CASE CARD | 16 October 2026

S-Markt & Mehrwert v AIDA Cruises (6 U 5/24)

Agency

1. CASE SUMMARY

A. Summary of facts

The claimant, S-Markt & Mehrwert, operates customer loyalty programmes under which consumers receive reimbursements when purchasing certain products or services. One of the claimant's business activities concerns travel mediation services. The defendant, AIDA Cruises, offers cruise holidays and cooperates with travel agencies for the distribution of its products. The parties concluded an agency agreement under which the claimant promoted the defendant's cruises in exchange for commission payments. As part of its business model, the claimant returned part of the commission received to its customers.

The agency agreement prohibited this practice. In particular, Clause 3(c) required the claimant to advertise only with prices made available to the public and prohibited it from promising or granting customers discounts, rebates, or other monetary benefits without the defendant's prior consent. Clause 3(j) further prohibited the claimant from arranging bookings in a manner that granted third parties a monetary advantage. Despite these provisions, the claimant continued to offer loyalty programmes involving commission reimbursements. The defendant subsequently issued a warning letter and ultimately terminated the agreement. The claimant challenged the validity of the termination, arguing that the relevant contractual provisions infringed competition law.

B. Notes on case history

The Düsseldorf Regional Court held that the prohibition on passing on commission restricted competition. It relied on the principles developed by the Court of Justice of the European Union in Case 311/85, *Vlaamse Reisbureaus*.

On 17 December 2025, the German Federal Cartel Office ('FCO') submitted observations under Section 90(2) of the German Act against Restraints of Competition ('ARC'). It considered that the commission sharing prohibition infringed Article 101 TFEU and Section 1 ARC and was therefore unlawful.

C. Legal analysis

The Higher Regional Court of Düsseldorf, like the lower court before it, held that the termination was invalid, but differed in a few respects in its reasoning.

In the court's view, the contractually agreed prohibition on passing on commission contravened competition law, in particular Article 101(1) TFEU and Section 1 ARC. The clause in question is deemed unlawful, as travel agents are (in principle) permitted to compete with one another and to pass on commissions to customers. The clause therefore restricts competition in an impermissible manner.

Central to the Senate's decision was the conclusion that the claimant was a 'non-genuine commercial agent' because it bore significant commercial and financial risks (e.g., loss of commission in circumstances linked to the principal's business risks, liability provisions, and other contractual risks).

C.1. - Article 101 (1) TFEU

The court held that the clauses prohibiting discounts, rebates, and commission-sharing with customers (sections 3(c) and 3(j) of the agency agreement) infringed Article 101(1) TFEU. The restriction prevented travel agents from using their commissions to reduce the effective retail price and therefore eliminated price competition among distributors. The court characterised the clauses as a restriction by object. The prohibition functioned economically as a minimum resale price mechanism and was treated as a hardcore restriction comparable to resale price maintenance. Given the nature of the restriction, its market-wide application, and the concentrated German ocean-cruise market, the restriction was also considered appreciable. As a result, the clauses were void and the subsequent termination of the agency agreement – implemented to enforce those clauses – was likewise invalid.

As already mentioned above, there is a difference in the courts' reasoning: unlike the Regional Court, the Higher Regional Court attributes the prohibition on passing on commission to the product market (the market for ocean-going cruises), because it directly influences the effective final price for consumers.

C.2. - Article 101 (3) TFEU

The court rejected both block exemption and individual exemption arguments. The restriction qualified as a hardcore restriction under Article 4(a) of Regulation 2022/720 (the 'VBER'), because it prevented the intermediary from sharing its commission with customers and thereby restricted independent price-setting. The court also noted that the cruise operator's market share exceeded the VBER's 30% threshold. As regards an individual exemption under Article 101(3) TFEU / Section 2(1) ARC, the defendant failed to provide evidence. General references to preventing free-riding or protecting smaller travel agencies were insufficient.

2. QUOTES

"*The Regional Court correctly held, with reference to the ECJ judgement in the 'Flemish Travel Agencies' case, that such agreements between travel agencies and tour operators have the object or effect of restricting*

competition between travel agents. Agents are prevented from engaging in price competition by the fact that, on their own initiative, they waive a smaller or larger portion of the commission to which they are entitled for the benefit of their customers." (free translation of §186)

"*The presumption that there is an intended restriction of competition is evident simply because the prohibition on passing on commissions constitutes a hardcore restriction within the meaning of Article 4(a) of the Vertical Block Exemption Regulation.*" (free translation of §192)

"*In paragraph 192 of the Vertical Guidelines, the Commission also takes the view that any direct or indirect obligation which prevents or restricts the (non-autonomous) commercial agent from sharing his commission with the customer constitutes a hardcore restriction under Article 4(a) of the Vertical Block Exemption Regulation. The Commission therefore consistently classifies the prohibition on commission-sharing as a restriction on the product market.*" (free translation of §193)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Section 1 ARC
- Regulation 2022/720

4. PRACTICAL SIGNIFICANCE

The decision may also be especially influential in sectors where suppliers rely heavily on independent intermediaries, such as travel, insurance, financial services, online platforms, automotive distribution, and real estate brokerage, because similar commission-sharing restrictions are common in those industries.

Principals should reassess contractual provisions that restrict intermediaries from disclosing or passing on commissions to customers. Particular attention should be paid to agreements with independent intermediaries, as restrictions could ultimately prove unenforceable.

For intermediaries, the decision may be relevant where sanctions, contractual penalties, or termination measures were imposed for passing on commissions. In such cases, it may be worth examining whether the contractual provisions relied upon are compatible with competition law and therefore capable of being validly enforced.