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COMMERCIAL AGENTS AND ONLINE PLATFORMS RISKS RELATED TO MARKET SPECIFIC INVESTMENTS

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ABSTRACT

Certain suppliers choose to distribute their products through commercial agents. Due to special features of this particular commercial relationship, for the purpose of EU competition law the agent is considered to form an integral part of supplier's undertaking and as a consequence, the agreement between the two falls out of the scope of competition rules. The aim of this article is to demonstrate the importance of the EU competition law criteria for agency qualification and the existent ambiguities in that regard, with a view of providing a much-needed clarification in the context of online platforms. To this end, the authors first provide a brief overview of CJEU and EU Commission development related to agency agreements, followed by a comparative NCA's analysis of the market-specific investments as the most critical agency criteria when it comes to online platforms business models. Finally, authors analyze the revisions of Vertical Guidelines proposed during the EU Commission's evaluation of VBER. The authors argue that Vertical Guidelines should make a clear distinction between online platform's investments that are specifically related to the relevant market and investments which could also be used in other product markets. This would improve legal certainty for undertakings by allowing them to assess what types of risks or costs would bring their agreements within the scope of competition rules.

Keywords*: commercial agents, EU competition law, market specific investment, online platforms, VBER.*

1. INTRODUCTION

When appointing a commercial agent or a distributor (or a reseller), the supplier effectively chooses to outsource the sale function of its business in order to benefit from the agent's or distributor's knowledge and established trade connections, to save costs and to ensure compliance with local law.[1] Certain suppliers choose to distribute their products through commercial agents instead of distributors. Under the Commercial Agents Directive,[2] the agent is a person having the authority to negotiate the sale or purchase of goods on behalf of the principal, or to negotiate and conclude such transactions on behalf and in the name of the principal.[3] There are a number of advantages and disadvantages of this business model for the contracting parties.

Advantages of agency (in comparison to the use of an independent distributor) include a greater degree of principal's control, more freedom in setting the price of goods in the downstream market, supplier's freedom to choose customers and maintain closer contact with customers and greater control over marketing.[4] Since the principal is the party to the contract with end customer, the principal will be free to lawfully fix the prices at which the products are sold. This is certainly an advantage for the principal, as this practice would qualify as a hardcore restriction of competition under EU and Croatian competition law (so called resale price maintenance) if imposed on an independent distributor. Furthermore, the principal (supplier) which uses an agent to distribute the products will retain control of the terms of supply of products to end customers and will be able to choose its customers. In addition, the commission paid to the agent is typically lower than the margin which the distributor earns (considering that the distributor assumes a greater risk), which will probably result in the agency structure being more cost-effective for the principal.[5]

However, using commercial agents to distribute the products or services also has its disadvantages, including the agent's post-termination compensation/indem-

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1 Practical Law UK Practice Note Overview, *Commercial Agents*, Thomson Reuters, 2021, p. 10. [https://uk.practicallaw.thomsonreuters.com/], Accessed 30 March 2021.

2 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, [1986] OJ L 382/17.

3 Article 1 (2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ [1986] L 382/17.

4 Practical Law UK Practice Note Overview, *Commercial Agents*, Thomson Reuters, p. 13. [https://uk.practicallaw.thomsonreuters.com/], Accessed 30 March 2021.

5 *Ibid.,* p. 10.

nity and potential tax implications[6] (for example, the application of rules on permanent establishment of the territory in which the agent is operating). Commercial Agents Directive contains rules protecting the commercial agent in cases of termination of agency agreement, unless the agreement is terminated because of default attributable to the commercial agent, or unless the agent has terminated the agreement unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot be required to continue his activities.[7] The risk of application of rules on post-termination compensation/indemnity to independent distributors, on the other hand, is significantly lower.

In this context, a commercial agent is often considered to economically form a part of the principal's undertaking, i.e. the commercial agent and the principal are qualified as a single undertaking for the purpose of applying competition law rules. When this is the case, the property of the goods does not pass to the agent and the agent bears no commercial risk in relation to transactions between the principal and the customer and is consequently excluded from the application of Article 101(1) of the Treaty on Functioning of European Union ('**TFEU**'),[8] as well Article 8(1) of the Croatian Competition Act[9] (essentially corresponding to Article 101(1) TFEU) in a purely domestic context.

Developing on the CJEU case law on agency agreements in the context of EU competition rules, the European Commission Guidelines on Vertical Restraints (2010/C 130/01) ('**Vertical Guidelines**') list agency agreements as vertical agreements which generally fall outside the scope of Article 101(1) TFEU.[10] Vertical Guidelines are a soft law instrument that sets out the principles for assessment of vertical agreements under Article 101 TFEU.[11] They are not legally binding but may be used to interpret and clarify the rules of TFEU and the Regulation

6 *Ibid*., p. 13.

7 Articles 17 and 18 of the Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ [1986] L 382/17; Articles 830 and 831 of the Croatian Civil Obligations Act (Zakon o obveznim odnosima),Official gazette, No. 35/05, 41/08, 125/11, 78/15, 29/18.

8 Whish, R.; Bailey, D., *Competition Law*, Oxford University Press, 9th edition, Oxford, 2018, p. 634.

9 Croatian Competition Act (Zakon o zaštiti tržišnog natjecanja), Official gazette, No. 79/09, 80/13, 41/21.

10 European Commission Guidelines on Vertical Restraints, OJ [2010] C 130/1, para. 18.

11 *Ibid.*, para. 1.

330/2010 in vertical agreements ('**VBER**').[12] [13] In order to benefit from the exemption, the agency relationship must be genuine. In other words, the agreement must satisfy the conditions provided in Vertical Guidelines regarding commercial or financial risk borne by the agent in relation to the activities for which the agent was appointed to act on behalf of the principal.[14] One of the risks which is material for determining whether an agency agreements is exempted from application of competition law is the risk related to market specific investments, which are defined in Vertical Guidelines as investments specifically required for the type of activity for which the agent has been appointed.[15]

In a roundtable discussion related to agency agreements within the evaluation of VBER conducted by the European Commission, the participants pointed out that a particular problem in the application of currently effective VBER and Vertical Guidelines is the lack of clarity of the notion of a market-specific investment, including in the context of online platforms acting as agents for their suppliers.[16] The question whether specific costs incurred by agents are considered market-specific investments is important to assess whether agents are independent actors on the relevant market on which the supplier's products/services are sold.

