

# International Agency & Distribution Handbook

**EMEA**





# International Agency and Distribution Handbook EMEA

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## Introduction

This is the 6th edition of the Agency and Distribution Handbook covering 39 countries in the EMEA region with chapters on each of the 28 European Union member states, two European Economic Area countries (Norway and Switzerland) and chapters from further afield, including countries such as Egypt, the Russian Federation, Saudi Arabia. To make for easier reading and comparison, each chapter follows the same structure and approach.

The 1986 EU Agency Directive (Council Directive 86/653/EEC) has applied for a number of years and has been implemented by all the EU member states. The directive has created a common body of protection for agents, although variations still exist as the directive is a minimum harmonisation instrument and, at the time the directive was introduced, many member states had existing laws that were comparable with, and in some cases more protective than, the provisions of the directive and these were largely preserved. For example, the directive includes certain protections for an agent dealing with the sale or purchase of goods, but many member states extend their rules to also protect agents dealing with the sale or purchase of services.

One important principle currently applicable to international agency agreements, derived from the *Ingmar*<sup>1</sup> EU Court of Justice judgment of 9 November 2000, refers to the choice of non-EU governing law. In particular, the principle sets out that a choice of non-EU governing law will not entitle a principal to evade liabilities under the directive, notably those entitling the agent to compensation or an indemnity payment on termination. In other words, the directive will guarantee certain mandatory rights to commercial agents in the EU, although the principal is established in a non-EU member country and a term of the agreement expressly stipulates that the contract is to be governed by the law of that non-EU country.

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<sup>1</sup> *Ingmar GB Ltd v. Eaton Leonard Technologies Inc* Case C-381/98.

A more recent case, the EU Court of Justice judgment in *Unamar*<sup>2</sup> of 17 October 2013, concerned the effectiveness of the choice of EU law in an agency agreement. In this case, the agent and principal were established in different EU member states, which had both implemented the Agency Directive. The agreement between the parties used the governing law of the member state where the principal was established. Subsequently, the agent argued that it was entitled to the protection provided by the “mandatory rules” of the agency law of the EU member state where the agent operated. The court held that where both member states have implemented the directive, it will be for the court of the forum to establish if the laws protecting agents in that country are “mandatory rules” and supersede the choice of law in an agreement.

As for the position of distributors, apart from Belgium, no country in the European Union has equivalent specific legislation protecting distributors. However, there has been an increasing trend in some EU member states where courts have started to establish protections for distributors that are influenced by and analogous to those set out in the Agency Directive.

The EU Competition Law chapter of this handbook gives the reader an overview of EU competition law in general and describes rules under the Verticals Regulation. There are no separate sections on national competition law in each country chapter, but the reader should be aware that each country will also have its own national laws on competition, which will apply alongside the EU competition law regime.

We have included a chapter on Compliance, Anti-Corruption and Export Controls dealing with some of the key issues that agency and distribution arrangements can raise in areas such as anti-bribery and corruption, export controls and trade sanctions.

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<sup>2</sup> *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare* Case C-184/12.



The contributions to this 6th edition of the handbook have been prepared by members of Baker McKenzie's International Commercial & Trade Practice Group and by experts in correspondent law firms. Special thanks go to those correspondent law firms in Bulgaria, Cyprus, Denmark, Estonia, Finland, Greece, Ireland, Latvia, Lithuania, Malta, Norway, Portugal, Romania and Slovenia.

The summaries in this publication are intended as a general guide only, and specific advice should be sought in individual cases. For assistance and questions, the authors of each chapter would be pleased to assist and can be contacted directly. Their contact details are set out in the Contributors section.

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# EU Competition Law

## 1. EU Competition Law Policy

EU competition law policy has two main objectives: (i) to protect and develop effective competition in the common market, and (ii) to achieve a single European market by abolishing all national barriers to intra-Community trade (ie, allowing the free flow of goods and services throughout the market). It therefore prohibits anti-competitive arrangements and abusive conduct by dominant players which threaten the effective working of a market economy and re-erect barriers to trade between Member States. For example, an agreement between a manufacturer and distributor reinforces national divisions in trade between Member States if the manufacturer entirely prohibits the distributor from supplying customers outside the distributor's territory.

Article 101 of the Treaty on the Functioning of the European Union ("TFEU") prohibits agreements that appreciably restrict trade between the Member States and Article 102 TFEU prohibits the abuse of a dominant market position by an enterprise. These provisions are the main legislative framework of European competition policy and regulate distribution and agency relationships in Europe.

## 2. Distribution Agreements

### 2.1 Article 101 TFEU

Article 101 TFEU generally prohibits all agreements between companies which may affect trade between countries within the European Economic Area ("EEA"), and which have as their object or effect the restriction, prevention or distortion of competition within the EEA. This prohibition applies to horizontal agreements (ie, agreements between competitors, for example cartels) as well as vertical agreements (ie, agreements between enterprises acting at different levels of the distribution or production chain, for example a distribution agreement between a manufacturer and a distributor).





Examples of anti-competitive provisions which might be found in distribution agreements include retail price maintenance, customer restrictions, export bans, non-compete obligations, exclusive purchase obligations as well as minimum purchase obligations.

However, following the principles of the Court of Justice of the European Union, the European Commission (the “Commission”) acknowledges that Article 101(1) TFEU is not applicable where the impact of the agreement on competition or trade between Member States is not appreciable.

In the Commission’s Notice on Agreements of Minor Importance of 25 June 2014 (“De Minimis Notice”) (OJ 2014/C 291/01), the Commission indicates the circumstances in which it considers that agreements do not constitute an appreciable restriction of competition with the help of market share thresholds. Consequently, vertical agreements where neither party holds a market share of more than 15%, are presumed by the Commission not to breach Article 101(1) TFEU, provided that they do not have as their object the prevention, restriction or restriction or distortion of competition within the internal market).<sup>1</sup> The Commission will not apply the safe harbor created by the market share threshold to agreements containing any of the restrictions that are defined or listed as hard core restrictions in any current or future Commission block exemption regulation, which are considered by the Commission to generally constitute restrictions by object. The De Minimis Notice is accompanied by a Commission Staff Working Paper to assist companies in assessing whether their agreements can benefit from the market share safe harbor of the De Minimis Notice. This document lists the restrictions of competition that are described as “by object” or “hard core” in the various Commission regulations, guidelines and notices. It also includes examples taken from case law and the Commission’s decisional practice.

In addition, in 2004, the Commission issued Guidelines on the Effect on Trade Concept contained in Articles 101 and 102 of the Treaty,

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<sup>1</sup> The 2014 De Minimis Notice replaces an earlier version that was issued in 2001.

(“Effects Notice”) (OJ C 2004 101/81). According to the Effects Notice, the Commission presumes that a vertical agreement has no appreciable effect on trade between Member States if (i) the aggregate market share of the parties on any relevant market within the EU affected by the agreement does not exceed 5% and (ii) the aggregated EU turnover of the supplier in the products covered by the agreement does not exceed EUR 40 million.

Where an agreement does breach Article 101(1) TFEU, without qualifying for an exemption under Article 101 (3) TFEU (see under Section 2.2. below), the anti-competitive restrictions contained in the agreement will be void and unenforceable according to Article 101(2) TFEU. This means that the restrictive provisions in the agreement are unenforceable in the national courts of the Member States. The extent to which it is possible to save the remaining provisions of the agreement depends on the applicable national law. In addition, infringements of Article 101(1) TFEU may result in the imposition of fines of up to 10% of a company’s worldwide group annual turnover and exposure to a private action for damages by those who consider that they have been harmed by the anti-competitive agreement.

## 2.2 Exemption from the prohibition of Article 101 TFEU

The prohibition contained in Article 101(1) TFEU is not absolute. Any anti-competitive agreement that falls within the scope of Article 101(1) may benefit from an exemption under Article 101(3).

An exemption under Article 101(3) TFEU will be available, if broadly speaking, the pro-competitive advantages of the agreement outweigh its anti-competitive effects (that is to say, if the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided this does not result in restrictions which are not indispensable to the attainment of these objectives or afford the possibility of eliminating competition in respect of a substantial part of the products in question).



There are two types of exemption: (i) an exemption following an individual self assessment and (ii) a block exemption.

### *2.2.1 Exemptions following an Individual Self Assessment*

Agreements containing appreciable anti-competitive restraints caught by Article 101(1) TFEU and not covered by a block exemption, may benefit from the general exemption of Article 101 (3) TFEU following an individual self assessment.

European competition law is directly applicable at Member State level. Although the Commission retains the power to issue decisions and to stop infringements of EU competition law violations (including decisions of a declaratory nature finding that Article 101 TFEU does not apply), the enforcement of EU competition law will mainly be in the hands of national competition authorities and, ultimately, national courts.

### *2.2.2 Block Exemption Regulations and Guidelines*

The Commission has the power to issue block exemptions. These block exemptions set out the conditions under which restrictions in certain types of agreements will automatically be held to fall within the exemption of Article 101(3) TFEU.

On 22 December 1999, the Commission adopted Regulation No. 2790/1999/EC on the application of Article 101(3) to categories of vertical agreements and concerted practices, which expired on May 31, 2010. On 20 April 2010, the Commission adopted its successor, the Commission Regulation 330/2010 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 (Official Journal L 142, 23.4.2010, p.1) (“Verticals Regulation”)

Vertical agreements are agreements entered into between parties which operate at different levels of the production or distribution chain, for example a distribution agreement between a manufacturer and distributor. The Commission has also published “Guidelines on

Vertical Restraints” which describe the Verticals Regulation and the approach taken towards vertical agreements not covered by the Verticals Regulation. The Verticals Regulation is explained in more detail in section 3.1 below.

The Verticals Regulation declares that it does not apply to vertical agreements whose subject matter falls within the scope of any other block exemption regulation. With regard to agreements on repair and maintenance services for motor vehicles and spare parts for motor vehicles, such agreements are governed by the Verticals Regulation and Commission Regulation No. 461/2010 of May 27, 2010 on the application of Article 101(3) of the Treaty of the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (“Motor Vehicle Aftermarket Regulation”). The Motor Vehicle Aftermarket Regulation applicable to vertical agreements relating to the aftermarket, ie, to agreements on the purchase or sale of spare parts for motor vehicles or repair and maintenance services for motor vehicles is described briefly in section 3.2.1 below. Please note that agreements concerning the distribution of new motor vehicles fall within the scope of the Verticals Regulation.

The only way in which parties to a distribution agreement that contains anti-competitive restrictions that infringe Article 101(1) TFEU can be sure of avoiding the risks of unenforceability and fines is by assessing the agreement for an exemption. Given the time, effort and cost involved in conducting a self assessment under Art. 101 (3) TFEU, in practice, parties seek to mold their distribution agreements to fit within the Verticals Regulation (or the Motor Vehicle Aftermarket Regulation if the agreement relates to the sale or purchase of spare parts for motor vehicles or repair and maintenance services for motor vehicles) to achieve maximum legal certainty.



### 3. The Verticals Regulation And The Motor Vehicle Aftermarket Regulation

#### 3.1 Outline of the Verticals Regime

The Verticals Regulation is a single “umbrella” block exemption that allows companies entering into a vertical agreement to benefit from an exemption from the prohibition in Article 101(1) TFEU. It provides a safe harbor for most vertical agreements entered into by parties with a market share not exceeding 30%, except those containing hardcore restrictions.

Generally speaking, three types of distribution models can be distinguished:

- i. *exclusive distribution* refers to a distribution model in which a supplier agrees to sell its products only to one distributor for resale in a particular territory or only to a particular customer group. At the same time the distributor is usually limited in its active selling into other (exclusively allocated) territories. A supplier may also reserve certain territories or customer groups to itself.
- ii. *selective distribution* refers to a distribution model 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 unauthorized distributors within the territory reserved by the supplier to operate that system. The selection criteria are usually aimed at protecting the quality of the products or protecting brand image;
- iii. *open distribution* refers to a distribution model with no restrictions imposed by the supplier as to the territory into which or the customers to whom a distributor may sell.

### *3.1.1 Scope of the Verticals Regulation*

The Verticals Regulation exempts vertical agreements, ie, agreements that relate to the purchase, sale or resale of certain goods or services between two or more undertakings operating at different levels of the production or distribution chain (Article 2.1).

The Verticals Regulation does not, however, generally apply to vertical agreements between competing undertakings, except in the case of non-reciprocal vertical agreements between competitors where:

- i. the supplier is a manufacturer and distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or
- ii. the supplier is a provider of services at several levels of trade, while the buyer provides its services at the retail level of trade and is not a competing undertaking at the level of trade where it purchases the contract services.

Non-reciprocal vertical agreements are where one manufacturer becomes the distributor of the products of another manufacturer and where the latter does not become the distributor of the products of the first manufacturer.

### *3.1.2 Market Share Threshold of 30%*

The Verticals Regulation applies if the market shares held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services in the preceding calendar year, and where the market share of the buyer does not exceed 30% of the relevant market where it purchases the contract goods (Article 3.1).

See section 4.2 below for a discussion about how to define a relevant market.



### 3.1.3 *Hardcore Restrictions*

The benefit of the Verticals Regulation only applies as long as the parties have not agreed on any hardcore restrictions. The Commission blacklists the following five hardcore restrictions (Article 4):

- resale price maintenance;
- a restriction of the territory into which the buyer may sell the contract goods or services and the restriction of the customers to whom the buyer may sell the contract goods or services. Territorial or customer restrictions can be achieved both by direct and indirect means. Indirect means include, for example, measures aimed at inducing a distributor not to sell to certain customers or into within territories, eg, by refusing or reducing bonuses or discounts, terminating supply, reducing supply or limiting supplies to the demand within the allocated territory or customer group, threat or contract termination, requiring higher prices for products to be exported, limiting the proportion of sales that can be exported;
- in a selective distribution system: the restriction of active or passive sales to end users by authorized members operating at the retail level (without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorized place of establishment);
- in a selective distribution system: the restriction of cross-supplies between authorized distributors (operating at the same or different levels of trade):
- a restriction agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end users, independent repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

If any of the above restrictions are found in a vertical agreement, the agreement as a whole can no longer benefit from the Verticals Regulation.

However, the Verticals Regulation and the Guidelines on Vertical restraints *inter alia* carve out the following resale restrictions as exemptions from the hardcore restrictions:

- the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, provided that the sales by the buyer's customers are not limited. Please note, however, that passive sales ie, sales in response to unsolicited customer orders, including general advertising and sales over the Internet, must always remain possible;
- the restriction of sales to end users by a buyer operating at wholesale level;
- in a selective distribution system: the restriction of sales to unauthorized distributors by authorized members within the territory reserved by the supplier to operate that system; and
- the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who use them to manufacture goods that compete with the supplier's products.

Hardcore restrictions are unlikely to benefit from an exemption under Article 101(3) TFEU. Therefore, parties entering into an agreement containing a hardcore restriction (in particular a resale price maintenance provision, territorial or customer restriction) risk severe fines of up to 10% of each of the parties' group annual worldwide turnover in the preceding business year. The largest fine imposed so far for a vertical infringement was EUR 167.8 million on Nintendo and seven of its official distributors for colluding and thereby portioning the European market to prevent exports to high-priced from low-priced





countries. Volkswagen has also received a fine of EUR 102 million (which was reduced on appeal to EUR 90 million) for systematically forcing its authorized dealers in Italy to refuse to sell Volkswagen and Audi cars to consumers and other authorized dealers in other member states, mainly from Germany and Austria.

### 3.1.4 *Non-Compete Provisions*

The Verticals Regulation provides that the following non-compete provisions qualify as “excluded restrictions” that cannot benefit from the automatic exemption (Article 5):

- a direct or indirect non-compete obligations for a period in excess of five years or an indefinite term. A non-compete obligation that is tacitly renewable beyond a period of five years is deemed to have been concluded for an indefinite period. “Non-compete obligation” is given an extended meaning to cover also an obligation on the buyer to source 80% or more of its total purchases of the goods or services from the supplier (Art. 1(b)). There is an exception where the goods or services are re-sold by the buyer from premises owned or leased by the supplier (for example a tied pub or petrol service); in such a case, the non-compete obligations can last for the period of occupancy of the buyer;
- a direct or indirect non-compete obligation which applies after the termination of the agreement, except where the obligation is: (i) limited to the premises and land from which the buyer has operated during the contract period; and (ii) indispensable to protect the know-how of the supplier transferred to the buyer; and (iii) limited to a period of one year after termination of the agreement. In addition, the obligation must relate to goods or services which compete with the goods or services contracted for. This is of limited value given the proviso that the obligation can only apply to activity from the premises which the buyer has operated during the contract period. Such

- a post-termination obligation will be easy for the buyer to side step by commencing operations out of new premises; and
- in a selective distribution system, any direct or indirect obligation imposed on distributors not to sell the brands of particular competing suppliers.

Non-compete obligations which do not benefit from the protection of the Verticals Regulation, may be severed from the rest of the agreement. The remainder of the agreement will continue to be covered by the exemption.

### *3.1.5 Non Application of the Exemption*

The Verticals Regulation provides in Article 6 that the Commission can declare that the exemption shall not apply to vertical agreements where parallel networks of similar vertical restraints cover more than 50% of a relevant market, and the agreement contains specific restraints relating to that market.

## **3.2 Outline of the Motor Vehicle Aftermarket Regulation**

Until 1 June 2013 the motor vehicle industry had always benefited from its own block exemption because of the unusual features of distribution in the industry. However, in its review process of the motor vehicle regime the Commission found no indications of material competition shortcomings in regard to the sale of new motor vehicles which would justify a sector specific block exemption regulation in the future. Only with respect to after sales services and repair services the Commission found competition still to be limited. In light of the market situation the Commission decided to publish the Motor Vehicle Aftermarket Regulation as regards agreements on the purchase or sale of spare parts for motor vehicles or repair and maintenance services for motor vehicles effective as of June 1, 2010. Agreements relating to the purchase and sale of new motor vehicles are now governed by the Verticals Regulation rather than a sector-specific block exemption.



The Motor Vehicle Aftermarket Regulation is based on the same philosophy as the Verticals Regulation, in that, provided an agreement corresponds to the basic conditions for the application of the block exemption, everything is permitted with the exception of a defined blacklist of “hardcore” restrictions.

### 3.2.1 *The Motor Vehicle Aftermarket Regulation*

As regards repair and maintenance of motor vehicles, the Commission’s aim is to ensure that consumers can choose between different alternatives and that all operators can offer good quality services. As this aim cannot be achieved by the Verticals Regulation alone, the Commission issued the Motor Vehicle Aftermarket Regulation which shall apply in addition to the Verticals Regulation to agreements on the sale and purchase of spare parts for motor vehicles and repair and maintenance services for motor vehicles. The Motor Vehicles Aftermarket Regulation prohibits:

- a restriction of the sale of spare parts by members of a selective distribution system to independent repairers which use those parts for the repair and maintenance;
- a restriction, agreed between a supplier of spare parts, repair tools or diagnostic or other equipment and a manufacturer of motor vehicles, of the supplier’s ability to sell those goods to authorized or independent distributors or to authorized or independent repairers or end users;
- a restriction, agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components, of the supplier’s ability to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts.

Agreements on the sale and purchase of spare parts for motor vehicles and repair and maintenance services for motor vehicles must now be in line with the Verticals Regulation (see section 3.1) and the

Motor Vehicle Aftermarket Regulation in order to benefit from an exemption from the prohibition in Article 101(1) TFEU.

## 4. Article 102 TFEU

### 4.1 General

To the extent that a company which enters into a vertical agreement is dominant, the dominant player will need to act more cautiously in respect of all restrictions, lest they fall foul of the EU competition rules prohibiting abuse of a dominant position. That is to say that, notwithstanding that an arrangement between a manufacturer and a distributor may infringe Article 101(1) TFEU but benefit from an individual or block exemption, the arrangement may still infringe Article 102 TFEU. Article 102 TFEU prohibits dominant companies from abusing their position in the relevant product market if the abuse actually or potentially affects trade between Member States within the European Economic Area. The rules in Article 102 TFEU apply to dominant players in addition to the rules in Article 101 TFEU.

### 4.2 Dominance

Whether or not a company has a dominant position in the market raises two questions - the definition of the market in which the company is alleged to be dominant and whether it is dominant within that market.

When determining the definition of the market, the Notice on the definition of the relevant market for the purposes of Community competition law 1998 emphasizes that one must look at the product and geographical markets. Relevant product markets comprise all those products that are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. In defining the relevant product market the Commission will take into account two potential sources of competitive restraint: demand substitutability (ie, whether a customer would switch to readily available substitutes in response to a small but significant non transitory price increase in the product in the range of 5



- 10%) and supply substitutability (whether a company can easily adapt its line of production to supply the same or similar products). The relevant geographic market is analyzed in a similar way. It comprises the area in which the companies concerned are involved in the supply and demand of products in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas.

A company will be dominant on the market if it possesses a substantial level of market power. The essence of dominance is the power to behave independently of competitive pressures (ie, if it enjoys a position of economic strength which enables it to behave to an appreciable extent independently of its competitors and customers). The Commission takes into account various factors to establish dominance, including: market share, barriers to entry, access to capital, vertical integration, overall size and strength of the undertaking, the period of time in which the undertaking has held its position in the market and the undertaking's behavior. On the whole, companies with over 50% market share are presumed to have substantial market power.

### 4.3 Abuse

Where companies have market power, special care is required to ensure that their behavior is not designed to eliminate their competitors or exploit their customers.

The following are examples of conduct that could be considered abusive when carried out by dominant undertakings:

- **Excessive Pricing:** occurs when a dominant company charges prices higher than it would do if it faced effective competition. The important issue is when do prices become excessively high. All companies must earn some level of profits in order to finance investments. However, the profits of a dominant company in the relevant market consistently

exceeding its relevant cost of capital (the return that could be earned from investing elsewhere having regard to the risks incurred by investing in the particular company) might indicate that its prices are excessive.

- **Price Discrimination:** involves applying different conditions (normally different prices) to equivalent transactions. It can take two basic forms: (i) charging of different prices to different customers for the same product - where the differences in price do not reflect the quantity, quality or any other characteristics of the items supplied, or (ii) the charging of the same price to different customers, even though the costs of supplying the product were very different. For example, a policy of uniform delivered prices throughout the country could be discriminatory if differences in transport costs were significant.
- **Predatory Pricing:** constitutes a class of anti-competitive behavior where prices are set so low as to eliminate some undertakings and threaten the competitive process itself. Selling below average avoidable costs is unlikely to be viewed as rational and can be taken as conclusive proof of predation.
- **Fidelity Rebates and Discounts:** a company having a dominant position in a specific market may not grant a customer rebates or discounts as a reward for its loyalty. Target rebates or individual turnover rebates that are likely to hinder expansion or entry even by competitors that are as efficient as the dominant company may be considered abusive. Generally unproblematic are incremental quantity rebates or function rebates that are derived from genuine cost savings to the supplier.
- **Tying:** a dominant company may not make the sale of a product or service that is unique or highly desirable conditional on the sale of another product or service, for example if the overall price of the product is so low that it



forecloses as efficient competitors that offer the tied products individually. Such a practice could be abusive because it forces customers to purchase a product or service that they do not want in order to get the one they want. The customer should be given the choice of purchasing each product or service individually.

- **Refusal to deal:** a refusal to supply an existing customer or a new customer or the failure to make available an essential facility by a dominant undertaking can be an abuse if no objective justification for the behavior can be provided. Obvious justifications might include the fact that the customer had poor creditworthiness or that supplies were cut for a temporary period due to capacity constraints.
- **Exclusivity:** an obligation to purchase exclusively from a dominant company is most likely to result in anti-competitive foreclosure where the dominant company is an unavoidable trading partner (for instance, because it sells “must stock” products), or where they are of such long duration that customers face difficulties in switching supplier.

Where the Commission finds a violation of Article 102 TFEU (i) it can issue a decision ordering the undertaking to put an end to the abuse; (ii) it can impose fines on the undertaking up to 10% of the group’s worldwide annual turnover in the preceding year of business, and/or (iii) injured parties who have suffered a loss as a result of the abuse of dominance may bring civil proceedings before a national court for damages.

## 5. Agency Agreements

### 5.1 Relationship with EU Competition Law

Whether restrictions in agency agreements fall under the scope of EU competition law depends on the commercial and financial risks and obligations imposed on the agent by the principal. The Guidelines on Vertical Restraints define the term agent as “a legal or physical person

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 or services by the principal, or sale of goods or services supplied by the principal. The determining factor in defining an agency agreement is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal. For the purposes of applying Article 101(1) TFEU, an agreement will be an agency agreement if the agent does not bear any or only insignificant risks.

Where an agent falls within the Commission's definition of an agent, many of the restrictions imposed by the agency agreement will fall outside of the scope of Article 101(1). For example, a principal can impose resale price obligations and territorial restrictions on its agents. However, agency agreements may also contain other provisions which concern the relationship between the agent and the principal - such as restrictions on the principal appointing another agent or the agent from acting as agent of a third party. These types of restrictions may fall within Article 101(1). Outside the legitimate agency context, an agency agreement would fall within the Article 101(1) prohibition (where for example, a number of principals use the same agent to exchange sensitive information, such as prices).

If an agent does not qualify as agent under the Commission's definition, restrictions in the agency agreement may fall within Article 101 (1). Therefore, an agency agreement that appreciably affects trade between Member States and that has as its object or effect the appreciable restriction of competition will fall foul of Article 101(1) TFEU. This means that such agreement must be assessed under the general rules for distribution agreements (ie, Article 101(1) TFEU, including the Verticals Regulation - see sections 2 and 3 above). In practice if an agent does not meet the requirements the agency agreement will generally not benefit from the Verticals Regulation as the agent is obliged to adhere to the prices established by the principal when offering products to customers. Such obligation





constitutes a “hardcore restriction” - see Section 3.1.3 above. If an agreement cannot be qualified as an agency agreement under the Commission’s definition, an obligation preventing or restricting the agent from sharing its commission, fixed or variable, with the customer would be a hardcore restriction.

## 5.2 Agency Agreements

Whether or not agency agreements fall within the scope of Article 101(1) TFEU is determined on the basis of the financial and commercial risks borne by the agent. In the Guidelines on Vertical Restraints the Commission has set out the criteria for the relevant financial and commercial risks. The Commission distinguishes three types of financial or commercial risks: (i) the contract specific risks, which directly relate to the contracts procured by the agent, (ii) the risks related to market-specific investments, which are generally necessary to enable the agent to perform its activities but cannot be used for other activities or - in the case of a termination of the agency agreement - can only sold at significant loss and (iii) risks related to other activities undertaken on the same product market to the extent that the principal requires the agent to undertake such activities but not as an agent on behalf of the principal but for its own risk. The Commission has provided a non-exhaustive list of risks, which must not be borne by an agent in order for the agent to be regarded as a “non-risk bearing agent.

### ***Contribution to the Costs Relating to the Supply / Purchase of the Goods, including Transportation Costs***

An agent shall not contribute to the costs of the supply or purchase of the contract goods or services. This includes the costs for the transportation of the goods. This does not preclude the agent from carrying out the transport service, provided that the costs are covered by the principal.

### ***Contribution to Storage Costs and Risks***

An agent must not maintain stocks of the contract goods at its own cost or risk. Hence, if the agent maintains stocks of the goods, the storage costs should be fully borne by the principal. This also includes the costs for insuring the relevant goods in stock. Further, an agent may only be held liable for the loss of stock, if it is actually responsible for the loss.

### ***Assumption of Product Liability***

An agent should not undertake responsibility towards third parties for damage caused by the contract goods sold, unless, as agent, it is responsible for the defect leading to the product liability.

### ***Assumption of Liability for the Non-Performance of the Customer***

An agent may not assume the liability for the contractual non-performance of the customer, also known as a *del credere* risk, with the exception of the loss of the agent's commission, unless the agent is liable for fault (eg, by failing to comply with reasonable security or anti-theft measures or failing to comply with reasonable measures to report theft to the principal or police or to communicate to the principal all necessary information available to him on the customer's financial reliability).

### ***Obligation to Carry out Sales Promotion***

An agent must not be obliged to invest in sales promotion or to contribute to an advertisement fund. The fact that the agent actually does, of its own accord, invest in such advertising, in order to increase sales and its commission payments, does not lead to the application of Article 101(1) TFEU.

***Investment in Equipment***

An agent may not make market-specific investments in equipment, premises or training of personnel, unless these costs are fully reimbursed by the principal.

***Obligation to undertake other activities in same product market***

An agent may not undertake other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal.

## Compliance, Anti-Corruption and Export Controls

A review of key rules applicable to agency and distribution arrangements would be incomplete without a discussion of the broad risk management and compliance issues that agency and distribution relationships can raise. In some cases, the distribution or agency agreement itself can raise compliance risks (for example, under competition law, vertical resale price maintenance) and, in other cases, the activities of distributors and agents can engage the vicarious liability of suppliers/manufacturers (for example, bribes paid by distributors or agents on behalf of suppliers). With the high level of enforcement and the increasing size of penalties being imposed on companies for violations of such areas as anti-bribery and corruption, export controls and trade sanctions and antitrust and competition laws, risk management and compliance are firmly on the radar of companies and their boards.

In this chapter, we refer briefly to some of the key risk management issues that agency and distribution arrangements can raise in the areas of anti-bribery and corruption, export controls and trade sanctions and antitrust and competition laws.

### 1. Anti-Bribery and Corruption Laws

Many jurisdictions around the world have anti-bribery and corruption laws. While, in many countries, these laws may have been on the statute books for decades, it is only during the last decade that authorities have started to enforce these rules more rigorously.

The most enforced of the anti-bribery statutes in the world is the US Foreign Corrupt Practices Act 1977 (“US FCPA”). The US FCPA, broadly speaking, contains two types of obligations:

- anti-bribery obligations, which prohibit corrupt payments (and any offer, authorization or promise of a payment) of money or anything of value to foreign officials, parties or candidates to



assist in obtaining or retaining business or securing any improper advantage; and

- record keeping and internal controls provisions.

The US FCPA imposes obligations on:

- issuers and agents thereof (ie, companies whose securities are registered in the US or which are required to file periodic reports with the US Securities and Exchange Commission — “SEC”);
- domestic concerns and agents thereof (this includes any individual who is a citizen, national or resident of the US and any entity having its principal place of business in the US); and
- foreign nationals or businesses or agents thereof who take any action in furtherance of a corrupt payment while within the territory of the US.

Under the US FCPA, a company may be liable for a payment by an agent or other third party (including a distributor) if the company authorizes such a payment or if it knew that the improper payment would be made. Individuals or corporations that consciously disregard or deliberately ignore known circumstances that should have put them on notice of an improper payment could also be prosecuted. The risk of vicarious liability for payments made by agents and distributors means that companies should take steps to reduce the risks.

It is also important to note that independent monitors or consultants have also been imposed on companies in recent FCPA settlements with the US Department of Justice (“DOJ”) and/or the SEC. The monitor, typically appointed for three years, will have a mandate to review all remedial measures introduced by the company as part of its settlement to improve compliance processes, and will also review the activities of more problematic foreign operations. In addition to the

large corporate penalties, there have been a number of prosecutions of individuals.

The UK Bribery Act 2010 (“UK Act”) entered into force on 1 July 2011. Although bribery has been illegal in the UK for centuries pursuant to both common law and statutory offences, the old regime was much criticized for its inconsistent and confusing terminology. The UK Act makes it an offence to receive, offer or give a bribe for a function to be performed “improperly.” The types of functions covered include functions of a public nature as well as functions of a private nature (for example, activities connected with a business and activities performed in the course of a person’s employment). A function would be performed “improperly” if, by way of example, it were performed in breach of a duty or expectation of good faith, impartiality or trust.

The UK Act also introduced a new corporate offence for entities incorporated in the UK or otherwise carrying on business in the UK. Under the UK Act, a company or other commercial organization faces strict liability where a person “associated with it” bribes another person, intending to obtain or retain business for the organization or to obtain or retain an advantage in the conduct of business for the organization. This could include bribes paid on behalf of a company by its agent and potentially its distributor. It is a defense for the company to prove that it had adequate procedures to prevent bribery. What is “adequate” will be determined by the size and resources of the organization, the ethical risks associated with its industry, its geographical coverage and the types of transaction concerned; where the likelihood of corruption is high, the company is required to have more rigorous policies to stop bribery. As under US law, under the UK Act, companies should introduce measures to prevent agents and distributors paying bribes on their behalf.

Companies that already have policies that comply with the FCPA should not assume that such policies would constitute adequate procedures under the UK Act (or, indeed, other national laws) for the following reasons:



- the UK Act goes beyond the FCPA by also catching bribes paid to private persons, whereas the FCPA only prohibits payments to foreign public officials; and
- the defenses available under the two regimes vary. For example, it is permissible under the FCPA to pay so-called “facilitation payments” (namely, the payment of a small sum of money to a public official as a way of ensuring that they perform their routine, non-discretionary duties, either promptly or at all). There is no similar exemption for facilitation payments under the UK Act.

Accordingly, companies need to adapt existing policies to ensure full compliance with the UK Act.

Maximum penalties under the UK Act include jail sentences of up to 10 years and/or unlimited fines. Further, a company convicted of a corruption-related offence may be debarred from competing for public contracts under the Public Contracts Regulations 2006. For companies with sizeable sales to public authorities, this exclusion would be the most serious consequence of a corporate conviction.

Similar risks as those highlighted above under the UK and US laws exist under the laws of other countries. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions has now been ratified by 43 countries (including EU countries, such as France, Germany, Greece, Hungary, Italy and Poland, and a number of non-European countries, such as Australia, Brazil, Israel, Japan, Korea, Mexico Russia and South Africa).

In terms of limiting the risks associated with agents and distributors, suppliers/manufacturers should think about the following practical steps:

- effective due diligence of the agent or distributor;

- clear representations and warranties from the agent or distributor that it complies with all applicable anti-bribery legislation and that it never pays bribes;
- annual certifications by the agent or distributor that it understands and complies with anti-bribery rules;
- ability to audit the agent's or distributor's compliance processes, books and records; and
- ability to immediately terminate the agreement in relation to any of the anti-bribery provisions within the agreement.

## 2. Antitrust and Competition Laws

As noted, both distribution and agency agreements can raise risks under antitrust and competition laws. For example, under EU competition law principles, there may be risks associated with distribution agreements and so-called non-genuine agency agreements that include the following restrictions:

- resale price maintenance — namely, an obligation on the distributor or non-genuine agent to adopt a minimum or fixed resale price;
- restrictions on the territory into which or the customer group into which the distributor or non-genuine agent may resell; and
- non-compete obligations.

Further, where either the supplier or the distributor/non-genuine agent is considered to hold a dominant position, there are greater restraints on the restrictions that can be included in an agreement due to the risk that such restrictions could be viewed as amounting to abusive conduct (for example, by including tying obligations or rebate schemes with foreclosure effects). We refer you to the EU





Competition Law chapter for more details on the principles of EU competition law.

US antitrust principles are not as rigid as EU competition law in relation to what may be included in vertical agreements. However, depending on the circumstances, resale price maintenance can still be problematic under both federal and state laws. It is important to note that competition law is not just an issue for the more developed economies (such as the US, the EU, Canada, Australia and Japan); there are now competition regimes in force in well over 100 jurisdictions around the world, including some of the emerging economies, such as Brazil, Russia, India and China.

Therefore, in relation to both distribution and agency agreements, the parties should be very careful to ensure that no anti-competitive provisions are included.

### 3. Export Controls and Trade Sanctions

There are also risks associated with distribution and agency relationships pursuant to export controls and trade sanctions laws. Many countries around the world have export control rules, whose objective is to ensure that sensitive items do not end up in the hands of problematic countries or terrorists. A prior licensing requirement is imposed on the export of controlled military goods, software and technology and certain sensitive dual-use goods (namely, items that have a genuine civilian application, but can also be put to more sensitive nefarious uses, such as terrorist or military uses). The list of controlled items is usually set out in the relevant legislation (for example, the EU Dual Use List contained in Annex I to the EU Dual-Use Regulation 428/2009 as amended, or the US Commerce Control List set forth in Part 774 of the US Export Administration Regulations). Even in relation to items not on relevant product control lists, there may be a prohibition on the export of such items if they will or may be put to a sensitive end use (such as a military end use or an end use related to weapons of mass destruction).

It is important to note that an export can include both physical shipment of tangible items and also intangible transfers of software and technology/data (for example, by email, fax, web download or making software/technology available on an intranet site).

Under US rules set forth in the US Export Administration Regulations, in addition to the export of items from and through the US, US jurisdiction exists over the re-export of the following items out of third countries:

- US-origin items;
- non-US items incorporating more than a *de minimis* amount of US-controlled content; in relation to most jurisdictions, the *de minimis* threshold is 25%, but in relation to certain comprehensively sanctioned countries (currently, Iran, North Korea, Sudan and Syria), the threshold is 10%; and
- in certain circumstances, non-US items with no US content, but based on certain US technology.

Further, under US-deemed export and re-export rules, the US also imposes a licensing requirement on the release of controlled technology (for example, through visual inspection or oral exchanges) to foreign nationals depending on their nationality.

Such releases are deemed to be an export/re-export to the country of the foreign national.

A violation of applicable export and re-export controls by an agent or a distributor could risk implicating the manufacturer/supplier.

Accordingly, a supplier should impose obligations on its agents and distributors to comply with all applicable export controls (in particular, those of the US and the EU and its Member States). Moreover, if the manufacturer/supplier becomes aware or otherwise suspects that its agent or distributor is violating any applicable export controls, it should consider terminating the agreement immediately in order to effectively distance itself from the infringing conduct.



In some cases, the relevant legislation may require certain provisions to be included in distribution and supply contracts. For example, pursuant to Article 22(10) of the EU Dual-Use Regulation 428/2009, with respect to the supply of an item controlled on the EU Dual-Use List, there is an obligation to include a statement within relevant commercial documents (including contracts) that the relevant item being supplied is controlled and that a license is required prior to the export of the item out of the EU.

Export controls exist in many countries around the world. The primary international export control arrangement (the Wassenaar Arrangement) is adhered to by 41 countries, including most EU countries, Argentina, Australia, Russia, South Africa, South Korea, Switzerland, Turkey and Ukraine.

In addition to export controls, trade sanctions restrict dealings with certain countries/territories, groups and/or individuals based on certain foreign policy or national security concerns. Thus, by way of example, the US has a comprehensive embargo in place against Cuba, Iran, Crimea, North Korea and Syria; no US person can do business with the foregoing countries and, furthermore, US persons are prohibited from facilitating business by non-US persons with the same countries. The EU also has tight restrictions in place against certain countries, such as Iran and Syria, albeit not an outright ban on doing business in these countries. Moreover, both the US and the EU restrict dealings with other countries, including Russia and Venezuela. In addition to the country restrictions, both the EU and the US prohibit dealings with certain designated groups, entities and individuals (for example, terrorist groups, entities facilitating Iran's nuclear proliferation program or individuals violating human rights in Zimbabwe).

In the context of a distribution or agency agreement, counterparties should be screened to ensure that they are not included within lists of designated parties. In the US, the designated parties lists are maintained by a number of different authorities, although the key list is maintained by the US Office of Foreign Assets Controls (within the US

Department of Treasury). In the UK, the key list is maintained by the Office of Financial Sanctions Implementation within Her Majesty's Treasury. Further, a manufacturer/supplier should include an obligation on its agents and distributors requiring them to comply with all applicable trade sanctions rules (in particular, those in force in the US and the EU).

Enforcement of export controls and trade sanctions is on the rise. For example, certain global financial institutions have entered into multibillion-dollar settlements with the US Government in relation to violations of US sanctions. In the UK, jail sentences, director disqualifications, and criminal and administrative fines have all been imposed for violations of applicable export controls and trade sanctions. Moreover, an infringement can result in the revocation of export privileges and licenses and significant reputational harm.



## Austria

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law Applicable*

The rules that govern the relationship between the commercial agent and principal are subject to the Austrian Commercial Agents Act (*Handelsvertretergesetz*), “the Act.” The Act implements Council Directive 86/653/EEC relating to self-employed commercial agents (“Agency Directive”) into Austrian law. It does not apply to brokers, stockbrokers or to employment relationships of any kind. However, the Act also applies to commercial agents in the insurance business and provides special provisions for such commercial agents regarding the commission and the compensation for their transactions. Section 1 of the Act defines a commercial agent as a self-employed intermediary who concludes or negotiates any form of transactions — except transactions related to real property — in the name and for the account of a principal. The Act extends beyond the scope of the Agency Directive, including not only agents acting as intermediaries for goods but also services.

##### 1.1.2 *Formal Requirements*

An agency agreement is not subject to any formal requirements and may be executed in writing, orally and may even be implied from the parties’ conduct. However, the commercial agent may demand from the principal a written document setting out the terms of their relationship.

The Act does not impose any obligation on the commercial agent to register the agency agreement with any public authority.

##### 1.1.3 *Individual/Corporate Entity*

The commercial agent may act as an individual or may organize his business in the form of a partnership or a corporation.

#### *1.1.4 Duration of Agreement*

An agency agreement may be concluded for a fixed or an indefinite period. An agency agreement for a fixed period, which continues to be performed by both parties following the expiry of such term, is deemed to be converted into an agency agreement for an indefinite period. An agreement for an indefinite period may only be terminated in accordance with the minimum statutory periods (see section 1.5 on Termination).

### **1.2 Exclusive/Non Exclusive**

Commercial agents may be appointed on an exclusive or non-exclusive basis.

### **1.3 Non-Compete**

Generally, a commercial agent is not allowed to perform services for a competitor of the principal throughout the duration of the contractual relationship. Pursuant to Section 25 of the Act, a non-compete obligation enduring after the termination of the agreement is void. The purpose of this provision is to protect the commercial agent in his professional capacity. The restrictions imposed by a non-compete clause must therefore be evaluated on a case-by-case basis, in order to ascertain whether the commercial agent is prevented or restricted from earning a living.

### **1.4 Commission**

#### *1.4.1 Basic Principles*

Under Section 8, Para 2 of the Act, the commercial agent is entitled to receive commission on commercial transactions concluded because of his efforts. In the absence of an agreement specifying the amount of commission payable, the commercial agent shall be entitled to a commission of an amount which is customary (Section 10, Para 1 of the Act). If such customary remuneration cannot be determined, the agent shall be entitled to reasonable remuneration.



Unless provided otherwise in the agency agreement, the payment of commission does not depend on the endeavors of the commercial agent, but rather on his success. If the commercial agent has brought new customers or increased business with existing customers or if the commercial agent is entrusted with a specific geographical area or group of customers (whether on an exclusive basis or not), the commercial agent is entitled to receive commission based on such transactions, even if the transaction in question is not concluded as a direct result of his efforts. This provision does not apply to commercial agents in the insurance business, where such commercial agents shall only be entitled to receive commission for direct transactions. Unless provided otherwise in the agency agreement, the commercial agent is not entitled to reimbursement of expenses or general costs, unless the costs are due to an extraordinary expense (eg, due to a specific order).

Where commission is calculated on the basis of the value of the transaction, price reductions granted by the principal following conclusion of the transaction with the third party may not operate to reduce the amount of commissions owed to the commercial agent. However, the parties may derogate from this provision in the agency agreement.

#### *1.4.2 When Due and Payable?*

The right to receive commission arises as soon as, and to the extent that, (i) the principal has executed the transaction, (ii) the principal should have executed the transaction according to the contract with the third party or (iii) the third party has performed his contractual obligations. At the very latest, the right to receive commission arises when the third party has fulfilled his part of the transaction or should have done so if the principal had performed his obligations. Any derogation from this rule to the detriment of the commercial agent will be invalid. The right to receive commission will become due the day the commission shall be paid in regards to the parties' agreement. Any commission due must be paid, at the latest, on the last day of the month following the calendar quarter in which the commission became

due. The parties may agree to a shorter period for the payment of the commission. However, the agreement of a longer period will not be valid. The commercial agent may demand an advance payment on the commission due, plus any expenses or other disbursements (assuming that the agent is contractually entitled to claim such expenses or disbursements). The commercial agent may only demand advance payment for work completed. He may therefore not demand advance payment for future agency activities.

In case of insurance agency agreements, the right to receive commission arises with the legal effect of the transaction, if and in so far the insured has paid the premium or should have done so.

#### *1.4.3 Extinction of Rights to Commission*

The right to receive commission will be extinguished if, and to the extent that, it is established that the contract with the third party will not be executed for reasons outside the principal's control (which will not be the case where the principal is found to have been negligent in its dealings with the customer), or where it is unreasonable for the principal to execute the transaction. Where the third party fails to make payment to the principal, the right to receive commission is extinguished only if the principal makes all reasonable efforts to obtain the outstanding monies. Any commission already paid to the agent in respect of such a transaction must be refunded to the principal.

#### *1.4.4 Accounting and Audit*

The principal is obliged to render commission accounts to the commercial agent on a quarterly basis. The parties may not agree on longer accounting periods. The accounts are due on the last day of the month following the quarter in which the right to receive commission arose. In case of insurance agency agreements, the commission accounts are due, at the latest, one month after the right to receive commission arose. The accounting books must contain the relevant information necessary to calculate the commission due. In addition, the commercial agent may request the disclosure and





inspection of the books and may ask to be given access to all the information needed for the calculation of his commission. If the books are incorrect, incomplete or if the principal does not keep the books, he may be ordered by the courts to provide all the necessary information.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

The giving of notice is a declaration of intention and may be given informally, unless otherwise agreed upon. It is, however, preferable to provide written notice of termination.

### 1.5.2 *Notice Period*

Pursuant to Section 21, Para 1 of the Act, agreements which run for an indefinite period must comply with minimum notice periods. The length of the notice period will vary according to the duration of the agency agreement: one month during the first contract year, two months during the second contract year, three months during the third contract year, four months during the fourth contract year, five months during the fifth contract year and six months during the sixth contract year and all subsequent years. Shorter contractual periods will be void and will be replaced by these minimum statutory periods. Where longer notice periods are agreed, but different notice periods apply for the commercial agent and the principal, the commercial agent will be entitled to insist on receiving the longer of the two notice periods. Unless otherwise agreed, the end of the notice period must coincide with the end of a calendar month.

Furthermore, either party is entitled to terminate the agreement at any time without prior notice if, on the facts, there is a reasonable cause for one party to terminate the contractual relationship. Section 22, Para 2 and 3 of the Act provide a non-exhaustive list of factors that will be taken into account in assessing whether such “reasonable cause” exists: the inability of the commercial agent to perform his duties, loss of confidence by the principal in the commercial agent’s

abilities, and so forth. Any derogation from these provisions will be invalid.

In the event that a fixed-term agency agreement is terminated early because of default attributable to one contracting party according to Section 22, the other party is entitled to claim damages. If one contracting party has terminated the agency agreement without reasonable cause or if the agency agreement is terminated within a shorter notice period than provided in Section 21 of the Act, the non-terminating party is entitled to claim damages or to insist on the fulfilment of the agreement.

### *1.5.3 Liability of Principal on Termination*

#### **Commission**

The termination of the agreement does not affect the commercial agent's right to receive commission on transactions concluded during the term of the agreement, irrespective of whether the commission became due during the term ("pipeline commission").

Section 11, Para 1 of the Act also entitles the commercial agent to receive commission for transactions executed after the date of termination ("post-termination commission") where:

- the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency agreement and the transaction was entered into within a reasonable period of time after the agreement was terminated; or
- an order by a third party that would normally lead to the payment of commission to the commercial agent reaches the principal or the commercial agent before the termination of the agency agreement.

A successor agent is not entitled to receive commission on any such transaction if the former commercial agent is entitled to the relevant



commission, unless it is equitable that commission be shared in circumstances where the successor agent's efforts contributed to the execution of the transaction.

Commercial agents in the insurance business are also entitled to receive commission for communicated or expanded insurance contracts after termination of the agreement, if and in so far the insured continues to pay the premium or should do so. Instead, if this is a "subsequent" commission, the parties may agree that the commercial agent in the insurance business receives a support commission in case the commercial agent undertakes to support the insured.

### ***Termination Payment***

Under Austrian law, commercial agents are (under certain circumstances) entitled to an indemnity if the agency agreement is terminated (Section 24 of the Act). The indemnity shall not be payable where the principal has terminated the agency agreement because of a default attributable to the commercial agent which would justify immediate termination of the agency agreement.

A commercial agent shall be entitled to an indemnity if and to the extent that:

- he has brought new customers or has significantly increased the volume of business with existing customers;
- it can be expected that the supplier continues to derive substantial benefits from the business with such customers; and
- the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.

The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years, the indemnity shall be calculated on the average for the period in question. The commercial agent shall lose his entitlement to the indemnity if he does not notify the principal within one year following termination of the contract that he intends to pursue his entitlement.

Therefore, the agent will have the right to claim an indemnity following termination of the agreement, unless:

- the commercial agent gives notice of termination - in such case he is, however, entitled to claim an indemnity payment where the principal gives the agent reasonable cause to terminate the agreement, or the age or the health of the agent makes the continuation of the agreement unreasonable;
- the agent acts negligently, giving the principal reason to terminate the agreement or to give notification of termination; or
- the rights and duties of the agent are assigned to a third party.

Agents in the insurance business may also receive an indemnity in situations where they are not entitled to receive a commission after termination of the agency agreement. Any derogation of this rule to the detriment of the agent will be invalid.

### ***Investment Claim***

According to Section 454 of the Austrian Commercial Code (*Unternehmensgesetzbuch*), the agent may claim investment indemnification for the compensation of all investments made pursuant to an obligation under the agency agreement, provided that:

- the investments are not reasonably exploitable, or



- have not been amortized before the termination of the agency agreement.

Any derogation of this rule to the detriment of the agent will be invalid.

The right to receive investment indemnification will be lost if:

- the agent terminates the agency agreement unless the principal gives the agent reasonable cause to terminate the agreement;
- the principal terminated the agreement for cause based on reasons which are attributable to the agent; or
- the rights and duties of the agent are assigned to a third party.

This provision is without prejudice to the right of compensation under Section 24 of the Act.

## 1.6 Limitation Periods

For claims based on agency agreements, the Act provides that they must be asserted within three years from (i) the end of the year in which the settlement of the commission took place or, if the claim was not included in the settlement of the commission, (ii) the end of the year in which the agreement was terminated (Section 18 of the Act). It is important to note that the limitation period is suspended if the agent notifies the principal of his/her claim in any form (Section 18(3) of the Act).

Claims for a termination payment or investment indemnification upon termination of the agreement must be brought within one year following termination (Section 24, Para 5 of the Act and Section 454 Para 3 of the Austrian Commercial Code).

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Distribution agreements are not subject to any particular statutory provisions. The applicable rules have been developed by the Austrian Supreme Court and through practical experience, and are derived from German law. Even though the distributor acts on his own account and in his own name, certain circumstances may lead to the analogous application of individual provisions of the Austrian Commercial Agents Act.

#### 2.1.2 *Formal Requirements*

See section 1.1.2 above.

#### 2.1.3 *Individual/Corporate Entity*

The distributor may be an individual or a legal entity (whether a partnership or a corporation).

#### 2.1.4 *Duration of Agreement*

Distribution agreements may be for a fixed or an indefinite period.

### 2.2 Exclusive/Non-Exclusive

The parties are generally free to determine the extent of the distributor's rights of distribution. Thus, the parties are free to agree whether the distributor will have an exclusive or a non-exclusive right of distribution. For the avoidance of doubt, this should be set out precisely in the distribution agreement. In particular, the agreement should specify whether the supplier is prevented from selling the contractual products within the contractual territory through another distributor and whether he must also refrain from making direct sales to customers of the distributor. Contractual provisions that provide for an exclusive distribution relationship or a non-compete obligation (see section 2.3 below) may be unenforceable under Article 101 of the



Treaty on the Functioning of the European Union insofar as the provisions of the distribution agreement are not exempted by an individual or block exemption. Please see the earlier chapter on EU competition law for further discussion of these issues.

## 2.3 Non-Compete

The provisions regarding non-compete clauses are set out in Section 25 of the Act and may, on a case-by-case basis, be applied by way of analogy to distributors (provided that the contractual arrangements is similar to that of an agency agreement). Please see section 1.3 above and the EU Competition Law chapter.

## 2.4 Termination

### 2.4.1 *Formal Requirements*

There are no statutory requirements for giving a notice of termination. Notice may therefore be given as provided in the distribution agreement.

### 2.4.2 *Notice Period*

There is no statutory termination period. In general, notice may be given as provided in the distribution agreement. Where the contractual arrangement is similar to that of an agency agreement, the statutory termination periods for agency agreements may apply by way of analogy (please see section 1.5.2 above).

### 2.4.3 *Liability of Supplier on Termination*

## **Compensation**

According to the practice of the Austrian Supreme Court (*Oberster Gerichtshof*), the right to indemnity may also apply to distributors by way of analogy (unlike the agent, the distributor is not an intermediary, but a dealer who buys goods in order to resell them in his own name and on his own account). The right to indemnity for distributors has been confirmed in only a few cases in which the distributor was

integrated into the organization of the supplier to such an extent that his position resembled that of a commercial agent. However, the Supreme Court held that it is not required that the position of the distributor is as weak as that of an agent. The assessment of whether the right to indemnity may be applicable to a specific distributor by way of analogy is made on a case-by-case basis. The Supreme Court developed the following criteria that are considered in the assessment (please note that there are no hard and fast rules as to how many or which of the following criteria shall be met):

- the distributor is appointed for a specific territory (even if not exclusively);
- the distributor is required to keep a considerable stock of the products covered by the contract;
- the distributor is required to organize, maintain or ensure at his own expense a substantial service to customers free of charge;
- the distributor is required to purchase a minimum volume from the supplier;
- the distributor must render warranty services;
- the distributor must report to the supplier;
- the supplier has a right to inspect the records and facilities of the distributor; or
- the distributor is not allowed to sell competing products.

Since a distributor is not entitled to commission on commercial transactions (ie, the compensation paid by the principal to the commercial agent, usually a percentage of the volume transactions concluded during the period covered by the agency agreement), the Supreme Court held that in case of a distribution agreement the maximum compensation shall be calculated on the basis of the





distributor's operating margin. The average operating margin of the distributor therefore reflects the maximum indemnity.

However, parts of the remuneration which compensate services that are typically not rendered by a commercial agent must be taken into account. This applies to the compensation for risks relating to the keeping of stocks, credit risks as well as other commercial risks. The calculation basis shall be further reduced by a certain percentage reflecting estimated customer attrition and the coattail effect of a brand.

### ***Investment Indemnification Claim***

Where the nature of the distribution agreement is, by its characteristics, similar to an agency agreement the distributor may claim investment indemnification for the compensation of all investments made pursuant to an obligation under the distribution agreement, provided that:

- the investments are not reasonably exploitable, or
- have not been amortized before the termination of the distribution agreement.

Any derogation of this rule to the detriment of the distributor will be invalid.

The right to receive investment indemnification will be lost if:

- the distributor terminates the agency agreement unless the supplier gives the distributor reasonable cause to terminate the agreement;
- the supplier terminated the agreement for cause based on reasons which are attributable to the distributor; or
- the rights and duties of the distributor are assigned to a third party.

#### 2.4.4 *Return of Products*

The supplier is generally obliged to accept and perform the orders of the distributor. If the distributor is contractually obliged to keep a stock of contractual products, the supplier is required to buy back the distributor's products as long as they are unused, undamaged and still in their original packaging. Generally, the supplier must pay the original purchase price. In certain circumstances, it is possible to include in individually negotiated as well as in standard form contracts that certain deductions from the original purchase price shall be made.

### 2.5 Limitation Periods

The Austrian Civil Code (Section 1480) provides that claims arising out of a contract must be asserted no later than three years after the time of knowledge of the damage.

Claims for a termination payment or investment indemnification must be brought within one year from the agreement's termination date (Section 24(4) of the Act and Section 454(3) of the Commercial Code).

## Belgium

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law Applicable*

While Belgium concerned itself with the fate of exclusive distributors as early as 1961 (see section 2 below), specific legislation with respect to agency contracts was enacted as late as 1995, through the act of 13 April 1995 (the “Agency Act”), now part of book X of the new Economic Law Code. This Agency Act is Belgium’s belated implementation of the Agency Directive. Before entry into force of the Agency Act (June 12, 1995), agency contracts were governed by general Belgian contract law, allowing the parties a good deal of freedom when stipulating their contractual terms, provided that these terms did not violate Belgian public order or contradict mandatory legal provisions.

As in other countries, the Agency Act covers the relationship between a principal and a commercial agent, ie, a person (individual or legal entity) who, on a regular basis, acts independently (non-employed) for the principal in the negotiation, and in some cases the conclusion, of commercial contracts.

However, three differences need particular attention.

First, the Agency Act applies not only to agents promoting or concluding the sale of goods but also to agents promoting or concluding the sale of services. In its first version, the Agency Act expressly excluded the banking, insurance and securities sectors, but by an amendment of May 4, 1999, these exclusions were removed.

Second, the non-employee nature of the relationship between the principal and the agent is of paramount importance under Belgian law and care must be taken to make sure that this position is not contradicted by even the slightest factual hint of an employer-

employee type of relationship (such as detailed and precise instructions to the agent). Pursuant to article 4.2° of the main Belgian employment act (July 3, 1978), each relationship between a principal and an intermediary is, by default, considered an employment relationship unless there is proof to the contrary. Such proof may be delivered only by objective facts, not by the title of the agreement nor by specific clauses that say the opposite (eg, “parties shall be independent...”) when such clauses are not adhered to in practice. It is generally accepted that a judge is not bound by the qualification of the relationship as given by the parties but may declare the existence of an employment relationship if he finds facts to support that.

Third, although the Agency Directive would have allowed the insertion of a requirement that an agency contract must be in writing, Belgium has stuck to the principle that an agency agreement may be written or unwritten. The burden of proving the existence of an unwritten agreement is upon the party claiming that the agreement exists.

The Agency Act applies to all disputes relating to the activities of an agent with principal place of business in Belgium, and Belgian courts are competent with respect to such matters. The mandatory provisions of the law generally cannot be avoided by electing as governing law the law of another jurisdiction. However, in certain exceptional cases of an international agency agreement (ie, Belgian agent, foreign principal) where a foreign (but EU) governing law and jurisdiction is selected, the mandatory provisions of the Agency Act (but not necessarily the provisions of the Agency Directive) may not apply.<sup>1</sup>

### *1.1.2 Formal Requirements*

An agency agreement is not subject to any formal requirements. It may be concluded orally or in writing. Even without an explicit written

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<sup>1</sup> One important principle in international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities under the Agency Directive, notably those entitling the agent to compensation or an indemnity payment on termination.

or oral agreement, an agency relationship may arise by way of implied conduct between the parties. Furthermore, there is no specific requirement to register an agency agreement with any public authority to ensure its validity. However, other types of registration may be required because an agent is considered a “merchant” and must be registered as such.

As in the Agency Directive, each party is entitled to obtain from the other party a written statement of the terms of the agreement upon request.

### *1.1.3 Individual/Corporate Entity*

An agent may be an individual, a partnership or a corporate entity.

### *1.1.4 Duration of Agreement*

An agency agreement may be concluded for a fixed or an indefinite period. Automatic extensions of a fixed term may also be agreed upon. An agency agreement for an indefinite period may be terminated by ordinary notice (see section 1.5 below). An agency agreement concluded for a fixed term generally ends after expiry of the fixed period unless both parties continue to perform the agreement beyond its term. In that case, the agency agreement is deemed to have been converted into an agency agreement for an indefinite term, applicable retrospectively as of the first day of the fixed term unless the agreement contains a specific automatic renewal clause that indicates the term of the renewal or the parties have explicitly agreed to renew the agreement for another fixed term.

Unwritten agreements are automatically deemed for an indefinite duration.

### *1.1.5 Pre-contractual Information*

The Belgian Act of December 19, 2005 regarding pre-contractual information in commercial cooperation agreements, now incorporated into Book X of the Belgian Economic Law Code (the “PI Act”) applies to commercial cooperation agreements pursuant to which a party

grants the other party the right to use a “commercial formula” in one or more of the following forms: (i) a shared signage, (ii) a shared trade name, (iii) the transfer of knowhow, and/or (iv) commercial or technical support.

The PI Act was predominantly intended to cover franchise agreements, but due to the very large scope of application as laid down in the Act, also other types of commercial agreements, such as agency agreements, can fall within its scope. Bank and insurance agency agreements have, however, been excluded from the scope of application of the PI Act.

When it applies, the PI Act requires the principal to provide the future contract party with a draft agreement and a separate document with certain specific information at least one month before entering into the agreement. During the one-month standstill period, no commitments, payments or deposits can be asked or received from the future contract party.

If the draft agreement and the separate information document are not provided, or if the standstill period is not respected, the party receiving the right to use a commercial formula may invoke the nullity of the agreement as a whole up to two years after the signature date. If the principal fails to include any of the required information in the separate information document, the party receiving the right to use a commercial formula may invoke the nullity of the relevant provision up to ten years after the signature date.

Whether the PI Act applies to an agency agreement is to be assessed on a case-by-case basis.

## 1.2 Exclusive/Non-Exclusive

Subject to any issues of competition law (as to which, see the specific chapter on competition law), there are no restrictions on the principal's ability to appoint exclusive/non-exclusive agents or to impose on an agent the obligation to represent the principal exclusively.

### 1.3 Non-Compete

The agency contract may, by a written non-competition clause, provide that the agent will not compete with the principal after termination, subject to the following limitations:

- it is limited to the activities and the sector (geographic or group of clients) served by the agent; and
- its duration does not exceed six months after termination.

Again, three differences from the Agency Directive need particular attention.

First, a non-compete clause may be invoked only if the contract is terminated by the agent without cause or terminated by the principal due to a serious breach of the agreement by the agent.

A non-compete clause is therefore ineffective upon termination by the principal (without cause) or by the agent (with cause).

Second, while the Agency Directive allows a non-compete clause for a maximum period of two years following termination, in Belgium, a non-compete clause is limited to six months after termination.

Third, the mere existence of a non-compete clause (even when not invoked upon termination) creates a legal (but rebuttable) presumption that the agent has furnished new customers that are of value to the principal, thus automatically creating for the agent a right to a termination payment (see section 1.5.3). This is different from the Agency Directive, which requires, for the existence of such a legal presumption, that the non-compete clause be applied (ie, invoked at the end of the relationship), as opposed to merely agreed upon (ie, at the beginning of the relationship). The trigger for the presumption in the Agency Directive seems more logical than the one set out in the Belgian Agency Act.

## 1.4 Commission

### 1.4.1 *Basic Principles*

“Commission” means the part of the remuneration that varies depending on the number of sales or their value. In other words, the agent’s fixed remuneration, cost reimbursements, bonuses or profit-sharing schemes that relate to the principal’s success only, or after-sales service remuneration, are not “commissions” and thus fall outside the provisions dealing with the agent’s right to commission described in this section.

If the agent is remunerated by commission, the following provisions apply:

A commission can be due for a transaction that is concluded as a direct result of the intervention of the agent, for a transaction that is concluded with a customer that was previously solicited by the agent for similar transactions, or for a transaction with a third party customer if it has been agreed that the agent would be exclusive to a specific territory or a list of customers and the transaction was concluded in that territory or with one of those listed customers.

The commission is deemed earned when:

- the principal has performed, or should have performed, its obligations to the customer; or
- the customer has performed its obligations, whichever is earlier.

Thus, for example, commission will ordinarily be earned when delivery is made or should have been made, but if advance payments are made by the principal’s customers, pro rata commission will be earned earlier, on the date of such payments.

The parties can agree that commission will not be due until the customer performs its obligations (eg, pays for the goods/services) or until the date the customer should have done so if the principal had



performed its obligations when it should have (a provision of “*delcredere*”) but they cannot agree that the commission is due any later than this time.

#### 1.4.2 *When Due and Payable*

Payment is due to the agent no later than on the last day of the month following the quarter in which the commission is deemed earned. The parties to the agency agreement may not agree to a later date.

#### 1.4.3 *Extinction of Rights to Commission*

The commission may be made forfeitable, if so agreed, only:

- if, and to the extent that, it has been definitively determined that the principal’s customer will not perform its obligations (for reasons not attributable to the principal);
- if the principal’s performance of the contract has become impossible for reasons not attributable to the principal; or
- if the principal cannot be reasonably expected to perform the contract, in particular due to the fault of a third party.

Article 11 of the Agency Directive allows the right to commission to be extinguished only in the first scenario above. It also expressly prohibits any further restriction on the agent’s rights in this respect. One may thus argue that the Belgian Agency Act is in violation of the Agency Directive on this point.

#### 1.4.4 *Accounting and Audit*

Pursuant to Article 16 of the Agency Act, the principal must provide the commercial agent with a statement of the commissions due no later than on the last day of the month following the quarter in which those commissions are deemed earned. The statement must specify the basis on which the commissions were calculated.

The agent has the right to demand copies of the accounting documents of the principal, to the extent that such accounting documents are necessary to verify the amount of its commissions.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

All agency contracts of indefinite duration must be terminated by advance written notice. The notice letter must state the length of the notice period and its start and end date, and must be sent by registered mail.

Fixed term contracts do not, strictly speaking, have to be terminated, as they simply expire at the end of the agreed term, but a written notice is still recommended to exclude any risk of a tacit renewal.

### 1.5.2 *Notice Period*

Agency contracts of indefinite duration (including unwritten agreements, fixed term contracts that provide the option of early termination, or fixed term contracts that have been extended without an express automatic renewal clause or without explicit agreement on the renewal term) must be terminated by giving a notice period of not less than one month for each year (or a fraction thereof) of the agreement's duration, up to a maximum of a six months' notice. This applies to both termination by the principal and termination by the agent. Unlike some other EU countries, Belgium has exercised the option in the Agency Directive to have a mandatory notice period of up to six months, rather than three months.

If the above notice requirement is not observed, the remedy is always for damages in lieu, ie, the payment of an indemnity equal to the remuneration that would have been earned by the agent had the proper notice period been observed (based on the monthly average (fixed and/or variable) remuneration during the 12 months prior to termination).

The default position (which may be varied by agreement) is that the end of the notice period must coincide with the end of a calendar month. A notice period of three months given on February 4 will thus last until May 31.

A notice by registered mail has effect only as of the third business day following the postal date. Therefore, a termination notice with a three-month notice period sent by registered mail on Friday, January 27, will last until May 31.

Early termination (ie, termination of a fixed term contract before its expiry) or immediate termination (ie, termination of an indefinite term contract without a notice period) is possible in the case of (i) grave fault (a concept generally well understood), or (ii) exceptional circumstances (a concept less well understood and probably meaning a circumstance beyond the control of either party that is both exceptional and renders any further cooperation immediately and definitively impossible).

In the event of such grave fault or exceptional circumstances, the right to early or immediate termination may be exercised only within seven business days from the date on which the facts supporting such early or immediate termination are known to the terminating party.

### 1.5.3 *Liability of Principal on Termination*

#### **Commission**

With respect to business concluded after termination of the agency, the agent is entitled to commission if:

- the order has been received by the agent or the principal prior to termination; or
- the business was obtained principally by the activity of the agent prior to termination and is concluded within six months after termination.

In other words, the Agency Directive's requirement for a "reasonable term after termination" has been implemented in Belgium as a period of six months after termination.

### ***Termination Payment***

Upon termination of the contract, the agent is entitled to a termination payment in the form of an indemnity if (i) he has furnished new clients to the principal or has substantially developed business with existing clients, and (ii) the benefit of such activity accrues to the principal unless:

- the termination is due to the grave fault of the agent;
- the agent terminates the contract for reasons other than the "grave fault" of the principal or the agent's inability to continue due to his age or disability; or
- the agent sells, with the consent of the principal, his agency to another party.

The amount of the indemnity is not specified in the Agency Act, which merely states that it shall be in proportion to the volume of business that has been produced by the agent. The Agency Act does limit the payment to a maximum of one-year remuneration (based on a five-year average) but then goes on to provide that the agent may obtain more if and to the extent that he can prove that his actual damages exceed the termination payment. This "escape clause" is generally considered to create more uncertainty than anything else.

This right to an indemnity is "over and above" the right to post-termination commissions and/or to damages in lieu of notice (see above), and is always due if the conditions are fulfilled.

## **1.6 Limitation Periods**

All claims between an agent and a principal originating from the agency agreement must be formally commenced by court

proceedings within a term that is the shortest of either one year following the effective date of termination or five years following the date of the act/omission on which the claim is based.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Belgium is, and has almost always been, primarily a country of importers-distributors, as opposed to homegrown manufacturers. Apart from some notable exceptions, most of the common consumer goods and household appliances (cars, dishwashers, computers, television sets, furniture, batteries, garden equipment, DIY-tools, etc.) are manufactured in other countries. Against this background, parliament enacted, on July 27, 1961, a specific law on the “Unilateral Termination of Exclusive Distributorship Agreements granted for an indefinite duration” (“the Act”), now part of book X of the new Economic Law Code, granting substantial protection to Belgian distributors in the event that their agreements with manufacturers are terminated. The Act itself is very short (six articles), but more than 50 years of case law has led to abundant cases and literature.

The Act applies to most but not all distributorship agreements (see below) and, when it does apply, the Act is mandatory and may not be deviated from (see section 2.5.1). In situations where the Act does not apply, the relationship is governed by the provisions of the agreement, completed, where necessary, by the rules of general Belgian contract law (see section 2.5.2).

#### ***When Does the Act Apply?***

The Act may be characterized by its three main components: (i) it applies only under a specific set of conditions, (ii) it addresses only the situation of the unilateral termination of the distribution agreement by the manufacturer and (iii) when applicable, it is mandatory and may not be deviated from.

The specified conditions are that the distributor must be:

- an exclusive distributor (although the Act will also apply if the distributor is “implicitly” exclusive or is *quasi* or *pseudo* exclusive; see further discussion below);
- appointed for the territory of Belgium or a part thereof; and
- appointed for an indefinite duration.

“Appointed” does not require the existence of a written agreement. Therefore, a distributorship arrangement without any written documents, or with only some letters and invoices going back and forth, may also, under certain conditions, be governed by the Act (eg, when the manufacturer has clearly taken an interest in how the distributor runs its business).

### ***The “Exclusivity” Condition***

This condition may be fulfilled in different ways:

- The distributor is contractually appointed as the exclusive distributor in a given territory and that provision has been honored in fact (*contractually exclusive*).
- There is no written agreement or the written agreement is vague or silent on whether the appointment is exclusive or non-exclusive but from other elements (such as the manufacturer’s website or promotional material or correspondence), it is clear that the manufacturer has wanted the distributor to be a real distributor (and not just a reseller) as well as an exclusive one (*implicitly exclusive*). A strong indication would be that the distributor has for years been the only distributor in his territory.

In both the *contractually exclusive* and the *implicitly exclusive* relationship, the right that the manufacturer may have reserved to make “direct sales” (ie, the right of the

manufacturer to sell the products directly in the territory with or without the right of the distributor to claim a “commission”) does not undo the exclusive nature of the relationship.

- Regardless of what the contract says, including even when it says “non-exclusive,” and regardless of whether other distributors or the manufacturer itself are active in the same territory, the distributor in question sells practically all the contract goods (>80%) in the territory (*quasi exclusive*).
- The distributor is truly non-exclusive (ie, neither contractually or implicitly, nor quasi-exclusive), but the contract imposes upon the distributor important duties which are so onerous that a termination of the agreement will cause substantial prejudice to the distributor (eg, obligation to provide substantial after-sales services, obligation to respect minimum sales quotas, minimum stock quotas, and minimum investments, advertisement or promotion obligations) (*pseudo exclusive*).

### ***Appointed on Belgian Territory***

As long as the distributor is active on Belgian territory or a part thereof, this condition will be deemed fulfilled. It does not matter whether it is also appointed as the distributor in other territories (the Netherlands, Luxembourg, etc.) but case law agrees that the protective clauses in the Act should apply only to its “Belgian” activities. Conversely, it is argued that a foreign distributor (eg, a Dutch distributor) will also be entitled to protection under the Act if, and to the extent that, the Dutch distributor is (also) active in Belgium.

### ***Appointed for an Indefinite Duration***

The Act does not apply to distributorship agreements for a fixed term, although it does include provisions aimed at ensuring that fixed term agreements are not used to avoid the application of the Act.

First, the Act stipulates that agreements for a fixed duration (however short or long that may be) can be terminated only at the expiry of the fixed term, and, to avoid tacit renewal, by means of a written notice sent by registered mail not more than six and not less than three months before the expiry date of the fixed term. Failure to comply with this formality will cause the agreement to be tacitly renewed. The renewal period will be deemed for a non-fixed term (ie, indefinite duration) unless the agreement contains an explicit automatic renewal clause and such clause indicates the term of the renewal. In the latter case, the agreement will be renewed for the term specified in the renewal clause; the same rules apply on the next expiry date of that term.

Second, a fixed term agreement can be renewed only twice, either by express agreement (provided that the previous fixed term agreement was validly terminated) or pursuant to an automatic renewal clause. Upon the third renewal, it becomes, by virtue of law, an agreement for an indefinite duration.

Unwritten agreements are automatically deemed to run for an indefinite duration. These rules are a potential trap for unwary suppliers, who must not assume that their “fixed term” agreement protects them from the application of the Act.

### ***Consequences of Application***

Once recognized as an agreement for an indefinite duration, either from the start of the relationship (because it has been expressly agreed in the contract or because there is no written contract), or as a result of the above rules (a de facto renewal without an automatic renewal clause, a renewal by virtue of an automatic renewal clause which does not specify the renewal term, or multiple renewals), the distributor is, in the case of unilateral termination by the manufacturer, entitled to a threefold protection (see section 2.3.2).



### 2.1.2 *Formal Requirements*

There are no filing, notification or authorization requirements for ensuring the validity of a distributorship agreement. There is no national register of distributors, and, as mentioned, distributorship agreements may be verbal.

### 2.1.3 *Individual/Corporate Entity*

The distributor may be either an individual or a corporate entity. That does not change any of the principles explained in this chapter.

### 2.1.4 *Duration of Agreement*

Suppliers are free to appoint distributors for fixed or indefinite periods, but, as explained in this chapter, the legal consequences of each option are very different.

### 2.1.5 *Pre-contractual Information*

Similar to what has been set out with respect to agency agreements, the Belgian Act of December 19, 2005 regarding pre-contractual information in commercial cooperation agreements, now incorporated into Book X of the Belgian Economic Law Code (the “PI Act”), could also apply to distribution agreements that are regarded as commercial cooperation agreements pursuant to which a party grants the other party the right to use a “commercial formula” in one or more of the following forms: (i) a shared signage; (ii) a shared trade name; (iii) the transfer of knowhow; and/or (iv) commercial or technical support.

Reference is made to the summary of the PI Act in point 1.1(e) above.

Whether the PI Act applies to a distribution agreement is to be assessed on a case-by-case basis.

## 2.2 *Exclusive/Non-Exclusive*

Suppliers are free to grant or not to grant the distributor exclusivity for a certain territory, but, as explained in this chapter, the legal consequences of each option are very different.

## 2.3 Termination

### 2.3.1 *Situation of Unilateral Termination by Manufacturer Only*

It is important to note that the Act only addresses the scenario of the manufacturer unilaterally terminating the distributorship agreement without cause. The Act does not apply to a termination by the distributor (unless the distributor was forced into terminating by the actions of the manufacturer), to a termination by both parties by mutual consent (although care must be taken to ensure that the distributor would not be able to deny having given consent, eg, by effecting the termination as part of a settlement agreement), or to a termination by the manufacturer for a substantial breach of contract on the part of the distributor. In the latter case, the manufacturer is entitled to terminate the agreement with immediate effect upon notice to the distributor. However, it is likely that the distributor (who would otherwise have benefited from the protection of the Act) would take legal action to dispute the seriousness of the breach. If the manufacturer terminates the agreement in reliance on a clause expressly permitting termination in the event of a breach, such breach would, viewed objectively, have to be substantial enough to justify termination.

### 2.3.2 *Notice Period and Liability of Manufacturer Upon Termination: The Threefold Protection Mechanism*

Assuming that the Act applies, there are three levels of protection for a distributor where the manufacturer terminates the agreement without cause:

#### ***Reasonable Termination Notice or Cash Equivalent in Lieu***

The first protection mechanism is the notice period. An agreement for an indefinite duration may be terminated at any time upon notice, or by paying a cash indemnity in lieu of notice. The law limits itself to stating that the notice period must be “fair and reasonable” and leaves it to the courts to fill that in. The principle is that the notice period must cover the period that the distributor needs to re-organize itself properly

following the loss of the distribution rights. There is thus no mathematical formula and there is a certain level of discrepancy between courts of one district and courts of another, as well as between judges in that same district. It is, however, understood that fairness and reasonableness vary directly (but not exclusively) with the duration of the relationship - the longer the relationship, the longer the notice period.

Although there is no mathematical formula, and each judge may approach this differently, a good starting position is to accept that, as a rule of thumb, the notice period must be equal to one month (for relationships that lasted a long time) to one-and-a-half months (for shorter relationships) for every year of the contract term. This base figure may then be argued upward or downward. Upward arguments will be the size of the territory, profitability of the product line, difficulty of the distributor in finding a replacement product (or range of products) to distribute, the large investments made by the distributor, the importance of that business to the overall business of the distributor, the number of employees occupied by that business, the manner in which the distributor created the market that was previously non-existing, etc. Downward arguments will include the above factors argued in reverse.

Assuming that the correct notice period is determined, the manufacturer has the choice either to observe it or to pay the distributor compensatory damages in lieu of notice. A third possibility is to observe the notice period only partially: in such case, a partial compensation in lieu of notice will have to be paid out to the distributor.

