

04

DLC COUNTDOWN



“VERTICAL” IN THE SPOTLIGHT: AGENCY (DEFINITION AND TEMPORARY TRANSFER OF OWNERSHIP)

WHAT?

In the previous DLC countdown, it was highlighted that EU competition law applies a **particular definition of agency**. Not every agent in the sense of commercial or business law will be treated as an agent for EU competition law purposes.

The **agency test** under EU competition law is met if the agent assumes no or only insignificant risks associated with the agreements concluded or negotiated on behalf of the principal. If the agency test is met, the agent will be deemed an integral part of the principal and the rules of EU competition law will not apply to agreements between the principal and the agent relating to the transactions negotiated for the principal. If the agency test is not met, the rules governing independent distributors will have to be adhered to. This implies, for instance, that the agent cannot be compelled to apply a particular fixed price level, or that he cannot be forbidden to deal with certain customers or in certain territories.

A typical feature of the commercial or business law concept of agency is that the agent does not acquire the **ownership** of the relevant products. Ownership will pass directly from the principal to the customer and will not transit via the agent. Otherwise, a resale transaction between the principal and the agent would be involved, which is typically incompatible with the concept of agency in the commercial or business law sense.



Now?

According to the current Vertical Guidelines, an **agent** is a legal or physical person who has the power to negotiate and/or conclude agreements on behalf of a principal, either in the agent's own name or in the name of that principal, for the purchase of goods or services by the principal, or for the sale of goods or services supplied by the principal.

This definition covers a number of **important features** that are unique to the concept of agency:

- Both agents acting in the name and on behalf of a principal, and other intermediaries acting in their own name but on behalf of the principal (e.g. the so-called "commissionaires"), fall under the definition of agency.
- The definition targets both purchasing agents and sales agents.
- It is the agent's core task to negotiate or conclude agreements on behalf of the principal. Therefore, according to the definition, the agent is not expected to acquire the ownership of the contract goods purchased or sold.

THE FUTURE AS OF 1 JUNE 2022?

It has become apparent over the years that, for reasons independent from EU competition law, that the **temporary acquisition of ownership of the contract goods** by the agent may be needed or desirable. Such justifications typically relate to tax or accounting laws, local regulations or the wish of the customer to have the agent rather than the principal as his counterpart.

The current proposals by the European Commission address these particular needs. If the agent acquires the ownership of the goods temporarily, i.e. for a very short period of time, while selling them on behalf of the principal, the agreement **will not necessarily be precluded from being qualified as an agency for EU competition law purposes**. In such a case, the agency qualification is preserved as long as the agent does not incur any or only incurs insignificant costs or risks related to such transfer of property and to the agency in general.

IN PRACTICE?

The current proposals of the Vertical Guidelines do not alter the treatment of agency for EU competition law purposes in the case of a temporary transfer of ownership of the goods by the principal to the agent prior to such goods being sold to the customer.



ASSESSMENT?

The possibility to acquire the goods for a very brief period of time provides additional and useful **flexibility** for agents in the performance of their activities. Such a temporary acquisition may serve useful purposes in a commercial context, without endangering the application of the agency test (no or only *de minimis* risks) under EU competition law.

However, it remains unclear why the current proposals of the Vertical Guidelines are limited to **sales** scenarios and do not cover **purchasing** scenarios. From an EU competition law perspective (coherent application of the agency test), there is no obvious reason for such a difference in treatment. The failure to amend the proposals on this point may entail the risk of an *a contrario* interpretation.



THE FINAL REVISED VBER IS PLANNED TO ENTER INTO FORCE ON 1 JUNE 2022.

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