The consequence of agency qualification is that specific provisions of agency agreements dealing with contracts negotiated on behalf of the principal will fall outside the scope of Article 101(1) TFEU or Article 8(1) of the Croatian Competition Act. These provisions would include limitations on territory into which the agent may sell products/services; limitations on customers to whom the agent may sell products/services; and prices and conditions at which the agent may sell products/services.[17] With regard to online platforms, this question is relevant for assessment of legality of contractual provisions restricting the platform from selling products to certain customers or setting the prices and conditions under which the platform may offer supplier's products/services. In addition, although it may appear that agency qualification is not relevant for assessment of most favored nation clauses (MFN) since they are primarily concerned with the relationship between the prin-

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12 Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ [2010] L 102/1.

13 Tuytschaever, F.; Wijckmans, F., *Vertical Agreements in EU Competition Law*, Oxford University Press, Third Edition, Oxford, 2018, p. 29.

14 *Ibid.,* p. 5.

15 *Ibid.*

16 European Commission Staff Working Document: Evaluation of the Vertical Block Exemption Regulation, SWD (2020) 172 final, p. 136.

17 Tuytschaever, Wijckmans, *op. cit.*, note 13, p. 305.

cipal and the agent (agency market) which is always subject to Article 101 TFEU, such clauses may nevertheless have an effect on the relevant product market.[18]

The aim of this article is to demonstrate the importance of the criteria for EU agency qualification and the existent ambiguities in that regard with a view of providing a much-needed clarification, particularly in the context of online platforms acting as agents for their suppliers. To this end, the authors first provide a brief overview of CJEU and EU Commission development related to agency agreements, followed by a comparative NCA's analysis of the market-specific investments as the most critical agency criteria. The final section of this article deals with revisions of Vertical Guidelines proposed during the EU Commission's evaluation of VBER with the view of contributing to the upcoming legal clarifications.

2. DEFINING COMMERCIAL AGENCY0

Already in 1962, the EU Commission published a Notice on Exclusive Dealing Contracts with commercial agents that remains relevant to date. Under this Notice, the main factor for distinguishing a genuine commercial agent from an independent distributor was the risk resulting from the transaction with the customer.[19] It provided that "a commercial agent must not by the nature of his functions assume any risk resulting from the transaction."[20] Following the publication of the Notice, the subsequent EU Commission practice and court decisions were focused on the factor of agent's integration with the principal, instead of the risk assumption by the agent.[21]

In the VVR case[22] from 1987, the CJEU had the opportunity to rule on nature of the relationship between a tour operator and a travel agent. The judgment was rendered in the preliminary reference procedure initiated by the Belgium commercial court in the course of proceedings by Vereniging van Vlamsee Reisbureaus against the Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten ('Sociale Dienst') for an order prohibiting Sociale Dienst from continuing to grant rebates to its clients, contrary to the Belgian national rules on commercial practices for

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18 *Ibid.*

19 EU Commission Notice on exclusive dealing contracts with commercial agents of 24 December 1962, OJ [1962] 139, p. 1. Huyue Zhang, A., *Toward an Economic Approach to Agency Agreements*, Journal of Competition Law & Economics, Vol. 9, No. 3, 2013, p. 565.

20 European Commission Notice on Exclusive Dealing Contracts with Commercial Agents of 24 December 1962, p. 1.

21 Huyue Zhang, *op. cit.,* note 19, p. 565.

22 Judgment of 1 October 1987, *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, C-311/85, EU:C:1987:418.

travel agents.[23] Sociale Dienst was established by the Special Family Allowance Fund and had the task of acting as the travel agent for local and regional public service employees.[24] In that capacity the Sociale Dienst granted those persons rebates on the price of tours organized by tour operators, passing on to them all or part of commission normally paid to travel agents.[25] In the course of an action for a restraining order the Belgian court referred to the CJEU for a preliminary ruling questions on whether the provisions of Belgian national law which provide that it is contrary to fair commercial practice for an approved travel agency to (i) offer prices and tariffs other than those agreed or imposed by law and (ii) to share commissions, give rebates, or offer advantages in any form whatsoever, on conditions which are contrary to customary practice, are compatible with Article 101(1) (former Article 85(1)) EEC Treaty).[26] In the course of proceedings for preliminary ruling, CJEU established that the documents disclosed by the parties suggested that there were agreements at various levels intended to oblige travel agents to observe prices of tours fixed by tour operators.[27] According to the CJEU, such agreements had the object and effect of restricting competition between travel agents by preventing travel agents from competing on prices by freely deciding to pass on consumers some portion of commission they receive.[28] The Belgian government argued that Article 101(1) TFEU (former Article 85(1) EEC Treaty) cannot apply to a relationship between a tour operator and a travel agent, since such relationship was one of principal and agent, and that a travel agent must be regarded as an auxiliary organ of the tour operator.[29] However, the CJEU held that a travel agent which sells travel organized by a large number of different tour operators should be regarded as an independent agent that provides services on an independent basis, and cannot be treated as an auxiliary organ of the tour operator.[30]

Similar reasoning was applied in Suiker Unie[31] where the EU Commission was of the opinion that the agency agreement between sugar supplier and its trade representatives did not fall outside the scope of Article 101(1) TFEU because the

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23 *Ibid.*, para. 2.

24 *Ibid.,* para. 4.

25 *Ibid.*

26 *Ibid.,* para. 8.

27 *Ibid.,* para. 12.

28 *Ibid.,* para. 17.

29 *Ibid.,* para. 19.

30 *Ibid.*

31 Judgment of 16 December 1975, *Suiker Unie*, Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, EU:C:1975:174.

agents did not work exclusively for the sugar supplier and were not integrated into the supplier (which was also confirmed by the CJEU).[32]

The change of approach by European courts occurred first in 1995.[33] In a preliminary ruling procedure in Volkswagen AG case,[34] the CJEU provided responses to questions raised in proceedings between Bundeskartellamt and Volkswagen AG ('VAG') and VAG Leasing GmbH ('VAG Leasing'), after an order by the Bundeskartellamt requiring from VAG and VAG Leasing to desist from practice contrary to German competition law. The relationship between VAG and its dealers was governed by a distribution agreement by which VAG granted the dealers the right to resell to the public new motor vehicles and spare parts of Volkswagen and Audi marks and obliged the dealers to provide certain other services, including leasing transactions.[35] The dealers were required to negotiate leasing contracts on behalf of VAG Leasing. They would need to buy the vehicles from VAG in their own name and then transfer the ownership of vehicles to VAG Leasing at the same price at which they had bought them.[36] For each leasing transaction completed by VAG Leasing (with the customer), the dealers received a commission which would correspond to their profit which would have been made on a similar transaction, while following the expiry of the lease, the vehicles needed to be returned to dealers and dealers needed to sell the vehicles. For the purpose of their sale, dealers were required to repurchase the vehicles from VAG Leasing (after expiry of leasing contracts).[37] In the course of its investigation, Bundeskartellamt held that exclusive arrangements between VAG Leasing and dealers unfairly impeded the business activity of those dealers and the independent leasing companies and it prohibited VAG and VAG Leasing from requiring the dealers to negotiate leasing contracts exclusively for VAG Leasing.[38] Once the case ended up in proceedings before the German supreme court (Bundesgerichtshof), Bundesgerichtshof stayed the proceedings and referred several questions for a preliminary ruling to the CJEU, the first two of which were essentially whether Article 101(1) (former Article 85(1) EEC Treaty) prohibits an obligation imposed by the manufacturer on all its dealers established in that member state to develop activities as agents for

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32 Huyue Zhang, *op. cit.,* note 19, p. 566. EU Commission Notice on Exclusive Dealing Contracts with Commercial Agents of 24 December 1962.