To calculate the amount of compensatory damages in lieu of notice, the notice period expressed in months would be multiplied by the monthly semi-gross profit that the distributor would have received had the required number of months of notice been given. As such future calculations are impossible to make, this is usually done by way of averaging the last three or five years. Nevertheless, the “ideal”

calculation is on the basis of the future revenue stream and, consequently, it is possible to argue down the result of this averaging with evidence that the future revenue stream would have been considerably less than the average of the last three or five years. In addition, if for whatever reason a specific year is not representative of the average turnover, the averaging could be corrected.

The phrase “semi-gross” means net profit plus some incompressible costs. Incompressible costs are costs that the distributor will continue to incur during the remainder of the notice period even if it no longer has to distribute. This will include, for instance, the rent on the (part of the) warehouse that is rented for an additional number of years but is no longer used for storage of the products.

### ***Termination Payment***

The second level of protection is a clientele indemnity (or a goodwill “termination payment”). This is due in any event even if proper notice has been given (or an indemnity in lieu of that proper notice has been paid) and thus comes on top of that.

The conditions are (i) that a substantial new customer base has been developed or that the value and business of existing customers have substantially increased, (ii) through the efforts of the distributor, and (iii) these customers will transfer to the new distributor or to the manufacturer if the manufacturer “goes direct.”

Goodwill calculations are at best “elastic,” and in practice, the real calculations are almost never made (as there is no uncontested method of calculation) and a lump sum is awarded, usually based on gross profit figures (for instance the equivalent of one-year gross profit).

Examples of arguments that can be used to reduce the manufacturer’s liability on termination are given in section 2.3.2 above. However, the effect of the actual poor performance of the distributor is thought to be already incorporated in the calculations

(because the figures will be lower) and can therefore not be cited as a separate factor in reducing the clientele or termination payment award.

### ***Other Indemnities and Costs***

The third level of protection is cost reimbursement and reimbursement of redundancy payments. Cost reimbursement is intended to cover all expenses made by the distributor that are now lost to the distributor but would still be of value to the manufacturer after termination. This would, for instance, include the cost of translation of promotional material or manuals. Redundancy payments incurred by the distributor would have to be reimbursed if it could be demonstrated that the personnel were made redundant as a result of the termination and the insufficient length of the (effective) notice period.

Therefore, the manufacturer would in principle not be liable for redundancy payments if the “fair and reasonable” notice period is effectively observed by the manufacturer.

#### ***2.3.3 Return of Products***

In addition to the above, the manufacturer is obliged to take back all saleable inventory (meaning, stock which is non-obsolete and has a useful shelf-life) at the purchase price paid by the distributor and all transportation costs to be borne by the manufacturer (the extent of this obligation, too, will vary, depending on how much of the notice period is effectively observed by the manufacturer).

## **2.4 Limitation Periods**

As the Act of 1961 does not provide any specific rules on limitations, the claims of either the distributor or the manufacturer are governed by the “default” statute of limitation, which is 10 years following the act/omission on which the claim is based.

## 2.5 Mandatory Laws

### 2.5.1 *Exclusive Distributor: The Act is Mandatory and May Not Be Deviated From*

Under general Belgian contract law, the parties enjoy a freedom of contract and may stipulate any provision or condition as long as these do not violate Belgian public order or Belgian mandatory legal provisions. This is equally the case for distributorship agreements, including those that fall within the scope of the Act, with the exception, in respect of the latter, of the terms and conditions that relate to unilateral termination. The provisions of the Act being mandatory, they may not be deviated from or “contracted out.” There are two nuances to this rule that are both complex and require further in-depth legal advice on a case-by-case basis.

The first nuance is the scenario of a distributor relationship that falls within the application of the Act but where the parties have validly chosen the governing law and the competent courts (but not an arbitration tribunal) of another jurisdiction (often the manufacturer’s). In certain cases, this may result in the provisions of the Act not being applied. This may be the case where the chosen jurisdiction falls within the scope of application of (a) Brussels Regulation 1215/2012 “on jurisdiction” of December 12, 2012, and of (b) Rome I Regulation 593/2008 “on the law applicable to contractual obligations” of June 17, 2008. The exception is based on the argument that although the Act may perhaps need to be considered as an overriding mandatory provision within the meaning of Article 9.1 of the Rome I Regulation, it should not qualify as one within the meaning of Article 9.3 of the Rome I Regulation.

The second nuance is the scenario of a distributor relationship that falls outside the application of the Act (eg, not active in Belgium) but where the parties have validly chosen the governing law and the competent courts of Belgium (because, for instance, the manufacturer or importer for the EU is in Belgium). It is now accepted legal doctrine

and case law that, in such a case, “default” Belgian contract law will indeed apply, but not the provisions of the Act of 1961.

As “default” Belgian contract law allows for a large degree of contractual freedom, this second nuance leads to the (somewhat counter-intuitive) conclusion that it is generally a good legal strategy to set up a subsidiary company in Belgium that imports goods from overseas, which will then be distributed by distributors in the rest of Europe, pursuant to contracts governed by “default” Belgian contract law, which imposes virtually no restrictions on what the parties wish to agree upon (see section 2.5.2).

### 2.5.2 *Agreements Outside the Application of the Act*

“Truly” non-exclusive distributorship agreements (as explained above), fixed term distributorship agreements, and all distributorship agreements with distributors that are not active on Belgian territory do not fall within the (substantive) field of application of the Act.

This means that (with the exception of the termination formalities that apply to exclusive fixed term contracts when on Belgian territory only; see section above) they may be terminated in accordance with the provisions of the agreement or, in the absence of any relevant provisions, with the general “default” Belgian contract law.

General Belgian contract law allows the parties to agree freely on the provisions of their agreement, including the provisions relating to termination, as long as they are not abusive. Usually, termination clauses that provide for 90 days’ notice or six months’ notice are unproblematic. If nothing is provided for, the court would make its own decision on “the reasonableness of the notice period.” Outside the application of the Act of 1961, such “reasonableness” would be anything between three and six months’ notice. Here, too, if insufficient notice is given, a cash indemnity would be due in lieu thereof but the calculation would be easier and lead to substantially lower amounts. Additional indemnities would not be due unless the distributor is able (exceptionally) to demonstrate that the termination

was unjust or abusive, as a result of which it incurred specific damages.

In the case of fixed term contracts (and when exclusive upon following the notice formalities described above), the contract would simply end at the expiry of the fixed term without any compensation being due (unless agreed otherwise).





## Bulgaria

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 Law Applicable

The legal relationship between a commercial agent and a principal is regulated by Section II, Chapter VI, Part I of the Bulgarian Commercial Act, referred to hereinafter as the “CA.” The CA and its rules on commercial agents (Articles 32-48) entered into force on July 1, 1991 but have been amended and supplemented numerous times thereafter. One specific amendment effected on May 13, 2006 was aimed at transposing the rules of the Agency Directive into Bulgarian law.

Article 32 of the CA provides the basic definition for a “commercial agent,” described as a merchant (natural or legal person) engaged independently and by occupation in assisting the business of another merchant. A commercial agent may be authorized to effect transactions on behalf of the principal (direct agent), or in its own name, but for the account of the principal (indirect agent).

Thus, overall, the CA follows the Agency Directive in that it defines a commercial agent as a self-employed merchant with continuing authority to conclude or negotiate any form of transaction for the account of another merchant - a principal. Unlike the Agency Directive, the rules of the CA apply to agents in transactions related not only to the sale of goods, but also to the sale of services, and to almost all kinds of intermediation in commercial transactions (to date, the law has not imposed specific requirements on a particular intermediary, which is the case, inter alia, for financial and insurance services). Furthermore, the rules of the CA do not apply to persons engaged as representatives or brokers in stock exchange transactions, or as representatives of persons engaged in auctions.

Due to the broad definition of “commercial agent,” the CA also covers agents whose agency activities are “secondary” (ie, their activities are not the primary purpose of their agency agreement with their principal), as long as such activities are related to the provision of assistance in respect of the business activities of the principal.

### *1.1.2 Conflict of Laws*

A leading principle of Bulgarian private international law is that a contractual relationship with an international element is regulated by the law chosen by the parties. Only in cases where no choice (expressed or implied) has been made, is the proper law of contract to be determined according to the rule of the closest connection - for example, the law of the state, under the jurisdiction of which a substantial part of the facts of the case have taken place.

With respect to commercial agency agreements, the rule of closest connection would point to Bulgaria where (i) the agent is habitually resident or has its place of incorporation in Bulgaria, or (ii) the agent has its main place of business in Bulgaria. If the place where the performance under the agency agreement is effected differs from the main place of business of the agent, it is presumed that the agreement is most closely connected with Bulgaria if, at the moment of execution of the agreement, the performance is to be effected from a place of business in Bulgaria.

However, pursuant to Article 46 (1) of the Bulgarian Code on Private International Law, the foreign law selected by the parties may not preempt the application of the mandatory rules of Bulgarian law which, according to their subject matter and aim, should be applied to a particular relationship irrespective of its attachment to a foreign law.

Furthermore, the choice of law shall not apply to relations which, if governed and construed under a foreign law, would infringe Bulgarian public policy. In both cases, the court will always apply the Bulgarian mandatory rules, regardless of the contractual choice of foreign law. Should the particular rule rise to the level of a principle of Bulgarian



public policy, then Bulgarian law would apply to the extent that no other appropriate provision of the chosen foreign law could be attached to the respective factual elements of the legal relationship.

It should be noted in this regard that the rules related to remuneration of the agent and on termination of the agency agreement are regarded as mandatory, and their application to an agency relationship developed in Bulgarian territory cannot be dismissed even by an express will of the parties to the opposite. These rules are considered essential for Bulgarian legal order and parties to an agency agreement falling within Bulgarian jurisdiction may not evade them by simple implementation of party autonomy through a choice of law clause.

### *1.1.3 Formal Requirements*

An agency agreement should be executed in writing, but no formal registration with a public authority is required. The courts have accepted that even where an explicit written agreement does not exist, the existence of an agency relationship may be established by extrinsic evidence, such as communication between the parties. The burden of proving the existence of an unwritten agreement is upon the party claiming that an agreement exists.

### *1.1.4 Individual/Corporate Entity*

The agent may act as an individual or may organize his business in the form of a commercial company (a partnership or a corporation). However, the agent should have the status of a “merchant” or should be otherwise entitled to engage by occupation in agency transactions pursuant to the relevant *lex personae*. For Bulgarian natural and legal persons, this is achieved by a formal registration with the Bulgarian Commercial Register.

### *1.1.5 Duration of an Agency Agreement*

An agency agreement may be concluded either for a fixed or for an indefinite period. An agency agreement for a fixed term, which

continues to be performed by both parties following the expiry of such term is deemed to be converted to an agency agreement for an indefinite term.

An agreement for a definite term may be terminated before expiration without fault only if the terminating party compensates the other party for the injury caused. If an agency agreement is concluded for an indefinite term, within the first and second year of its commencement, either party may terminate it upon one month or two months' prior notice, respectively. After the expiry of the second year from the contract's commencement, the minimum notice period is three months.

## 1.2 Exclusive/Non-Exclusive

The CA does not limit or require the principal to grant exclusivity to its agent. The general rule is that where an agent is entrusted with a specified territory or a circle of clients, the agent is entitled to commission for all transactions concluded with persons from the same territory/clientele even without the agent's assistance. This is not mandatory, however, and the provisions of the agency agreement shall take precedence.

## 1.3 Non-Compete

Generally, an agent may represent several merchants as long as they are not competitors. The agent and the principal may enter into an agreement (i) whereby the agent could be restricted from representing competitors, or (ii) whereby they could restrict the agent even further, limiting its rights to represent (any) other merchants. Insofar as such rights or obligations form part of the agency agreement, they must be concluded in writing.

Any restrictions on the activities of the agent following the termination of the agency agreement should be agreed upon in writing. Such restrictions must not exceed the product/geographical scope of the representative authority conferred upon the agent pursuant to the agency agreement, and may not be extended for more than two years



following the termination of the agency agreement. The agent should be provided with appropriate compensation during the period over which the non-compete covenant is operating. The courts have noted that any restrictions imposed by a non-compete covenant must be evaluated on a case-by-case basis in order to ascertain whether the commercial agent is prevented or restricted from earning a living.

Finally, where the agreement is terminated by the agent because of the principal's fault, the agent is entitled to discharge himself from the non-compete restriction by notice in writing served to the principal within one month of the date of termination.

## 1.4 Commission

### 1.4.1 *Basic Principles*

The agent is entitled to receive commission for all transactions effected by him or through his assistance during the term of the agency agreement. Commission is also due for transactions prepared by the agent but not concluded by the principal, except in cases where this is due to something other than the fault of the principal. Finally, an agent granted with exclusivity for a specific territory or circle of clients is generally (unless otherwise provided in the agreement) entitled to commission for all transactions concluded with persons from the same territory or with the same clientele, even without his assistance.

Where the commission is calculated on the basis of the price of the transactions concluded by the agent or with his assistance, price reductions granted by the principal following conclusion of the transaction with the third party may not operate to reduce the amount of the commission to which the agent is entitled. However, the parties may derogate from this provision.

In the absence of an agreement specifying the amount of commission payable, the agent will be entitled to customary remuneration. If the customary rate cannot be established, the commission shall be determined by the courts according to merit.

Furthermore, unless the agreement provides otherwise, an agent is also entitled to reimbursement for the customary expenses related to its activities. The principal is always obliged to cover extraordinary expenses of the agent (eg, due to a specific order).

In addition, upon termination of the agency agreement (see section 1.5.3 below), the agent may seek remuneration for all transactions: (i) concluded or (ii) negotiated by the agent but not yet concluded, before termination of the agency agreement.

#### *1.4.2 When Due and Payable?*

The right to receive commission arises as soon as, and to the extent that, (i) the principal has executed the transaction, (ii) the principal should have executed the transaction according to the contract with the third party or (iii) the third party has performed his contractual obligations. At the very latest, commission will become due when the third party has fulfilled his part of the transaction or should have done so if the principal had performed its obligations. Any derogation from this rule to the detriment of the agent is invalid.

The commission is normally paid on a monthly basis. The parties may derogate from this rule and specify another payment term, which may not be extended beyond the end of the month, following the quarter during which the relevant transaction was concluded or should have been concluded.

#### *1.4.3 Extinction of Rights to Commission*

The right to receive commission will be extinguished if, and to the extent that, it is established that the contract with the third party will not be executed for reasons outside the principal's control (which will not be the case where the principal is found to have been negligent in his dealings with the third party), or where it is unreasonable for the principal to execute the transaction (eg, where the financial risk for dealing with that third party is clearly high).



#### 1.4.4 *Accounting and Audit*

Pursuant to Article 36(4) and 36(5) CA, the principal must supply the agent with the information necessary for calculating the amount of the remuneration due (agency commission), ie, not later than the last day of the month following the quarter in which the corresponding transaction has been or had to be concluded. Both the agent and the principal are entitled to obtain from one another an extract from the accounting books related to the transactions concluded under the agency agreement, and in particular such extracts as may be necessary in order to check the amount of the remuneration to which the agent is entitled.

The principal is obliged to provide commission accounts to the agent on a regular basis, reflecting the agreed-upon term for payment of the commission. Thus, in light of the restrictions (discussed above in section 1.4.2), the parties to an agency agreement may not agree on an accounting period longer than a quarter.

The accounting books must contain the relevant information necessary to calculate the commission due. In addition, the agent may request the disclosure and inspection of the books and may ask to be given access to all the information needed for the calculation of their commission. If the books are incorrect, incomplete or if the principal does not keep the books, the courts may oblige the principal to provide all the necessary information.

### 1.5 Termination

#### 1.5.1 *Formal Requirements*

The law does not impose any requirements as to the form of notice of termination. For evidentiary purposes, however, it is advisable to provide a written notice of termination.

### **1.5.2 Notice Period**

As already noted hereinabove (see section 1.1.5 above), agreements concluded for a specific term may not be terminated without just cause, unless the other party is provided with sufficient compensation.

Agreements for an indefinite term, on the other hand, must comply with minimum notice periods. The length of the notice period will vary according to the duration of the agency agreement: (i) one month, ie, during the first year following the effective date of the agency agreement; (ii) two months, ie, during the second year; and (iii) three months, ie, during the third and any subsequent year. The parties may specify longer notification periods, but may not agree on shorter ones.

### **1.5.3 Liability of Principal on Termination**

#### **Commission**

Termination of the agreement does not affect the agent's right to receive commission on transactions concluded before termination of the agency agreement, irrespective of whether the commission has become due or not during the term of the agreement ("pipeline commission").

Furthermore, the agent may claim "post-termination commission" due for transactions concluded by the principal after the date of termination, where:

- the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency agreement (Article 40(4) CA); or
- an order by a third party was accepted by the commercial agent before the termination of the agency agreement (Article 36 (3) CA).

A successor agent is not entitled to receive commission on any such transaction if the former agent is entitled to the relevant commission, unless it is equitable that the commission be shared in circumstances





where the successor agent's efforts contributed to the execution of the transaction (Article 40 (5) CA).

### ***Termination payment***

Where the principal has terminated without good cause an agency agreement concluded for a fixed term, before the expiry thereof, the agent may claim damages resulting from an early termination. Such damages in principle are equal to the remuneration due to the agent for the remaining period of the agency agreement.

The CA, by virtue of Article 40 (1), further entitles the agent (or the successors of a deceased agent) to a termination payment in the form of an indemnity provided that the principal:

- continues, after termination of the agency agreement, to benefit from the clients attracted by the terminated agent; or
- the terminated agent has significantly increased the number of transactions concluded with existing clients.

The agent's entitlement to such an indemnity should be determined considering all relevant circumstances, including any post-termination non-compete covenants. Generally, the payment is equal to the amount of the agent's annual remuneration, calculated on the basis of the average remuneration over the preceding five years or over the period of the agency agreement, if this was less than five years.

The agent is not entitled to claim an indemnity under any of the following circumstances:

- if more than a year has passed since the termination of the agreement and the agent has not notified the principal of his claim in writing;
- if the agency agreement has been terminated through the agent's fault, or has been terminated unilaterally by the agent with due notice and through no fault of the principal; or

- the agent has transferred its rights and obligations under the agency agreement to a third party, with the consent of the principal.

## 1.6 Limitation Periods

The CA does not provide for a specific statute of limitations for claims related to commission and expenses (if the agent is entitled to the latter) arising out of an agency agreement. Pursuant to the general principles of Bulgarian Contract law, such claims will become statute-barred within (i) three years, where the payment is due on a monthly or other regular basis, or (ii) five years, where a payment is due upon conclusion of each individual transaction, commencing as of the date on which the payment becomes due.

Claims for a termination payment upon termination of the agreement must be brought within one year following the termination thereof (Article 40 (3) CA).

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Under Bulgarian law, the relationship between a distributor and a supplier can be classified either as commercial agency or as a continuous supply/consignment agreement, depending on the bundle of rights and obligations accorded to the parties.

Presently, under Bulgarian law, there are no specific rules regulating distribution agreements as such. Bulgarian legal theory and practice consider distribution agreements to be a variation of the sales contract, under which the seller is obliged to provide a constant supply of certain goods over a period of time and the buyer is obliged to accept the goods, to pay the seller the agreed price, and to market the goods in its own name and for its own account. However, depending on the degree of autonomy of the distributor, especially the



supervisory rights of the supplier, the commercial agency protection rights may also apply.

The general rule is that the more autonomous the distributor is in managing its enterprise, the less probable it is that it will qualify as a commercial agent. The most significant distinction between an “ordinary” distributor and a commercial agent is that, under Bulgarian law, the commercial agent acts on behalf of the principal, while in contrast, the distributor acts on its own behalf and bears the risk of its own economic activity.

According to the interpretation of the statutes provided by current case law, the distinction between a distributor and a commercial agent is based on the so-called “independent dealer” test. Pursuant to the latter, a distributor will not be deemed a commercial agent where the distributor enters into sales agreements with the supplier and resells the purchased goods to customers on its own behalf and for its own account, and receives commercial profit, measured as the margin between purchase and sales prices. On the contrary, the commercial agent assists the principal in its commercial activity, acting on behalf and for the account of the principal, and receives remuneration as a percentage of the deals executed on behalf of the principal.

### *2.1.2 Formal Requirements*

There are no formal requirements for the validity of a distribution agreement – it may be concluded orally or in writing. Even without an explicit written or oral agreement, the relationship can arise by way of implied conduct between the parties. Furthermore, there is no specific requirement to register a distribution agreement with any public authority to ensure its validity.

### *2.1.3 Individual/Corporate Entity*

The distributor may be a natural or a legal person (whether a partnership or a corporation). Where the distributor is a natural person, he should be registered as a merchant (sole trader) with the Commercial Register.

#### 2.1.4 *Duration of Agreement*

Distribution agreements may be for a fixed or an indefinite period.

### 2.2 Exclusive/Non-Exclusive

Pursuant to the principle of freedom to contract, the parties to a distribution agreement are generally free to determine the scope and extent of their respective rights and obligations. Thus as a general rule, exclusivity clauses, which restrict the rights of one of the parties to a distribution agreement to conclude supply transactions with competing suppliers/clients, are permissible insofar as such undertakings do not infringe the rules of Bulgarian or EU Competition law. The parties are free to agree on whether the distributor will have an exclusive or a non-exclusive region/product range/clientele, etc.

Bulgarian law and practice recognizes both exclusive supply and exclusive purchase agreements. In the first case, exclusivity is in favor of the distributor, and it reserves a specific territory or clientele for them; while in the second case, exclusivity favors the supplier and restricts the distributor in its ability to deal with other suppliers. The latter restriction usually is shaped as a non-compete covenant, whereby the distributor agrees not to distribute the goods of any other undertaking to the extent that such goods compete with the goods of the supplier.

It should be noted, however, that unless an express provision to the contrary is included in the agreement, the relations between the parties shall be deemed to be non-exclusive, ie, the supplier has the freedom to sell into the territory through other distributors and possibly via direct sales to customers, while the distributor may purchase goods from competitors of the supplier. Thus, for the avoidance of doubt, exclusivity should be expressly stipulated in the distribution agreement, or it should follow from the bundle of rights and obligations accorded to each of the parties thereto. In particular, the agreement should clearly specify whether the supplier is prevented from selling the contractual goods within the contractual territory through another



distributor and/or whether he may sell directly to customers in the contractual territory.

## 2.3 Non-Compete

As noted above, non-compete (including exclusive purchasing) undertakings are permitted in distribution agreements, so long as they do not infringe the rules of Bulgarian and EU Competition law.

## 2.4 Termination

### 2.4.1 *Formal Requirements*

Bulgarian law does not contain any explicit provisions regulating termination of a distribution agreement. The law allows the parties to provide for termination of their contract when a condition arises, including stipulating a right to unilateral termination at the discretion of one or both of the parties. The principle of contractual freedom allows the parties to determine events upon which the agreement may be terminated by a unilateral declaration of one of the parties, including in case of default, as well as the notification required for such termination.

Provided that the parties to a distribution agreement have not agreed on specific termination grounds and procedures, a distribution agreement shall be terminated in compliance with the general provisions of Bulgarian Contract law, ie, on the grounds explicitly provided for in the law, or upon mutual consent of the parties.

The law indeed stipulates that where the agreement was executed in writing, notice of termination should also be served in writing. However, this requirement is not related to the validity of the declaration for termination, but serves only evidentiary purposes. In all cases, for the avoidance of doubt and to satisfy the burden of proof, it is advisable to give advance written notice within a reasonable time and in a way that may evidence the receipt of such notice.

#### *2.4.2 Notice Period*

There is no statutory defined notice period and the parties to a distribution agreement are free to agree whether in the event of termination thereof a notice period will be required and what will be its duration. In the absence of an agreed-on notice period, notice must be served reasonably in advance before termination. The burden of proof that the notice has been received is borne by the party that served the notice.

The courts will determine whether the notice was “reasonable” taking into consideration all the circumstances of the relationship between the parties, as well as the facts of the situation at the time such notice was given. The courts will examine, *inter alia*, the length of the distribution relationship, the practices adopted by the parties for notifying events under the agreement, the specific products and requirements of the clientele, and so forth. Normally, a period between three and six months is considered reasonable.

Even if the period of notice given is found not to be “reasonable,” the termination itself will remain valid although the aggrieved party will be entitled to a remedy in the form of damages. Furthermore, in certain situations where termination is exercised in bad faith (including where the length of the notice period is unreasonably short) the aggrieved party could also claim damages in tort, raising a claim of unfair competition.

#### *2.4.3 Liability of Supplier on Termination*

Unlike the commercial agent, a distributor is not entitled to any statutory compensation or termination payment where a distribution agreement is terminated or expires by efflux of time. There is no specific requirement for payment of indemnity/commission in the event of lawful termination of a distribution agreement. Therefore, unless it is provided for in the agreement, the distributor would not be entitled to claim a termination payment.



The only remedy available to the distributor is to claim damages, which may be awarded if the distributor suffers damages as a result of the contract not being performed/terminated in accordance with its terms.

#### 2.4.4 *Return of Products*

Upon termination of an ordinary distribution agreement, the supplier is not obliged to buy back unsold products from the distributor, and neither is the distributor obliged to return unsold products to the supplier. However, in the specific case of a distributor acting on the basis of a consignment agreement, the rule is exactly the opposite and return of unsold goods will be required, since the title in such goods shall remain with the supplier.

The parties may agree otherwise in the agreement and it is common to require a distributor to sell back any remaining products to the supplier.

### 2.5 Limitation Periods

Bulgarian law does not provide for a special limitation period for distribution agreements. Pursuant to the general rules of the Obligations and Contracts Act, the party to, inter alia, a distribution agreement will normally have five years to raise its claims for breach of contract, commencing as of the date the respective cause of action has accrued. Where the claim is based on default in respect of an obligation with periodic performance, it must be asserted no later than three years after the party becomes aware of the damages/loss.

# Cyprus

## 1. Agency Agreement

### 1.1 General

Specific legislation on agency and distribution arrangements was first introduced in preparation for entry into the European Union. Until then, issues had been dealt with under common law and the Contract Law Cap. 149 (the “Contract Law”). Domestic law on the matter has continued to evolve in line with the *acquis communautaire* since Cyprus joined the EU.

#### 1.1.1 Law Applicable

The legal framework with respect to agency consists of the following:

- Articles 142-198 of the Contract Law, which essentially reflect English common law principles;
- The Commercial Agents Law (the “1986 Law”), as amended by Laws 21(I) of 1994 and 148(I) of 2000;
- The Regulation of Relations between Commercial Agents and Principals Law (the “1992 Law”), as amended by Law 149(I) of 2000; and
- The Commercial Agents (Formation and Functioning of the Board, Registration of Members and Charges) (Amending) Regulations of 2003 (the “Regulations”), which came into effect on May 1, 2004, on accession to the EU.

Both the 1986 Law as amended and the 1992 Law as amended are substantially in line with EU legislation as Cyprus has implemented the Agency Directive. In the absence of express statutory provisions, English common law principles are applied. They also provide guidance in interpreting the provisions of the Contract Law.





A commercial agent is defined by Article 2 of the 1986 Law, as amended, as:

“Every legal or natural person who, by his capacity as an independent intermediary, has the permanent authority to negotiate on behalf of another person, the principal, the sale or purchase of goods or negotiate and conclude such actions in the name and on behalf of the principal.”

The legal doctrines that have evolved may be divided into two broad categories relating respectively to the external aspects of the agency and its internal aspects. The first concerns the agent’s power to bind his principal, and is of crucial importance to third parties dealing with agents. The second concerns the rights and liabilities of the principal and the agent *inter se*: it imposes certain obligations on the agent and regulates his rights to remuneration and indemnity.

Unless otherwise stated, any rules set out in the rest of this section apply to agents classified as “commercial agents.” Where there is any overlap or inconsistency between relevant legislation and the common law, the former will prevail.

### 1.1.2 Formal Requirements

The relationship of principal and agent may be established only with the consent of both parties. An agency may be created by:

- express appointment;
- the conduct or situation of the parties or from the necessity of the case; or
- ratification by the principal.

While it is common for an agency relationship to arise by way of an agreement, the legal requirement to have such agreements evidenced in writing applies only if the agreement is classified as a commercial agency agreement. The actual relationship of the parties is

determined by all the circumstances of the particular case and not merely by the use of the word agent or agency in an agreement.

Part IV of the 1992 Law obliges both parties to a commercial agency agreement to sign a written agreement which determines the terms of the commercial agency and any other subsequent terms to be agreed. The following factors determine whether the contract between principal and agent falls within the ambit of the 1992 Law:

- If the agreement is a written agreement concluded before the 1992 Law came into force (in July 1992), the 1992 Law will not apply and the relevant law will be the Contract Law and common law.
- If the agreement is an unwritten agreement concluded before July 1992, all provisions of the 1992 Law will apply.
- If the agreement is a written agreement concluded after July 1992, the 1992 Law will apply.

Article 143 of the Contract Law provides that any person who has capacity to contract may appoint an agent.

Article 3 of the 1994 Law, which amended Article 4 of the 1986 Law, restricts the ability to act as a commercial agent. The necessary requirements are that the commercial agent:

- has not been convicted, within the last 10 years preceding the date of submission of the application for registration, of any offence under the Exchange Control Law or the Customs and Consumption Taxes Law, or any other offence involving immorality or dishonesty;
- has never been declared bankrupt; and
- is a high school graduate.



### 1.1.3 *Individual/Corporate Entity*

The Companies Law, Cap. 113 (the “Companies Law”), which closely resembles the English 1948 Companies Act, provides that a company registered in Cyprus under the Companies Law has capacity to enter into any contract or to do any act provided for in the company’s memorandum. It is therefore possible for a corporate entity to enter into an agency agreement if its memorandum permits such activity.

Both individuals and corporate entities fall within the definition of a commercial agent. It is important to note that officers of companies or associations, partners, administrators appointed by the court, insolvency practitioners and liquidators are expressly excluded from the scope of the definition.

### 1.1.4 *Duration*

The term of an agency agreement may be fixed or indefinite. If the agreement is silent on the issue of duration, it will be deemed to have been entered into for an indefinite period and terminable on notice as specified in Articles 16-17 of the 1992 Law. An agency agreement concluded for a fixed term will expire at the end of the term. If a fixed-term commercial agency agreement continues to be performed by the parties after its expiration, it will be considered to have become a commercial agency agreement of an indefinite duration.

### 1.1.5 *Sub-agents*

The issue of sub-agents is dealt with in Articles 151-154 of the Contract Law. A sub-agent is defined as “a person competent to contract, employed by and acting under the control of the original agent in the business of the agency.” If a sub-agent is properly appointed, the principal is, insofar as third parties are concerned, represented by the sub-agent and is bound by and accountable for his acts as if he were an agent originally appointed by the principal. The agent is responsible to the principal for the acts of the sub-agent and the sub-agent is responsible for his acts to the agent, but not to the principal except in case of fraud or willful wrongdoing.

Article 154 makes it clear that where an agent appoints a person to act as a sub-agent without authority from the principal, the agent will be liable for the sub-agent's acts both to the principal and to third persons. In that case, the principal is not represented by or liable for the acts of the sub-agent, nor is the sub-agent liable to the principal.

## 1.2 Exclusive/Non-Exclusive

In general, a principal may appoint an agent on an exclusive or a non-exclusive basis. Similarly, there is no general prohibition on agents acting for more than one principal. However, it is important to note that Article 3 of the 1992 Law places a commercial agent under a general duty to act according to the law and in good faith toward the principal and in the best interests of the principal. Therefore, in most circumstances it is unlikely that an agent may also act for a competitor of the principal.

In practice, the issue of exclusivity is generally dealt with in the agency agreement. Exclusivity rights may be granted:

- in favor of the principal;
- in favor of the agent; or
- in favor of both agent and principal.

If the agreement is silent on this point, the agency will be deemed to be non-exclusive. Thus, the agent may act for other non-competing principals and the principal may appoint other agents.

## 1.3 Non-Compete

As stated previously, under the 1992 Law, the commercial agent is under an obligation, during the exercise of his duties, to act according to the law and in good faith toward the principal and to safeguard the principal's interests. Acting as an agent for two competing principals is generally likely to be inconsistent with this obligation. Equally, an agent placing himself in direct competition with his principal will breach this obligation. Article 9 of the 1986 Law renders commercial



agents liable for up to six months' imprisonment or a fine, or both, if they breach any of the provisions of the law.

In practice, the issue is commonly dealt with via the inclusion of a “non-compete” clause in the agency agreement. Such a clause generally extends beyond the period of the agency agreement. A Cypriot court, however, will uphold such a clause only if it is consistent with Article 20 of the 1992 Law and the prohibition of contracts in restraint of trade contained in the Contract Law. In making its assessment, the court will have regard to matters such as the customer base or geographical territory referred to, the period of the prohibition (Article 20 of the 1992 Law restricts non-compete agreements to a maximum duration of two years), the type of goods included in the prohibition and the extent to which the agent's ability to earn an income is impaired.

## 1.4 Commission

### 1.4.1 *Basic Principles*

In cases of remuneration in the form of a commission, the 1992 Law sets out the circumstances in which a commercial agent is entitled to commission from commercial transactions contracted during and after expiration of the commercial agency agreement. An agent is entitled to commission during the agreement if:

- the transaction was secured due to the involvement of the commercial agent;
- the transaction was contracted with a third party which the commercial agent had secured earlier as a client for transactions of a similar kind; or
- the agent was appointed to cover a particular geographical area or a particular group of people, and the transaction was contracted within the specified geographical area or with a person belonging to the specified group even if negotiations for the transaction were carried out by a person other than the

commercial agent or a different agreement was contracted by the commercial agent.

An agent is entitled to commission after expiration of the agreement if:

- the transaction is mainly due to the activity he developed himself during the term of the agreement; or
- the order of the third party came to the commercial agent or the principal before the expiration of the agreement.

In all cases, the test is whether, as a matter of construction of the commercial agency agreement, the parties intended that the agent be paid commission after termination. The older authorities held that there must be clear and unequivocal words to entitle the agent to such commission, but this thinking has changed; it now appears that the normal rules for implying terms into a contract must be applied.

Commission may be shared between previous and present commercial agents if this is just and right under the circumstances. According to Article 11 of the 1992 Law, a right to commission exists in any of the following cases:

- the principal has executed the agreement with the third party;
- the principal should have executed the agreement; or
- the third party has executed the agreement.

Importantly, the 1992 Law does not allow the parties to deviate from the statutory provisions relating to commission to the detriment of the commercial agent.

#### *1.4.2 When Due and Payable?*

The right to commission arises, at the latest, when the third party executes his part of the transaction or the part he should have executed if the principal had executed his part of the act. The



commission must be paid at the latest by the last day of the month following the quarter during which the right in question accrued.

#### *1.4.3 Extinction of Rights to Commission*

The agent loses his right to commission if:

- it is proved that the agreement between the third party and the principal will not be executed; and
- the non-execution is not due to the principal's fault.

Where the agent's right to commission is lost, he must return any payment he has already received on account of commission. In estimating the amount of commission due, the principal must provide the commercial agent with an account of the commissions owed by the last day of the month following the quarter during which the relevant commission arose. This account should contain all substantial data which formed the basis for calculating the amount of the commission. Furthermore, the commercial agent is entitled to demand that all information be supplied to him, particularly an extract of the books which are at the disposal of the principal and which he needs in order to verify the amount of the commission owed.

#### *1.4.4 Accounting and Audit*

An agent is bound to render proper accounts to his principal on demand (Contract Law, Article 173). It is the duty of every agent to:

- keep the money and property of his principal separate from his own and from that of other persons;
- maintain at all times proper accounts of all his dealings and transactions in the course of his agency; and
- produce for inspection, by the principal or a proper person appointed by the principal, all books and documents in his hands relating to the principal's affairs.

If an agent fails to keep proper accounts or pay his principal money or receives a secret profit or bribe, he is liable to his principal in an action to account for profits. In such an action, the agent will be allowed to deduct all reasonable expenses incurred on his principal's behalf, unless such deduction is contrary to the terms of the agency agreement.

An agent will usually be held to be bound by his own accounts; if they show that he has credited his principal with money received, the agent will be presumed to have received that money and will be liable for it to his principal. However, the agent will not be liable if the accounts show that the money has not, in fact, been received or if the principal's accounts show that the agent has not received the money.

If an account is agreed, the principal may sue on an account stated. This may be a mere acknowledgment of a debt, in which case the agent may show that no such debt in fact exists or that there is an account containing debts on both sides in which the parties have agreed that the debts of one must be offset against the debts of the other and only the balance must be paid.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

Where the agency agreement is for a fixed term, it will normally specify that the agreement expires at the end of that fixed term.

Where the agency agreement is of an indefinite duration, Article 16 of the 1992 Law allows either party to terminate it by written notice. Additionally, Article 17 stipulates that any party may terminate the agreement at any time on account of the failure of one of the parties to comply with all or any part of his obligations or due to exceptional circumstances.

### 1.5.2 *Notice Period*

The 1992 Law specifies that the period of notice which the terminating party is required to give is identical for both agent and principal. The





prescribed period is one month for each year that the agency agreement has existed, up to a maximum of six months. The calculation of the notice period must take into account the duration of any previous fixed contract. The Law does not permit the parties to agree on a shorter period of notice. Agreement on a longer period is permissible, provided that the notice to be given by the principal is not shorter than that to be given by the commercial agent. Unless the parties have agreed otherwise, the expiration of the notice must coincide with the end of a calendar month.

In the event that the 1992 Law is inapplicable (for example, by reason of its narrow definition section), the Cypriot courts will apply the Contract Law and common law principles to determine what constitutes a reasonable period of notice. In applying these principles, a judge will, of course, exercise his discretion and much will depend on how he views the merits of the case as a whole.

The principle is that the question of length of notice depends on the facts existing on the date the notice is given. A weighty factor to be considered is the expense incurred in establishing and running an agency.

### *1.5.3 Liability of Principal on Termination*

#### ***Pipeline commissions***

Following termination of the agency, the principal is obliged to pay the agent commissions that became due and payable prior to termination where termination of the agreement occurred before the due date for the payment of commission to the agent. The agent would also be entitled to commission from a transaction where the order of a third party reached the principal or the agent before the termination of the agency agreement. It is important to note that it is the order date rather than the date of the sale contract which is important.

### ***Post-termination***

In all cases, the test is whether, as a matter of construction of the agency contract, the parties intended that the agent be paid commission after termination.

Article 9 of the 1992 Law provides that if an agency agreement falls within the scope of the 1992 Law, the commercial agent is entitled to receive commission from commercial transactions concluded after termination of the agreement if:

- the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency agreement and the transaction was entered into within a reasonable period after expiration of the agreement; or
- as stated above, the order of the third party was placed either with the commercial agent or with the principal before expiration of the agency agreement.

### ***Termination payment***

Under Article 18 of the 1992 Law, the commercial agent is entitled to a termination payment in the form of an indemnity if and to the extent that:

- he has introduced new customers to the principal or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and
- the payment is fair and equitable, having regard to all the circumstances and, in particular, the commissions lost by the commercial agent from the business transacted with such customers.

The circumstances include the application or otherwise of a restraint of trade clause. The amount of the termination payment is capped at a



sum equal to one year's remuneration calculated on the commercial agent's average annual remuneration over the preceding five years and, if the contract goes back less than five years, the payment is calculated on the average for the period in question. The award of such a termination payment does not prevent the commercial agent from also claiming damages for loss suffered.

The 1992 Law also entitles agents to be compensated for the damage<sup>1</sup> suffered as a result of the termination of their relations with the principal and, in particular, when the termination takes place in circumstances which have:

- deprived the commercial agent of the commission which proper performance of the agency contract would have procured for him while providing the principal with substantial benefits linked to the commercial agent's activities; or
- prevented the commercial agent from amortizing the costs and expenses that he incurred during the performance of the agency contract at the principal's behest.

The 1992 Law does not allow the parties to agree on a deviation from these provisions to the detriment of the commercial agent. It also sets out the circumstances in which the termination payment and damages are not due, namely, where:

- the principal terminates the commercial agency agreement due to the agent's fault, which will justify, according to the law, an immediate termination;

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<sup>1</sup> Article 17(1) of the Agency Directive expressly entitles an agent to receive an indemnity in accordance with Article 17(2) or to receive compensation for damage in accordance with Article 17(3) of the Directive. An agent is entitled to claim for damages over and above any Article 17(2) indemnity payment as long as such damages fall within Article 17(2)(c), but not if they fall within the meaning of compensation for damage as set out in Article 17(3). Interestingly in this particular country chapter, the language used to describe the type of the damages available (in addition to the indemnity payment) appears to be based on the language used in Article 17(3), and not 17(2)(c) of the Directive.

- the commercial agent terminates the agreement, unless the termination is due to the fault of the principal or is justified due to the age, physical capacity or ailment of the agent, as a result of which it is not reasonable to request him to continue his activities; or
- after agreement with the principal, the commercial agent assigns to a third party the rights and obligations which he has undertaken by virtue of the commercial agency agreement.

## 1.6 Limitation Periods

The agent loses the right to claim the indemnity and damages unless he notifies the principal within one year following termination of the agreement, of his intention to pursue his claims.

## 1.7 Tax Issues

Being based on the OECD Model, Cyprus's double taxation agreements generally provide that if an enterprise has a representative in the territory of a country that has, and habitually exercises, authority to conclude contracts in the name of the enterprise, the enterprise concerned is deemed to have a permanent establishment in respect of any activities that the person undertakes for it. However, there is an exemption for an independent broker or agent who represents the enterprise in the ordinary course of business. Care needs to be taken when drafting agreements so as not to risk inadvertently creating a permanent establishment, with potentially unfavorable consequences.

# 2. Distribution Agreements

## 2.1 General

### 2.1.1 *Law Applicable*

There are no statutory provisions that govern relationships involving distributors. In general, a distributorship agreement between a supplier and its distributor is governed by the principles of Articles



142-198 of the Contract Law, which reflect common law principles. Thus, the parties to a distributorship agreement have the freedom to agree on the contractual terms which will govern their relationship, provided that such terms do not contravene rules of public policy, EU and Cyprus competition law and any other mandatory Cyprus laws, including those relating to trademarks and intellectual property rights.

### *2.1.2 Formal Requirements*

A distribution agreement is not subject to any formal requirement. It may be created via:

- explicit oral or written agreement, or
- the actual conduct of the parties implying the existence of an agreement.

It is advisable that the parties to the agreement document it fully, to avoid uncertainty in case of a later dispute.

### *2.1.3 Individual/Corporate Entity*

A distributor may be an individual, a partnership or a corporate entity. Where the distributor is an individual, the supplier should take care to ensure that the relationship does not inadvertently constitute an employer/employee relationship.

### *2.1.4 Duration of Agreement*

In Cyprus, the term of a distributorship agreement is to be agreed by the relevant parties. Where no agreement on term is made, the law assumes that the agreement is for an indefinite period and may be terminated by either party giving reasonable notice.

## **2.2 Exclusive/Non-Exclusive**

A distributor may be appointed on either an exclusive or a non-exclusive basis. Equally, exclusivity may be agreed in favor of the supplier. In each case, however, care must be taken not to breach competition law. Article 6(2) of the Protection of Competition Laws of

2008 and 2014 prohibits abuse or exploitation by one or more related undertakings involving economic dependence is prohibited when this exploitation is exercised toward a client, supplier, producer, agent, distributor or commercial co-operator, even when this involves a specific type of product or service without an equivalent alternative.

## 2.3 Termination

### 2.3.1 *Formal Requirements*

Cypriot law does not stipulate any specific formalities to be followed in order to terminate a distributorship agreement. General principles of contract law apply. The parties are free to contract in relation to termination provisions and are able to agree on all relevant terms, such as the circumstances in which termination may be effected and the required notice period. It is important to note that the courts will set aside a contract or a provision of a contract which they consider to be unduly onerous.

### 2.3.2 *Notice Period*

Cypriot law does not stipulate the notice period which must be applied to a distribution agreement, but leaves it to the contracting parties to decide. The Contract Law provides that, where there is an express or implied contract that the distribution agreement must continue for any particular period, the parties are obliged to give reasonable notice of termination to each other and, unless they do so, any resulting damage to one must be made good by the other. The courts will apply the Contract Law and common law principles to determine what constitutes a reasonable period of notice. In applying these principles, a judge will, of course, exercise his discretion and much will depend on how he views the merits of the case as a whole. Under common law, the judge must have regard to a number of relevant factors, including:

- the length of time the distribution agreement has been in existence;



- the percentage of the distributor's business which is attributable to the agreement;
- the strength of the relationship between the distributor and customers;
- the time it will take for the distributor to reposition itself in the market; and
- the time it will take the supplier to secure and adjust to a new distributor.

The length of notice period deemed reasonable will likely increase in line with the degree of dependency of one party to the agreement on the other party.

### 2.3.3 *Liability of Supplier on Termination*

In contrast to an agent, a distributor has no automatic legal right to be indemnified upon termination of the distribution agreement. The distributor could, however, be entitled to damages arising from loss of profit if the agreement is terminated other than in a manner specified in the distribution agreement or if the court decides that termination occurred without reasonable notice on the part of the supplier. The distributor could also claim damages in respect of any outstanding breaches of contract on the part of the supplier which existed at the time of termination. There is also recourse to action if the supplier fails to honor any post-termination obligations stipulated in the original agreement.

### 2.3.4 *Return of Products*

This will normally be dealt with in the distribution agreement. Cypriot law does not have a provision for the compulsory buyback of unsold products from the distributor nor does it place any obligation on the distributor to return unsold stock to the supplier. In practice, however, fixed-price buyback clauses are a common feature of most agreements, as they tend to be mutually beneficial. It is not in the

interest of the supplier to see its goods “dumped” on the market at a low price. Equally, the former distributor will not wish to have its working capital tied up in the stock of an ex-partner, particularly if it has formed a link with a new supplier.

## 2.4 Limitation Periods

Article 3 of Law 66 (I) of 2012, which governs limitation periods generally, provides that the limitation period for a claim commences from the day of completion of the basis of the claim, defined in Article 2 as all events that give rise to an actionable right. Furthermore, Article 4 stipulates that, unless otherwise provided by law, no proceedings may be issued after 10 years have passed from the day of completion. Article 7 sets a general limitation period of six years for actions based on contractual claims. However, for proceedings concerning a contract or a quasi-contract relating to an agreed or reasonable remuneration of a contractor or other independent professional, the limitation period is three years.

## 2.5 Tax Issues

Being based on the OECD Model, Cyprus’s double taxation agreements generally provide that if an enterprise has a representative in the territory of a country that has, and habitually exercises, authority to conclude contracts in the name of the enterprise, the enterprise concerned is deemed to have a permanent establishment in respect of any activities that the person undertakes for it. However, there is an exemption for an independent broker or agent who represents the enterprise in the ordinary course of business. Care needs to be taken when drafting agreements so as not to risk inadvertently creating a permanent establishment, with potentially unfavorable consequences.





## Czech Republic

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law Applicable*

Agency agreements are governed by sections 2483 to 2520 of Act No. 89/2012 Coll., Civil Code, which also implements the Agency Directive.

The regulations provided for in the Civil Code generally apply if the requirements of the statutory definition of an agency agreement as set out in section 2483 para. 1 of the Civil Code are met.

An agency agreement is defined as an agreement under which an independent entrepreneur undertakes to perform long-term activities for a principal, aimed at the conclusion of a certain type of agreement by a principal, or the negotiation of agreements on behalf of a principal and on its account and the principal undertakes to pay a commission to the commercial agent.

As stipulated by section 2484, a commercial agent of a principal cannot bind the principal or a customer, with whom the principal's business is concluded.

Both agents for goods and agents for services are subject to the regulations provided in the Civil Code to the extent that those regulations, based on the Czech conflict of laws provisions, apply. The law applicable to an agency agreement will be that chosen by the parties, subject to Czech conflict of laws provisions. However, Czech courts may find the provisions of an agency agreement governed by the law of a foreign jurisdiction to be unenforceable if it contravenes Czech public policy. This may happen, for example, in cases where the provisions of the agency agreement would put the agent in a substantially worse position than it would be under the Civil Code.

Certain provisions of the Agency Directive, as implemented in the Civil Code, are mandatory for the protection of the agent (such as the right to indemnity on termination of the agreement), irrespective of the choice of governing law of the agency agreement.

The Civil Code contains both mandatory and non-mandatory provisions, which regulate the relationship between the agent and the principal and impose certain obligations and duties on the parties. For example, a principal is required to pay commission; an agent must act with due care and in accordance with the instructions of the principal and must inform the principal on developments in the market.

#### *1.1.2 Formal Requirements*

An agency agreement must be concluded in writing. There are no specific requirements that an agency agreement be registered with any public authority.

#### *1.1.3 Determined Territory*

Unless agreed otherwise where an agent shall carry out activities, it is deemed that the Czech Republic is the determined territory. In case when an agent is a foreign person, it is deemed that the determined territory is a state in which an agent is seated in the time of the agreement conclusion.

#### *1.1.4 Individual/Corporate Entity*

A commercial agent may be an individual or act through a legal entity.

#### *1.1.5 Duration of Agreement*

An agency agreement may be concluded for a fixed or an indefinite period. If it is not specifically agreed in the contract or if it is not clear from the purpose of the agreement, the agency agreement is considered to be concluded for an indefinite period.

Where the parties to an agency agreement continue to abide by the terms of an agency agreement for a fixed period after its expiration,



the agency agreement is deemed to be concluded for an indefinite period terminable on notice as discussed below.

## 1.2 Exclusive/Non-Exclusive

Subject to any applicable competition law restrictions, the parties to an agency agreement may, at their discretion, determine whether the agency shall be exclusive or non-exclusive. In the absence of a specific contractual arrangement, the agency will be deemed to be non-exclusive.

## 1.3 Non-Compete

Subject to any applicable competition law restrictions, the parties to an agency agreement may agree that a non-compete clause will apply on expiry or termination of the agency agreement. A non-compete clause may be for a period of not more than two years following the expiry or termination of the agency agreement and may only relate to a specific territory or a specific group of customers in such territory.

## 1.4 Commission

### 1.4.1 *Basic Principles*

An agent is entitled to a commission on all transactions concluded during the contractual period where (i) the transaction has been concluded as a result of the agent's efforts; or (ii) the transaction is concluded with a third party whom the agent has previously acquired as a customer for transactions of the same kind. In the case of an exclusive agency, an agent is also entitled to commission for a deal concluded with a third person from the territory or group of persons who do not belong to the exclusive agency.

The agent is entitled to the commission agreed in the agency agreement. In the absence of agreement in respect of commission, the agent shall be entitled to such commission as that customarily received by agents of similar goods in the place where the agent performs its agency activities. If there is no usual practice, the

commercial agent will be entitled to reasonable remuneration taking into account all aspects of the transaction.

The Civil Code does not oblige the principal to pay the agent's expenses as it is assumed that an agent's commission includes the costs associated with business representation. If it has been agreed that the principal will pay these expenses in addition to any commission, an agent will be entitled to reimbursement of those costs.

#### *1.4.2 When Due and Payable?*

If the parties have agreed that the agent only has to procure an opportunity for the principal to enter into an arrangement then the agent has the right to be paid commission for obtaining the opportunity.

Unless otherwise agreed between the parties, the agent is entitled to commission when (i) the principal fulfils its obligations under the contract or (ii) the principal was obliged to fulfil its obligations under the contract or (iii) a third party fulfilled its obligations under the contract.

However, if a third party is supposed to fulfil its obligations more than six months after the conclusion of the agreement, the right to commission arises when the agreement is concluded. This can be agreed otherwise in the agreement but only if it does not worsen the position of the agent.

The commission is payable no later than on the last day of the month following the quarter in which the entitlement to such commission arose. This period can be extended by agreement of the parties but only if such extension is to the benefit of the agent.

#### *1.4.3 Extinction of Rights to Commission*

The right of an agent to receive commission in respect of a transaction is revoked if it is apparent that the contract between the principal and the third party shall not be fulfilled for reasons not caused by the



principal. Any commission that the agent has already received in respect of a transaction shall be refunded if the agent's right to receive commission in respect of that transaction is revoked. Any derogation from this provision which are to the detriment of the agent are void.

#### *1.4.4 Accounting and Audit*

The principal is required to give the agent a report on commission payable by the end of month following the last day of a calendar quarter in which the commission became due. The report must contain major items based on which the commission has been calculated. The agent may demand that it is provided with all data available to the principal (at least the data from the accounting records or similar records) necessary for verification of the calculation of agent's commission. Any derogation from this provision which are to the detriment of the agent are void.

### **1.5 Termination**

#### *1.5.1 Formal Requirements*

Notice to terminate an agency agreement should be given in writing. However, as discussed below, it is not strictly necessary to give notice to terminate an agency agreement of a fixed period, as it will expire by effluxion of time.

#### *1.5.2 Notice Period*

If an agency agreement is concluded for an indefinite period, the notice period is one month for the first year of the contract, two months for the second year and after two years, the notice period is three months. Unless agreed otherwise, the notice period must expire at the end of a calendar month.

It is generally not necessary to terminate an agency agreement for a fixed period. However, in order to avoid an implied continuation of the agency agreement, notice should be given within the applicable notice period or a letter should be sent to the agent stating that the agency

agreement shall not continue in force after the expiry of the fixed period.

Exclusive agency agreements for a fixed period may be terminated by either party where the volume of transactions in the last 12 months is lower than has been agreed or was adequate, unless agreed otherwise in the contract.

In respect of agreements of an indefinite duration, or those for a fixed term which are terminated in the circumstances set out above, the parties cannot by agreement shorten the notice periods referred to above nor may the notice period to be observed by the principal be shorter than that to be observed by the agent.

### *1.5.3 Liability of Principal on Termination*

Unless agreed otherwise, the agent is entitled to a commission on transactions concluded after the expiration or termination of the agency agreement where (i) the transaction is mainly attributable to the agent's efforts during the period covered by the agency agreement and the transaction was entered into within a reasonable period after the agency agreement expired or terminated or (ii) an order placed by a third party, which would normally give rise to a commission payment to the agent, reaches the principal or the agent before the agency agreement expires or is terminated.

In addition, the agent may be entitled to claim a special remuneration from the principal upon termination of the agency agreement if the following statutory requirements are met: (i) the agent acquired new customers for the principal or increased significantly the volume of business transacted by the principal with existing customers and the principal continues to gain substantial benefits from the business with such customers and (ii) the payment of remuneration is equitable with regard to the circumstances.

The maximum special remuneration may not exceed the amount equal to one year's commission calculated by reference to the agent's average annual commission over the preceding five years. If the



agreement lasted less than a year, it may not exceed the total commissions for its entire duration.

No special remuneration shall be payable, where (i) the agent has terminated the agency agreement, unless such termination is justified by circumstances attributable to the principal or the agent cannot be expected to continue his activities due to his age or illness; (ii) the principal has terminated the agency agreement and such termination is due to default attributable to the agent that would justify termination of the agency agreement; or (iii) with the consent of the principal, the agent has assigned its rights and duties under the agency agreement to another person.

The parties may not derogate from the rules on special remuneration as described above to the detriment of the commercial agent.

## 1.6 Limitation Periods

In respect of the special remuneration claim described in section 1.5 above, an agent must bring a claim for such a payment within one year of the effective date of the termination of the agency agreement. In respect of all other claims, the general limitation periods applicable to claims under Czech law will apply. These general limitation periods are either three years or ten years, depending on the type of claim.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Czech law does not recognize a “distribution agreement” as a separate type of contract which is governed by specific provisions of the Civil Code. Thus, the relevant agreement can be considered to be an agency agreement or quite often as a so-called “innominate contract” having some aspects of the agent agreement. It may even be a simple series of purchase contracts. The provisions of the Civil

Code will apply to the distribution agreement as relevant, depending on whether it is a commercial agency or an innominate contract.

The law applicable to a distribution agreement will be that chosen by the parties, subject to Czech conflict of law provisions.

#### *2.1.2 Formal Requirements*

As distribution agreements are not specifically regulated by the Civil Code, there is no requirement for the distribution agreement to be in writing and thus there is no filing requirement. As with all contracts, in order to achieve a degree of certainty, it is preferable that terms agreed be formalized in writing.

#### *2.1.3 Individual/Corporate Entity*

A distributor may perform his business as an individual or as a legal entity.

#### *2.1.4 Duration of Agreement*

Distribution agreements can be concluded for a fixed period or for an indefinite period of time.

### **2.2 Exclusive/Non-Exclusive**

According to Czech law and subject to any applicable competition law restrictions, the parties are generally free to determine the extent of the distribution rights of the distributor. Thus, the parties are free to agree as to whether the distributor should have exclusive or non-exclusive distribution rights. Under an exclusive sales contract, the seller is not bound to sell to the distributor. However, if the seller decides to make sales into the area reserved in the exclusive sales contract, such sales must be to the customer. For the sake of clarity, the extent of the distribution rights should be set out precisely in the distribution agreement.

A supplier may commit not to sell particular products within an agreed territory through any other person and/or to refrain from direct sales to





customers of the distributor. It should, however, be noted that such restrictions may be void under Czech competition law. See also the earlier chapter on EU Competition law.

## 2.3 Termination

### 2.3.1 *Formal Requirements*

Unless otherwise agreed by the parties, there is no prescribed form for a notice of termination. Thus, notice to terminate may also be given orally. For the sake of clarity and in order to be able to meet the burden of proof, it is advisable that notice to terminate be given in writing, by a method that evidences receipt of the notice.

### 2.3.2 *Notice Period*

In the absence of a contractual provision, a distribution agreement entered into for an indefinite period of time may be terminated to the end of the calendar quarter, giving at least a three-month notice period.

Where the supplier fails to observe the required notice period, the distributor may have a right to seek damages for early termination, eg, loss of those future earnings, which he would have earned until the end of the ordinary notice period.

In addition to termination by notice, either party is generally entitled to rescind a distribution agreement if stipulated by law or in certain situations agreed by the parties (ie, for a substantial breach of contract). These cover cases of 'good cause,' where considering the relevant circumstances and the interests of both parties, the terminating party cannot reasonably be expected to wait until the end of the ordinary notice period or the agreed expiry of the distribution agreement. For example, 'good cause' may exist if the distributor intentionally, or with gross negligence, fails to carry out his contractual obligations on a permanent basis or otherwise substantially breaches the distribution agreement.

### *2.3.3 Liability of Supplier on Termination*

The Civil Code only expressly provides for a termination payment to be made claim of an agent upon termination of an agency agreement. In the absence of any specific liability/indemnity provisions in the relevant distribution agreement and to the extent that the provisions of the Civil Code on agency agreements would apply to the distributorship relationship, the provisions discussed above on compensation of agents, would apply. In particular, the provisions on commercial agency would generally apply if the agreement described by the parties as a “distribution agreement” (or otherwise) would actually meet the test outlined above for the agency agreements (please see section 1.1(a) on “Scope”) and thus, in fact, be governed by these provisions of the Civil Code (ie, there is a substance-over-form approach).

### *2.3.4 Return of Products*

There is no requirement under Czech law for a distributor to sell its inventory of products back to the supplier on termination of the distribution agreement.

## **2.4 Limitation Periods**

In respect of claims, the general limitation periods applicable to claims under Czech law will apply. These general limitation periods are either three years or ten years, depending on the type of claim. The parties may negotiate a shorter or longer limitation period from the day when the right could be exercised for the first time other than that provided by law, but at least one year in duration and the longest duration of fifteen years. If a shorter or longer period is negotiated in the detriment of the weaker party, such agreement is deemed void. Additionally, arrangements for shorter period are disregarded, if the claim relates to the loss of freedom, life or health or a claim arising from willful misconduct.



## Denmark

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *The Parties*

According to the Danish Act on Commercial Agents (Act no. 272 of May 2, 1990, hereinafter the “Act”), which implements the Agency Directive, an agent is defined as a person or an entity who, in the course of business, has agreed with another person or entity, the principal, on behalf of the principal to independently and continuously engage in the sale or purchase of goods by obtaining offers in favor of the principal or by concluding agreements in the principal’s name.

The principal may act as an individual or as a legal entity including as a limited liability company.

##### 1.1.2 *Obligations of the Parties*

The Act stipulates that the agent must act loyally and honestly, and the agent shall safeguard the principal’s interests. The agent must, in particular, make reasonable efforts to procure offers and, if it is within the agent’s authority, conclude agreements as to matters that are covered by the agency agreement.

The agent must notify the principal about offers that have been procured and agreements that have been concluded and about other important circumstances of which the agent is aware or should have been aware. The agent must follow any reasonable instructions given by the principal.

In addition to the Act, Danish law provides for another commercial relationship related to the agent. Under the Act on Commissioned Agents (*Kommissionsloven*), a commissioned agent is a person who in his own name has agreed with a principal to sell or purchase goods, securities or other chattels on the principal’s account. The two commercial relationships have a number of similarities, but are

different in other ways, especially regarding the rights of third parties. Unless specifically stated in this chapter, the law stated refers to the Act.

The principal must also act loyally and honestly towards the agent. The principal must supply the agent with samples, descriptions, price lists and other necessary material, and the principal must supply the agent with the information required for implementation of the agent's activities. The principal is also required to inform the agent, without undue delay, that an offer forwarded by the agent has been accepted or rejected by the principal or that an agreement brokered by the agent has not been fulfilled.

If the principal can foresee that the volume of the business will be substantially less than what could be expected by the agent, the principal must notify the agent without undue delay

### *1.1.3 Law Applicable*

The rules governing the relationship between agents and their principals in Denmark are regulated by the Act, which implements the Agency Directive.

If the basic principles for an agent apply, the relationship will be considered an agency. The provisions in the Act can be derogated from unless otherwise stated in the Act. The provisions regarding commercial travelers (Chapter 3 of the Act) can be derogated from according to custom.

The agency agreement will be governed by the law agreed by the parties. However, the provisions regarding termination of the agency agreement (section 22) and compensation upon expiry of the agency agreement (Sections 25-27) may not be derogated from to the disadvantage of the agent. This cannot be bypassed through a choice of law agreement stipulating that foreign law shall apply if the agency



agreement apart from the choice of law agreement would otherwise be assessed under the Act.<sup>1</sup>

In the absence of an agreement, the agency agreement will be governed by the law of the country to which the agency agreement is most closely connected. Typically, this is the law of the country where the agent has its place of business, provided, however, that the agent performs the main part of its business in that country.

#### *1.1.4 Formal Requirements*

Both parties to the agreement can demand that a formal agreement be concluded stating the terms of the agency agreement, cf. Section 3 of the Act. Apart from this specific provision, an agency agreement is not subject to formal requirements. It may be concluded orally or in writing.

Further, a non-competition clause pertaining to the period after the duration of the agreement must be in writing in order to be legally binding on the agent.

#### *1.1.5 Duration of Agreement*

The agency agreement can be concluded for a fixed period. If no fixed period has been agreed, the agency will be for an indefinite period. The agreement can be terminated with a notice of one month during the first year. The notice period will be prolonged by one month for each year it is in existence up to a maximum of six months, unless a longer notice period is agreed. An agreement for a fixed period will expire at the end of the fixed term.

### **1.2 Exclusive/Non-Exclusive**

The Act does not have any provisions relating to exclusivity. The parties may agree on this without restrictions. If no reservation is

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<sup>1</sup> As mentioned in the Introduction, one important principle in international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities derived from the Agency Directive, notably those entitling the agent to compensation or an indemnity payment on termination.

made in the agency agreement and the agent is given a certain territory or a certain customers, the agent will be entitled to a commission of sales made in the territory or with customers without his participation. A reservation is considered made if the principal in the agency agreement has reserved the right to appoint more than one agent in the territory or for the customers.

### 1.3 Non-Compete

The agent has an obligation to safeguard the principal's interests and to act loyally and honestly. This will not necessarily mean that the agent is precluded from representing competing principals, but it will depend on the specific circumstances, including the practice in this area of business, whether or not the principals are aware of the situation, if it has a negative impact on the performance of the agent, if the parties have agreed on it, etc.

The parties may agree that the agent shall be bound by a non-competition clause after the expiry of the agency agreement. Such an agreement will, however, be subject to Section 30 of the Act. It must be in writing and must be limited to the territory or the customers and territory which has been allocated to the agent. It cannot be valid for more than two years.

### 1.4 Commission

#### 1.4.1 *Basic Principles*

The agent will be entitled to commission in accordance with the agreement or the Act.

If the parties have not agreed on the agent's commission, the commission shall be determined based on what the customary commission of agents for the goods in question is. If no such custom exists, the commission shall be determined at what is reasonable in view of all the circumstances involved.



Normally the parties will agree on a commission of a percentage of the invoiced price of the goods that have been sold with the direct participation of the agent or in some circumstances within the agent's territory even if the agent has not participated. The agent will be entitled to commission for transactions concluded (i) during the term of the agency agreement which have arisen through the participation of the agent; (ii) without the agent's participation but with a third party previously procured as a customer by the agent, provided that the transaction is for goods of the same type as provided in the agency agreement; or (iii) with a third party belonging to a territory or customers that have been allocated to the agent. The agent will further be entitled to commission on transactions that are concluded after the expiry of the agency agreement if the transactions can be referred to mainly the agency period. The provisions regarding commission are not mandatory and the parties are therefore free to agree on other methods for calculating the agent's commission.

#### *1.4.2 When Due and Payable?*

Commission becomes due when (i) the principal has or should have delivered the goods or paid the purchase price according to the agreement with the third party or (ii) the third party has or should have paid the purchase price or delivered the goods according to the agreement with the principal if the principal has fulfilled his part of the agreement. Whether the goods are delivered or the purchase price is paid is determined by Danish general principles. An agreement in which the commission is due later than mentioned under (ii) is void.

The commission must be paid to the agent within one month from the end of the quarter in which the commission became due. This provision is mandatory for the benefit of the agent and cannot be derogated from beforehand. If the principal does not pay the commission within the stipulated time, the principal is obligated to pay interest to the agent, either according to the agreement between the parties or otherwise according to the Danish Interest Act.

#### *1.4.3 Extinction of Rights to Commission*

The agent will lose the right to commission if an agreement between the principal and a third party fails to be performed and the failure is not due to circumstances under the principal's control. The entitlement to commission, however, is not affected where a third party does not fully perform under the agreement and the principal has, without the consent of the agent, granted the third party extension of payment or agreed with the third party to either suspend or rescind the contract. If the agreement is only performed partly, the agent generally has the right to commission on a pro rata basis. These provisions are mandatory for the benefit of the agent. If a claim for commission ceases and this is not due to circumstances under the principal's control, the agent shall reimburse any commission already received.

#### *1.4.4 Accounting and Audit*

No later than one month after the quarter in which the commission became due the principal must provide to the agent a commission statement that shall include information on how much commission was earned during the quarter and all information of significance for the calculation of the commission. The principal must upon request from the agent provide all relevant information. Such information can be regarding loss of commission, etc. If the principal refuses to give such information, the agent can request that either the agent or an auditor appointed by the agent be given access to the books of the principal. The provision is mandatory and may not be deviated from by prior agreement to the detriment of the agent.

### **1.5 Termination**

#### *1.5.1 Formal Requirements*

The Act does not have any provisions regarding the formalities concerning termination of the agreement. The parties may agree on such provisions in the agreement. It is normally agreed that the notice shall be in writing, which is advisable for reasons of proof.





### 1.5.2 *Notice Period*

An agency agreement that is not concluded for a fixed term may be terminated on notice from the agent or the principal. The notice period during the first year of the agency agreement is one month, from the end of the calendar month in which the notice is given. The notice period is extended by one month for each further year of the term of the agency agreement, up to a maximum of six months. Shorter notice periods than mentioned cannot be stipulated by prior agreement to the detriment of the agent. However, the parties may agree that the notice period is limited to three months when terminated by the agent even if the agency agreement has lasted more than three years. The parties may agree to a longer notice period than provided for in the Act. The notice period to be given by the principal may not be shorter than the notice period of the agent.

An agency agreement concluded for a fixed term expires at the end of the term. If the parties continue without a specific agreement, the agreement will be regarded as an agreement of indefinite term and the notice periods described above will be applicable.

Each of the parties may, without observing existing periods of notice, terminate the agreement with immediate effect if the other party, to a considerable extent, has ceased to fulfil his obligations according to the agency agreement or the Act.

### 1.5.3 *Liability of Principal on Termination*

The agent may have a right to commission on transactions that are concluded after expiry of the agency agreement. If the parties have not agreed otherwise, the agent is entitled to commission on transactions concluded after the agency agreement ended if the agent or the principal had obtained the offer from a third party during the period of the agency agreement or if the transaction was mainly prepared during, or can otherwise be referred to, the period prior to expiry of the agency agreement and if it was concluded within a reasonable time after expiry of the agency agreement.

The agent is entitled to a termination payment in the form of an indemnity if and to the extent that (i) the agent brought the principal new customers or substantially increased trade with the existing customers and if the principal will continue to benefit substantially from the relationship with these customers, and (ii) the payment is reasonable in view of all circumstances, especially the loss of commission on agreements with these customers. These provisions will also apply in case of the agent's death.

The amount of the indemnity will depend on specific matters but cannot exceed one year's commission, calculated on the basis of the average commission for the past five years or, if shorter, the performed period of the agency agreement.

The agent is not entitled to an indemnity payment (i) if the principal terminates the agency agreement with immediate effect due to the agent's material breach of contract; (ii) if the agent terminates the agreement, unless entitled as a consequence of (a) circumstances attributable to the principal or (b) the agent's age, infirmity or illness, thus making it not reasonable to demand that the agent continue his activities; or (iii) if the agent, with the principal's consent, assigns the agency to another party.

The provisions regarding the indemnity payment cannot be deviated from to the detriment of the agent by prior agreement.

## 1.6 Limitation Periods

The agent must claim any indemnity payment to which he is entitled within one year from the expiry of the agency agreement. Failure to do so will result in the loss of the right to receive such a payment.

The provision regarding the limitation period for an indemnity payment cannot be deviated from to the detriment of the agent by a prior agreement.



## 2. Distribution Agreements

### 2.1 General

A distributor is an independent entity (a person or a legal entity) who in the course of business purchases goods from a manufacturer, wholesaler or supplier (hereinafter collectively referred to as the “supplier”) and resells the goods in its own name and for its own account. A distributor is independent from the supplier and does not act as an agent or commissionaire for the supplier. The distributor will purchase the goods and the goods will legally and physically be transferred to the distributor. The distributor will sell the goods at a price decided by the distributor and the profits belong to the distributor. The distributor will not receive any commission but may of course be entitled to a bonus depending on the agreement. In an ongoing relationship, there will often be a detailed agreement and requirements regarding inventory, marketing, sales support, etc.

#### 2.1.1 *Law Applicable*

There is no specific legislation regulating distributors in Denmark. The distributor’s rights are governed by the distribution agreement and furthermore by legislation regarding the sale of goods, agreements, etc., and the general principles of Danish contract law. Legal precedents show that the principles in the Danish Act on Commercial Agents are used to some extent.

The distribution agreement may be governed by the laws of the supplier’s country or the distributor’s country, depending on the agreement of the parties. Choice of law agreements are generally considered to be valid unless they violate the Danish *Ordre Public* doctrine. In the absence of an express choice of law, the applicable law will be determined according to international private law regulations, including EC regulation and conflict of laws provisions.

### *2.1.2 Formal Requirements*

There are no formal requirements, and distribution agreements may be concluded orally or in writing. As most distribution agreements include various provisions regarding the duties of the distributor, the agreements will normally be in writing. There are no requirements to register a distribution agreement with any public authority or register.

### *2.1.3 Individual/Corporate Entity*

The distributor may be a person or a legal entity in various forms such as a partnership or a limited company. A personally owned distributorship must be registered as a business but this is similar to other personally owned businesses.

### *2.1.4 Duration of Agreement*

The duration will depend on the parties' agreement. If the parties have not agreed and cannot agree on duration or termination, this will be determined by the court. Normally the court will consider what a reasonable notice should be, based on the period of the agreement. Normally, this will not exceed six months.

## **2.2 Exclusive/Non-Exclusive**

It is possible to agree that the distributor shall have an exclusive right in relation to the supplier's other distributors and in relation to the supplier itself. The distribution agreement should deal with this, as there is no legislation as to the default position. It should be noted that Danish and EC competition law limits the ability to agree on exclusive distribution agreements. It is important to decide if the distributorship shall be exclusive or non-exclusive. Quite often, the distributorship will be exclusive for a defined territory. If it has not been agreed, it will depend on the duration of the agreement and the actual operation. Exclusive distributorships will be subject to competition law. See the earlier EU Competition Law chapter.



## 2.3 Non-Compete

Again, no legislation applies and the parties can agree on what they want. The distributor will only be bound by the provisions in the Danish Marketing Act regarding secrecy, etc. The more favorable the agreement is for the distributor, the more likely it is that the distributor must accept a duty of loyalty towards the supplier.

## 2.4 Compensation

As already mentioned, the distributor will not receive any commission from the supplier. The distributor makes his earnings on the profits on the sale of the goods. If the agreement is terminated without cause and without notice it is likely that the distributor will receive compensation, especially if the distributor has contributed to the marketing and has built up the brand in the territory.

## 2.5 Accounting and Audit

Unless agreed between the parties none of them has a right to review or have access to the other party's accounts or bookkeeping.

## 2.6 Termination

### 2.6.1 *Formal Requirements*

Termination will be subject to general Danish contract law principles. This means that there are no formalities and that the notice of termination can be either oral or written. If the agreement is in writing, the notice should be in writing. For evidential reasons, the termination notice should always be in writing.

### 2.6.2 *Notice Period*

There are no provisions regarding notice period, but normally a reasonable notice must be given. This can be up to six months depending on the work and investments of the distributor and the duration of the distributorship. The court will apply principles similar to those in the Danish Contracts Act. Section 36 of the Danish Contracts

Act may become relevant. Under section 36 of the Danish Contracts Act unfair contract terms can be modified or set aside by a court, partially or entirely, if they lead to unjust and inequitable results for a party to the distribution agreement. In all likelihood, section 36 could be applied to challenge a short termination period, especially where the relationship of the parties spans over many years.

### *2.6.3 Liability of the Supplier on Termination*

The distributor will not be entitled to a termination payment upon termination. If the distributor, however, has invested time and money in building up the brand and relationships with the customers he may be entitled to compensation, especially if the notice is short.

### *2.6.4 Return of Products*

If the parties have not agreed on how to handle the remaining stock, the distributor does not have a right to return the goods but the distributor can sell the products freely.

## **2.7 Limitation Periods**

There is no limitation period under Danish law that relates to distribution agreements. The Danish Sale of Goods Act contains a two-year limit after purchase. A professional buyer must make a complaint regarding the products immediately after a defect has been discovered. These provisions may be of relevance to a distribution agreement where the Danish Sale of Goods Act is applicable. In addition to the above and to the extent that the above provisions of the Danish Sale of Goods Act are not applicable, the provisions of the Danish Limitations Act will apply to claims under a distribution agreement. Under the Danish Limitations Act, claims will generally become statute-barred three years after the date on which breach of contract happened.

## Egypt

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 Law Applicable

Agency is regulated under the following Egyptian laws and regulations (the “Laws and Regulations”):

- (i) Commercial Code No. 17 of 1999 (the “Commercial Code”);
- (ii) the Egyptian Civil Code (the “Civil Code”); and
- (iii) Commercial Agency Law No. 120 of 1982 and the Executive Regulations thereto (the “Commercial Agency Law”).

The Civil Code addresses the general rules of agency, while commercial agency is more specifically regulated under the Commercial Code and Commercial Agency Law.

For purposes of this chapter, we have depended mainly on the above-mentioned Laws and Regulations and the relevant jurisprudence.

#### ***The Laws and Regulations***

According to the Commercial Code, a person is considered a commercial agent and is thus subject to the rules of commercial agency if he habitually undertakes commercial transactions for the account of others. Further, Article 1 of the Commercial Agency Law states that a commercial agent is:

*“A natural/juristic person who undertakes the following activities on a habitual basis and has not entered into an employment contract or a lease of services agreement; applying for tenders, entering into purchase, sale, lease or supply of services transactions, in the name and for the account of*

*producers, merchants, distributors, or in his name and for the account of the aforementioned persons.”*

Accordingly, the definition of a commercial agent entails that (i) the agent’s business is not limited to a single transaction but is performed on a habitual/ professional basis and (ii) the transactions entered into by the agent are concluded for the account of the principal. A commercial agent may deal with goods or services.

The Commercial Code also defines a contract agent as a person who continuously markets, negotiates and concludes transactions in the name and for the account of the principal in a certain geographical area and may also be responsible for the execution of contracts. In this regard, a contract agent works independently and is responsible for all the costs incurred from managing its business.

### **Conflict of Laws**

The Commercial Code and Commercial Agency Law apply to commercial agency activities taking place in Egypt, while the Civil Code governs the general principles of contract (including agencies) executed and/or performed in Egypt.

It should be noted that the Civil Code recognizes the choice of governing law agreed upon by the parties under the contract. In that regard, Article 19 of the Civil Code states:

*“Contractual obligations are governed by the law of the domicile when such domicile is common to the contracting parties, and in the absence of a common domicile by the law of the place where the contract was concluded. These provisions are applicable unless the parties agree, or the circumstances indicate that it is intended to apply another law.”*

Thus, the choice of a foreign law as the governing law of an agency agreement will be upheld by the courts of Egypt provided that such submission is legal, valid, binding, irrevocable and enforceable under



the laws of the foreign jurisdiction, although some Egyptian jurists consider such submission revocable in commercial agency contracts based on public policy considerations.

