



GWA. Exclusivity clause in agency contracts. Guidelines.

The subject

Agency and client must be able to rely on each other in their business dealings. This means, among other things, that matters which one of the parties considers should remain confidential should be handled confidentially by the other party. This is not a controversial point. Infringements are extremely rare.

The demand for exclusivity is more difficult. This too is conceivable two ways: the client wants the agency to work solely for him. The agency wants the client – in return for a grant of exclusivity on its own part, for instance – to rely solely on this agency in all communication tasks.

These are very wide-ranging requirements. Under what conditions are they really appropriate? When should other solutions be sought? What might these be?

These are the main themes of this paper. Such themes are certainly not new, but the business situation is in a process of upheaval and may well require different answers from those current up till now.

The problem at the moment

Mergers and globalisation are leading companies to redefine their parameters of competition. At the same time they expect a higher level of sector expertise from their agency, along with integrated communication and international service.

To ensure optimum co-operation, therefore, it is desirable to formulate exclusivity clauses more precisely. In the last resort, an agency can only develop sufficient sector expertise and offer the client an optimum service if it is advising various companies within one sector of industry. But in most cases an exclusivity clause, formulated in global terms, prevents the agency from developing the expertise the client needs.

The following guide is designed to rethink the subject of exclusivity. This paper deliberately comes to no final conclusions in its formulations; it is open-ended. It is addressed to both clients and agencies. The optimum solution, to find which this guide is designed to help, cannot come in the form of a recipe; it is always the result of



a discovery process. The optimum is individual. But even the individual needs a framework. This is an attempt at providing just that.

1.

Does the relationship desired between client and agency justify the introduction of an exclusivity clause?

Only a low volume of work or joint activity on a pure project basis can make exclusivity disadvantageous – for both client and agency.

The important thing for agencies: in such cases the agency should protect its commercial freedom. In this process it should exploit the opportunity to build up sector expertise through client relationships which are independent but low-intensive.

2.

Does a confidentiality clause provide added value vis-à-vis an exclusivity clause?

If the main intention is to secure the confidentiality of client-specific information, in most cases a confidentiality clause combined with appropriate security measures will be sufficient. In such cases an exclusivity clause does not offer any further protection. Rather, it will prevent the agency from providing an optimum and good-value service for the customer.

The important thing for clients: if the agency is able to provide a service for competing clients, this must not lead to the client's disadvantage. The agency must be able to show here that it can guarantee the confidentiality of its client information. To this end, the agency should be able to present comprehensive schemes for data protection.

The important thing for agencies: if agencies want to position themselves via sector expertise, measures for protecting client data are a necessary capital asset.

3.

Have any possible alternatives been discussed to the exclusivity clause?



In many cases there are good alternatives to an exclusivity clause, e.g. setting up a client-specific unit or branch. A further possibility is to set up a "centre of expertise" within the agency. Client-specific information can be gathered and general sector expertise developed there. At the same time, any exchange of client-specific information between competing teams will be prevented.

Companies should approach their agencies about arrangements of this kind, or similar ones.

Many companies particularly require sector expertise or expertise in integrated communication. But an exclusivity clause prevents an agency from developing this expertise precisely. This prevents any effective or successful co-operation between client and agency.

4.

Is an exclusivity clause a normal or exceptional part of a contract?

Should the inclusion of an exclusivity clause for the market or medium in question be a normal part of the contract, the focus of negotiations will be on the scope of the clause.

Should the inclusion of an exclusivity clause be an exceptional request, the agency can expect exceptional payment in return.

It is important in this process to observe the general negotiating practice in the market in question. Japanese agencies, for example, are not limited by any exclusivity clauses.

There is no model in any part of the world for an agency being in charge of a client's entire account without an exclusivity clause.

Even corporate consultants and market-research institutes trade commercial freedom against project work and unsecured income.

5.

Does the exclusion zone cover products, brands, segments or other areas?

Exclusivity should be limited to direct competitors in the client's own segment and should not embrace a whole sector of industry. Exclusivity clauses based on price or target group should be avoided,



since they have the same effect as cross-market exclusivity clauses (total exclusivity): they prevent an agency from growing and thus from being able to provide its clients with comprehensive sector expertise and savings through increased production and synergy effects.

Should the client desire exclusivity in sectors which are only relevant for its future business field, the agency in return can expect to be compensated for this loss of income.

6.

How far does the exclusivity clause reach geographically? Is it regional, national, international or global?

If a company wants exclusivity in countries where it is not present, that is a limitation on the agency's commercial activity. The agency will expect to be compensated for this potential loss of income.

If the client still desires exclusivity, then the best thing may be to found or acquire a branch office.

7.

Which agency activities are involved? Service, medium, agency, network or holding company?

Along with defining the field of exclusivity and its geographical extent, it will also be necessary to consider the agency activities involved in such exclusivity:

Does such exclusivity involve:

- A single activity or a full-service activity?
- An activity in one medium or an activity in all media?
- An activity in one market or an activity in all markets?
- An agency office or the entire agency network?
- The agency network or the agency's holding company?

The conflict definitions should not exceed the agency-brand level. In other words, exclusive subsidiary agencies belonging to the same global communications group which are administered separately should not be affected.

Equally, any cross-over between individual advertising disciplines is



disadvantageous for both client and agency. A classic account, for instance, should not have any effect on a POS account.

8.

Is it intended to revise the exclusivity clause annually?

Total exclusion clauses often have extreme effects. It is therefore advisable to rethink them annually.

In this way both client and agency will get the freedom they need to react to changed market circumstances. Thus they will be able to ensure that the contract continues to serve their joint interests.

9.

Would you like more information?

This brochure is only intended to give you a short survey of the current problems with respect to exclusivity clauses. You will find fuller answers to all questions relating to this topic on our website: gwa.de.

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