33 Huyue Zhang, *op. cit.,* note 19, p. 566.

34 Judgment of 24 October 1995, *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH*, C-266/93, EU:C:1995:345, para. 4.

35 *Ibid.,* para. 4.

36 *Ibid.,* para. 6.

37 *Ibid.*

38 *Ibid.,* para. 10.

leasing transactions exclusively for the manufacturer's leasing company.[39] VAG and VAG Leasing claimed that their German dealers, as intermediaries of VAG Leasing, form one economic unit with VAG and VAG Leasing, so that in the absence of more of one undertaking, the exclusive agency agreement between the above undertakings and their dealers falls outside the scope of Article 101(1) TFEU.[40] This argument was rejected by the CJEU on the grounds that agents can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal and they operate as auxiliary organs forming an integral part of the principal's undertaking.[41] The CJEU further held that this was not the case in proceedings at hand, considering that German Volkswagen dealers assumed, at least partially, the risk of transactions concluded on behalf of VAG Leasing, in so far as they repurchased the vehicles from it upon expiry of the leasing contracts, and their busines of sales and after-sales services was carried on largely in their own name and for their own account.[42]

Several years later, in DaimlerChrysler case,[43] the CJEU decided on appeal against the decision of EU Commission,[44] where the EU Commission rejected the argument that agreements entered into with German dealers were agency agreements and therefore exempt from application of Article 101 TFEU.[45] In DaimlerChrysler, the EU Commission argued that commercial agents were required to devote a considerable part of their financial resources to sales promotion and bore the risk of sales for a large number of vehicles, since the agents were required to purchase demonstration cars which is directly relevant for marketing to the final customer and constitutes a market-specific investment.[46] The Commission also argued that the financial commitment the principal required from its agents could not be considered separately from their activities as intermediaries, as demonstration cars

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39 *Ibid.,* para. 16.

40 *Ibid.*, para. 18.

41 *Ibid.,* para. 19.

42 *Ibid.* Specifically, the dealers were required to purchase vehicles from Volkswagen AG and sell them to Volkswagen AG Leasing. Further, the dealers negotiated leasing contracts on behalf of Volkswagen AG Leasing and were remunerated by a commission based on the profits the dealers would make by selling vehicles in the open market for each transaction. Following the expiry of relevant leasing contracts, the dealers were required to repurchase the vehicles back from Volkswagen AG Leasing.

43 Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322.

44 European Commission decision of 10 October 2001 COMP/36.264 – *Mercedes Benz*.

45 Ezrachi, A., *EU Competition Law – An Analytical Guide to the Leading Cases*, Hart Publishing, Sixth edition, Oxford, 2018, p. 208.

46 Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322, para. 76.

were a market-specific investment required by the principal.[47] Although the CJEU accepted in this case that the commercial agent runs a certain risk by purchasing demonstration vehicles from the principal, it nevertheless stressed that such demonstration vehicles were purchased on preferential terms and could have been resold three to six months later if they accumulated a minimum of 3000 kilometers, which significantly undermined the importance of the risk identified by the Commission.[48] The CJEU held that even if the agent has a separate legal personality, but does not freely determine its conduct on the market and carries out the instructions of the principal, the restrictions from Article 101 TFEU do not apply to the relationship between the agent and the principal.[49] In DaimlerChrysler it was the principal that determined the conditions of sale of vehicles to customers and that bore the risks associated with sale of vehicles.[50] Furthermore, the terms of individual agency agreements prevented the agents from purchasing and holding stocks of vehicles.[51] For the above reasons, the agents were supposed to be treated the same as employees, integrated into the principal's undertaking and forming the same economic unit.[52] In these proceedings the existence of an agreement between undertakings within the meaning of Article 101 TFEU (former Article 81(1) TEC (Nice)) has not been established to the requisite standard.[53]

The facts in Volkswagen AG case were in part similar to the facts in above mentioned DaimlerChrysler decision, in which the CJEU concluded that the relationship between the supplier (principal) and the dealers was one of genuine agency which fell outside the scope of Article 101(1) TFEU. However, the important difference between Volkswagen AG and DaimlerChrysler facts is related to the arrangement between principals and dealers for (re-) purchase of demonstration vehicles.[54] Specifically, in Volkswagen AG (where the agency agreement was qualified as independent distributor agreement) the dealers had an obligation to repurchase the vehicles following the termination of leasing contracts and further resell those vehicles at their own risk.[55] On the other hand, in DaimlerChrysler, the dealers were required to purchase demonstration vehicles from the supplier, however the manufacturer (supplier) also had the obligation to repurchase the vehicles

47 *Ibid.*

48 *Ibid.,* para. 108.

49 *Ibid.*, para. 88. Ezrachi, *op. cit.*, note 45, p. 208.

50 Ezrachi, *op. cit.,* note 45, p. 209.

51 *Ibid.*

52 *Ibid.*

53 Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322*,* para. 119.

54 Huyue Zhang, *op. cit.,* note 19, p. 568.

55 *Ibid.*

from dealers once they reach certain mileage.[56] Therefore the difference in facts which led CJEU to reach opposite conclusions in the two cases, related to the risk born by dealers, which thus appears to be the most important element of what is considered to be a genuine agency agreement.