We note that according to Article 191 of the Commercial Code, an Egyptian court will have jurisdiction to review disputes arising in connection with application of the Commercial Code to contract agents. Thus, if a dispute arises between parties to the agreement and there is a conflict between the jurisdiction of a foreign court and that of Egyptian courts, an Egyptian court may assume jurisdiction over such a dispute if the Commercial Code is deemed applicable to the agreement.

However, if the agreement in question calls for arbitration as the means of dispute resolution, such arbitral proceeding will not be subject to the jurisdiction provision of the Commercial Code. Pursuant to Article 13 of the Arbitration Law No. 27 of 1994, if the agreement includes an arbitration clause, a court to which a dispute arising under such agreement is submitted must refuse to hear the case if so requested by the respondent.

### ***Formal Requirements***

Under the Laws and Regulations, an agency agreement must be concluded in writing. Further, the agreement must explicitly state (i) the extent of the agency (exclusive or non-exclusive), (ii) the remuneration of the agent, (iii) the duration of the agreement and (iv) the geographical location within which the agency shall be performed.

Any person wishing to undertake commercial agency activities in Egypt must register with the Commercial Agents and Intermediaries Registry (the “Registry”), maintained with the General Authority for Export and Import Control, which further requires the agent to fulfil the following:

- (a) In case of a natural person, he/she:

- (1) shall be an Egyptian national;
  - (2) shall have the full capacity to enter into contracts;
  - (3) shall be of good reputation and has a clear criminal record;
  - (4) has not been declared bankrupt;
  - (5) is not a governmental employee and
  - (6) is not a member of the two chambers of the parliament, the national local councils or a full time politician and is not a first-degree relative of any of the aforementioned parties.
- (b) In case of a juristic person:
- (1) its headquarters shall be located in Egypt;
  - (2) commercial agency and intermediary work is listed as one of its purposes;
  - (3) its capital shall be fully owned by Egyptians; in case a shareholder of the agent is a juristic person, 51% of the capital must be owned by Egyptians;
  - (4) shareholders, partners or the members of the board of directors of a joint stock company must fulfil the aforementioned requirements of the natural person and
  - (5) its capital may not be less than EGP 20,000.

In respect of item (b) (3) above, we note that in assessing the nationality of any entity shareholders of the commercial agency entity the authorities currently require that such shareholder entities are also owned by Egyptians. As a matter of practice, the authorities currently refuse to register commercial agency companies owned by Egyptian

entity shareholders that are foreign-owned (ie, they do not apply the 51% rule).

### 1.1.2 Individual/Corporate Entity

As noted above, an agent can be either a natural person or a juristic person, provided the above requirements for the purpose of registration at the Registry are fulfilled.

### 1.1.3 Duration of Agreement

Parties to an agency agreement can agree to any duration of the agreement. If the agreement is silent in this regard, the courts have the authority to decide on the term based on the facts of each case.

However, where the subject of the agency agreement includes the agent's obligation to establish premises for performance of the contract, the Commercial Code requires the agency agreement to have a minimum duration of five years. In that regard, Article 181 of the Code reads as follows:

*"If the contract obligates the agent to construct buildings for use as showrooms, product warehouses or repair and maintenance facilities, the term of the contract may not be less than five years."*

## 1.2 Exclusive/Non-Exclusive

Under the Laws and Regulations on commercial agency in general, there are no restrictions on concluding an exclusive or a non-exclusive agency agreement.

However, in respect of contract agencies in particular unless otherwise agreed under a contract agency agreement, the principal may not hire more than one contract agent in the same geographical area for the same activity. The contract agent in turn may not enter into more than one agency relationship in the same geographical area for the same type of activity.

Furthermore, under the Competition Law, dominant persons are prohibited per se from entering into exclusive agreements with their distributors. From a Competition Law perspective, an agency relation does not amount to a genuine agency agreement unless the agent does not actually bear any financial costs. In addition, the ECA interprets this matter very narrowly and has always reviewed qualified agency agreements as distribution agreements as far as the Competition Law is concerned.

The Economic Court has delivered numerous decisions confirming that the court is not bound by the name of the contract as stated by the parties but it delves into the actual reality of how the contract is performed and how contracts are implemented in fact.

### 1.3 Non-Compete

Under the general rules of commercial agency, an agent is obliged to perform his agency duties in good faith and loyalty, according to professional standards.

A non-compete clause in a commercial agency agreement will be valid and effective as long as the duration, geographic location and type of business upon which the agent may not undertake a competing activity are reasonable and specified under the agreement. Assessing whether the conditions are reasonable or not is subject to the court's own discretion and assessment.

Having said the above, we note that the Egyptian Competition Law No. 3 of 2005 (the "Competition Law") provides for a general restriction that no agreement may be entered into between a person and his suppliers or customers (commercial agents and distributors may arguably be deemed customers of the principal) if such an agreement limits competition.

In general, non-compete clauses requiring an agent/distributor to purchase certain products or services exclusively from a manufacturer/principal or service provider fall under the regulation of vertical restraints. Vertical restraints are not per se illegal; however,

such is subject to the rule of reason, which involves studies and analysis to determine whether such vertical restraints constitute any anti-competitive behavior. Vertical restraints are regulated under Article 7 of the Competition Law and Article 12 of the Executive Regulations to the Competition Law.

Article 7 reads as follows:

*“Any agreement between any person and any of its suppliers or clients shall be prohibited only if it shall limit the competition in the market.”*

Article 12 of the Executive Regulations, on the other hand, sets the criteria based on which the Competition Authority shall determine whether such agreement shall be considered anti-competitive. Such criteria are as follows:

- the impact of the agreement on the market competitiveness; (this criterion depends on the market power and/or share of the contracting parties and the market foreclosure ie, the ability of other competitors to enter a certain level in the production chain);
- consumers' benefits from the agreement;
- considerations regarding preserving a certain level of quality or requirements for safety and security.

If a non-compete clause is challenged, the Competition Authority may look at the circumstances to determine whether the clause constitutes anti-competitive behavior depending on the above-mentioned criteria.

A non-compete clause of an agency/distribution agreement may also be challenged on the basis of abuse of dominance under Article 8 of the Competition Law if the scope of such clause is covered by those actions that may not be carried out by a person in a dominant position in a given relevant market. A dominant position exists if three cumulative criteria are fulfilled: (i) share in the relevant market

exceeds 25%; (ii) ability to have an impact on the price or quantity of the relevant product; and (iii) the inability of competitors to limit such impact.

It should also be noted that in order to avoid the inevitable conflict of interests, an agent may not act as an agent and an opponent in one of the transactions it undertakes for the account of the principal, except in the following cases:

- by the explicit approval of the principal;
- the subject matter of the transaction is a product that has a specified price in the market and the agent bought or sold it at that price; or
- where the agent has followed the principal's clear and specific instructions with respect to the transactions. In the foregoing cases, the agent will not be entitled to a commission.

## 1.4 Commission

### 1.4.1 *Basic Principles*

An agent will be entitled to the agreed commission as soon as the transaction has been concluded, even in the case of non-performance of the transaction for reasons attributable to the principal.

Where the agency agreement is silent on the remuneration of the agent, the agent will be entitled to a commission amount according to the prevailing commercial customs. In case of the non-existence of the said customs, the agent will be entitled to a fair amount, calculated usually as a percentage of the sales. Should a dispute arise between the principal and the agent on the remuneration amount of the agency, the court will have the discretionary power to decide on the amount according to the nature of the disposal, the efforts of the agent and the prevailing customs in this regard.

### 1.4.2 *Payment Due Date*

Under a commercial agency agreement, the commission becomes due in two cases:

- Upon execution of the transaction between the customer and the principal. Accordingly, the agent will be entitled to a commission even in the case of non-performance of the agreement.
- If the non-execution of the transaction was attributed to the principal. This includes the case where the principal directly executes the transaction with the customer. Should the reason for the non-execution of the transaction be attributed to the customer or any third party, the agent will not be entitled to a commission.

In all other cases, except for the agent under a contract agency agreement, the principal will be obliged to reimburse the agent for the efforts and the expenses incurred.

The date of payment of the amounts owed to an agent of a contract agency agreement is determined in accordance with the nature of the mandate assigned to the agent under the agreement. If the agent's mandate included negotiations between the customer and the principal, in order to facilitate a meeting, the commission shall be due upon the occurrence of that meeting. If the agent's mandate extends to the execution of the transaction, the commission will be due from the time of execution of the transaction.

### 1.4.3 *Loss of Right to Commission*

The agent will lose its right to commission in the following cases:

- Where it simultaneously acts as an agent and opponent under the same transaction (as discussed in section 1.3 above).
- An agent is obliged to submit a record to the principal providing all the actual and correct information in relation to

the transactions undertaken by it for the account of the principal. According to the general rules of commercial agency, if the agent submits incorrect information with respect to a certain transaction, the principal may disregard said transaction and bring a claim for compensation, and thus the agent will lose its right to a commission.

- If the agent fails to comply with the instructions of the principal while concluding a transaction without appropriate authority, the principal may disregard the commission of said transaction.

#### *1.4.4 Accounting and Audit*

Upon conclusion of the assigned transactions, the agent should provide the principal with records including all the amounts received from the seller on behalf of the principal, the amounts spent for the performance of its obligations under the agency agreement and the balance after concluding the transactions. The record should be submitted to the principal along with other documents evidencing the information included. The agent may not benefit from any discounts or benefits acquired without approval of the principal.

Further, the agent may not receive a commission for the same work more than one time.

### **1.5 Termination**

#### *1.5.1 Formal Requirements*

According to the Ministry of Foreign Trade and Industry Decree No. 362 of 2005, the parties may terminate an agency agreement at any time subject to the terms of the agreement.

However, the agent will be entitled to compensation in cases referred to in section 1.5.3 below.



### **1.5.2 Notice Period**

An agency agreement may be terminated upon notice by either the principal or the agent. The Laws and Regulations do not specify a minimum notice period and therefore the termination period will be subject to the terms of the agency agreement, without prejudice to a party's right to compensation (as discussed below).

### **1.5.3 Liability of Principal Upon Termination**

An agency agreement is usually terminated upon the lapse of the agency duration stipulated in the contract. Generally, the principal shall be liable to compensate the agent for activities undertaken during the agency agreement even if the transaction was concluded after the termination or the lapse of the agency agreement, as long as the transaction can be attributed to the agent's efforts.

According to the general rules of agency under the Commercial Code, termination is only effective upon sending the other party a notice of termination. Thus, the principal will be obliged to pay the commission for any activities undertaken by the agent prior to the agent's knowledge of termination.

### ***Damages in Lieu of Notice***

Failure of the principal to give notice of termination may be one of the factors included in the court's assessment of compensation for termination of the agency agreement.

### ***Compensation/Indemnity***

According to general contract rules under the Civil Code, parties to an agency agreement can agree on a compensation/indemnity amount; however, calculation of such amount will be subject to the discretionary review of the court. The court may decrease the amount of compensation/indemnity where it believes that the amount agreed upon is excessive. It may also rule against the entitlement of the injured party to the indemnity if no actual damage can be proven or

the said party has committed an error or contributed to the occurrence of an error. In all events, the court has the discretion to determine the amount of compensation/indemnity if it was not specified under the agreement. Determining the amount of compensation/indemnity will include the losses incurred and anticipated profits by the injured party.

### ***Compensation***

Articles 188 and 189 of the Commercial Code expressly provide that a principal is obligated to compensate an agent in the event the principal chooses not to renew a fixed-term agency agreement or to terminate an indefinite agreement, despite any agreement to the contrary, provided that the agent is not at fault. However, Article 189 has recently been held to be unconstitutional. Nonetheless, Article 13 (bis 3) of the Commercial Agency Law entitles the agent to compensation in the event the principal does not renew the definite period commercial agency agreement where there has been no error or default on the part of the agent in executing the agreement, provided that the activities of the agent resulted in an apparent success in the promotion of the products or an increase in the number of clients. Thus, we believe that in light of the unconstitutionality of Article 189 of the Commercial Code, Article 13 (bis 3) of the Commercial Agency Law may be ruled inapplicable if challenged before administrative judiciary or the constitutional court. Furthermore, since the agent's compensation is not mandatory, the parties may agree to omit the compensation requirement (ie, the agent may waive its right to compensation).

### **1.6 Statute of Limitations**

Pursuant to Article 68 of the Commercial Code, the general statute of limitations applicable to commercial contracts is seven (7) years. However, under the Commercial Code, a limitation period of two (2) years will apply to any claims under a contract agency agreement from the date the obligation became due.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Applicable Law*

There is no specific legislation in Egypt that regulates the relationship between manufacturers/principals and distributors. Accordingly, distribution agreements will be subject to the general rules of contract under the Civil Code as well as the Commercial Code, since such agreements are considered of a commercial nature. The distributor will not benefit from the protection stipulated under agency agreements; accordingly, there is a great deal of flexibility in relation to distribution agreements, provided there is no deviation from the general rules of contract.

#### 2.1.2 *Formal Requirements*

There are no formal requirements as to the execution of a distribution agreement. In order to avoid evidentiary difficulties, it is advisable that the distribution agreement be concluded in writing.

There are no requirements to register a distributor in the Registry or any other form of registration. However, historically, the General Authority for Export and Import Control used to accept to register distributorship agreements and provide distributors with a certificate of registration (Form S-14) similar to agents. This practice has recently ceased and if a Form S-14 is required, then the parties must enter into a commercial agency agreement. Form S-14 is usually required in cases where the principal must enter into government tenders to sell its products.

#### 2.1.3 *Individual/Corporate Entity*

A distributor may be either an individual or a legal entity.

#### *2.1.4 Duration of Agreement*

There are no requirements as to the duration of a distribution agreement and therefore the duration will be subject to the parties' agreement.

### **2.2 Exclusive/Non-Exclusive**

A distribution agreement can take the form of an exclusive distribution agreement or a non-exclusive distribution agreement as determined by the parties.

The same Competition Law restrictions may apply, as explained above.

### **2.3 Termination**

#### *2.3.1 Formal Requirements*

There are no formal requirements as to the termination of a distribution agreement. General contract law shall apply in this regard and thus termination shall be subject to the parties' agreement, including in respect of the actions/events giving rise to the right to terminate and any applicable notice requirements.

In the case of unilateral termination, the non-terminating party will be entitled to bring a compensation claim. Non-renewal of a fixed term distribution agreement will not entitle the harmed party to compensation.

Termination of an indefinite contract will also be subject to the terms of the agreement, upon sending a notice of termination according to the agreement or the prevailing customs. Compensation as a result of termination will not be due unless such termination was wrongful and resulted in damages to the distributor.

#### *2.3.2 Notice Period*

There are no provisions providing for a mandatory notice period for termination of a distribution agreement.

### 2.3.3 *Liability of Manufacturer/Principal upon Termination*

There are no special provisions concerning the liability of the manufacturer/principal upon termination of a distribution agreement.

The general rules under the Civil Code will apply. We refer to section 1.5.3 above in this regard.

### 2.3.4 *Return of Products*

In the event of termination, unless the parties agree otherwise, there is no obligation on the manufacturer/principal to repurchase the unsold goods or spare parts from the distributor. Instead, such is a matter that may be contractually agreed upon by the parties.

### 2.3.5 *Statute of Limitations*

There is no statute of limitations specifically stated under Egyptian law concerning distribution agreements. As such, the generally applicable statute of limitations of seven (7) years will apply. The statute of limitations begins to run from the date the obligation became due.

# Estonia

## 1. Agency Agreements

### 1.1 General

#### 1.1.1 *Law Applicable*

Agency agreements are governed by Sections 670-691 of the Law of Obligations Act (“LOA”). Under the LOA, a commercial agent is a person who undertakes in the interests of and for the benefit of another person (the principal) to intermediate or enter into contracts in the name and on account of the principal independently and on a permanent basis. In addition to agency agreements, the LOA also distinguishes between brokerage agreements (Sections 658-669) and commission agency agreements (Sections 692-702) as types of authorization agreements. General provisions regarding authorization agreements (Sections 619-635) may also be applicable to agency agreements.

This chapter focuses on agency agreements in the sense of LOA Sections 670-691 since these provisions implement the Agency Directive into Estonian legislation. Unlike the Agency Directive, the provisions of the LOA on agency agreements are not restricted to sales or purchase of goods but also apply to services.

The provisions of the Private International Law Act (“PILA”) are applicable in cases where an agency agreement is connected with the law of more than one state. Under sub-Section 32 (1) of the PILA, parties to an agreement are free to agree on the applicable law.

In light of sub-Section 32 (3) of the PILA, it is important to note the fact that where the parties have chosen a foreign law to govern the contract, whether or not accompanied by the choice of a foreign jurisdiction, where all the elements relevant to the contract at the time of the choice are connected with one state only, then such a choice of law shall not prejudice the application of such rules of the law of the state which cannot be derogated from by contract (mandatory rules).



Agreements that submit disputes to the exclusive jurisdiction of foreign courts may be void, if one of the parties has been deprived of Estonian jurisdiction contrary to the principles of good faith. There is no established court practice on application of this prohibition.

If the parties to an agency agreement have not chosen the applicable law, then according to sub-Section 33 (1) of the PILA, such agreements will be governed by the law of the state with which the agreement is most closely connected. If an agreement is divisible and a part of the agreement has independently established a closer connection with another state, such part may be governed by the law of that other state.

Under PILA sub-Section 33 (2), an agreement is presumed to be most closely connected with the state where the residence or the seat of the directing body of the party who is to perform the obligation characteristic of the agreement is situated at the time of entry into the agreement (ie, the agent). Agency agreements concluded after 17 December 2009 where the choice of law is absent shall be governed by the laws of the country where the agent has his habitual residence.

### 1.1.2 Formal Requirements

The law does not prescribe any general formal requirements for agency agreements — they may be concluded orally, in writing and electronically. Implied agreements are also recognized — it is possible to qualify a legal relationship as an agency agreement if this can be derived from the conduct of the parties even if no express agreement has been made.

Agreements whereby the agent is also liable for the performance of an obligation of the other party arising from a contract intermediated or entered into by the agent (*del credere* agent) and agreements that establish non-compete obligations must be in written form.

There is no requirement to register agency agreements with any state bodies. However, companies or persons operating in areas of activity subject to special requirements must obtain a prior registration in the

Register of Economic Activities and meet certain requirements or obtain a respective license. Such special requirements and licenses are usually regulated under specific laws (eg, the Liquid Fuel Act).

#### *1.1.3 Individual/Corporate Entity*

An agent may be a natural person or any type of legal entity. Some provisions of the Agency Directive that were initially designed to protect self-employed individuals acting as commercial agents have been transposed to the LOA in a way that makes such provisions also applicable to legal entities acting as commercial agents.

#### *1.1.4 Duration of Agreement*

The parties are free to agree on the duration of the agreement. An agency agreement may be concluded for a fixed period or for an unspecified term. Parties may agree upon automatic extensions of the term.

Under sub-Section 686 (3) of the LOA, if the parties to an agency agreement continue to perform the agreement after the expiry of the term, then the agreement will be considered an agency agreement concluded for an unspecified term.

### **1.2 Exclusive/Non-Exclusive**

Principals are free to appoint commercial agents as exclusive or non-exclusive commercial agents. According to Section 675 of the LOA, in the absence of a written agreement that states otherwise, it is presumed that the agent may act for other principals. Certain restrictions that arise out of the general loyalty obligation and an obligation to avoid conflicts of interest may restrict such presumption. Likewise, the principal may authorize other persons to perform the same obligations as the agent.

If a principal has assigned a particular territory to the agent or has determined a group of customers for the agent with whom the agent is to intermediate or enter into contracts, the agent has the exclusive right to intermediate and enter into contracts in the name and on





account of the principal in that territory or with that group of customers, unless agreed upon otherwise in writing.

Parties to an exclusive agency agreement should be aware that certain limitations on exclusive distributorship agreements derived from EU and Estonian competition law may be equally applicable to agency agreements which in turn may render the exclusivity clause void. See earlier EU Competition law chapter. In Estonia, certain breaches of competition law are punishable in criminal proceedings.

### 1.3 Non-Compete

During the term of the agency agreement, the agent may not compete with the principal - this is derived from the statutory loyalty obligation of the agent.

The provisions governing the prohibition to compete after the term of an agency agreement are contained in Section 689 of the LOA. Several restrictions are imposed on agreements that prohibit competition after the term of the agency agreement. Importantly, such agreements must be in written form and the term of the prohibition may not exceed two years. The prohibition to compete only extends to the territory determined by the agency agreement or to the group of customers with whom the agent was to intermediate or enter into contracts pursuant to the agency agreement and only to such contracts which the agent was to intermediate or enter into. The principal must pay reasonable compensation to the agent for the term of the non-compete obligation even if payment of such compensation has not been agreed on.

Until the termination of the agency agreement, the principal may terminate the non-compete obligation in writing. If the agency agreement expires within six months of the date on which the principal terminates the non-compete obligation, the principal must still pay compensation to the agent for the period of time between the date on which the agency agreement expired and the date when six months have passed from the termination of the non-compete clause.

If an agency agreement is terminated due to a violation of the contract by one of the parties, the terminating party may also terminate the non-compete obligation within one month from the termination of the agency agreement. In such case, the principal is not required to pay compensation to the agent.

The provisions of Section 689 of the LOA are mandatory and any agreements which derogate from the provisions in that Section to the detriment of the agent are void.

## 1.4 Commission

### 1.4.1 *Basic Principles*

Under Section 678 of the LOA, an agent has the right to receive commission on all the contracts entered into by the principal as a result of the activities of the agent during the term of the agency agreement. An agent also has the right to receive commission on contracts entered into with a person who, as a result of the activities of the agent, entered into a permanent business relationship with the principal for entry into such contracts which were usually intermediated or entered into by the agent (eg, repetitive contracts). If a specific territory has been assigned to an agent or if the group of customers of the agent has been determined, the agent has the right to receive commission on contracts entered into during the term of the agency agreement without the agent's participation with persons in the territory or belonging to the group of customers assigned to the agent. An agent also has the right to receive commission on contracts entered into after the expiry of the agency agreement if the agent has intermediated the contract or prepared the entry into the contract such that said entry could be deemed, for the most part, to be the result of the activities of the agent and if the contract is entered into within a reasonable time after expiry of the agency agreement. The above provisions may be derogated from in the agency agreement.

Generally, the amount of commission or principles for calculating commission is agreed on in the agency agreement. Section 680 of the



LOA provides provisions to calculate the amount of commission if it has not been agreed on in the agency agreement. If the size of the agency commission has not been agreed on, the standard local commission or a reasonable amount of remuneration shall be deemed to be the agreed amount. However since such practice is not well established or publicly available, fixing the conditions governing the calculation of the agency fee in the agency agreement is recommended.

#### *1.4.2 When Due and Payable?*

Under Section 679 of the LOA, an agent is entitled to receive commission after the principal has performed its obligations arising from a contract intermediated or entered into by the agent. The parties may agree that such commission is to be paid later. The agent, however, still has the right to receive a reasonable advance payment. Even so, the right of the agent to receive commission still arises as soon as the other party to the contract intermediated or entered into by the agent has performed the obligations arising from such contract.

If the principal does not perform the contract (intermediated or entered into by the agent) and if the non-performance is caused by circumstances dependent on the principal, the agent is still entitled to receive commission. This requirement cannot be derogated from to the detriment of an agent.

The claim of an agent for commission is due on the last day of the month during which the commission is to be accounted for (see Section 1.4.4 below). This requirement cannot be derogated from to the detriment of an agent.

#### *1.4.3 Extinction of Rights to Commission*

An agent does not have the right to commission if it is evident that the contract is not performed due to a circumstance beyond the control of the principal. In such case, the agent has an obligation to refund any commissions already received pursuant to the provisions concerning unjustified enrichment.

#### *1.4.4 Accounting and Audit*

Under Section 682 of the LOA, the principal must account for the commission payable to an agent on a monthly basis. The accounting period may be extended for up to a period of three months by agreement.

The account of the commission must be forwarded to the agent not later than by the end of the month following the accounting period. The accounts for the commission must set out the size of the commission and the circumstances which are relevant for the determination thereof. An agent has the right to request an extract from the accounts of the principal concerning all contracts on which the commission is to be paid to the agent.

Additionally, an agent may demand that information be submitted on all circumstances relevant to the claim for commission, to the date on which it is due and to the method of its calculation.

If a principal refuses to provide the relevant accounts or extract or if an agent has reason to doubt the correctness or completeness of the accounting, the agent may demand that the principal allow either the agent or an auditor appointed by the agent, whichever the agent chooses, to examine the principal's books to the extent necessary to certify the correctness or completeness of the relevant accounts or extract. If the principal allows the agent to examine the books, the agent has the right to use the assistance of an auditor in such examination.

Any agreements which preclude or restrict the rights of an agent as described above are void.

### **1.5 Termination**

#### *1.5.1 Formal Requirements*

Unless the parties have agreed otherwise, there are no formal requirements on giving notice of termination, and this may be done in any format. It is recommended that notice of termination be given in at



least the same format as the agency agreement. It is up to the terminating party to prove that a notice has been given to the other party (eg, witness statements, receipts of delivery, etc.). Therefore, notice should be given at least in a format that is reproducible in writing.

### 1.5.2 *Notice Period*

An agency agreement which has been concluded for an unspecified term may be terminated by giving at least one month's advance notice. If the agency agreement has been in force for more than one year and acting as an agent has been the agent's principal activity, then the principal must give the agent at least two months' advance notice. If the agency agreement has been in force for more than two years and acting as an agent has been the agent's principal activity, the principal must give the agent at least three months' advance notice. Agency agreements may be terminated only at the end of a month. These requirements cannot be derogated from to the detriment of an agent, meaning that longer, but not shorter, notice periods are allowed.

If the parties continue to perform an agency contract after expiry of the fixed term of the contract, the contract is deemed to become an agency contract for an unspecified term after expiry of the fixed term.

Either party to an agency agreement may terminate it for good reason without giving advance notice (extraordinary termination). Agency agreements concluded for an unspecified or fixed term may both be extraordinarily terminated. Any agreement which precludes or restricts the right to terminate the agency agreement for good reason is void. Good reason usually means that the party terminating the agreement cannot reasonably be expected to continue performing the contract until the end of the term or until the expiry of the notice period when taking into account all the circumstances and the mutual interests of the parties.

A person entitled to terminate an agency agreement may terminate the agreement only during a reasonable period of time after that person becomes aware of the circumstances substantiating the extraordinary termination. If non-performance of a contractual obligation by the other party provides good reason to terminate the agreement, the agreement may be terminated only after the other party has failed to render a conforming performance within a reasonable time after having received a warning from the terminating party.

### *1.5.3 Liability of Principal on Termination*

#### ***Commission***

As a general principle, an agent is entitled to commission on transactions that were concluded during the term of the agency agreement. In some cases, however, an agent is entitled to commission also after the expiry of the agency agreement. (See Section 1.4.1 on Basic Principles above.)

#### ***Termination payment***

An agent has the right to receive a separate termination payment in the form of an indemnity upon termination of an agency contract if all the following conditions are met:

- the agent has created business relationships with new clients for a principal or significantly extended the existing business relationships of the principal;
- the principal has significantly benefited from such business relationships even after termination of the agency agreement;
- due to the termination of the agency agreement, the agent loses the right to commission which, had the contract continued, the agent would have been entitled to on contracts which were already entered into or which would have been entered into in the future with persons who, as a result of the



activities of the agent, entered into a permanent business relationship with the principal for entry into contracts which were usually intermediated or entered into by the agent; and

- payment of compensation is justified taking into consideration all the circumstances.

The LOA establishes principles to determine the maximum amount of the indemnity payable to the agent. An agent may not claim an indemnity payment that exceeds the average annual fee of the five last years of the agent's activity or, if the agency agreement was in force for a shorter period, an indemnity payment which exceeds the average annual fee of the entire period of the duration of the contract. Unless otherwise agreed, only fees paid as commissions for contracts intermediated or entered into by the agent will be included in such calculations. Other fees (eg, set-up fees) paid to the agent will be excluded.

Payment of an indemnity does not preclude or restrict the right of an agent to demand compensation for damage caused to the agent by the termination of the agency contract.

An agent loses the right to an indemnity payment or compensation for damage sustained as a result of termination of an agency agreement if any one of the following conditions is applicable:

- the agency contract is terminated by the agent, except in case the reason for termination is a circumstance dependent on the principal or the age or state of health of the agent which does not enable the agent to continue the activities thereof;
- the agency agreement is terminated by the principal due to the wrongful behavior of the agent;
- after termination of a contract, the principal and the agent enter into an agreement pursuant to which the agent is substituted by a third party who pays a fee to the departing agent in an amount equal to the indemnity payment and

compensation for damage which the agent would otherwise have been entitled to; or

- acting as an agent was a secondary activity of the agent.

Any agreements entered into before the termination of an agency agreement which preclude or restrict the right of an agent to an indemnity payment or compensation for damages are void.

## 1.6 Limitation Periods

The limitation period for a claim arising from an agency agreement is four years calculated from the end of the year in which the claim fell due. Parties to a contract may not agree on a limitation period shorter than one year. The limitation period for a claim for an indemnity payment and compensation for damage is one year from the date of termination of the agency agreement.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

There are no special provisions that specifically govern distributorship agreements. Distributorship agreements are governed by the general provisions of the LOA applicable to all contracts and special provisions of the LOA that govern various types of agreements that may be part of distributorship agreements (eg, license agreements; sales agreements, etc.). Application of provisions regulating agency agreements is possible under the principle of analogy. There are no Supreme Court judgments that would provide further details or guidance on the law applicable to distributorship agreements.

The provisions of the PILA are applicable in cases where a distribution agreement is connected to the law of more than one state. (Please see Section 1.1.1 on Law Applicable above for more information.)





### 2.1.2 *Formal Requirements*

No general formal requirements are applicable to distributorship agreements. There is no requirement to register distributorship agreements with any state body. However, companies or persons operating in areas of activity subject to special requirements must obtain a prior registration in the Register of Economic Activities and meet certain requirements or obtain a proper license. Such special requirements and licenses are usually regulated under specific laws.

### 2.1.3 *Individual/Corporate Entity*

A distributor may be a natural person or any type of legal person.

### 2.1.4 *Duration of Agreement*

The parties are free to agree on the duration of the agreement. A distribution agreement may be concluded for a fixed period or for an unspecified term. Parties may agree upon automatic extensions of the term.

## 2.2 *Exclusive/Non-Exclusive*

Parties to a distributorship agreement are free to determine the type of the distributorship and both exclusive and non-exclusive distributorship agreements may be concluded. Parties to an exclusive distributorship agreement should be aware that certain limitations on exclusive distributorship agreements derived from EU and Estonian competition law may be applicable which in turn may render the exclusivity clause void. See earlier EU Competition Law chapter. In Estonia, certain breaches of competition law are punishable in criminal proceedings.

## 2.3 *Non-Compete*

The law is silent on this issue. Parties to a distributorship agreement are free to agree on non-compete or restraint of trade as long as this remains permissible under applicable EU and Estonian competition

law. For avoidance of any future disputes, agreeing on the non-compete terms in the distributorship agreement is recommended.

## 2.4 Termination

### 2.4.1 *Formal Requirements*

Unless the parties have agreed otherwise, there are no formal requirements on giving notice of termination, and this may be done in any format. It is recommended that notice of termination be given in at least the same format as the distribution agreement. It is up to the terminating party to prove that a notice has been given to the other party (eg, witness statements, receipts of delivery, etc.). Therefore, notice should be given at least in a format that is reproducible in writing.

### 2.4.2 *Notice Period*

There is no minimum statutory notice period or other limits specifically imposed on the termination of distribution agreements. If the parties have not agreed upon notice periods for termination, then the general rules of the LOA on the termination of contracts are applicable. Since distributorship agreements are usually concluded for the performance of a continuing obligation or recurring obligations, LOA subsection 195 (3) is applicable. Under this provision, (distributorship) agreements which are entered into for an unspecified term may be terminated by either party by giving reasonable advance notice unless otherwise prescribed by law or the contract.

Under subsection 196 of the LOA, either party to a contract entered into for the performance of a continuing obligation or recurring obligations may terminate the contract with good reason without giving advance notice, in particular if the party terminating the contract cannot reasonably be expected to continue performing the contract until the due date agreed upon or until expiry of the notice period taking into account all the circumstances and the mutual interests of the parties (extraordinary termination).



A person entitled to extraordinarily terminate an agreement may only terminate the agreement within a reasonable period of time after that person becomes aware of the circumstances substantiating the extraordinary termination. If non-performance of a contractual obligation by the other party provides good reason for terminating the agreement, the agreement may be terminated only after the other party has failed to comply with the obligation within a reasonable time after having received a warning from the terminating party. It is not clear whether the right to extraordinary termination may be waived by agreement in the case of a distributorship agreement.

#### 2.4.3 *Liability of Supplier on Termination*

There are no provisions in the legal acts that govern termination specifically in connection with distributorship agreements. If the distributorship agreement has been correctly terminated, then the supplier should be under no obligation to pay any compensation, fees or damages unless otherwise agreed upon in the distributorship agreement.

#### 2.4.4 *Return of Products*

This question is unregulated. If the supplier wishes to ensure that the distributor returns the products in stock, then such clauses should be included in the distributorship agreement. Otherwise, it may be presumed that the distributor has no obligation to return (or sell back) the products to the supplier.

### 2.5 Limitation Periods

General rules for limitation periods are governed by the provisions of the General Part of the Civil Code Act (the “GPCCA”). Claims arising from distributorship agreements become time-barred pursuant to the general limitation periods applicable to transactions. Under Section 146 of the GPCCA, the general limitation period for a claim arising from a transaction is three years. If an obligated party has intentionally violated its obligations under an agreement, then the limitation period is 10 years.

The limitation period of a claim begins when the claim becomes due unless otherwise provided by law. Under the GPCCA, the limitation period for a claim for payment of the agreed remuneration begins at the end of the year when the payment claim falls due. Where a claim falls due upon submission of an invoice, the limitation period for the claim begins at the end of the calendar year when the entitled person had the right to submit the invoice.

The GPCCA further provides that for claims related to the performance of recurring obligations, the limitation period is three years for each separate obligation regardless of the legal basis for the claim. In such cases, the limitation period will begin at the end of the calendar year when the claim corresponding to the obligation becomes due.



## Finland

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 Law Applicable

The Act on Commercial Representatives and Salesmen (417/1992) (the “Agency Act”), which implements the Council’s Directive 86/653 on self-employed commercial agents (“Agency Directive”), governs the relationship between an agent established in Finland and its principal. The Agency Act applies to a relationship under which the agent has undertaken to continuously promote the sale or purchase of goods (not services) on behalf of the principal by negotiating and obtaining offers for the principal or by concluding sales or purchase contracts in the name of the principal. According to the preparatory works of the act, it may be applicable also in cases where the relationship is entered into for fairly short periods such as seasonal sales and campaigns.

The Agency Act regulates, besides the relationship between the parties to an agency agreement, the competence of the agent towards a third party and the conclusion of contracts between the principal and a third party. The act also governs the relationship between an employee acting as a salesperson and its principal, although to a more limited extent, (see section 1.1.3 below).

A provision in the Agency Act, which cannot be derogated from by an agreement to the detriment of the agent, also cannot be derogated from by agreeing that a foreign law shall apply.

The Agency Act entered into force on November 1 1992 and is as of January 1, 1994 applicable on agency contracts of an earlier date. The Agency Act is as per the repealed Act on Commercial Representatives (389/1975), unless otherwise stated, non-mandatory. The old act, the applicability of which was limited to the sale of goods, did not include mandatory provisions for the protection of the agent to

the extent required under the Agency Directive. A repeal of the old act was, however, primarily founded due to the need of making primarily technical changes to almost all of the provisions in the Act.

### *1.1.2 Formal Requirements*

Agency agreements are not subject to any formal requirements. Agency agreements and amendments to agency agreements may accordingly be executed either in writing or orally. Agency agreements may also arise through practice adopted by the parties or other usage which is to be deemed binding on the parties. However, if either party requests, the agency agreement (and any amendments) must be made in writing. Restrictions to this right are invalid. There are no requirements for registering agency agreements.

An agreement or a provision restricting the activities of the agent following the termination of the agency agreement is valid only to the extent that it has been concluded in writing.

### *1.1.3 Individual/Corporate Entity*

Both individuals and legal entities may act as agents. The only requirement set on individuals is that they must be self-employed. However, if all or part of the remuneration paid to an employee acting as a salesperson is paid in the form of a commission, the employee may invoke the Agency Act's provisions regarding the right to commission, the obligation to provide commission statements and the right to audit. A "salesman" is defined as an employee who has undertaken, on behalf of the employer, to promote the sale of goods "by travelling from place to place or by visiting clients at the place where the business of the employer is located."

Principals engaging individuals as agents should carefully assess whether or not the relationship may be considered to fall within the legal definition of an employee. If the answer is yes, the principal, although avoiding the provisions on indemnity (see section 1.5 below), could become subject to legal, social security and tax consequences arising from its status as an employer. In order to avoid the risk of



being deemed an employer, the agent should, for example, be free to organize his activities and working hours.

#### 1.1.4 *Duration of the Agreement*

Agency agreements may be entered into for a fixed term or until further notice. Agency agreement concluded for an indefinite time may be terminated upon ordinary notice, whereas fixed term agreements expire without notice at the end of the term.

### 1.2 Exclusive/Non-Exclusive

Subject to any issues of competition law (see the chapter on EU Competition Law above and the concept of non-genuine agent), principals may freely decide to appoint agents on an exclusive, sole or non-exclusive basis.

It should be noted that unless the parties explicitly limit the agent's right to commission to certain transactions concluded as a result of the agent's action, the agent may be entitled to commission also for transactions concluded by the principal or by other agents (without the agent's contribution) within a specific geographical area or with a group of clients entrusted to the agent, even if the agency agreement is sole or non-exclusive (see section 1.4.1 below).

### 1.3 Non-Compete

Subject to any issues of competition law, there are no restrictions on the principal's right to impose non-compete obligations on the agent or obligations to exclusively represent the principal during the term of the agency agreement.

The Agency Act provides that, unless otherwise stated in the agency agreement, the agent may enter into similar commitments with third parties, as long as the agent looks after the interests of their principal, acts dutifully and in good faith, and complies with all reasonable instructions when performing their tasks.

Pursuant to the Agency Act, a non-compete obligation surviving the termination of an agency agreement shall only be valid to the extent that (1) it has been concluded in writing, (2) it concerns the geographical area or the group of clients entrusted to the agent, and (3) it concerns the same kind of goods covered by the agency agreement. The Agency Act further provides that a non-compete obligation can only bind the agent for a maximum of two years, even if the agent has agreed to a longer period. However, the preparatory works of the Agency Act state that even a two year non-compete obligation, although valid under the Agency Act, may be considered unfair and can consequently be adjusted under section 36 of the Contracts Act (228/1929 as amended). A non-compete clause could also be problematic under EU and Finnish competition law, especially in the case of a non-genuine agent.

## 1.4 Commission

### 1.4.1 *Basic Principles*

The Agency Act affords the agent with the right to commission on commercial transactions concluded as a result of the agent's actions as well as transactions with a third party whom the agent had acquired as a client for the principal for similar transactions. If the agent is entrusted with a specific geographical area or with a specific group of clients, the agent has the right to commission on transactions concluded not only by themselves, but also on transactions concluded by the principal and by any other agents with a third party belonging to that area or group of clients. According to the preparatory works of the act, the right to commission does, however, in the last-mentioned case not apply to transactions concluded by other agents if the agent, when entering into the agency agreement, was aware of the fact that other agents had been appointed for the same area. In this situation, the agent would be considered to have approved not being entitled to claim commission on transactions concluded by other agents. The agent's right to commission is not mandatory and the parties may agree that other principles shall apply.





In the absence of an agreement on the amount of commission payable to the agent, the amount of commission shall be determined on the basis of remuneration customarily paid for the execution of identical or corresponding activities in the geographical area in which the agent operates. If the amount of commission cannot be determined on this basis, the agent is entitled to a commission that is “reasonable under the circumstances.” Unless otherwise agreed, the commission shall be calculated based on the purchase price payable by the buyer (not deducting any cash discounts granted). Freight costs, packaging costs, customs duties, insurance premiums, tax or other such additional cost may only be deducted if they have been separately itemized in the invoice sent to the buyer based on the transaction.

#### 1.4.2 *When Due and Payable?*

The right to commission arises, if not otherwise agreed, as soon as and to the extent that one of the following conditions has been fulfilled: (1) the principal has fulfilled his performance under the transaction concluded between him and the third party; (2) the principal should have fulfilled his performance obligation under a transaction; (3) the third party has fulfilled his performance obligations under a transaction. The parties cannot validly agree that the right to commission shall arise later than on the date when the third party fulfilled his performance obligation or should have done so if the principal had performed his/her obligations in accordance with the transaction.

Unless otherwise stated in the agency agreement, the principal shall pay commission to the agent within one month from the end of the calendar month during which the right to commission arose. A contract term according to which commission shall be paid later than one month from the end of the calendar quarter during which the right arose, shall not be binding on the agent.

#### *1.4.3 Extinction of Rights to Commission*

An agent loses his right to claim commission only to the extent a transaction between the principal and a third party is not executed and such non-execution is not attributable to the principal or any circumstances under his control. If the principal has agreed with a third party on a total or partial cancellation of a transaction or an amendment of its terms without the consent of the agent and the third party, as a consequence, will not fulfil its obligations, such non-fulfilment shall not affect the right of the agent to commission. The Agency Act further provides that any advance waiver by the agent of the agent's right to commission shall not be binding.

#### *1.4.4 Accounting and Audit*

A principal must provide their agent with a monthly commission statement on transactions that entitle the agent to commission. The statement shall list commissions due for the previous month on a transaction-by-transaction basis. If the agent is not credited with a commission or has fully or partially lost his right to commission on a transaction, this shall be stated in the commission statement. Any waiver by the agent of the above right is not binding under the Agency Act. The parties may, however, agree that commission statements are to be issued to the agent within one month of the end of the calendar quarter during which the commission became due.

The Agency Act further provides that the agent is entitled to receive an extract from the books of the principal and all other information that is available to the principal and which the agent needs in order to verify the commission statement. The agent's right to obtain information to verify the commission statement is mandatory. Should the principal refuse to give such information or should there be a justified reason to suspect that the statement or the information given is incomplete or false, an auditor authorized by the Central Chamber of Commerce or a local chamber of commerce and named by the agent shall have the right to audit the books of the principal to the extent necessary to ascertain the right of the agent to commission.



## 1.5 Termination

### 1.5.1 *Formal Requirements*

There are no formal requirements for termination of an agency agreement, unless otherwise stated in the agreement. However, it is strongly recommended to provide a written notice of termination, including the date as of which the termination is to take effect and the reasons for termination, in the event of a later dispute regarding the termination.

### 1.5.2 *Notice Period*

An agency agreement that has been concluded for an indefinite term may be terminated upon notice by either the agent or the principal. During the first year of the term of the agreement, notice must be given at least one month in advance. The notice period is extended by one month for each beginning year of the contract up to the sixth contract year. However, from the sixth year onwards the notice period is six months. The parties may agree on a longer period of notice than what is provided for under the Agency Act. However, the parties cannot validly agree that the period of notice to be observed by the principal shall be shorter than the one with which the agent must comply.

Furthermore, an advance agreement by the parties on a shorter period of notice than what is provided for in the Agency Act is not binding, with the exception that the parties may agree that the period of notice to be observed by the agent is to be three months even if the agency agreement remains in force for more than three years. The parties may, however, validly agree on a shorter notice period after one of the parties has informed the other party of his intention to terminate the agreement. Unless otherwise agreed, a notice period is calculated as of the end of the month when notice is given.

The above rules on notice periods do not apply to fixed term agreements, which simply expire at the end of the fixed term. However, if the parties continue to perform under a fixed term

agreement after expiry, the agreement shall be deemed to have been converted into an agreement for an indefinite period, applicable retroactively as of the first day of the fixed term. In this case, the above rules on notice periods will apply.

Notwithstanding the above, a party is entitled to terminate an agency agreement with immediate effect for a material reason. An omission or act of a party that would make it unreasonable to require that the other party continue the contract relationship is deemed to constitute a material reason. Unless deemed otherwise, a party may under the Agency Act, in particular, cancel an agreement in cases where (i) the other party has deceived the party concerning an essential issue; (ii) the other party refuses to agree to the demand of the party to conclude the agreement or any amendments in writing; (iii) the other party is guilty of severely violating the interests of the other party; or (iv) the other party has failed, in an essential issue, to fulfil his obligations under the agreement.

Notably, an agency agreement shall automatically be deemed to have expired if the assets of the principal or the agent are surrendered into bankruptcy as of the date when the bankruptcy application was submitted to a court.

Liquidation or insolvency may also be grounds for termination, depending on the facts of the case.

### *1.5.3 Liability on Principal upon Termination*

#### **Post-termination Commission**

An agent shall, unless otherwise agreed, be entitled to commission on transactions concluded after the termination of the agency agreement to the extent that such transactions can be deemed mainly attributable to the agent's contributions during the term of the agreement.

Moreover, the transaction must be concluded within a reasonable period after the termination of the contract. The question of whether or not a transaction is concluded within a reasonable period is to be assessed taking into account the type and size of the transaction and



potential trade practice within the field in question. A new agent shall not be entitled to a share of commission payable for transactions attributable to the previous agent, unless this would be equitable due to an essential input by the new agent. An agent's right to post-termination commission remains even if the principal sells its business to a third party.

However, the Agency Act's provision on post-termination commission is non-mandatory and the parties may deviate from this rule to the detriment of the agent.

### ***Termination Payment***

Upon termination of the agency agreement by the principal, or by the agent due to justifiable circumstances attributable to the principal or to the agent's age, infirmity or illness; the agent shall be entitled to a termination payment in the form of an indemnity from the principal, if and to the extent that:

- the agent has brought the principal new clients or significantly increased the volume of business with existing clients and the principal continues to gain substantial profit from business with said clients; and
- the payment is equitable having regard to the commission lost by the agent on the transactions with such clients and taking into account all other relevant circumstances.

The agent's descendants or bankruptcy estate may claim termination payment even if the agreement has expired due to the death or bankruptcy of the agent.

The agent may claim termination payment in an amount not exceeding the remuneration obtained by the agent for one year, calculated based on the average annual remuneration over the preceding five years. If the agency agreement has been in force for less than five years, the average remuneration shall be calculated based on the total remuneration paid during the contract period. Any

agreement concluded before the end of the agency agreement restricting the right to a termination payment is null and void.

If the agency agreement is terminated due to an omission by or act of the agent that would make it unreasonable to require the contractual relationship to continue, the agent does not have any legal grounds to claim termination payment. The same applies if the agent, with (or without) the consent of the principal, has assigned its rights and duties under the agency agreement to a third party.

### ***Damages***

Under the Agency Act, both parties are entitled to prematurely terminate both a fixed term and a non-fixed term agency agreement even if there are no grounds for termination. However, in this case the party prematurely terminating the agreement is liable to compensate the other party for any (direct and indirect) damages incurred as a result. A waiver by the agent of the right to compensation for premature termination is not binding on the agent.

If premature termination of the agreement is due to willful default or negligence or if the agreement terminates due to bankruptcy of a party, the other party is, under the Agency Act, entitled to compensation for any (direct or indirect) loss incurred as a result.

Pursuant to the Agency Act, the right to termination payment shall not prevent the agent (his descendants or estate) from claiming damages for breach of contract.

## **1.6 Limitation Periods**

Under the Agency Act, the agent must notify the principal of his intention to bring a claim for termination payment within one year of the termination of the agency agreement. Otherwise, the agent forfeits his right to bring such a claim.

The Agency Act does not stipulate any limitation period for other claims than a claim for termination payment. Other claims under the



act must be brought within the general limitation period set out in the Limitation Act (2003/728), which applies to agency agreements in the same way as it applies to claims brought under other contracts. The Limitation Act provides that claims must be brought within a period of three years, in case of commission, from the point in time when the commission fell due, and in case of damages, from the point in time when the other party noted or should have noted the breach of contract causing the damage.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

There is no specific legislation in Finland regulating the relationship between suppliers and distributors. Distribution agreements are governed by the Contracts Act, the Sale of Goods Act (1987/355) and general contractual principles. Consequently, the parties to a distribution agreement may freely agree on contractual terms and governing law, to the extent that such terms do not contravene rules of public policy, EU and Finnish competition law and any other mandatory Finnish laws.

In the absence of a choice of law clause, a Finnish court will determine the applicable law to a cross-border distribution agreement using Finnish conflict of law provisions. If the dispute relates closely to the part of the distribution agreement pertaining to the sale and purchase of goods the applicable law would as a starting point be chosen under the Finnish Act on the Law Applicable to International Sale of Goods (1964/387) implementing the 1955 Hague Convention on the sale of goods. Under said Act the law of the country of the supplier would generally apply, unless the order was received by the supplier or his representative in the country in which the distributor is established, whereby the law of the country of the distributor would apply.

The Agency Act does not (as such) apply to distributorships. As a starting point, distributors generally do not benefit from equivalent protection. There is, however, one Supreme Court Decision (KKO 1987:42) concerning an exclusive distribution agreement, which was entered into for an indefinite term and which did not include any provisions on the termination of the distribution agreement. In this case, the Supreme Court applied the rules on cancellation and termination of agency agreements set out in the Act on Commercial Representatives in force at that time. However, other than this case, there are no Finnish precedents or generally applicable principles supporting an analogous application of the Agency Act to distribution agreements.

Section 36 of the Contracts Act contains a clause that aims at adjusting the balance of contractual relationships. Under said rule, a contract term which is unfair or the application of which would lead to an unfair result may be adjusted or set aside. In determining what is unfair, regard shall be given to the entire content of the contract, the position of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors. The provision primarily only applies to contracts in which one of the parties is clearly in a weaker position than the other party is. In a case decided by a Finnish arbitration court in 2004, a distributor claimed termination payment in the form of an indemnity, and nullification of a clause in the distribution agreement which denied the distributor any compensation in the event of termination of the distribution agreement. The distributors' claim was based on an analogous application of the Agency Act. The arbitration court found that there was no legal basis for applying the mandatory provisions in the Agency Act to the distribution agreement. Nevertheless, the arbitration court adjusted the contract term denying any right to compensation upon termination of the agreement under Section 36 in the Contracts Act, on the grounds that applying the term would lead to an unfair result due to changed circumstances (the supplier's problems with the manufacture and supply of the products). The supplier was ordered to pay compensation in an amount deemed reasonable by the arbitration court.





### 2.1.2 *Formal Requirements*

Similarly to agency agreements, distribution agreements are not subject to any formal requirements and may thus be concluded orally or in writing. Distribution agreements may also arise based on practice adopted by the parties or other usage that is to be deemed binding on the parties. With regard to possible future disputes between the parties it is, however, recommended to set out the terms and conditions of the distribution relationship and any amendments to the agreement in writing.

### 2.1.3 *Individual/Corporate Entity*

Both individuals and legal entities may act as distributors. Similarly to agents, individuals acting as a distributors risk being considered employees of the supplier, if they are not self-employed.

### 2.1.4 *Duration of the Agreement*

There are no Finnish laws regulating the duration of a distribution agreement. The parties may accordingly freely agree on the term. In the absence of an agreement, a distribution agreement is likely to be deemed to have been concluded for an indefinite term.

## 2.2 Exclusive/Non-Exclusive

A distributor may be appointed on an exclusive, sole or non-exclusive basis. It is important that the parties expressly agree on this issue since there is no presumption under the law. It should be noted that competition rules may limit a supplier's possibilities to restrict a distributor's right to carry out passive sales into other territories.

## 2.3 Non-Compete

There are no specific legal provisions regulating the use of non-compete obligations in distribution agreements. EU and Finnish competition law rules may apply, however (see chapter on EU Competition law). To the extent that such terms and conditions do not violate any applicable competition laws, the parties are free to agree

to what extent the distributor shall, or shall not be, free to market goods that compete with those of the supplier. In the absence of contractual provisions, the presumption is that the distributor is free to sell competing products.

## 2.4 Termination

### 2.4.1 *Formal Requirements*

There are no formal requirements for terminating distribution agreements. However, it is strongly recommended to give notice of termination in writing and to include the date as of which termination is to take effect, as well as the reasons for termination in a manner that may evidence the receipt of such notice in the event that a dispute regarding the termination later arises.

### 2.4.2 *Notice Period*

Finnish law does not set out a minimum notice period for termination of a distribution agreement. Section 36 of the Contracts Act could, however, be invoked to challenge an unreasonably short termination period in a distribution agreement which has remained in force for many years. Furthermore, as stated in section 2.1.1, an analogous application of the provisions of the Agency Act cannot be excluded.

### 2.4.3 *Liability of Supplier on Termination*

There are no Finnish laws that would entitle a distributor to a termination or severance payment upon termination of a distribution agreement. Unless otherwise agreed, and provided that the supplier complies with a reasonable notice period and is not in breach of contract, the distributor generally does not have any legal basis to claim indemnity or compensation for costs or damages. As already stated (see section 2.1.1 above) a clause limiting the distributor's right to compensation for damage due to termination of a contract, may however, be successfully challenged under Section 36 of the Contracts Act, especially if the supplier is in default.



#### 2.4.4 *Return of Products*

Suppliers and distributors do wisely in expressly agreeing on how to deal with remaining stock in the possession of the distributor after the termination of the distribution agreement, since this question is unregulated under Finnish law. If the distribution agreement is silent on this issue, the distributor is free to dispose of the stock.

#### 2.4.5 *Limitation Periods*

There is no limitation period under Finnish law that would apply specifically to distribution agreements. Claims under distribution agreements shall be brought within the same general limitation period set out in the Limitation Act as claims brought under contracts. Under the Limitation Act, claims must be brought within a period of three years. In cases concerning compensation, this period is calculated from the point of time when the compensation fell due. When claiming damages, the period is calculated from the point of time the other party noted or should have noted the breach of contract causing the damage.

# France

## 1. Agency Agreements

### 1.1 General

#### 1.1.1 *Law Applicable*

The Agency Directive was incorporated into French law by law n° 91-593 of June 25, 1991. Such law is codified under Articles L.134-1 to L.134-17 of the French Commercial Code ("FCC").

Under Article L.134-1 of the FCC, an agent is "a representative who, on an independent and usual basis, without being bound by an employment agreement, negotiates and eventually concludes sale or purchase of goods, or services agreements in the name and on behalf of manufacturers, suppliers or other commercial agents. An agent can be either an individual or a legal entity." While depending on the facts in each case, this definition potentially includes agents who negotiate contracts on behalf of their principals but do not have the authority to execute those contracts.

French law generally applies to all agency agreements concluded with an agent operating within the French market.

Problems have arisen in the past in relation to the application of French law to international agency agreements.

The French Cour de cassation (ie, the French Supreme Court) and the European Court of Justice have, in appearance, expressed different views of whether French agency law is mandatory in respect of agency agreements with agents operating in France:

- Under French case law (Cour de cassation, chambre commerciale, November 28, 2000 n° 98-11335, confirmed in another case Cour de cassation, chambre civile 1, October 25, 2005 n°02-13.252 and Cour de cassation, chambre commerciale, January 5, 2016, n° 014-10.628), even though



the provisions regarding commercial agency contracts are mandatory under national law, they are not of international public order. Therefore, if the parties choose a foreign law (ie, a non-European law) to govern the contract, the articles of French Law and of the Agency Directive protecting the commercial agent do not apply.

- European case law (European Court of Justice, November 9, 2000 C-381/98) recognizes the mandatory nature of Articles 17 and 18 of the Agency Directive 86/653/EEC of 18 December 1986 (implemented as Articles 134-12 and 134-13 FCC), which ensure that the commercial agent is indemnified after termination of the agency contract. The European Court of Justice ruled that Articles 17 and 18 of the Agency Directive must be applied when the case is closely related to the EC, especially when the commercial agent carries out its activity in the territory of a Member State.

Consequently, Articles 17 and 18 were applied in situations where the commercial agent carried out its activity in a Member State even though the principal was established in a non-member country (USA) and a clause of the contract stipulated that the contract would be governed by the law of that foreign country (USA).

There is therefore a potential conflict between national and European case law. However, European Court of Justice case law should prevail because of the primacy of European law. Consequently, where an agency agreement is entered into between a French agent and a non-EU principal, which is expressed to be governed by the law of the principal's jurisdiction or another non-EU country, the termination and indemnity provisions of the FCC protecting the commercial agent could still apply.

Regarding a conflict of law between two European Union Member States' provisions, more recent European case law recognizes that the "overriding mandatory provision" in a Member State's legal regime may supersede the choice of law provisions in an agency agreement,

even though the choice of law was that of a Member State which had transposed the Agency Directive.

Consequently, an EU Member States' mandatory provisions concerning commercial agency agreements could still prevail over the law applicable to a commercial agency agreement pursuant to the parties' contractual choice. However, the question of whether the commercial agency provisions are overriding mandatory provisions remains to be answered on an individual basis by that country.

### *1.1.2 Formal Requirements*

No requirement for a formal written contract is imposed by FCC provisions regarding agency agreements. Indeed, an agency agreement may result merely from letters between the parties or from an oral agreement. It may be proven by any written evidence.

Nevertheless, Article L.134-2 of the FCC entitles each party to obtain from the other upon request a written statement of the terms of the agreement.

The validity of an agency agreement may not be made conditional upon the registration of the agent with the national register of agents.

Moreover, an agent's failure to comply with an obligation to register does not constitute a serious contractual breach on the part of the agent justifying the termination of the agreement without compensation.

Nevertheless, where the agreement provides that it will take effect from the date on which the agent registers with the national register of agents, the agent whose contract is terminated may not claim compensation for orders made before its registration.

### *1.1.3 Individual/Corporate Entity*

Agents may be individuals or corporate entities, and French law does not distinguish between them.



An “*intuitu personae*” agency agreement concluded in consideration of the individual himself may not be assigned automatically by the principal, eg, following an assignment of the principal’s activity to another company. It may be transferred only with the agreement of the commercial agent.

Should the agent not have the capacity to negotiate prices, it may qualify as a sales representative of the principal and potentially not benefit from the protection granted to commercial agents (Cour de cassation, chambre commerciale, January 15, 2015, n°13-24.231)

#### *1.1.4 Duration of Agreement*

Principals are free to appoint agents for fixed or indefinite periods.

However, Article L.134-11 of the FCC provides that if a contract concluded for a fixed period continues to be performed after its term, then in the absence of an express automatic renewal clause providing for a fixed term renewal, or an express agreement to that effect, the contract will be considered to have been converted into an indefinite term agreement.

#### *1.1.5 Sub-Agents/Employees*

A sub-agent is a commercial agent that negotiates in the name and for the account of another agent. Sub-agents benefit from the protective status set out in the FCC provisions on agency agreements. Unless provided for otherwise in the agency agreement, the agent may employ sub-agents without the prior authorization of its principal. The sub-agent may take action directly against the principal to obtain the commissions due to the sub-agent.

Prior to a decision of the Cour de Cassation on December 3, 2002, the sub-agent could claim commission from the principal even though the principal had ignored the existence of sub-agents and had already paid the commission due to the agent.

Since the above decision was rendered, direct action by the sub-agent against the principal for unpaid commissions remains possible only if the principal has not paid the agent. Otherwise, the sub-agent must claim against the agent.

### ***Employees of agents***

The agent is independent from its principal and may be a legal entity. To the extent that it is a legal entity, it is free to hire employees for the performance of its agency agreement. Vis-à-vis its principal, the agent may be held liable for defaults due to its employees and for non-compliance with applicable employment laws.

## **1.2 Exclusive/Non-Exclusive**

Unless agreed otherwise, an agent may represent other principals even without authorization from the first principal. The agent only has to be authorized by its principal if it wishes to represent the principal's competitors.

Exclusivity rights may be granted in favor of the principal and/or the agent. When exclusivity is granted in favor of the principal, the agent is not entitled to represent other principals but the principal may be represented by several agents. It is important to note that, in such a case, there is a risk that the agency agreement concluded with each agent will be requalified by a judge as an employment contract if the agent is deemed "employed" by the principal (ie, in a position of subordination).

When exclusivity is granted in favor of the agent, the principal may be represented by only one agent that may also represent other non-competing principals.

Finally, the exclusivity may be reciprocal if the agent is entitled to represent only one principal, which itself may be represented by only one agent.





### 1.3 Non-Compete

#### ***During the term of the agreement***

Under the FCC provisions on agency agreements, the relationship between the agent and the principal provides for an obligation of loyalty.

In line with this principle, Article L.134-3 of the FCC states that the commercial agent may not represent competitors of its principal without the latter's express approval. However, courts have already ruled that the commercial agent, who represented a competitor with the knowledge of the principal and without the latter requesting exclusivity or prior authorization, had not committed a serious misconduct.

French courts have very restrictively interpreted the notion of competitors. For instance, if similar products have different characteristics but may be used in a different manner or may be used with, or as accessories of, the principal's products, the commercial agent may represent other principals of these products without these being deemed competitive.

A breach of a non-compete obligation justifies termination of the contract without compensation.

#### ***After termination of the agreement***

Article L.134-14 of the FCC provides that the principal and the commercial agent may include in their agency agreement a non-compete clause with a maximum duration of two years as of the end of the agency agreement.

Such a non-compete clause is valid only to the extent that it is entered into in writing and covers the geographical area or the group of customers entrusted to the commercial agent and the goods or services that are the subject of the agency agreement. A judge may declare a non-compete clause null and void or, depending on the

circumstances, may define the scope of the clause if it does not precisely determine the geographical area, customer group or type of goods or services covered. Moreover, the clause must be intended to protect the principal's interests and must not impede the agent's right to exercise any professional activity.

## 1.4 Commission

### 1.4.1 *Basic Principles*

#### ***Prerequisites***

Pursuant to Article L.134-5 of the FCC, commission is defined as “any element of compensation which varies with the number or value of business transactions.” The agent may be remunerated in whole or in part by commission. While payment by means of a monthly lump sum (or “retainer”) is not prohibited, this may increase the risk of requalification into an employment contract in the case of agents operating as individuals.

Under Article L.134-6 of the FCC, this commission is due with respect to all commercial transactions concluded during the period covered by the agency agreement when such transactions were concluded as a result of the agent's action or concluded with a third party that the agent had previously acquired as a customer for transactions of the same type.

The Commission is also due to the commercial agent for all transactions concluded during the period covered by the agency agreement when the agent is entrusted with a specific geographical area or a group of customers and when the transaction was entered into with a customer belonging to such area or group. However, the European Court of Justice has considered that commercial agents entrusted with a specific geographical area/group of customers do not have the right to commission on transactions concluded with customers belonging to that area without any direct or indirect action by the agent (ECCJ, 17 January 2008, case C-19/07). Such interpretation has been adopted by French jurisdictions (see, for



instance, Cour de cassation, chambre Commerciale, 1 July 2008, n°03-12.724, “Chevassus Marche v. Danone”).

As a matter of principle, the commission should be set out in the agreement. However, in the absence of any agreement on the agent’s remuneration, the agent is entitled to the remuneration which commercial agents are customarily entitled to in the same field of activities in which it performs its activities. If there is no such customary practice, the agent shall be entitled to reasonable remuneration, taking into account all aspects of the transaction. In practice, agency agreements precisely define the method of calculation of the commission.

### ***Commission when several agents are appointed to one territory***

Several commercial agents may be appointed to a single territory. In such circumstances, they receive commissions on the transactions concluded through their respective efforts. If each commercial agent is entrusted with a specific group of customers and not with a specific geographical area, it is entitled to commission on commercial transactions concluded with customers belonging to such a group. Unless otherwise agreed, the agent’s right to receive commission on all transactions with customers in the agent’s geographical territory or belonging to a group of customers entrusted to the agent applies to the extent that the agent was directly or indirectly involved in the sale.

Commissions that become due after termination of the agreement may trigger conflicts between the former agent and any new agent. Article L.134-8 of the FCC provides in such a case that the new commercial agent is not entitled to commission that are due the former agent. Pursuant to Article L.134-7, the former agent is entitled to commission on transactions deriving principally from its past action and concluded within a reasonable period after the end of the contract term (see section 1.5.3 below) unless it is fair to share the commission between the former and the new agent in view of the circumstances. A French Court of Appeal has considered that a reasonable period after the end of a contract was three months for a contract that was almost

four years in duration (Cour d'appel de Lyon, 28 January 2011, n°10/02455). The determination of such “reasonable” period is nevertheless to be done on a case-by-case basis.

### ***Reimbursement of costs and expenses***

Unless otherwise expressly provided for in the commercial agency agreement, the agent may not request reimbursement from the principal for costs and expenses incurred in performing its obligations under the agreement.

#### ***1.4.2 When Due and Payable?***

Under Article L.134-9, paragraph 1 of the FCC, the commission is due to the agent as soon as the principal has executed, or should have executed, the transaction pursuant to the agreement entered into with the third party, or when the third party has performed its obligations. From a practical standpoint, the commission could be due either when the principal has supplied, or should have supplied, the product or service under the terms of its agreement with the customer, or when the customer has paid for those products or services.

Article L.134-9, paragraph 2 of the FCC provides that the commission is due at the latest when the third party has performed its obligations pursuant to the transaction (ie, has paid for the products or services) or should have done so if the principal has executed its part of the transaction (ie, has supplied the products or services).

Commission due to the agent must be paid no later than on the last day of the month following the quarter in which it became due.

Article L.134-9, paragraph 2 of the FCC is mandatory. Therefore, the agency agreement may not derogate from it to the detriment of the commercial agent. It is, of course, permissible to agree on more favorable commission terms with an agent, for example, commission becomes due, or is to be paid, earlier than the above rules provide.



### 1.4.3 *Extinction of Rights to Commission*

Under Article L.134-10, paragraph 1 of the FCC, the agent's right to commission is extinguished if it is established that the agreement between the third party and the principal will definitely not be performed but not due to a breach by the principal of its obligations vis-à-vis the third party (eg, failure to deliver products ordered by the customer). This provision is mandatory, and the agency agreement may not derogate from it to the detriment of the commercial agent.

If the agent's right to commission is validly extinguished, Article L.134-10, paragraph 2 of the FCC provides that any commission already paid to the agent must be reimbursed.

### 1.4.4 *Accounting and Audit*

Pursuant to Article R.134-3 of the FCC, the principal must provide the commercial agent with a statement of the commission due no later than on the last day of the month following the quarter in which such commission became due. The statement must specify the basis on which the commission was calculated.

The commercial agent must report to its principal regarding the operation and conduct of its activities. The commercial agent and the principal respectively bear an obligation to provide each other with all information necessary for the performance of the agency agreement. Pursuant to Article R.134-3 of the FCC, the commercial agent may also require the principal to supply all information necessary to enable the agent to calculate the amount of commission due, including extracts of the principal's accounting records.

The provisions of the FCC regarding commission statements and information obligations are deemed compulsory and may not be excluded from the agency agreement to the detriment of the commercial agent.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

Under Article L.134-11 of the FCC, where an agency agreement is concluded for an indefinite term, either party may terminate it by giving notice. An agency agreement for a fixed term which continues to be performed after expiration of its term without an express clause providing for a fixed term renewal, or an express agreement between the parties on such a renewal, is deemed to have been converted into an indefinite term agreement. There is no legal requirement in the FCC that a notice to terminate an agency agreement must be in writing, but it is of course advisable that a written notice be given.

### 1.5.2 *Notice Period*

The required minimum notice period is one month for the first year of performance of the agreement, two months for the second year, and three months for the third year and thereafter. Unless otherwise stipulated in the agreement, the period of notice must expire at the end of a calendar month.

The parties may not agree on shorter periods of notice to the detriment of the commercial agent but may agree on longer notice periods. In such cases, the notice period to be observed by the principal may not be shorter than that to be observed by the commercial agent.

Where the notice period is not respected by one of the contracting parties, the party that suffers from the breach may claim damages in respect of the loss suffered. If the claiming party is the agent, the amount of damages generally awarded corresponds to the commission the agent would have been paid had the contract been normally performed during the required notice period.

Such provisions do not apply, and the notice period requirement is waived, when the agency agreement is terminated because of a material breach by either party of its obligations or when an event of



force majeure occurs. A material breach must de facto make it impossible for the commercial agent to pursue the relationship (Cour de cassation, chambre commerciale, April 7, 2009, n°08-12382).

### *1.5.3 Liability of Principal on Termination*

In addition to liability for failure to comply with the correct notice period, if on or after termination of the agency agreement the principal is in breach of the contract, the agent will be entitled to claim damages under normal contractual principles, provided it can show that it has suffered a loss.

If the principal's breach is serious enough, it may also entitle the agent to terminate the agency agreement and claim the compensation described in Section 1.5.4 below.

Irrespective of any breach of contract by the principal, Article L.134-7 provides that the commercial agent is entitled to commission on commercial transactions concluded after the agency agreement is terminated if:

- the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency agreement, and the transaction was entered into within a reasonable period after termination of the agreement; or
- in accordance with the conditions of Article L.134-6 of the FCC, the order from the third party reached the principal or the commercial agent before termination of the agreement.

### *1.5.4 Compensation Upon Termination of Agreement*

Under Article L.134-12 of the FCC, the commercial agent is entitled to compensation for damage suffered as a result of the termination of its relationship with the principal. This provision is mandatory and the parties may not therefore contract out of this requirement. The agent's estate is also entitled to compensation where the agency agreement is terminated because of the commercial agent's death.

The right to compensation is specifically aimed at compensating the agent for losses suffered during the period which will be necessary for the agent to find and develop another agency activity ensuring an equivalent level of revenues. It is not aimed at compensating the agent for the loss of its clientele.

The FCC does not provide for any specific amount of compensation, or any maximum, the principle being that the agent must be compensated for its full damage. The amount traditionally granted to commercial agents by French courts is equivalent to two years of gross commissions calculated on the average commissions paid to the agent over the last two or three years of performance of the agency agreement. However, this is not a strict rule, and compensation of a lesser amount may be awarded if it is shown that the agent did not develop any business during its agency or if the term of the agency agreement was relatively short. Termination of an agreement during a trial period does not deprive the agent of its right to compensation.

Compensation is not due the agent where the principal terminates the agency agreement as a result of a material breach by the agent which justifies immediate termination of the agency agreement. Only the judge may determine what constitutes a material breach. The parties may not contractually decide that a particular behavior constitutes a serious breach. In particular, a clause of the agreement specifying that failure of the agent to reach a minimum turnover will be considered as a material breach justifying the termination of the agreement without compensation, will be declared void.

A mere drop in the turnover generated by the agent is not enough to constitute a material contractual breach. Nevertheless, if other contractual breaches not considered in themselves as sufficiently serious are added together, a material breach may be established.

In any case, the principal will have to prove the material breach. In addition, the principal may not invoke material breaches by the agent





if the principal has always tolerated them during the performance of the agreement.

Compensation is also not normally due where the commercial agent terminates the agency agreement on his own initiative, unless such termination results from circumstances attributable to the principal or is due to the age, infirmity or illness of the commercial agent preventing him from reasonably continuing his activities. However, the French Supreme Court has recently ruled that the compensation was due should the agent refuse to renew the agreement. The Court held that the refusal to renew an agreement could not be considered as a decision from the agent to terminate the agreement, and therefore compensation was due (Cour de cassation, chambre commerciale, June 21, 2017, n°15-29.127).

It has been ruled that under specific circumstances, a change in the shareholding of the principal that causes a drop in the agent's turnover entitles the agent to terminate the agreement and claim compensation. The principal has a duty to facilitate the exercise by the agent of his activity and may be held liable where the agent terminates the agreement due to adverse financial consequences on the agent of a new economic or financial strategy of the principal.

Finally, pursuant to Article L.134-13 of the FCC, compensation is not due to the commercial agent where, with the agreement of the principal, the commercial agent has assigned his rights and duties under the agency agreement to another agent.

Nevertheless, the principal is deemed to have terminated the agreement if it repeatedly and/or without valid reason does not approve the new agent. In such a case, the principal will have to pay the former agent compensation upon termination.

## 1.6 Limitation Periods

Under Article 134-12 of the FCC, the commercial agent's right to compensation is time-barred if the commercial agent fails to claim it from the principal within one year of the termination of the agency

agreement. With regard to other claims, such as for damages in lieu of statutory notice or any breach of contract, the statute of limitations requires that the claim be brought within five years.

## 2. Distribution Agreements

### 2.1 General

A distributorship agreement is an agreement pursuant to which a manufacturer or supplier agrees to sell products to a legally independent third party (an individual or legal entity) that, in turn, agrees to buy such products for resale.

There are four main categories of distributorship in France: approved distributors, selective distributors and exclusive or non-exclusive distributors.

An approved distributorship agreement is an agreement pursuant to which a distributor is named as an Approved Distributor (“*distributeur agréé*”) authorized to hold itself out to the public as empowered to sell and/or service the products of the manufacturer.

A selective distributorship agreement is an agreement pursuant to which a manufacturer agrees to supply goods to only a limited number of distributors that it selects according to objectively verifiable qualitative and/or quantitative criteria. Such agreements do not confer upon the distributors any exclusive right to sell and/or service the goods of the manufacturer within a geographical area. Therefore, the distributors may deal in other products and the manufacturers may sell to other distributors.

An exclusive distributorship agreement is an agreement pursuant to which the manufacturer agrees to supply, within a geographical area, goods to one distributor only. It confers exclusive rights in favor of the distributor and the manufacturer therefore may not sell its products to other distributors within a specific geographical area.



A non-exclusive distributorship agreement is an agreement pursuant to which the manufacturer agrees to supply, on a non-exclusive basis, goods to a distributor. The manufacturer may therefore sell to other distributors.

### *2.1.1 Law Applicable*

There is no specific law on distribution agreements similar to the FCC provisions regarding agency agreements. The laws applicable to distribution agreements are the rules of the FCC that apply to commercial agreements generally, as augmented by case law.

### *2.1.2 Formal Requirements*

There are no filing/notification requirements to ensure the validity of distribution agreements. Distribution relationships may derive from either oral or written agreements, without any formal requirements.

### *2.1.3 Individual/Corporate Entity*

French law does not distinguish between distributors that are individuals and those that are corporate entities.

### *2.1.4 Duration of Agreement*

Suppliers are free to appoint distributors for fixed or indefinite periods. Please note, however, that French law limits the duration of exclusive supply agreements.

Indeed, pursuant to Article L.330-1 of the FCC, provisions whereby distributors undertake to purchase products only from one supplier are limited to a maximum duration of 10 years.

## **2.2 Exclusive/Non-Exclusive**

A manufacturer is free to grant exclusivity to the distributor.

Generally, within the framework of an exclusive distributorship agreement, an exclusive purchase clause accompanies the exclusive

sale clause. It is therefore common for exclusivity in distribution agreements to be reciprocal.

As indicated above, any clause requiring the distributor to deal only in products of its supplier may not be concluded for a period longer than 10 years.

This maximum contractual period may also be influenced by EU competition law, which limits non-compete obligations to five years if the agreement is of a community dimension. This issue is discussed more fully in the chapter on EU competition law in the earlier part of this book.

Furthermore, under Article L.330-3 of the FCC, any person licensing a distributor a corporate name, trademark or trade name and requiring an exclusivity or quasi-exclusivity commitment must provide a pre-contractual information document to the distributor prior to conclusion of the agreement (Doubin pre-contractual information requirement).

## 2.3 Termination

### 2.3.1 *Formal Requirements*

Article L.442-6 of the FCC requires a written notice of termination for all established commercial relationships.

### 2.3.2 *Notice Period*

Subject to the above rules limiting the duration of agreements containing non-compete obligations, distributorship agreements may be concluded for a fixed or an indefinite term.

When the agreement is concluded for a fixed term, it must be performed until the end of its term. If the parties continue to perform a fixed term agreement after it expires without an express clause providing for a fixed term renewal, or an express agreement between the parties for such a renewal, the agreement will be generally deemed tacitly renewed for an indefinite term.



When the distributorship agreement is concluded for an indefinite term or has continued for successive fixed terms, either party should terminate/not renew the agreement by giving a “reasonable” notice (irrespective of the contractually agreed notice periods).

Indeed, Article L.442-6-I-5 of the FCC prohibits the so-called “abrupt termination” of any commercial relationship, irrespective of whether such relationship results from a succession of fixed term agreements or an indefinite term agreement, or is an informal relationship, and irrespective of the contractual notice period. The law provides for action to recover damages from termination (whether total or partial) of an established commercial relationship without sufficient notice. The claimant has to demonstrate that it suffered a loss that is attributable to the abrupt termination. Damages are generally based on the gross margin the claimant could have made during a “reasonable” notice period, plus any “special” non-amortized investments it could prove. In addition, the minister of the economy and/or the public prosecutor may request the imposition of a civil fine of up to EUR 5 million, which may be increased to up to 5% of the French VAT excluded turnover, excluding.

The notice period given must therefore take into consideration the entire duration of the parties’ relationship, irrespective of the notice period contractually agreed upon.

Either party may terminate the distribution agreement in the event of a breach by the other party, assuming that the agreement expressly permits termination for the particular breach, or the breach is sufficiently serious to justify termination. Prior to such termination, the party in breach must be notified of the breach and required to remedy the same, assuming that the breach is remediable.

### 2.3.3 *Liability of Supplier on Termination*

The distributor is entitled to obtain compensation only where the contractual notice period is not given or the termination by the manufacturer is “abrupt,” as discussed above.

