shall send his own personnel to advise and support the Agent: the latter shall reimburse all travel expenses of such personnel while the Principal shall bear all other expenses, provided his participation was necessary.

14.3. The Agent agrees to have at his own expenses (except the hotel accomodation, which shall be paid by the Principal) his technical personnel participating in the training and updating courses which the Principal may decide to organize.

14.4. The Agent shall carry out free of charge all repairs and replacements provided for under the Principal's warranty conditions and shall bear all expenses of such service. The Principal shall supply the Agent free of charge with all defective parts replaced by the Agent in accordance with the Principal's warranty conditions.

14.5. The Principal shall supply the Agent on a consignment basis with a stock of spare parts suitable for the warranty and after sales service. The spare parts used by the Agent in accordance with article 14.4. above, shall be replaced free of charge; in all other cases (except for spare parts placed at the disposal of the customers at their factory upon the Principal's instructions) the spare parts taken out of the stock shall be paid by the Agent. The Agent shall keep in good conditions the spare parts stored in his premises by the Principal, at the conditions set out in Exhibit F. Such spare parts remain the Principal's property.

14.6. When the Agent acts as reseller, he shall take into account the cost of the above services in fixing the sales price to the customer. On the contrary, with reference to business made by the Agent as intermediary (i.e. not as reseller), the Principal shall reimburse the sums stated case by case under the relevant voices in the Price Schedule agreed upon between the parties. In calculating the above sums, the parties shall consider as compensation for the global service (including after sales service, warranty, installation, acceptance test and training by ...) 6% of the first 50.000 € and 4% of the remaining part of the ex works price of every contract.

14.7. A compensation for warranty services rendered by the Agent on Products delivered in the Territory by third parties as part of a complete installation, shall be agreed upon between the parties on a case-by-case basis.

7. THE AGENT UNDERTAKES OTHER ACTIVITIES, WITHIN THE SAME PRODUCT MARKET, REQUIRED BY THE PRINCIPAL, UNLESS THESE ACTIVITIES ARE FULLY REIMBURSED BY THE PRINCIPAL (§ 31(h))

This statement, made in general terms, conflicts with the usual practice, especially in contracts for machinery and other products requiring assistance, where the agent is requested to perform such services, as has been shown in the examples of the previous paragraph.

It is true that additional activities of this type may not be compatible with a «true» agency if they are disproportionate with respect to the agent's activity as intermediary. However, when this is not the case, there is no reason to consider that the agreement is no «genuine» agency. It is interesting to note that also the Court of first instance rejected the Commission's position regarding the obligation to supply repair and assistance services in the Mercedes case.

8. CONCLUSIONS

We believe that the above examples may be useful for a better understanding of the current agency contracts, avoiding the risk of being misled by the border-line cases which have been examined by the Commission and the Court of justice during the past years.