In CEPSA case[57] the Spanish supreme court (Tribunal Supremo) referred the question for preliminary ruling to the CJEU regarding exclusive fuel distribution agreements. In its judgment, the CJEU assessed whether the referred agreements constituted agreements between undertakings for the purpose of applying Article 101 TFEU, i.e. whether the parties' relationship is qualified as an agency agreement.[58] The CJEU held that the decisive factor for determining whether a service station operator is an independent economic operator (resulting in the concerned agreement being qualified as an agreement between undertakings) should be found in the clauses of the relevant agreement relating to the assumption of financial and commercial risks linked to the sale of goods to third parties.[59] CJEU further stated that the question of risk is to be assessed on case-by-case basis taking into account the real economic situation.[60] With respect to the risks linked to market-specific investments (i.e. investments required to enable the service-station operator to negotiate or conclude contracts with third parties), CJEU held that it was necessary to establish whether that operator makes investments into the premises or equipment, such as a fuel tank or in advertising campaigns.[61]

Adoption of Commission Notice on Guidelines on Vertical Restraints in 2000 and its replacement with Vertical Guidelines in 2010 eliminated doubt as to whether an agent must be integrated with the principal in order to be exempt from application of EU (or national) competition law altogether, since the Vertical Guidelines clearly specify the risks which cannot be borne by a genuine agent.

Vertical Guidelines define agents as legal or physical persons vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal for the purchase of goods/services by the principal or for sale of goods/services supplied by

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56 Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322, para. 108.

57 Judgment of 11 September 2008, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, C-279/06, EU:C:2008:485.

58 Ezrachi, *op. cit.*, note 45, p. 210.

59 Judgment of 11 September 2008, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, C-279/06, EU:C:2008:485, para. 36.

60 *Ibid.*

61 *Ibid.,* para. 39.

the principal.[62] Despite the similarities or differences in the definition of an agent under national legislation and the Vertical Guidelines, only the criteria developed in EU competition law, including CJEU's practice and Vertical Guidelines as a soft law instrument developed on the basis of CJEU's decisions, are relevant to determine whether an agency agreement may be indeed qualified as genuine agency and therefore be exempt from the application of Article 101(1) TFEU.[63] Vertical Guidelines expressly provide that the only determining factor in assessing an agency agreement in the context of Article 101(1) TFEU is the financial or commercial risk borne by the agent, irrespective of the qualification of such agreement by the terms stipulated in the contract or national legislation.[64] Three types of financial or commercial risk are identified which are relevant for assessment whether the agency agreement is genuine and falls outside the scope of Article 101(1), specifically (i) contract-specific risks, (ii) risks related to market-specific investments, namely those that are specifically required for the type of activity for which the agent is appointed and (iii) risks related to other activities undertaken on the same product market (at the risk of agent).[65]

Vertical Guidelines further state that an agreement will fall under the definition of agency only if the agent does not bear any or bears only insignificant risk in relation to the contracts negotiated and/or entered into on behalf of the principal, while the agreement is considered to constitute genuine agency where the agent does not take title in the goods supplied and (a) does not contribute to costs relating to supply or purchase of the contract products; (b) does not maintain stocks at its own costs or risk; (c) does not undertake responsibility for product liability; (d) does not take the risk for customer's non-performance of the contract; (e) is not under an obligation to invest in sales promotion; (f) does not make market-specific investments in equipment, premises or training of personnel and (g) does not undertake other activities within the same product market required by the principal.[66]

In Croatia, the definition of agency is similar to the one provided in Vertical Guidelines. Croatian Civil Obligations Act qualifies the commercial agent as person authorized to negotiate agreements with third parties on behalf of the principal and, if so agreed with the principal, enter into agreements with third parties on principal's behalf. In performing its activities a commercial agent must look after

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62 European Commission Guidelines on Vertical Restraints, para. 12.

63 *Ibid.*, para. 13.

64 *Ibid.*

65 *Ibid.,* para. 14.

66 *Ibid.,* paras. 15 and 16.

the principal's interests and act dutifully and in good faith.[67] Commercial agent must in particular make proper efforts to negotiate and conclude transactions it is authorized to enter into on behalf of the principal, communicate to the principal all necessary information regarding the market conditions available to him, and to comply with the instructions given by the principal.[68] Although not expressly provided under the provisions of Croatian law, the agent does not take title or become owner of the goods sold on behalf of the principal to the customers. Transfer of title to goods from the principal to the commercial agent will usually result in the agreement being considered as a sales or distribution contract since the fact that the agent negotiates and/or concludes transactions on behalf of the principal is an essential element of commercial agency which would not exist in case of a transfer of title.

Despite similarities, the risks and liabilities of the agent described in Vertical Guidelines are not relevant for finding of commercial agency in the context of Croatian national contract law, and the other way around, qualification of agency under national contract law does not affect the finding of agency under competition law. The only relevant criteria for establishing agency relationship under Croatian contract law are related to agent's authorization to negotiate and enter into contracts on behalf of the principal.[69] Consequently, even if the intermediary would qualify as commercial agent within the meaning of Croatian contract law, this would not automatically result in satisfying requirements for agency qualification for the purpose of competition rules.

Given the fact that the two approaches may yield different results, it is of outmost importance to make a clear distinction between the two at the enforcement stage. The separate line of interpretation of competition law concepts is meant to satisfy the specificities of commercial relationships with a view of addressing systematical distortions of competition. Thus, when such interpretation is coupled with the complex relationship between EU and national competition law rules, specific interpretative obligations arise for the national enforcer. When interpreting legal norms or filling in legal gaps in relation to articles 101 and 102 TFEU or the corresponding harmonized national legislation, the national enforcer, be it the Croatian Competition Agency or a national court should make recourse to EU competition law understanding of a given concept or term rather than to a na-

67 Article 811 of the Croatian Civil Obligations Act (Zakon o obveznim odnosima).

68 Articles 811 – 813 of the Croatian Civil Obligations Act (Zakon o obveznim odnosima).

69 Article 804 of the Croatian Civil Obligations Act (Zakon o obveznim odnosima).

tional, civil law-based jurisprudence.[70] This is supported by the express provision of Croatian Competition Act.[71]

3. MARKET – SPECIFIC INVESTMENTS MADE BY THE AGENT

Vertical Guidelines expressly provide that, if the analysis of agency agreement in question shows that there are no contract-specific investments made by the agent, the existence of market-specific investments must be analyzed and, if such investments exist, the agency will not be considered as genuine[72] and will fall under the prohibition of Article 101(1) TFEU or corresponding national rules (in Croatia, Article 8(1) of the Croatian Competition Act). Market-specific investments are usually understood as investments that are required for activity for which the agent has been appointed by the principal, and which enable the agent to negotiate this type of contract.[73] These investments are different than those made to enhance the provision of agency services, such as investments in personnel or services, which only improve the agent's competitive position in the agency market.[74] If the agent decides to work for another principal, or if it decides to distribute the products or offer services as an independent dealer, investments made in personnel or services will not be sunk costs as they may very well be used for such other activities.[75] On the other hand, market-specific investments will typically be considered as sunk costs if the agent stops offering products or services on behalf of the principal, i.e. if the agent leaves this field of activity a market-specific investment cannot be used for other activities or sold other than at significant loss.[76]

It has been pointed out during the roundtable discussions in the course of VBER evaluation that the notion of market-specific investments is unclear in practice, in particular when determining which activities could constitute market-specific investments in the context of online platforms acting as agents for their suppliers.[77] In its earlier case law, CJEU held that market-specific investments are those

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70 For a detailed discussion see Pecotić Kaufman J.; Butorac Malnar V., *The interaction between EU regulatory implants and the existing Croatian legal order in competition law*, in: Kovač, M.; Vandenberghe, A. (eds.), Economic evidence in EU competition law, Intersentia, 2016, pp. 327- 356.