However, as a matter of principle, the distributor is not entitled to compensation in the event that there is no tacit or express renewal of a fixed term distribution agreement or in the event that reasonable (and, where applicable, contractual) notice is given to terminate an indefinite term distribution agreement. Nevertheless, the distributor is entitled to bring a claim for damages under normal contractual principles if the supplier is in breach of contract with regard to the termination itself, or in respect of its post-termination obligations.

Please also note that if the manufacturer has suffered from an abrupt termination by the distributor, it is also entitled to claim damages before the French commercial courts for the damage suffered.

#### *2.3.4 Return of Products*

There is no specific rule obliging the distributor to return products to the supplier on termination of the distribution agreement, and an obligation to this effect will therefore need to be expressly stated in the agreement, if appropriate.

However, distribution agreements often prohibit distributors from marketing the supplier's products within the territory after termination of the agreement. This restriction is generally supported by provisions relating to the intellectual property rights of the supplier, which often prohibit the distributor from using the trademarks and commercial names of the supplier after expiration or termination of the agreement.

### **2.4 Limitation Periods**

As a matter of principle, actions for breach of a contract entered into by businesses are subject to a statute of limitation of five years.



## Germany

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law Applicable*

In Germany, Sections 84 to 92 c of the German Commercial Code (“HGB”) set out the rules governing the relationship between agents and their principals as defined in Section 84 (1) HGB. These sections implement the Agency Directive but also go beyond the scope of the Agency Directive.

According to Section 84 (1) HGB, an agent is any self-employed intermediary who has continuing authority to procure transactions on behalf of a principal or to conclude transactions in the name of the principal. In order to ascertain whether the provisions dealing with agents apply, consideration must be given to the contractual provisions and the handling of the agreement in practice and not its chosen denomination. The HGB provisions extend beyond the scope of the Agency Directive, to cover agents acting as intermediaries not only with respect to goods but also with respect to services.

German courts will determine the law applicable to an international agency agreement in accordance with German conflict of laws rules (including the Rome I Convention), which provide that the parties to an agreement are free to choose the law governing the agreement. In the context of agreements between merchants, such choice of law clauses are generally valid. Notwithstanding the aforementioned, German overriding mandatory rules may apply irrespective of the choice of a foreign law. In addition, as mentioned in the Introduction, with respect to agreements that provide for the applicability of the law of a non- member state of the European Union, the application of any mandatory European Community law (where appropriate as implemented in German law) is not prejudiced if all elements relevant to the agreement (except the choice of law clause) are connected to one or more member states of the European Union.

Absent an explicit or implied choice of law, the agreement will be governed by the law of the country with which it is most closely

connected. According to German conflict of laws rules, it is presumed that an agreement is most closely connected with the country where the party effecting the characteristic performance of the agreement, ie, the agent, is domiciled or, in the event of a corporate entity, has its registered office at the time the agreement is concluded.

### *1.1.2 Formal Requirements*

An agency agreement is not subject to any formal requirements. It may be concluded orally or in writing. Even without an explicit written or oral agreement, an agency relationship can arise by way of the parties' implied conduct. Furthermore, there is no specific requirement to register an agency agreement with any public authority to ensure its validity. However, an agent is generally obliged to notify his business to the local authorities. In addition, registration with the local Commercial Register is necessary if the agent's business has achieved a certain volume or the legal entity chosen by the agent requires registration pursuant to statutory law (as is the case with a German limited liability company ("GmbH")).

### *1.1.3 Individual/Corporate Entity*

An agent may either be an individual or act in the form of a corporate entity, eg, in the form of a partnership or corporation.

### *1.1.4 Duration of Agreement*

An agency agreement may be concluded for a fixed or an indefinite period. Automatic extensions of the term can also be agreed upon. An agency agreement entered into for an indefinite period may be terminated by ordinary notice (see section 1.5). An agency agreement concluded for a fixed term generally ends after expiry of the fixed term, unless both parties continue to perform the agreement beyond the said term. In that case the agency agreement is deemed to be converted into an agency agreement for an indefinite term.





## 1.2 Exclusive/Non-Exclusive

It is at the discretion of the parties to determine the scope of the agent's rights. Accordingly, the parties may determine whether the agency will be exclusive or non-exclusive. For the avoidance of doubt, the scope of the agent's rights should be explicitly set out in the agency agreement. Absent a specific choice, the agency is generally considered to be non-exclusive. If the agency is exclusive, the agreement should specify whether this implies that the principal only commits itself not to use any other agents or distributors or whether this also prevents the principal from effecting direct sales of the contract products in the contract territory and/or to the customer group allocated to the agent.

The parties should also adjust the provision regarding the agent's right to commission to fit the scope of the agency, eg, where the agent is non-exclusive (and may therefore share his territory with other agents of the principal or if the principal is entitled to sell directly), the agent should not be given a right to commission for transactions concluded in the contract territory that are not the result of the agent's efforts, as this could result in the principal being liable for multiple commissions in respect of the same transaction.

## 1.3 Non-Compete

It is inherent to the agency agreement that during its term the agent may not compete with the principal. This includes direct competition by acting for a competitor of the principal, as well as any involvement or support of a principal's competitor, which may affect the interests of the principal more than insignificantly.

A non-compete obligation enduring after termination of the agency agreement is only valid if it is explicitly spelled out in writing and is limited to a maximum term of two years as from the effective date of termination of the agency agreement. Furthermore, the post-contractual non-compete obligation must be limited to the contract territory and/or customer group allocated to the agent and the contract

products. For the term of the post-contractual non-compete obligation the principal is obliged to pay the agent a reasonable indemnification. The reasonableness of the indemnification is to be determined according to the individual circumstances. Whether monies earned by the agent during the term of the post-contractual non-compete obligation may be deducted from the indemnification has not yet been finally decided by the courts.

During the term of the agreement, the principal may waive the post-contractual non-compete obligation imposed on the agent by written notice to the agent. This waiver will take immediate effect, although the indemnification obligation will remain in place for six months from receipt of notice of the waiver by the agent.

Where one party terminates the agency agreement for good cause due to default by the other party, the terminating party is entitled to cancel the non-compete obligation within one month after giving notice of immediate termination of the agency agreement.

Agreements deviating from these provisions to the detriment of the agent are void.

## 1.4 Commission

### 1.4.1 *Basic Principles*

According to Section 87 HGB, an agent is entitled to commission on all transactions concluded during the term of the agency agreement to the extent such transactions have been concluded as a result of the agent's efforts.

Commission is also payable where the transaction is not a direct result of the agent's efforts, but the respective customer was previously procured by the agent for transactions of the same kind (eg, repeat orders). Where the agent has been assigned a specific geographical area or customer group, the agent will be entitled to commission on all transactions concluded during the term of the agreement with customers in such territory or of such customer group,



irrespective of whether these transactions were concluded as a result of the agent's involvement. Provided that the requirements set out in Section 87 (3) HGB are met, the agent may also be entitled to commission on transactions concluded after termination of the agency agreement (see section 1.5.3). In the agency agreement, the parties may to some extent derogate from the above-mentioned provisions.

The commission due to an agent is generally calculated on a fixed percentage of the price to be paid by the customer to the principal. In the absence of any agreement between the parties on a specific commission rate, the agent is entitled to the customary remuneration. Typically, the remuneration of the agent does not depend on the extent of the agent's endeavors, but on his success in procuring business transactions for the principal. Generally, the payment of commission is the sole consideration for the agent's activities under the agreement. However, where the agent performs specific additional services, eg, collection of monies, additional commission may become due. The parties are also free to agree on a remuneration of the agent in addition to, or instead of, the payment of commission.

#### *1.4.2 When Due and Payable?*

The agent is entitled to commission once, and to the extent that, the principal has executed the transaction, ie, has performed its contractual obligations, such as the delivery of the goods. The parties may also agree that the agent is entitled to commission as soon as and to the extent that the customer has executed the transaction, ie, has paid the consideration for the respective goods or services to the principal. In the latter case the agent is entitled to a reasonable advance of the commission at the time the principal has executed his part of the transaction.

It should be noted that the agent is generally also entitled to commission if it is established that the principal will not execute the transaction in whole or in part or will do so differently from how it was concluded. The agent, however, is not entitled to commission if and to the extent that the agreement with the customer was not executed by

the principal in whole or in part due to reasons for which the principal is not responsible, eg, where the principal's non-performance is the result of strikes affecting the principal's supplier.

The commission becomes due at the end of the month in which the principal must account for the commission (see Section 1.4.4 below). Any derogation from the rules in this section 1.4.2 to the detriment of the agent (except as expressly stated herein) will be invalid.

#### *1.4.3 Extinction of Rights to Commission*

The agent will not be entitled to commission if it is established that the customer will not fulfil its payment obligations, eg, in the case of insolvency. Any commission already paid to the agent must be refunded to the principal. If the principal is responsible for the non-performance on the part of the customer (as in the case of non-performance by the principal; see section 1.4.2 above), the agent remains entitled to a commission. To avoid taking responsibility for the non-execution of the transaction, the principal is generally forced to sue his customer for outstanding monies. Any derogation to the detriment of the agent is void.

#### *1.4.4 Accounting and Audit*

The principal is obliged to account for all commissions (and potential advance payments on such commissions; see section 1.4.2 above) monthly and not later than the end of the month following the respective accounting period.

The parties may agree on different accounting periods that, however, may not exceed quarterly accounting terms.

Furthermore, the agent is entitled to request from the principal an extract from the principal's books regarding all business transactions on which the agent is entitled to receive commission. Such extract must contain all the information available in the books of the principal at the time of establishing such extract, which is relevant for the calculation of the commissions of the agent. This includes, for



example, the names and addresses of the customers, details on the goods sold, eg, type, volume and price, as well as information concerning the return of goods and the non-performance of transactions including the reasons therefor. These rights of the agent cannot be excluded or limited.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

Giving notice of termination is, unless otherwise agreed, not subject to any formal requirements. Hence, notice of termination may be given orally. However, for the avoidance of doubt and to obtain proof of delivery of the termination notice, the notice of termination should be given in writing and by means that may evidence the receipt of the notice by the other party.

### 1.5.2 *Notice Period*

If an agency agreement is concluded for an indefinite term, the minimum statutory notice periods according to section 89 HGB are one month during the first contract year, two months during the second contract year, three months during the third through the fifth contract year, and six months as of the sixth contract year. Unless otherwise agreed by the parties, the end of the notice period must coincide with the end of a calendar month.

Generally, it is not necessary to terminate a fixed-term agreement upon the end of the term (see section 1.1.4 above). However, in case the parties continue their business relationship in order to avoid a tacit extension of the agreement, a letter should be sent stating that the term of the agreement will not be extended.

The right of the parties to deviate from the statutory notice periods is very limited: the statutory notice periods apply irrespective of the parties' choice of a shorter notice period. Agreements on longer notice periods are generally permitted. However, the notice period to be

observed by the principal may not be shorter than the one to be observed by the agent.

Either party may terminate the agreement with immediate effect for good cause where, under the circumstances, the terminating party cannot reasonably be expected to adhere to the applicable notice period or continue to perform its obligations under the agreement until its expiry, eg, in case of a culpable infringement of contractual non-compete obligations. Termination for good cause must be made within a reasonable period after the terminating party becomes aware of the circumstances entitling it to terminate (eg, normally within one month), otherwise termination may not be valid. However, no definite knowledge of the circumstances is required. The aforementioned reasonable period already starts once the party has reasonable suspicion of the existence of a termination reason that must be sufficiently concrete. Generally, notice of termination for good cause can only be given after a warning letter has been sent to the other party.

If a party giving notice of termination fails to comply with the applicable notice period, the agreement will remain in place until the expiry of such period. Accordingly, the agent will be entitled to receive commission during such time and, under certain circumstances, damages, eg, for loss of profit, which would equal the commission which would have been payable until the end of the applicable notice period.

### *1.5.3 Liability of Principal on Termination*

#### **Commissions**

Termination of the agency agreement does not affect the agent's right to receive commission for transactions that he has procured during the term of the agreement, even if they are executed after the effective date of termination. Furthermore, unless the parties have provided otherwise, the agent is entitled to commission on



transactions concluded after the effective date of termination of the agency agreement:

- if the transaction was procured or initiated by the agent, is mainly attributable to the agent's efforts during the term of the agency agreement, and is entered into within a reasonable period of time after the effective date of termination of the agreement; or
- if an order from a customer, for whom the agent would normally be entitled to receive commission, is received by the principal or the agent prior to the effective date of termination of the agreement.

An agent appointed as the successor to the agent is entitled to a share of the commission payable if, under the circumstances, a split of the commission for such transaction between the former and the successor agent is to be made on grounds of equity.

It is possible that the parties may derogate from these aforementioned provisions in an individually negotiated agreement.

### ***Termination Payment - Indemnity***

The agent is entitled to receive a termination payment in the form of an indemnity from the principal upon termination of the agreement if the statutory requirements set out in Section 89 b HGB are met. The following three requirements must be fulfilled:

- the agency agreement is terminated;
- the principal derives substantial benefits from the customer base solicited or substantially increased by the agent also after termination of the agency agreement; and
- the payment of an indemnity is equitable having regard to all the circumstances of the case, in particular, the agent's loss of commission due to termination of the agency agreement.

Very detailed and complex case law exists dealing with the calculation of the indemnity on the basis of the requirements set out above, taking a number of variations into account. If it becomes necessary to calculate such an indemnity, legal advice should be sought.

The statutory indemnity payable may not exceed the average annual commission or remuneration of the agent during the last five contract years, or if the term of the agreement is less than five years, such shorter contract term.

No indemnity will be payable according to Section 89 b (3) HGB if:

- the agent himself gave notice of termination of the agency agreement, unless the principal's behavior gave justified cause for such termination or the agent could not be expected to continue his activities due to his age or illness;
- the principal terminated the agency agreement for good cause due to the agent's negligent behavior; or
- where, due to an agreement between the principal and the agent, the agent is replaced by a third party and such agreement is not entered into after the termination of the contractual relationship with the agent.

The right to receive an indemnity upon termination of the agency agreement cannot be waived or limited prior to the effective date of termination of the agency agreement. Hence, agreements regarding the amount of indemnity payable can only be validly concluded at the same time as, or after, the termination of the agency agreement takes effect. Agreements on the indemnity prior to that point in time will not be binding for the agent to the extent that they deviate from the statutory provisions to the agent's detriment. Only where the agent acts outside the territory of the European Union and the European Economic Area may the parties deviate from the statutory provisions on indemnity and even exclude them completely prior to the effective termination of the agency agreement.





## 1.6 Limitation Periods

Claims arising out of the agency agreement become time-barred after a period of three years, beginning at the end of the year in which the agent became entitled to bring the claim and was aware or was not aware in a grossly negligent manner of the circumstances entitling him to such claim. This period of limitation can be suspended by, for example, taking action against the other party prior to the end of the aforementioned period.

With respect to the agent's claim for an extract from the books, it is essential that the agency agreement does not provide for an obligation of the agent to inspect the monthly or quarterly accounting of the commissions. Otherwise, the limitation period might run for 10 years instead of three.

The indemnity claim upon termination of the agency agreement must be asserted within one year from the effective date of termination of the agency agreement without adhering to any specific form. If the agent fails to assert his indemnity within that period, he will no longer be entitled to receive an indemnity.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Distribution agreements are, in contrast to agency agreements, not subject to any particular statutory provisions. The applicable rules have been developed by case law. Even though the distributor acts, in contrast to an agent, on his own account and in his own name, certain circumstances may lead to the analogous application of several statutory provisions governing agency agreements.

German courts will determine the law applicable to a distribution agreement in accordance with the German conflict of laws rules.

Please see in more detail the elaboration in section 1.1.1 above, which applies likewise to distribution agreements.

### *2.1.2 Formal Requirements*

Distribution agreements are, like agency agreements, not subject to any formal requirements. A distribution agreement may be concluded orally or in writing and, absent an explicit oral or written agreement, may even arise out of the parties' implied conduct. There is no obligation (or possibility) to register a distribution agreement with an official authority. However, there may be specific requirements to notify or register the business of the distributor with specific authorities. For further details please refer to section 1.1.2.

### *2.1.3 Individual/Corporate Entity*

The distributor may perform his business as an individual or as a legal entity, for example, in the form of a corporation or partnership.

### *2.1.4 Duration of Agreement*

Distribution agreements can be concluded for a fixed or an indefinite period. For further details, please refer to section 1.1.4.

## **2.2 Exclusive/Non-Exclusive**

Under German law, the parties are generally free to determine the scope of the distributor's rights of distribution. Thus, the parties may agree on an exclusive or a non-exclusive distribution relationship. For the avoidance of doubt, the scope of the distributor's rights of distribution should be explicitly set out. In particular, if the distributor is appointed as an exclusive distributor, the agreement should specify whether such an exclusive appointment prevents the principal from selling the contract products within the contract territory through another distributor or agent or whether the principal is also limited from selling the contract products directly to customers in the territory.

Contractual provisions that provide for an exclusive distribution relationship or impose non-compete obligations or similar restrictions



may be invalid and unenforceable based on Article 101 of the Treaty on the Functioning of the European Union insofar as they are not exempted by an individual or a block exemption.

Please see the chapter on EU competition law for further discussion of these issues.

## 2.3 Termination

### 2.3.1 *Formal Requirements*

Unless otherwise agreed by the parties, giving notice of termination is not subject to any formal requirements. Hence, a distribution agreement may be terminated by written (including email) as well as oral notice. For the avoidance of doubt and in order to be able to prove that notice of termination has been given, notice of termination should be given in writing and in such a manner that receipt of the termination notice can be established.

### 2.3.2 *Notice Period*

Among legal commentaries, there are different views as to whether the mandatory notice periods for agency agreements in Section 89 HGB also apply to distribution agreements. Some deem substantially longer notice periods appropriate, depending on the circumstances of the individual case, in order to ensure that the distributor is able to obtain a return on his investments made during the term of the agreement. According to the case law of the German Federal Court (Bundesgerichtshof, “BGH”), the statutory notice periods for agency agreements in Section 89 HGB generally also apply to distribution agreements, as long as the distributor did not make high investments. A distribution agreement may thus in general be terminated with one month’s prior notice during the first contract year, two months’ prior notice during the second contract year, three months’ prior notice during the third through fifth contract year, and six months’ prior notice as of the sixth contract year. Unless otherwise agreed by the parties, the end of the notice period must coincide with the end of a calendar month. Longer notice periods may exceptionally apply if, depending

on the circumstances of the case at hand, the reliance of the distributor on the principal's products calls for increased protection.

If the distribution agreement is terminated without adhering to the applicable notice periods, the distributor may be entitled to bring a claim for damages, eg, for loss of those future profits that the distributor would have made with the contract products until the end of the applicable notice period. However, if the notice of termination provides for a termination date that is too early, it is not invalid but is only effective as of the applicable date.

Both parties may terminate the distribution agreement with immediate effect for good cause for circumstances where, on the facts, the terminating party cannot reasonably be expected to adhere to the applicable notice period or continue to perform its obligations under the agreement until its expiry. Good cause is assumed in favor of the principal if, for example, the distributor intentionally or with gross negligence repeatedly fails to carry out his contractual obligations, or in favor of the distributor if, for instance, the principal repeatedly refuses, arbitrarily and without any reason, to accept orders of the distributor. For further details regarding termination for good cause, please refer to section 1.5.2.

### *2.3.3 Liability of Principal on Termination*

German statutory law does not expressly grant the distributor an indemnity claim upon termination of the distribution agreement. However, in line with the well-established case law of the BGH, the distributor is entitled to an indemnity claim (analogous to an agent's right as set out in Section 89 b HGB) if:

- the contractual relationship between the distributor and the principal is such that it is not a simple vendor/purchaser relationship, but the distributor is integrated into the sales organization of the principal like an agent and must to a considerable extent fulfil the tasks of an agent; and



- the distributor is contractually obliged to make available his customer data to the principal, so as to enable the principal to immediately and easily use the distributor's customer base after the termination of the distribution agreement.

The following criteria have been held to affirm the distributor's integration into the sales organization of the principal, but not all of them must be fulfilled: the distributor is granted an exclusive distribution right, is subject to a non-compete obligation, is allocated a particular area of market responsibility, and is obliged to promote sales, and the principal has the right to control and supervise the distributor.

The obligation to communicate the customer data to the principal does not have to be spelled out expressly in the agreement, but must at least indirectly follow from the contractual stipulations, be they oral, in writing or the result of implied conduct. Hence, any agreement which leads to the transfer of the distributor's customers' names and addresses to the principal, will suffice. It is irrelevant whether the distributor is obliged to provide the principal with the customer data during the term of the agreement or only upon its termination, or whether the principal actually makes use of such customer data. The mere option to use the customer data will suffice. However, according to the recent case law of the BGH, this precondition can be contractually excluded if the principal commits him/herself to no longer use the customer data after termination and to delete it from his/her systems.

In addition to the above requirements, the following preconditions must be met (by analogy with Section 89 b HGB, as described in section 1.5.3):

- the contractual relationship has been terminated;
- after the termination principal derives substantial benefits from the customer base solicited or substantially intensified by the

distributor also after termination of the distribution agreement;  
and

- the payment of an indemnity is equitable taking into account all the circumstances of the case, in particular, the distributor's losses due to the termination of the agreement.

The calculation of the indemnity claim of a distributor is somewhat more complex than that with respect to an agent's indemnity claim. Whereas an agent receives commission, the distributor is remunerated by his trade margin, ie, the margin between his purchase and sales prices. According to BGH decisions, only that part of the distributor's trade margin, which is granted to the distributor for activities comparable with those of an agent, is relevant when calculating the indemnity payable. In other words, the parts of the remuneration that can be allocated to activities or risks typical for a distributor but non-existent for an agent must be deducted from the trade margin (the so-called "core discount"). Such risks are, for example, the risk of sale, the risk of stock, the risk of price fluctuations and credit risks. As a rough rule of thumb, the margin should equal the commission that the principal would have paid to a comparable agent on the basis of the sales achieved by the distributor.

There is vast case law dealing with the method of calculating the indemnity claim. However, due to the restricted space in this book, this topic cannot be elaborated in more detail. Please also refer to section 1.5.3.

By analogy with Section 89 b (2) HGB, the indemnity is capped at the distributor's average annual revenues generated from the core discount in the last five contract years or the term of the agreement, if shorter.

Under specific circumstances, a distributor is not entitled to an indemnity by analogy with Section 89 (3) HGB. In this respect, please refer to the comments concerning agents under section 1.5.3, which also apply to distributors.



The right of a distributor acting in Germany to receive an indemnity cannot be waived or limited prior to the effective date of termination of the agreement. Hence, an agreement regarding the distributor's indemnity claim can only be validly concluded after the termination of the distribution agreement or if the termination shall take effect immediately. However, if the contract territory is outside the territory of the European Union and the European Economic Area, the obligation to pay an indemnity can be excluded or limited upon execution, as well as during the term or after termination of the agreement. If the contract territory is located outside of Germany but within the European Union or the European Economic Area, such an exclusion is not effective according to the recent case law of the BGH.

There are conflicting opinions regarding the question whether a distributor should, upon termination of the distribution agreement in adherence to the applicable notice period, be entitled to a so-called investment indemnification claim, if and to the extent that its investments have not been amortized upon termination of the agreement. Although there is no clear case law, there are good arguments to deny such a claim.

#### *2.3.4 Return of Products*

The principal is generally obliged to accept and fulfil the orders of the distributor, which the distributor may reasonably be expected to sell within the ordinary course of business until the effective date of termination of the agreement. If the distributor is contractually obliged to maintain a certain stock of contract products or is prohibited from selling the contract products in stock after termination of the agreement, as is often the case in selective distribution agreements, the principal must repurchase all or some of the contract

products upon the request of the distributor, provided they are unused, undamaged and in their original packaging. In general, the principal must pay the original purchase price for the contract products, although in specific circumstances it is possible to agree on certain deductions from the original purchase price.

## 2.4 Limitation Periods

### 2.4.1 *Statute of Limitations*

With respect to the parties' claims arising out of the distribution agreement, the general limitation regime applies. Thus, claims become time-barred after a period of three years, beginning at the end of the year in which the party became entitled to bring the claim and was aware or was not aware in a grossly negligent manner of the circumstances entitling him to such claim. This period of limitation can be suspended, for example, by taking action against the other party prior to the end of the aforementioned period.

### 2.4.2 *Forfeiture of the Indemnity Claim*

The distributor must assert its indemnity claim upon termination of the distribution agreement within one year after the effective date of termination of the agreement without adhering to any specific form, by analogy with Section 89 b HGB. Otherwise, the distributor may no longer claim an indemnity from the principal.



## Greece

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law Applicable*

The rules that govern the relationship between commercial agents and their principals are set out in Presidential Decree No. 219/1991 (hereinafter, the “PD”) as amended, by which Greece has implemented the provisions of the Agency Directive (86/653/EEC).

Under Article 1, par. 2 of the PD, the commercial agent is an intermediary who has continuing authority to negotiate the sale or purchase of goods or services on behalf of the principal, or to negotiate and conclude such transactions on behalf of and in the name of that principal.

A commercial agent does not include a person who, in their capacity as an officer, is empowered to enter into commitments binding on a company or association, a partner who is lawfully authorized to enter into commitments binding on their partners and an administrator appointed by a court, a liquidator or a trustee in bankruptcy.

The PD does not apply to commercial agents whose activities are unpaid or who operate on commodity exchanges or in the commodity markets.

##### 1.1.2 *Formal Requirements*

Until 2007, the PD required a written commercial agency agreement as a condition for its application. Oral commercial agency agreements were governed by the Civil Code’s provisions on “mandate.” This provision sparked a heated debate, and case law was split down the middle, sometimes stating that without a written document an agent could not benefit from the PD and at other times ruling the opposite.

Following the amendment by Law 3557/2007, a commercial agency agreement is not subject to any formal requirements and may be concluded orally or in writing. Relatively recent (2014) Supreme Court jurisprudence reinterpreted the initial pre-2007 provisions of the PD, ruling that oral agency agreements, even if entered into prior to 2007, were valid and benefited from the PD.

However, each party is entitled to receive from the other upon request a signed written document setting out the terms of the agency contract, including any terms subsequently agreed.

#### *1.1.3 Individual/Corporate Entity*

A commercial agent may be either an individual or a legal entity.

#### *1.1.4 Duration of Agreement*

There is no specific provision in PD 219/91, as amended, regulating the duration of a commercial agency. Therefore, the agreement's duration remains a matter of agreement between the contracting parties. A commercial agency agreement may be for a fixed or an indefinite period.

According to article 8, par. 2 of said PD, "A contract for a fixed period which continues to be performed by both parties after that period has expired, shall be deemed to be converted into a contract for an indefinite period."

Accordingly, if the agreement is silent on this specific issue, it shall be deemed an agreement for an indefinite term.

The Supreme Court has ruled that an agency agreement consisting of successive agreements for a definite period will be considered an agreement for an indefinite period if the content and the material provisions of the successive agreements are identical or substantially similar and no negotiation was conducted. Such agreements must therefore be terminated according to rules applying to indefinite term agreements.

## 1.2 Exclusive/Non-Exclusive

Subject to any competition law issues, a commercial agent may be appointed on either an exclusive or a non-exclusive basis.

In any case, any exclusivity or non-compete provisions are governed by the principles and legal requirements of EU and Greek competition law.

## 1.3 Non-Compete

The provisions of article 10 of the PD state that an agreement restricting the business activities of a commercial agent following termination of the agency contract is valid only if and to the extent that:

- it is concluded in writing; and
- it relates to the geographical area or the group of customers and geographical area entrusted to the commercial agent and to the kinds of goods covered by its agency under the contract.

A non-compete clause shall be valid for no more than one (1) year after termination of the agency contract.

## 1.4 Termination

### 1.4.1 *Formal Requirements*

Termination of written agreements should be in writing even if the agreement is silent on the matter. Any specific formalities stipulated in a written agreement must be abided by. Other than these cases, neither the PD nor Greek civil law require compliance with any formalities in order to terminate an agency agreement. It is advisable, however, for the avoidance of future disputes, that any termination notice be given in writing and specifically in a way that proof of receipt of notice is generated.

The general principles of civil law also apply to the termination of an agency agreement, and, therefore, the contracting parties are absolutely free to stipulate all the relative terms, except those strictly regulated by the PD (as amended by Law 3557/2007).

#### *1.4.2 Notice Period*

According to article 8, par. 3 & 4 of the PD “Where a contract is concluded for an indefinite period either party may terminate it with notice. The period of notice shall be one month for the first year of the contract, two months for the second year commenced, three months for the third year commenced, four months for the fourth year commenced, five months for the fifth year commenced and six months for the sixth year commenced and subsequent years. The parties may not agree on shorter periods of notice.”

Moreover, according to article 8, par. 5 & 6 of the PD “If the parties agree on longer periods than those laid down in paragraphs 3 & 4 of PD 219/91, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent. Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.”

The provisions of article 8, as set out above, shall apply also to fixed-period contracts where such are converted under article 8, par. 2 into contracts for an indefinite period because of continued performance after expiry, subject to the proviso that any earlier fixed period must be taken into account in the calculation of the period of notice.

Also, as noted above, successive fixed term contracts will be treated as indefinite term contracts and must be terminated accordingly.

The agency contract may be immediately terminated without the observance of the above-cited periods of notice where one of the contracting parties fails to carry out all or part of its obligations or where exceptional circumstances arise.

### 1.4.3 *Liability of Principal on Termination*

According to article 9 of the PD “The commercial agent, after termination of the agency contract, shall be entitled to a termination payment in the form of an indemnity if and to the extent that he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers and the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission (profits) lost by the commercial agent on the business transacted with such customers.”

The calculation of the indemnity is based on the provisions of article 9, par. 1(b) of PD, which state “The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the agent’s average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.”

In particular, the Greek courts calculate the indemnity as follows.

- First of all, the court calculates the maximum indemnity payment according to the above method, ie, a payment equal to the agent’s average annual revenues over the last five years (or over the period of the agreement’s duration if it was less than five years).
- Then the court will examine whether this maximum amount is just and equitable. Greek Courts have not developed a clear method of calculation. Some rely to some lesser or larger degree on the EC 1996 Report on the Application of Article 17 of the Agency Directive (Council Directive 86/653/EEC [COM (96) 364 final]) and calculate the benefit that the principal will enjoy over a certain period following termination of the agreement (normally, five years) by (a) extrapolating the revenues (gross profits) of the agent during the last year of

the agreement which concern new customers, (b) adjusting this number to reflect an annual percentage of loss of customers (normally, in the area of 30%), and (c) deducting from this amount the discount interest of 5% due to the fact that the substantial indemnity payment will be paid at once. Other courts rely on and evaluate the specific circumstances, such as agent investments, brand recognition, market trends, advertising contributions by the principal, etc. in order to exercise their discretionary power to determine a just and equitable indemnity.

- If the amount of the total loss of the agent's revenues is less than the amount of the agent's average annual revenues over the last five years (or over the period of the agreement's duration if it was less than five years), then the lesser amount is, in principle, the amount of the indemnity payment.

Furthermore, under article 9, par. 3 of the PD the indemnity is not payable:

- where the principal terminates the agency contract because of default attributable to the agent justifying immediate termination of the contract;
- where the agent terminates the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the agent as a consequence of which he may not reasonably be required to continue its activities; or
- where, with the agreement of the principal, the agent assigns its rights and duties under the agency contract to another person.

The obligation to pay an indemnity is absolute (subject, of course, to article 9, par. 3 PD see above). The grant of such a termination payment, however, may not prevent the agent from claiming any

damages he has suffered as a result of the termination of its relations with the principal.

In particular, in the absence of contractual provisions to the contrary, such damages include the costs incurred by the commercial agent as a result of the termination. For example: such costs include the statutory severance payments for employees dismissed as a result of the termination, penalties paid by the agent on terminated leases which are not needed by the commercial agent as a result of the reduction in turnover and non-amortized investments which were incurred for the purpose of the terminated business. If the circumstances surrounding the termination could be deemed a tort, damages in tort (such as lost profits and damage to reputation) may also be compensated.

Entitlement to a termination payment or to compensation for damages also arises where the agency contract is terminated as a result of the agent's death.

The agent may not be asked to waive their right to claim a termination payment or compensation for damages before the agency contract expires.

#### *1.4.4 Return of Products*

In the absence of an agreement to the contrary, in the event of termination of a commercial agency agreement, the Greek Supreme Court has ruled that unsold stock must be repurchased if the stock is unsalable and was purchased in the normal course of business, even in cases where termination was for cause.

The Greek Courts apply the rules on mandate which prescribe that the mandatee must be compensated for any expenses incurred for the performance its duties. The opposite, though, is not the case: the agent has no legal obligation to return any unsold products to the supplier. The rules on mandate are non-mandatory law, and hence the parties are free to enter into different arrangements or even exclude repurchase of stock.

## 1.5 Limitation Periods

According to article 9, par. 2 of the PD “The agent shall lose their entitlement to the indemnity payment or to compensation for damages in the instances provided for above, if within one (1) year following termination of the contract they have not notified the supplier that they intend to pursue their entitlement.” The Supreme Court has ruled that such notification of intent may be either oral or written.

Generally, commercial claims among traders/merchants are prescribed after five years from the date when the relevant party became entitled to claim.

## 1.6 Registration requirements

Following the enactment of Law 4441/2016, with effect from 6.12.2016, the PD has been amended so that it now imposes a registration requirement on a commercial agent. In particular, according to article 1, new par. 3 of the PD, the agent must register as such in the competent Tax Office and insurance organization (“OAE”) as well as in the Chamber of Commerce and/or in the Commercial Department of the other chambers.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

With regard to other kinds of distributors/dealers, until the enactment of Law 3557/2007, there was no specific legislation in Greece regulating the relationship between suppliers and distributors. For this reason, majority opinion and case law held that the provisions of civil law, especially those governing mandate agreements, applied by analogy to distribution agreements other than commercial agency. The European Court of Justice had ruled (Case C-85/2003, Decision of 10.2.2004) that, despite the fact that Directive 86/653 was designed to apply only to commercial agents, it did not contain any provision prohibiting any national legislation from extending the application of



the Directive to other categories of commercial relationships. To this effect, the Greek Supreme Court, confirming the application by analogy of the provisions of the PD to commercial relationships which are similar in structure and function to a commercial agency, handed down its ruling in Decision 139/2006, stating that there is no legal impediment to applying the PD to other continuous contracts “which present similarities as to the actual interests with commercial agency.”

The Supreme Court in its Decision 139/2006 defined the conditions under which a commercial relationship may be considered similar to a commercial agency structure and, therefore, the provisions of the PD apply to any such relationship indirectly/by analogy only, as follows:

- (i) the dealer acts as part of the commercial organization of its supplier, occupying a weak position and having an intense dependence on the supplier and is integrated to the same degree as a commercial agent in the supplier’s distribution system,
- (ii) the dealer contributes to the expansion of the supplier’s customer base by acting in a manner comparable to the commercial agent manner,
- (iii) the dealer undertakes a non-competition/exclusivity obligation,
- (iv) the supplier is aware of the dealer’s customers and at the end of the business relationship the dealer’s customers are forwarded to the supplier and
- (v) generally, the financial activity of the dealer and its financial rewards (irrespective of their legal characterization) are similar to those of a commercial agent.

These conditions are merely indicative, not cumulative nor exclusive.

Following the amendment of the PD by Law 3557/2007, and the subsequent case law of the Greek Supreme Court (515/2016, see below) its provisions (including the indemnity claim under article 9)

now continue to be applicable by analogy, not only in relation to product commercial agents but also to service agents and exclusive distribution agreements, on the condition that as a result of the agreement, the distributor constitutes part of the commercial organization of the producer/supplier.

Law 3557/2007 gave rise to a further round of litigation centered on whether the specific mention of only exclusive distribution meant that other forms of distribution such as commissionaire arrangements, selective distribution, franchising and brokerage agreements were not regulated by analogy by the PD.

The Supreme Court has reaffirmed its position and criteria stated in Decision 139/2006 in a number of decisions (most recently Decisions No.191/2016, 515/2016) that in principle, the PD will not be directly applicable and will instead apply by analogy only to downstream intermediary arrangements, irrespective of whether they are agency or reseller based, where the arrangement in question (following an ad hoc analysis) presents the basic characteristics of a commercial agency agreement and there is a similarity of interests which creates the respective need for protection. These conditions are deemed to exist where, in the case of exclusive distribution, the criteria of Supreme Court Decision 139/2006 apply and in all other cases where the downstream operator:

- (i) is bound by a non-competition clause during the term of the agreement and/or following termination,
- (ii) is obliged to promote only the supplier's products continuously during the term in a defined territory (this is admittedly confusing because it overlaps with the previous criteria and confuses the concept of exclusivity. The Supreme Court in this case seems to refer to exclusive purchase from the supplier only and from no-one else, not even other dealers, which if correct tends to remove selective systems from the scope of the PD.),

- (iii) maintains confidentiality,
- (iv) is obliged to advertise products even at its own expense (this concept of advertising is also confusing since agents are not typically obliged to advertise, although their business is to canvass and search for new clients. Again the Supreme Court in this case seemingly means that an obligation to advertise the goods and not its business, in a particular manner – specific content and trademark outlay – and with a particular approved budget, shows that the downstream operator is “integrated” since all the major decisions are in effect taken by the supplier.),
- (v) is obliged to follow the supplier’s instructions as to sales and promotion techniques, product presentation, use of IP/trademarks (particularly disconcerting in relation to selective distribution and *intuitu persona* contracts),
- (vi) is obliged to provide access to its client base which can be used by the supplier or given by the supplier to third parties after termination to continue the business. This is deemed a major characteristic equating a distributor to an agent.

That said, each case will be judged on the merits. A case may have all or some of the characteristic criteria named above or even have other characteristics, such as:

- a fixed income on each sale, such as when the distributor’s remuneration is the difference between the wholesale price and the supplier’s (maximum or recommended) retail price,
- a fixed percentage calculated on the difference between the wholesale price and the retail price,
- the supplier determines the clientele and the daily delivery schedule,

- the supplier is entitled to inspect facilities to ascertain compliance with obligations such as compliance with the non-compete obligation and whether technical specifications are abided by (again disconcerting in relation to selective distribution systems),
- the downstream operator is obliged to continuously provide market information, transaction information, etc.,
- vehicles and premises are branded.

It also seems that, when confronted with a complex business relationship comprising agency and distribution, the Supreme Court looks at the relationship as a whole rather than dissecting each function and examines whether the relationship as a whole fulfils the criteria of its Decision 139/2006.

The Supreme Court's stance has drawn both criticism and support. Naturally, in view of what, in the absence of legislative intervention, seems to be now an irreversible trend in case law at least with regard to distributors, the trend seems to encompass, at least initially, all and any types of distribution agreement where there is a degree of integration, such as selective distribution and franchise agreements.

To be clear, although there is no rebuttal to the argument that, in principle, there is nothing to prevent commercial agency concepts from being applied to other forms of distribution where there is a degree of integration with the supplier, the criteria of Decision 139/2006 and of Decisions No.191/2016 and 515/2016, as analyzed above, have to be applied in establishing whether there are sufficient similarities between the function of any particular downstream operator and that of a commercial agent before one can say with any certainty that the provisions of the PD may be applied.

### 2.1.2 *Formal Requirements*

A distribution agreement is not subject to any formal requirements and may be concluded orally or in writing, or may arise impliedly from the conduct of the parties.

In order to avoid evidential difficulties in the event of a subsequent dispute between the parties, it is of course advisable that the terms of the distribution relationship be documented in a formal agreement.

### 2.1.3 *Individual/Corporate Entity*

A distributor may be either an individual or a legal entity.

### 2.1.4 *Duration of Agreement*

There is no specific provision in the law in general regulating the duration of a distribution agreement. Therefore, the agreement's duration remains a matter for agreement between the contracting parties.

A contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into a contract for an indefinite period.

Recently, the Supreme Court ruled that a distributorship agreement consisting of subsequent agreements of definite periods is considered an agreement for an indefinite period if the content and the material provisions of the subsequent fixed term extensions are the same or nearly the same with the initial agreement.

## 2.2 *Exclusive/Non-Exclusive*

Subject to any competition law issues, a distributor may be appointed on either an exclusive or a non-exclusive basis. Exclusive distribution means the supplier agrees to sell its products to only one distributor for resale in a particular territory (territorial exclusivity). If an exclusive distributor constitutes an integral part of its supplier's sales organization, performing functions similar to those performed by

commercial agents, the PD will apply. Non-compete obligations/single branding are in this sense circumstances which, if co-existent with territorial exclusivity, significantly increase the odds in favor of application of the PD by analogy.

In any case, any exclusivity or non-compete provisions are governed by the principles and legal requirements of EU and Greek competition law, which for all practical purposes are identical.

## 2.3 Non-Compete

As noted the existence of a non-compete clause in an (exclusive or non-exclusive) distributorship relationship constitutes evidence that the distributor may be part of the commercial organization of the producer, increasing the likelihood of the analogous application of the agency provisions of the PD.

In the case of an exclusive distribution agreement where the PD applies, the requirements and conditions of validity of post-termination non-compete clauses of the PD (notably that the clause must be in writing and refer solely to the territory and the contractual products/services (art 14§4, Law 3557/2007, art 10 PD, implementing art 20 Dir. 86/653/EC)), shall apply. In such circumstances, a non-compete clause shall be valid for not more than one year after termination of the distribution agreement.

In the case of non-exclusive distribution agreements to which the PD may apply by analogy, it is a matter of ad hoc assessment of the particular case whether the post-termination non-compete obligation is subject to same constraints and requirements.

## 2.4 Termination

### 2.4.1 *Formal Requirements*

Termination of written agreements can be oral but, as a matter of prudence should be in writing even if the agreement is oral or silent on the matter. Any specific formalities agreed in a written agreement

must be abided by. Other than these cases, neither the PD nor Greek civil law requires compliance with any formalities in order to terminate a distributorship agreement. It is advisable, however, for the avoidance of any misunderstandings and future disputes, that any termination notice be given in writing and in a way that a proof of receipt is generated. This way, there would be no room for uncertainty, particularly in relation to whether the termination notice was ever actually given or its effective date.

#### 2.4.2 *Notice Period*

Being unregulated, distribution agreements may be terminated for convenience at any time and with only a “reasonable” notice. How “reasonable” is interpreted depends on the circumstances of each case, such as the duration of the cooperation, the investments made by the distributor, trade practices etc.

Where the distributor is “economically dependent” on the supplier and has no other viable economic alternative, the abrupt and unjustified termination of a long-standing distribution agreement may be deemed as an abuse of economic dependency (art. 18a, Law 146/14) and the distributor may request the cessation of such abuse and damages and also commence criminal actions against the supplier.

Where a distribution agreement fulfills the requirements for direct (as in the case of exclusive distribution) or analogous (in all other cases fulfilling the requirements of Supreme Court jurisprudence) application of PD, there is lower court case law to suggest that the PD’s termination provisions, especially those referring to notice of termination should be applied. According to article 8, par. 3 & 4 of the PD “Where a contract is concluded for an indefinite period either party may terminate it with notice. The period of notice shall be one month for the first year of the contract, two months for the second year commenced, three months for the third year commenced, four months for the fourth year commenced, five months for the fifth year commenced and six months for the sixth year commenced and

subsequent years. The parties may not agree on shorter periods of notice.”

Moreover, according to article 8, par. 5 & 6 of the PD, “If the parties agree on longer periods than those laid down in paragraphs 3 & 4 of PD 219/91, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent. Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.”

The provisions of article 8, as set out above, shall apply to a contract for a fixed period where it is converted under article 8, par. 2, into a contract for an indefinite period, subject to the proviso that the earlier fixed period must be taken into account when calculating the period of notice.

Greek lower courts have ruled that these provisions are mandatory law.

The distributorship contract may be immediately terminated, (subject to any contrary provisions of the agreement) without the observance of the above-cited periods of notice in case one of the contracting parties fails to carry out all or part of its obligations or where exceptional circumstances arise.

#### *2.4.3 Liability of Supplier on Termination*

Normally, in the case of lawful termination of distribution agreements to which the PD does not apply, no liability arises from termination other than, and subject to any contrary provision in the agreement, to reimburse certain expenses incurred as a result of the termination, including product stock (see below).

Where the distribution agreement is subject to the PD, either directly (in the case of exclusive distribution) or by analogy (in the case of distribution agreements fulfilling the criteria of the Supreme Court’s jurisdiction), the PD’s provisions on goodwill indemnity shall apply. According to Article 9 of the PD “The commercial agent (here:



distributor), after termination of the agency (here distribution) contract, shall be entitled to a termination payment in the form of an indemnity if and to the extent that he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers and the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission (profits) lost by the agent (here: distributor) on the business transacted with such customers.”

The calculation of the termination payment is based on the provisions of article 9, par. 1(b) of the PD, under which “the amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the distributor’s average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.”

In particular, the Greek courts calculate the termination payment as follows:

- First of all, the court calculates the maximum termination payment according to the above method, ie, a termination payment equal to the distributor’s average annual revenues over the last five years (or over the duration of the agreement if it was less than five years).
- Then, the court will examine whether this maximum amount is just and equitable. Greek Courts have not developed a clear method of calculation. Some rely by and large on the EC 1996 Report on the Application of Article 17 of Council Directive 86/653/EEC [COM (96) 364 final] and calculate the benefit that the supplier will enjoy over a certain period following termination of the agreement (normally, five years) by (a) extrapolating the revenues (gross profits) of the dealer during the last year of the agreement which concern new customers, (b) adjusting this number to reflect an annual percentage of

loss of customers (normally, in the area of 30%), and (c) deducting from this amount the discount interest of 5% due to the fact that the substantial termination payment will be paid at once. Other courts rely on and evaluate the specific circumstances, such as agent investments, brand recognition, market trends, advertising contributions by the principal, etc. in order to exercise their discretionary power to determine a just and equitable indemnity.

- If the amount of the total loss of the distributor's revenues is less than the amount of its average annual revenues over the last five years (or over the duration of the agreement if it was less than five years), then the lesser amount is, in principle, the amount of the termination payment.

Furthermore, under article 9, par. 3 of the PD, the termination payment shall not be payable:

- where the supplier terminates the distributorship contract because of default attributable to the distributor which will justify immediate termination of the contract;
- where the distributor terminates the distributorship contract unless such termination is justified by circumstances attributable to the supplier or on grounds of age, infirmity or illness of the distributor as a consequence of which he may not reasonably be required to continue its activities;
- where, with the agreement of the supplier, the distributor assigns the supplier's rights and duties under the distributorship contract to another person.

The obligation to pay a termination payment is absolute (subject, of course, to article 9, par. 3 of PD; see above). The grant of such a termination payment, however, does not prevent the distributor from claiming any damages it has suffered as a result of the termination of its relations with the supplier.

In particular, such damages include the costs incurred by the commercial agent as a result of the termination. For example: such costs include the cost of redundancy, penalties paid by the agent on terminated leases which are not needed by the commercial agent as a result of the reduction in turnover and non-amortized investments which were incurred for the purpose of the terminated business. If the circumstances surrounding the termination could be deemed a tort, damages in tort (such as lost profits and damage to reputation) may also be compensated.

Entitlement to a termination payment or to compensation for damages shall also arise where the distributorship contract is terminated as a result of the distributor's death.

The distributor may not waive its right to claim a termination payment or compensation for damages before the distributorship contract expires.

#### *2.4.4 Return of Products*

In the event of termination of a distributor agreement of any kind, the Greek Supreme Court has ruled that unsold stock must be repurchased, even in cases where termination was for cause. The Greek Courts apply, by analogy, the rules on mandate which prescribe that the mandatee must be compensated for any expenses incurred for the performance of its duties. However, said compensation does not include expenses incurred by the distributor as a quid pro quo for entering into the distribution agreement and performing its obligations under the agreement, and hence the liability to re-purchase stock depends on whether stock levels are reasonable and can be disposed of in a reasonable period of time. The opposite, though, is not the case: the distributor has no legal obligation to return any unsold products to the supplier.

It is advisable for the contracting parties to agree in advance on return or repurchase of any unsold products.

## 2.5 Limitation Periods

As to the cases where goodwill indemnity can be claimed the relevant provisions of the PD will apply. According to Article 9, par. 2 of the PD “The agent (here: distributor) shall lose their entitlement to the indemnity or to compensation for damages in the instances provided for above, if within one (1) year following termination of the contract they have not notified the principal (here: supplier) that they intend to pursue their entitlement.”

Notification of intent to claim goodwill indemnity may be either oral or written.

Generally, commercial claims among traders/merchants are prescribed after five years from the date when the relevant party became entitled to claim.



# Hungary

## 1. Agency Agreements

### 1.1 General

Agency agreements concluded after March 15, 2014 are governed by Act No V of 2013 of the Civil Code (the “Civil Code”) and Government Decree No 65 of 2014 on Commission of Agents Acting in Long-Term Agency Relationship (the “Commission Decree”). Any agency agreement signed before March 15, 2014 is governed by Act No CXVII of 2000 on Independent Commercial Agents (the “Agency Act”) which contains much more detailed rules and regulations than the Civil Code and the Commission Decree.

Since the new Civil Code entered into force only on March 15, 2014, there is no evolved case law available as yet. Therefore, the explanation and interpretation of the Civil Code’s provisions set out below are mainly based on their wording and the related official guidance, the Agency Act (previously in force) and the relevant EU law and practice, which served as a model for the creation of the new provisions of the Civil Code.

#### 1.1.1 Law Applicable

The Civil Code’s provisions do not apply to an agreement reflecting a consultancy or a buy-and-resell distributor relationship, but to an agreement with a self-employed commercial agent. Further, the Civil Code is not applicable in the context of a commercial agent carrying out its activity on the basis of an employment or executive officer capacity or any other relationship invoked by law, court order or administrative decision, granting the right of representation of a corporate entity to a person.

An agency agreement is defined in the Civil Code as contract under which an agent undertakes to enter into a long-term relationship and to broker contracts for the principal to be concluded with third parties by acting independently, including where the agent is also entitled to

conclude contracts in the name of the principal; and, where the principal undertakes to pay the agreed fee. The commercial agent's right to conclude the contract must be expressly set out in the agency agreement. Agency agreements may be applied in respect of goods, services, pecuniary rights, securities or deals concluded at an exchange.

The Civil Code and the Commission Decree permit the parties to an agency agreement to opt out of the application of certain provisions of the Civil Code or the Commission Decree by using appropriate contractual wording. On the other hand however, certain provisions of the Civil Code or the Commission Decree are mandatory, and the parties may not deviate from them at all. Certain other mandatory provisions may be deviated from only if the deviation is for the agent's benefit.

Pursuant to the current interpretation of Hungarian private international law rules and the principle of non-discrimination between Hungarians and non-Hungarians, this rule applies not only to an agency relationship where the principal and the agent are Hungarian but also where only the agent is Hungarian. Thus, some of the Civil Code's provisions may apply even to an agreement between a non-Hungarian principal and its Hungarian agent, and notwithstanding the fact that the agreement is governed by the law of a country other than Hungary.<sup>1</sup> This fact, together with several of the Civil Code's other provisions, represents a substantive and substantial change in Hungarian legislation applicable to agency agreements, and significantly affects the rights of foreign principals towards their Hungarian agents.

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<sup>1</sup> As mentioned in the Introduction, one important principle in international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities derived from the Agency Directive, notably those entitling the agent to compensation or an indemnity payment on termination.



### 1.1.2 *Scope of the Agent's Authorization*

If the commercial agent has been specifically authorized to conclude contracts in the name of the principal, the agent will automatically be deemed to be authorized to make all legal statements which are usually required in connection with negotiating and fulfilling a contract; however, this shall not automatically include the right to amend an existing contract, accept money or to determine a payment date. Nonetheless, the principal may also authorize the agent to receive payments on behalf of the principal, and the principal can deviate from the above exclusions.

Any restriction of the scope of the commercial agent's authorization will be effective vis-à-vis a third party only if the third party was aware or should have been aware of such restriction.

### 1.1.3 *Formal Requirements*

A commercial agent may carry out its activity only on the basis of an agency agreement. An agency agreement does not have to be concluded in writing, but if the parties concluded the agency agreement in writing, one party must make available to the other party, upon request, a copy of the agreement and any amendments thereto. There are no specific filing/notification/registration requirements under Hungarian law for ensuring the validity of an agency agreement.

### 1.1.4 *Individual/Corporate Entity*

A commercial agent may either be a private individual or act in any legal form, which is generally authorized to conduct business activities. However, as stated in section 1.1.1 above, the Civil Code is not applicable to commercial agents operating in the context of an employment or executive officer relationship or any other relationship invoked by law, court order or administrative decision, granting the right of representation of a corporate entity.

### *1.1.5 Duration of Agreement*

An agency agreement may be concluded for a fixed or an indefinite period of time. If the parties to a fixed-term agency agreement continue to perform the agency agreement even after the end of its stated term, the agreement will automatically become an indefinite term agreement. Whether the agreement is for a fixed or an indefinite term makes a material difference in the rights and obligations of the parties in connection with the termination of the agreement (see section 1.5 below).

## **1.2 Exclusive/Non-Exclusive**

The agency agreement must set out the scope of the agent's activity, ie, either (i) the goods or services and the geographical area or (ii) the customers and the geographical area in relation to which the agent is obliged to and/or entitled to carry out its activity. The agent may be granted an exclusive right with respect to the scope of its activity.

In certain cases, an exclusive agency agreement or certain provisions thereof, or a non-exclusive agency agreement (such as for example, a selective agency agreement) may have a restrictive effect on competition law.

Therefore, agency agreements and exclusivity clauses in particular need to be carefully drafted in each case in order to ensure that they comply with EU and Hungarian competition law rules and regulations.

## **1.3 Non-Compete**

The Civil Code permits the principal and the agent to agree on a restriction of the agent's right to compete with the principal for a period of up to two years after the termination or expiry of the agency agreement. Any non-compete clause for a term of over two years shall be null and void.

The agent's non-compete undertaking for the time after termination or expiry of the agency agreement will be valid only if expressly





documented in writing, and if it applies to the agent's scope of activity under the agency agreement. This means that, after the termination or expiry of the agency agreement, the agent may not be prevented from conducting any agency activity in a geographical area or with respect to goods or services or potential customers that were not included in the agent's authorized scope of activity under the agency agreement.

## 1.4 Commission

### 1.4.1 *Basic Principles*

The general rule provides that the commercial agent is entitled to a fee for its activity performed under the agency agreement. Payment to the commercial agent is often made in the form of commission. Commission is defined in the Commission Decree as any element of the fee that varies in accordance with the number or value of the brokered, negotiated and/or concluded deals.

If the payment is determined in the agency agreement as a commission, the commercial agent is entitled to a commission on the contracts concluded during the term of the agency agreement if: (i) the contract was concluded as a result of the commercial agent's activity; or (ii) the contract was concluded with a third party previously acquired by the agent for transactions of the same kind.

If the commercial agent is granted an exclusive right (see section 1.2 above) the commercial agent is also entitled to a commission on contracts which are concluded during the term of the agency agreement without the agent's contribution, directly by the principal with a third party belonging to the geographical area or group of customers to which the agent has an exclusive right.

The principal and the commercial agent may also agree in the agency agreement that the commercial agent will be entitled to an additional commission for collection of payments carried out by the commercial agent ("commission for collection").

#### *1.4.2 When Due and Payable?*

At the parties' option, commission is due and payable at the time, and to the extent that: (i) the contract has been concluded with the third party and the principal has, or should have, fulfilled its obligations undertaken in the contract; or (ii) the contract has been concluded with the third party and the third party has fulfilled its obligations undertaken in the contract.

The Commission Decree provides that the payment to the commercial agent becomes due at the latest when the third party has or should have performed its obligations under its contract with the principal. Also, the Commission Decree provides that the commercial agent is entitled to commission also in case of non-performance of the transaction except if such non-performance is due to a failure that may not be attributed to the principal.

The parties may agree that commission is payable upon the conclusion of the contract, irrespective of the fulfilment by the parties of their contractual obligations. Commission that becomes due must be paid to the agent not later than the last day of the month following the calendar quarter in which it became due.

#### *1.4.3 Extinction of Rights to Commission*

The commercial agent is not entitled to commission if the contract concluded with a third party has not been performed due to a reason for which the principal is not liable. In this case, the commercial agent must refund any commission it has already received.

#### *1.4.4 Accounting and Audit*

The principal is obliged to provide the commercial agent with an account of the commission due not later than the last day of the month following the calendar quarter in which the commission became due. The accounts must contain all data which is necessary for the calculation of the commission.



The Commission Decree establishes the agent's right to receive from the principal all information relevant to the calculation of the agent's commission, including an extract from the principal's accounting books on the relevant transactions.

The parties may not deviate from the above provisions of the Commission Decree if such deviation is to the commercial agent's detriment, excluding agency agreements of certain commercial agents such as credit institutions, insurance companies, investment firms, etc.

## 1.5 Termination

An agency agreement concluded for a fixed period expires upon the lapse of such period and it may not be terminated by way of ordinary termination. If the agency agreement is concluded for an indefinite period, either of the parties is entitled to terminate the agreement.

### 1.5.1 *Formal Requirements*

If the agency agreement is concluded in writing, pursuant then it may be terminated only in writing. If, however, the agreement is not terminated in writing but, with the parties' mutual agreement, where they actually cease their agency relationship, the termination of the agency agreement will be valid despite the non-compliance with formal requirements.

### 1.5.2 *Notice Period*

The Civil Code establishes a minimum notice period which applies to the termination of an agency agreement signed for an indefinite term. That notice period increases with the number of years during which an indefinite-term agency agreement remains in effect. That notice period is one month during the first year, two months during the second year and three months during the third year and beyond, of an indefinite term agency agreement.

A notice period shorter than the above shall be null and void. However, the parties are entitled to agree on a notice period longer

than the above in the agency agreement. Nevertheless, the notice period to be given by the principal may not be shorter than the notice period to be given by the commercial agent; any deviation from this requirement shall be null and void.

In the event that a fixed-term agreement is transformed into an indefinite-term agreement, the entire term of the agreement (ie, including the fixed term) must be taken into account in calculating the notice period.

Notwithstanding the agreement's term, any of the parties may terminate the agreement with immediate effect if the other party breached any of its material contractual or statutory obligations.

### *1.5.3 Liability of Principal on Termination*

#### **Commission**

Pursuant to the Commission Decree, if payment was determined in the agency agreement as a commission, the commercial agent is also entitled to a commission on contracts concluded following the termination of the agency agreement if: (i) the principal or the agent has received, prior to the termination of the agency agreement, the third person's offer to conclude a contract in respect of which commission is payable; or (ii) the conclusion of the contract is mainly attributable to the commercial agent's activity during the term of the agency agreement, and the contract was concluded within a reasonable time following the termination of the agency agreement.

If the conclusion of the contract is a result of the activity of two commercial agents, where one agent has replaced the other in respect of the same scope of activity, the commission must be shared between the two agents.

The principal may refuse the payment of the commercial agent's commission if such commission is payable to another commercial agent who was authorized to carry out its business within the same scope of activity prior to the commercial agent's authorization.



However, the above provision of the Commission Decree is applicable only if the commercial agent has been informed of the existence of the previous agency agreement upon the execution of its own agency agreement.

### ***Termination Payment - Indemnity***

On termination of the agency agreement, the agent is entitled to a termination payment in the form of an indemnity, if the payment is justified, taking into consideration all relevant circumstances, particularly the loss of the agent's right to commissions based on future contracts between the principal and the customers acquired by the agent, provided that (i) the agent acquired new clients for the principal, from which substantial revenues are generated after the agency agreement's termination; or (ii) the agent completed the assignment for setting up a long-term relationship, but loses regular income due to the termination of the agency agreement.

The Civil Code does not, however, establish an exact formula for the amount of the indemnity payment which the principal must pay to the agent. The Civil Code states only that the termination payment may not be more than the average per annum commission during the last five-year period of the agency agreement or, if the agency agreement is concluded for a term that is less than five years, it may not be more than the average per annum commission for the agency agreement's term.

Payment of the indemnity will not affect any other rights that the commercial agent may have to claim damages and receive the fee due on the basis of the non-compete clause. The agent will not be entitled to an indemnity payment, if (i) the agency agreement was terminated by the agent, except where such termination was attributable to the agent's age, disability or illness or to any circumstance within the principals control, as a result of which the continuation of the agreement cannot be reasonably expected from the commercial agent, or (ii) the commercial agent assigned its rights

and transferred its obligations arising from the agency agreement to a third party with the principal's consent.

Any deviation from the above statutory provisions regarding the indemnity to the commercial agent's detriment before the termination of the agency agreement shall be null and void.

## 1.6 Limitation Periods

The claim for indemnity must be reported to the principal within one year following the termination of the agency agreement. If this is not done, the agent loses its right to claim the indemnity.

Regarding the limitation of other claims arising from the agency agreement, the general provisions of the Civil Code applicable to contractual relationships shall apply. Pursuant to such provisions, claims arising from contractual relationships lapse after five years from the date on which the relevant party became entitled to a claim. The following circumstances interrupt the limitation period, which means that from the date of the interruption or following the completion of the proceedings that triggered the interruption, the limitation period will start again:

- the claim was reported in bankruptcy proceedings;
- enforcement of the claim before a court, provided that the court issued a final and binding decision;
- amendment of the claim based on the parties' agreement, including the settlement of the claim; or
- acknowledgement of the debt by the debtor.

## 2. Distribution Agreements

### 2.1 General

Legislation regarding distribution agreements is quite new in Hungary, as the new Civil Code introduced such legal provisions, effective as of



March 15, 2014. There was no specific legislation before this. Due to such new regulation (and the place of these provisions in the system of the Civil Code), it became clear that the provisions on agency agreements do not apply to distribution agreements. The provisions of the Civil Code on distribution agreements are not mandatory and therefore the parties are free to agree on different terms than those laid down by the Civil Code. The specific provisions of the Civil Code on distribution agreement are detached from the market practice, therefore it is highly advisable for the parties to regulate all important issues in sufficient detail in their distribution agreement. Based on the general principles of Hungarian contract law, the parties to an agreement are free to decide the terms of the agreement governing their contractual relationship.

### *2.1.1 Law Applicable*

Under a distribution contract the supplier undertakes to sell specific products (movable properties as well as to supply services; services and products are referred together as “product”) to the distributor and the distributor undertakes to purchase the product from the supplier and to sell it in its own name and for its own account.

The parties have an obligation in connection with protection of reputation of the product and the supplier shall inform the distributor of advertisements on the product, and shall - for a fee - make available to the distributor promotional material for marketing the product (eg, brochures, sample products); meaning that the agreement may also be governed by other statutory provisions (eg, trade mark law, competition law etc.).

The supplier is entitled to give instructions as to the proper distribution of the product and check the fulfilment of the distribution agreement and the instructions. If the supplier gives unreasonable or unsuitable instructions, (i) the distributor is obliged to warn the supplier thereof; and (i) if, despite the warning, the supplier insists on the instruction, the distributor must carry out the instruction; but any damage resulting from compliance with such instruction is the liability of the supplier. If

execution of the instructions of the supplier would constitute an infringement of the law or any administrative decision, or it would jeopardize the safety or property of others, the distributor must refuse to comply with such instructions. As noted above, the parties may freely exclude the application of these provisions or may replace them with different provisions.

#### *2.1.2 Formal Requirements*

Generally, there are no formal requirements in respect of a distribution agreement, ie, it may be concluded orally, in writing or impliedly by way of factual execution between the parties concerned. There are no specific requirements to register a distribution agreement with any public authority.

#### *2.1.3 Individual/Corporate Entity*

A distributor may either be an individual or act in the form of any entity, which is generally authorized to engage in trading.

#### *2.1.4 Duration of Agreement*

Suppliers are free to appoint distributors for both fixed and indefinite periods. Whether the agreement is for a fixed or an indefinite term makes a material difference in respect of the parties' rights and obligations in connection with the agreement's termination (see section 2.3 below).

### **2.2 Exclusive/Non-Exclusive**

Pursuant to Hungarian law, the parties are generally free to determine the extent of the distribution right of the distributor, ie, the parties are free to decide whether the distributor shall have an exclusive or a non-exclusive distribution right. The distributor may be granted an exclusive right with respect to the scope of its activity, ie, whereby the supplier commits itself not to use any other agents or distributors and/or not to effect direct sales of the contractual products in the contractual territory. Exclusivity may, however, also be imposed on the distributor in the form of a restriction, pursuant to which the





distributor may not act as an agent or distributor of either a third party supplier engaged in the same business as the supplier, or with respect to goods which compete with the goods manufactured or distributed by the supplier. For the sake of clarity, the extent of the distribution right must be set out precisely in the distribution agreement.

In certain cases, an exclusive or a non-exclusive (eg, a selective) distribution agreement or certain provisions thereof may have a restrictive effect on competition. Therefore, distribution agreements and exclusivity clauses in particular need to be carefully drafted in each case in order to ensure that they comply with EU and Hungarian competition law rules and regulations.

## 2.3 Termination

### 2.3.1 *Formal Requirements*

The same formal requirements apply regarding the termination of the agreement as apply to the conclusion of the distribution agreement (see section 2.1.2 above). If the distribution agreement expressly states that the termination notice requires a written form, an insufficient notice (eg, an oral declaration) would render the termination invalid.

### 2.3.2 *Notice Period*

#### ***Fixed Term Agreements***

A distribution agreement concluded for a fixed period terminates after the expiry of such fixed period. Unless otherwise agreed by the parties in the agreement, it may not be terminated by way of ordinary termination. Prior to the expiry of the fixed term, the agreement may be terminated only by extraordinary termination based on a material breach by either of the parties of the obligations undertaken in the agreement. The extraordinary termination has immediate effect unless agreed otherwise in the agreement or stated otherwise in the termination notice.

The type of conduct that would qualify as a material breach is usually expressly determined in the distribution agreement. However, it is advisable to avoid agreeing on an exhaustive list of acts or omissions which qualify as a material breach (eg, by the use of the term “in particular” at the start of the list), as other forms of conduct may also be deemed to be a material breach of the agreement on the basis of general contractual principles. However, if the list expressly determines what conduct qualifies as a material breach, only the conduct that is listed in the agreement may be used as a cause for extraordinary termination.

Generally, a fixed-term agreement may not be terminated by ordinary termination. However, the parties may agree on the contrary.

### ***Indefinite Term Agreements***

A distribution agreement concluded for an indefinite period may be terminated by notice at any time. If a distribution agreement is concluded for an indefinite period of time, the length of the notice period is usually agreed by the parties in the agreement.

An indefinite term distribution agreement may also be terminated with immediate effect by way of extraordinary termination in the event of a material breach. Regarding the determination of conduct qualifying as a material breach see the sub-section 2.3.2 above for fixed term agreements.

If the parties conclude an indefinite term distribution agreement but fail to agree on the notice period applicable in the case of an ordinary termination of the agreement, it will be unclear how long the notice period must be. In these cases, it is recommended to use a notice period which is both equitable and conforms to industry practice.

#### ***2.3.3 Liability of Supplier on Termination***

The liability of the supplier on termination is regulated by the general contractual provisions of the Civil Code. The parties must settle their accounts upon the termination of the distribution agreement, ie, the



distributor must pay the purchase price of the products already delivered by the supplier, and the supplier must deliver the products for which the distributor has already paid the purchase price.

In the case of a fixed-term agreement, the parties usually agree that the distributor must pay liquidated damages or some other security in the event that the agreement is terminated before the expiry of the fixed term for reasons attributable to the distributor.

#### *2.3.4 Return of Products*

Besides the parties' obligation to settle their accounts upon termination, there are no statutory provisions regulating the return of products. It is up to the parties whether they agree in the distribution agreement that the supplier will purchase back any unsold products from the distributor in the event of the termination of the agreement.

### **2.4 Limitation Periods**

Pursuant to the general provisions of the Civil Code, claims arising from contractual relationships lapse after five years from the date that the relevant party became entitled to claim (for further details regarding the general limitation period, see section 1.6 above).

## Ireland

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law Applicable*

The law of agency in Ireland is a combination of case law (also known as common law) and Ireland's implementation of the Agency Directive.

The Agency Directive was implemented into Irish law by the European Communities (Commercial Agents) Regulations 1994 (S.I. No.33/1994) and the European Communities (Commercial Agents) Regulations 1997 (S.I. No.31/1997) (together "the Regulations"). The former provided for substantial implementation and the latter provided a clarification in relation to compensation for commercial agents. The Regulations apply to commercial agency arrangements with effect from 1 January 1994.

This section focuses on rights established by the Regulations, rather than those arising under common law. Common law rights continue to be available to commercial agents and principals, save to the extent that they conflict with the Regulations.

#### ***Meaning of Commercial Agent***

A commercial agent is defined in the Regulations as a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the principal), or to negotiate and conclude such transactions on behalf of and in the name of the principal.



There are some points worth noting with respect to the definition of a commercial agent:

- the Regulations only apply to agreements for the sale or purchase of goods and do not extend to agreements relating to services.
- although the definition refers to a “self-employed” intermediary, this is deemed to include not just individuals but also legal entities (such as a company); and
- Irish courts have given some guidance on the required authority to “negotiate” in the context of the definition. It is not necessary that an agent be involved in active bargaining in order to satisfy the requirement. Rather, the Irish courts look to whether the agent brings a material level of skill or consideration to conducting, managing or otherwise dealing with the sale or purchase of goods on behalf of the principal. The relevant skill may indeed relate to bargaining, but can also relate to other aspects of the sale and purchase of goods, such as marketing and promotion.

The Regulations provide, in line with the Agency Directive, that a number of specified relationships fall outside the definition of a commercial agent (and to which the rights afforded by the Regulations do not apply). Those include, for example, a person who would otherwise come within the definition but whose activities are unpaid.

The Agency Directive permitted Member States to exempt certain activities of agents from the application of the Directive where they were considered secondary as a matter of national law. In that context, the Regulations provide that only the activities of a consumer credit agent or a mail order catalogue agent for consumer goods are presumed to be secondary, unless the contrary is established.

## ***Conflict of Laws***

Neither the Regulations nor the Agency Directive stipulate which law should govern a commercial agency agreement and it is a matter left to the discretion of the parties. Generally speaking, where a principal is based in Ireland and the agent carries on its activities in Ireland, parties tend to choose Irish law to govern their agreement.

Situations can arise, of course, where a principal is based in Ireland and the agent's activities are performed in another jurisdiction, or vice versa. The proper law to be applied to agreements in such situations would be governed by applicable principles of the conflict of laws. Ireland implemented the 1980 Rome Convention on the law applicable to contractual obligations (with the exception of Article 7.1 of the Convention relating to the application to an agreement of mandatory laws of another country in certain circumstances).

### ***1.1.2 Formal requirements***

The Regulations state that the agency agreement will not be valid unless it is evidenced in writing. Parties usually satisfy this requirement by entering into a formal written agreement. The requirement may also be satisfied, in the absence of a formal written agreement, if the terms of an arrangement are set out in correspondence or other written instrument. It is also worth noting, in this context, that Irish law recognises the legal validity of agreements and other documents in electronic form.

The Regulations also provide that the principal and commercial agent are each entitled under the Regulations to receive a signed, written document setting out the terms of their agency contract (including any amendments subsequently agreed).

The terms of a written agreement are naturally an important factor in determining the nature of a contractual arrangement. The Irish courts, however, have also looked at the way in which parties conduct their relationship in order to determine the true nature and terms of an agency arrangement. This is particularly so where the relationship



lasts over a number of years and where the business practices between the parties evolve.

There is no general requirement to register an agency agreement with a public authority or to have it authorised by such an authority.

### *1.1.3 Individual/Corporate Entity*

The definition of a commercial agent in the Regulations refers to a “self-employed” commercial agent. However, as noted above (see clause 1.1.1 Law Applicable), legal entities as well as individuals can avail of the protections afforded by the Regulations.

Where a commercial agent is an individual, the principal should consider the nature of the relationship so as to avoid the commercial agent being deemed to be an employee of the principal (as a result of the application of general principles of employment law).

### *1.1.4 Duration of Agreements*

The parties to an agency agreement are free to choose whether the agreement will be for a fixed or indefinite term and, if for a fixed term, what the term will be. An agreement that is for a fixed term but continues to be performed by the parties after the fixed term has expired is deemed by the Regulations to be converted to an agreement for an indefinite term. An agreement with no specified term will also be deemed to be for an indefinite term.

The categorisation of an agreement as being for a fixed term or an indefinite term has implications under the Regulations relating to termination and those are addressed below (see section 1.5.2).

## **1.2 Exclusive/Non-Exclusive**

The Regulations and Irish law generally do not impose restrictions on the type of agency arrangement that parties may agree on. A principal can therefore appoint an agent on an exclusive, non-exclusive or sole basis. If the agency agreement does not expressly define the nature of the relationship, it will be deemed to be non-exclusive. It is also

common for the principal to define the scope of the agent's rights by reference to a particular territory and other factors.

The nature of the relationship will have commercial implications for the agent as well as for the principal. For example, where an agency relates to a particular territory:

- an agent appointed on an exclusive basis will preclude the principal from actively seeking sales in the territory and from appointing other agents for the territory;
- in the case of a sole agent, the principal can actively seek sales in the territory but will be precluded from appointing other agents for the territory; and
- where an agent is appointed on a non-exclusive basis, the principal has the freedom to actively seek sales in the territory and to appoint other agents for the territory.

It is advisable, therefore, for the parties to expressly define the nature of their relationship so as to properly give effect to their commercial intentions.

The nature of the relationship will also have an effect on the agent's right to commission under the Regulations if the agent is granted exclusivity in respect of a geographical area or a specific group of customers (see section 1.4.1 below).

### 1.3 Non-Compete

The Regulations contain certain limitations on a principal's ability to restrict the activities of a commercial agent. Such restrictions must be in writing and are permissible only if they relate to the geographical area or the group of customers entrusted to the agent and to the type of goods covered by the agency. The Regulations only permit post-termination restrictions for a maximum period of two years following termination.





The parties to an agency agreement should also refer to applicable Irish and EU competition law and the common law doctrine of restraint of trade in the context of non-compete and exclusivity arrangements (see the EU Competition law chapter).

## 1.4 Commission

### 1.4.1 *Basic Principles*

One objective of the Agency Directive was to provide a level of social protection for commercial agents. The Regulations thus provide for the payment of remuneration to an agent in the event that the agency agreement does not address the issue. An agent will, in those circumstances, be entitled to remuneration that is customary for the type of goods and the area where the agent carries on his activities. In the absence of such customary practice, the agent will be entitled to reasonable remuneration.

There are additional requirements under the Regulations if an agent is remunerated partly or wholly by way of commission. An agent is entitled to commission on transactions concluded during the term of the agency agreement where the transactions:

- result from the agent's actions;
- are with a customer which the agent has previously acquired as a customer for transactions of the same kind; or
- are within a specific geographic area or with a specific group of customers in respect of which the agent has exclusivity.

The Regulations thus provide for the payment of commission on transactions in which the agent is actively involved and on repeat business that results from the agent's efforts.

A principal may also choose to pay an agent a retainer, expenses or other costs, but such payments would not be subject to the rules referred to above.

#### *1.4.2 When Due and Payable?*

The Regulations stipulate when commission becomes due and payable. They provide that commission becomes due as soon as the principal has executed a transaction (or should have done so according to an agreement with the customer) or the customer has executed the transaction (or should have done so if the principal had properly executed his part of the transaction).

Commission must be paid not later than the last day of the month following the quarter in which the commission becomes due.

A practical implication of these rules is that commission could become due and payable before the principal receives payment from the customer. Principals should, accordingly, be mindful of these rules when agreeing to terms of payment with customers.

Any derogation from these rules to the detriment of the agent will be void.

#### *1.4.3 Extinction of Right to Commission*

The entitlement to commission can be set aside only in limited circumstances. A principal need not pay commission if it is established that the agreement between the customer and the principal will not be executed and the principal is not to blame (for example, if the customer commits a breach). Any attempt to derogate from this to the detriment of the agent will be void.

The Regulations also deal with commission that may arise during the transition from one agent to another (see section 1.5.3 below).

#### *1.4.4 Accounting and Audit*

The Regulations provide for certain rights and obligations regarding information that relates to commission. The principal must provide an agent with a statement of commission that is due (setting out the main elements used in calculating the commission). The agent, in turn, has



a right to be provided with all information available to the principal, which the agent needs to verify the amount of commission due.

Any attempt to derogate from these requirements to the detriment of the agent will be void.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

The Regulations do not provide a formal termination process for agency agreements and the parties are free to determine the mechanics of termination. Agency agreements generally specify that a termination notice must be in writing and served in accordance with various formalities regarding service of notice.

If an agreement does not expressly provide for written notice, it is nevertheless advisable that any notice to terminate be given in writing and in a manner allowing for proof of receipt. This is principally for certainty and evidential purposes, enabling the terminating party to demonstrate that notice was given, the length of the notice period and the effective date of termination.

The effective date of termination can also have a bearing on commission payable to an agent (see section 1.5.3 below), which may be an added incentive to effect termination in writing.

### 1.5.2 *Notice Period*

#### ***Indefinite Term***

An agency agreement with an indefinite term can be terminated by either party by giving notice to the other. The Regulations provide for minimum notice periods for an agreement with an indefinite term and they are linked to the duration of the agreement.

Where the agreement is in its first year, at least one month's notice must be given. Where the agreement is in its second year, the minimum notice period is two months and where the agreement is in

its third or subsequent year, the notice period must be at least three months.

The parties can agree to longer termination notice periods, subject to the proviso that the notice periods for the principal cannot be shorter than for the agent. A notice period must expire at the end of a calendar month unless otherwise agreed.

It is unlikely, if a principal were to terminate an agency agreement without giving the required notice, that an Irish court would find the termination to be void. It is more likely, in such circumstances, that the agreement would be deemed terminated and that the agent would be awarded damages to compensate for loss incurred by the agent as a result of such wrongful termination. An Irish court may also award other damages, such as punitive or exemplary damages, although that would be rare.

### ***Fixed Term***

The requirements applicable to an agency agreement with an indefinite term do not apply to an agency agreement with a fixed term. The latter will simply expire at the end of the agreed term. However, as noted above (see section 1.1.4), a fixed term agreement that continues to be performed by the parties after the term has expired will convert to an agreement with an indefinite term.

The notice requirements relating to agreements with an indefinite term would then apply. The length of the fixed term would be taken into account in calculating the notice period required under the Regulations. Parties to an agency agreement (in particular the principal) should, therefore, be aware of the expiry of any fixed term agreements and any interaction between the parties following expiry.

### ***Contract Law***

The rules relating to termination referred to above do not preclude a party from terminating an agency agreement in certain circumstances,



for example, if a party commits a sufficiently serious breach giving rise to a right of immediate termination.

### *1.5.3 Liability of Principal on Termination*

#### **Commission**

An agent may be entitled to commission following termination of an agency agreement.

An agent is entitled to commission on relevant transactions (see section 1.4 above) where the order is received prior to termination. An agent can also be entitled to commission on relevant transactions concluded after termination of the agency agreement. This entitlement arises if the transactions are mainly attributable to the agent's efforts during the term of the agreement and if the transactions are entered into within a reasonable time following termination.

In the event that an agency agreement terminates and the principal engages a new agent, the new agent will not be entitled to commission that is properly payable to the previous agent under the rules set out above. However, the new agent may have an entitlement to share in such commission if it is equitable to do so in the circumstances. The principal should not, therefore, find himself in a position of paying double commission.

#### ***Damages in Lieu of Notice***

As mentioned above (see section 1.5.2), an agent may have an additional claim against the principal for wrongful termination if sufficient notice to terminate is not given.

#### ***Termination Payment***

The Agency Directive required that a remedy, in the form of a termination payment, be provided to a commercial agent on the termination of an agency agreement. Member States could implement this requirement by granting the commercial agent a right of indemnity or compensation against the principal.

The Regulations provide that an agent is entitled to a termination payment in the form of compensation for damage the agent suffers as a result of termination of the agency agreement. The Regulations set out certain instances in which damage is deemed to occur. Those instances include, for example, termination that deprives the agent of commission to which he would otherwise be entitled by proper performance of his obligations under the agreement. The instances in which damage is deemed to occur as set out in the Regulations are not exclusive and the right to compensation would need to be considered on a case by case basis. The Regulations do not specify a minimum or maximum threshold as to compensation that is payable.

A principal is not permitted to derogate from the requirement to pay compensation to the detriment of the agent and any such derogation will be void.

There are a limited number of exceptions to the general requirement to pay compensation. A principal need not pay compensation if:

- the principal terminates the agency agreement because of the agent's breach;
- the agent terminates the agency agreement, unless termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the agent; or
- the agent, with the agreement of the principal, assigns the agent's rights under the agency agreement to another person.

An agent will also lose the entitlement to compensation if the agent does not, within one year of termination of the agency agreement, notify the principal that the agent will be seeking compensation.

The Regulations do not contain, nor have the Irish courts adopted, a formula or guidance for determining compensation in the event of termination of a commercial agency. The proper compensation payable has been considered by UK and French courts and it may be



that the Irish courts would look to decisions in those jurisdictions for guidance.

## 1.6 Limitation Periods

The Regulations do not attribute specific limitation periods to agency arrangements (save for the time within which an agent must claim compensation as referred to above). Usual limitation periods for contractual claims apply and a claim must be brought within six years from the date on which the action accrued. However, that period is extended to 12 years if the agreement is executed as a deed.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

In its simplest form, a distribution arrangement is one between a buyer (the distributor) and seller (the supplier) of goods, whereas an agency arrangement involves an agent acting on behalf of a principal.

There is no specific Irish legislation that regulates the relationships between suppliers and distributors. The Regulations do not apply to such relationships and Irish law does not grant equivalent rights to distributors. The parties to a distribution agreement have, therefore, greater autonomy in choosing the contractual terms to govern their relationship.

Usual principles of Irish contract law (arising under statute and common law) apply to distribution arrangements. EU and Irish competition law are also relevant, as are aspects of sale of goods legislation.

If there is a cross-border element to a distribution agreement, applicable conflict of laws principles referred to in the Agency section would apply (see section 1.1.1).

### *2.1.2 Formal Requirements*

There are no formal requirements in Irish law specific to distribution agreements and they can be oral, in writing or implied from conduct of the parties. It is advisable, however, for parties to set out the terms governing their relationship in a formal written agreement for certainty and evidential purposes.

There is no general requirement to register a distribution agreement with a public authority or to have it authorised by such an authority.

### *2.1.3 Individual/Corporate Entity*

A distributor or supplier may be either an individual (operating as a sole trader) or a legal entity (such as a company or partnership).

A supplier should be mindful of general principles of employment law where the distributor is an individual so as to avoid the distributor being classed as an employee of the supplier (and thereby being entitled to legal protections afforded to employees).

### *2.1.4 Duration of Agreement*

The duration of a distribution agreement is a matter for agreement by the parties. An agreement without a specified term will be deemed to be for an indefinite period.

## **2.2 Exclusive/Non-Exclusive**

Parties are free to agree on the type of distribution arrangement they wish to operate, and a supplier can appoint a distributor on an exclusive, non-exclusive, sole or selective basis. The type of distribution arrangement chosen will have commercial implications for both the supplier and distributor as it does for a principal and agent under a commercial agency arrangement (see section 1.2 above).





Irish and EU competition law and the common law doctrine of restraint of trade would need to be considered in respect of exclusive arrangements and non-compete restrictions (see the previous chapter relating to EU Competition law).

## 2.3 Termination

### 2.3.1 *Formal Requirements*

Irish law does not stipulate formal requirements for termination of distribution agreements. The parties are free to agree on the circumstances in which a distribution agreement can be terminated, how termination is to be effected and the consequences of termination. General principles of Irish contract law will also be relevant. It is usual for a distribution agreement to specify that notice of termination and any other formalities required for proper termination (for example, the methods of serving notice and what constitutes evidence of delivery) be in writing.

If a distribution agreement does not expressly require termination in writing, it is still advisable to do so for the reasons outlined in the Agency section above (see section 1.5.1).

### 2.3.2 *Notice Period*

There is no specific notice period under Irish statute for termination of a distribution agreement. The parties are thus free to agree on the applicable notice period.

### ***Indefinite Term***

If a termination notice period is not specified in an agreement of an indefinite term, common law provides that the length of notice must be “reasonable”. There is no particular formula or method of calculation for determining what constitutes reasonable notice. It is a matter to be decided on the facts in each particular case.

The Irish courts have given some guidance as to the factors that are relevant in assessing whether a period of notice is reasonable. Those factors include the nature of the business and the products concerned, the duration of the business arrangement between the parties, the amount invested by the distributor in the arrangement, the extent to which the distributor was dependent on the arrangement as part of his business and the length of time it would take the distributor to secure a similar arrangement.

The Irish courts, taking such factors into account, have implied notice periods of nine months (where the arrangement was in place for five years) and 12 months (where the arrangement was in place for 10 years and accounted for 40% of the aggrieved party's business).

If the period of notice given is found not to be reasonable, damages will likely be the appropriate remedy for the distributor. The termination itself would, in those circumstances, remain valid and the distribution agreement would be treated as terminated.

Where a distribution agreement of an indefinite term specifies the notice period for termination, it is most unlikely that an Irish court would intervene if the agreement is terminated in accordance with its terms. In those circumstances, termination would be effective and a claim for damages relating to termination would not succeed, irrespective of whether the period of notice might objectively be considered to be unreasonable.

### ***Fixed Term***

An Irish court may not readily recognise the common law right to terminate on reasonable notice referred to above where the agreement is for a fixed term.

A principle underlying the Irish courts' willingness to imply termination on reasonable notice is that the courts will only do so in order to give effect to the true intentions of the parties. Where parties enter into an agreement for a fixed term, it is at least questionable whether the



parties intend that the agreement can be terminated on reasonable notice if the agreement does not expressly provide for such a right.

### 2.3.3 *Liability of Supplier on Termination*

Irish statute does not provide for a termination payment in the form of compensation or indemnity for a distributor upon termination or expiry of a distribution agreement (this being an important distinction between an agency and distribution arrangement).

A distributor would need to rely on usual causes of action relating to termination (for example, wrongful termination) and the usual remedy would be damages if the distributor can prove loss. A cause of action may lie if a supplier does not comply with a specified notice period or, if not specified, the notice given by the supplier is considered by a court not to be reasonable (see section 2.3.2 above). A distributor may have additional causes of action in respect of breaches that may have occurred before termination (for example, under sale of goods legislation if goods were not delivered) or if post-termination obligations are not met.

### 2.3.4 *Return of Products*

Irish law does not require a supplier to buy back unsold product from a distributor, nor does it require a distributor to return unsold product to a supplier upon the termination of a distribution agreement. It is common, however, for those matters to be addressed in distribution agreements and they often provide for the return of product by the distributor on terms more favourable to the supplier. A supplier may be particularly keen to manage the use of unsold product following termination as a means of protecting the supplier's brand and sales channels.

## 2.4 Limitation Periods

There is no limitation period specific to distribution agreements. Limitation periods that apply to contracts generally also apply to distribution agreements. A party claiming breach of contract under a

distribution agreement must bring a claim within six years of the date on which the cause of action accrued. Where a distribution agreement is executed as a deed, however, the relevant limitation period is extended to 12 years.



## Italy

### 1. Agency Agreements

#### 1.1 General

Italian law defines an agency agreement as a contract by which the agent undertakes to promote, on a continuous basis and for a compensation, the conclusion of transactions on behalf of a principal and in a defined area. Under Italian law, transactions may be any lawful contracts (for example, concerning goods, services or any other contract) and are not restricted to sales.

##### 1.1.1 Relevant Law

Commercial agency law has, for many decades, been governed by specific statutes in Italy. Since 1991 Italy has passed a number of laws amending existing provisions, mainly, but not only, to bring them in line with the Agency Directive. Almost all of the relevant provisions are set out in the Civil Code.

The continuous process of amending commercial agency law has given rise to some uncertainties with regard to specific legal issues, because the provisions of the Agency Directive are quite different from the pre-existing rules in Italy.

Another peculiar, perhaps unique, aspect of commercial agency in Italy is the fact that commercial agents' unions have for decades negotiated and entered into National Collective Agreements with representatives of industrial associations, setting out rules governing agency agreements. Different collective agreements have been negotiated by agents' and principals' associations, in different business sectors, although there are two main collective agreements that are most often used as a reference by the parties negotiating individual agreements: the "*Accordo economico collettivo per la disciplina del rapporto di agenzia e rappresentanza commerciale (settore industria)*," ie, the Collective Agreement for Agents of Industrial Principals, renewed on July 30, 2014, and the "*Accordo*

*economico collettivo per la disciplina del rapporto di agenzia e rappresentanza commerciale del settore commercio,”* ie, the Collective Agreement for Agents of Commercial Principals, last amended on March 10, 2010.

Doubts are often raised regarding the consistency of National Collective Agreements with the Directive.

In addition to the Civil Code and the National Collective Agreements, numerous court decisions over the years have led to the establishment of a complex and extensive body of case law that must also be taken into consideration.

In this section on agency we will, for the most part, be dealing with the statutory provisions, although we will also cover some of the provisions of the National Collective Agreements.

#### *1.1.2 Formal Requirements*

An individual or an entity willing to start a commercial agent’s activity, has to meet some requirements and file a notice (“Segnalazione Certificata di Inizio Attività,” or “SCIA,” ie, “Certified Notice of Start of Activity”) with the competent Chamber of Commerce.

The requirements necessary to start an agency activity are the following (if the agent is a corporate entity, the requirements must be met by the relevant legal representative/s)

- 1) **personal and moral requirements:**
  - 1.1. to be an Italian citizen or a citizen of a EU member State or a foreigner residing in Italy;
  - 1.2. not to be employed as subordinate employee in Italy;
  - 1.3. not to perform any professional activity as “mediatore” (broker);



- 2) **educational/professional requirements** (alternatively, one of the following):
  - 2.1. to enroll in and pass with profit a specific credited course;
  - 2.2. to have a high school or university degree in the field of business/economics/law (specific degrees requirements are specified by the law and applicable regulations);
  - 2.3. to have prior experience in the sales field. Such experience can consist of at least a total of two-years' activity (during the course of the five years before the start of an agency activity) as an employee, with duties (i) either as a salesperson, or (ii) as an employee in charge of organizing and managing sales, (ie, as a sales director or a sales manager);
- 3) the prospective agent must not have been debarred/incapacitated and must not have a record of certain criminal offences, mainly related to governmental activities, business activities, fraudulent activities or, in general, willful crimes subject to imprisonment exceeding two years (as a minimum) and five years (as a maximum).

The Directive requires that each party to an agency agreement must be entitled to obtain, from the other party, on request, a signed written document setting out the terms of the agency contract, including any terms subsequently agreed. Italian law has been properly amended to expressly include such a provision. In addition, Italian law now provides that evidence of an agency agreement may be given only in writing, ie, not through the depositions of witnesses, but with one or more written documents showing the existence and the essential contents of an agency agreement. Italian law does not provide that verbal agency agreements are void, but clearly the above requirement could make the existence and/or the terms of a verbal agreement very difficult to prove.

### *1.1.3 Individual/Corporate Entity*

Principals and agents can be either individuals or corporate entities.

Under Italian law there is a difference between individual agents that mainly carry out their activity personally, and agents (whether individuals or corporate entities) whose organization is a more complex one.

The first type of agent benefits from some rules that commonly apply to employees. Such protective rules include: (i) a requirement that all litigation must be brought in front of Labor Courts, in the area where the agent is domiciled; (ii) a provision that waivers and releases of mandatory rights are void, if challenged within six months from signature or six months from termination of an agency agreement, unless such waivers and releases have been issued in Court, or in front of unions, or in front of a Labor Council (an administrative panel set up by the local offices of Ministry of Labor).

Moreover, if the agent is an individual, Principals are obliged to inform the territorially competent Labor Office (“Centro per l’Impiego”) of: (i) the beginning of the agency relationship; (ii) the termination of any permanent agency relationship; early termination of any fixed-term agency agreement.

### *1.1.4 Duration of Agreement*

Agency agreements may be either for a fixed or for an indefinite period (however, see considerations below with respect to non-compete obligations).

Italian law provides that an agency agreement for a fixed period, which continues to be performed by the parties after the expiry of the term, is converted into an agency agreement for an indefinite period.

According to the prevailing case law, however, such a conversion occurs only if the fixed-term agreement does not include any clause providing for a periodic tacit renewal of the fixed-term agency





agreement, in which case the agreement would not be turned into an agency for an indefinite period of time.

According to the Collective Agreements for Agents of Industrial and Commercial Principals, if the principal intends to renew or to extend a fixed-term agency agreement, whose original term was longer than six months, the principal must inform the agent at least 60 days before the expiry of the agreement. Moreover, according to the Collective Agreement for Agents of Commercial Principals, the renewal or the extension of the agency agreement must be approved by the agent in writing; otherwise the agreement for a fixed-term turns into one for an indefinite period.

The above-mentioned Collective Agreements also clarify that in case of renewal of subsequent fixed-term agency agreements having the same purpose (territory, products, and customers), a probationary period clause may be included only in the first agreement.

## 1.2 Exclusive/Non-Exclusive

Unless the parties have expressly agreed otherwise, under Italian law an agency agreement is always an exclusive one for both parties. More precisely the law provides that a principal may not appoint more agents in the same territory and in respect of the same line of business, and that an agent may not promote the business of competing principals, in the same territory and line of business.

Courts and commentators commonly acknowledge that the parties may agree otherwise and therefore enter into a non-exclusive agency agreement, or confine exclusivity in favor of the principal or, alternatively, the agent.

It must be pointed out, however, that said provisions must be coordinated with the EU and Italian competition law rules, which exclude the application of the provisions (Article 101 Treaty on the Functioning of the European Union - formerly Article 81 EC, and Article 2 Law 287/90) prohibiting agreements in restriction of competition to agency agreements to the extent (i) the agent is a

genuine agent according to the EU and national case law and practice (ie, the agent does not bear any or only not significant financial or commercial risk) and (ii) the restrictive provisions are imposed on the agent in relation to the contracts concluded/negotiated on behalf of the principal - this may include, eg, limitation on the territory in which the agent may sell the goods/services, limitation of the customers to which the agent can sell the goods/services.

### 1.3 Non-Compete

#### 1.3.1 *During the Term of the Agreement*

Competition by the agent against the principal during the term of the agreement is arguably contrary to the duty of loyalty and good faith owed by the agent to the principal. Nevertheless, agency agreements frequently include express covenants not to compete, which are regarded as valid and enforceable.

It must be noted that the EU and Italian competition law rules concerning the scope and duration of non-compete obligations (provided for in the Vertical Agreements Block Exemption Regulation and explained in the associated Commission's guidelines) apply both to "genuine" and "non-genuine" agents. Pursuant to said rules a non-compete obligation imposed on an agent benefits from a presumption of lawfulness only where the duration of the obligation (or of the agreement) is less than or equal to five years (without automatic renewal, and provided that the principal is not dominant). Above the five-year threshold, a case-by-case competition law assessment on the lawfulness (and enforceability) of the obligation is recommended.

#### 1.3.2 *After Termination of the Agreement*

Italian law provides that covenants not to compete after termination of agency agreements are valid if they are concluded in writing, and relate to the same geographical area, customers, and to the same kind of goods or services for which the agency agreement had been concluded. According to Italian law, non-compete covenants may be entered into by the parties at the same time of the execution of the



agency agreement or thereafter (during the agency relationship or at its termination). On the contrary, according to the Collective Agreement for Agents of Commercial Principals the parties are entitled to enter into a non-compete covenant only at the beginning of the agency relationship. Such non-compete covenants may not exceed two years after termination of the agency agreement.

As mentioned above, since EU and Italian competition law rules concerning the scope and duration of non-compete obligations apply both to “genuine” and “non-genuine” agents, the post-termination non-compete obligations must also be compliant with competition law in terms of scope and duration (and a specific case-by-case assessment is recommendable).

At the time of termination of the agency agreement, the agent is entitled to an indemnity for the non-compete covenant, the amount of which depends on its duration and on the nature of the agency agreement, and on the amount of the termination indemnity (see section 1.5.3 below on Liability of Principal upon Termination). The law provides that the actual amount of the indemnity in respect of the covenant should be determined, based on the above general criteria set out in the law, by the terms of the individual agency agreements, taking into account also the rules set out in the National Collective Agreements.

The following are the provisions of the Collective Agreements.

- (1) According to Article 14 of the Collective Agreement for Agents of Industrial Principals, the indemnity for the non-competition obligations should be calculated as follows:
  - (A) 1st step: identifying the monthly average (hereinafter, “Monthly Commissions”) of the commissions paid to the agent during the last five years of the agency relationship (or during the whole duration of the agreement if shorter than five years);

(B) 2nd step: calculating the indemnity based on the following schedules.

(I) AMOUNT OF THE INDEMNITY IF THE DURATION OF THE COVENANT IS TWO YEARS		
DURATION OF THE AGENCY AGREEMENT	AGENTS PROMOTING EXCLUSIVELY FOR ONE PRINCIPAL and AGENTS THAT, DESPITE THE ABSENCE OF AN OBLIGATION TO PROMOTE EXCLUSIVELY FOR ONE PRINCIPAL, OBTAIN AT LEAST 80% OF THEIR TOTAL COLLECTED COMMISSIONS FROM ONE PRINCIPAL:	AGENTS NOT PROMOTING EXCLUSIVELY FOR ONE PRINCIPAL
More than 10 years	12 Monthly Commissions	10 Monthly Commissions
More than 5 years and up to 10 years	10 Monthly Commissions	8 Monthly Commissions
Up to 5 years	8 Monthly Commissions	6 Monthly Commissions



The amount of the indemnity (due to agents not promoting exclusively for one principal) is reduced by 30% if the agreement has been terminated by the agent, provided that the agent did not obtain more than 25% of their total collected commissions from the terminated agreement and further provided that the ground of termination was not a contract breach by the principal, old age retirement by the agent or the agent's disability.

According to the Collective Agreement for Agents of Industrial Principals, if the agent breaches the non-compete covenant, the agent should pay back all amounts already paid to the agent in order to compensate his obligation not to compete; the agent should also pay liquidated damages that cannot exceed 50% of the compensation for the non-compete restrictions.

**(II) AMOUNT OF THE INDEMNITY IF THE DURATION OF THE COVENANT IS SHORTER THAN TWO YEARS**

The indemnity under point (I) above is reduced by 40% for the 1st year and by 60% for the 2nd year, in relation to the actual duration of the restriction to compete.

(2) According to Article 7 of the Collective Agreement for Agents of Commercial Principals, the indemnity for the non-compete covenant must be calculated as follows:

- (A) 1st step: identifying the annual average commissions paid to the agent in last five years of the agency relationship (or during the whole duration of the agreement if shorter than five years);
- (B) 2nd step: calculating the indemnity based on the following schemes:

AGENTS PROMOTING EXCLUSIVELY FOR ONE PRINCIPAL and AGENTS THAT DESPITE THE ABSENCE OF AN OBLIGATION TO PROMOTE EXCLUSIVELY FOR ONE PRINCIPAL OBTAIN AT LEAST 80% OF THEIR TOTAL COLLECTED COMMISSIONS FROM ONE PRINCIPAL:

- The average annual commissions under point (A) above must be divided by 24, and multiplied by the number of months of the duration of the non-compete agreement.
- The resulting amount is the indemnity for the non-compete provision, in case the duration of the agency relationship is longer than five years. If the duration is shorter, the agent is entitled to 85% of the amount resulting from the above calculation.

AGENT NOT PROMOTING EXCLUSIVELY FOR ONE PRINCIPAL:

- The average annual commissions under point (A) above must be reduced by 20% and the result must be divided by 24 and then multiplied by the number of months of the duration of the non-competition agreement (hereinafter, the result of this multiplication will be the "RESULT");
- If the duration of the agency agreement is:
  - i. longer than 10 years, the agent will be entitled to 100% of the RESULT;
  - ii. between 5 and 10 years, the agent will be entitled to 75% of the RESULT;
  - iii. between 0 and 5 years, the agent will be entitled to 50% of the RESULT.

In case the collective agreement provisions do not apply and in the absence of an agreement between the parties, the law provides that



the courts should calculate the indemnity for a non-compete covenant on equitable grounds, taking into consideration the following criteria:

- the average commission paid to the agent during the agreement (and their proportion of the agent's overall turnover during the same period);
- the cause of termination of the agency agreement;
- the extent of the agent's territory; and
- the fact that the agent was bound by exclusivity in favor of one single principal.

In case of breach of the post-termination non-compete obligations by the agent the principal is entitled to:

- petition for a Court's order enjoining the agent from performing services in favor of the new principal;
- claim compensation for damages. Damages can be quantified in advance through a specific liquidated damages clause. According to the Collective Agreement for Agents of Industrial Principals the relevant amount cannot exceed 50% of the compensation for the obligations not to compete.

## 1.4 Commission

### 1.4.1 *Basic Principles*

The Italian law concerning commission due to agents has been widely changed by the implementation of the Agency Directive.

For a very long time, a fundamental principle of the Italian law on commercial agency provided that commission was due to an agent only if a transaction promoted by the agent was duly performed by the customer (eg, in the case of a sale transaction, commission was due only upon payment of the price by the customer); such event used to be known as "buon fine." The entire law on agents' commission was

based on this principle and there was no distinction (comparable with the one set out in the Agency Directive) between the “entitlement” of an agent to commission, and the date commission became “due.”

Italian law now distinguishes between the entitlement to commission and the moment commission becomes due.

An agent is entitled to commission under the following circumstances:

- where a transaction is concluded as a result of his action;
- except as otherwise agreed, where a transaction is concluded by the principal with third parties that the agent had previously acquired as customers;
- except as otherwise agreed, where a transaction is concluded with a customer belonging to a geographical area, or to a category or a group of customers “reserved” to the agent;
- where a transaction is concluded after the agency agreement terminated, if the order reached the principal or the agent prior to termination or the transaction is concluded within a reasonable period after the date of termination of the agreement and conclusion is mainly attributable to the activity performed by the agent (according to the Collective Agreements for Agents of Industrial and Commercial Principals, the duration of such reasonable period is six months).

Agents are not entitled to any reimbursement of expenses incurred in performing an agency agreement.





### 1.4.2 *When Due and Payable?*

Implementing Article 10 of the Agency Directive, Italian law provides that commission becomes due:

- as soon as, and to the extent that, the principal has executed or should have executed the transaction according to his agreement with the third party (customer);
- at the latest, as soon as, and to the extent that, the third party (customer) has executed or should have executed the transaction if the principal had executed his part of the transaction.

The parties may not agree to any later time than the latter option.

If the principal and the customer agree not to perform the transaction they entered into, or to perform it only in part, the agent is entitled to a reduced commission on the portion of the transaction that has not been performed. The extent to which such commission should be reduced must be determined in accordance with local customary practices or, absent those, by the Courts, on equitable grounds.

The principal must pay the commission to the agent no later than the last day of the month following the quarter during which commission has accrued.

### 1.4.3 *Extinction of Rights to Commission*

An agent is obliged to refund commission that has been received only if and to the extent that it is certain that the contract between the third party and the principal will not be performed for reasons not attributable to the principal.

Arguably, only under such circumstances can an agent's right to commission be deemed extinguished.

#### *1.4.4 Accounting and Audit*

A principal must inform the commercial agent, within a reasonable period, of his acceptance, refusal, and of any non-execution of a commercial transaction that has been procured for the principal.

The principal must provide the agent with a statement of commission due no later than the last day of the month following the quarter during which commission has accrued. Such statement must set out the main components used in calculating the amount of commission.

By the end of each month, according to the Collective Agreements, an Agent is also entitled to receive copy of the invoices issued by the Principal to the clients managed by the Agent.

In addition an agent is entitled to be provided with all information that is necessary to enable the agent to check the calculation of commission, and in particular is entitled to be provided with an extract from the principal's accounts.

The scope of such a right by agents is controversial, as it directly impacts on issues of procedural law, concerning the right of a party to litigation to obtain disclosure of documents by the other party.

### **1.5 Termination**

#### *1.5.1 Formal Requirements*

The law does not impose any formal requirements for terminating an agency agreement. However, the National Collective Agreements require written notice and of course, in order to prove that an adequate notice was given, and the relevant date of such notice, a written notice of termination is advisable.

#### *1.5.2 Notice Period*

In order to terminate an agency agreement, which is expressed to be for an indefinite term (or has become indefinite by operation of law - see section 1.1.4 above on Duration of Agreement) Italian law



requires that the terminating party give a notice period of one month during the first year, two months during the second, three months during the third, four months during the fourth, five months during the fifth, and six months during the sixth year and thereafter.

Unless otherwise agreed upon by the parties to the agreement, termination must take effect at the end of a calendar month.

According to the prevailing opinion of commentators and the Courts, the replacing of a notice period with an indemnity is possible, at least where the parties expressly agreed so.

The notice periods provided for by the Collective Agreements applicable to agency agreements are usually more favorable to the agents than the notice periods required by law and set out above.

There are specific cases, however, where the opposite is true, and therefore, arguably, the notice periods provided for by these Collective Agreements may be challenged as void, since the parties may only provide for notice periods which are longer than the statutory periods.

Under the Collective Agreements a notice of termination may be replaced by the paying of an indemnity.

The notice periods due to agents under the Collective Agreements for Agents of Industrial and Commercial Companies are set out in the following chart:

	Duration of Agreement	Notice due
Agents not promoting exclusively for one principal	0-3 years	3 months
	4 years	4 months
	5 years	5 months
	6 years or more	6 months

Agents promoting exclusively for one principal	0-5 years	5 months
	6-8 years	6 months
	9 years or more	8 months

Normally it is not necessary to state the reason for termination when terminating an agency agreement, since the right to terminate an agency agreement does not depend on the reason it is being terminated.

There are no express statutory provisions concerning termination of an agency agreement “for cause,” and the ordinary provisions on breach of contract apply to agency agreements as well.

According to some case law, however, the specific provisions concerning termination of an employment relationship for a “just cause” may apply to agency agreements too. Under labor law, employers and employees may terminate an employment contract immediately when there is “just cause” such as when something happens to make even temporary continuation of the agreement impossible. The existence of a just cause makes it possible to terminate in advance even a fixed-term employment contract. Where the employment contract is for an indefinite term, the party terminating the agreement is entitled to terminate immediately, with no notice period.

### *1.5.3 Liability of Principal on Termination*

#### **Statutory Provisions**

According to Article 1751 of the Italian Civil Code (which corresponds to the provisions of Article 17 (2) of the Agency Directive) an agent may be entitled to a termination payment in the form of an indemnity if both of the following conditions are met:

- the agent has brought new customers to the principal, or has significantly increased the volume of business with existing



customers and the principal continues to derive substantial benefits from the business with such customers;

- the payment of the indemnity is equitable having regard to all the circumstances and, in particular, the commissions that the agent loses and that originate from the principal's transactions with such customers.

A termination indemnity is not due if:

- the principal has terminated the agency contract because of a breach that, due to its seriousness, makes even temporary prosecution of the agreement impossible;
- the agent terminated the agreement, unless such termination is justified by circumstances attributable to the principal or by circumstances attributable to the agent such as age, infirmity or illness, in consequence of which he cannot reasonably be required to continue his activity;
- the agent assigned his rights and duties under the agency agreement to a third party, with the agreement of the principal.

The amount of the indemnity may not exceed a figure equivalent to one year's commission, calculated on the basis of an agent's average annual remuneration over the preceding five years and, if the agreement is less than five years old, on the basis of the average for the period in question.

The grant of a termination indemnity does not deprive an agent of the right to claim damages in the event the principal is also in breach of the agency agreement.

***Termination Indemnity under the National Collective Agreement for Agents of Industrial Principals and the National Collective Agreement for Agents of Commercial Principals (“National Collective Agreements”)***

The National Collective Agreements provide three termination indemnities that can be cumulative, according to certain rules, summarized below.

***“Indennità di risoluzione del rapporto” (so-called “FIRR”)***

The “*Indennità di risoluzione del rapporto*” (literally, the “contract termination indemnity”) is also popularly known as FIRR. This indemnity is due in any case of termination (including termination due to the agent’s fault, subject to a few strict exceptions). The amount of the indemnity must be calculated (according to the schedules below) as a percentage of commissions and any other amounts paid/due during each year of the agency agreement.

***National Collective Agreement for Agents of Industrial Principals***

	Annual Commissions (EUR)	Indemnity due
Agents not promoting exclusively for one principal	0–6,200.00	4%
	6,200.01–9,300.00	2%
	9,300.01 and more	1%
Agents promoting exclusively for one principal	0–12,400.00	4%
	12,400.01– 18,600.00	2%
	18,600.01 and more	1%



***National Collective Agreement for Agents of Commercial Principals (Termination Indemnity on Commission accrued after January 1, 2002)***

	<b>Annual Commissions ITL and (EUR)</b>	<b>Indemnity due</b>	<b>Additional Indemnity due</b>
Agents not promoting exclusively for one principal	0–6,200	1%	3%
	6,200–9,300	1%	1%
	9,300 and more	1%	-
Agents promoting exclusively for one principal	0–12,400	1%	3%
	12,400–18,600	1%	1%
	18,600 and more	1%	-

The National Collective Agreements provide that the annual accruals of this indemnity should be set aside by principals and placed in a fund which is managed by a third party (ie, the “Fondazione Enasarco”). At the end of the employment relationship, the Fondazione Enasarco pays the amounts set aside by the principal to the agent directly.

***“Indennità suppletiva di clientela” (goodwill/clientele supplementary indemnity)***

The National Collective Agreements provide for an additional termination indemnity that the principal must pay to the agent upon termination of the agreement. In general terms, payment is due unless termination is attributable to the agent (specific rules apply here).

Under the provisions of the National Collective Agreement for Agents of Commercial Principals, for all transactions concluded after January 1, 1989 the clientele indemnity will be calculated as follows (different rules apply for previous periods of time):

- 3% of the aggregate of all commissions accrued by the agent during the first three years of the agreement;
- 3.5% of the aggregate of all commissions accrued by the agent during the fourth, fifth and sixth years of the agreement;
- 4% of the aggregate of all commissions accrued by the agent after the sixth year of the agreement.

Under the provisions of the National Collective Agreement for Agents of Industrial Principals, the clientele indemnity must be calculated as follows:

- 3% of the aggregate of all commissions, and any other amounts possibly due to the agent;
- 0.5% of annual commissions accrued by the agent for each year from the fourth year of the agreement until its termination (but with an annual commission cap equal to EUR 45,000);
- an additional 0.5% of annual commissions accrued by the agent for each year from the sixth year of the agreement until its termination (but with an annual commission cap equal to EUR 45,000).

### ***“Merit” indemnity***

The National Collective Agreements also provide for a third indemnity, possibly payable to agents following termination of an agreement. The National Collective Agreements provide that such additional indemnity is due only if, at the time of termination, the agent has brought new customers to the principal, or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers. Generally speaking, the “merit” indemnity, like the clientele indemnity, is not required to be paid if termination is attributable to the agent.





### ***Merit Indemnity according to the Collective Agreement for Agents of Industrial Principals***

According to the Collective Agreement for Agents of Industrial Principals, the merit indemnity should be determined based on the difference between the commissions (and any other remuneration) paid to the agent respectively at the start and at the end of the agency relationship.

Calculation of the merit indemnity is effected as follows.

- 1st step: calculation of the value of the increase (hereinafter “V” in short) of clientele or turnover:

<b>DURATION OF THE AGENCY AGREEMENT</b>	<b>V</b>
Duration > 10 years	<i>V = (average annual commissions of the last 3 years) less (average annual commissions of the first 3 years of the agency relationship, increased according to the official cost of living index).</i>
5 years < Duration < 10 years	<i>V = (average annual commissions of the last 2 years) less (average annual commissions of the first 2 years of the agency relationship, increased according to the official cost of living index).</i>

<b>DURATION OF THE AGENCY AGREEMENT</b>	<b>V</b>
Duration up to 5 years	<i>V = (commissions of the last year) less (commissions of the first year of the agency relationship, increased according to the official cost of living index).</i>

- 2nd step: the second step consists of identifying the expected:
  - i. duration of the period during which the principal will continue to benefit from the agent's promotional activity (hereinafter "P" in short); and
  - ii. percentage of clients that will not continue to use the services/products of the principal (hereinafter "T" in short);

based on the following schedule.

<b>Agency relationship</b>	<b>P (years)</b>	<b>T</b>
Agent promoting exclusively for one principal Duration is less than or equal to 5 years	2.25	15%
Agent promoting exclusively for one principal Duration is more than 5 years but less than or equal to 10 years	2.75	20%
Agent promoting exclusively for one principal Duration is more than 10 years	3.25	35%
Agent not promoting exclusively for one principal Duration is less than or equal to 5 years	2.00	17%



Agency relationship	P (years)	T
Agent not promoting exclusively for one principal Duration is more than 5 years but less than or equal to 10 years	2.50	22%
Agent not promoting exclusively for one principal Duration is more than 10 years	3.00	37%

- 3rd step: the third step consists of calculating the net value of the increase (hereinafter “NV” in short) for each year of P. In particular, for the first year of P it is necessary to deduct T from V, whereas for the other years of P, T must be deducted from the amount of VP calculated for the previous year.

All the VPs resulting from the said calculations have to be summed up, thus obtaining the total NV for the entire duration of P (hereinafter “TNV” in short).

*1st year of P:  $V - T = NV1$*

*2nd year of P:  $NV1 - T_2 = NV2$*

*etc.*

*$NV1 + NV2 + \dots = TNV$*

- 4th step: reduce TNV by a variable percentage based on the following schedule, thus obtaining the merit indemnity.

DURATION OF THE AGENCY AGREEMENT (years)	PERCENTAGE
Duration is less than or equal to 5 years	10%
Duration is more than 5 years but less than or equal to 10 years	15%

DURATION OF THE AGENCY AGREEMENT (years)	PERCENTAGE
Duration is more than 10 years	20%

Please note that the merit indemnity cannot exceed the indemnity provided under article 1751 of the Italian Civil Code.

- 5th step: deduct the sum of the clientele indemnity and the FIRR indemnity from the merit indemnity.

### ***Merit indemnity according to the Collective Agreement for Agents of Commercial Principals***

According to the Collective Agreement for Agents of Commercial Principals, the merit indemnity is calculated based on the increase in turnover (ie, principal's sales in the territory to the clients assigned to the agent). The calculation must be made on the basis of the duration of the agreement.

- 1st step: calculation of the actual value of the increase (hereinafter, in short, "V"):

DURATION OF THE AGENCY AGREEMENT	V
Duration > 12 years	<i>V = (average annual turnover of the last 20 quarters) less (average annual turnover of the first 20 quarters of the agency relationship, increased according to the official cost of living index).</i>
From the start of the 10th year to the 12th year	<i>V = (average annual turnover of the last 16 quarters) less (average annual turnover of the first 16</i>



<b>DURATION OF THE AGENCY AGREEMENT</b>	<b>V</b>
	<i>quarters of the agency relationship, increased according to the official cost of living index).</i>
From the start of the 7th year to the 9th year	<i>V = (average annual turnover of the last 12 quarters) less (average annual turnover of the first 12 quarters of the agency relationship, increased according to the official cost of living index).</i>
From the start of the 4th year to the 6th year	<i>V = (average annual turnover of the last 8 quarters) less (average annual turnover of the first 8 quarters of the agency relationship, increased according to the official cost of living index).</i>
For the 3rd year of the agency agreement	<i>V = (average annual turnover of the last 3 quarters) less (average annual turnover of the first 3 quarters of the agency relationship, increased according to the official cost of living index).</i>
For the 2nd year of the agency agreement	<i>V = (average annual turnover of the last 2 quarters) less (average annual turnover of the first 2 quarters of the agency relationship, increased according to the official cost of living index).</i>

<b>DURATION OF THE AGENCY AGREEMENT</b>	<b>V</b>
For the 1st year of the agency agreement	<i>V = (average of turnover of the last 3 months) less (average turnover of the first 3 months of the agency relationship, increased according to the official cost of living index).</i>

- 2nd step: the second step consists in calculating which percentage rate of the initial turnover (or average annual turnover) “V” (ie, the actual value of the final annual increase) represents. If we indicate said percentage rate as “T,” the following proportion will give the desired result:

*(V): (average initial turnover/average annual turnover, increased according to the official cost of living index) = (T): (100)*

- 3rd step: calculating the merit indemnity according to the following scheme:

<b>Duration of agency relationship</b>	<b>T</b>	<b>Percentage of merit indemnity to be applied to the maximum amount under the statutory provisions (from which the clientele indemnity and the FIRR indemnity must be subtracted)</b>
Up to 12 months	From 0 to 5%	-
	From 5% to 30%	25%



<b>Duration of agency relationship</b>	<b>T</b>	<b>Percentage of merit indemnity to be applied to the maximum amount under the statutory provisions (from which the clientele indemnity and the FIRR indemnity must be subtracted)</b>
	From 30% to 60%	30%
	From 60% to 150%	40%
	Over 150%	100%
From 12 to 24 months	Up to 30%	30%
	From 30% to 60%	35%
	From 60% to 150%	40%
	Over 150%	100%
From 24 to 36 months	Up to 30%	35%
	From 30% to 60%	40%
	From 60% to 150%	45%

<b>Duration of agency relationship</b>	<b>T</b>	<b>Percentage of merit indemnity to be applied to the maximum amount under the statutory provisions (from which the clientele indemnity and the FIRR indemnity must be subtracted)</b>
	Over 150%	100%
From 36 to 48 months	Up to 30%	40%
	From 30% to 60%	45%
	From 60% to 150%	50%
	Over 150%	100%
From 48 to 60 months	Up to 30%	45%
	From 30% to 60%	50%
	From 60% to 150%	55%
	Over 150%	100%





<b>Duration of agency relationship</b>	<b>T</b>	<b>Percentage of merit indemnity to be applied to the maximum amount under the statutory provisions (from which the clientele indemnity and the FIRR indemnity must be subtracted)</b>
From 60 months onward	Up to 30%	50%
	From 30% to 60%	55%
	From 60% to 150%	60%
	Over 150%	100%

### ***Issues Arising from the Co existence of the Statutory Provisions and the National Collective Agreements***

Both under Article 19 of the Agency Directive and under the legislation that has implemented the Agency Directive in Italy, the statutory provisions on termination indemnity may not be derogated to the detriment of an agent.

This provision has raised the issue of consistency between the Collective Agreements and the statutory provisions of law, with regard to termination. In fact, according to some commentators, the standardized mechanism of calculation of the termination indemnity under the Collective Agreements might prove to be detrimental for agents that have performed well according to the Agency Directive requirements. In other words, according to this argument, when the

parties agree in advance on a formula to calculate a termination indemnity, it is always possible for an agent to claim, upon termination of the agency, that such a formula is detrimental, if compared with the actual performance of the agent during the agreement.

In light of the above and since the calculation of termination indemnities pursuant to the Collective Agreements often used to be lower than the one resulting from the application of statutory provisions, many agents filed petitions in order to be paid termination indemnities according to statutory provisions instead of according to the Collective Agreements.

The issue has been quite controversial for a long time until, eventually, the European Court of Justice held that “Article 19 of Directive 86/653 on the coordination of the laws of the Member States relating to self-employed commercial agents must be interpreted as meaning that the indemnity for termination of contract which results from the application of Article 17(2) of the Directive cannot be replaced, pursuant to a collective agreement, by an indemnity determined in accordance with criteria other than those prescribed by Article 17, unless it is established that the application of such an agreement guarantees the commercial agent, in every case, an indemnity equal to or greater than that which results from the application of Article 17.”

The Collective Agreement for Agents of Commercial Principals, which was renewed in 2010, with the express intent to align the collective provisions to the quoted opinion by the Court of Justice, has not yet been tested in Court.

## 1.6 Limitation Periods

According to the prevailing opinion, claims to commissions are barred by statute of limitations in five years.

As provided by Article 1751 of the Italian Civil Code, claims concerning an agent’s termination indemnity must be notified to the principal no later than one year following termination of the agency



agreement (otherwise the agent loses any right to such indemnity). Once an agent has timely notified to the principal that he intends to pursue his entitlement to a termination indemnity, the relevant right shall be barred by statute of limitations in 10 years.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Italian legislation does not expressly regulate distribution agreements, which fall into the general category of “sale agreements.” The following general points should be noted:

- the Italian Civil Code contemplates several types of contracts that can be adopted to sell products on the Italian market, namely agency (Article 1742), commission (Article 1731) and supply (Article 1559);
- commercial practice has created (actually inherited from the common law countries) a so-called “distribution contract,” which in fact combines sale (Article 1470 of the Italian Civil Code) and supply contracts (Article 1559 of the Italian Civil Code). The so-called distribution contract is where one party (the supplier) undertakes to sell its products (or some of them) to the other party (the distributor) for resale purposes in a given territory; and
- no specific provision is set out in Italian antitrust law regarding exclusive distribution agreements (however see section 2.2 below on Exclusive/Non-Exclusive).

With respect to the governing law in case one of the parties to the distribution agreement is not Italian (eg, commonly, the supplier has its registered office or main place of business outside the Italian territory, while the distributor is established in Italy), two different sets

of rules will apply, depending on the date of execution of the distribution agreement.

- Agreements executed until December 17, 2009 will be still subject to the rules set forth in the 1980 Rome Convention on the Law Applicable to Contractual Obligations (the “Convention”).

Under the Convention, the parties are free to elect any law to govern the contract. However, the choice of governing law by the parties will be limited by the operation of mandatory rules and/or the public policy (*Ordre Public*) of the forum.

If the contract is silent on governing law, the contract will be subject to the law of the country of residence (or registered office) or principal place of business of the party carrying out the “characteristic performance” of the contract.

For distribution agreements it is controversial whether the characteristic performance is the supply or, as an alternative, the resale of the products. So far the Italian courts tended to stress the importance of the supplies and, therefore, to apply the law of the country of residence of the principal.

- Agreements executed after December 17, 2009 will be regulated by the provisions of EU Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I) (the “Regulation”).

Also under the Regulation the parties to a distribution agreement are free to choose the law governing each contractual relationship (Article 3).

In the absence of an express (or implicit) choice of governing law, the Regulation provides (see Article 4 (1) f)) that distribution agreements shall be governed by the law of the country where the distributor has its “habitual residence.”



Therefore, if the distributor has its “habitual residence” in Italy, Italian law will govern the agreement unless the parties elect a different governing law.

Similarly to the regime of the Convention, the Regulation also provides for some limitations to the parties’ freedom of choice. Said limitations include mandatory rules (Article 3 (3) and (4)), overriding mandatory rules (Article 9) and the public policy (*Ordre Public*) of the forum (Article 21).

### 2.1.2 *Formal Requirements*

There is no specific formal requirement for the execution of a distribution agreement. Unwritten distribution agreements are valid and enforceable under Italian law.

The problem in such cases is rather that of evidencing the terms agreed between the parties. In view of the foregoing, having a written agreement is generally advisable.

The validity of the distribution agreement is not subject to any specific notification or authorization.

### 2.1.3 *Individual/Corporate Entity*

Under Italian law a distributor may be either an independent business person or a company.

### 2.1.4 *Duration of Agreement*

The parties may freely determine whether the duration of a distribution agreement is for a fixed or indefinite period of time.

As to fixed-term agreements drafted unilaterally by one of the parties (with no significant negotiation), if a clause provides that the contract is automatically renewed upon expiration unless a notice of termination is sent in advance, then it must be expressly approved in writing by the other party (eg, by means of a second signature for acceptance relating specifically to the clause at issue). Should this

requirement not be met, the clause would be considered null and void (Article 1341 of the Italian Civil Code).

## 2.2 Exclusive/Non-Exclusive

Under Italian law the parties are free to establish the extent of their mutual rights and to agree upon exclusive/non-exclusive distribution rights. Often, the parties provide for exclusivity (within the limits permitted by competition laws) in favor of both the supplier and the distributor, so that the supplier will not appoint other distributors in the same territory and the distributor will not distribute other products manufactured by competitors of the supplier. The parties may also provide for exclusivity only in favor of one party. If the parties do not include any specific provision concerning exclusivity rights, the distribution agreement is deemed to be non-exclusive. However, it is advisable that the parties include relevant provisions in their agreement.

The provisions of the Italian Anti-trust Law (287/90) that protect the freedom of competition and that prohibit understandings in restraint of free competition mirror the basic principles contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (formerly Articles 81 and 82 of the Treaty of Rome). As already mentioned above, however, no specific provision is set out in Italian antitrust law regarding exclusive distribution agreements.

It is also worth mentioning that the Italian Antitrust Authority observes the principles set out by the EU Commission regarding vertical agreements (ie, the Vertical Agreements Block Exemption Regulation and related Guidelines in force).

Please see the earlier EU Competition Law chapter for further discussion of these issues.



## 2.3 Termination

### 2.3.1 *Formal Requirements*

There is no formal requirement for the termination of a distribution agreement, unless otherwise provided by the agreement.

### 2.3.2 *Notice Period*

Under Italian Law there is no statutory protection for distributors regarding notice of termination, and the length of notice is determined by the contractual arrangement between the parties. It is always advisable that the parties expressly set out the length of the termination notice in the agreement.

Please note, however, that in the event (i) the agreement is entered into for an indefinite period of time and (ii) the parties did not provide for a termination notice, a party may in any event terminate the agreement by giving a “reasonable” termination notice to the other. Likewise, in case the parties provided for a termination notice which, in light of the duration and nature of the contractual relationship is, however, unfair (too short) prevailing Courts consider that, in spite of the contractual provisions, the terminating party cannot invoke the forthwith enforcement of the (unfair) termination contractual notice as it should, in any event, give a reasonable termination notice to the other party. The Courts have normally determined whether a notice may be considered reasonable or not by taking into account the duration of the agreement and the general commercial practice in the relevant field of business. In light of the practice depending on the circumstances a termination notice period ranging between six to twelve month is usually considered as adequate (this obviously does not exclude that shorter or longer notice periods may apply in light of the specific circumstances). If the termination notice is considered not “reasonable” the party which gave the notice will have to pay damages to the other party. If the party giving the notice is the supplier, the damages will be based on the likely profit that the distributor would have made during the period of notice that should have been given.

Unless otherwise provided by the parties, a fixed-term distribution agreement can only be terminated by one party where the other party has committed a serious breach of a material contractual obligation. In the absence of such a breach, a notice to terminate a fixed-term agreement would be invalid and the terminating party would be exposed to liability for contractual breach with damages calculated on the basis of the residual duration of the agreement and the anticipated profitability of the other party during that period.

As to termination for default, as a general rule a party may terminate a distribution agreement in the event that the other party commits a serious breach of a material contractual obligation (Articles 1453-1455 Italian Civil Code). The same articles of the Italian Civil Code entitle a party to seek an order for specific performance of the relevant contractual obligation, as an alternative to termination.

The party in default must be granted, by written notice, a period of time (in principle not less than 15 days, although a shorter period may be agreed in the contract) to cure the breach. If the breach is not cured within this period of time then the agreement is automatically terminated.

The agreement may also contain, pursuant to Article 1456 of the Italian Civil Code, a specific “early termination clause” listing one by one the serious contractual breaches that would entitle one of the parties to immediately terminate the agreement by simply sending a notice of termination.

### *2.3.3 Liability of Supplier on Termination*

No compensation is due, in principle, to either party in the event the distribution agreement is terminated with due notice or upon expiration.

In particular, distributors are normally not entitled to an indemnity upon the termination of the relationship. Having said that, in the event of an unlawful termination, the distributor is entitled to a compensation





for damages suffered as a consequence of the unlawful termination, as it would happen for any other commercial contract.

In particular, the compensation should cover both the actual damages and the loss of profits. Italian law does not provide for the award of punitive damages.

The actual damages also should take into account the investments made by the distributor, which cannot be used due to the early unlawful termination of the relationship. In this latter case, the compensation should be calculated bearing in mind the expected residual duration of the contract assuming a lawful termination.

#### *2.3.4 Return of Products*

Under Italian law there is no statutory provision concerning the return of products on termination. The parties are free to include, and often do, an obligation on the supplier to buy back a reasonable stock of unsold products.

### **2.4 Limitation Periods**

The contractual claims of distributor and supplier are subject to the ordinary statute of limitation for contractual claims, which are time-barred after 10 years (Article 2946 of the Italian Civil Code). However, any claims related to outstanding payments that are due annually or more frequently must be brought no later than five years from when the cause of action accrued (Article 2948 of the Italian Civil Code).

# Kazakhstan

## 1. Agency Agreements

### 1.1 General

#### 1.1.1 *Law Applicable*

Kazakhstani laws do not expressly regulate agency agreements. The closest type of agreements is a commission agreement. The main rules for commission agreements are set out in the Civil Code of the Republic of Kazakhstan.

The General Part of the Civil Code<sup>1</sup> establishes main principles and rules applicable to all types of contracts. The Special Part of the Civil Code<sup>2</sup> provides for special rules applicable to specific types of contracts, including commission agreements.

Under the Civil Code, a commission agreement is where one party (a commission agent) undertakes to execute one or more transactions on its own behalf and at the expense and for the benefit of the other party (a principal). A commission agent has to fulfill a transaction executed with a third party and transfer all proceeds from such transaction to a principal.

A commission agent is not liable to a principal for breaches of the transaction by a third party customer, unless the agent has not exercised due diligence in selecting the third party customer or the agent has provided a guarantee in favor of the third party customer. In the event of a breach, the agent must collect all documents and evidence related to the breach and transfer them to the principal.

A commission agreement is not limited by sale and purchase agreements and can be executed with respect to any type of commercial contracts (ie. for either services or goods).

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<sup>1</sup> Adopted by the Decree of the Supreme Soviet dated 27 December 1994.

<sup>2</sup> Adopted by the Law of the Republic of Kazakhstan dated 1 July 1999.



In the event of conflict of laws, the Civil Code will have priority over ordinary laws that may have some impact on a commission agreement. A commission agreement can be governed by foreign law if at least one of the parties is a foreign entity or there is other “foreign element” in the agreement.

### *1.1.2 Formal Requirements*

Under the Civil Code, a commission agreement must be executed in written form. Breach of the written form requirement will not result in invalidation of the agreement, however, the parties will not be able to refer to witness statements in order to prove existence and contents of their agreement.

International sales of products must be in written form with risk of invalidation in the event of breach of this requirement.

There are no requirements to register a commission agreement with, or to obtain authorization from, any public authority.

### *1.1.3 Individual/Corporate Entity*

Under Civil Code, both individuals and legal entities can be commission agents.

If sales of certain goods require a license (eg, pharmaceutical products) it will be necessary to ascertain that a commission agent has the relevant license.

### *1.1.4 Duration of Agreement*

A commission agreement may be concluded for a fixed or an indefinite term. If the agreement is silent on the issue of duration, it will be deemed to have been entered into for an indefinite period and will usually be terminable on notice (see section 1.5.2 below). A commission agreement concluded for a fixed term will expire at the end of the term.

## 1.2 Exclusive/Non-Exclusive

The Civil Code is silent on whether a commission agreement can or cannot be on exclusive basis. However, it should be noted that, depending on circumstances, exclusivity provisions may raise issues under Kazakhstani competition laws.

## 1.3 Non-Compete

There is no general prohibition against a commission agent having competing agencies, and the parties are free to agree whether the agent may be an agent for competing goods.

However, under the Civil Code, a commission agent is obliged to act on the basis of terms most favorable to a principal. If a principal proves that a commission agent's sales of competing products result in deterioration of the results for the principal, the commission agent may be sued for damages.

Please also note that clauses relating to matters such as exclusivity and/or non-compete obligations may also raise issues under Kazakhstan's competition law.

## 1.4 Commission

The Civil Code does not provide for detailed regulation of commission payments, or the order, timing or other details of payment of the remuneration due to the commission agent. Therefore, it is always advisable to regulate these questions in detail in a written commission agreement. The Civil Code provides only for certain basic rules applicable to calculation and payment of remuneration due to a commission agent. These rules can be summarized as follows:

- Under the Civil Code, a principal must pay remuneration to a commission agent. The amount of such remuneration should be set out in the commission agreement. If the commission agreement does not specify the amount of the remuneration, the principal should pay the amount which would be paid in



comparable circumstances, for similar services. Since it may be difficult to prove such amount in the event of a dispute, it is always recommended to clearly specify the amount of the remuneration in the commission agreement.

- Further, if a commission agent executes a transaction on terms more favorable than agreed with the principal, the agent is entitled to receive half of the additional profit.
- In addition, a principal has to compensate expenses borne by the commission agent in connection with the principal's assignments.
- If the commission agreement has not been fulfilled due to reasons attributable to the principal, the commission agent retains the right to obtain remuneration, as well as compensation of its expenses.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

Generally, correspondence regarding termination of the commission agreement should be in written form. Although there are certain cases where the Civil Code does not specify that a notice should be in writing, it is always advisable to provide a written notice of termination so that the terminating party's intention to terminate is clear, as is the date on which termination is to take effect and the reasons for such termination. Such matters may be extremely important in the event that there is a dispute regarding the termination itself or the agent's rights upon termination.

### 1.5.2 *Notice Period*

A principal is entitled to terminate the commission agreement for an indefinite term by giving one month prior notice. A longer period may be specified in the commission agreement.

In the event of termination by the principal, the principal has to pay the commission agent remuneration for all transactions executed prior to the termination date, as well as compensate all expenses incurred prior to such termination.

A commission agent is also entitled to terminate a commission agreement for an indefinite period by giving one month notice (unless a longer period is specified in the commission agreement). In such an event, the principal must take measures to collect or remove any of its property held by the commission agent. If the principal does not do so, the commission agent must transfer the property for storage or sell it on terms most favorable for the principal.

In the event of termination by the commission agent, the commission agent is entitled to receive remuneration and compensation of expenses accrued up to the termination date.

### *1.5.3 Termination for Other Reasons*

The commission agreement will terminate if the principal cancels all assignments given to the commission agent.

The principal is entitled to cancel any assignment given to the agent at any time. In such an event, the principal must compensate the commission agent for all damages connected with the cancellation. The principal also has to take measures to remove its property held by the commission agent within 1 month of the cancellation date. If the principal does not take such measures, the commission agent must transfer the property to storage or sell it on terms most favorable for the principal.

As a general rule, a commission agent is not entitled to refuse fulfilment of the principal's assignment. As an exception, the agent may refuse to fulfil such assignment where the assignment cannot be fulfilled due to the principal's breach of its obligations or other reasons for which the agent is not responsible. If the commission agent terminated the agreement due to the principal's breach of the contract,



the principal has to pay the outstanding remuneration and compensate the agent's expenses.

Also, a commission agreement can be terminated in the event that a commission agent dies, is declared legally incapable, partially incapable, missing or bankrupt.

In addition, the Civil Code provides general grounds for termination which are applicable to all contracts. Generally, a contract can be terminated in the following cases:

- material breach of a contract by one of the parties;
- impossibility of fulfilment of a contract due to reasons for which the relevant party is not responsible;
- if a party is bankrupt (unless this is prohibited by the bankruptcy legislation); or
- amendment or cancellation of legislation on the basis of which the contract was executed.

Depending on a specific termination ground, termination can be either through court or out-of-court proceedings.

## 1.6 Limitation Periods

There is no limitation period under Kazakhstani law that applies specifically to commission agreements. Therefore, general provisions of the Civil Code regarding limitation period will apply to a commission agreement. Under the general rule, a party should bring its claim within 3 years from the date when such party knew or should have known about the relevant breach.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

There is no specific legislation in the Republic of Kazakhstan that regulates the relationship between suppliers and distributors. A distribution agreement between a supplier and its distributor is governed by the ordinary principles of Kazakhstani contract law. Accordingly, the parties to a distribution agreement have the freedom to agree on the contractual terms which will govern their relationship, provided that such terms do not contradict mandatory provisions of Kazakhstani laws.

#### 2.1.2 *Formal Requirements*

As a general rule (of the Civil Code), a contract concluded for business activities (except for contracts which are fulfilled upon their execution) should be executed in writing. Given that distribution agreements are executed in the course of a business activity, they should be executed in writing.

Breach of the written form requirement will not result in invalidation of the agreement. However, the parties will not be able to refer to witness statements in order to prove existence and contents of their agreement.

International sales of products agreements must be in written form as there is a risk of invalidation if they are not.

There are no general requirements to register a distribution agreement with, or to obtain authorization from, any public authority. However, depending on its content, a distribution agreement may be subject to state registration if, for example, it contains elements of a trademark license agreement.





### 2.1.3 *Individual/Corporate Entity*

A distributor may be either an individual or a legal entity. If sales of certain goods require a license (eg, pharmaceutical products) it will be necessary to ascertain that a distributor has the relevant license.

### 2.1.4 *Duration of Agreement*

Kazakhstani law does not regulate the duration of a distribution agreement, and this is a matter to be agreed by the parties. If the agreement is silent on this issue, the agreement will be deemed an agreement for an indefinite term and should be fulfilled within a reasonable period of time. An agreement not fulfilled within a reasonable period should be fulfilled within seven days from the date when a creditor asks for a status update in connection with fulfilment of the agreement.

## 2.2 Exclusive/Non-Exclusive

Kazakhstani laws are silent on whether a distribution agreement can or cannot be on exclusive basis. Depending on circumstances, exclusivity provisions may raise issues under Kazakhstani competition laws. Restrictions set forth by competition laws do not apply to certain types of agreements (such as license agreements with regard to intellectual property rights, provided that they do not limit or eliminate competition).

## 2.3 Termination

### 2.3.1 *Formal Requirements*

Kazakhstani laws do not regulate the question as to in which form a distribution agreement can be terminated. Generally, an agreement to terminate an existing agreement should be in the same form as the agreement itself.

General principles of contract law apply in relation to termination of the agreement. The parties are free to contract in relation to termination provisions and may agree on all relevant terms, such as

the circumstances in which termination may be effected, the required period of notice of termination, and the consequences of termination. Termination rights may be unilateral or mutual.

In addition, the Civil Code provides general grounds for termination which are applicable to all contracts. Generally, a contract can be terminated in the following cases:

- material breach of a contract by one of the parties;
- impossibility of fulfilment of a contract due to reasons for which the relevant party is not responsible;
- if a party is bankrupt (unless this is prohibited by the bankruptcy legislation); or
- amendment or cancellation of legislation on the basis of which the contract was executed.

Depending on a specific termination ground, termination can be either through court or out-of-court proceedings.

### *2.3.2 Notice Period*

The parties are free to agree on the notice periods which apply in the event of termination of a distribution agreement. Where the agreement is for an indefinite term, in the absence of an agreed notice period in respect of the termination event in question, the general rule established by the Civil Code will apply. Under the general rules of the Civil Code, a notice period applicable in absence of any rules in the contract is 30 days.

### *2.3.3 Liability on Termination*

As noted above, the Civil Code does not expressly regulate distribution agreements. Therefore, liability of parties for termination of an agreement will be governed by general provisions of the Civil Code applicable to all contracts.



Generally, a party which terminates an agreement without grounds stipulated either in the agreement or legislation has to compensate to the non-breaching party all damages caused by such termination.

Damages are generally classified into two groups: (i) expenses that have been or are likely to have been incurred by a non-breaching party for loss or damage to his property (real damages); and (ii) profit that a non-breaching party would have received if his rights had not been breached (lost profit). A party which claims damages must prove the amount of damages.

## 2.4 Limitation Periods

There is no limitation period under Kazakhstani law that applies specifically to distribution agreements. Therefore, general provisions of the Civil Code regarding limitation period will apply to such agreements. Under the general rule, a party should bring its claim within three years from the date when such party knew or should have known about the relevant breach.

# Latvia

## 1. Agency Agreements

### 1.1 General issues

#### 1.1.1 *Law Applicable*

Commercial agency relations are governed by the Commercial Law (“Komerclikums” 2000) which implements the provisions of the Agency Directive. According to the Commercial Law, a commercial agent is a merchant who has been authorized to independently conclude transactions with third persons in the name and for the benefit of another person (principal) or also to prepare transactions for conclusion.

The Commercial Law does not distinguish transactions concluded or prepared for conclusion by the agent on the basis whether such transactions concern goods or services. Accordingly, the relevant provisions in the Commercial Law on commercial agency are applicable to both goods and/or services.

#### 1.1.2 *Formal requirements*

The Commercial Law requires the agency contract to be concluded in writing. Under the Civil Law (1937), a transaction (agreement) is not valid if the requirement for written form has not been observed. Nevertheless, the contract will be enforceable if the parties or even one of the parties to the contract has begun performing the contracted obligations. The Commercial Law does not impose a duty for the commercial agent to register the contract with any government authority.

#### 1.1.3 *Individual/Corporate Entity*

The commercial agent is a business entity - either as an individual entered into the commercial register as an individual merchant or as a commercial company — limited liability company, joint stock company,

partnership or limited partnership. An entity which is not a business entity is not subject to regulation as a commercial agent.

#### 1.1.4 *Duration of Agreement*

The contract can be concluded for a fixed or indefinite period. Under the Commercial Law, a fixed-term agency contract which is mutually continued after maturity of the contracted period shall be deemed to be concluded for an indefinite period. A contract concluded for an indefinite period can be terminated pursuant to the Commercial Law by serving a termination notice one to four months prior to termination, depending on the length of the contract (see section 1.5.2).

### 1.2 Exclusive/Non-Exclusive

Neither the Commercial Law nor the Civil Law provides for any limitations on the principal's ability to appoint an agent on an exclusive or non-exclusive basis.

### 1.3 Non-Compete

While the Commercial Law does not explicitly prohibit a commercial agent from performing services for a competitor of the principal during the contractual relationship, it is generally understood that the commercial agent cannot fully comply with the obligation to look after the interests of the principal if it performs services for a competitor. Therefore, during the term of the agency contract the commercial agent is prohibited from acting in favor of a competitor of the principal, if such actions may harm the interests of the principal, with the exception where the principal has expressly permitted the commercial agent to act on behalf of a competitor.

An agreement under which the professional activity of a commercial agent is restricted after termination of the agency contract (non-compete obligation) must be concluded in writing. If the agreement is not executed in writing, then the competition restriction is not valid (although each party may request the other to write it down). There is no requirement for a separate non-compete agreement - it can be

included both in the agency contract upon conclusion thereof or later on. Restrictions on competition may relate only to the geographical territory or the group of clients entrusted to the commercial agent, and are limited to the field of activities in which the agent took care of concluding the transactions or prepared such transactions for concluding.

Non-compete obligations may not exceed two years after the termination of the agency contract.

The principal has an obligation to pay an appropriate compensation to the commercial agent for the post-termination non-compete period. It should be noted that “appropriate compensation” is not defined under the Commercial Law and is yet to be tested in the courts. Prior to the expiry of the contract, the principal may at any time, without specifying the reasons, recall the non-compete obligation. A notice thereof must be given in writing. In such case, the duty of a principal to pay the non-compete compensation shall cease after six months from the date of notification of the waiver. If the post-termination non-compete obligation is waived simultaneously or less than six months before termination of contract, the principal will be obligated to pay the non-compete compensation for the duration of time after the termination of contract until the expiry of the six-month period.

Nevertheless, if the principal terminates the contract due to a material breach on the part of the commercial agent, the commercial agent loses the right to receive compensation while simultaneously still being bound by the non-compete obligation. On the other hand, if the commercial agent terminates the contract for an important reason, the cause of which was the fault of the principal, the commercial agent is entitled to choose not to be bound by the non-compete obligation. Such choice has to be made within one month after the termination notice has been given.

Please note that EU and Latvian competition law may be applicable to clauses relating to matters such as exclusivity or non-compete obligations.

## 1.4 Commission

### 1.4.1 *Basic principles*

The remuneration of the commercial agent will usually be set out in the contract. If, however, the remuneration has not been set out in the contract, the commercial agent nevertheless has the right to receive such remuneration as is normally paid in the relevant area for the conclusion of the same or similar transactions. If there is no such standard, a “reasonable” compensation has to be paid, which shall be determined taking into account all the circumstances associated with the relevant transaction. In such a situation, the following could be taken into account upon establishing remuneration for the commercial agent: field of operations of the commercial agent, specifics of the goods to be sold, scope of authorization and work of the commercial agent, level of competition in the relevant industry, geographic area where the commercial agent is operating, and the principal’s profit from the transaction.

Pursuant to the Commercial Law, compensation which varies depending on the number or value of the transactions is called “commission.” It should be noted that the Commercial Law does not prohibit disbursing part of the total compensation of the commercial agent based on a fixed rate, and a part according to a floating rate as commission. Neither does the Commercial Law prohibit the parties to the contract from agreeing on a remuneration which does not include commission.

If, however, the parties to the contract have agreed on a remuneration scheme which consists or includes commission, the Commercial Law provides the following rules. A commercial agent has a right to commission on a transaction which is concluded during the period the contract is in effect, if such transaction has been concluded as a result of the commercial agent’s activity, or with a person whom the commercial agent has previously acquired as a client for transactions of the same kind. Furthermore, if the commercial agent has been entrusted to work with clients from a defined territory or with a specific

group of clients, the commission is payable also on such transactions that have been concluded with these clients, even if the commercial agent has not participated in their conclusion.

In relation to transactions concluded after the contract has expired, the commercial agent has a right to commission only if:

- the transaction has been concluded primarily because of the agent's activities performed during the period the contract was in effect, and such transaction was concluded within a reasonable period of time after the contract expired; or
- prior to the expiry of the contract, the commercial agent or the principal had received an offer from a third person regarding the conclusion of such transaction, in respect of which the commercial agent has a right to commission.

The commercial agent is not entitled to commission from a transaction concluded during the validity of the contract, if taking into account the previous paragraph, it is the previous commercial agent who shall be entitled to such commission. An exception is the case when special circumstances justify a fair split of the commission between the commercial agents.

#### *1.4.2 When Due and Payable?*

As noted above, the Commercial Law provides for specific rules in those instances where the parties to the contract have agreed on the form of remuneration, which includes commission. According to the Commercial Law, a commercial agent has a right to commission as soon as and to the extent the principal has performed the transaction. The parties may also agree on different conditions as to when the commission is due, but in such a case, at the moment when the principal has performed the transaction, the commercial agent has a right to an appropriate advance payment (a portion of the commission), which shall be paid no later than on the last day of the next month. Irrespective of such an agreement, the commercial agent



has at the very latest a right to commission as soon as and to the extent the third party has performed the transaction.

The commercial agent has a right to commission also when it is clear that the principal has not fully or in part performed the transaction, or has not performed the transaction in such a way as it was concluded. Any derogation from this rule to the detriment of the commercial agent will be invalid. Generally, any commission shall be payable no later than on the last day of the month when the principal was obliged to calculate its amount. Again, any derogation from this rule to the detriment of the commercial agent will be void.

#### *1.4.3 Extinction of Rights to Commission*

The right to commission in case of non-performance will only be lost if the non-performance was caused by circumstances beyond the control of the principal. Any derogation from this rule to the detriment of the commercial agent will be invalid. Similarly, a right to commission will be lost, and any advance commissions repayable, if the principal has performed but it is clear that the third party will not perform the transaction.

#### *1.4.4 Accounting and Audit*

The principal has a duty to calculate the amount of commission due to a commercial agent on a monthly basis. The calculation period can be prolonged, but cannot exceed three months. The calculation must be performed without delay, but not later than within a period of one month following the end of the calculation period.

A commercial agent receiving the calculation from the principal may request an extract from the accounts regarding all transactions for which he or she has a right to commission. A commercial agent also has a right to request information which is of significant importance in respect of the right to receive a commission, the coming into effect of its payment terms, and the calculation of the commission. In case the principal refuses to provide an extract from the accounts, or there are concerns regarding the accuracy of the information given, the

commercial agent may request, at the discretion of the principal, to allow a review of the accounts either by the commercial agent himself/herself or by his/her chosen sworn auditor to verify the accuracy of the information.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

The Commercial Law does not stipulate any formal requirements regarding termination notices. It is advised, however, to give the termination notice in writing for evidence purposes.

### 1.5.2 *Notice period*

If the contract is entered into for an indefinite period, either of the parties may terminate the contract, observing, at the very least, the following notice periods:

- one month, if the contract is terminated in its first year of operation;
- two months, if the contract is terminated in its second year of operation;
- three months, if the contract is terminated in its third year of operation; or
- four months, if the contract is terminated in its fourth or subsequent years of operation.

Agreements stipulating shorter termination periods are void. If, however, longer notice periods are agreed upon in the contract, the notice period for the principal must not be shorter than the notice period for the commercial agent. Unless agreed otherwise, the contract is terminated at the end of the calendar month.

The above minimum notice periods do not apply to contracts that have been concluded for a fixed period, which, unless stipulated otherwise

in the contract, expire at the end of the fixed term. A contract that has been concluded for a fixed period, but after expiry of which the parties continue their contractual relationships voluntarily, shall be deemed to be concluded for an indefinite period. In such case, the total duration of the contractual relationship shall be taken into account when determining the notice periods (ie, one to four months, depending on the length of the relationship).

The Commercial Law also stipulates that both parties can give a notice of termination at any time disregarding the established notice periods if they have an important reason. The party terminating the contract referring to an important reason has to substantiate it. The Commercial Law, however, does not stipulate what reasons shall be deemed to be important. Therefore, it is best to define such reasons in the contract, or it will become an issue for assessment on a case-by-case basis.

### 1.5.3 *Liability of Principal on Termination*

The Commercial Law entitles the commercial agent to a termination payment in the form of an indemnity payable after the termination of the contract if:

- after the termination the principal still gains substantial benefits from transaction relations with new clients which were attracted by the commercial agent;
- due to the termination the commercial agent loses the right to a commission or remuneration, which he or she would have been entitled to if the contract was continued; and
- the payment of indemnity would be fair, taking into account all the circumstances.

The amount of indemnity may not exceed the average annual commission or other average annual remuneration of the commercial agent. It shall be calculated taking into account the revenues received

by the commercial agent over the last five years or over the actual period, if it was less than five years.

If the contract is terminated without notice due to an important reason (see section 1.5.2 above) for which one party is liable, then the other party is entitled to damages for losses incurred due to termination.

The commercial agent is additionally entitled to compensation of damages incurred due to the expiry of the contract, especially to indemnification of expenses and unreturned investments which the commercial agent has made as a result of a suggestion by the principal during the performance of the contract.

The right to claim indemnification and/or damages is lost if:

- the commercial agent terminates the contract himself/herself, except in cases where the actions of the principal give a justified reason for termination or due to age or health conditions the commercial agent is no longer able to perform the contract;
- the principal terminates the contract with an important reason, the cause of which was the fault of the commercial agent; or
- a third party replaces the commercial agent based on agreement between the principal and the commercial agent, which cannot be concluded before the expiry of the contract.

## 1.6 Limitation Periods

The Commercial Law stipulates that the right to claims arising out of the contract expires after four years from the end of the calendar year when the event giving right to such claim occurred. A right to claim indemnification or damages due to termination of the contract expires within one year from the termination.

## 2. Distribution Contracts

### 2.1 General issues

#### 2.1.1 *Law Applicable*

Distribution agreements are not specifically regulated under Latvian law. The provisions of the Commercial Law regarding commercial purchase contracts (which came into force on 1 January 2010) and the provisions of the Civil Law regarding regular purchase contracts are, however, in some respects applicable to distribution contracts. It should be noted that, in contrast to several provisions in the Commercial Law on commercial agency, the relevant provisions on commercial purchase contracts are not of imperative character.

#### 2.1.2 *Formal Requirements*

A distribution agreement is generally not subject to any formal requirements and may be concluded orally or in writing. Although an oral agreement would be valid for distribution contracts, it is advisable to conclude distribution agreements in writing for evidence purposes. Furthermore, the law does not impose a duty on the distributor to register a distribution agreement with any government authority.

#### 2.1.3 *Individual/Corporate Entity*

In the absence of specific regulation, the law does not restrict distribution relationships only to corporate or other specific types of entities. Hence, the distributor can be any person, including an individual. However, given that the nature of distribution agreements is that the distributor buys certain goods and resells them acting as an independent seller in its own name, it qualifies as an economic activity. Where the economic activity involves the acquisition of goods in another Member State and where the value of the acquired goods is equal to or exceeds EUR 10,000 a year, it calls for VAT registration. Furthermore, registration in the Commercial register as an individual merchant would be needed if the turnover exceeds EUR 28,500 a year and the distributor simultaneously employs more than five

employees (otherwise the turnover can reach up to EUR 284,600 without registration). Thus, in most cases, the distributor would be registered in the Commercial register, usually as a limited liability company.

#### *2.1.4 Duration of Agreement*

There are no restrictions on the period of distribution agreements.

### **2.2 Exclusive/ Non-Exclusive**

Subject to competition law issues, the parties to a distribution agreement are generally free to determine the extent of the distributor's rights of distribution. Thus, the distributor may be appointed on either an exclusive or non-exclusive basis for a specified territory or a designated customer group.

It should be stressed that any exclusivity or non-compete commissions in a distribution agreement may be subject to the requirements of EU and Latvian competition law (see earlier EU Competition Law chapter).

### **2.3 Non-Compete**

Similarly as with exclusivity, the parties to a distribution agreement are generally free to agree on a non-compete obligation on the distributor, but such provisions in the distribution agreement are subject to the requirements of EU and Latvian competition law.

### **2.4 Termination**

#### *2.4.1 Formal Requirements*

There are no formal requirements for giving a notice of termination. It is advisable, however, to use written termination notices for evidence purposes. The termination procedure can be prescribed in more detail in the distribution contract. In case no provisions exist, the termination is subject to provisions of the Civil Law.

### 2.4.2 *Notice Period*

Specific notice periods for distribution contracts are not set by law. The notice period shall be stipulated in the distribution contract. In case no provisions exist, a reasonable notice period shall be chosen. Reasonableness may vary depending on the length of the relationship (a similar approach could be used as with notice periods in commercial agency contracts), the volume of the transactions (the relations might have existed for several years, but in an annual context there has been very little business/goods exchanged between the parties), the fact whether the distributor is exclusively dealing only with the goods of the supplier (ie, whether the distributor has any other business besides the distribution contract in question), and other circumstances.

### 2.4.3 *Liability of the Supplier on Termination*

Unlike the position in relation to commercial agency, no provisions as to the compensations of investments, lost business or other specific indemnifications due to termination of a distribution contract exist under Latvian law. The parties have to agree on such provisions contractually. If such contractual clauses do not exist, the distributor can only claim damages under the general provisions of the Civil Law. The distributor would be required to prove a wrongful termination by the supplier, demonstrate that losses have actually been sustained, demonstrate a causal connection between the termination and the damages, and prove the fault of the supplier.

### 2.4.4 *Return of Products*

No specific provisions under Latvian law entitling the supplier or distributor to demand the return of products exist. These conditions must be agreed upon in the distribution agreement. Under the general rules of the Civil Law, if a supplier sells goods to a distributor, in the case of a faulty product the latter can request the contract to be canceled or the price to be reduced. Return can be claimed by the supplier if, in accordance with the terms of the distribution contract, it has preserved a title over these goods up until the payment is made.