71 Article 74(1) of the Croatian Competition Act (Zakon o zaštiti tržišnog natjecanja).

72 European Commission Guidelines on Vertical Restraints, para. 17.

73 Lianos, I., Commercial Agency Agreements, *Vertical Restraints, and the Limits of Article 81(1) EC: Between Hierarchies and Networks*, Journal of Competition Law and Economics, Vol. 3, No. 4, p. 638.

74 *Ibid.,* p. 639.

75 *Ibid.*

76 European Commission Guidelines on Vertical Restraints, para. 14.

77 European Commission Staff Working Document: Evaluation of the Vertical Block Exemption Regulation, *p.* 148.

required to enable the agent to negotiate or conclude contracts with third parties, such as investments in premises or equipment (e.g. fuel tank) (investments specifically linked to the transactions concluded on behalf of principal)[78], or in advertising campaigns (investments linked to sales promotion).[79] An example of market-specific investments related to sales promotion in earlier case law of CJEU would be the agent's obligation to purchase demonstration products sold on behalf of the principal.[80]

Even though the agent's investments related to sales promotion are considered as market-specific investments which run the risk of agency agreement being considered as an independent distributor contract, it has been recognized by the European Parliament in the course of drafting the Vertical Guidelines that there always has to be a certain financial or economic risk borne by the agent in order to implement the agency agreement properly, i.e. the agent must always bear a certain level of risk which should not necessarily result in the agreement automatically being considered as non-genuine agency.[81] This question whether sales promotion risks constitute market-specific investments has also been discussed in relation to e-commerce providers (for example, platforms advertising accommodation services).

Legal commentators have argued that maintenance of specialized websites entails risks which cannot be borne by the principals (suppliers) and therefore that such platforms cannot be qualified as agents.[82] Other authors have disagreed with the above approach and held that since investments in specialized websites are not made in the relevant market but in the agency market (i.e. in relation to platform's own business), those investments would not preclude the application of agency exemption to platforms.[83]

Recent decisions of national competition authorities ('NCAs') across EU Member States have shown that NCAs have adopted different approaches towards online

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78 Wijckmans, Tuytschaever, *op. cit.,* note 13, p. 303.

79 Judgment of 11 September 2008, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, C-279/06, EU:C:2008:485, para. 39; Judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, C-217/05, EU:C:2006:784, para. 59.

80 Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322, para. 76. Wijckmans, Tuytschaever, *op. cit.,* note 13, p. 303.

81 Wijckmans, Tuytschaever, *op. cit.,* note 13, p. 303.

82 Akman, P., *Online Platforms, Agency and Competition Law: Mind the Gap*, Fordham International Law Journal, Vol. 43, No. 2, p. 280, citing an excerpt from Gurin, A., Peeperkorn, L., *Vertical Agreements*, in: Faull, J.; Nikpay, A. (eds.), The EU Law of Competition, Oxford University Press, Third Edition, Oxford, 2014, para. 9.58.

83 Akman, *op. cit.,* note 83, p. 280.

platforms and application of agency rules. In the decision of 15 April 2015 no. 596/2013 adopted by Swedish competition authority (Konkurrensverket*)* ('Booking.com decision'), Konkurrensverket was dealing with a question whether horizontal and vertical parity clauses would appreciably restrict competition within the meaning of the Swedish and EU competition law. When dealing specifically with vertical price parity, Konkurrensverket concluded that the business model utilized by Booking.com "also means that hotels only pay for the online travel agency's services when a booking is actually completed, which means that they do not need to invest in or bear any risk for marketing that does not lead to a reservation."[84] However, in its Booking.com decision, Konkurrensverket does not deal with the question of whether the online travel agent (i.e. Booking.com) bears any risk on the relevant market (different from the agency market) and whether the vertical arrangement between Booking.com and suppliers would be qualified as genuine agency and therefore benefit from the exemption of application of competition rules altogether. Still, the wording of the Booking.com decision and the fact that Konkurrensverket conducted at least a preliminary assessment of possible effects of vertical price parity on the relevant market (not the agency market) may serve as an indication that Konkurrensverket did not consider the vertical relationship in question as agency within the meaning of Vertical Guidelines. Otherwise, if Konkurrensverket considered that the agreement in question qualified as agency, its assessment would likely not include the examination of effects on the relevant market, considering that in cases of genuine agency the supplier is in principle free to fix prices and conditions under which the products/services are sold on the relevant market.

Furthermore, Bundeskartellamt decided a similar case against the undertaking Hotel Reservation Service GmbH (HRS) where Bundeskartellamt held that HRS was not a genuine, dependent agent "since it bears its own financial and economic risk."[85] This decision was subsequently confirmed by the Higher Regional Court of Düsseldorf. In the summary of its decision, Bundeskartellamt expressly stresses that the agreements in question between HRS and its suppliers fall within the scope of both German and European bans on anti-competitive agreements, which is not contradicted by the status of HRS (since it is not a genuine agent, as HRS claimed in those proceedings).[86] Among other investments which, in the competition authority's view, pointed to a conclusion that HRS is not a genuine agent was HRS' investment into its specialized website and cooperation with major Internet

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84 Decision of 15 April 2015 no. 596/2013 of the Swedish Competition Authority, para. 27.