However, the supplier is also entitled to claim performance of the contract, ie, to request payment of the purchase price for the goods, instead of their return. The distributor, however, is not entitled to return the goods, except for cases where the delivered goods are non-conforming with the contract terms (quality, quantity, type, etc.).

## 2.5 Limitation Periods

Under the Civil Law all rights of claim, which under the law are not subject to specific limitation periods, expire within 10 years. However, the provisions of the Commercial Law that came into effect on 1 January 2010 provide that all claims arising out of commercial transactions expire within three years. In most cases distribution relations will be regarded as commercial transactions, hence the limitation period for claims under distribution contracts will be three years. In the case of faulty product, a contract cancelation claim is limited to six months, while a price reduction claim is limited to one year after the conclusion of contract or the day on which the supplier issued a guarantee.





## Lithuania

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 Law Applicable

Matters related to agency relationships are governed by Articles 2.152-2.175 of the Civil Code of the Republic of Lithuania (“the Civil Code”), by which the Agency Directive is implemented into the Lithuanian law.

In the Civil Code, a commercial agent is described as an independent person whose basic business activity is to act as intermediary for a principal for remuneration for the conclusion of contracts in the principal’s name and at the latter’s expense and interest.

A commercial agent must be an independent person - ie, (i) a natural person not in an employment relationship with the principal or (ii) a legal person not an organizational part of the principal (eg, branch or affiliate). In addition, bodies of legal persons and partners acting under a joint venture agreement are not considered commercial agents.

The Civil Code does not distinguish activities of commercial agents with respect to goods and services, and therefore, uniform rules are applicable.

An important feature of Lithuanian law, which should be highlighted is that a commercial agent may commence its activities only when he insures his civil liability against possible damage which, as a result of his activities, may be incurred by the principal or third persons. However, in practice, this rule is rarely observed.

In addition to provisions of the Civil Code, additional requirements and exemptions may be provided in other laws with respect to agents’ activities in specific areas, eg, the insurance and tourism sectors.

With respect to international agency agreements, Lithuanian conflict of laws rules are applicable. The parties are free to choose the law governing their agreement. However, the choice of a foreign law may not be a ground to refuse to apply mandatory rules of the law of Lithuania.<sup>1</sup> If the parties do not choose the law applicable to their agency relationship, the law of the state with which the agency agreement is most closely connected will be applicable. It is presumed that an agreement is most closely connected with the state in the territory of which the party affecting the characteristic performance of the agreement, ie, the agent, is domiciled (for natural persons) or has its central administration (for legal persons).

#### *1.1.2 Formal Requirements*

The rights and obligations of the agent may be established either in writing or orally. In case a written form is chosen, it may take the form of (i) a power of attorney or (ii) an agency agreement.

Following requirements established by the Civil Code as well as the case law of Lithuanian courts, a legal relationship shall be characterized as an agency relationship if the following criteria are met:

- (1) The main function of the agent is to intermediate when concluding contracts or conclude contracts on behalf of the principal and on the principal's account.
- (2) The agent is independent from the principal.
- (3) Intermediating is the main activity of an agent.
- (4) The agent's activities are of a permanent nature.
- (5) The agent is remunerated.

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<sup>1</sup> As mentioned in the Introduction, one important principle in international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities derived from the Agency Directive, notably those entitling an agent to compensation or an indemnity payment on termination.



Where at least one of the above is not satisfied, the corresponding legal relationship shall not qualify as an agency relationship.

Each of the parties has a right to request that the agency agreement be concluded in writing.

The following provisions must be included in a written agreement in order for it to be valid: (i) restrictions on the civil liability of any party, (ii) prohibition of competition after termination of the agreement, (iii) conditions of termination of the agreement, (iv) exclusive rights of a commercial agent to a specific geographical area or group of customers (in any case, such a provision cannot infringe competition law rules), and (v) the dependence of the agent's remuneration on the performance of the contract.

### *1.1.3 Individual/Corporate Entity*

An agent may be any natural or legal person.

### *1.1.4 Duration of Agreement*

The agreement between a commercial agent and a principal may be concluded for (i) a fixed period or (ii) an indefinite period. Terms and conditions of termination of the agency agreement vary from the period of validity thereof (fixed or indefinite), as described in Section 1.5 on Termination below.

In case of expiry of the period of validity of an agreement of fixed duration, and where both parties continue performance thereof, the agreement is extended for an indefinite period on the same terms and conditions.

### *1.1.5 Rights of the agent*

The agent has the right to act on behalf of the principal (without a special representative's authorization) to carry out any actions necessary for the proper performance of the principal's instructions. However, the following actions may only be performed by the agent if the respective right is specifically indicated in the agreement or a

separate power of attorney: (i) amending the terms of contracts (with customers); or (ii) accepting the performance of contracts (with customers).

## 1.2 Exclusive/Non-Exclusive

The agency agreement may provide for an exemption, which grants a commercial agent an exclusive right to conclude contracts in the principal's name (i) in a certain territory or (ii) with a certain group of consumers. However, such a provision cannot infringe competition law rules.

An agent having the exclusive right to act on behalf of the principal, as provided in the preceding paragraph, is entitled to commission fees (such right is further described in Section 1.4.1 on Basic Principles below).

## 1.3 Non-Compete

During the period of a contractual relationship, an agent cannot compete with the principal, if the parties agree on such a provision. However, there is no requirement to establish such prohibition in a written agreement.

After termination of the agency agreement, provisions of the Civil Code relating to prohibition on competing correspond to the respective requirements of the Agency Directive, ie, a non-compete clause (i) must be established in writing, (ii) may be related only to a certain territory or certain kinds of goods and services or a group of customers and a territory, which were entrusted to the commercial agent, (iii) may be valid for not longer than two years after termination of the agreement.

A principal has the right, at any time during the validity of the agency agreement or before the expiry of the terms of validity on the non-compete clause, to unilaterally waive, in writing, the non-compete restriction. In situations where a non-compete clause is established, an agent has the right to receive compensation for the period of the



non-compete and the amount of such compensation has to be agreed on between the parties. In any case, the amount of compensation has to be reasonable. However, the agent loses such right of compensation if the agency agreement is terminated due to his own fault.

The principal is prevented from relying on the non-compete clause, if (i) he terminates the agreement by not complying with the terms and conditions of termination thereof or (ii) the agreement is terminated by the agent or the court for reasons for which the principal is held liable.

The Civil Code establishes an additional right of the agent to request the court to declare a non-compete clause void, if he considers that such clause causes him serious damage. In such case, the legitimate interests of the agent should be taken into consideration and it is the duty of the agent to prove such “serious damage.”

The Civil Code sets out the exhaustive list of restrictions on the agent’s activities after termination of the agency agreement and all agreements contradicting the Civil Code and aggravating the situation of the agent are null and void.

## 1.4 Commission

### 1.4.1 *Basic Principles*

A commercial agent performs commercial activities, and therefore, remuneration is a necessary feature of the agent’s activities. An agent is remunerated by a principal for every successfully concluded contract under the terms and conditions established in the agency agreement (eg, it may be a specific amount or percentage from the transactions value, ie, commission). In case the parties fail to agree on the remuneration in the agency agreement, the agent is paid customary remuneration or, in absence of the same, reasonable remuneration considering all the provisions of the contract.

If the agent has been granted an exclusive right to conclude contracts in a certain territory or with certain customers, a commercial agent is

entitled to payment of commission based on contracts concluded within the period of validity of the agency agreement with the persons from the said territory or the said customers.

The agent also has the right to receive remuneration if the contract is concluded by the principal himself, but as a result of activities of the agent (such commission is paid even if the contract is concluded after the expiry of agency relations, ie, during a reasonable period upon expiration).

Payment of commission to the agent may be subject to the (i) quality of services performed or (ii) execution of contracts by third parties.

In addition to commission for services of the agent, additional expenses (transport of goods, storage, protection, packaging expenses, customs duties paid, as well as other dues and fees) may be also refunded to the agent.

#### *1.4.2 When Due and Payable?*

A commercial agent acquires the right to commission upon the following conditions: (i) a contract with a customer is concluded and (ii) a principal has performed or has to perform a contract according to an agreement reached with the third party, or the third party has performed a contract. The latest date on which an agent acquires the right to commission is the day the third party performs its part of the contract or could have done it if the principal had performed his part of the contract.

Remuneration to a commercial agent is paid by a principal on a monthly basis and no later than on the last day of the month following the accounting period (the parties may extend such period by written agreement for a maximum of three months).

Where commission is payable only upon performance of the contract by a third party, the agent has the right to receive an advance payment, amounting to at least 40% of the commission amount. Such advance payment is payable not later than on the last day of the next



month following the month on which a contract has been concluded, except if the parties agree otherwise.

#### *1.4.3 Extinction of Right to Commission*

The right of an agent to request commission is terminated if (i) it becomes evident that the third party will fail to perform a contract with a principal (such failure to perform should be evident to a reasonably prudent businessman) and (ii) failure to perform the contract is not related to the fault of the principal. In case any payment has already been made, a principal has the right to recover such amount from the commercial agent.

Where a commercial agent is entitled to receive payment of commission after the expiry of the agency agreement, the new agent is not entitled to payment of commission unless it is fair under the circumstances to share the commission between two agents.

#### *1.4.4 Accounting and Audit*

A principal must provide the agent with accounting documents, which form the basis of the remuneration calculation, once a month (or at least once a quarter, if agreed so in writing), as well as notify the agent in writing of any circumstances that have led to remuneration being withheld or reduced.

If any disagreement with respect to commission amounts arises, an agent has the right to request an audit to establish the exact amounts of commission amounts and payments. Where a principal refuses to carry out an audit or in the event of disagreement about the auditor, the commercial agent has the right to apply to the court for mandatory appointment of an auditor.

#### *1.4.5 Additional Recovery Rights*

The agent is entitled to detain the principal's belongings and documents proving the principal's rights to the belongings until the principal makes the payments due to the agent.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

There are no formal requirements established in the Civil Code for termination of agency agreements concluded either for a fixed or indefinite period.

### 1.5.2 *Notice Period*

Agency agreements may be terminated on each party's initiative subject to the notice periods established in the Civil Code.

For agreements of indefinite duration, the following termination notices apply: (i) one month during the first year; (ii) two months during the second year; (iii) three months during the third year; and (iv) four months during the fourth and subsequent years. The parties may not agree to shorter terms of notifications, but may establish longer periods, which in all cases must be the same for both parties.

Where the agreement is to be executed for an indefinite duration upon expiry of the term of validity of the agency agreement, the above termination notice periods will be applicable, taking into account the entire period for which the agreement was valid.

Both fixed and indefinite duration agency agreements may be terminated by each of the parties under exceptional circumstances (eg, bankruptcy of the agent or the fact that the principal does not use the agent's services) and the other party is notified without delay about such circumstances.

In addition, any party may unilaterally terminate the agency agreement if the other party commits a material breach of the agreement.





### 1.5.3 *Liability of Principal on Termination*

#### ***Commission***

After termination of the agency agreement, the agent is entitled to receive commission if (i) the order of the customer has reached the principal within a reasonable period of time after expiry of the agency agreement and (ii) the contract is related to the agency agreement.

#### ***Damages in Lieu of Notice***

If the principal unilaterally terminates the agency agreement without complying with the notice periods referred to in Section 1.5.2 on Notice Period above, the principal must compensate the agent for the losses incurred as a result of the principal's action, unless the agreement was terminated owing to exceptional circumstances and the agent was notified without delay about such circumstances.

#### ***Indemnity/Compensation***

According to the Civil Code, the agent is entitled to receive a termination payment if the agency agreement is terminated through no fault of the agent. Two remedies are available to the agent in case of termination of the agency agreement: (i) indemnity or (ii) compensation for damages. The agent is entitled to indemnity if the parties have not agreed that after the expiration of the contract the agent shall be entitled to compensation of damages. Waiver of the right to indemnity or damages is null and void.

#### ***Indemnity***

The agent's right to receive a termination payment in the form of an indemnity is subject to the absence of the following circumstances: (i) termination of the agency agreement on the initiative of the agent (except for such reasons as unlawful action by the principal, illness, age of the agent, etc.), (ii) termination of the agency agreement by the principal due to the fault of the agent, (iii) transfer of rights and

obligations of the commercial agent under the agency agreement to another person.

If the circumstances referred to in the previous paragraph do not exist, the agent is entitled to indemnity where (i) upon the termination of the contract, the principal has generated considerable profit from the business relationships established by the commercial agent and (ii) payment of indemnity is reasonable considering all circumstances.

The maximum amount of indemnity is also established in the Civil Code and is equivalent to (i) the average annual payment to the commercial agent calculated for the entire term of validity of the agency agreement where the agreement was valid for up to five years or (ii) the average annual payment calculated for the last five years where the agreement was valid for more than five years.

Payment of an indemnity does not prevent the agent from seeking damages for breach of the agreement. The agent is entitled to full compensation if the maximum amount of damages is not established.

### ***Compensation for Damages***

A commercial agent is entitled to request compensation for damages upon termination of the agency agreement, and especially if (i) he fails to receive commission he is entitled to after successful performance of the agency agreement and a principal profits substantially from the commercial agent's activities, and/or (ii) expenses of the commercial agent in performing instructions of the principal have not been refunded.

The damages referred to in the preceding paragraph are only in relation to the termination of the agency agreement (including expiry of the term of the fixed-period agreement), and additional damages for breach of the agreement may be claimed according to the general rules of contractual liability.



## 1.6 Limitation Periods

The following specific limitation periods with respect to agency relations are established in the Civil Code: (i) a three-year limitation period for claims for recovery of remuneration of the commercial agent, and (ii) a one-year limitation period for claims for indemnity/compensation for damages (the latter period is calculated from the day of termination of the agency agreement). For other claims arising out of agency relations, general limitation periods established in Lithuanian laws are applicable.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Contractual aspects relating to distribution agreements are governed by a special section (Articles 6.796-6.806) of the Civil Code “Distribution.” Apart from these provisions, general rules of civil law, certain provisions of national and EU competition law rules and private international law rules are equally applicable to distribution relations, if particular circumstances so require.

#### 2.1.2 *Formal Requirements*

The relationship between the parties may be qualified as distributorship, provided the following formalities are met:

- the distributor and supplier agree to the purchase of certain goods or services provided by supplier;
- the distributor is an independent entity that purchases goods/services in his own name and employs his own funds to this end;
- the distributor undertakes to sell goods/services to the clients and perform other works related to goods/services; and

- a distribution agreement is concluded in writing (failure to observe this requirement renders the agreement void).

### *2.1.3 Individual/Corporate Entity*

Individuals (provided they carry out commercial activities) and corporate entities may be parties to distribution agreements.

### *2.1.4 Duration of Agreement*

Distribution agreements may be concluded for a fixed term or an unlimited duration.

If, after the term of the fixed-term agreement expires, the parties continue to perform the agreement, the agreement is considered to be renewed under the same terms for the same period of time.

## **2.2 Exclusive/Non-Exclusive**

The parties are free to enter into exclusive and non-exclusive (selective) distribution agreements.

According to the Civil Code, under an exclusive distribution agreement, the supplier undertakes to sell goods/services to the exclusive distributor (i) in the territory designated exclusively to him or (ii) for the group of customers designated exclusively to him.

Under a non-exclusive (selective) distribution agreement, the manufacturer undertakes to only sell goods to certain distributors that meet technical, qualification and other criteria specified by the supplier.

Parties are free and usually use the option to agree on more elaborate provisions concerning the function of both an exclusive and a non-exclusive distribution relationship. The limits to the freedom of contract, depend on mandatory provisions of applicable Lithuanian and EU competition law.



## 2.3 Non-Compete

In a nutshell, non-compete covenants in distribution agreements are allowed provided they do not infringe mandatory provisions of applicable competition law rules.

Lithuanian competition law rules have been enacted in the process of harmonization of national laws with EU competition law, making them equivalent to EU competition law rules. In addition, EU competition law rules are also directly applicable in Lithuania. See earlier EU Competition law chapter.

## 2.4 Termination

### 2.4.1 *Formal Requirements*

Parties to distribution agreements of unlimited duration may terminate such agreements by providing a written notice to the counterparty. A party is free to disregard the requirement of written notice in case a distribution agreement is a fixed-term arrangement; nevertheless, it is strongly advisable to serve termination notices in writing and keep proper evidence of their delivery to the counterparty.

### 2.4.2 *Notice Period*

The minimum termination notice in case of a distribution agreement of unlimited duration is three months, but the parties may extend the term by mutual agreement (preferably concluded in writing). In case of a fixed-term distribution agreement, the parties are free to choose the termination notice period that suits them best.

### 2.4.3 *Liability of Supplier on Termination*

A supplier may incur liability for the termination of a distribution agreement if the termination thereof was performed in violation of applicable laws or provisions of a distribution agreement. In case of such termination, the distributor may claim from the supplier compensation of direct and indirect losses in the form of, for instance, losses sustained in fact (eg, investments) and lost profits,

respectively. In addition, following the general principals of civil law, if the breaching party has benefited from unlawful termination, the benefits received by such party may be recognized as losses of the suffering party. Should the case reach the court, all losses must be substantiated by proper evidence.

Apart from the general rules described above, parties to a distribution agreement may agree to limit their liability under the agreement. Such provisions are usually expressed in the form of maximum lump sum payment, percentage of the contract value, compensation for direct losses only or a combination of the above.

In case of termination of a distribution agreement sanctioned by law (eg, material breach of the distribution agreement by the counterparty) or the actual distribution agreement (eg, by serving proper termination notice), supplier shall not incur any liability towards distributor.

Provisions of the Civil Code governing distribution allow the distributor to claim lost profits for the period extending until expiry of a fixed-term distribution agreement, provided said agreement was terminated due to the fault of the supplier. The same paragraph grants the distributor the right to claim remuneration for additional services rendered, if the distribution agreement does not provide otherwise.

Under the Civil Code, a supplier may be liable to third parties (eg, consumers/clients) where the loss is the supplier's fault (eg, defective products). Provisions in the distribution agreement stating that the supplier is not liable for the losses caused to consumers are void.

#### **2.4.4    *Return of Products***

Upon termination of a distribution agreement, the distributor is obliged to return to the supplier any products (including all the documents, samples of goods, materials, etc.). Where there is no agreement to the contrary, the expenses for the return of the products shall be covered by the distributor.



## 2.5 Limitation Periods

According to the Civil Code, the general limitation period for the protection of one's rights is 10 years. For claims concerning compensation of losses due to defective goods (or any type of damages), the limitation period is three years. It is also noteworthy that claims concerning defective goods shall be lodged within six months.

Please note that the limitation period starts on the day the person finds out or should have found out about the violation of his rights.

# Luxembourg

## 1. Agency Agreements

### 1.1 General

#### 1.1.1 *Law Applicable*

Following the implementation of the Agency Directive into Luxembourg law, independent commercial agency agreements are regulated by the law of June 3, 1994 organizing relations between independent commercial agents and their principals (the “1994 Law”).

Under Article 1 of the 1994 Law, a commercial agent (or “agent”) is an independent intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person, the principal, or to negotiate and conclude business transactions in the name and on behalf of the principal. The commercial agent’s activity may be a main or ancillary occupation and is supplied in consideration for remuneration.

The 1994 Law does not apply to agents who operate on commodity exchanges or on raw materials markets, nor in the context of a contract concluded with an insurer or to activities which are reserved to credit institutions.

Furthermore, a commercial agent within the meaning of the 1994 Law may not be:

- a person who, in his capacity as an officer, is empowered to enter into commitments binding on a company or an association;
- a partner who is lawfully authorized to enter into commitments binding on his partners; or
- a receiver, a liquidator or a trustee in bankruptcy.





Finally, there must be no bond of subordination between the agent and the principal, the lack of such subordination being the main criteria by which commercial agents are distinguished from employed representatives.

### *1.1.2 Formal Requirements*

Pursuant to Article 15 of the 1994 Law, an agency agreement, as well as any amendments thereto, must be in writing and in two originals, each party being provided with an original. Nevertheless, if there is no written agreement, the same provision provides that the commercial agent may establish the existence and the content of the agency agreement by any means, whatever the value of the claim.

It is not necessary to register an agency agreement with any public body in order to ensure its validity. However, a commercial agent carrying out business in Luxembourg would have to apply for a business license from the Ministry of Middle Classes by virtue of the law of September 2, 2011 regulating the access to the craft, commercial and industrial professions, as well as certain liberal professions.

### *1.1.3 Rights and obligations*

Pursuant to Articles 3 and 4 of the 1994 Law, the commercial agent and the principal must act dutifully and in good faith toward each other.

In particular, a commercial agent must look after his/her principal's interests, make proper efforts to negotiate and, where appropriate, conclude the transactions he/she is instructed to take care of; communicate to his/her principal all the necessary information available to him/her and comply with reasonable instructions given by his/her principal.

A principal must provide his/her commercial agent with the necessary documentation relating to the goods concerned; obtain for his/her commercial agent the information necessary for the performance of

the agency contract, and notify the commercial agent within a reasonable period once he/she anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected.

A principal must also inform the commercial agent within a reasonable period of his/her acceptance or refusal, and of any non-execution of a commercial transaction that the commercial agent has procured for the principal.

The parties cannot derogate from such provisions.

#### *1.1.4 Individual/Corporate Entity*

Under the 1994 Law, a commercial agent may be either an individual or a legal entity.

#### *1.1.5 Duration of the Agreement*

A commercial agency agreement can be concluded for either a limited or unlimited period of time. Following Article 16 of the 1994 Law, if the parties to a limited period agreement continue to perform the agreement after the expiration of its term, the agreement is considered to be concluded for an unlimited period of time.

### **1.2 Exclusive/Non-Exclusive**

On condition that there is no specific agreement to the contrary, and that applicable competition law is complied with, the commercial agent is free to represent at the same time one or more principals.

However, the agent must ensure that he acts in good faith towards the principal. Indeed, disloyal conduct could, depending on the gravity, be considered unlawful in certain cases - either as a breach of contract or as unfair competition.

### **1.3 Non-Compete**

An agency agreement may contain a non-compete clause under certain conditions which are set out under Article 26 of the 1994 Law.



First, the clause must be in writing, without which it will be considered void. Second, the clause may relate only to a specific professional sector, and to activities similar to those carried out under the agency agreement. The clause must also be restricted to the geographical area or group of persons which was assigned to the agent, and to the type of goods or services which the latter represented under the agreement.

The non-compete clause may bind only the agent for a period of up to 12 months after the termination of the agency agreement.

It is important to note that pursuant to Article 27 of the 1994 Law, the principal may not demand the enforcement of a non-compete clause if the agency agreement was terminated in the following situations:

- where the principal terminated the agreement in breach of the legal or contractual notice period, without the consent of the commercial agent, and for no serious default for which the principal informed the agent of without delay;
- where the agent terminated the agreement because of a serious default attributable to the principal and which the agent informed the principal of without delay; or
- where the agreement was terminated by a court order, following the principal's fault or wrongful behavior.

Finally, in accordance with Article 27 (2) and (3) of the 1994 Law, a court may, at the agent's request, (i) declare the non-compete clause invalid or limit its effects if consequences are contrary to fairness and/or (ii) reduce any fine or compensation provided for by the agency agreement in the event of a breach of a non-compete clause by the agent, if it considers that such fine or compensation is excessive.

## 1.4 Commission

### 1.4.1 *Basic Principles*

“Commission” is defined by Article 7 of the 1994 Law as any element of the remuneration which varies according to the volume or value of the agent’s activities.

The 1994 Law allows the parties to choose whether the agent will be paid via a fixed sum, commission, or part via fixed sum and part via commission.

Should no remuneration be provided for by the agency agreement, then the agent is entitled to a reasonable remuneration which complies with customary practices for such an arrangement. If no such customary practices exist, the agent shall be entitled to a reasonable remuneration which takes into account all elements of the transaction.

Regarding transactions which are entered into during the period of the agency agreement, Article 8 of the 1994 Law provides that the agent is entitled to commission:

- when the transaction was concluded, thanks to his intervention;
- when the transaction was concluded with a third party whom the agent had previously obtained as a customer for transactions of the same kind; or
- where the transaction was concluded with a person residing within the geographical area or belonging to a group of persons assigned to the agent, unless it was expressly agreed that the latter would not benefit from exclusive rights for this area or group of persons.

The commission is considered to be due as soon as the principal has either performed the transaction or should have performed the



transaction in accordance with the agreement concluded with the third party, or once the third party has performed the transaction.

At the latest, the commission shall be deemed to be due when the third party has performed his part of the transaction, or when he should have performed it if the principal had performed his obligations towards the third party. The parties may not depart from this provision in any way which is prejudicial to the agent.

Pursuant to Article 9 of the 1994 Law, commercial agents are also entitled to commission for transactions concluded even after the agency contract has been terminated:

- if the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after that contract was terminated; or
- if, in accordance with the conditions mentioned under Article 8 of the 1994 Law, the third party's order reached the principal or the commercial agent before the agency contract was terminated.

#### 1.4.2 *When Due and Payable?*

By virtue of Article 12 of the 1994 Law, commission must be paid at the latest on the last day of the month following the quarter during which it was acquired. The parties to the agency agreement may not provide otherwise if it would be detrimental to the agent.

#### 1.4.3 *Extinction of Rights to Commission*

According to Article 13 of the 1994 Law, the agent loses his right to commission if it is established that the contract between the third party and the principal will not be executed, and that such lack of execution is not due to something for which the principal is to blame. This is a mandatory provision which may not be derogated from to the detriment of the agent.

If the agent has already received a commission, this will have to be refunded if the right thereto has been extinguished.

#### *1.4.4 Accounting and Audit*

According to Article 14 of the 1994 Law, the principal must supply the agent with a statement of commission which is due, at the latest on the last day of the month following the quarter during which they were acquired. The statement must mention all the essential elements on the basis of which the amount of commission was calculated.

Furthermore, the agent has the right to demand that the principal provide him with all information necessary for him to check the amount of commission due (in particular, an extract from the accounting books). This is a mandatory provision that cannot be derogated from to the detriment of the agent.

### **1.5 Termination**

#### *1.5.1 Formal Requirements*

Agency agreements which are concluded for a limited period of time automatically expire once the term is reached, and do not require any formal termination.

Agency agreements concluded for unlimited periods of time, or those concluded for limited periods but containing provisions allowing the parties to terminate the agreement prior to the term, may be terminated following advance written notice. The 1994 Law does not specify how such notice should be provided, although it is recommended that the parties give notice via registered mail so as to ensure that they can prove that the legally required notice has been provided.

#### *1.5.2 Notice Period*

Article 17 of the 1994 Law provides that an agency agreement concluded for an unlimited period of time or for a limited period but with a possibility of prior termination may be terminated by each of the parties with a notice period of at least one month if the relationship



between the parties did not exceed one year. After the first year, the notice period is increased by one month for each supplementary year, although it may not exceed six months. The parties may not convene a shorter notice period. If they convene a longer period, the notice period to be complied with by the commercial agent may not be longer than that applicable to the principal.

Unless the agency agreement provides otherwise, the notice period expires at the end of the relevant month.

Article 18 of the 1994 Law allows each of the parties to terminate the agreement without notice in exceptional circumstances which make the continuation of any professional relationship between agent and principal impossible, or in case of a serious default by one of the parties to its commitments. The party who thus terminates the agreement has to prove the existence of such circumstances, which are assessed by a judge.

### *1.5.3 Liability of Principal on Termination*

Upon termination of the agency agreement, agents may be eligible to receive an indemnity and/or damages, in accordance with Articles 19 to 25 of the 1994 Law. The parties may not, before the term of the agency agreement, derogate from such provisions to the detriment of the agent.

### ***Termination Payment - Indemnity***

Upon termination of the agency agreement, the commercial agent is, under Article 19 of the 1994 Law, entitled to a termination payment in the form of an indemnity if:

- new clients have been acquired by the principal through the agent or if the agent has substantially developed the business relationship with existing clients and if the principal still has substantial advantages resulting from these transactions with the clients, and

- payment of such an indemnity would be equitable in view of the circumstances and in particular by reason of the loss of commissions suffered by the agent or the restrictions to the professional activities of the agent due to a non-compete clause.

An indemnity, as described above, is also due if the termination of the agency agreement is the consequence of the agent's death.

On the other hand, Article 20 of the 1994 Law sets out the following list of exceptions under which no indemnity is due:

- if the principal terminates the agreement because of a serious default of the agent justifying the immediate termination of their relationship;
- if the commercial agent terminates the agreement, unless such termination is justified by circumstances attributable to the principal or if the continuation of the agent's activity may not reasonably be requested because of his age, disability or illness; or
- if the commercial agent assigns the rights and obligations resulting from the agency agreement to a third party with the principal's consent.

In the event an indemnity is due, the amount thereof may not exceed the average annual remuneration (commission, override profits, and the like) over the last five years preceding the termination of the agreement. If the agency agreement lasted for less than five years, the average of the annual remuneration calculated over the period of time in question is taken into account.

### ***Damages***

The payment of an indemnity does not deprive the agent from being able to request damages. Indeed, if a party terminates the agreement prior to the agreed term, without complying with the legal or





contractual notice period or without such prior termination having been agreed upon by both parties, the other party may request damages by virtue of Article 23 of the 1994 Law. However, such damages are not due if the termination of the agency agreement is justified by a serious default of the other party. In this case, it would be up to the defaulting party, rather than the party which terminated the agency agreement, to pay damages. The clause that determines serious default shall be null and void.

As regards the amount of damages, this has to correspond to a sum equivalent to the remuneration to which the party would be entitled for the period between the actual day of termination and the agreed expiration date of the agency agreement. The agent's commissions preceding the termination as well as any other relevant factor are taken into account for the determination of such sum. However, the injured party may instead demand the full compensation of its loss, in which case it will have to prove the extent of such loss.

The amount of damages calculated in the manner described above may be reduced by a judicial decision.

## 1.6 Limitation Periods

The agent loses his right to an indemnity if he has not notified to the principal that he intends to enforce his rights within the year following the termination of the contract, in accordance with Article 21 of the 1994 Law.

Other claims between an agent and a principal are subject to the limitation periods set out by general provisions of commercial law.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Distribution agreements, that is to say agreements whereby a supplier sells goods to an independent distributor in order for the latter to then

sell them in his own name, are not subject to any specific legal provisions. General contractual law is applicable.

### *2.1.2 Formal Requirements*

Luxembourg courts initially tended to analyze distribution agreements as forms of sales contracts and thus held that the formal requirements (such as the agreement having to fix the quantity of the prices of the goods) regarding such contracts had to be complied with. However, since a decision of the Court of Appeal on October 2, 1996,<sup>1</sup> Luxembourg case law now seems to have adopted the view that distribution agreements are framework agreements which do not have to comply with such provisions, although, as for any contract, they must contain sufficient elements of precision and comprehensibility. In accordance with this case law, the purpose of a distribution agreement is to pave the way for future sales without concluding a sale itself, and thus provisions on sales contracts need only be complied with in the subsequent sales contracts.

Distribution agreements do not require registration with Luxembourg authorities, although, by virtue of the law of September 2, 2011 regulating the access to the craft, commercial and industrial professions, as well as certain liberal professions, the parties will need to obtain a business license from the Ministry of Middle Classes if they carry out business in Luxembourg.

### *2.1.3 Individual/Corporate Entity*

Distribution agreements may be concluded between both individuals and legal entities.

### *2.1.4 Duration of Agreement*

A distribution agreement may be entered into for either a limited or an unlimited period of time.

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<sup>1</sup> *Pasicrisie* case.



## 2.2 Exclusive/Non-Exclusive

The parties may choose whether their distribution agreement is exclusive or not, and can also choose whether to limit it to a certain geographical area.

## 2.3 Termination

Agreements entered into for a limited period of time automatically come to an end at the expiration of the predetermined period of time, unless renewed. They may not be terminated unless both parties consent thereto or there is a sufficiently serious reason to terminate. Indeed, under Article 1184 of the Civil Code, a party may request for the judicial termination of the agreement due to the other party's non-performance of its obligation(s). A judge will assess whether the non-performance justifies termination.

Agreements entered into for an unlimited period of time may be denounced unilaterally at any time by one of the parties. As the commercial consequences of unilateral termination by the supplier can be harsh for the distributor, Luxembourg courts have applied the general principles of contract law (especially the principles relating to good faith and to abuse of rights) and have defined the conditions of valid termination of a contract by the supplier.

According to the leading Luxembourg case,<sup>2</sup> a unilateral termination of an exclusive distributorship agreement will be deemed abusive (and the supplier will be liable for damages to the distributor) unless it is:

- justified by a serious reason (the courts being restrictive in their interpretation of “serious reason”); or
- given with “sufficient” advance notice. “Sufficient advance notice” has been defined as sufficient for the distributor to be able, under the circumstances, to reorganize his business (or enter into an exclusive distributorship agreement with another

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<sup>2</sup> Superior Court of Justice, July 11, 1972, Flammant v. Alfa-Laval.

supplier) so as to enjoy a situation “equivalent” to that which the terminated agreement accorded him. The assessment of the reasonable notice is operated on a case by case basis by the judge in the case of litigation. In this respect, the judge may take into account different criteria such as the investments operated by the distributor, the behavior of the party that terminates the agreement and/or the duration of the ongoing contractual relationship.

- According to case law, regardless of whether the agreement has a limited or unlimited duration, the gravity of the behavior of a party may justify an immediate termination by the other party, but such a unilateral decision to terminate will be at that party’s own risk. However, the judge has the power to determine whether, on the facts, the conditions for a termination were met.

No indemnity whatsoever is due to the distributor upon lawful termination of a distribution agreement.

If the distribution agreement is the object of invalid termination, this will inevitably be considered a breach of contract. In particular, the supplier will be liable for any direct or consequential loss suffered by the distributor. Although the Belgian concept of a clientele indemnity (based on the principles of unjust enrichment and independence of any fault on the supplier’s side) is unknown under Luxembourg law as such, it has been held that the loss of the distributor’s clientele is one of the elements of the damages that the distributor is entitled to.<sup>3</sup>

## 2.4 Limitation Periods

Claims between distributor and supplier are subject to the limitation periods set out by general provisions of commercial law.

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<sup>3</sup> District Court of Luxembourg, June 2, 1986, *Wagener v. Breuval & Cie SA*, unreported (role no. 36587).



## Malta

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law applicable*

The law of commercial agency in Malta is regulated by the Commercial Code – Chapter 13 of the Laws of Malta and the Civil Code – Chapter 16 of the Laws of Malta. Malta has implemented the Agency Directive by transposing the terms of the Directive into Maltese law.

The Agency Directive was implemented in Malta through amendments to the Commercial Code by Act IX of 2003 and subsequent amendments through Act XIII of 2008 (“the Regulations”).

The Commercial Code provides that, in the absence of any agreement, law or custom to the contrary, a mercantile agency is governed by the provisions contained in Title XV111 of Part II of Book Second of the Civil Code so far as applicable. The Commercial Code also provides that the relations between commercial agents and their principals and the activities of commercial agents are regulated by Sub-title IV of the Commercial Code.

Both the Commercial Code and the Civil Code contain various provisions regulating the relationship between principal and agent which would apply in the absence of any contractual agreement to the contrary (ie, they are not mandatory).

Therefore, the parties to an agency agreement have a great deal of freedom to establish the terms of their relationship, provided such terms do not contradict any mandatory rules of Maltese law or any rules of public policy.

Maltese law extends its scope to include and provide for agents for goods and services. Such an agency arrangement would also be

governed by certain provisions of the Employment and Industrial Relations Act, so far as applicable.

An agency may be made out in general terms or it may be special. An agent can never do anything beyond the limits of his/her agency. For the purpose of establishing the validity and the effects of an agent's act, regard shall be had to the capacity of the principal and the intention of the agent.

All acts done by the agent on behalf of the principal within the scope and powers of his/her authority have direct effect whether in favor of, or against the principal.

Save any custom or agreement to the contrary, the power to buy shall not be deemed to include the power to buy on credit and the power to sell shall not be deemed to include the power to sell on credit.

Where an agent has been engaged to do something in the ordinary course of his/her calling, operations or business, without any express limitation of power, then such an agent will be presumed to have been given the power to do all that which he/she thinks necessary to carry on his/her agency's business, and which according to the nature of the calling, operation or business, may be done by him.

The Regulations also apply to agency contracts entered into before 1 May 2004 on which the Regulations came into force, although they do not affect the rights and liabilities of the agent or the principal to the extent that those rights or liabilities accrued before 1 May 2004.

In accordance with the Agency Directive, the Regulations will apply only to self-employed agents who have continuing authority to negotiate (or to negotiate and conclude) the sale or purchase of goods and services on behalf of the principal.

This definition can be broken down into its constituent parts:

- “Goods and services:” The Regulations apply to agents negotiating the sale or purchase of goods and services;



- “Self-employed.” The Regulations refer to the agent being “self-employed.” The word “person” used in the Regulations comprises individual agents and agents operating as legal entities, such as partnerships or limited companies; and
- “Continuing authority.” The agent must have “continuing authority to negotiate or to negotiate and conclude” sale or purchase contracts or service contracts on behalf of the principal for the Regulations to apply. The Regulations (in line with the Agency Directive) therefore distinguish between agents who have authority to negotiate and conclude contracts on behalf of the principal and those who only have the authority to negotiate, with the conclusion of any contract remaining at the discretion of the principal.

An additional factor that determines the application of the Regulations is the issue of “secondary activities.” The Agency Directive gave Member States the right to exclude certain agents from the protection of the Agency Directive where their agency activities could be considered “secondary.” Although not all Member States implemented this additional criterion, Malta has done so, and the Regulations will not apply if the agent’s activities can be considered “secondary” in accordance with the criteria set out in the schedule to the Regulations.

The classic agency situation, where an agent is appointed, with or without other agents, to sell the principal’s products or services in a particular jurisdiction and thereby build up goodwill in the principal’s business, cannot be considered secondary. However, the criteria should nevertheless be considered in each case. Part 1 of the Schedule of the Commercial Code - Chapter 13 of the Laws of Malta sets out those factors that indicate that the agent’s activities are secondary, and those that indicate otherwise.

### 1.1.2 *Conflict of laws*

The provisions contained in the Maltese legislation apply only to the activities of commercial agents in Malta.

The provisions of Maltese legislation will, however, not apply if, despite the agent operating in Malta, the governing law of the agency agreement is that of another EU Member State or a Third Party state. In those circumstances, the law of the relevant Member State or Third Party state applies. Nevertheless, a Malta court, while applying the law of the other Member State or third party, is entitled to apply certain mandatory Maltese laws, notably those entitling the agent to compensation or an indemnity on termination even if they conflict with the foreign law.<sup>1</sup>

With regard to an agency agreement governed by Maltese law, where the agent's territory is not Malta but is elsewhere in the EU, a Malta court will apply the Agency Directive, provided the law of the agent's territory permits such a choice of law in its implementation of the Agency Directive.

Maltese legislation also regulates those arrangements that may be a hybrid of agency and distribution arrangements remunerated on a commission basis.

### *1.1.3 Formal requirements*

An agency agreement is not subject to any formal requirements. An agency agreement must have for its object something lawful that the principal might have done himself/herself. An agency can be granted by a public deed through private document, by letter or verbally or even tacitly. The acceptance on the part of the agent may also be tacit and may be inferred from certain acts. If the agency is granted through private document, the name of the agent may be left blank; in which case, so long as the name is not written, the bearer of the document or of the instrument or procuration shall be deemed the agent. Where the law requires that an act be expressed in writing, the

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<sup>1</sup> As mentioned in the introduction, one important principle in international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities under the Agency Directive, notably those entitling the agent to compensation or an indemnity payment on termination.





authority given to an agent to do such an act must be conferred in writing.

However, to avoid evidential difficulties in the event of a dispute between the parties, it is clearly advisable that the terms of the agency agreement be documented in a formal agreement. In addition, under the Regulations, either of the parties to an agency agreement is entitled to require from the other party a signed written document setting out the terms of the agreement, including any terms subsequently agreed upon. There are no requirements to register an agency agreement with, or to obtain authorization from, any public authority.

#### *1.1.4 Individual/corporate entity*

An agent may be an individual or a legal entity (such as a partnership or a limited liability company). For the agent to be classified as a commercial agent, within the scope of the Regulations, the only requirement is that the agent be “self-employed,” which will include both individuals and legal entities.

Maltese law also provides that the commercial agent should have a license issued by the Council of the Chamber of Commerce. In the context of agents operating as individuals in the provision of services, the principal should consider whether, on balance, the nature of the relationship might result in the agent inadvertently falling within the legal definition of an employee. Although this would enable the principal to avoid the provisions of the Regulations, it would also mean that the principal would be subject to all the legal and tax consequences that arise from its status as an employer.

There is a short list of specialized agents who are excluded from the ambit of the Regulations, such as agents operating on commodity exchanges and commercial agents whose activities are unpaid.

### *1.1.5 Duration of agreement*

An agency agreement may be concluded for a fixed or an indefinite term. If the agreement is silent on the issue of duration, it will be deemed to have been entered into for an indefinite period, and will be terminable on notice.

An agency agreement concluded for a fixed term will expire at the end of the term. However, under the Regulations, if the parties continue to perform the agreement after the fixed term has expired, it shall be deemed to be converted into an agreement for an indefinite period.

## **1.2 Exclusive/non-exclusive**

Neither the Regulations (ie, Sub-title IV of the Commercial Code) nor the Civil Code impose any restrictions on the ability of a principal to appoint an agent on an exclusive or a non-exclusive basis. If this issue is not dealt with in the agency agreement, the agent will be deemed to be non-exclusive.

Principals should note that a distinction is often drawn between agents that are appointed as sole agents, and those appointed as exclusive agents, within a particular territory. The difference between the two is that, in the former case, the principal remains entitled to sell or solicit orders directly from customers within the agent's territory. Therefore, principals should be careful not to describe an agent as "exclusive" if they wish to reserve the right to make direct sales or approaches to customers within the agent's territory. In any event, the agreement should state precisely what level of exclusivity is being granted to the agent and should not simply use the word "sole" or "exclusive" without further clarification.

One other point to note is that, under the Regulations, if a commercial agent is granted exclusivity in respect of a specific geographical area or a specific customer group, the agent's rights to commission will be extended.



### 1.3 Non-compete

There is no general prohibition against an agent having competing agencies and the parties are free to agree whether the agent may, or may not, be an agent for competing goods. However, under the Regulations, a commercial agent is obliged to look after the interests of his/her principal and act dutifully and in good faith. Maltese courts have not yet been asked to pronounce themselves regarding whether the duty of the agent to look after the interest of his/her principal and to act dutifully and in good faith can properly be fulfilled in circumstances where commercial agents enter into agency agreements with competitors of the principal. When and if such a reference to the courts takes place, it is likely to be a matter of fact, to be decided on a case-by-case basis.

With regard to non-compete clauses applicable after the expiration or termination of the agency agreement, the principal's ability to restrict a commercial agent in this way is limited by the Regulations. Such a non-compete clause is valid only if it is in writing, relates to the geographical area or the group of customers which was allocated to the agent in the agreement, and concerns the same type of goods covered by the agent's mandate. Furthermore, a non-compete undertaking will not be valid for more than two years after the termination or expiry of the agency agreement.

It must also be underlined that clauses relating to matters such as exclusivity or non-compete obligations may, in the case of a "non-genuine" agent, be regulated by EU and Maltese competition law.

### 1.4 Commission

#### 1.4.1 *Basic principles*

Where an agency agreement is silent on remuneration, the Regulations require that an agent receive the "customary" amount of remuneration for his/her work or, in the absence of such custom, "reasonable" remuneration.

Most agents are paid, either wholly or partly, by way of commission, in which case the following rules apply. The Regulations provide that commission will be payable, not only for transactions concluded as a result of the agent's actions, but also (i) where a transaction is made with a third party previously "acquired" by the agent for transactions of the same kind, and (ii) where the transaction is made with a customer belonging to a specific geographical area or group of customers to which the agent has an exclusive right.

It appears from a reading of the applicable provisions of the Regulations that the parties to an agency agreement may agree to derogate from these aforementioned rules concerning the payment of commission, and agree on alternative circumstances in which the agent will become entitled to commission, eg, restricting commissions to transactions resulting wholly from the agent's actions, or overriding (ii) above to state that the agent will not be paid commission on sales to "house accounts" within the agent's exclusive territory, which the principal has reserved to itself.

In addition to commission, it is permissible to agree to pay the agent a regular retainer (but there is no obligation to do so). There are no default obligations on a principal to reimburse an agent for the expenses incurred in carrying out his/her duties.

#### *1.4.2 When due and payable?*

Unless the parties agree otherwise, commission will become due as soon as the principal or the customer executes the transaction, or on the date the principal was contractually obliged to execute the transaction, whichever is sooner. In any event, the latest date that the parties can agree on commission becoming due is the date the customer executes his/her part of the transaction (eg, pays for the goods) or the date on which the customer would have done so had the principal performed his/her obligations under the contract (eg, delivered the goods to the customer). Any attempt to agree on a date later than this to the detriment of the agent will be void.



Once commission has become due to the agent, it must be paid no later than the last day of the month following the quarter in which it became due. Again, any attempt to agree on a longer period for payment will, if detrimental to the agent (which is highly likely), be void.

#### *1.4.3 Extinction of right to commission*

The agent may lose his/her right to commission, and may have to refund any commission already received, if it is established that the contract between the customer and the principal will not be executed, and this occurs in circumstances for which the principal is not to blame. Examples of such circumstances might be where the principal becomes entitled to terminate the sale contract agreed on with a customer due to the customer's material breach of that contract, or where unforeseen circumstances have arisen which have compromised the principal's ability to perform its obligations, such as an "act of God."

Any attempt to derogate from this provision to the detriment of the agent will be void.

If the principal replaces an agent with a new agent, and the former agent is still entitled to post-termination commission on certain transactions, the new agent will not be entitled to commission in relation to such transactions, unless it is equitable under the circumstances to have one agent share the commission with the other. In this way, the principal should be protected from being required to pay double commission during the transitional stage of a new agent's appointment.

#### *1.4.4 Accounting and audit*

The principal must provide the agent with statements detailing the commission due, and setting out the main calculations involved; such statements have to be provided no later than the deadline for paying the commission to the agent. In addition, the agent is entitled to receive all the information that he/she needs to check the amount of

commission due to him, including extracts from the principal's accounts.

Any contractual provisions derogating from the agent's rights to such information, or to receive commission statements, will be void.

## 1.5 Termination

### 1.5.1 *Formal requirements*

There are no formal requirements for terminating an agency agreement, save for any which may be stipulated in the agreement itself. However, it is obviously preferable to provide a written notice of termination so that the terminating party's intention to terminate is clear, as is the date on which termination is to take effect and the reasons for such termination. Such matters can be extremely important in the event that there is a dispute regarding the termination itself, or regarding the agent's rights upon termination.

### 1.5.2 *Notice period*

An agency contract for an indefinite period can be terminated on notice. The Regulations provide that the minimum notice is one month in the first year of the agreement, two months in the second year and three months in the third and all subsequent years of the agency. These notice periods apply whether it is the agent or principal that is terminating the agreement, and they are minimum periods only. Therefore, if the contractual notice periods are longer, the contractual periods will apply. However, the period of notice to be observed by the principal must not be shorter than that to be observed by the agent. Unless otherwise agreed by the parties, the end of the notice period must coincide with the end of a calendar month.

It is possible to terminate an agency agreement without observing the above notice periods, for example, if one of the parties has committed a sufficiently serious breach of the contract which would justify immediate termination and in exceptional circumstances such as the bankruptcy or winding up of the agent.



The above minimum notice periods do not apply to fixed-term agreements, which simply expire at the end of the fixed term. However, if the parties continue to perform a fixed-term agreement after the end of the fixed term, the Regulations provide that the agreement will be deemed to be an agreement for an indefinite term, and the above notice periods will then apply. The length of the fixed term would need to be taken into account when calculating the length of notice required to be given under the above rules.

The parties may not contract out of the minimum notice periods if they apply. However, it is likely that if a principal attempted to terminate an indefinite-term agency agreement with insufficient notice, the notice would be effective and the agent would simply have a right to claim damages in lieu of such notice.

### *1.5.3 Liability of principal on termination*

#### *Pipeline Commissions*

A principal will be obliged to pay an agent commissions that have become due and payable prior to termination, but where termination of the agreement has occurred before the due date for the payment of the commission to the agent.

However, the Regulations provide that, where the customer's order has reached the principal or the agent before termination of the agency agreement, the agent will be entitled to commission on that transaction, even if the sale contract was not concluded until after termination.

#### *Post-Termination Commission*

It may be that, while the agent had done what was required of him/her to secure commission on a transaction prior to termination of the agreement, the commission did not become due before termination. For example, the agreement might provide that the commission will become due only when the principal accepts an order, or even that it will not become due until the principal receives payment from the

customer for the goods. If the agent secures a sale and forwards the purchase order to the principal the day before the agency agreement is terminated, the liability to pay commission to the agent may not therefore arise prior to termination (and certainly would not arise if the commission only became due on payment by the customer).

If a sale is made to a customer within a “reasonable period” after the termination of the agency agreement, and the sale is “mainly attributable” to the agent’s efforts during the term of the agreement, the agent will be entitled to a commission on that sale, even though the agent may have had no involvement in the particular transaction, and it was entered into weeks, or even months, after termination. There is no clear indication as to when a sale can be “mainly attributable” to the agent’s efforts during the term of the agreement. Each case will be decided on its own merits.

### *Termination Payment*

The Regulations provide agents with a legal right on termination of an agency agreement to be paid a termination payment in the form of damages and an indemnity.

The agent is entitled to an indemnity where he/she has built up the principal’s business (either by finding new customers or by increasing the principal’s volume of business with existing customers) and the principal continues to derive substantial benefits as a result, provided that payment of the indemnity is equitable under all the circumstances. The amount of the indemnity is capped at a sum equal to one year’s remuneration, calculated by reference to the agent’s average remuneration over the preceding five years or over the period of the contract, if this was less than five years. The agent’s right to an indemnity is expressed to be without prejudice to the agent’s right to seek damages for other losses.

The agent is entitled to compensation on termination of the agency agreement if he/she suffers consequent “damage.” The agent is deemed to suffer such damage particularly if (i) he/she is deprived of





commission to which he/she would otherwise have been entitled in circumstances where the principal has obtained substantial benefit or (ii) termination has meant that the agent has not been able to amortize costs and expenses that he/she has incurred in the performance of the agency on the principal's advice.<sup>2</sup>

The principal may not derogate from the agent's right to damages or an indemnity to the agent's detriment before the agency contract has been terminated. Therefore, it is not possible to contract out of these rights via a provision in the agency agreement. However, it is likely that a settlement agreement between the principal and the agent by which the agent agrees to the termination of the agreement and the waiver of his/her rights to damages or indemnity in return for a payment would be enforceable. Before entering into an agency agreement, the principal and agent must consider which of the damages and indemnity remedies would be less onerous or (in the case of the agent) more advantageous in regard to the termination of the agreement.

The agent does not have to establish the loss or damage he/she would not have suffered but for the termination. This is illustrated by the fact that the entitlement applies on the expiry of fixed-term agreements, and even on the death of the agent.

The Regulations also provide for the criteria that the agent must satisfy when seeking an indemnity, which do not apply in the context of damages. The agent must establish that he/she has substantially increased the principal's customer base, or its business with the existing customers, and the principal must also derive substantial

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<sup>2</sup> Article 17(1) of the Agency Directive expressly entitles an agent to receive an indemnity in accordance with Article 17(2) or to receive compensation for damage in accordance with Article 17(3) of the Directive. An agent is entitled to claim for damages over and above any Article 17(2) indemnity payment as long as such damages fall within Article 17(2)(c), but not if they fall within the meaning of compensation for damage as set out in Article 17(3). Interestingly in this particular country chapter, the language used to describe the type of the damages available (in addition to the indemnity payment) appears to be based on the language used in Article 17(3), and not 17(2)(c) of the Directive.

benefits from such customers following termination of the agreement. There is also a requirement that an indemnity payment be equitable in all the circumstances.

The agent will not be entitled to damages or an indemnity if (i) the principal terminates the agency immediately in circumstances where this is objectively justified by the agent's breach or (ii) the agent, with the principal's consent, assigns the agency to a third party or (iii) the agent terminates the agency and his/her termination is not justified either by circumstances attributable to the principal or by the age, illness or infirmity of the agent.

## 1.6 Limitation periods

Under the Regulations, the agent must notify the principal of his/her intention to bring a claim for compensation or indemnity within one year of the termination of the agency agreement; otherwise, the agent will lose all rights to bring a claim. There are no such restrictions with regard to any claims arising out of the other rights granted to agents by the Regulations. Such claims would simply have to be brought within the applicable limitation periods under Maltese law.

There is no specific or particular limitation period under Maltese law that applies specifically to agency agreements. However, the time-bar provisions of the Civil Code apply to contractual claims under agency agreements in the same way as they apply to claims brought under other contracts. Therefore, a principal or agent, if claiming for breach of contract, must bring any claim no later than five years from when the cause of action accrued.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law applicable*

There is no specific legislation in Malta that regulates a relationship between suppliers and distributors. The Regulations do not apply to



distribution agreements and distributors in Malta do not benefit from equivalent protection. A distribution agreement between a supplier and its distributor is governed by the ordinary principles of Maltese contract law. Accordingly, the parties to a distribution agreement have the freedom to agree on the contractual terms that will govern their relationship, provided that such terms do not contravene rules of public policy, EU and Maltese competition law and any other mandatory Maltese laws.

### *2.1.2 Formal requirements*

A distribution agreement is not subject to any formal requirements and may be concluded orally or in writing, or may arise impliedly from the conduct of the parties.

However, to avoid evidential difficulties in the event of a dispute between the parties, it is advisable that the terms of the distribution relationship be documented in a formal agreement.

There are no requirements to register a distribution agreement with, or to obtain authorization from, any public authority.

### *2.1.3 Individual/corporate entity*

A distributor may be either an individual (sole trader) or a legal entity (such as a partnership or a limited liability company).

As with agents, consideration should be given to the nature of a supplier's relationship with an individual distributor to ensure that, on balance, the distributor could not be classified as an employee of the supplier.

### *2.1.4 Duration of agreement*

Maltese law does not regulate the duration of a distribution agreement, and this is a matter to be agreed on by the parties. If the agreement is silent on this issue, the agreement will be deemed an agreement for an indefinite term, terminable on reasonable notice.

## 2.2 Exclusive/non-exclusive

Subject to any competition law issues, a distributor can be appointed on either an exclusive or non-exclusive basis.

The need to be careful with regard to the use of the words “sole” and “exclusive” applies equally in the context of distribution agreements.

Exclusive distributorship arrangements (including sole distributorships) often impose more restrictions or obligations on the distributor than non-exclusive distributorship arrangements where the supplier has the freedom to sell into the territory through other distributors and possibly via direct sales to customers.

Exclusivity may also be agreed upon in favor of the supplier, in which case the distributor agrees not to act as a distributor in the contract territory for any other suppliers. Alternatively, this restriction may be diluted to a non-compete clause, whereby the distributor agrees not to distribute products for any other suppliers, to the extent that they compete with the suppliers' products.

As stated above, any exclusivity or non-compete provisions will be subject to the requirements of EU and Malta competition law.

## 2.3 Termination

### 2.3.1 *Formal requirements*

Maltese law does not require compliance with any formalities to terminate distribution agreements. For the sake of contractual certainty, it is usual for the parties to a distribution agreement to agree that all notices of termination shall be in writing, but there is no obligation to do so. However, even without any such contractual obligation, it is advisable to ensure that any notice of termination is given in writing, and in a manner that generates a proof of receipt (eg, a record of delivery). This may avoid subsequent disputes over, for example, whether notice to terminate was ever given, the length of the notice period, or the effective date of termination.



General principles of contract law apply in relation to termination of the agreement. The parties are free to contract in relation to termination provisions and can agree on all relevant terms such as the circumstances in which termination can be effected, the required period of notice of termination, and the consequences of termination. Termination rights may be unilateral or mutual.

### 2.3.2 *Notice period*

As mentioned above, the parties are free to agree on the notice periods which will apply in the event of termination of a distribution agreement. Where the agreement is for an indefinite term and its execution implies the necessity of time, then such time would need to be fixed by the court. Moreover, if the principal has a valid reason for dissolving the agreement, then such agreement shall be dissolved when the principal informs the distributor by whatever means of his/her intention to dissolve the agreement and this without the need of any confirmation or authorization by the court.

If an indefinite-term agreement expressly provides a notice period in relation to a particular termination event (eg, termination for cause) but not another (eg, termination at will), then a reasonable notice would suffice to the latter termination right. It will be irrelevant that any express notice period falls short of what a court could determine to be a reasonable notice period. Terms expressly agreed on by the parties in the distribution agreement will stand, and where termination in accordance with an express provision is effected, a claim for damages in respect of the termination will not succeed.

### 2.3.3 *Liability of supplier on termination*

Unlike the position in relation to a commercial agency, a distributor is not entitled to any statutory termination payment in the form of compensation or indemnities where a distribution agreement is terminated or expires by effluxion of time.

The only remedy available to a distributor is damages. These may be awarded if the distributor suffers loss as a result of the contract not

being terminated in accordance with its terms, where the agreement is terminated on unreasonable or unfair grounds or where the agreement contains no express terms dealing with the termination in the relevant circumstances. The distributor may also be entitled to damages in respect of any outstanding breaches of contract by the supplier at the date of termination, or in the event that the supplier fails to comply with post-termination obligations set out in the contract.

#### *2.3.4 Return of products*

In the event of termination, under Maltese law, a principal/supplier has no obligation to buy back unsold products from a distributor. Conversely, a distributor has no obligation to return any unsold products to the supplier. However, the parties are free to agree otherwise in the distribution agreement itself and it is not unusual to see an obligation on a distributor to sell any unsold products back to the supplier on terms favorable to the supplier upon termination. A supplier may wish to include such a provision to protect its brand, since buying back products upon termination will prevent products being sold via channels other than authorized distributors.

### **2.4 Limitation periods**

There is no limitation period under Maltese law that applies specifically to distribution agreements. However, the provisions of the Civil Code relating to time-bar periods apply to contractual claims under distribution agreements in the same way as they apply to claims brought under other contracts. Therefore, a supplier or distributor, if claiming for breach of contract, must bring any claim no later than five years from when the cause of action accrued.



## Morocco

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Commercial Intermediation*

Commercial intermediation under Moroccan law may take three different forms, which are detailed in the Moroccan Commercial Code (“Commercial Code”):

- i. a commercial agency contract (*l’agence commerciale*) is defined under Articles 393 to 404 of the Commercial Code as a mandate by which a person, without being bound by an employment contract, agrees to negotiate or conclude in a customary manner, purchases, sales or makes any other general business operations on behalf of a merchant, a producer or another commercial agent, who agreed to pay for the services.
- ii. A brokerage (*le courtage*) is defined under Articles 405-421 of the Commercial Code as the convention by which a broker is in charge by a person to find another person, and to put them in touch in order to conclude an agreement. Pursuant to Article 414 of the Commercial Code, the broker who has a personal interest in the transaction must inform the parties, failing which he is liable to damages.
- iii. A commission (*la commission*) is defined under Articles 422-430 of the Commercial Code as an agreement by which a commissioner (*le commissionaire*) obtains the power to act in his own name on behalf of the principal (*le commettant*).

##### 1.1.2 *Law Applicable*

Under Moroccan law, the agency agreement is regulated by the Law 15-95 (the “Law”) creating the Commercial Code.

Title II of the Law deals precisely with agency agreements in Articles 393 to 404. However, it is necessary to not separate these provisions from the rest of text when for instance Article 37 provides that any physical person or entity, Moroccan or foreigner, carrying on business in Morocco is required to be registered as a merchant with the competent Moroccan Registry of Commerce.

Article 393 of the Commercial Code provides that the activities of the commercial agent must be exercised on a regular basis and thus have a permanent character. Moreover, the execution of the activities should be done independently and as a result, the commercial agent is not bound by any type of employment contract.

However, according to Article 6 of the Moroccan Labor Code, a person is considered as an employee when he/she exercises professional activity under the supervision of one or more employers, in exchange for a salary, whatever its nature or its way of payment is. Consequently, if in principle, a commercial intermediary is not considered as an employee under Moroccan law, there is still a risk of requalification if the conditions set by the Labor Code are met.

Furthermore, according to Article 394 of the Commercial Code, when the agent's activity is exercised incidentally in a contract whose principal object is different, the contractors might decide not to apply the provisions of the Law to the part of the contract concerning the commercial agency. However, such clause is void if the main object of the contract appears to be the commercial agency.

### *1.1.3 Formal Requirements*

The agency agreement is subject to a mandatory formal requirement to be in writing. Indeed, Article 397 of the Commercial Code specifies that the agreement, but also any amendments, shall be concluded in writing.

However, Courts are not bound by the content of the agreement signed by the parties and the requalification of the contractual relationship may be chosen on a factual situation basis.





#### 1.1.4 *Duration of the Agreement*

Article 396 of the Commercial Code provides that the agreement may be entered into for an indefinite or a definite duration. In case the agreement is entered into for a fixed term, and the parties carry on performing it after its expiration, the agreement is converted into an indefinite duration agreement.

### 1.2 Exclusive/Non-exclusive

According to Article 393 of the Commercial Code, the principal cannot ensure the commercial agent an absolute protection of its customers against passive competition of its other commercial agents. However, there does not seem to be anything that prevents the parties to foresee “reserved-customer” clause which could protect the commercial agent against active competition and at the same time fully respecting the provisions of Article 393.

The competition is considered as “active” when the agent is actively looking for customers outside his/her area whereas the competition is “passive” when the agent limits him/herself to accept spontaneous demands from customers outside his/her area.

In order to facilitate the fulfilment of the provisions of Article 393, it would appear necessary to strictly define the geographic segment and the nature of the customers which is the purpose of the agreement.

### 1.3 Non-Compete

Article 393 provides that an agent can represent several principals with their consent. Nevertheless, he/she cannot represent competing firms.

Article 395 also provides that the Commercial agency shall be concluded in the common interest of the parties. They are bound by a mutual obligation of loyalty and information. The principal must make his/her agent able to fulfil his/her mission, which the agent must

complete his/her obligations under the agreement as a good professional.

The content of this duty is not clearly defined in the provisions of the Article. For example, the agent may have an obligation to provide information and documents about his customers, his needs, his progress in market research, the competitive environment, etc. and conversely, the principal must provide any information which may help the agent to perform his obligations.

With respect to non-compete clauses, Article 403 provides that the agreement can provide a non-compete obligation after its termination. This clause must be strictly limited to a geographical area or a group of persons, as well as a type of goods or services. The clause will not be valid if it exceeds two years after the termination of the agency agreement.

## 1.4 Commission

### 1.4.1 *Basic Principles*

The amount of the fee of the commercial agent is fixed by mutual agreement between the parties or according to the business practices pursuant to Article 398 of the Commercial Code. The fee may consist in whole or in part as a commission based on the number or value of the cases handled by the commercial agent. If there is no specification in the contract or in the business practices, the amount of the commission is fixed by the court based on the circumstances of the transaction.

### 1.4.2 *When Due and Payable?*

According to Article 399, when a commercial transaction is concluded during the agreement, the commercial agent is entitled to a commission when the transaction has been concluded thanks to his intervention or when the transaction has been concluded with a third party from whom he has obtained customers for similar transactions.



When the agent is in charge of a specific geographical area or group of persons, he also has a right to commission for any transaction concluded during the agreement with a person belonging to this sector or group.

According to Article 400, when the commercial transaction is concluded after the agreement's termination, the agent is entitled to commission:

- when the transaction is primarily due to the agent's work deployed during the Agreement's execution and only if the transaction has been concluded within one year following the agreement's termination or/and;
- when the customer order has been received by the principal or by the agent before the agreement's termination.

Therefore, an agent is not entitled to any commission if the transaction is completed by the actions of a previous agent, unless it would appear fair and equitable to share this commission according to the circumstances.

The commission becomes due once the transaction has been executed by the agent, or should have been executed under the agreement, or once the customer has executed his part of the transaction. The commission shall be paid the last of the month following the quarter during which it was earned, in accordance with Article 401.

#### 1.4.3 *Extinction of Right to Commission*

According to Article 401 of the Commercial Code, the right to commission can be lost only if it has been established that the contract between the customer and the agent will not be executed and if this non-performance is not attributable to the agent.

In the case of such loss, the commercial agent must repay any advances he has received on the commission.

## 1.5 Termination

### 1.5.1 Notice Period

Each party can terminate an indefinite contract by giving to the other notice, in accordance with Article 396 of the Commercial Code. The notice period varies according to the time elapsed since the signature of the contract: one month during the first year of the contract, two months during the second year, and three months from the third year.

Where a fixed-term contract has become indefinite, the calculation of the notice period takes into account the fixed-term period.

The parties can derogate from these provisions to provide longer periods but only if the period imposed on the principal is not shorter than the period imposed on the commercial agent.

### 1.5.2 Liability of the Principal upon Termination

Liability is incurred in case of termination of the agreement under the following conditions. Pursuant to Article 402 of the Commercial Code, upon termination of the agreement, the commercial agent is entitled to compensation for the harm suffered pursuant to the termination. He must notify the principal of his intention to claim this compensation within a year from the termination of the agreement. Compensation is not due in the three following cases:

- when the termination of the agreement is caused by a serious misconduct (*faute grave*) of the commercial agent;
- when the termination is initiated by the commercial agent, (except when justified by acts made by the principal or when the commercial agent is prevented from carrying out its activities by virtue of age, infirmity or sickness);
- when, upon so agreeing with the principal, the commercial agent transfers his rights and obligations to a third party.



## 2. Distribution Agreements

### 2.1 Law Applicable

Moroccan law does not provide a specific regulation for distribution agreements. In particular, franchising is not specifically regulated and may therefore be relatively freely implemented.

Nevertheless, distribution contracts are regulated by several provisions implemented in different acts, such as:

- Moroccan Obligations and Contracts Code (*Dahir des Obligations et des Contrats*);
- Commercial Code;
- Law 06-99 relating to freedom of pricing and competition;
- Consumer Protection Act (Law 31-08).

The duration of the distribution agreement is fixed by mutual agreement by the parties. It can be a fixed-term contract, with the possibility of renewal in accordance with Article 753 of the Code of obligations and contracts. If the contract is extended beyond its normal end of validity by tacit consent, it becomes indefinite.

### 2.2 Exclusive/Non-Exclusive

Exclusive distribution agreements can require the distributor to supply on exclusive basis for the benefit of the supplier, and conversely, on the supplier, the obligation of exclusive provision for the benefit of the distributor.

The period of validity of such clause is limited to 10 years.

### 2.3 Termination

In case of a fixed-term contract, the distribution agreement cannot be unilaterally terminated, unless due to manifest negligence by the supplier, or provided by an express contract clause. However, Article

754 provides that when the term of the contract is indefinite, either party may terminate the agreement subject to a prior notice reflecting usual business arrangements or as agreed between the parties. The period of notice must be reasonable.

With respect to potential damages, Article 754 of the Obligations and Contracts Code provides that the termination of the agreement decided at the discretion of either party may not, *per se*, give rise to damages. However, damages may be awarded in the following cases:

- if no prior notice is given and/or;
- if the termination is considered unfair.

## 2.4 Termination Payment

There are no statutory requirements for the distributor to receive a compensation payment upon termination.

## Netherlands

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law Applicable*

The Agency Directive has been fully implemented in the Netherlands in Book 7, Title 7, Chapter 4 of the Dutch Civil Code. An agency agreement is defined as an agreement for a fixed or indefinite period of time between a principal and an agent, whereby the agent has continuing authority to act on the principal's behalf against payment with respect to the conclusion of contracts and, possibly, to conclude those contracts in the name and for the account of the principal without being subordinate to the principal. Note, however, that these provisions extend beyond the scope of the Agency Directive to include, not only the sale of goods by an agent, but also the procurement by the agent of other kinds of contracts, whether relating to the provision of goods, services or otherwise. Agency agreements that are covered by the Act on Financial Supervision are excluded from the Dutch agency rules.

The Netherlands is a signatory to the Hague Convention on the 1978 Law Applicable to Agency. Subsequently, a Dutch court will observe a choice of law clause in an international agency agreement pursuant to Article 5 of that Convention. It should be noted, however, that a Dutch court may apply specific mandatory provisions of a law to which the agency agreement is closely connected (Article 16 of the Convention), regardless of the parties' choice of law.

In recent years, only the following mandatory law provision has been applied to agency cases:

- following the decision of the Court of Justice of the European Community of 9 November 2000, the rules relating to the payment of compensation upon termination, where the agent carries out his/her activities in the EU, even if the principal is

domiciled in a country outside the EU and the agency agreement contains an express choice of law for the laws of that country.<sup>1</sup>

A choice of forum clause in an international agency agreement is expressly recognized by the Dutch courts provided that this choice is made in accordance with, and is subject to, Article 23 of the EEX Regulation, or Article 17 of the Brussels Convention of 1968 (for Denmark) or Article 17 of the Lugano Convention of 1988 (for Poland, Norway, Iceland and Switzerland).

If the clause does not fall within the scope of the aforementioned articles, a choice of forum clause will be recognized provided that there is written evidence of the same. The relevant document must either contain a choice of forum clause or refer to the general terms and conditions that contain such a clause. The other party must have explicitly or tacitly accepted this document. Alternatively, an agency agreement may provide that disputes arising out of the agreement may be finally settled by arbitration.

#### *1.1.2 General Duties Imposed*

Dutch agency law is substantially mandatory in nature, in particular those provisions aimed at the protection of agents. Dutch agency law provides that the agent must further the principal's interests with the necessary degree of diligence and comply with the principal's reasonable instructions. The agent is obliged to provide the principal with all necessary information and, in particular, to inform the principal without delay of commercial transactions negotiated or concluded on the principal's behalf.

The principal must do everything necessary to enable the agent to carry out its obligations and is required to notify the agent, without

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<sup>1</sup> As mentioned in the Introduction, one important principle in international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities derived from the Agency Directive, notably those entitling the agent to compensation or an indemnity payment on termination.



delay, if it foresees that considerably fewer commercial transactions will, or might, be concluded than the agent might anticipate. The principal must inform the agent within a reasonable period of his acceptance, refusal or any non-execution of a transaction that was procured by the agent.

### *1.1.3 Formal Requirements*

Although no formal requirements exist under Dutch law for entering into agency agreements, written agreements are advisable as, generally speaking, a claimant has the burden of proving the existence of an agreement. Furthermore, a party to an agency agreement may at all times request the other party to make available a duly signed document reflecting their agreement, while certain arrangements require a written understanding. In addition, some clauses must be in writing in order for them to be enforceable (such as a non-compete or a “del credere” clause).

### *1.1.4 Individual/Corporate Entity*

Both individuals and corporate entities can act as agents. Before July 2015, Dutch law provided special protection in case of termination for “small agents,” ie, individuals who act as agents for no more than two principals and who do not employ more than two assistants. However, with the new Work and Security Act, which came into force on 1 July 2015, this protection by a preventive dismissal test was canceled. Both individuals and corporate entities now enjoy the same protection.

### *1.1.5 Duration of Agreement*

Agency agreements may be for a fixed or an indefinite period of time. Agreements for a fixed period of time lapse automatically upon expiry of their term; thus, no prior notice of termination is required unless the agreement provides otherwise.

If an agreement for a fixed period of time is continued after the projected date of expiry, the initial agreement will automatically become an agreement for an indefinite period of time and binds the

parties on the same conditions. Indefinite agreements can only be terminated by observing the applicable notice periods (discussed in section 1.5.2).

## 1.2 Exclusive/Non-Exclusive

Agency agreements can be exclusive or non-exclusive. In the absence of an express choice, the principal will be free to appoint other agents for a particular area or group of customers. However, unless it has been expressly agreed that the agent does not have exclusivity, the agent will be entitled to commission for transactions concluded with a member of the agent's regular group of customers or from a customer who is established within the geographical area assigned to the agent.

## 1.3 Non-Compete

Dutch agency law does not contain mandatory provisions regarding non-compete obligations during the term of the agreement. However, non-compete obligations should comply with Dutch and European competition rules. As far as agency, distribution and commissionaire agreements are concerned, Dutch competition rules mirror those of the European Community (see earlier chapter on EU competition law rules for a further discussion of this issue).

In addition, a non-compete clause applying after termination of the agency agreement will be valid only if it is concluded in writing and relates to the kind of goods or services covered by the agreement and to the geographical area or the group of customers entrusted to the agent. Furthermore, the non-compete clause must not endure for more than two years following termination of the agency agreement.

The principal may not invoke a non-compete clause if the agreement has been terminated:

- by the principal, without the consent of the agent and without due regard to the statutory or agreed notice period and

without an “urgent reason” communicated to the agent without delay;

- by the agent, for an urgent reason communicated to the principal without delay, which can be attributed to the principal; or
- by the courts, based on circumstances that can be attributed to the principal.

A court may, at the request of the agent, wholly or partly nullify a non-compete clause on grounds that, in proportion to the principal’s interests to be protected, the agent is unreasonably affected by that clause. If the non-compete clause also contains a “penalty,” the courts may reduce the penalty amount, if the principle of “reasonableness and fairness” so requires.

## 1.4 Commission

### 1.4.1 *Basic Principles*

The agent is entitled to receive the agreed commission or, in the absence of an agreed commission, the customary amount of commission. If no such customary practice exists, the agent is entitled to receive a “reasonable” commission.

The agent will be entitled to commission for transactions brought about during the term of the agency agreement if:

- the transaction has been brought about as a result of the agent’s intervention;
- the transaction has been concluded with a party with whom the agent had previously negotiated a similar transaction; or
- the transaction has been concluded with a member of the agent’s regular group of customers or from a customer who is established within the geographical area assigned to the

agent, unless it has been expressly agreed that the agent does not have an exclusive right to that customer or area.

#### *1.4.2 When Due and Payable?*

The right to receive commission arises as soon as the transaction with the third party has been entered into. However, parties may agree that the right to receive commission arises at another time. The agent is entitled to demand from the principal inspection of the supporting data on the basis of which the agent's commission is calculated. The agent may hire, at the agent's own expense, an expert to conduct such a review.

If the role of the agent has been confined to that of an intermediary for the conclusion of the transaction, the order that was conveyed to the principal will be regarded as having been accepted insofar as the agent's right to receive commission is concerned, unless the principal notifies the agent of the principal's refusal to accept the order or expresses reservations in respect of such order within a reasonable period. If the agency agreement does not provide for the notice period to be observed by the principal in this respect, acceptance or refusal shall be given within one month from receipt of the order by the principal.

The agent will have the right to receive commission if he is prepared to meet his obligations under the agreement or has already met them, even though the principal has not availed himself of the agent's services or has availed himself to a considerably lesser extent than the agent might expect, unless the principal's conduct is due to circumstances that cannot be attributed to the principal.

Any stipulation that makes the right to receive commission dependent on completion of the transaction must be made expressly in writing.

#### *1.4.3 Accounting and Audit*

At the end of each calendar month, the principal is obliged to provide the agent with a written statement of the commission due for that

month, stating the data upon which the computation is based. The parties may agree that the statement be provided on a bi-monthly or quarterly basis. The commission must be paid no later than the date on which such statement is to be provided.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

There are no formal requirements under Dutch law for the termination of agency agreements. However, it is generally advisable to give written notice. As discussed in paragraph 1.1.4, the special protection for “small agents” in case of termination has been canceled.

### 1.5.2 *Notice Period*

The parties to an agency agreement may agree on notice periods for termination, provided that such notice periods are not less than one month for the first contract year, two months for the second contract year, and three months for all subsequent years.

Where the agency agreement does not expressly provide for notice periods for termination, the applicable notice period shall be four months, to be increased by one month if the agency agreement has been in effect from three to six years, and to be increased by two months after six years. Unless otherwise agreed, the end of the notice period must coincide with the end of a calendar month.

Non-observance of the notice period will not render the termination invalid. Instead, the party that terminates the agreement could be held liable for any loss or damage that the other party suffers as a result of early termination.

### *1.5.3 Liability of Principal on Termination*

#### ***Commission upon Termination***

An agent will be entitled to receive remuneration for transactions concluded after termination if:

- the transaction is mainly attributable to the agent's efforts during the period covered by the agency agreement and the transaction was entered into within a reasonable period following termination; or
- the third party's order reaches the principal or the agent before termination and (i) the transaction was the result of the agent's intervention, or (ii) the transaction was concluded with a party with whom the agent previously negotiated a similar transaction, or (iii) the transaction was concluded with a regular customer of the agent or a customer established within the geographical area assigned to the agent.

A newly appointed agent is not entitled to receive commission on any such transaction if commission would be payable to the former agent, unless it is reasonable under the circumstances for the commission to be shared between them.

#### ***Indemnity upon Termination***

Upon termination of the agency agreement, the agent will be entitled to receive a termination payment in the form of an indemnity, with the maximum indemnity being one year's commission calculated as an average over the preceding five years or, if for a shorter period, as an average over that period, provided that:

- the agent has procured new clients, or has considerably extended existing agreements with clients, from which the principal takes enduring and significant advantage after termination; and

- considering all circumstances of the case (in particular any lost commission), the payment of an indemnity is reasonable.

The agent is not entitled to receive an indemnity if the agency agreement is terminated:

- by the agent, unless termination is justified by circumstances attributable to the principal or justified by the agent's age, invalidity or sickness;
- by the principal, for urgent reasons which make the agent liable for damages; or
- by the agent, who in accordance with an agreement with the principal has assigned its rights and obligations to a third party.

The value of the indemnity is determined by a three-stage approach:

- first, by determining the benefit to the principal, of the clients the agent has procured or existing agreements he has extended;
- secondly, determining whether the indemnity is fair;
- finally, determining the maximum amount of the indemnity. In each of these three phases, the agent's lost commission will be a constitutive element.

## 1.6 Limitation Periods

The limitation period for bringing a claim for damages for an inadequate notice period (see Section 1.5.2 above) is one year following the termination of the agreement.

Claims for an indemnity on termination of an agency agreement (see Section 1.5.3 above) must also be brought within one year of the termination of the agreement.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

A distribution agreement differs from an agency agreement in that the distributor undertakes to purchase goods - or obtains the right to provide services - from the supplier and resell them to third parties in its own name and for its own account. There are no Dutch statutory provisions governing distribution. Consequently, distribution agreements are governed by the general principles of Dutch contract law. These provisions are rather liberal and allow for substantial freedom of contract. However, this freedom is not unrestricted. For example, unacceptably unfair clauses in distribution agreements can be challenged on the basis of the general principle of “reasonableness and fairness” that governs all Dutch contractual relationships. The burden of proof rests with the party invoking that principle.

#### 2.1.2 *Formal Requirements*

No formal requirements apply to distribution agreements. The conclusion of an agreement will require only a consensus and can therefore be concluded orally or even tacitly. However, given the uncertainty that this may bring, written contracts are generally advisable.

#### 2.1.3 *Individual/Corporate Entity*

A distributor can be an individual or a corporate entity.

#### 2.1.4 *Duration of Agreement*

Distribution agreements may be for a fixed or indefinite period of time. Agreements for a fixed period of time lapse automatically upon expiry of their term; thus, no prior notice to terminate is required unless a party wishes to invoke an explicit right of early termination.



## 2.2 Exclusive/Non-Exclusive

Distribution agreements may be exclusive or non-exclusive, provided the competition rules, discussed in the earlier chapter on EU competition law, are observed. If the agreement is non-exclusive, the principal is free to appoint other distributors for a particular area or group of customers.

## 2.3 Termination

### 2.3.1 *Formal Requirements*

There are no specific rules pertaining to the termination of distribution agreements. The parties to the agreement are bound by the terms of the agreement, including the termination provisions thereof. However, a Dutch court may set aside a contractual provision if it finds the inclusion of that provision under the circumstances unacceptable in view of the principle of “reasonableness and fairness.”

Where a distribution agreement is silent on termination, the question of whether that agreement can be terminated (absent a breach) must be answered on the basis of the aforementioned principle of reasonableness and fairness, taking into account all circumstances of the case. However, it appears that distribution agreements entered into for an indefinite period, in practice, may in general be terminated.

A fixed-term agreement that is silent on termination cannot in principle be terminated prior to the end of the fixed term.

### 2.3.2 *Notice Period*

In the absence of a contractual notice period, distribution agreements can be terminated by observing a “reasonable” notice period. In assessing reasonableness, all relevant, factual circumstances need to be taken into account. Relevant circumstances include, for example, the duration of the relationship, the dependence of the distributor on the supply of the goods, or the investments recently made by the terminated party. However, some lower courts have placed considerable emphasis on the duration of the relationship.

Depending on the circumstances, notice periods may vary from one month to several years. Some legal commentators have defended a system for the notice period that implies a month's notice for each year of the distribution agreement; other have argued that a notice period of six months should always suffice and that if the circumstances justify a longer period, the additional time is converted into an obligation to pay damages.

Without a contractual provision to the contrary, the Dutch Civil Code provides that an agreement may be terminated (in whole or in part) for cause - with immediate effect - if performance is no longer possible or is temporarily impossible and the cause justifies that termination. In all other cases, the terminating party should demand in writing that the agreement be performed within a reasonable period (unless the agreement provides to the contrary), failing which the agreement may be terminated.

Non-observance of the notice period would entitle the other party to claim specific performance and/or damages that it suffers as a result of the premature termination.

### *2.3.3 Liability of Supplier on Termination*

As a rule, a distributor shall not be entitled to compensation if reasonable notice has been given. As an exception to this rule, the Dutch Supreme Court has created the possibility of payment of compensation on the basis of the principle of "reasonableness and fairness" despite the fact that reasonable notice has been given. For example, this may be the case if the manufacturer has given the impression that the agreement would be continued, and the distributor has made investments that cannot be earned back. Distributors are generally not entitled to a goodwill compensation.

### *2.3.4 Return of Products*

In principle, a distributor acquires title to the goods. Hence, unless the agreement provides otherwise, the distributor does not have to return the goods to the supplier on termination.



## 2.4 Limitation Periods

In general, a limitation period of five years applies to claims arising from distribution agreements. It should be noted that other limitation periods might apply to the respective sales contracts ensuing from a distribution agreement.

## Norway

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law applicable*

Under Norwegian Law, the business relationship between a commercial agent and a principal is governed by Act no 56 of 19 June 1992 relating to Commercial Agents and Commercial Travellers, hereinafter referred to as the “Agency Act.” The Agency Act implemented the Agency Directive.

A commercial agent is defined in Section 1 of the Agency Act as “a person who as a business activity has undertaken by agreement with another person (the principal) to negotiate on an independent and continuing basis, the sale or the purchase of goods for the principal or by concluding transactions in the principal’s name.”

The Agency Act is limited to the commercial agent’s sale or purchase of goods, and does not include sale of services. However, where the transaction negotiated by the agent includes both goods and services, the Agency Act is applicable where the purchase of goods is the main part of the transaction.

Pursuant to Section 2 of the Agency Act, the provisions of the Act shall not apply when the agreement between the parties, established practice, commercial convention or other custom provide otherwise. However, to protect the agent, who is deemed to be the weaker party in the contractual relationship, several of the provisions are mandatory, ie, the parties may not derogate from the statutory provisions in the agency agreement.<sup>1</sup>

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<sup>1</sup> As mentioned in the Introduction, one important principle of international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities derived from the Agency Directive, notably those entitling the agent to compensation or an indemnity payment on termination (this principle applies equally to Norway as an EEA country).



### 1.1.2 *Formal requirements*

The agency agreement is not subject to any formal requirements and may be concluded orally or in writing. However, pursuant to Section 4 of the Act, either party may demand that the agency agreement be concluded in writing and that it receives a signed copy of the agreement.

### 1.1.3 *Individual/Corporate entity*

The commercial agent may be an individual or a corporate entity.

### 1.1.4 *Duration of agreement*

The agency agreement may be concluded for an indefinite or fixed period, cf. Section 25 of the Agency Act.

An agency agreement for a fixed period which continues to be performed by both parties following the expiry of such term is deemed to be converted into an agency agreement for an indefinite period.

## 1.2 *Exclusive/Non-exclusive*

The extent of the commercial agent's rights in this respect under the agreement is subject to the discretion of the parties.

## 1.3 *Non-compete*

The agency agreement may limit the commercial agent's right to perform services for a competitor of the principal throughout the duration of the contractual relationship. However, the Agency Act limits provisions for restraint of trade subsequent to termination of the agreement. Pursuant to Section 34 of the Agency Act, a restriction on the agent's right to carry on business activities subsequent to termination of the agency agreement shall be binding on the agent only if, and to the extent that the agreement:

- is concluded in writing;

- relates to the geographical area or the group of customers entrusted to the agent; and
- is related to the kind of goods covered by the agency contract.

In accordance with the Agency Directive, the non-compete clause may not be valid for more than two years after termination of the contract.

## 1.4 Commission

### 1.4.1 *Basic principles*

Pursuant to Section 10 of the Agency Act, the commercial agent is entitled to receive commission on commercial transactions provided that the transaction has been concluded as a result of the agent's involvement.

Despite the transaction not being negotiated by the agent, the agent is likewise entitled to commission where the transaction is entered into with a third party whom the agent has previously acquired as a customer for transactions of the same kind, or where the agent has been entrusted with a specific geographical area or group of customers, and the transaction has been concluded with a third party belonging to that area or group.

The level of remuneration is subject to agreement between the commercial agent and the principal. However, where the parties have not agreed on the level of remuneration, the agent is entitled to the remuneration that is customarily allowed in the area where the agent carries on his or her activities; see Section 9 of the Agency Act. Pursuant to the preamble of the Act, the appropriate remuneration is found by comparing the transaction in question with transactions of goods of the same sort and within the same line of business.



### 1.4.2 *Payment*

Pursuant to Section 12 of the Agency Act, the commission is due as soon as and to the extent that:

- the principal has delivered the goods (in a situation where the agent is acting in a sales role) or paid the purchase amount (in a situation where the agent is acting in a purchase role); or
- the principal, according to the contract with the third party, should have delivered the goods or received the purchase amount;
- the third party has received the goods or paid the purchase amount; or
- the third party, according to his or her agreement with the principal, should have received the goods or paid the purchase amount, assuming that the principal had executed his or her part of the transaction.

Any derogation from the third and fourth bullet point above to the detriment of the commercial agent is not permitted and will be invalid.

Commission shall be paid no later than within the first month following the quarter in which it became due. Any derogation from this to the detriment of the commercial agent is invalid.

### 1.4.3 *Extinction of Rights to Commission*

Section 13 of the Agency Act governs the rights to commission where the agreement between the principal and the third party is not, or merely partially, executed. It follows from the provision that:

- the right to receive commission is extinguished if the transaction between the principal and the third party will not be executed and the principal can establish that this is for a reason for which the principal is not to blame;

- the commission is not extinguished if the reason for non-execution by the third party is that the principal has granted a waiver or terminated the transaction. However, this shall not apply where the commercial agent has given his or her consent to the waiver or termination;

or

- if the third party only executes part of the transaction, the right to commission from the part not executed will be extinguished if any of the first two bullet points apply to that part.

Any derogation from this provision to the detriment of the commercial agent is not permitted.

Any commission already paid to the agent must be refunded to the principal.

#### *1.4.4 Accounting and Audit*

Within one month after the quarter in which the commission becomes due, the principal is obliged to supply the commercial agent with a statement of the commission due. The statement shall include all information of significance for calculating the amount of commission, including information about the amount of extinguished commission and grounds for the extinction.

Any derogation from this to the detriment of the commercial agent is not permitted.

### **1.5 Termination**

#### *1.5.1 Formal requirements*

Pursuant to Section 26 of the Agency Act, agreements concluded for a fixed period lapse when that period expires. Agency agreements concluded for an indefinite period may be terminated by either the commercial agent or the principal, cf. Section 25 of the Agency Act. Furthermore, according to Section 27 of the Act, either party has the





right to revoke the contract with immediate effect if the other party is in material breach of the agreement by failing to fulfil his or her obligations pursuant to the agreement or the Agency Act.

There are no formal requirements related to termination of the agency agreement. However, to avoid uncertainty, we recommend that the termination is made in writing.

### *1.5.2 Notice period*

Where the agency agreement is concluded for an indefinite period, the period of notice is extended proportionately with the duration of the contractual relationship. In the first year of the agency agreement, the period of notice is one month. In the following years, the period of notice is extended by one month for each year the contract is commenced until a period of notice of six months is reached. The provisions on period of notice are mandatory, with the exception that the parties may agree that the commercial agent may terminate the agreement with three months' notice irrespective of the duration of the agreement.

### *1.5.3 Commission*

Termination of the agreement does not affect the agent's right to receive commission on transactions concluded during the term of the agreement. Section 11, paragraph 1 of the Agency Act entitles the agent to receive commission for transactions executed subsequent to the date of termination where:

- the transaction satisfies the conditions in Section 10 of the Agency Act, (ref. Article 1.4.1 Basic principles) and the commercial agent or the principal received the order from the third party prior to the termination of the contract; or
- the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency agreement and the transaction was concluded within a

reasonable period of time after the agreement was terminated.

#### *1.5.4 Liability of principal on termination*

Pursuant to Section 28 of the Agency Act, the commercial agent is entitled to a termination payment in the form of an indemnity, provided that:

- the agent has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal will continue to derive substantial benefits from the business with such customers; and
- the indemnity is equitable having regard to all the circumstances, including the commission lost by the commercial agent.

Exceptions to the right of indemnity are found in Sections 29 and 30 in the Agency Act. In short, the agent's right to indemnity lapses if (i) he or she is found liable for material breach of the agreement, (ii) if the agent has terminated the agreement without any justifiable reason and (iii) if the agent with consent from the principal has transferred his or her rights under the agreement to another person.

The parties may not derogate from the provision on indemnity to the detriment of the commercial agent before the agency contract expires.

#### **1.6 Limitation periods**

Limitation periods are stated in Act no 18 of 18 May 1979 relating to the limitation period for claims. According to Section 2 of the Act, the general limitation period is three years, meaning that claims arising out of a breach of the contract shall be asserted no later than three years after the date that the breach commenced, see Section 3 of the Act.

To avoid loss of the indemnity payment, the indemnity must be claimed within one year after termination of the agreement.



## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law applicable*

Distribution agreements are not subject to any distinct statutory provisions under Norwegian law. However, distribution agreements are subject to general contractual provisions applicable to any contractual relationship, including those found in the Act of 31 May 1918 on conclusion of agreement. Moreover, according to its preamble, the Agency Act will apply by analogy to the distribution agreement where the nature of the distribution agreement is, by its characteristics, similar to an agency agreement. A general provision of particular importance is Section 36 of the Act on Conclusion of Agreements. Pursuant to this provision, an agreement may be partly or wholly made unenforceable if it is regarded as being unreasonable to either of the parties. It follows from case law that this provision has been applied several times, particularly in cases where one of the parties to the agreement is deemed to be superior to the other, either in size or in respect of bargaining power and has abused this position to impose on the other party unreasonable duties or lack of rights. The provision may be invoked in any contractual relationship, including distribution agreements. As a general rule, an unreasonable decision does not make the entire agreement unenforceable but may be limited to the part of the agreement found to be unreasonable.

#### 2.1.2 *Formal requirements*

A distribution agreement is not subject to any formal requirements and may be concluded orally or in writing. However, to confirm the parties' rights and to avoid any disputes regarding the existence or content of the agreement, we strongly advise that any contractual relationship be made in writing.

A distributor:

- is authorized by the supplier to distribute the supplier's products;
- is an independent dealer of the products of the supplier; and
- acts in his or her own name, at his or her own risk and for his or her own account.

### *2.1.3 Individual/Corporate entity*

The distributor may be an individual or a legal entity.

### *2.1.4 Duration of the agreement*

The duration of the agreement is subject to the discretion of the parties.

## **2.2 Exclusive/Non-exclusive**

The extent of the distributor's rights of distribution is subject to the discretion of the parties, and the agreement may be either general, selective or exclusive.

An exclusive agreement grants upon the distributor an exclusive right to distribute the supplier's goods either in a certain market segment or in a certain limited territorial area. The exclusivity may imply that the supplier is being prevented from distributing the products covered by the contract through another distributor or that the supplier is prevented from making direct sales to customers of the distributor. As the agreement confers on the distributor an exclusive right to distribute the supplier's goods in that market, exclusive agreements are very attractive to the distributor.

A selective agreement is an agreement where the supplier directly or indirectly is obliged to sell the goods exclusively to distributors that are chosen based on certain criteria, and the distributors are obliged not to sell the goods to unauthorized distributors. Both exclusive and



selective distribution agreements must comply with Norwegian and EU competition law to be enforceable (see earlier EU Competition Law chapter).

## 2.3 Termination

### 2.3.1 *Formal requirements*

There are no formal requirements related to termination of distribution agreements under Norwegian law, and the notice may be given orally or in writing. However, for the avoidance of doubt, it is advisable to give written notice.

### 2.3.2 *Notice period*

There are no statutory requirements under Norwegian law related to the notice period. Thus, the parties are free to determine in the agreement the duration of the notice period. However, it follows from case law that if the notice period is not settled in the agreement and one of the parties terminates the agreement, the other party shall be given reasonable time to end the contractual relationship.

### 2.3.3 *Payment upon termination of the agreement*

There are no distinct statutory provisions under Norwegian law relating to the distributor's right to compensation upon termination of the agreement.

The preamble to the Agency Act states that it should apply to distribution agreements if it, by its characteristics, is similar to an agency agreement.

A recent judgment from the Norwegian Supreme Court (13 February 2014 — the “Webasto-judgment”) has concluded that Section 28 in the Agency Act does not apply by analogy to a distribution agreement, unless this would lead to a “very unreasonable result,” which confirms the principles set out in the “Tampax-judgment” from 1980 (Rt. 1980 s. 243).

The Supreme Court decided, with the specific facts of this case in mind, that “*the rules in the Agency Act regarding payment upon termination have the character of an active law regulation which is modelled specifically for agency agreements. Neither foreign law nor the consideration for a uniform application internationally can support an application by analogy of this provision.*”

With this in mind, a distributor is therefore not entitled to any payment upon termination, unless this is provided for in the agreement between the parties, or if a refusal to grant payment would lead to a very unreasonable result for the distributor and the agreement is by its characteristics similar to an agency agreement.

## 2.4 Limitation periods

Limitation periods are set out in Act no. 18 of 18 May 1979 relating to the limitation period for claims. According to Section 2 of the Act, the general limitation period is three years, meaning that claims arising out of a breach of the contract shall be asserted no later than three years after the date the said breach commenced.



## Poland

### 1. Agency Agreements

#### 1.1 General

The Polish Civil Code stipulates a legal framework for an agency agreement. Under such an agreement, the person accepting the mandate (“agent”) assumes the obligation to mediate permanently, within the scope of the activities of their enterprise, against remuneration (“commission”), in:

- concluding contracts with clients for the benefit of the entrepreneur being the principal; and/or
- concluding such contracts in the principal’s name.

##### 1.1.1 *Individual/Corporate Entity*

Pursuant to the Polish Civil Code, both the agent and principal are two independent entities.

An agent may be a natural person or a corporate entity. However, in both cases, they act within the scope of the activities of their enterprise.

By contrast, the Polish Civil Code requires the principal to be an entrepreneur, conducting business in the form of a sole proprietorship or a corporate entity. The principal may still conclude an agency agreement with a professional agent, even if they do not possess the status of an entrepreneur. In this case, however, the rights and liabilities of the principal and the agent shall be modified (ie, the agent will not be entitled to compensatory allowance).

##### 1.1.2 *Formal Requirements*

Polish law does not provide for any specific formal requirements for the execution of an agency agreement; an unwritten agreement is as valid and enforceable as a written one. Nevertheless, each of the

parties to the agreement may demand that the other party confirm, in writing, the contents of the agreement and the provisions that amend or complement it. Moreover, the right to such a demand cannot be waived, since under the Polish Civil Code such a waiver shall be deemed invalid.

It should be noted, however, that if the agency agreement is concluded orally, evidencing the extent of the terms and conditions agreed may be difficult if there is a dispute.

In addition, there are no provisions that would prevent the parties from concluding the agency agreement in a foreign language. The only exceptions will apply when the agreement is concluded with consumers or public authorities. In these cases, the agreement must also be executed in Polish.

### *1.1.3 Duration of Agreement*

Pursuant to the freedom of contract provided for in the Polish Civil Code, the parties to an agency agreement may freely determine its duration. Hence, the agreement may be concluded for a fixed or indefinite period of time. The agreement may also provide for an initial term with automatic renewal for another fixed period, unless one party gives advance notice of termination to the other party.

Moreover, an agency agreement performed by the parties after the lapse of the fixed period for which it was concluded shall be deemed as concluded for an indefinite time.

## **1.2 Exclusive/Non-Exclusive**

The concept of exclusivity is based on the assumption of restricting the agent's activities to a defined territory or to a defined group of customers. Such restrictions may be treated as examples of competition restricting agreements and will be subject to competition law.





### 1.3 Non-Compete

Although there is no statutory non-compete obligation on the agent within the duration of an agency agreement, the parties may expressly agree to such an obligation.

The Polish Civil Code allows for the limitation of the agent's activities of a competitive nature to a certain period following the termination of the agency agreement. Such limitation shall be effective if it relates to a group of clients or a geographical area covered by the agent's activities and the types of goods or services that are the object of the agency agreement. The limitation period may not be longer than two years starting from the date on which the agreement was terminated. The limitation has to be made in writing; otherwise, it shall be null and void.

The agent is entitled to receive appropriate compensation for the duration of the non-compete obligation, unless the agency agreement is terminated due to a breach by the agent or if its provisions stipulate otherwise.

The non-compete obligation may be cancelled by the principal in writing, but the obligation to pay compensation to the former agent continues for a period of six months from the date of such cancellation.

### 1.4 Commission

#### 1.4.1 *Basic Principles*

If the agreement does not specify the manner of remuneration, the agent is entitled to a commission. The amount of commission depends on the number or value of the concluded contracts. The Polish Civil Code does not provide for minimum payments to the agent.

If the agreement does not specify the amount of commission, the commission due should be an amount commonly accepted in

relationships of a given type in the area where the agent pursues their activities. If it is impossible to determine the commission that way, the commission due to the agent shall be an appropriate amount, which takes into account all the circumstances directly pertaining to the performance of the acts mandated to them.

The agent may demand commission for contracts concluded within the duration of the agency agreement if their conclusion was effected as a result of their activities or if they were concluded with clients previously solicited by the agent for contracts of the same type.

Moreover, if the agent was granted the exclusive right with respect to a designated group of clients or a geographical area and, within the duration of the agreement, a contract with a client from that group or area was concluded without the agent's participation, the agent shall also have the right to demand commission for that contract and the principal is obliged to notify the agent, within a reasonable time, of the conclusion of such contract.

Furthermore, if the principal or the agent receives a proposal from a client to conclude a contract before the termination of the agency agreement, and the contract was concluded as a result of the agent's activity, the agent may demand commission for that contract.

The agent may also demand commission for a contract concluded after the agency agreement is terminated if the contract concerned was concluded predominantly as a result of the agent's activities within the duration of the agency agreement, and within a reasonable time after it was terminated.

In addition to commission, barring a contractual provision to the contrary, the agent may also claim reimbursement of expenses connected with the performance of the mandate only insofar as they were justified and did not exceed the usual amount accepted in the given relationships.



### 1.4.2 *When Due and Payable?*

The agent acquires the right to the commission on the date the principal should have already made their performance under the contract with a client or when they actually made it, or when the client made their performance, unless the agency agreement stipulates otherwise.

However, in any event, the parties cannot agree that the agent shall acquire the right to the commission later than on the date on which the client made their performance, or would have made it if the principal had made their performance.

Commission due to the agent must be paid no later than on the last day of the month following the quarter in which it became due. A contractual provision less favorable to the agent is null and void.

### 1.4.3 *Extinction of Rights to Commission*

The agent may not demand commission for contracts concluded within the duration of the agency agreement if that commission is due to the previous agent, unless it follows from the circumstances that it would be fair to distribute the commission between the two agents.

Additionally, the agent may not demand commission if it is obvious that the contract with a client will not be executed due to reasons beyond the responsibility of the principal. If commission has already been paid to the agent, it must be refunded to the principal. A contractual provision less favorable to the agent is null and void.

### 1.4.4 *Accounting and Audit*

The agent may demand access to the information required to establish whether the amount of commission due to them was correctly calculated. In particular, they may demand excerpts from the principal's commercial books or demand that the inspection into and excerpts from those books be made available to an expert auditor chosen by the parties.

Where the above information is not rendered accessible to the agent, they may demand access by bringing an action within six months from the day on which the demand was made to the principal.

If the parties fail to agree on the appointment of the expert auditor, the agent may demand that the expert auditor indicated by the court inspects the books and makes the relevant excerpts, by bringing an action within six months from the day on which the demand was made to the principal.

#### *1.4.5 Compensating Performance*

If, within the duration of the agency agreement, the agent obtained new clients or their efforts led to a significant increase in turnover with the existing clients and the principal still derives considerable benefit from the contracts with those clients, the agent may demand a compensating performance from the principal after the termination of the agency agreement.

The agent shall acquire the right to the above if, taking all the circumstances into consideration, particularly the agent's loss of commissions for the contracts that the principal concluded with those clients, there are good reasons to support such claim.

The compensating performance cannot exceed the agent's remuneration for one year, calculated on the basis of an average annual remuneration obtained within the last five years. If the duration of the agency agreement is less than five years, the average amount for the whole duration of the agreement shall be taken into consideration when calculating the remuneration.

No compensating performance is due if:

- (i) the agency agreement was terminated by the principal due to circumstances for which the agent is liable, justifying termination without notice;



- (ii) the agreement was terminated by the agent without a good reason, such as the fault of the principal, illness or old age of the agent; or
- (iii) the agent, with the principal's consent, assigned its rights and obligations under the agreement to a third party.

The right to compensating performance may not be excluded or amended to the agent's disadvantage within the duration of the agency agreement.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

The Polish Civil Code does not provide for a way of terminating an agency agreement. Pursuant to the general rules of civil law, a person performing a legal action may express their declaration of will by any behavior which manifests their intention sufficiently. For evidential purposes, however, a termination notice should be submitted in writing.

### 1.5.2 *Notice Period*

The general rules regulating the termination of agency agreements differentiate between agreements concluded for a fixed period and those concluded for an indefinite period.

If an agency agreement is concluded for an indefinite period, it may be terminated upon one month's notice during the first year of the duration of the agreement, two months' notice during the second year and three months' notice during the third and following years. The notice periods may not be shortened contractually. They may, however, be extended, but the notice period given by the principal may not be shorter than the one given by the agent. Any extension of notice periods granted to the agent shall be automatically applicable to the principal.

In respect of agency agreements terminated without the required notice period, Polish law recognizes the concept of the “abuse of right.” For example, if a party terminates the agreement within a time shorter than the minimum periods stated above, the other party may claim the abuse of right. Therefore, it is advisable to include a contractual provision specifically stipulating termination without cause.

Agency agreements, even if concluded for a definite time, may be terminated without the observance of the terms of notice, due to the non-performance of the duties by one of the parties in full or to a significant degree, as well as in the case of extraordinary circumstances.

However, generally, agency agreements concluded for a definite period may not be terminated at all before the end of the period.

If an agency agreement is terminated without a notice period for reasons that are the sole responsibility of the non-terminating party, the terminating party may be entitled to damages in respect of any damage caused.

## 1.6 Limitation Periods

In principle, under Polish law, all claims arising from commercial activity expire after three years. Nonetheless, several claims arising from agency agreements have expired after shorter periods.

The agent’s right to demand access to information expires within six months from the day on which the agent first requested access. This is also true of the agent’s right to demand that the expert auditor appointed by the court be allowed to inspect the principal’s books and make extracts required in order to establish whether the amount of the due commission was calculated correctly. Finally, the agent’s claim for compensation performance expires within one year from the date of the termination of the agency agreement.



## 2. Distribution Agreements

### 2.1 General

Polish civil law does not recognize a distribution agreement as a separate type of civil law agreement. However, it does provide detailed regulations in the Polish Civil Code regarding agency agreements, commission agreements, supply agreements and/or mandate agreements.

The general rule of Polish contract law is the freedom of the parties to the agreement to arrange their mutual obligations according to their own wishes, unless the contents or the purpose of the contract are contrary to the nature of the relationship, to the mandatory provisions of law or to the principles of social coexistence.

Legal doctrine and commercial practice has also caused distribution agreements to evolve. Consequently, these types of agreements consist of specific provisions characteristic of the distribution relation. Usually, a distribution agreement resembles a typical supply agreement but also includes a number of distributor obligations toward the supplier, such as taking care of proper merchandising of the distributed goods or protecting the know-how and intellectual property of the supplier.

As regards the assessment of distribution agreements in light of competition law, it is not only the case that contractual provisions restricting the freedom of the distributor are relevant but also actual behavior. Apart from applying Polish Competition law, practitioners should refer to EU Competition law in this matter.

#### 2.1.1 *Law Applicable*

In accordance with Rome I, the parties to a contract may make their relations subject to any legal system they choose. They may even choose a law to govern a contract that is different from the laws of their countries of origin. The general condition for the applicability of Rome I is that the contractual obligations of the parties must be

related to the laws of the different countries. By way of exception, the parties may choose a foreign law (irrespective of whether a foreign tribunal has been chosen) to govern the contract even if all the other elements which are relevant to the situation at the time of the choice are connected with one country. This, however, may not prejudice the application of the rules of the law of that country which may not be derogated from by contract (so-called “mandatory rules”). For example, if the parties are subject to different laws, their obligations may be governed by one of those systems or by a different legal system. On the other hand, if both parties are subject to the laws of one country (eg, Poland), they may also choose a foreign law to govern the contract, but in such situation, the mandatory rules of Polish law shall still apply. Therefore, in the case of distribution agreements, it is possible to choose a foreign law as the law governing the contract even if both parties to the distribution agreement are situated in the same country.

If the law applicable to a contract has not been chosen, the contract will be governed by the law of the country with which it is most closely connected.

It is presumed that a distribution contract is most closely connected with the country where the principal place of business of the distributor (as an entrepreneur) is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, to the country in which that other place of business is situated.

This rule does not apply if it appears from the circumstances that the contract is more closely connected with another country.

Polish competition law will still be applicable to the distribution agreement even if the parties choose the law of another jurisdiction as the governing law of the agreement.





### 2.1.2 *Formal Requirements*

There are no specific formal requirements for the execution of a distribution agreement. A distribution agreement is valid and enforceable under Polish law even if it is not concluded in writing.

However, in the case of an unwritten distribution agreement, there may be a problem with evidencing the extent of the terms and conditions agreed upon.

### 2.1.3 *Individual/Corporate Entity*

Under Polish law, there are no limitations regarding the legal form of a distributor or supplier.

### 2.1.4 *Duration of Agreement*

The parties may freely determine whether the term of a distribution agreement is fixed or concluded for an indefinite period. The agreement may also provide for an initial term of the agreement with automatic renewal for another fixed period unless one party gives the other party a notice of termination.

## 2.2 *Exclusive/Non-Exclusive*

The concept of exclusivity is based on the assumption of restricting the distributor's activities to a defined territory or to a defined group of customers. Such restrictions may be treated as examples of competition restricting agreements which will be subject to Competition law.

## 2.3 *Non-Compete*

There is no statutory non-compete obligation on the distributor, but the parties may expressly agree to such an obligation.

In the event that such an obligation is agreed, the market share of the parties as well as the duration of the restriction will be taken into consideration in the assessment of the non-compete obligation under competition law provisions.

## 2.4 Termination

### 2.4.1 *Formal Requirements*

Polish law does not determine how a party may terminate a distribution agreement. According to the Polish Civil Code, a person performing a legal action may express their declaration of will in any way which manifests their intention sufficiently. However, for evidential purposes, it is recommended to serve the termination notice in writing or otherwise document the same.

### 2.4.2 *Notice Period*

Generally, a distribution agreement may be terminated by a party in the event that the other party does not perform its material contractual obligations.

There is no statutory period of termination. Thus, the question of how much notice must be given is left to the contractual freedom of the parties. Therefore, the parties must expressly state the length of the termination notice in the agreement. In the case of indefinite obligations, the agreement will terminate after a notice has been given which respects any contractual, statutory or customary time limits, and where there are no such time limits it will terminate immediately after said notice has been given. There is no default right under Polish law to terminate a distribution agreement for convenience, and it is therefore advisable to expressly include such a right in the distribution agreement if required.

A fixed term agreement may not be terminated unless the distribution agreement clearly provides otherwise. Termination by a party of a fixed term distribution agreement that does not contain provisions permitting early termination, or in circumstances where such provisions do not apply, entitles the other party to claim damages. The relevant common or arbitration court will determine the amount of damages.



In practice, the parties list in the distribution agreement those contractual defaults which will entitle a party to terminate the agreement. The party in default is notified of the breach of the contractual obligation and is called upon to cure the breach within a given period. If the default is not cured within this period, the agreement is automatically terminated.

### *2.4.3 Liability of the Supplier on Termination*

Upon termination of the agreement, the distributor is not entitled to any termination payment in addition to any damages that may be given for unlawful termination of the agreement and/or any outstanding liabilities.

However, if the court finds that the distribution agreement should be entirely, or in part, governed by the provisions on agency agreements, the distributor might be entitled to several claims based on the provisions that regulate agency agreements or based on general principles of Polish law (although there is very little jurisprudence on the latter). This could happen, for example, if a distributor is entitled to commission calculated according to the value of goods sold, in addition to the usual remuneration for distribution services (ie, a mark-up on resale). Those claims include the following:

- the distributor may demand a commission for any contract concluded after the distribution agreement is terminated if the supplier or the distributor receives a proposal from the customer to conclude a contract before the distribution agreement is terminated, provided however that additional conditions are fulfilled;
- the distributor may demand a commission for a contract concluded after the distribution agreement is terminated when the contract with the customer is concluded predominantly as a result of the distributor's activities within the duration of the agreement and within a reasonable period after it is terminated; and

- the distributor may demand a termination payment if the distributor, during the term of the agreement, obtains new customers or its efforts lead to a significant increase in turnover with existing customers and the supplier still derives considerable benefit from contracts with those customers.

#### *2.4.4 Return of Products*

Whether the distributor has to return products to the supplier depends on the distribution agreement; there is no default obligation on the distributor to do so.

### **2.5 Limitation Periods**

Under Polish law, generally all claims that originate from commercial activity terminate after three years.



## Portugal

### 1. Agency Agreements

#### 1.1 General

Unless stated otherwise, article references in this section are to Decree Law 178/86, dated 3 July (as amended by Decree Law 118/93, dated 13 April), on Agency Law (hereinafter referred to as “Portuguese Agency Law”).

##### 1.1.1 *Law Applicable*

The Agency Directive has been implemented in Portugal by the Portuguese Agency Law, which contains the legal regime for agency agreements.

Portuguese Agency Law applies in respect of the sale of goods and also in respect of other transactions, including the provision of services.

An agency agreement is regulated by the law chosen by the parties. However, where the agency activity is carried out in Portugal, the mandatory rules applicable under Portuguese law cannot be avoided, unless the other applicable law contains provisions more favorable to the agent regarding termination issues.<sup>1</sup>

##### 1.1.2 *Formal Requirements*

Portuguese Agency Law does not have any formal requirements. However, any of the parties may request that the agreement be executed in written form (Article 1).

To be valid and binding on the parties, the following matters must be agreed in writing: representation powers by the agent, exclusivity and

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<sup>1</sup> As mentioned in the Introduction, one important principle in international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities derived from the Agency Directive, notably those entitling the agent to compensation or and indemnity payment on termination.

non-compete covenants, and the assumption by the agent of the risk arising from the commercial transactions in relation to which the agent is involved.

#### *1.1.3 Individual/Corporate Entity*

An agent may be either an individual or a corporate entity.

#### *1.1.4 Duration of the Agreement*

Agency agreements may be entered into for either a definite or an indefinite period (Article 27).

However, should the parties continue performing their respective obligations under a definite term agreement it is automatically converted into an indefinite-term agency agreement.

Where there is no definite term, it is deemed to continue indefinitely.

### **1.2 Exclusive/Non-Exclusive**

The parties may decide whether the agent shall have exclusive or non-exclusive agency rights. Since the exclusivity may refer to a particular geographical area or to a particular group of clients, to ensure clarity, the level of exclusivity should be prescribed in writing in the agency agreement (Article 4).

### **1.3 Non-Compete**

Unless stated otherwise in the agreement, the agent shall be free to render its services for entities other than the principal (Article 4).

The parties may also restrict or limit the professional activities to be carried out by the agent upon termination of the agency agreement (Article 9). The Portuguese Agency Law sets out that the non-compete covenant may not have a duration longer than two years and can only impose restrictions in respect of the geographical areas or the clients for which the agent carried out its activities under the agency agreement.



For the non-compete covenant to be enforceable, it must be in writing.

## 1.4 Commission

The agent is entitled to receive remuneration and commission during the period covered by the agreement. The parties are free to agree on how remuneration is paid. Where the parties have not specifically agreed on the remuneration of the agent, under Portuguese Agency Law the agent will be remunerated in accordance with the commercial practice of the place where its activity is carried out.

### 1.4.1 *Basic Principles*

The commission is defined by Portuguese Agency Law as any element in the agent's remuneration that varies with the number or value of completed business transactions.

The agent is entitled to commission on commercial transactions concluded during the period covered by the agency agreement.

The agent is also entitled to commission on transactions concluded during the period covered by the agency agreement where he has an exclusive right to a specific geographical area or group of customers, and where the transaction has been entered into with a customer in that area or group, even if the agent has not been involved in such transactions.

Unless otherwise stated in the agreement, the agent is not entitled to reimbursement of its expenses by the current development of its activities.

### 1.4.2 *When Due and Payable?*

Portuguese Agency Law provides that commission is due upon occurrence of any of the following (Article 18):

- the principal has performed its obligations under the transaction;

- the principal should have performed its obligations under the transaction; or
- the third party has performed its obligations under the transaction. Commission should be paid no later than the last day of the month following the calendar quarter in which such commission accrued.

The parties may agree in the agency agreement to a shorter period within which the commission is to be paid, but not a longer one.

#### *1.4.3 Extinction of Rights to Commission*

The agent will lose the right to the commission arising from a given transaction in which it was involved if the principal provides evidence that such transaction has not been concluded due to a reason for which the principal is not to blame.

#### *1.4.4 Accounting and Audit*

Portuguese Agency Law sets out certain mandatory provisions regarding the agent's right to be informed of any commission accrued in the course of the agency relationship (Article 13). The principal is required to supply its agent with a statement of the commission accrued for each transaction, not later than the last day of the month following the calendar quarter in which such commissions had accrued.

The agent is also entitled to view the accounting records of the principal. This right is limited to any details that may be relevant for the purpose of determining the particulars of any commission due to the agent. In addition, the agent may request to be provided with any other information necessary to determine the amount of the relevant commission.





## 1.5 Termination

Portuguese Agency Law stipulates that the parties can terminate an agency agreement when:

- there is a mutual agreement concerning the termination (in writing);
- either party has a fair cause for terminating the agreement;
- the agreement terminates on the agreed termination date; or
- by giving notice to the other party of their intention to terminate the agreement.

### 1.5.1 Formal Requirements

Under Portuguese Agency Law, termination by notice is possible only for agreements with no fixed term (if made in writing and in observance of the minimum mandatory notice periods contained in the same Law). Agreements for a fixed term cannot be terminated before the end of the term.

It is also possible for either party to terminate the agreement if the other has breached the agreement. According to Article 30, such breach must be either of such seriousness or duration that continuance of the agreement cannot be demanded from the other party. Hence, the enforceability of the circumstances of the breach must be specifically considered in order to justify a termination by breach of agreement under Portuguese Agency Law.

Additionally, it is possible to terminate the agreement if special circumstances occur that endanger the whole purpose of the agreement to such an extent that it is not feasible to wait until the fixed term has elapsed.

Termination must be made in writing within a month of knowledge of the facts which are the basis of it and must indicate the motives for such termination. Each party is entitled to compensation in the terms

of the general civil law of agreement in case of breach of obligations of the parties.

### *1.5.2 Notice Period*

Where the agency agreement does not include a definite term, the applicable notice period is determined by reference to the duration of the agreement as follows (Article 28): (i) one month if the agreement is in force for a one year period; (ii) two months if the agreement has entered its second year; or (iii) right is limited to any details that may be relevant for the purpose of three months in the remaining cases. This type of termination requires no justification. However, Portuguese Courts may in certain cases provide for longer terms due to good faith reasons related with the specific case.

Where a fixed term agreement has expired and the agreement has become an “indefinite-term agreement,” the expired term shall be taken into account in calculating the required notice period.

The parties may increase but may not reduce the minimum notice periods. Where different notice periods are agreed upon for the principal and the agent, the notice period afforded to the agent cannot be shorter than that afforded to the principal.

### *1.5.3 Liability of Principal on Termination*

#### **Commission**

The termination of the agreement does not affect the agent’s right to receive commission on transactions concluded during the term of the agreement, irrespective of whether the commission became payable during the term (Article 16).

Portuguese Agency Law also entitles the agent to receive commission for transactions executed after the date of termination where the transaction is mainly attributable to the agent’s efforts during the period covered by the agency agreement.



### ***Damages in Lieu of Notice***

The agent will only be entitled to obtain compensation where the notice period was not respected (Article 29). The agent must prove that such lack of notice has caused damage.

Alternatively, the agent can claim an amount equal to the months where the notice period was not respected. This amount is calculated bearing into account the average monthly remunerations of the agent in the preceding year, or the monthly average during the number of months the agreement has been in force, if less than one year.

### ***Termination payment***

Portuguese Agency Law specifically acknowledges the right of the agent to receive a termination payment in the form of an indemnity upon termination of the agreement.

Article 33 provides for an indemnity payable to the agent by the principal upon termination of the agreement.

This indemnity is only due if the following requirements have occurred and evidence to that effect has duly been presented: (i) the agent obtains new clients for the principal or substantially increases its business turnover; (ii) the principal will continue to benefit considerably from those business activities; and (iii) the agent is not remunerated by the agreements concluded during the time the agreement has been in force or by the clients then obtained.

The indemnity shall not be payable where the agreement is terminated by the agent or where the agent assigns his rights and duties under the agreement to a third party. In addition, an indemnity is not payable if the agent is in breach of the agency agreement.

The indemnity payment shall be due when the agreement is terminated or on its expiry (for a fixed term agreement). It shall also be due if the agreement is terminated due to the death of the agent.

The indemnity payment is granted in the terms of Article 34 of the Portuguese Agency Law: the judge decides its amount *ex aequo et bono*, taking into account the special circumstances of the case and of the parties. This payment cannot exceed the amount of the annual average of the commission received by the agent during the last five years of duration of the agreement - or during the number of years the agreement has been in force, if less than five.

Additionally, it should be noted that right to receive this indemnity cannot be waived by the agent. Hence, clauses to that effect will not be enforceable according to Portuguese Agency Law.

## 1.6 Limitation Periods

The indemnity payment can only be claimed within a year of the date of termination and any judicial proceedings must be filed within a year of such communication by the agent (Article 33.4).

Any other claim for damages arising from default or compensation for lack of due notice can be claimed within three years as of the date in which the party claiming damages or compensation has had knowledge of the facts which motivate the claim.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

There are no specific Portuguese laws applicable to the several existing types of distribution agreements in general. The only type which has certain aspects specifically regulated is the Commission Agreement (in the Commercial Code of 1888).

However, it has been considered by the majority of court decisions and legal authors that the Portuguese Agency Law can be applicable to other distribution agreements, such as concession and franchising provided the contract itself has enough similarities with an agency agreement that justifies such an analogy.



In light of the above, the Portuguese Agency Law and its respective mandatory regulations must be considered when assessing distribution agreements in Portugal, especially any risk related to termination, as according to Article 38 the provisions of this Law on termination are always applicable to contracts with full or partial effects in Portugal even if the parties have agreed otherwise, unless the other applicable law contains provisions more favorable to the distributor.

The Supreme Court has repeatedly decided that in the absence of any specific law ruling distributor agreements, the rules on the termination of agency agreements contained in Portuguese Agency Law shall apply to distribution agreements.

### *2.1.2 Formal Requirements*

As a general principal of contract law, there are no formal requirements for distribution agreements. However, any of the parties may request that the agreement be executed in written form.

### *2.1.3 Individual/Corporate Entity*

A distributor may be either an individual or a corporate entity.

### *2.1.4 Duration of the Agreement*

Distribution agreements may be entered into for either a definite or an indefinite period. Where there is no definite term, they are deemed to continue indefinitely.

However, for a fixed term agreement, should the parties continue performing their respective obligations under the agreement after its expiry, it is automatically converted into an indefinite-term distribution agreement.

## **2.2 Exclusive/Non-Exclusive**

The parties may decide whether the distributor shall have exclusive or non-exclusive distributor rights. Since the exclusivity may refer to a

particular geographical area or to a particular group of clients, to ensure clarity, the level of exclusivity should be prescribed in writing in the distribution agreement.

## 2.3 Termination

Portuguese Agency Law (applicable to Distribution Agreements) stipulates that the parties can terminate the agreement when:

- there is a mutual agreement concerning the termination (in writing);
- either party has a fair cause for terminating the agreement;
- the agreement terminates on the agreed termination date; or
- by giving notice to the other party of their intention to terminate the agreement.

### 2.3.1 *Formal Requirements*

Termination by notice is possible only for agreements with no fixed term (if made in writing and in observance of the minimum mandatory notices periods contained in the same Portuguese Agency Law).

It is also possible for either party to terminate the agreement if the other has breached the agreement. Such breach must be either of such seriousness or duration that continuation of the agreement cannot be demanded from the other party. Hence, the enforceability of the circumstances of the breach must be specifically considered in order to justify a termination by breach of agreement under Portuguese Agency Law.

Additionally, it is possible to terminate the agreement if special circumstances occur that endanger the whole purpose of the agreement in such terms that it is not feasible to wait until the fixed term has elapsed.



Termination must be made in writing within a month of knowledge of the facts which are the basis of it and must indicate the motives for such termination. Each party is entitled to compensation in the terms of the general civil law of agreement in case of breach of obligations of the parties.

### **2.3.2 Notice Period**

Where the distribution agreement does not include a definite term, the applicable notice period is determined by reference to the duration of the agreement as follows (Article 28): (i) one month if the agreement is in force for a one year period; (ii) two months if the agreement has entered its second year; or (iii) three months in the remaining cases. This type of termination requires no justification.

Where the fixed term has expired and the agreement has become an “indefinite-term agreement,” the expired term shall be taken into account in calculating the required notice period.

The parties may increase but may not reduce the minimum notice periods. Where different notice periods are agreed upon for the principal and the distributor, the notice period afforded to the distributor cannot be shorter than that afforded to the principal.

### **2.3.3 Liability of Supplier on Termination**

#### ***Damages in Lieu of Notice***

As in an agency agreement, the distributor will only be entitled to obtain damages where the notice period was not respected. The distributor must prove that such lack of notice has caused damage.

Alternatively, the distributor can claim an amount equal to the profits earned in the months where the notice period was not respected. This amount is calculated bearing into account the average monthly profits of the agent in the preceding year, or the monthly average profit during the number of months the agreement has been in force, if less than one year.

### ***Distributor's Indemnity***

Portuguese Agency Law (applicable to distribution agreements) may be held to grant the right to the distributor to be paid a termination payment in the form of an indemnity upon termination of the agreement.

The Agency Law provides for a special type of indemnity payment to the agent by the principal upon termination of the agreement.

This indemnity payment is only due if the following requirements have occurred and evidence to that effect has duly been presented: (i) the distributor obtains new clients for the principal or substantially increases its business turnover; (ii) the principal will continue to benefit considerably from those business activities; and (iii) the distributor is not paid by the agreements concluded during the time the agreement has been in force or by the clients then obtained.

The indemnity shall not be payable where the agreement termination is terminated by the distributor or where the distributor assigns his rights and duties under the agreement to a third party. In addition, an indemnity is not payable if the distributor is in breach of the agreement.

The indemnity payment shall be due when the agreement is terminated, or on its expiry (for a fixed term agreement). It shall also be due if the agreement is terminated due to the death of the distributor.

The indemnity payment is granted in the terms of Article 34 of the Portuguese Agency Law: the judge decides its amount *ex aequo et bono*, taking into account the special circumstances of the case and of the parties. This payment cannot exceed the amount of the annual average of the net profits received by the distributor during the last five years of duration of the agreement - or during the number of years the agreement has been in force, if less than five.





Additionally, it should be noted that this right to receive an indemnity payment cannot be waived by the distributor. Hence the clauses to that effect will not be enforceable according to Portuguese Agency Law.

It should also be noted that the grant of an indemnity payment to the distributor is not automatic nor conducted in the same terms as to the agent. Legal authority and court decisions clarify that for such payment to be due, the actual nature of the agreement as well as the type of relationship between the parties must be considered to have similarities with that of an agency agreement. Hence the right of a distributor to receive such a payment must be carefully analyzed on a case by case basis by the courts.

## 2.4 Limitation Periods

The indemnity payment can only be claimed within a year of the date of termination and any judicial proceedings must be filed within a year of such communication by the distributor.

Any other claim for damages arising from default or compensation for lack of due notice can be claimed within three years as of the date in which the party claiming damages or compensation has had knowledge of the facts which motivate the claim.

# Romania

## 1. Agency Agreements

### 1.1 General

#### 1.1.1 *Applicable laws*

The enactment that governs the relations between the permanent commercial agents and their principals is regulated by Articles 2072 *et. seq.* of the Romanian Civil Code, in force as of November 2011, implementing the Agency Directive within the Romanian legal system (the “Civil Code”).

Although the Civil Code governs agency agreements in general, it expressly provides that it is not applicable to the activities of persons acting as intermediaries within stock exchange markets or other regulated markets, persons possessing the qualifications of insurance agents or brokers and the activities of those persons acting as *pro bono* agents.

The Civil Code defines a permanent commercial agent as a natural person or legal entity that, acting as an independent intermediary, is empowered to negotiate deals for the benefit of another person, be it a natural or legal entity, named principal, or to negotiate and enter into deals in the name of and for the benefit of the principal. Such enactment applies to agency agreements irrespective of the nature of their object, be it goods or services.

#### 1.1.2 *Formal requirements*

The Civil Code expressly provides for the agreement to be concluded in written form in order for it to validly constitute legal proof (written form is requested *ad probationem*).

An agreement that is not concluded in writing will not be void, but it will not constitute a legal instrument that may be used in court to enforce the obligations agreed between the principal and its agent.



### 1.1.3 *Individual/corporate entity*

Pursuant to the provisions of the Civil Code, the agent can be either a natural person or a legal entity, independent of the principal.

### 1.1.4 *Duration of the Agreement*

The Civil Code leaves it to the parties to reach a consensus on the duration of the agreement. Thus, the parties can agree either on a limited duration of the agreement or on an unlimited term thereof. Furthermore, to ensure the parties' benefits, the Civil Code stipulates that an agreement concluded for a limited duration, if continued by the parties thereto beyond the date of its expiry, is considered to be concluded for an indefinite duration.

## 1.2 Exclusive/non-exclusive

Pursuant to Article 2074 of the Civil Code, the agent may represent various principals, whereas the principal may use several agents within the same region and for the same activities at a given moment, unless the parties expressly agree to the contrary. Consequently, there is no legal impediment for the principal to appoint other agents in other territories than the one allocated to a certain agent, unless exclusivity is expressly agreed upon.

## 1.3 Non-Compete

### 1.3.1 *Concept and formal requirements*

The Civil Code contains extensive provisions regarding any non-compete obligations that may be imposed by the principal upon the agent. The Civil Code defines a non-compete clause as a stipulation whereby the professional activity of the agent is restricted for the time of the agreement and/or a period of time thereafter. Given the importance of such clause for the economic activities of the agent, the Civil Code notes that it should be in writing as a condition of validity.

It also stipulates that the agent may not conduct, on his/her own behalf and in his/her own/her interest, competing trading operations

concerning products and or services similar to the ones that form the object of the agency agreement, save for the principal's express consent in this respect.

### *1.3.2 Limitations*

The Civil Code also provides for certain limitations in respect of the non-compete clauses. Firstly, the non-compete clause is to only apply in respect of the geographic region, the group of persons and the products covered by the provisions of the agreement. Any extension of the scope of the non-compete clause will not be binding on the agent.

The duration of such a non-compete clause is limited by the Civil Code to a maximum of two years after the termination of the agency agreement. Any duration exceeding this timeframe will not be binding on the agent.

### *1.3.3 Invalidity*

The principal may not benefit from the non-compete clause in the following situations of contract termination:

- if the principal unilaterally terminates the agency agreement without consideration of the rules regarding the termination notice period and without any existing justified ground for termination having been communicated without delay to the agent;
- the agreement is terminated due to the fault of the principal.

In addition, the non-compete obligation may be limited or removed by a court of law if its effects are manifestly damaging and unjust to the agent.



## 1.4 Commission

### 1.4.1 *The rule of remunerated activity*

Pursuant to Article 2082 of the Civil Code, the agent is entitled to commission for all agreements concluded as a result of its involvement. The Civil Code also establishes that the agent's remuneration may consist of either a lump sum or a commission, which is to be computed pro rata with the number or value of the contracts concluded.

### 1.4.2 *The right to receive the commission*

Thus, pursuant to Article 2083 of the Civil Code, the agent is entitled to commission for a transaction that they concluded during the term of the agreement in any of the following circumstances:

- the transaction is concluded due to the agent's intermediating activities;
- the transaction is concluded with a third party without the agent's intermediation, but where the third party was a client procured by the agent previously, and where the transaction in question is of a similar nature to the one previously concluded with such client; or
- the contract is concluded with persons or with groups of persons within a specified region for which the agent was awarded exclusivity.

Moreover, pursuant to Article 2084 of the Civil Code, the agent is entitled to receive his/her commission even if the transaction benefitting his/her principal is concluded after the expiry of their agreement if:

- such transaction is concluded within a reasonable period from the expiry of the agency agreement owing to the activity undertaken by the agent pursuant to such agreement; or

- the third parties' order was received by the agent or by the principal before the termination of the agency agreement.

The Civil Code also provides for the situation in which a new agent is appointed immediately after the termination of the agency agreement that led to the transaction coming into effect. In such a situation, generally, the new agent is not entitled to receive a commission if all the activities that caused the concluded transaction to come into being were due to the former agent's work. However, out of equity, the new agent is entitled to a fair share of the commission when the objective circumstances of the case require that the commission be split between the two agents.

#### *1.4.3 When entitled to commission*

Pursuant to the Civil Code, commission is due when:

- the principal fulfils his/her contractual obligations toward the third party;
- the principal should have fulfilled his/her contractual obligations as per his/her agreement with the third party; or
- the third party fulfils its contractual obligations.

The commission is also due if the agreement is concluded between the principal and the third-party contractor, regardless whether the two parties quit their reciprocal obligation, as long as the agent entirely fulfils its task.

#### *1.4.4 Payment of commission*

According to the Civil Code, commission must be paid by the last day of the month that follows the quarter within the course of which the right to the commission came into being.

#### *1.4.5 Extinction of the right to commission*

The Civil Code specifically provides that the right to commission becomes extinct only if the transaction concluded by the principal and



the third party is not fulfilled and such non-fulfilment is due to circumstances for which the agent may be held liable.

#### *1.4.6 The agent's right of control over the commission*

With a view to protecting the agent's interests, the Civil Code provides that the agent is entitled to receive quarterly information from the principal in respect of the commission he receives for his/her services. Thus, the principal must prepare quarterly the commission accounts and send the agent a report thereof, together with copies of the invoices they have issued to the clients.

With a view to verifying whether the value of the commission was duly calculated by the principal, the agent is entitled to require the latter to grant them access to any type of information (accountancy books included) that may be relevant in this respect.

### **1.5 Termination**

#### *1.5.1 Formal requirements*

The agency agreement, concluded either for a limited or for an indefinite period, can be unilaterally terminated by either of the parties thereto subject to the provision of a prior written notice to that effect to the other party.

#### *1.5.2 Notice period*

Such notice must be served within a reasonable time, but not less than one month before the estimated termination date for the first year of the contract. If the contract is for more than one year, for each year of the ongoing agreement, one month will be added to the above notice period, although the notice period cannot exceed a maximum of six months.

This rule is not imperative. The parties have the freedom to set, by way of agreement, shorter terms for serving the termination notice mentioned above. The Civil Code also allows the parties to establish by mutual consensus terms for serving the termination notice that

exceed the legal ones. That being said, these terms cannot be detrimental to the agent, ie, the principal cannot benefit from the right to receive a termination notice that is longer than the one granted to the agent.

#### *1.5.3 Termination of the agreement in other situations*

An agency agreement can be terminated without serving the termination notice mentioned above, or before the date of its expiry, should either of the parties culpably fail to meet their contractual obligations.

The agreement may also be terminated immediately when exceptional circumstances, other than force majeure or any fortuitous occurrence, make the cooperation between the principal and his/her agent impossible. Under such circumstances, equitable compensation for the damages incurred by the other party needs to be paid. In this case, the contract is presumed terminated upon the date of the written notice of the intent to terminate the agreement and the grounds thereto are received by the other party.

#### *1.5.4 Rights of the agent upon the termination of the agency agreement*

Upon termination of the agreement, the agent is entitled to receive from the principal a termination payment in the form of an indemnity for his/her services in circumstances in which:

- he has procured new clients for the principal or has significantly increased the volume of the commercial operations with existing clients and such operations bring the principal significant economic advantages on the date of the agency agreement's termination; and
- the payment of such an indemnity appears to be just in comparison to the activities mentioned above and/or the limits imposed upon his/her commercial activities after the





termination of the agency agreement, due to the no-compete clause.

The value of the indemnity payment cannot exceed a sum equivalent to the value of an annual remuneration calculated upon the average value of the remunerations received by the agent within the last five years. However, should the term of the agency agreement not be so extensive, the average will be calculated in respect of the yearly remunerations received by the agent in virtue of the contract.

It should be noted that the Civil Code expressly provides that the right to the above termination payment does in no way prejudice the agent's right to request and obtain damages.

#### *1.5.5 Extinction of the right to the termination payment*

The Civil Code expressly provides that the right to the termination payment becomes extinct if the agent or his/her successors do not claim the payment of such an indemnity from the principal within one year from the date of the termination of the agency agreement.

#### *1.5.6 Post-termination payment not due*

Although the Civil Code expressly grants the agent the right to obtain termination payment, as detailed above, there are certain circumstances where such an indemnity cannot be requested by the agent. These are the following:

- the principal terminates the agreement due to the agent's serious infringement of his/her contractual obligations;
- the agent unilaterally terminates the agreement, in which case the agent is entitled to an indemnification only if such termination is objectively justified; and
- if the agent is replaced under the agency agreement by a third party.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law applicable*

Distribution agreements are subject to minimal statutory provisions provided by the Civil Code, which regulates the supply agreement. Among such provisions is one that identifies the moment when property passes from the supplier to the buyer upon delivery of the goods.

However, these provisions may be derogated from by the parties' express agreement.

The consumer protection legislation provides certain regulations for distribution, assimilating the legal status of the distributors to that of producers in terms of liability toward the consumer, where the distributor acts as importer of the product.

Specific rules are also laid out in highly regulated areas of business (eg, energy, pharma, etc.) where the distribution activity may only be carried out if a license is obtained from the relevant authorities.

Finally, distribution agreements are also subject to the EU and Romanian competition legislation requirements. See earlier EU Competition Law chapter.

#### 2.1.2 *Formal requirements*

As mentioned above, in order for an agreement to fall into the distribution category, the distributor must:

- act in its own name and for its own account; and
- purchase the relevant products from the supplier for the purpose of further reselling it.



### 2.1.3 *Individual/corporate entity*

The distributor may be an individual or a legal entity (company). On a case-by-case basis (ie, depending on the area of practice, especially in highly regulated industries), a distributor may be required to meet additional conditions in order to be able to obtain a license for carrying out the distribution activity.

### 2.1.4 *Duration of agreement*

Distribution agreements may be for a fixed or an indefinite period of time. The duration is usually established by the parties by mutual consent and may have an impact in relation to certain provisions of the agreement, such as the non-compete obligations which normally have to be limited to five years in order for the agreement to benefit from the block exemption from the application of certain competition rules.

## 2.2 Exclusive/non-exclusive

Both exclusive and non-exclusive distribution systems may be put in place.

Generally a non-exclusive distribution agreement does not pose any competition issues and therefore may be implemented without any additional formalities, unless it contains hardcore competition restrictions such as price fixing, market sharing and collusive bidding, or other restrictions of competition which may raise some doubts on the part of the competition authority, include things such as the imposition of minimum quantities, ban on exports (a very sensitive topic for the national competition authority in the last few years), non-compete obligations, etc.

With regard to exclusive distribution agreements, the competition legislation and the practice of the Competition Council (ie, the competition authority in Romania) have stated that, in general, exclusive distribution has the potential to hinder competition and therefore the requirements of the competition legislation must be

taken into account when choosing an exclusive distribution system. For the avoidance of doubt, such competition rules are not applicable where the supplier and the distributor are affiliated parties. See also the chapter on EU Competition Law.

It is worth noting that competition law also provides for a de minimis threshold that excludes the agreement from the application of the competition rules. Therefore, the distribution agreement will not be subject to competition rules if the market shares of the contractual parties do not individually exceed 10% of the relevant product market(s) and the parties have not achieved in the preceding year a turnover exceeding a certain threshold. By way of exception, the hardcore restrictions are prohibited irrespective of the involved parties' turnover and market shares.

## 2.3 Non-Compete

Non-compete restrictions must be imposed in relation to the scope of the agreement in order not to be considered abusive. To benefit from the block exemption mentioned in point 2.2 above, distribution agreements must not provide for non-compete obligations that exceed five years. It is worth noting that a non-compete obligation that is tacitly renewable beyond a period of five years is deemed to have been concluded for an indefinite period and may be implemented as such only based on an individual assessment by the parties (ie, a case-by-case assessment of compatibility with Articles 101(1) and 101(3) TFEU and Articles 5(1) and 5(2) of the Competition Law).

## 2.4 Termination

### 2.4.1 *Formal requirements*

There are no formal requirements for the giving a termination notice (the notification procedure is generally laid down in the agreement). It is advisable that the parties provide for a notification procedure which involves evidence of receipt. There are particular requirements applicable to the termination of a distribution agreement in the motor



vehicles sector, which are applicable in Romania under the corresponding EU competition rules.

#### *2.4.2 Notice period*

There are no statutory requirements for the termination period of a distribution agreement. Therefore, the parties may mutually agree under the agreement on the conditions and requirements for a valid termination of the said agreement. As previously mentioned, there are separate rules and requirements for the termination of a distribution agreement in the motor vehicles sector, which are laid down by the relevant Block Exemption Regulation issued by the European Commission.

#### *2.4.3 Liability of supplier on termination*

If the agreement is terminated by the supplier by observing the termination procedure provided in the agreement, or if the agreement is terminated for good cause (ie, due to the material breach thereof by the distributor), the supplier will not be liable to the distributor.

If the agreement is terminated by the supplier without good cause, the distributor will have the right to seek redress in court for all the damages incurred pursuant to such termination.

#### *2.4.4 Return of products*

As mentioned in point 2.1.2, a distribution agreement is characterized by the fact that the distributor acts as an independent entity that irrevocably purchases the relevant products for the purpose of resale. Therefore, the distributor takes over the risk of not being able to resell the relevant products. However, the parties may put in place a buy-back mechanism.

### **2.5 Limitation periods**

The Civil Code provides that claims arising out of a contract must be asserted no later than three years after the time the damage was acknowledged.

## Russian Federation

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Applicable Law*

The main Russian statute governing agency relationships is the Civil Code (the “Civil Code”). Part I of the Civil Code which came into force on January 1, 1995, contains general rules governing obligations, transactions and agreements, whereas specific regulations applicable to various types of contracts, including agency agreements, are set out in Part II of the Civil Code, which came into force on March 1, 1996.

In 2008 the President of the Russian Federation by his decree launched a full-scale reform of the Civil Code aimed at making the code more flexible, up-to-date and attractive to foreign investors. Since 2013, important changes have been introduced to the code, and some amendments are still expected to be made to the code during the next few years.

Agency agreements are regulated by Chapter 52 of the Civil Code. Under an agency agreement, an agent performs legal and other actions on behalf of the principal for a consideration. Legal actions are understood as the execution of certain agreements by the agent, and other (factual) actions are understood as the performance of certain activities by the agent. Russian law provides for two models of agency agreements: where the agent either acts in his own name but at the expense of the principal (“commission agency”), or acts in the name of and at the expense of the principal (“mandate agency”). The Civil Code provides no distinction between agency agreements with respect to goods and services.

Generally, an agency agreement combines two different contracts: a mandate agreement regulated separately by Chapter 49 of the Civil Code, and a commission agreement regulated by Chapter 51. Both

these agreements apply to legal actions only. Depending on the model of the agency agreement, the provisions of Chapters 49 and 51, respectively, apply to the relations under an agency agreement in addition to the rules of Chapter 52.

The Civil Code includes certain mandatory rules which the parties to an agency agreement must comply with (for example, the agent must submit reports to the principal). These rules cannot be overridden in the agency agreement. Certain other rules apply unless the agreement provides otherwise.

If the “mandate model” is used, the agent enters into a transaction with third parties on behalf and in the name of the principal, who becomes a party to such transactions concluded by the agent. The principal is held solely liable for the performance of such transactions. The agent’s authority to act on behalf of the principal must be confirmed by a power of attorney issued by the principal.

If the “commission model” is used, the agent enters into transactions in his own name, becomes a party to such transactions with third parties and is liable to the third parties for the performance of the transactions. The counter-party to a transaction with a commission agent need not be aware that the agent is acting for a principal.

The principal may, however, transfer to itself the rights arising from an agreement concluded by a commission agent. However, such assignment of rights is allowed only if (i) both the agent and principal agree to such a transfer, or (ii) the counter-party does not properly perform its respective contractual duties arising from the agreement concluded by the agent. The counter-party’s consent for such transfer of rights is not required.

Furthermore, the rights and obligations of a commission agent under a transaction entered into at the principal’s instruction transfer to the principal in the event of the commission agent being declared insolvent.

Should the agency transaction involve the purchase or supply of goods, or the manufacture of products for the principal or by the principal for a customer, title to the goods or products is not transferred to the agent, irrespective of the applied model of the agency agreement. Title is transferred from the principal to the counter-party.

The above-mentioned regulations have been in force for more than 10 years. However, despite extensive court practice in their interpretation, there are still certain gaps which have to be addressed. Although court precedents are not treated as a source of law in Russia, in practice the judgments, recommendations, and overviews of practice issued by the Highest Arbitrazh<sup>1</sup> Court (up to 2014),<sup>2</sup> by the Supreme Court of the Russian Federation and by the Federal Arbitrazh Courts of districts of Russia normally serve as guidance for lower courts and for jurists generally. By way of example, Information Letter of the Highest Arbitrazh Court of the Russian Federation No. 85 dated November 17, 2004, explains and clarifies how the courts should construe and apply Civil Code provisions related to commission agreements. Accordingly, such explanations and clarifications apply to agency agreements drafted on the basis of the commission model.

The general rules of Part I of the Civil Code – related to commercial agreements – apply to agency agreements subject to the provisions of the respective Chapters of the Civil Code, mentioned above.

According to Federal law dated December 28, 2009, No.381-FZ On the Fundamentals of State Regulation of Trading Activity in the Russian Federation, as amended (the “Trade Law”), the “commission model” of agency agreements is prohibited for food products, including, inter alia, bottled water, alcohol products, beer, soft drinks, chewing gum and dietary supplements, between suppliers and retailers which conduct their business through retail chains, save for where the supplier’s or the retail chain’s annual turnover does not



exceed RUB 400 million, or such agreements are entered into within the same group of persons or within the same retail chain.

### 1.1.2 *Conflict of Laws*

Generally, parties may choose the governing law applicable to a contract. If the parties do not agree on the applicable law, its choice should be defined based on the conflict of laws regulations stipulated by Part III of the Civil Code. At the same time, if all the circumstances relating to the parties' relationship are linked to only one country, when deciding which country's governing laws will be applied, choosing a foreign country's laws will not affect the application of the mandatory requirements of the law of the country to which such circumstances relating to the relationship of the parties are connected.

It should be noted, however, that foreign law may apply to a transaction entered into by a Russian company if the transaction involves a "foreign element," such as, for example, a foreign counterparty. Transactions between Russian companies, as a general rule, must be governed by Russian law.

In the absence of a choice of law provision in a contract, it is subject to the law of the country with which it is most closely connected, and it is presumed that the contract is most closely connected with the country where the party whose performance is decisive for the contract has its habitual residence or place of business. With respect to agency agreements, the agent is such a party.

### 1.1.3 *Formal Requirements*

A commercial agreement performed in Russia must be executed in written form with only a few minor exceptions. Failure to observe the written form requirement may result in the invalidity and unenforceability of the transactions in Russia. In the absence of a written agreement a party to the agreement may not invoke testimonial evidence to prove that the respective transaction was concluded and to prove the terms and conditions of such transaction by such evidence.

The written form requirement is considered observed if the agreement is prepared as a single document signed by the parties, or by counterparts. Further, a written offer of one party to conclude an agreement (provided that the offer contains all the material provisions of the agreement), followed by the respective performance of the terms and conditions of that offer by the other party, may form a written agreement.

Email or fax message exchanges formally are allowed as ensuring written form. In practice, it is advisable to ensure getting a proof that messages come from a counterpart's authorized person, and that the agreement provides for a procedure of such email exchange, for example, by referring to the use of designated email addresses.

#### *1.1.4 Individual/Corporate Entity*

It makes no difference whether a party to an agency agreement is an individual or a legal entity. However, if an individual enters into an agreement for a business purpose, they must be registered as an individual entrepreneur in accordance with the established procedure.

#### *1.1.5 Duration of the Agreement*

An agency agreement may be concluded for a definite or indefinite term. If the agreement is concluded for an indefinite period, either party may refuse to perform under it (ie, terminate it) at any time.

### **1.2 Exclusive/Non-Exclusive**

The parties to an agency agreement may agree that:

- the principal may not engage other agents operating in the territory set out in the agency agreement to perform similar instructions, or should refrain from engaging in activity similar to the scope of the agency agreement in the territory determined in the agency agreement; and/or



- the agent may not take assignments similar to those under the agency agreement from other principals in the territory prescribed in the agency agreement.

The terms of an agency agreement providing for the right to sell goods, carry out work or render services to a predetermined category of purchasers (customers), or to purchasers (customers) residing or otherwise located in the predetermined territory, are null and void.

The exclusivity provisions of an agency agreement should be reviewed for compliance with Federal Law No. 135-FZ dated July 26, 2006 “On Protection of Competition” (the “Competition Law”).

Infringements of the Competition Law may result in the initiation of an anti-monopoly investigation and the imposition of an administrative fine amounting to up to 5% (and in the case of a cartel infringement, between competitors up to 15%) of the company’s turnover, or prescriptions by the anti-monopoly authorities to modify the contractual relationship of the parties to the agency agreement.

### 1.3 Non-Compete

The Civil Code explicitly provides that an agency agreement may restrict the principal from conducting, in a specific territory, independent activity analogous to the activity that is the subject of the agency agreement.

Any non-compete provisions of an agency agreement should be considered from the perspective of the Competition Law, as they may potentially lead to infringement of its provisions.

### 1.4 Commission

#### 1.4.1 *Basic Principles*

##### ***Commission***

Generally, the principal should pay to the agent commission in the amount and in accordance with the procedure agreed between the

parties and set out in the agency agreement. If the amount of commission is not agreed, the commission shall be assessed on what is payable for similar services under comparable conditions.

The agent may retain assets owned by the principal (should those assets be in the possession of the agent) in order to secure the principal's obligation to pay the commission. Further, the commission agent may withhold all amounts payable to him by the principal from any amounts received by the agent for the account of the principal.

If a commission agency assignment is not performed due to reasons for which the principal is responsible, the commission agent retains the right to withhold the commission.

If the agent performs the principal's instructions on conditions more favorable than those provided in the agency agreement (or as per the principal's instructions), the respective benefit shall be shared between the agent and the principal equally unless the agency agreement provides otherwise.

The agent retains the right to commission under the agency agreement irrespective of the fulfilment of the transaction by the third party with whom the agent entered into a contract within the scope of the performance under the agency agreement.

### ***Reimbursement of Expenses***

The principal must reimburse the agent for all the agent's expenses incurred in the course of performance of the principal's instructions. However, the principal is not obliged to reimburse the commission agent for expenses for the storage of goods purchased for the principal, unless the parties have agreed otherwise in the contract.

Further, based on Russian court practice, the agent may be entitled to reimbursement only of those expenses which were necessary for the performance of the principal's instruction directly connected with that performance and economically reasonable.

## ***Del Credere Fee***

A commission agent may guarantee to the principal the performance by a third party under a contract entered into by the agent with such third party. This agent's guarantee is provided in the form of del credere - a written agreement between the agent and the principal (or a special clause in the agency agreement) providing for such a guarantee.

The principal pays to the agent a del credere fee (in addition to the agency fee) in the amount agreed upon between the parties. In the event of the absence of such an agreement, this fee is defined based on fair market fees.

### ***1.4.2 When Due and Payable***

The principal and the agent are free to agree on the procedure for commission payments in the agency agreement. If the agency agreement is silent about this, the remuneration must be paid to the agent within one week of the submission of the agent's report for the preceding reporting period, unless it follows otherwise from the essence of the agreement or business custom.

### ***1.4.3 Extinction of Rights to Commission***

The principal may refuse to pay remuneration to the agent only in case the latter fails to perform under the agency agreement and such failure is not due to the principal.

### ***1.4.4 Accounting and Audit***

The agent is obliged to submit reports on the performance of the agency assignments in accordance with the procedure prescribed in the agency agreement. If the agreement does not prescribe such a procedure, the reports are submitted by the agent as he performs the agreement or at the end of the operation of the agreement. The principal can present objections, if any, to the agent's report within 30 days of its receipt, unless another period is agreed in the agency agreement.

Unless provided otherwise by the agreement, evidence of expenses made by the agent must be appended to the agent's report.

Russian law does not entitle an agent to audit the books of the principal, and vice versa, unless the parties agree otherwise.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

In general, an agency agreement can be terminated (i) by agreement of the parties, (ii) on the occurrence of certain events stipulated in the law or in the agreement, or (iii) through court action.

Generally, an agreement to terminate an agency agreement must be in writing.

The Civil Code provides for certain events that lead to the termination of an agency agreement. Such events include the death of the agent, who is an individual, his legal incapacity, limited legal capacity or if the agent goes missing, or is declared an insolvent individual entrepreneur. In such cases the occurrence of such an event would be sufficient to deem the agency agreement terminated, and no additional documents need to be prepared. Also the agency agreement may contain certain events for, and a procedure for, its termination.

Further, Russian law provides that the refusal by a party to an agreement to perform thereunder causes the termination of the agreement, provided that such refusal is allowed by law or by the agreement. The Civil Code provides that either party to an agency agreement concluded for an indefinite period may refuse to perform under it. In such cases written notice must be provided to the other party to the agreement.

Additionally, the Civil Code stipulates that an agency agreement can be terminated by either party by applying to court in case of a material breach of the agreement by the other party or in case of a material

change of circumstances that the parties relied on when they entered into the agreement, unless provided otherwise by the agreement.

### 1.5.2 *Notice Period*

The Civil Code sets out a 30-day notice period that applies with respect to (i) notice given by either party to a commission agency agreement concluded for an indefinite period of time, and (ii) notice given by either party to a mandate agency agreement with a commercial agent, except in case of reorganization of the commercial agent - when immediate notice is allowed. The parties may agree in the agreement on a longer, but not shorter, notice period.

With respect to an agreement with a mandate agent who is not a “commercial representative” (the agent that permanently represents its principal in commercial relations), the Civil Code establishes no minimum termination notice period.

In the case of a commission agency agreement concluded for a fixed period of time, the principal can terminate the assignment at any time and no minimum notice period is stipulated in the Civil Code. At the same time an agent cannot refuse to perform under a commission agency agreement concluded for a fixed period of time by giving unilateral notice, unless the agency agreement expressly allows otherwise.

If a party gives notice referring to a date of termination earlier than the expiry of the notice period that was contractually agreed upon or statutorily required, the termination should occur only upon the expiration of the notice period.

### 1.5.3 *Liability of Principal on Termination*

As a general rule the principal is obliged to compensate the agent for expenses incurred prior to the termination of the agreement and pay a commission for the transactions concluded by the agent. If the agent is entitled to remuneration, the principal must also pay remuneration in proportion to the work that the agent has done. This rule does not

apply to the performance undertaken by the agent after he has learned of, or should have learned of the agreement's termination. Moreover, a commission agent who refuses to perform under an agency agreement retains his right to remuneration for transactions concluded prior to the termination and compensation of his expenses, unless the agency agreement provides otherwise.

If the principal cancels the assignment before it is fully performed under (i) a commission agency agreement concluded for a fixed period, or (ii) a mandate agency agreement where the agent acts as a commercial agent, the agent is entitled to compensation of damages.

Moreover, in the event of early termination of the commission agency agreement the principal has to instruct the agent with respect to the principal's property in the agent's possession. If the principal initiates termination, it has to provide instructions immediately (ie, in the notice of termination). If the agent initiates termination, the principal must provide such instructions within 15 days, unless another period is stipulated in the agreement. Should the principal fail to provide such instructions, the agent is entitled to give the property to a third party for storage at the principal's expense, or to sell the property at the most favorable price.

## 1.6 Limitation Periods

The Civil Code provides for a general limitation period of three years for bringing any claims. Parties to an agreement may not contractually extend or limit this statutory limitation period. Any such agreement between the parties is void.



## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Applicable Law*

##### ***General Regulation***

The Civil Code does not contain any specific rules regulating distribution agreements. Based on the principle of freedom of contract, parties may enter into a contract which is not specified in the Civil Code. Pursuant to part 3 of Article 421 of the Civil Code, if parties enter into an agreement containing elements of different types of agreements regulated by the law (a “mixed agreement”), the respective regulations relating to such different types of agreements apply to the relevant parts of the mixed agreement accordingly. On this basis regulations applicable to a distribution agreement depend on its model and the elements used therein.

Starting from 2015, the Civil Code provides for general rules applicable to a framework agreement as an agreement establishing general arrangements and obligations between the parties that would be further specified in particular agreements to be entered between the parties.