85 Decision of 20 December 2013 no. B 9 - 66/10 of the German competition authority (Bundeskartellamt), para. 148.

86 *Ibid.*, para. 6.

providers.[87] The Bundeskartellamt further found that HRS was not a dependent agent due to its investments in "advertising the HRS brand, establishment of a contractual network with a large number of hotels and cooperation partners (e.g. major travel companies, such as DB AG, AirBerlin, Germanwings and public clients such as the Bundeswehr), as well as the establishment and ongoing technical refinement and development of the content of the HRS website, and cooperation with major Internet providers, such as Amadeus, Google, Facebook, Twitter and TravelTainment."[88] Based on some of the legal commentaries, such "investments to create, maintain, and update specialized website to be active on the particular market are market-specific investments that entail risks of the type which cannot be borne by the principal (i.e. supplier) and thus lead to the conclusion that platforms are not agents."[89] On the other hand, there are authors disagreeing with the above qualification, and finding that the described investments are related to the agency market instead of the relevant market for products/services provided to third parties since they are not made in relation to a particular product/service of a supplier, but in relation to platform's business (which requires maintenance of a website).[90] The latter author also suggests that impossibility to transfer the relevant risks to the supplier demonstrates that these risks/investments are related to the agency market, and not the relevant market.[91]

Based on paragraph 15 of Vertical Guidelines, the agreement should be qualified as a (genuine) agency agreement if the agent does not bear any, or bears only insignificant risks in relation to market-specific investments. Since the market-specific investments are defined as investments that are specifically required for the type of activity for which the agent has been appointed by the principal (i.e. which are required to enable the agent to conclude and/or negotiate this type of contract) and which are usually sunk[92], it would be required to analyze (i) whether the investments into the platform's website are required to enter into or negotiate contracts with end customers and (ii) whether they entail such sunk costs.

When using an online intermediary, typically the contracts between the platform's supplier (e.g. hospitality service provider) and the end customer are entered into through the agent's platform and not through direct interaction between the supplier and the end customer. This was also the case in proceedings against HRS,

87 *Ibid.*

88 *Ibid.,* para. 148.

89 Akman, *op. cit.,* note 83, p. 280, citing an excerpt from Gurin, A., Peeperkorn, L., *Vertical Agreements*, in: Faull, J.; Nikpay, A., *op. cit.,* note 83, para. 9.58.

90 *Ibid.*

91 *Ibid.*

92 European Commission Guidelines on Vertical Restraints, para. 14.

where the hotel customers were able to make direct bookings at the hotel displayed on HRS' website and based on the prices displayed on the site.[93] In cases where an online intermediary is used by the supplier to enter into contracts with end customers, there is usually no option for the end customer to enter into the contract for accommodation service in any way other than by using the intermediary's website. In such cases, any developments made by the intermediary to its website/platform should be considered as necessary to enter into contracts with end customers. If such investments are necessary to enter into contracts with the supplier's end customers, then they would in principle be regarded as investments in the relevant market, and not the agency market.

Based on the EU Commission Notice on the definition of the relevant market for the purposes of Community competition law ('**Relevant Market Notice**'), a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of products' characteristics, their prices and their intended use.[94] In HRS case, Bundeskartellamt considered that the relevant product market constitutes the market for sale of hotel rooms via hotel portals (which was defined as national in its geographic dimension).[95] In this regard, if the specialized website operated by a platform service provider in HRS was necessary to sell hotel rooms to end customers via hotel portals (online platforms), then a strong argument may be made that the investment into such website is an investment into the relevant market. However, even though the costs are related to entry into contracts with customers on the relevant market, such costs are not sunk if they can also be used in other product markets, such as the agency market.

In case website development would be considered as an investment in the relevant market, the important question for assessing whether the risk/investment related to such website development is borne by intermediary or the supplier is who bears the costs of such website maintenance/development. Here it should be noted that online intermediaries do not only offer the products or services of a single supplier, but are engaged by a number of suppliers who enter into contracts with their customers via intermediaries' platforms. Some authors suggest that particularly this fact, i.e. that products/services of multiple suppliers are sold through intermediary's platform resulting in impossibility to transfer website development costs to

93 Decision of the German Competition Authority (Bundeskartellamt) no. B 9 - 66/10 of 20 December 2013, para. 3.

94 EU Commission Notice on the definition of the relevant market for the purposes of Community competition law, [1997] OJ 372/05, para. 7.

95 Decision of the German Competition Authority (Bundeskartellamt) no. B 9 - 66/10 of 20 December 2013, para. 68.

the supplier, demonstrates that these costs are market-specific investments borne by the intermediary which consequently cannot be qualified as (genuine) agent.[96] Considering that the structure of agent's commission is not relevant for the assessment whether the agency agreement is exempt from Article 101 TFEU, it appears that the costs related to specialized websites of platforms cannot be transferred to suppliers by changing the structure of agent's commission.

Vertical Guidelines expressly provide that costs which are considered as market-specific investments are usually sunk, i.e. upon leaving that particular field of activity the investment cannot be used for other activities or sold other than at significant loss.[97] Generally, costs of website development may be considered as irrecoverable costs. Once the company leaves a specific field of activity (for example, sale of suppliers' products or services through its specialized website), the company's website cannot be used any longer for other activities or sold at a profit. In this regard, competition authorities are likely to consider investments into website development as market-specific investments which prevent the agent (e.g. an online platform provider) from being considered as a genuine agent whose agreements or practices would be (at least partially) exempt from application of Article 101(1) TFEU and national competition law rules. Nevertheless, it appears that he above conclusion also depends on the purposes for which the online platform is used, specifically whether the platform is a two-sided transactional platform.

Online intermediaries such as HRS are usually considered as two-sided transactional platforms.[98] Such two-sided transaction platforms are characterized by transactions being carried out between two groups of platform users (including, for example, suppliers and end customers/users).[99] Therefore, a specialized website maintained by the online platform may be used both by the suppliers and by the end customers. In this regard, a contrary argument may be made that investment into such website could not be characterized solely as an investment into the market for sale of products/services marketed by the platform, since these investments are also used in the market in which the platform as the intermediary provides services to suppliers, i.e. the agency market. In this context, it appears that based on the current practice of CJEU it cannot be stated with certainty whether the development of a specialized website is related to the agency market or the relevant market since the online platform is used by the intermediary both for conclusion

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96 Akman, *op. cit.*, note 83, p. 280, citing an excerpt from Gurin, A.; Peeperkorn, L., *Vertical Agreements*, in: Faull, J.; Nikpay, A., *op. cit.,* note 83, para. 9.58.

97 European Commission Guidelines on Vertical Restraints, para. 14.

98 Niels, G., *Transaction versus Non-Transaction Platforms: A false dichotomy in two-sided market definition*, Journal of Competition Law & Economics, Vol. 15, No. 2-3, p. 328.

99 *Ibid.*

of contracts with end customers (e.g. in case where the contracts are concluded directly between the supplier and the end customer through the platform or where the intermediary is a merchant of record and enters into the contract directly with the customer) and for provision of agency services to the suppliers. In this context, it seems that agent's investments into the website are linked not only to the transactions negotiated or concluded on behalf of the principal, but also to provision of agency services. This means that such investments may be used in other product markets, and that costs of website development are not necessarily sunk costs.

Significance of online intermediary's investment in developing a specialized website must be assessed in comparison to the overall risk related to sale of products / provision of services to end customers. Even if the online intermediary meets the first criterion of agency definition (that is, if it indeed has the role of an agent), but bears more than insignificant financial or commercial risk related to the activity for which it was appointed by principal, the agreement will not be qualified as agency.[100] In this regard, in addition to being considered as a market-specific investment, investment into a specialized website of the online intermediary must also be assessed in comparison to the overall risk related to the conclusion of contracts for sale of products/services to end customers. The agreement will still be qualified as an agency agreement if the agent bears only insignificant risk in relation to market-specific investment for that field of activity.[101] The case law of the CJEU suggests that a level of risk which is higher than merely negligible or insignificant share of risk may be found acceptable for the agreement to be qualified as agency.[102] Therefore, investment into the intermediary's specialized website should be compared to other costs borne in connection with the sale of products/services for which the agent is appointed by the principal.

If the sales of accommodation services are taken as an example, this means that online travel agent's costs of website development should be compared to the total costs associated with the sale of accommodation to end customers through that platform. These costs would include, for example, acquisition of accommodation units and related equipment, personnel costs, maintenance costs, and any other costs related to the property. It appears likely that the cost of advertising such property through the online travel agent's website may seem negligible when compared to the costs of maintaining accommodation units, the risks arising from cancellation of booked accommodation and other risks borne by the principal. In this regard, even if such costs are to be considered as risks related to market-spe-

100 Tuytschaever, Wijckmans, *op. cit.,* note 13, p. 305.

101 European Commission Guidelines on Vertical Restraints, para. 15.

102 Tuytschaever, Wijckmans, *op. cit.,* note 13, p. 305.

cific investments, it is likely that the cost of developing the website would appear negligible or insignificant when compared to all other market-specific investments related to sales of accommodation to end customers and that the degree of risk borne by the agent would not justify the classification of agreement as a sham agency. On the other hand, if an online travel agent would incur significant costs, for example, for pay-per-click advertisements for specific products of the supplier, irrespective of whether the bookings are actually made, it is more likely that those costs would actually be a non-negligible risk that could qualify the platform as an independent reseller.[103]

It appears that the sole fact that an online intermediary makes an investment into the two-sided platform through which the supplier's products/services are sold to end customers, is not sufficient for a conclusion that such online intermediary cannot qualify as agent for the following reasons: (i) a two-sided transactional platform is used both for conclusion of contracts with end customers who purchase supplier's products/services, and for provision of agency services to suppliers by the online intermediary, and in this regard, the investment is not linked specifically to sale of supplier's products/services and (ii) it is possible that the amounts of investments related to maintenance of a website used for promotion of supplier's products/services would be considered insignificant in comparison to the costs related to acquisition and development of products/services (such as accommodation), equipment, personnel etc. by the suppliers. This said, while costs of website development are general and not directly related to the sale of specific products/services on the relevant market, specific costs that are aimed at selling the product to end customers, such as pay-per-click advertisements which are not recovered by suppliers to agents, are more likely to be viewed as market – specific investments because they are related exclusively to the field of activity for which the agent was appointed by the supplier.

Vertical Guidelines also state that they should not be applied mechanically, and that due consideration must be made to the specific circumstances of each case.[104] In DaimlerChrysler case, even though the EU Commission found and qualified specific obligations imposed under the agency agreement between Mercedes-Benz and its agents as provisions indicating that the agents in fact bore significant risk in relation to the sales of vehicles, it seems that CJEU primarily assessed the overall economic relationship between the parties (instead of finding whether each

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[103] Jung, N., *European Union – Restrictions of Online Sales, including Geo-blocking and Geo-filtering*, 2019, [https://www.lexology.com/library/detail.aspx?g=0218b01f-cd9f-4c16-a52f-adbde5e07a13], Accessed 30 March 2021.

[104] European Commission Guidelines on Vertical Restraints, para. 5.

individual obligation from the relevant agency agreement constituted a prohibited type of risk). CJEU stated that the EU Commission merely listed the obligations imposed under the agency agreement which were linked to sale of vehicles and mentioned the alleged significance of revenue obtained by the agent from those activities which were contractually linked to the sale of vehicles compared with the revenue the agent obtained from sale of cars without showing how those obligations represented material risks for which the agent was responsible.[105] CJEU held that even if it must be recognized that the relevant obligations exposed the agent to certain limited risks, they did not on their own operate to affect the relationship between the supplier and its agents (although it should be noted that these obligations were not related to the relevant market for retail sale of Mercedes Benz vehicles, but to another market).[106]

Considering that investments made by two-sided transactional platforms have a more general nature and have the aim of improving the platform itself[107] instead of being contract or market-specific, those investments of themselves should not have as a consequence that an online platform is understood as an independent distributor/reseller.

4. REVISION OF THE VERTICAL GUIDELINES

Considering the above arguments brought forward by legal scholars, the past practice of CJEU and the difficulties with the interpretation of the term market-specific investments in practice, it seems reasonable to expect that the revision of Vertical Guidelines could include changes to the definition of agency agreements, including a clarification on whether online platforms could in any case qualify as agents, and if so, whether the costs related to maintenance of the specialized website / online platform would constitute market-specific investments which should not be borne by the agent. Since online platforms are often multi-sided, in such cases it is difficult to discern whether a cost or risk related to their development or maintenance is related to the agency market, or the relevant market where the products or services marketed by the platform are sold. The past decisions of national competition authorities and courts also show that in practice it is more likely that the investments into website development would be considered as be-

[105] Judgment of 15 September 2005, *DaimlerChrysler AG v Commission of the European Communities*, T-325/01, EU:T:2005:322, *para.* 112.

[106] *Ibid.,* para. 113.

[107] Colangelo, M., *Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking*, Journal of Competition Law and Practice, 2017, Vol. 8, No. 1, p. 11.

ing specifically linked to the relevant market and prevent the online platform from qualifying as agent.

However, in cases where an online platform acts agent for multiple suppliers, it effectively cannot transfer the costs of maintaining the website to those suppliers. This is because the structure of the agent's commission does not influence its qualification under the Vertical Guidelines. Furthermore, the costs of website development are not related entirely to the relevant market, but they are also related to the agency market. As the EU Commission recognized in its Working Paper on Distributors that also act as agents for certain products of the same supplier, market-specific investments are understood as covering all investments necessary to enable the agent to negotiate or conclude contracts in the relevant market, including for example investments in furnishing shops or in training sales staff that are specifically required for selling products in the relevant market and that cannot be used for activities in other product markets.[108] In this context, investments that are related not only specifically to the sale of products in the relevant market, but also to another market, such as website development costs which are also related to the agency market, should not be viewed as market-specific investments.

A different interpretation of Vertical Guidelines which would automatically exclude the possibility of agency qualification merely because an undertaking invests in the online platform without assessing whether the investment is related specifically to relevant market and cannot be used also in another product market would mean that an online intermediary cannot be qualified as an agent because it operates online. This is because any online platform necessarily incurs costs related to development of its website. In this regard, in order to precisely determine whether such costs are market-specific investments, it must be established in each case whether the investment in question is used specifically for sale of products/services in the relevant market, and whether it can be used in other product markets. Costs which are specifically related to marketing of suppliers' products, such as advertisement costs aimed at promoting the sale of products, or the costs related to software development that is used for communication with end customers, are clearly related to the relevant market, and not the agency market. If the latter costs would be incurred by online intermediary instead of the supplier, the agreement should not be qualified as agency because the only purpose of those costs would be to improve the sale of supplier's products, which cannot be transferred to an agent.

[108] European Commission Working Paper: Distributors that also act as agents for certain products of the same supplier, para. 19, [https://ec.europa.eu/competition/consultations/2018_vber/working_paper_on_dual_role_agents.pdf], Accessed 30 March 2021.

An online intermediary which provides services both to its suppliers and end customers through its website should therefore not be considered as an independent reseller merely because it makes an investment into its specialized website. This is because the website is used not only for sale of products in the relevant market, but also for management of relationships between the agent and suppliers. Online travel agents (OTAs) are an example of typical online intermediaries whose activity consists in supplying of hotel rooms, airline tickets, tours to tourists, while also providing separate services to suppliers and offering them the possibility to contact a large number of consumers.[109] On the other hand, where an e-commerce platform is acting as a selling agent for suppliers and invests into development of its platform solely for the purpose of selling products to end customers on the relevant market (comparable to an investment of a brick-and-mortar shop into its store and training of staff specifically for the purpose of selling the products), the costs of website development are specifically related to activities for which the agent was appointed by the principal and should be understood as market-specific investments. Denying the status of agency to an online intermediary (such as an OTA) for the reason that it invests into development of its website would also mean that the supplier (for example, an accommodation service provider or an airline) cannot freely determine the prices at which its products will be sold (since this would constitute a price fixing agreement). There are also price comparison websites which do not usually act as traditional agents. In contrast to transactional platforms, comparison websites do not offer products/services on behalf of suppliers, but merely provide information to customers. The primary aim of such websites is to increase transparency and decrease search costs for consumers, instead of engaging in negotiating or concluding contracts on behalf of suppliers.[110] Based on the wording of Vertical Guidelines, price comparison websites should not be considered as agents, unless they would be authorized to negotiate contracts with suppliers' end customers. In addition, there are also sharing economy platforms which have as a common feature that they establish a marketplace which connects the buyer and sellers, typically individuals or small undertakings, with a fee charged for these connecting services.[111] In cases where the contracts between buyers and sellers are not directly negotiated/concluded by the use of such platforms, agency qualification would not be relevant for them. However, to the extent that they provide the possibility to enter into contracts directly through the platform, and where the platform is acting on behalf of either party, such platforms could

[109] Colangelo, *op. cit.,* note 107, p. 7.

[110] European Commission Staff Working Document: Evaluation of the Vertical Block Exemption Regulation of 8 September 2020, p. 148.

[111] Nowag, J., *When Sharing Platforms Fix Sellers' Prices*, Journal of Antitrust Enforcement, 2018, No. 6, p. 3.

also benefit from agency qualification. Even in case of sharing economy platforms it seems unfair not to allow those platforms to qualify as agents because they invest in their marketplace, and thereby prevent the suppliers from setting the prices at which their products will be sold on the marketplace.

Although the majority of respondents to the public consultations related to the Evaluation of VBER responded that relevant paragraphs of Vertical Guidelines dealing with agency provide an adequate level of legal certainty, national competition authorities and a significant number of respondents considered that the criteria for defining agency are difficult to apply to online platforms.[112] Clarification of the meaning of market-specific investments in Vertical Guidelines would be useful for harmonizing approach of national competition authorities towards agency qualification when it comes to online platforms acting as intermediaries between suppliers and end customers. This clarification would also be helpful for businesses in evaluating whether their agreements and practices are covered by competition rules or not, and therefore improve legal certainty. The revision of Vertical Guidelines could provide, for example, that in the context of two-sided transactional platforms there are certain costs or investments which will not prevent the qualification of agency, such as general investments into the platform's website, where costs are not sunk because they may also be used for platform's activities in the agency market, and not only in the relevant market (similar to investments in personnel of brick-and-mortar agents that may be used for provision of services in a different product market). By expressly differentiating between investments which are specifically related to the relevant market, and to other markets, Vertical Guidelines would likely help undertakings in assessment of their vertical agreements, as well as national competition authorities which are currently facing difficulties in establishing which investments should be considered market-specific in the context of online platforms. Furthermore, revised Vertical Guidelines could also expressly exclude price comparison websites from the definition of agency since they do not seem to satisfy the general criteria of agency qualification. This is because such platforms are not authorized to negotiate and/or enter into contracts on behalf of suppliers in the sense in which traditional agents or other platforms (such as OTAs) are authorized to do.

5. CONCLUSION

Based on the established practice of the European Commission and CJEU which is reflected in the Vertical Guidelines, the agreement between the commercial agent and the supplier must meet a number of requirements to be exempted from

112 *Ibid.*

application of competition rules, including the requirement that the agent does not make any market-specific investments.[113] In the course of evaluation of VBER it has been pointed by national competition authorities that the notion of market-specific investments is unclear in practice and difficult to apply to online platforms.[114] Decisions of some national competition authorities show that even general investments in development of websites were considered as market-specific investments which prevent the agreement from being qualified as agency for the purpose of competition rules. However, specialized websites used by online platforms are not always developed exclusively for sale of products to end-customers on the relevant market, but are also used for provision of services in the agency market. This dual role of two-sided transactional platforms and their websites means that costs for development of online platform's website are not always sunk costs, but may also be used for provision of services in other markets. Therefore, a clarification in the Vertical Guidelines expressly making a distinction between online platform's investments that are specifically related to the relevant market and investments which could also be used in other product markets could improve legal certainty by allowing undertakings to assess what types of risks or costs would bring their agreements within the scope of competition rules. This clarification in the Vertical Guidelines could also provide clear criteria for national competition authorities to interpret the meaning of market-specific investments when assessing agreements and practices of online platforms.

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