In addition to general regulation of obligations and commercial agreements contained in Part I of the Civil Code, the specific regulations in Part II of the Civil Code, relating to (i) the supply of goods (Chapter 30); (ii) rendering of services (Chapter 39); (iii) agency agreements (Chapter 52), commission agreements (Chapter 51) and mandate agreements (Chapter 49) (also see part 1 above on Agency Agreements); and (iv) franchise agreements (Chapter 54), as well as (v) regulations on intellectual property rights (trademarks) of Chapter 76 of Part IV of the Civil Code, may apply to the respective parts of a distribution agreement. For example, depending on whether title to goods transfers to the distributor or not, regulations on supply agreements or agency agreements would apply. It should be noted that the parties to a mixed agreement are allowed to expressly provide

in the agreement that specific regulations relating to the particular elements of the mixed agreement are excluded.

Ruling of the Plenum of the Highest Arbitrazh Court of the Russian Federation No. 18 dated October 22, 1997 “On Certain Issues Relating to Application of the Provisions of the Civil Code on the Supply of Goods” explains and clarifies how the courts should construe and apply the Civil Code provisions related to the supply of goods. Such explanations apply to the relevant provisions of a distribution agreement on supplying goods to a distributor.

### ***Regulation of Trade***

The Trade Law applies to trading activities involving all kinds of goods except for activities involving (i) the sale and purchase of securities, (ii) the sale and purchase of immovable property, (iii) the sale and purchase of energy resources, (iv) foreign trading activities, (v) trade on commodity exchanges, and (vi) retail sales. The Trade Law also establishes requirements and restrictions with respect to the supply of food products, including, inter alia, bottled water, alcohol products, beer, soft drinks, chewing gum and dietary supplements.

Under the Trade Law, a supply contract for food products cannot contain provisions providing for any further actions relating to the supplied goods, including their marketing, advertising, promotion or similar activities. However, such arrangements between a supplier and distributor of food products can be the subject of a separate contract for the provision of services entered into by the same parties.

A supply contract for food products can provide only one type of performance bonus, that based on the volume of purchased products. Any other type of bonus is not permitted for a foodstuffs supply contract. Performance bonuses are prohibited across the board - even for purchase volume bonuses - with respect to specific food products deemed the most - “socially important” and included on the respective list approved by the Russian Government.



Furthermore, the aggregate amount of a bonus under a foodstuffs supply contract together with the total amount of remuneration payable to the purchaser of the food products under all separate service agreements connected with the promotion of, and other services relating to, the food products supplied under such foodstuffs supply contract may not exceed 5% of the value of the supplied food products.

Notwithstanding that a supplier can have its own distribution structure, the Trade Law requires that the supplier of food products must provide retailers conducting their business through retail chains with information about (i) the selection criteria for a counterparty for the conclusion of a foodstuffs supply contract, (ii) the material terms of a foodstuffs supply contract, and (iii) the quality and safety of supplied food products by publishing such information on its internet website.

If payment for the supplied food products is made in arrears, the maximum possible deferral terms are prescribed by the Trade Law - in the range of from 8 business days up to 40 calendar days, depending on the shelf-life of the respective food products.

A foodstuffs supply contract cannot stipulate provisions prohibiting the assignment of rights thereunder, or any liability for such assignment. The Russian Government may also establish maximum retail prices for the most socially important food products for a limited period (up to 90 days) in case the retail price for any of these products increases by 30 percent in 30 days.

The Trade Law prohibits foodstuffs' suppliers to retail chains and retailers conducting their business through retail chains to enter into any arrangements with respect to (i) charging or making any payments with respect to a "right for supply" of food products to existing or new retail stores, (ii) charging or making any payments with respect to changing the assortment of food products, (iii) reimbursement of expenses in connection with the loss or damage of food products after the title to them has been transferred to the purchaser, unless such loss or damage was the supplier's fault, and

(iv) reimbursement of any expenses not connected with the performance of the foodstuffs supply contract and consecutive sale of a particular lot of food products.

### ***Consumer Protection***

Law of the Russian Federation No. 2300-1 dated February 7, 1992 “On the Protection of Consumer’s Rights,” as amended (the “Consumer Protection Law”), imposes certain obligations on the parties of the distribution process involving the distribution of goods to consumers.

An individual consumer who buys defective goods may exercise remedies available under the Consumer Protection Law not only against the respective retailer, but also against the importer and the manufacturer of the goods. In particular, the manufacturer and the distributor who imported the goods into Russia must, at a consumer’s request, replace or repair the respective defective product, or the consumer may return the product to the manufacturer and seek a refund. Such liability of the manufacturer or the importer cannot be avoided or limited by a contract.

### ***Cross-border Transactions***

With respect to a cross-border transaction, ie, when the supplier and the distributor are located in different countries, the legal provisions of international treaties and conventions, as well as regulations on importation, export control, and currency control also apply and need to be observed.

If a distribution agreement with a Russian party being either the supplier or distributor involves the supply of goods, the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) applies unless the parties exclude its application.

Under Russian customs legislation, the importers of record can only be Russian legal entities. Foreign companies as well as their Russian branches and representatives offices are not prohibited from acting as

importers of record in Russia, but their legal capacity as the importer of record is significantly limited. In practice, foreign companies have difficulties importing goods to Russia themselves (but can do so using local subsidiaries and business partners).

Foreign trade transactions involving Russian counterparties should comply with sanctions that have been applied to certain Russian legal entities and economic sectors as well as territories (Crimea and the City of Sebastopol), starting from 2014 by several states, including the US, EU, Canada, Australia, Japan and Switzerland. When negotiating a foreign trade contract, foreign companies are recommended to apply a number of undertakings, including the screening of Russian counterparties and their ownership structure, the determination of risks related to the application of sanctions and export control limitations, the development of sanctions and an export control compliance strategy and policies, and the inclusion of sanctions and export control compliance clauses in contracts.

Use of the agency and commissionaire cross-border models will also be ineffective for the importation and distribution of goods due to the statutory Russian limitations established for the right of a Russian agent/commissionaire to deduct import customs duties and offset import VAT (the so-called double VAT issue). The double VAT issue may also be problematic for the distribution of services.

### ***Conflict of Laws***

Since the Civil Code does not provide for any specific regulation of distribution agreements, if parties to a distribution agreement fail to specify the governing law, it is determined on a case-by-case basis depending on the model on which the distribution agreement is based. For example, if a goods' supply element prevails in the distribution agreement, the country of the supplier can be recognized as that most closely connected to the agreement. Alternatively, if a service or agency element prevails in the distribution agreement, the country of the distributor can be recognized as that most closely connected to

the distribution agreement. It is advisable to make a clear choice of governing law in a contract in order to avoid any uncertainty.

### *2.1.2 Formal Requirements*

Generally, distribution agreements should be in writing.

If a distribution agreement is made in the form of a franchise agreement, or if it involves the licensing of intellectual property rights (eg, trademarks or patents), the granting of these particular intellectual property rights under the franchise agreement or license agreement are subject to state registration with the state authorities in charge of intellectual property issues. Currently, the Federal Service on Intellectual Property (“Rospatent”) performs such functions. Failure to obtain such registration will result in the respective rights being treated as not granted.

### *2.1.3 Individual/Corporate Entity*

It makes no difference whether a party to a distribution agreement is an individual or a legal entity. Due to the business nature of distribution relations, an individual who enters into a distribution agreement has to be registered as an individual entrepreneur in accordance with the established procedure.

### *2.1.4 Duration of the Agreement*

The Civil Code does not stipulate any specific requirements with respect to the duration of a distribution agreement.

Nevertheless, some chapters of Part II of the Civil Code governing particular types of agreements, which can apply to the respective elements of a distribution agreement, provide for a certain requirement on the duration of such agreements. For example, if the particular distribution agreement (or a part thereof) is governed by Chapter 30 of the Civil Code (Supply of Goods), the agreement may specify fixed period(s) for the supply of goods, and if the agreement does not specify this period the goods should be supplied within a reasonable period. Alternatively, a distribution agreement that

provides for rendering certain services by the distributor must indicate the date of commencement and completion of those services (as per Chapter 39 of the Civil Code). Therefore, a distribution agreement that contains such elements cannot be concluded for an indefinite period.

## 2.2 Exclusive/Non-Exclusive

The Civil Code provides for exclusivity regulation depending on the type of agreement chosen as a basis for the distribution agreement. We describe the exclusivity provisions available for the most common distribution models below.

The exclusivity provisions of a distribution agreement need to be considered from the perspective of the Competition Law to check for violations of prohibitions stipulated by the law and/or that lead to restriction of competition. The Competition Law applies to distribution agreements performed in Russia, regardless of the law governing such agreements. Infringements of the Competition Law may trigger an anti-monopoly investigation and the imposition of an administrative fine amounting to up to 5% (and in the case of a cartel infringement between competitors, up to 15%) of the company's turnover, or prescriptions by the anti-monopoly authorities on modification of the contractual relationship of the parties to the distribution agreement.

### ***Supply Model***

The Civil Code does not provide any guidance with respect of the exclusivity provisions that can be used for a distribution agreement based on the supply model. Therefore, the parties to a distribution agreement are free to provide for either an exclusive or non-exclusive distribution relationship in their agreement to the extent not violating the restrictions established by the Competition Law.

The agreements that are deemed “vertical,” ie, concluded for the supply of goods, are exempted from the Competition Law restrictions, provided that the market share of each party thereto in the respective market does not exceed 20% and such an agreement entered

between competitors does not contain or result in any cartel prohibitions.

The Competition Law and the Block Exemptions with Respect to Agreements between Purchasers and Suppliers, adopted on 16 July 2009 by Resolution of the Government of the Russian Federation No. 583 (the “Block Exemptions”), provide for the following requirements and restrictions with respect to the exclusivity provisions of a distribution agreement based on the supply model:

- under the Competition Law an agreement may not provide for a restriction on the purchaser not to allow the sale of the commodity of the supplier’s or manufacturer’s competitor save for sales arranged under the supplier’s or the manufacturer’s trademark or firm name;
- the Block Exemptions are applicable to agreements between companies which do not compete with each other (or compete only in the market of the goods purchased under the distribution agreement) and have a market share of less than 35%. In accordance with the Block Exemptions, granting to the distributor an exclusivity in the distribution agreement with respect to a particular territory is conditional on the distributor’s obligation to refrain from exclusivity provisions with respect to the same or partially coinciding territory in other agreements entered into by this distributor with the suppliers of the substitutable (competing) goods;
- the Block Exemptions do not allow the distribution agreement to prohibit the distributor from selling goods in a territory determined in the agreement and/or to buyers categorized in the agreement, except for conditions prohibiting the distributor (except for a retail-trade organization) from advertising and selling the goods in a territory which in an agreement between the supplier and another distributor is determined as a territory within which only the other distributor may sell goods, or within which only the supplier sells goods; and



- the Block Exemptions provide for certain other restrictions that can be connected with the distributor's exclusivity under a distribution agreement. For example, an obligation of the distributor to purchase from the supplier more than 50% of the goods which it purchases during the year is limited to a maximum three-year period and, beyond such a period, is permissible only for distributors who are selling goods in premises or on land granted to them by the supplier.

### ***Agency Model***

If the distribution agreement is based on an agency model, the parties to the agreement may agree that:

- the principal may not engage other agents operating in the territory determined in the agency agreement for the performance of similar instructions, or should refrain from effecting its own activity similar to the scope of the agency agreement in the territory determined in the agency agreement; and/or
- the agent may not take assignments similar to the scope of the agency agreement from other principals in a territory prescribed in the agency agreement.

The conditions of an agency agreement providing for the right to sell goods, fulfil works or render services only to a predetermined category of purchasers (customers) or only to purchasers (customers) residing or otherwise located in a territory prescribed in the agency agreement are null and void.

## ***Franchise Model***

If the distribution agreement is made in the form of a franchise agreement, the Civil Code provides for the following exclusivity provisions that may be used in the agreement:

- the franchisor may not provide other franchisees with the same rights to be used in the territory determined in the franchise agreement, or should refrain from effecting its own activity similar to the scope of the franchise agreement in the territory;
- an obligation of the franchisee not to compete with the franchisor in the territory determined in the franchise agreement with respect to operating by the franchisee of the business conducted using the franchisor's exclusive rights;
- a refusal by the franchisee to obtain under another franchise agreement similar rights from the franchisor's competitors (or potential competitors);
- an obligation of the franchisee to sell goods, perform works or render services using the franchisor's exclusive rights at prices determined by the franchisor;
- an obligation of the franchisee not to sell similar goods, perform similar works or perform similar services under trademarks or trade names of other persons;
- an obligation of the franchisee to sell goods, perform works or render services exclusively within a certain territory; and/or
- an obligation of the franchisee to agree with the franchisor the location for the commercial premises that are used for trading goods, performing works or rendering services using the franchisor's exclusive rights as well as their exterior and interior design.

The conditions of a franchise agreement providing for an obligation of the franchisee to sell goods, perform works or render services only to purchasers (customers) residing or otherwise located in a territory prescribed in the franchise agreement are null and void.

Franchise agreements are exempted from the restrictions of the Competition Law, provided that a franchise agreement entered into between competitors does not contain or result in any cartel prohibitions. At the same time, the Civil Code expressly provides that the restrictive provisions of a franchise agreement may be invalidated by a claim of antimonopoly service or other interested person if such restrictions contradict the Competition law, taking into consideration the situation in the relevant market and respective position of the parties to the agreement in the respective market.

## 2.3 Termination

### 2.3.1 *General*

The general rule of Russian law is that the distribution agreement, as well as any other agreement governed by Russian law, may be terminated by either party in the event of a material breach of the contractual provisions by the other party or in some other events expressly provided in the law with respect to a specific type of agreement. This type of termination is available only under a court procedure. However, the Civil Code also provides for particular cases when a party may terminate the agreement.

Russian law (Article 310 and Article 450.1 of the Civil Code) also allows the parties to an agreement relating to a business activity to agree that the agreement may be terminated by either party (which in this event is called “refusal to perform”) upon certain events or even with no reason. An agreement relating to a business activity may provide that such unilateral refusal to perform an agreement is conditional on paying a certain monetary amount to the other party.

### 2.3.2 *Formal Requirements*

#### **Franchise Agreement**

The parties may terminate a franchise agreement by mutual agreement.

A franchise agreement may be terminated by one party in the event of a material breach of the agreement by another party.

Any party to a franchise agreement concluded for an indefinite term may refuse to perform (terminate) it unilaterally with a six-month notice to another party, unless the agreement provides for a longer notice period. Any party to a franchise agreement concluded for any definite term or without reference to a term may refuse to perform (terminate) it unilaterally with 30 days' notice to another party, provided that the agreement allows its termination by payment of a certain amount in consideration of its termination.

The franchisor is entitled to refuse to perform (terminate) it unilaterally in the event of:

- a breach by the franchisee of the requirements with respect to quality of the manufactured goods or performed services;
- a material breach by the franchisee of the instructions or guidance provided by the franchisor aimed at ensuring compliance of the use of the granted rights with the terms and conditions of the contract;
- a failure by the franchisee to pay remuneration in accordance with the terms and conditions of the contract;

in each case provided that the franchisee has failed to cure the violation within a reasonable period of time upon receipt of the written demand from the franchisor to cure the violation or the franchisee repeats the violation within one year after receipt of the respective written demand.

A franchise agreement shall be terminated automatically in the event of (i) cancellation of the franchisor's right to a trademark or commercial signage which forms subject matter of the agreement or is included into the subject matter of the agreement; or (ii) any party to the agreement is declared bankrupt by court.

Granting the particular intellectual property rights under the franchise agreement shall be subject to deregistration with Rospatent upon termination of the franchise agreement.

### ***Supply Agreement***

A distribution agreement entered as a framework agreement for supply of goods, which does not specify the particular type and quantity goods to be supplied, may be terminated in accordance with the general rules of termination provided in the Civil Code. The parties may agree upon certain events causing unilateral termination and the notice period. Further, any agreement may be terminated by a court on the claim of a party if the other party commits a material breach of the agreement.

A supply distribution agreement (or a single purchase order agreed upon between the parties), which specifies the particular type and quantity of goods to be supplied, may be terminated unilaterally by the supplier if the distributor refuses to pay for the goods more than once or refuses to receive the shipment more than once; or it may be terminated by the distributor in the event of supply of defective goods which are not replaced or repaired within a reasonable time or if the supplier does not supply the goods in time more than once.

For a description of the termination of an agency agreement, please refer to clause 1.5 above on Termination.

#### ***2.3.3 Notice Period***

Save for a franchise agreement, the Civil Code does not provide for a notice period for the termination of an agreement (in cases when termination is allowed). The parties may agree on a notice period for

termination in the agreement. If the agreement does not provide for any specific notice period, the termination is effected immediately upon receipt of a termination notice by the other party to the agreement unless the notice expressly specifies another term.

If the agreement provides for a certain period of time in which one must exercise the right to refuse to perform the agreement upon the occurrence of certain grounds, a notice on refusal to perform may not be served upon such term's expiry.

A franchise agreement may be terminated by a 6 month, or longer, notice if concluded for an indefinite period of time, or with 30 days' notice if the agreement provides for certain monetary compensation for termination.

#### *2.3.4 Liability of Supplier on Termination*

Russian law does not provide for any termination fees with respect to any type of distribution agreement.

The parties may agree on the payment of a certain fee as a condition for unilateral refusal to perform the agreement.

Furthermore, if the agreement is terminated by a party because of the failure to perform or improper performance of the other party, the latter party must reimburse the former for losses, including direct loss and lost profit (unless the parties restrict the liability).

#### *2.3.5 Return of Products*

In an agency model agreement, the agent must return the products to the principal in the event of cancellation of the principal's instruction to the agent, including events of termination of the agency agreement.

In a supply model agreement, the purchaser must return the supplied goods to the supplier at the supplier's request if the purchaser fails to pay for the goods within the payment period provided by the respective supply agreement.



In a franchise model agreement, since the franchisees usually purchase the products for distribution from the franchisor or persons assigned by the latter, the rules of returning the products provided for above, apply.

## 2.4 Limitation Periods

The Civil Code provides for a general limitation period of three years for bringing any claims. Parties to an agreement may not contractually extend or limit this statutory limitation period. Any such agreement between the parties is void.

# Saudi Arabia

## 1. Agency Agreements

### 1.1 General

Commercial agencies (which include commission agencies and franchise arrangements as well as distributorships) are presently governed by the Commercial Agency Regulations issued under Royal Decree M/11 dated 20/02/1382H (corresponding to 22/07/1962G), as amended (the “Regulations”) administered by the Ministry of Commerce and Investment (the “Ministry”). It has been announced that a new law to govern franchises separately is under consideration. When that new law becomes effective, the Regulations will presumably no longer apply to franchises.

The Regulations provide that only Saudi nationals and Saudi companies wholly owned by Saudi nationals may act as commercial agents in Saudi Arabia.<sup>1</sup>

The Regulations also impose certain requirements on the commercial agent to guarantee the quality of the products and (where appropriate given the type of product) to make available necessary maintenance and spare parts to consumers during the term of the agency and for up to a year after its termination.

### 1.2 The Registration Requirement

The Regulations require that any commercial agency agreement be registered at the Ministry by the Saudi commercial agent within three

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<sup>1</sup> Pursuant to a decision of the Supreme Economic Council in March 2007, Saudi companies with up to 75% foreign ownership may be licensed to engage in distribution (wholesale and retail trade) activities subject to certain restrictions. These include a minimum capital investment requirement of SAR 20 million for each foreign investor. More recently, starting in 2016, foreign investors were permitted to own up to 100% of such companies, subject to the fulfillment of even more stringent capitalization and other requirements. A number of distribution/trading companies with foreign participation have been formed but so far, the Ministry is maintaining the general position that only wholly Saudi-owned entities can register as “commercial agents” for purposes of the Regulations.





(3) months of its commencement. For an agreement to be accepted by the Ministry for registration, it must be notarized before a notary public, legalized by the Saudi Consulate in the country where the Supplier is located and, upon arrival in the Kingdom, be officially translated into Arabic. The Ministry reviews commercial agency agreements submitted to it for compliance with the Regulations and the policies

and practices of the Ministry. One requirement, which derives from the definition of “commercial agent” in the Regulations, is that the agreement be entered into either directly with the manufacturer of the products subject to the agency or the manufacturer’s representative in the manufacturer’s own country.

Other requirements have varied a good deal over the years. At one time, the Ministry insisted that agreements submitted for registration adhere closely to a model form agreement prepared by the Ministry, but over the past several years, it has accepted for registration agreements which differ very significantly from the “model form” in both form and substance.

A 1998 Ministry circular states that commercial agency agreements submitted for registration should include provisions requiring (a) some sort of warranty by the foreign party as to the good quality of the products and their compliance with applicable standards set by the Saudi Arabian Standards Organization (“SASO”), if any; (b) the foreign party to supply spare parts for the products (if applicable) during the term of the agency and for up to a year after its termination and the agent to provide spare parts and maintenance service to customers in all regions of Saudi Arabia and not just in the major cities, (c) the foreign supplier to provide a certificate of origin of the products, (d) the parties to announce any defects in the products and to withdraw the defective products from the market for repair or replacement at the manufacturer’s expense, (e) the agent to provide technical and managerial training to Saudis, and (f) disputes relating to the agency relationship to be resolved by arbitration or litigation in

Saudi Arabia. Based on our experience, however, the Ministry is flexible about these requirements. The last requirement, for example, has been interpreted (at least until recently) to mean simply that the agent should try to convince the foreign supplier to agree to resolve disputes in Saudi Arabia. Many agreements providing for foreign dispute resolution and foreign governing law have been registered, although the Ministry has recently started insisting that agreements submitted for registration be governed by Saudi law even if they provide for foreign dispute resolution.

Historically, the Ministry's policy was also that commercial agency agreements submitted for registration should confer exclusive rights on the agent for the line of products and territory covered by the agency. Although this was not always insisted upon in practice, registered agreements were effectively treated as exclusive, whether they were so by their terms or not, since the Commercial Agencies Department would not register more than one agreement for the same products and territory at the same time.

In 2002, the Ministry's Legal Department issued an opinion supporting the registration of non-exclusive agreements, including the potential registration of multiple non-exclusive agreements for the same products and territory. The Commercial Agencies Department initially resisted this view but has now accepted to register multiple non-exclusive distributorships in the same territory in at least some instances. This position has been strengthened following Saudi Arabia's adoption of its first Competition Law in 2005. The governmental body that administers the Competition Law has questioned the validity of exclusive distribution arrangements. Moreover, as officials at the Commercial Agency Department have advised, the body has also adopted a policy that although they will continue to accept exclusive agreements for registration, they will not treat them as such and will not refuse to register a new commercial agent/distributor on the basis that an existing, exclusive agent/distributor is already registered.



Both the responsibility for registering a commercial agency agreement with the Ministry and the penalties for non-compliance fall upon the Saudi commercial agent rather than the foreign party. In our experience, such penalties are seldom (if ever) imposed in practice, and non-registration does not seem to prevent commercial agents from operating effectively for the most part in Saudi Arabia. For this reason, and because registration is not a prerequisite to enforceability of an agreement in Saudi Arabia, foreign suppliers sometimes take the position that effecting the registration is entirely the problem of the Saudi party.

Registration does confer a certain status on the commercial agent which it would not otherwise have and which makes it easier for the agent to deal with Government agencies with respect to matters such as compliance with SASO or other government requirements (software, for example, is subject to censorship by the Ministry of Information), infringement of trademarks and other intellectual property rights. Moreover, some government agencies and government-owned companies require submission of a commercial agency registration certificate as a condition for participating in bidding for certain products (although we know of a number of distributors and other types of commercial agents who have successfully marketed foreign products to the Saudi Government without being registered).

Moreover, certain registrations may apply to the products themselves in order to import those products into the Kingdom. For example, pharmaceutical products must be registered with the Ministry of Health and animal feed additives must be registered with the Ministry of Agriculture and Water. It is generally necessary for the foreign supplier to have a distributor that is registered with the Ministry before those products can be registered with the relevant ministry and imported into the Kingdom.

### 1.3 Termination

Once a distribution agreement or other type of commercial agency agreement has been registered by a commercial agent for a given line

of products or services and territory, it has historically been difficult to register a new agreement in its place. When a new agent was appointed and this agent attempted to register its agreement at the Ministry, the Commercial Agencies Department would typically refer the new agent to the Committee for Settlement of Commercial Agency Disputes (the “Committee”) if there was a pre-existing exclusive registration. The Committee would then ask the former agent whether it objected to the new agent being registered. If the former agent objected, the Committee would review the facts of the dispute.

The Committee is not a court and has no authority to award damages. Rather, its role is to attempt to mediate between the parties to promote an amicable settlement, failing which it is supposed to make a recommendation to the Ministry as to whether the existing registration should be cancelled immediately or postponed until the dispute is resolved by arbitration or the courts.

Although it has been possible to convince the Committee to recommend in favor of transferring the registration, the process can be very prolonged, since the Committee is only a part-time body. In some cases, it has taken years to make a recommendation one way or the other. In the past, the terminated commercial agent would in such case remain the only registered agent for the products or services. Technically speaking, a new commercial agent should not act as such without registering, and even though the penalties for failing to register have never been aggressively enforced and unregistered agents can usually operate effectively, the fact that they are unregistered may, in some cases, cause them to keep a lower profile and/or interfere in other ways with their ability to market the foreign company’s products and/or services. For example, as already noted, an unregistered agent might, in some cases, have difficulty marketing products or services to government agencies and certain government-owned companies if the registered agent objects (although this is by no means always the case).



The role of the Committee and its continued ability to impede the registration of a new commercial agent is called into question by the new policy adopted by the Commercial Agency Department not to enforce exclusive arrangements. As a result, the main advantage provided by proceedings which may delay registration of a new commercial agent has been undermined. However, the Committee continues to play a role in attempts to deregister terminated commercial agents. While the inability to deregister is not a major issue under the current policy, those policies could change again in the future.

Unlike the situation in many other Middle Eastern countries, there is at present no regulation in Saudi Arabia that entitles a distributor or any other kind of commercial agent to any sort of indemnity upon the non-renewal or termination of a commercial agency. The Saudi courts are not bound by any formal system of binding precedent and there is no case reporting system, but in our experience, they do not typically award termination compensation unless there has been a breach of contract, the contract calls for such compensation to be paid or the court can be convinced that there has been a serious abuse of rights.

Even in those cases where Saudi courts have awarded compensation to the distributor, the awards have historically been limited to direct, actual and easily quantifiable damages and have not included compensation for lost profits or other consequential damages, which typically form the bulk of a termination compensation claim. In a number of recent distributor termination cases, however, the Board of Grievances<sup>2</sup> has taken a somewhat broader view than it has in the past regarding compensation and in particular has issued decisions compensating terminated distributors for “goodwill” allegedly created

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<sup>2</sup> Previously, a commercial division of the Board of Grievances was the competent tribunal. However, the Commercial Court was recently established and started operating from 21 September 2017. This was in accordance with an announcement made in October 2007 relating to major reforms to the Saudi judicial system, including the establishment of the new Commercial Court. It is expected, but not certain, that the Commercial Court will continue to apply the same approach as the Board of Grievances — at least in the short run.

for the principal and calculated based on a percentage of sales achieved by the terminated distributor or (if known) by the new distributor. It is our understanding that these cases involved either contracts containing an express (but unquantified) right to termination compensation, such as the Ministry's "model form," or terminations that were deemed to violate terms of the relevant contract. Hence, they do not seem to signal a trend toward any new extra-contractual compensation right. However, limitations on compensation for breach of contract may not be enforceable.



## Slovakia

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 Law Applicable

Agency agreements are governed by Sections 652 to 672a of Act No. 513/1991 Coll., Commercial Code, as amended. The Agency Directive has been implemented by an amendment to the Commercial Code, effective as of January 1, 2002. The amendment is retrospective and therefore also applies to agency agreements concluded before January 1, 2002. However, the validity of such agency agreements will be decided on the basis of the provisions of the Commercial Code effective at the time of the conclusion of the agency agreement.

Where the agency agreement states that the governing law is other than Slovak law then, provided that the choice of law is valid under Slovak law, the provisions of the Commercial Code will not apply. However, if the law of a state outside the EU is chosen, an agent will be entitled to a severance payment in the event that the agency agreement is terminated (see section 1.5.3 below), irrespective of the choice of law governing the contract, as these provisions of the Agency Directive are mandatory in respect of agents operating in the EU.<sup>1</sup>

The regulations in the Commercial Code generally apply if the requirements of the statutory definition of an agency agreement as set out in Section 652 (1) of the Commercial Code are met. An agency agreement is defined as an agreement under which an independent entrepreneur or agent undertakes to perform certain activities for the principal aimed at the conclusion, or the negotiation and conclusion, of transactions on behalf and for account of the principal, and the

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<sup>1</sup> As mentioned in the Introduction, one important principle in international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities under the Agency Directive, notably those entitling the agent to compensation or an indemnity payment on termination.

principal undertakes to pay the agent a commission. For the rules dealing with commercial agents to apply, it is imperative that these characteristics are met.

Both agents for goods and agents for services are subject to the agency provisions of the Commercial Code to the extent that, based on the Slovak conflict of laws principles, such provisions apply.

It should be noted that Slovak law also recognizes another type of agency agreement (“mandátna zmluva”) that also applies to agents who are not independent entrepreneurs and where the objective of such agency agreement is more general and not limited to the conclusion of transactions.

The relevant provisions governing agency agreements are not generally applicable to exclusive commercial representation, used largely for distributorship purposes, although there are certain elements of the agency provisions that are also used when negotiating exclusive commercial representation in the Slovak Republic.

### *1.1.2 Formal Requirements*

An agency agreement must be concluded in writing. The written agreement must determine the type of transactions to be negotiated or concluded by the agent and stipulate the obligation of the principal to pay commission to the agent for the services. There is no specific requirement that an agency agreement be registered with any public authority.

According to Section 40 of the Slovak Civil Code, if a commercial relationship is not entered into in the form required by law or by agreement of the parties, it shall be null and void. In addition, Section 37 of the Civil Code provides, among other things, that a commercial relationship must be made in a definite and intelligible manner; otherwise, it shall be null and void. Accordingly, if an agency agreement is not concluded in written form, or does not include an intelligible definition of the agent’s obligations (ie, the type of





transactions to be negotiated or concluded), the agency agreement will be null and void by virtue of law and with no need of a further court decision.

#### 1.1.3 *Individual/Corporate Entity*

An agent may either be an individual or a legal entity.

#### 1.1.4 *Duration of Agreement*

An agency agreement may be concluded for a fixed or an indefinite period of time.

Where the parties to a fixed-term agency agreement continue to abide by its terms after its expiration, the agency agreement is deemed to be extended for an indefinite period of time terminable on notice. This rule is set out in the Commercial Code, as amended pursuant to the Agency Directive.

### 1.2 Exclusive/Non-Exclusive

Subject to any applicable competition law restrictions, the parties to an agency agreement may, at their discretion, determine whether the agency shall be construed as exclusive or non-exclusive. In the absence of a specific contractual arrangement, the agency will be deemed to be non-exclusive.

### 1.3 Non-Compete

Subject to any applicable competition law restrictions, the parties to an agency agreement may agree in writing that a non-compete clause will apply on expiry or termination of the agency agreement. A non-compete clause may be for a period of up to two years following expiry or termination of the agency agreement and may only relate to a specific territory or a specific group of customers in such territory.

The court may, at its discretion, limit or cancel an excessive non-compete provision, if appropriate.

## 1.4 Commission

### 1.4.1 *Basic Principles*

An agent is entitled to a commission on all transactions concluded during the contractual period where (i) the transaction has been concluded as a result of the agent's efforts or (ii) the transaction is concluded with a third party whom the agent has previously acquired as a customer for transactions of the same kind. In the case of an exclusive agency in respect of a certain territory or group of customers, the agent is also entitled to commission on transactions concluded during the contractual period with customers from such territory or belonging to such group of customers.

The agent is entitled to the commission agreed in the agency agreement. If the agency agreement does not include a definition of commission or its amount, the agent will be entitled to commission as calculated by reference to the commission customarily paid to agents carrying out similar activities as those performed by the agent.

### 1.4.2 *When Due and Payable?*

Unless otherwise agreed between the parties, the agent is entitled to commission when (i) the principal fulfils its obligations under the contract or (ii) the principal was obliged to fulfil its obligations under the contract or (iii) a third party has fulfilled its obligations under the contract.

The commission is payable no later than on the last day of the month following the quarter in which the entitlement to such commission arose. This is a mandatory provision and may not be excluded or amended by the parties.

### 1.4.3 *Extinction of Rights to Commission*

The right of an agent to receive commission in respect of a transaction is revoked if it is apparent that the contract between the principal and the third party will not be fulfilled for reasons not caused by the principal. Any commission that the agent has already received in



respect of that transaction must be refunded if the agent's right to receive commission in respect of that transaction is revoked. Any derogations from this provision which are to the detriment of the agent are void.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

Notice to terminate an agency agreement should be given in writing. However, as discussed below, it is not strictly necessary to give notice to terminate an agency agreement of a fixed period of time, as it will expire by effluxion of time.

### 1.5.2 *Notice Period*

If an agency agreement is concluded for an indefinite period and there are no contractual provisions on notice, the notice period is one month for the first year of the contract, two months for the second year, and after two years the notice period is three months. Unless agreed otherwise, the notice period must expire at the end of a calendar month.

It is generally not necessary to terminate an agency agreement for a fixed period of time. However, in order to avoid an implied continuation of the agency agreement, notice should be given within the applicable notice period or a letter should be sent to the agent stating that the agency agreement shall not continue in force after the expiry of the fixed period.

Exclusive agency agreements for a fixed period may be terminated by either party where the volume of transactions in the last 12 months is lower than has been agreed or was adequate, unless agreed otherwise in the agency agreement.

In respect of agreements of an indefinite duration, or those for a fixed term which are terminated in the circumstances set out above, the parties cannot shorten the notice periods referred to above, nor may

the notice period to be observed by the principal be shorter than that to be observed by the commercial agent.

### *1.5.3 Liability of Principal on Termination*

Unless agreed otherwise, an agent is entitled to a commission on transactions concluded after the expiration or termination of the agency agreement where (i) the transaction is mainly attributable to the agent's efforts during the period covered by the agency agreement and the transaction was entered into within a reasonable period after the agency agreement expired or terminated or (ii) an order placed by a third party, which would normally give rise to a commission payment to the agent, reaches the principal or the agent before the agency agreement expires or is terminated or (iii) a third party performed its obligations under the agency agreement after its expiration.

In addition, the agent may be entitled to claim a termination payment from the principal upon termination of the agency agreement if the following statutory requirements are met: (i) the agent acquired new customers for the principal or increased significantly the volume of business transacted by the principal with existing customers and the principal continues to gain substantial benefits from the business with such customers and (ii) the payment of the termination payment is equitable with regard to the circumstances.

The termination payment may not exceed the amount that is equivalent to one year's commission, calculated by reference to the agent's average annual commission over the preceding five years.

No termination payment shall be payable where (i) the agent has terminated the agency agreement, unless such termination is justified by circumstances attributable to the principal or the agent cannot be expected to continue his activities due to age or illness; (ii) the principal has terminated the agency agreement and such termination is the fault of the agent justifying termination of the agency agreement; or (iii) with the consent of the principal, the agent has assigned its rights and duties under the agency agreement to another person.



In addition to a termination payment, an agent may request compensation for damage incurred in connection with the termination of the agreement where the agent has not been (i) paid commission to which it is entitled according to the agency agreement and applicable law or (ii) reimbursed for costs spent in connection with the activities carried out for the principal pursuant to the agency agreement and applicable law.

The parties may not derogate from the abovementioned provisions regarding the termination payment and compensation for damage incurred in connection with the termination of the agreement.

## 1.6 Limitation Periods

In respect of the termination payment claim described above, an agent must bring its claim for this payment within one year of the effective date of the termination of the agency agreement. In respect of all other claims, the general limitation periods applicable to claims under Slovak law will apply. These general limitation periods are either four years or 10 years, depending on the type of claim.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Slovak law does not recognize a distribution agreement as a separate type of contract which would be governed by specific provisions of the Commercial Code. Thus, the relevant agreement can be considered to be a commercial representation or an international exclusive sales contract<sup>2</sup> or quite often a so-called “innominate contract,” having some

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<sup>2</sup> For example, under an exclusive sales contract, a supplier of particular products undertakes not to deliver those products to any person in a particular area other than the exclusive customer and individual sales are effected on the basis of separate sales contracts. A breach under any of such separate sales contracts would be deemed to be a breach of the exclusive sales contract. Also, under an exclusive sales contract, the seller is not bound to sell to the customer; however, if the seller decides to make sales

aspects of the above two contractual types. It may even be a simple series of sale contracts.

The law applicable to a distribution agreement will be that chosen by the parties, subject to Slovak conflict of laws provisions.

### *2.1.2 Formal Requirements*

As distribution agreements are not specifically regulated by the Commercial Code, there are no requirements for the distribution agreement to be in writing and thus there is no filing requirement. As with all contracts, in order to achieve a degree of certainty, it is preferable that terms agreed be finalized in writing.

### *2.1.3 Individual/Corporate Entity*

The distributor may be either an individual or a legal entity.

### *2.1.4 Duration of Agreement*

Distribution agreements can be concluded for a fixed, or an indefinite, period of time.

## **2.2 Exclusive/Non-Exclusive**

According to Slovak law and subject to any applicable competition law restrictions, the parties are generally free to determine the extent of the distribution rights of the distributor. Thus the parties are free to agree as to whether the distributor should have exclusive or non-exclusive distribution rights. For the sake of clarity, the extent of the distribution rights should be set out precisely in the distribution agreement.

A supplier may commit not to sell the particular products within an agreed territory through any other person and/or commit not to make direct sales to customers of the distributor. It should, however, be

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into the area reserved in the exclusive sales contract, such sales must be to the customer.



noted that such restrictions may be void according to Slovak competition law and EU competition law.

## 2.3 Termination

### 2.3.1 *Formal Requirements*

Unless otherwise agreed by the parties, there is no prescribed form for a termination notice. Thus, it may be given orally. For the sake of clarity and in order to be able to meet the burden of proof, it is advisable that notice to terminate be given in writing and by a method which evidences receipt of the termination notice.

### 2.3.2 *Notice Period*

In the absence of a contractual provision, a three-month notice period will generally apply to a distribution agreement entered into for an indefinite period of time.

In respect of a distribution agreement which has been entered into for a fixed period with no provisions on the length of notice, the distribution agreement may not be terminated early (however, the right of the parties to withdraw from the distribution agreement in accordance with the applicable law is not affected).

To the extent that termination is unjustified due to a failure to observe the applicable notice period, the distributor may have the right to damages, eg, for the loss of those future earnings which he would have otherwise earned until the end of the ordinary notice period.

In addition to termination by notice, either party is generally entitled to rescind a distribution agreement for good cause if circumstances arise in which (having regard to all relevant circumstances and the interests of both parties) the terminating party cannot reasonably be expected to wait until the end of the ordinary notice period or the agreed expiry of the distribution agreement. For example, good cause may exist if the distributor intentionally, or with gross negligence, fails to carry out its contractual obligations on a permanent basis or otherwise substantially breaches the distribution agreement.

### *2.3.3 Liability of Supplier on Termination*

The Commercial Code only expressly provides for a termination payment claim of an agent upon termination of an agency agreement. In the absence of any specific liability/indemnity provisions in the relevant distribution agreement, the provisions discussed above in relation to compensation of agents would apply to the extent only that the commercial agency provisions of the Commercial Code apply to the relationship. The provisions of the Commercial Code will apply if the agreement, described as a distribution agreement, is in fact an agency relationship as set out in the Commercial Code and discussed above.

### *2.3.4 Return of Products*

The issue of how remaining stock in the possession of the distributor should be dealt with on and after the termination of a distribution agreement is unregulated under Slovak law. As the distributor owns the stock, the distributor is free to dispose of it unless the distribution agreement states otherwise.

## **2.4 Limitation Periods**

The general limitation periods applicable to claims under Slovak law will apply to claims brought under or in connection with a distribution agreement. These general limitation periods are either four years or ten years, depending on the type of claim.





## Slovenia

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law Applicable*

The provisions on agency agreements are subject to the Slovenian Obligations Code (Official Gazette of the Republic of Slovenia, No. 83/2001 as amended: the “Code”).

The Code introduced significant changes to the legal regulation of agency agreements. The main reason behind the changes was the implementation of the Agency Directive. Slovenia became an EU member state in May 2004, but the changes had already been introduced by the time the Code entered into force in January 2002.

As opposed to the old regulation and following the provisions of the Agency Directive, the Code mainly strengthened the position of the agent, introduced the commercial agent’s right to an indemnity upon termination, and included more detailed provisions regarding commission and certain obligations of the parties as well as provisions for termination of the agreement. However, the Code extends beyond the Agency Directive as its provisions are not limited to agreements for the sale of goods, but also regulate agency agreements for the sale of services.

##### 1.1.2 *Formal Requirements*

There are no requirements as to the form of the agreement. However, each party may request the other party to sign a written document setting out the terms of the agreement with any subsequent amendments.

Written form is, however, required for one particular provision. In general, the commercial agent assumes no liability to the principal for the execution of the contract by the principal’s customer. In respect of contracts between the principal and his/her customers, which were

concluded as a result of commercial agent's efforts or by the commercial agent acting as a proxy for the principal, the principal and the commercial agent may agree that the commercial agent warrants for the customer's execution of such contracts. The warranty can be given only in respect of certain transactions or transactions with certain customers, and is valid only if the warranty agreement is in writing. Under the Code, the commercial agent is entitled to additional payment (del credere commission). Whether the parties may deviate from the rule providing the obligation to pay del credere commission is unclear; according to legal theory, they may not.

### *1.1.3 Individual/Corporate Entity*

The provisions of the Code regulating the agency agreement are applicable only if the agent is an individual or a corporate entity which performs the activity of the commercial agent as part of his/her registered business activities independently and for profit. Due to changes in corporate law in 2008, the term "registered activities" should, as regards corporate entities, be understood as "activities entered into the articles of association."

### *1.1.4 Duration of Agreement*

The agreement can be entered into for a fixed term or an indefinite term. If the parties continue to perform the agreement entered into for a fixed term after the expiry of such term, the agreement is converted into an agreement for an indefinite term. For the purpose of calculating the notice period, the entire duration of the agreement from the time of its initial conclusion shall be considered.

## **1.2 Exclusive/Non-Exclusive**

In the absence of an agreement to the contrary, the principal may, according to the Code, engage several commercial agents for the same territory and the same type of transactions. Should an agent be appointed on an exclusive basis, it further remains to be agreed on whether the principal may sell or solicit orders directly in the territory or to a specific customer group within the agent's exclusivity. As the



Code has no specific provisions, it shall generally be considered that in the absence of any agreement, the principal is permitted to make such direct sales.

### 1.3 Non-Compete

According to the Code, the commercial agent may not take up any obligation to work for another principal in the same territory and for the same type of transactions or the same customer group without the prior consent of the principal. Even if the agent is allowed to work for another principal, he/she will need to act fairly and in good faith and look after the interests of all principals. This might, however, be difficult if he/she is, for example, selling the same type of goods for different principals.

Furthermore, the agent may have a contractual obligation to act only in a specific geographical area or to solicit or sell to a specific group of customers. Such agreement, however, gives rise to a special commission (please see section 1.4 on Commission). The issue of whether the commercial agent may act as an intermediary for customers outside the designated territory or the specific group, if the customer contacted the agent without the agent's solicitation (passive sale), is not regulated by the Code. In the absence of any contractual provisions to this effect, it seems that due to the obligation of the commercial agent to look after the interests of the principal, such actions are allowed. Which agent will be entitled to commission in this case, ie, the one with whose intervention the contract was concluded, or the one acting in the relevant territory or customer group, is unclear.

For issues regarding competition law, please see the EU Competition Law chapter.

## 1.4 Commission

### 1.4.1 *Basic Principles*

Unless otherwise agreed upon between the parties, the commercial agent will be entitled to payment as provided by the Code. Under the Code, the commercial agent is entitled to remuneration in the form of commission. Commission is payable (a) for contracts which were concluded with the intermediation of the commercial agent; (b) for contracts concluded by the commercial agent, if he/she was authorized to do so, on behalf of the principal; (c) for contracts concluded by the principal himself/herself with customers found by the commercial agent; (d) for contracts concluded with customers from a certain territory or belonging to a specific group, even if the conclusion of contracts was not a result of the agent's efforts, if the commercial agent may act only in a specific geographical area or solicit or sell to a specific group of customers; and (e) in certain cases also for contracts concluded after the termination of the agreement, such cases being: (i) if the contract was concluded within a reasonable time after the termination of the agreement as a consequence of the efforts of the commercial agent; or (ii) if the offer of the customer to enter into the contract was delivered to the principal or to the commercial agent prior to the termination of the agency agreement and the contract with the customer falls into one of the categories of contracts described above under (a) through (d).

Under the Code, a conflict between a potential new agent for payment of commission under items (c) and (d) and the former agent for payment of commission under item (e) will generally be resolved in favor of the former agent, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents.

The commercial agent has the right to receive a special payment for his/her effort if he/she successfully enforces payment by the principal's customer. The parties may derogate from this provision of the Code.



Unless otherwise agreed on or customary, the commercial agent is not entitled to reimbursement of his/her regular costs. It is, however, entitled to reimbursement of extraordinary costs he/she incurred to the benefit of the principal or following the request of the principal.

#### *1.4.2 Amount of Remuneration*

The amount of remuneration payable will normally be provided for by the agency agreement. In the absence of any agreement or applicable tariff, the agent is entitled to commission customary in the territory in which the agent is active. If the agent is active in different areas, then he/she will be entitled to the commission customary at the place of his/her registered business address. Should it be impossible to determine a customary payment, then the commercial agent is entitled to commission considering the circumstances of the transaction, mainly the number and value of transactions between the principal and third parties as well as the extent and level of difficulty of the commercial agent's endeavors.

#### *1.4.3 Decrease of Agreed-on Remuneration*

The remuneration payable to the commercial agent will mainly depend on the commercial agent's success rather than on his/her endeavors. However, under the Code the principal has a right to request a decrease of the agreed-on amount of remuneration, if such remuneration is disproportionately high in comparison to the commercial agent's endeavors.

The Code contains no further details on what is considered disproportionately high remuneration, so this will be determined by the courts on a case-by-case basis.

If the agent does not agree with the decrease of remuneration, the principal can claim the decrease either by filing a lawsuit against the commercial agent or by objecting to the amount of remuneration when sued for payment by the commercial agent.

#### 1.4.4 *When Due and Payable?*

The Code transposes the provisions of the Agency Directive in this connection. It further adds that the commercial agent is entitled to receive adequate advance payment on commission, if the agreement between the principal and his/her customer is being executed for a longer period of time.

#### 1.4.5 *Accounting and Audit*

The Code transposes the provisions of Article 12 Paragraphs 1 through 3 of the Agency Directive on the obligation of the principal to render commission accounts and on demand of the commercial agent supply extracts from the principal's books and other information on circumstances relevant for the calculation of commission. If the principal fails to act upon such request or if the commercial agent has doubts on the accuracy of the supplied extract or other information, the commercial agent is entitled to request an auditor to inspect the relevant documentation of the principal, and to inform the commercial agent of the results of such inspection. The parties may not derogate from the provisions of the Code in relation to accounting and audit.

The rules on supply of extracts from the principal's books and other relevant information, including audit rights, apply *mutatis mutandis* for the calculation of the indemnity.

#### 1.4.6 *Statutory Pledge*

As security for payment for the obligations of the principal arising from the agency agreement, the commercial agent has, by operation of the law, a pledge on any payments collected by the commercial agent acting as proxy of the principal, and on any other principal's assets received by the commercial agent in connection with the agency agreement.

The pledge on particular assets remains in force for as long as such assets are in direct or indirect possession of the commercial agent, or for as long as the agent holds a deed enabling him/her to dispose of



the assets. Due to its accessory nature, the pledge terminates also if the principal has no outstanding obligations. If the commercial agent is in possession of assets that need to be turned over to the principal and no payments of the principal are overdue at the time, the commercial agent is not allowed to keep the assets “just in case,” ie, to secure any potential obligations due in the future.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

A contract entered into for an indefinite term can be terminated by either party at any time by the applicable notice period. In general, there are no formal requirements for the termination notice; the unambiguous decision to terminate the agreement can be communicated to the other party in any manner. It is, however, advisable for the termination notice to be in writing.

Notice of termination must be given in writing, if the parties so agreed or if the parties agreed that written form shall be mandatory for the validity of the agency agreement and any amendments thereof.

### 1.5.2 *Notice Period*

According to the general rules of the Code, an agreement entered into for an indefinite term may be terminated at any time, save for an inconvenient time, in accordance with the notice period, by either party serving a termination notice to the other party. Whether the timing of the termination notice is convenient will be determined on a case-by-case basis. Generally, any time will be regarded as convenient, unless it can be proven otherwise by the other party due to particular circumstances.

The Code sets out the minimum notice periods when terminating agreements for an indefinite term. The duration of the notice period depends on the duration of the agreement. The notice period is one month for each initiated year of validity of the agreement; if the agreement was in force for more than five years, the notice period is

six months. Should longer notice periods be agreed on between the parties, the same period needs to be applicable for both the principal and the commercial agent.

### *1.5.3 Early Termination*

Generally, agreements entered into for a fixed term cannot be terminated prior to the expiry of the set term. There are, however, exceptions to this rule. The agency agreement can be terminated prior to the elapse of the fixed term (for agreements for a fixed term) or without notice period (for agreements for an indefinite period), respectively, on serious grounds.

The only specific reference the Code gives for what can be understood as “serious grounds” is the breach of obligations of the other contractual party or exceptional circumstances. These exceptional circumstances or other potential serious grounds that lead to an early termination will need to be considered and in the event of a dispute tested by the courts on a case-by-case basis. Generally, circumstances that can be regarded as normal business risk will not present serious grounds for the early termination of the agreement.

The agreement cannot limit or exclude the right of the parties to such early termination. The agreement can provide which reasons are deemed to be serious grounds justifying the termination. While the occurrence of grounds agreed on between the parties will enable early termination, listing such serious grounds in the agreement cannot, on the other hand, prevent termination owing to other grounds that would be considered “serious” under the Code.

In any event, such serious grounds, due to which the agreement is terminated, need to be communicated to the other party when the notice is given. If these grounds are not described, the termination notice cannot effect an early termination, but may in the event of an agreement for an indefinite term be considered as a termination with notice period.





#### 1.5.4 Termination Payment - Indemnity

The Code opted for the introduction of a termination payment in the form of an indemnity as provided by Article 17 Paragraph 2 of the Agency Directive. However, the right of the commercial agent to an indemnity does not preclude his/her claim for compensation of damages under the general rules of Slovenian law, if and to the extent the agent's damages due to the termination are higher than the total amount of the indemnity and commission that the agent is entitled to receive.

Generally speaking, the provisions on circumstances which give rise to or exclude the right to an indemnity are transposed from Article 17, Paragraph 2 and Article 18, respectively, of the Agency Directive.

In comparison to the Agency Directive, the Code however extends the right to an indemnity; it further contains additional provisions on calculation of an indemnity and the minimum amount thereof. According to the Code, if an agency agreement concluded for a fixed term is terminated prior to the expiry of such term, or an agency agreement concluded for an indefinite term is terminated prior to the elapse of five years, then the indemnity will be calculated as follows: anticipated income which would be obtained by the agent between the termination date of the agreement and the expiry of the agreed-on fixed term or until the elapse of five years, respectively, minus (costs of introduction of the goods into the market and all other costs incurred due to the performance of the agency agreement minus the agent's income obtained on the basis of the agency agreement).

The result of the above calculation presents a minimum indemnity for all situations in which the commercial agent is entitled to an indemnity.

Further, an indemnity for such amount is payable to the commercial agent even if the conditions for an indemnity are not met (ie, the agent did not bring new customers nor did he/she significantly increase the volume of business with existing customers or the principal does not continue to derive substantial benefits therefrom, and the indemnity is

not equitable having regard to all the circumstances). Although such additional provisions of the Slovenian law have been criticized by legal commentators, they nevertheless remain in force.

Though the agency agreement may set forth detailed provisions on indemnity, the parties may not in advance derogate from the provisions of the Code regulating an indemnity to the detriment of the commercial agent.

## 1.6 Limitation Periods

The general three year limitation period applies also to claims arising from an agency agreement. The limitation period starts when a particular claim becomes due.

There is a special provision to note as regards the right to an indemnity. Although the same limitation period applies, the commercial agent needs to notify the principal of his/her intent to enforce the right to an indemnity within one year after the termination of the agency agreement. Failure to notify the concerned parties causes the loss of such right. There are no provisions as to the form of notification, though for evidentiary purposes, written form with proof of delivery is advisable.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Distribution agreements are not subject to any particular statutory provisions. The case law of the Slovenian courts relating to distribution agreements has been developing in recent years, but it is still limited. It is therefore advisable for a distribution agreement to regulate the obligations of the parties in sufficient detail. The parties are free to agree on the terms of the contract, provided that the contractual provisions do not contravene the mandatory rules of the Code as well as of other legal provisions, such as competition law.



Distribution agreements are mainly subject to the rules of the Code regulating contracts in general. Which other rules will apply to a particular distribution agreement depends largely on the content of the agreement. Since distribution is generally regarded as a legal relation based on the sales contract, some provisions of the Code on the sale of goods will in most cases also apply to a distribution agreement. If a distribution agreement contains elements of other types of contracts as well (eg, agency agreements), the rules of the Code regulating such other type of contract may also be applicable. The said rules of the Code will apply to the extent they are mandatory and to the extent the distribution agreement is silent on a particular issue.

### *2.1.2 Formal Requirements*

There are no requirements as to the form of distribution agreements.

However, for evidentiary purposes, it is advisable to sign a written agreement. For example, if there is no written document, it might in practice be hard for the distributor to prove that his/her relation with the supplier extends beyond individual sales. The distinction may have several consequences, for example, in the obligation of the supplier to supply goods during the notice period. If the legal relation is based on individual sales only, then the supplier may at any time stop accepting individual orders. If, on the other hand, a distribution agreement is in place, then the supplier wanting to terminate the agreement will need to observe the notice period and continue to accept individual orders during the notice period and supply the goods so ordered.

### *2.1.3 Individual/Corporate Entity*

The distributor may be a company or an individual as a sole proprietor.

#### 2.1.4 *Duration of Agreement*

The agreement may be entered into for a fixed term or an indefinite term. In the absence of any provisions, it will be deemed that the agreement is entered into for an indefinite term.

### 2.2 Exclusive/Non-Exclusive

Subject to compliance with the applicable competition law provisions (please see chapter on EU competition law for further details), the parties may agree on distribution on an exclusive or non-exclusive basis. It is also advisable for the parties to agree whether the supplier himself/herself may directly sell the goods in the territory covered by the distributor. In the absence of any provisions to the contrary, the distributor will be deemed to be a non-exclusive distributor and the supplier will not be precluded from making direct sales. However, to avoid doubt, it is advisable to regulate the issue expressly in the distribution agreement.

### 2.3 Non-Compete

Subject to compliance with the applicable competition law provisions, the parties may agree that the distributor shall not distribute goods which compete with the goods of the supplier.

### 2.4 Termination

#### 2.4.1 *Formal Requirements*

There are no formal requirements for the termination of a distribution agreement.

#### 2.4.2 *Notice Period*

As mentioned above, there are no specific statutory provisions regulating distribution agreements. However, in relation to terminating a distribution agreement, the legal theory and recent court practice indicate that rules regulating agency agreements shall be applicable *mutatis mutandis* (please see section 1.5.2).



As mentioned, however, which rules apply to distribution agreements will largely depend on the content of the agreement itself.

Should the general rules (and not the rules regulating agency agreements) apply in a particular case, the parties would be free to determine the duration of the notice period in the distribution agreement. The agreement may also provide that there will be no notice period, which means that the agreement will be terminated as soon as the other party receives a termination notice. In the absence of contractual provisions regulating the issue, according to the general rules a customary or a reasonable notice period is to be observed. In Slovenia, there is very little practice or precedent on customary notice periods. Therefore, a reasonable notice period will need to be determined on a case-by-case basis.

#### *2.4.3 Liability of Supplier on Termination*

Under the Code, the distributor is not entitled to any termination payment in the form of an indemnity upon termination of the agreement. According to legal theory, however, the distributor may — by way of analogy — be entitled to an indemnity along the lines of a commercial agent, particularly if a distribution agreement contains elements of an agency agreement.

Upon termination of the agreement, either party may under general rules claim damages only if the conditions for liability for damages are fulfilled. The terminating party may, for example, be liable for damages due to termination on an unreasonably short notice period (where the contract was silent on notice periods).

#### *2.4.4 Return of Products*

Under Slovenian law, the supplier has no obligation to buy back any goods that remain unsold at the time of termination of the agreement. Likewise, the distributor has no obligation to sell the goods back to the supplier. Such obligations may be agreed under the distribution agreement.

## 2.5 Limitation Periods

The general three year limitation period applies to claims arising from a distribution agreement. The limitation period starts when a particular claim becomes due.



## South Africa

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 Law Applicable

The law of agency in South Africa is predominantly regulated by common law, and the Consumer Protection Act, 2008 (“CPA”). There are further requirements imposed by legislation in South Africa which relate to specific transactions and in particular those concluded by agents.

Common law still remains the primary regulator of the law of agency in South Africa.

#### ***The Common Law***

The common law recognizes two “types” of relationships between agent and principal, namely, a relationship of representation and a relationship of mandate.

In a relationship of **representation**, the agent is entitled to perform juristic acts on behalf of the principal, and, as such, acts as the representative of the principal. In order to do this, the agent requires authority to so act, which may arise from:

- (a) a unilateral grant of authority from the principal (express, tacit or implied); or
- (b) by operation of law.

The extent to which the agent may incur legal obligations on behalf of the principal depends on the extent of authority granted.

A relationship of **mandate** involves a bilateral contract in which one person (the mandatory), undertakes to perform some lawful task on behalf of another (the mandator). The mandatory may be

remunerated, and the obligation to remunerate depends on the contract of mandate between the mandator and mandatory. As a general proposition, the mandatory is not the mandator's representative and therefore does not have the authority to incur legal obligations on behalf of the mandator. The role of the mandatory is thus limited to bringing about an opportunity for the principal to enter into, vary, or terminate a contract or a contractual obligation but the mandatory does not do so on the principal's behalf.

Modern commercial transactions are predominantly concluded through representation agency relationships, as such the law detailed below refers to the law governing such relationships unless the context indicates otherwise.

Any agency relationship must not contemplate conduct by the agent that is against the law, immoral or contrary to public policy. To the extent that an agreement contemplates such conduct, it will be void.

The common law distinguishes between general and special agents. A general agent is an agent who is authorized to act for a principal in all transactions of a particular nature, or in all matters concerning a particular business, or in all transactions that the principal could perform personally. On the other hand, a special agent is an agent who is engaged by a principal for a particular transaction or a specific, limited purpose. Once this purpose has been achieved, the agent's authority will automatically terminate.

### ***The CPA***

The definition of "franchise agreement" under the CPA is broad enough in scope and includes the type of transactions and contractual terms which are sometimes included in agency and distribution agreements. Thus an agency agreement may, if certain restrictive provisions are imposed on an agent, constitute a "franchise agreement" as contemplated by the CPA. As such, provisions which allow the principal/supplier to dictate and impose *inter alia* business conditions and reporting obligations on an agent/distributor, could find





themselves in a deemed franchise relationship and in turn attract additional obligations to their agents/suppliers in turn. To the extent that such agreements are deemed to be “franchise agreements,” they will be subject to the requirements laid out in sections 2.1.1 and 2.1.2 below.

### *1.1.2 Formal Requirements*

Certain additional requirements are required for specific transactions under the applicable governing legislation.

In terms of the Alienation of Land Act, 1981 in order to alienate land via an agent, the agent must have authority in writing. Furthermore, the actual alienation of land must be contained in a deed of alienation signed by the parties thereto (or the agents with written authority). If either of the above requirements are not met, the purported alienation is void.

The General Law Amendment Act, 1956 which governs suretyship agreements, holds that no suretyship agreement will be valid unless it is concluded in writing. However, the authority of the agent to conclude such an agreement need not be in writing.

If an agreement does not fall within the aforementioned categories, the principal may confer authority to the agent either orally or in writing and the agent may conclude any agreement, within the authority conferred, either orally or in writing.

However, it is advised, for any transaction, that both the conferring of authority and the agreement be reduced to writing in a formal agreement. This allows for the principal to clearly define the extent of the agent's powers as well as the terms of the appointment in a manner which substantially reduces the risk of a potential dispute.

### *1.1.3 Individual/Corporate Entity*

An agent may be either an individual or legal entity. In light of the broad definition of an “employee” under the South African Labour

Relations Act, it is important that the formal agreement which gives rise to the agency relationship plainly illustrates that the relationship between the parties is one of principal/agent and not employer/employee.

#### *1.1.4 Duration of Agreement*

The parties are free to stipulate a period during which the relationship will exist in the agency agreement. The end of the period may be defined by reference to a date, specified year or event. Upon the happening of the event or effluxion of the period stipulated in the agreement, the relationship will be brought to an end. In the case of a special agent, the relationship will be brought to an end upon the performance, or substantial performance, of the particular transaction for which the agent was authorized to conclude. A contract of agency may be expressly or impliedly renewed before it expires.

In essence, the duration of the agreement is regulated by the terms of the agreement concluded between the parties and it is therefore important that such period is defined clearly and both parties understand when the agreement will expire.

### **1.2 Exclusive/Non-Exclusive**

There are no restrictions on the ability of a principal to appoint an agent on an exclusive or non-exclusive basis. If this issue is not dealt with in the agency agreement, the agent will be deemed non-exclusive.

Given that the essence of an agency agreement is the conferral of the principal's peculiar powers onto an agent, the principal is entitled to determine the extent and exclusivity of the powers so conferred.

### **1.3 Duties of an Agent**

The agent has a number of obligations towards the principal when performing under the agreement.



The agent must ensure that they personally carry out the terms of their agreement with the principal. The agent is not entitled to delegate the task to another without the principal's consent. Any permitted delegation will not give rise to privity of contract between the principal and the sub-agent, although the sub-agent will still owe fiduciary duties to both the principal and agent separately.

Furthermore, substantial performance of the agreement will suffice. This is a derogation from the ordinary rules of contract under South African law.

The agent is required to carry out the terms of the contract with reasonable care, skill and diligence. This standard is set as that of a reasonable and prudent person in the circumstances. The duty of skill is raised or lowered according to the skills the agent has or professes to have.

A fiduciary relationship is also established between the principal and agent. This relationship operates in a similar manner to the director's fiduciary relationship with a company. This relationship includes various sub-duties, such as the duty to not make secret profits, disclose relevant information and avoid conflicts of interest unless without the principal's consent.

#### 1.4 Conferral of Authority

Authority can be conferred from the principal to the agent in three ways, it may be:

- (a) expressly granted;
- (b) tacitly granted; or
- (c) implied by law.

Authority can be expressly granted orally or in writing, except where legislation specifically says that authority must be granted in writing (see section 1.1.2 above). The terms of the agency agreement will be

interpreted in accordance with the ordinary rules for interpretation of contract.

Authority may also be tacitly granted if a grant of authority can be inferred from the principal's words, conduct and the surrounding circumstances. In terms of South African case law,<sup>1</sup> authority is deemed tacitly granted "whenever authorization in favor of one person to represent another is on a balance of probabilities, the reasonable inference to be drawn from the conduct of the parties." Ultimately, the factual question to be determined is whether an intention on the part of the principal to grant authority can be inferred from the principal's words, conduct and the surrounding circumstances. If the granting of tacit authority is established, the legal consequences which will flow therefrom will be identical to if the authority was expressly granted. Authority may also be founded on the basis of ostensible authority, where a party represents, or permits it to be represented to a third party that he/she has given authority to another. In such case, the former party would become bound to the third party if the third party, induced by the representation, enters into a transaction reasonably believing that the other has the authority that he has been represented to have. In this scenario, the agent is said to have apparent authority, even though it has not actually been granted to him/her by the principal.<sup>2</sup>

Authority may also be implied by operation of law. For example, partners have authority to bind partners in a partnership, members of a Close Corporation have authority to bind their Close Corporation, and the board of directors of a company have authority to bind their companies.

Furthermore, where an agent cannot be said to have authority under the above three circumstances, it is possible that they may be granted apparent authority through ratification or estoppel. Ratification allows for authority to be granted ex post facto for an act which was not

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<sup>1</sup> Coetzer v. Mosenthals 1963 4 SA 22 (AD).

<sup>2</sup> Makate v. Vodacom Ltd 2016 (4) SA 121 (CC).



authorized in advance. In order for ratification to be effective, the following criteria must be present:

- (a) the unauthorized agent must disclose to the third party that he was acting as an agent; and
- (b) at the time of the unauthorized transaction, the principal must have been in existence (an exception being section 21 of the Companies Act 71 of 2008, where an incorporator can enter into a contract on behalf of a yet-to-be-incorporated company).

A principal may also be “estopped” from denying that the agent did not have authority if the principal made a representation to the third party that the agent had authority and the third party was reasonable in relying on such a representation.

Where the terms of the agency agreement are not expressly stated, the following terms will be implied in the agency agreement, that the agent has:

- (a) the powers which are necessary to enable the agent to perform their obligations; and
- (b) the usual powers to conduct themselves in ordinary business or what is “custom” in respect of particular types of agents.

### 1.5 The Doctrine of the Undisclosed Principal

The doctrine of the undisclosed principal applies where an agent fails to disclose that he/she is acting in a representative capacity when contracting on a principal’s behalf with a third party.

The consequences of the doctrine are that the principal is entitled to “step into” the contract entered into by the agent so that the principal becomes a party to the contract and not the agent. The principal may then demand any performance due under the contract from the third party.

From the perspective of the third party, a consequence of the doctrine is that the third party, on becoming aware of the principal, can elect to hold either the principal or agent liable for the performance or any breach of the contract.

The doctrine of the undisclosed principal will not apply where the doctrine has been specifically excluded or where the agent is purporting to act on behalf of more than one principal.

## 1.6 Remuneration

If the parties have agreed to remuneration, the principal is obliged to pay the agent as agreed. Unless the parties agree otherwise, the agent is only entitled to payment once the agent has completed, or substantially completed, the services that he agreed to perform.

In the absence of agreement as to remuneration, certain common law rules will apply. If the agent is a professional (auctioneer, broker, accountant etc.) then they are entitled to payment in accordance with the relevant industry standards and regulations. If the agent is not a professional then they are entitled to remuneration which is reasonable in the circumstances. In light of the subjective nature of what is reasonable in the circumstances, it is advised that the parties agree to the manner of remuneration in the formal agreement.

## 1.7 Commission

### 1.7.1 *Basic Principles*

The essence of a commission agreement is that the principal promises to pay a sum of money upon the happening of a specified event which involves the rendering of some service by the agent. The parties are free to determine the event or nature of the service which will give rise to the entitlement to commission, essentially leaving the circumstances in which the agent will become entitled to commission up to the parties to the agreement.



### 1.7.2 *When Due and Payable?*

Unless the parties agree otherwise, commission becomes due on the happening of the specified event or rendering of the relevant service even if the principal obtains no benefit. Substantial performance of the terms of the agreement is sufficient to give rise to an entitlement on behalf of the agent to their commission. In order to claim commission, the agent must be able to demonstrate that they were the proximate cause of the coming into being of the transaction which is the end result of the negotiations.

### 1.7.3 *Extinction of Right to Commission*

If the specified event or service to be rendered does not occur, then the agent is not entitled to their commission, even if the principal obtains the sum of money for which he was asking but acquires it as a result of a different transaction. The exception to this rule is the doctrine of fictional fulfilment. The doctrine of fictional fulfilment operates where a person, in this case the principal, deliberately, and in order to escape an obligation, prevents an event from taking place. In this instance the event may, by a fiction of law, be deemed to have taken place in which case the agent will be entitled to their commission.

Furthermore, if an agent fails to uphold its duties (see section 1.3 above) then they will forfeit their right to commission. Negligence on the part of the agent gives the principal grounds for damages if he has suffered loss, but it does not entail forfeiture of commission, unless it is the proximate cause of the principal losing the benefit of the transaction.

## 1.8 Termination

### 1.8.1 *Formal Requirements*

The authority of an agent may be terminated in the following ways:

- (a) the source of the authority ceases to exist;

- (b) performance;
- (c) effluxion of time;
- (d) principal's death, insanity, insolvency;
- (e) the agent's death or insanity;
- (f) the special relationship granting authority ends (eg, termination of partnership relationship, no longer a member of a Close Corporation or attainment of majority);
- (g) if authority derives from a contract, via the ordinary rules of contract governing termination; and
- (h) through revocation or renunciation.

The relationship of principal and agent terminates when both parties have fulfilled all their obligations, either entirely or substantially.

The parties are free to stipulate a period during which the relationship will exist in the agency agreement. The end of the period may be defined by reference to a date, specific year or any time period agreed between the parties. If the parties indicate their intention in general terms then the effluxion of time beyond that which, even on a generous estimate, they must have intended, brings the relationship to an end.

If the agency relationship arises from an agreement which is unremunerated, both the agent and the principal are free to repudiate or revoke the agency relationship respectively. The common law is currently unclear as to the situation when the contract is remunerated or the principal confers irrevocable authority, however, it is submitted that when a principal revokes his authority on a contract which is remunerated or the authority is irrevocable, he will be liable for contractual damages in accordance with the ordinary rules for breach of contract.





### 1.8.2 *Notice Period*

Unless the agreement indicates otherwise, before an agency agreement is terminated the party wishing to terminate must give reasonable notice. What is reasonable is a factual question involving the circumstances of each case.

### 1.8.3 *Liability of Principal on Termination*

As stated in section 1.7.1 above, the principal may be liable under the ordinary rules for breach of contract where they terminate an agency agreement which is remunerated or involves the conferral of irrevocable authority

## 1.9 Indemnity

The principal must indemnify the agent for all loss or liability duly incurred by the agent in the execution of the mandate, or directly caused to the agent by the execution, provided it is causally connected to the performance of the mandate and is reasonably foreseeable that such a loss would occur from the performance of the mandate.

If the principal fails to indemnify, the agent possesses the general contractual remedies available to him under the applicable rules of contract.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

Distribution agreements are generally governed by the terms agreed between contracting parties under the privity of contract. These agreements in South Africa are not subject to a single body of legislation, and are accordingly, predominantly governed by the law of contract.

There are, however, specific circumstances in which distribution agreements will be subject to legislation. The applicability of certain legislation will depend on the industry in which the distribution agreement is entered into. Irrespective of industry, however, distribution agreements in South Africa must be compliant with public policy, mandatory competition laws and the law relating to black economic empowerment. The broad legislative framework which impacts most distribution agreements includes;

- (1) the CPA;
- (2) the Competition Act, 1998 (“the Competition Act”); and
- (3) the Broad Based Black Economic Empowerment Codes of Good Practice (“B-BBEE Codes of Good Practice”); and
- (4) the exchange control regulations promulgated in terms of the Currencies and Exchanges Act, 1933 (“Exchange Control Regulations”) in respect of cross-border distribution agreements.

### ***The Common Law***

The South African common law places great emphasis on privity of contract, affording the parties the right to contract on their own terms, within the confines of public policy. To this end, a valid and binding contract is created when agreement is reached, orally or in writing, on the basic terms of the agreement at hand. The common law does not provide for distribution agreements specifically. Instead, the general principles of contract apply to distribution agreement (see section below).

### ***The Consumer Protection Act***

The CPA seeks to provide protection to “consumers” from abuse by “suppliers.” See section 1.1.1. for an explanation of how for the purposes of the CPA, a consumer may be a legal entity. As a general point of departure, the CPA imposes certain formalities in respect of



all transactions that qualify as being subject to the CPA. This includes that all agreements must be in writing and must to be written in plain and understandable language. In the context of distribution agreements, plain and understandable language would be that which is understood by people within the industry, of average literacy skills and minimal experience.

The CPA further prohibits unfair, unjust and unreasonable terms, and prevents the supplier from requiring a consumer, or other person to whom goods or services are supplied at the direction of the consumer;

- (a) to waive any rights;
- (b) assume any obligation; or
- (c) waive any liability of the supplier,

on terms that are unfair, unreasonable or unjust. Furthermore, such terms may not be imposed as a condition of entering into a contract. As such, any terms in an agreement, including those terms relating to price and definition of the main subject which are in breach of the above terms, would be subject to legal challenge by the relevant consumer..

In addition, there are four types of clauses which must be brought to the attention of the consumer in a conspicuous manner. These include:

- (a) exemption clauses;
- (b) assumption of risk clauses;
- (c) indemnity clauses; and
- (d) acknowledgements of fact clauses.

Though the CPA does not bear specific reference to distribution agreements, it provides a significantly broad definition of franchise agreements, which may be extended to include distribution, license

and agency agreements. A franchise agreement in terms of the CPA includes an agreement:

- (a) “in which, for consideration paid, or to be paid, by the franchisee to the franchisor, the franchisor grants the franchisee the **right to carry on business** within all or a specific part of the Republic **under a system or marketing plan substantially determined or controlled by the franchisor** or an associate of the franchisor;
- (b) under which the operation of the business of the franchisee will be **substantially or materially associated with advertising schemes** or programs or one or more trade marks, commercial symbols or logos or any similar marketing, branding, labelling or devices, or any combination of such schemes, programs or devices, that are conducted, owned, used or licensed by the franchisor or an associate of the franchisor; and
- (c) that **governs the business relationship between the franchisor and the franchisee, including the relationship between them with respect to the goods or services to be supplied to the franchisee by or at the direction of the franchisor** or an associate of the franchisor.”

[emphasis added]

To the extent that a distribution agreement contains provisions as set out in paragraphs (a) - (c) above, it would be deemed to be a franchise agreement for the purpose of the CPA, and would be subject to the further requirements set out in more detail below (see section 2.1.2).

“Consideration” paid under the CPA is defined in an equally broad manner, including anything of value given and accepted in exchange for goods or services, including any undertaking, promise, agreement or assurance.



While the CPA does not apply to juristic entities with a turnover above two million Rand, this threshold does not apply in the context of franchise agreements.

Parties to a distribution agreement should also be mindful of the strict liability of manufacturers and distributors under the CPA. Accordingly, they must consider the risk imposed by the CPA where their product may be unsafe, defective or inadequately labeled to give proper warnings and instructions. Where there is a failure in this regard, the distributor, producer, importer and retailer of the goods in question will be held jointly and severally liable for injury, illness or death of a person and damage to property.

### *2.1.2 Formal Requirements*

#### ***The Common Law***

A distribution agreement is concluded orally or in writing, when agreement is reached between the parties on the material terms of the contract. Tacit or implied terms may also form a part of the contract provided they are based on factual averments that support the inclusion of an implied or tacit term. It is unlikely that a term will be tacitly included unless the parties are deemed to have included it at conclusion of the contract. Thus, it is difficult to prove, for example, that the parties intended for a particular distribution agreement to be exclusive, unless it is clear from the parties' representations at the time of conclusion of the contract that they both tacitly consented to such an agreement. Terms may, however, be implied by trade usage, or by way of law, having full consideration of the express terms of a specific agreement.

#### ***The Consumer Protection Act***

To the extent that distribution or agency agreements are deemed to be franchise agreements under the abovementioned definition of the CPA, there are comprehensive formal requirements which should be complied with. Section 7 of the CPA provides that:

“(1) A franchise agreement must-

- (a) be in writing and signed by or on behalf of the franchisee;
- (b) include any prescribed information, or address any prescribed categories of information; and
- (c) comply with the requirements of section 22.”

Section 22 stipulates that any contract entered into in terms of the CPA must be written in plain and understandable language.

Section 7 further provides that the Minister may prescribe additional requirements, including information to be contained within such an agreement. Accordingly, the Minister has provided detailed requirements in Regulation GNR 293 of 1 April 2011 (“**GNR 293**”). GNR 293 specifies that, firstly, a distribution agreement must reflect a statement at the top of the first page of the agreement, to the effect that,

“A franchisee may cancel a franchise agreement without cost or penalty within 10 (ten) business days after signing such agreement, by giving written notice to the franchisor.”

Secondly, a franchise agreement must provide for prevention of the following:

- (1) unreasonable or overvaluation of fees, prices or other amounts;
- (2) conduct which is unreasonable or unnecessary in respect of risks incurred by one party; and
- (3) conduct that is unreasonably necessary for the protection of the legitimate business interests of any party to the system.

Thirdly, a franchise agreement must contain a clause which prevents a franchisor from indirect benefit or compensation, unless such



compensation is disclosed in writing, together with an explanation thereof.

Fourthly, a franchise agreement should contain information subject to GNR 293, which includes, *inter alia*, a description of the goods or services which the franchisee is entitled to render or sell, the respective obligations of each of the parties, and the consideration to be paid to each of the parties.

It must be noted that Section 7 of the CPA does not apply to agreements entered into before its commencement date on 24 April 2010. Thus, the CPA will only apply to new, or renewed franchise agreements.

### ***Compliance with B-BBEE Codes of Good Practice***

The codes apply to entities which need to be measured as to their compliance with ownership, employment and other requirements by black people, as defined by the Broad Based Black Economic Empowerment Act and other regulations. Distributors who constitute an organ of state, a public entity, or a “measured entity” which engages in economic activity with either of the former, will have to comply with the B-BBEE Codes of Good Practice. Though international parties to a distribution agreement may not have to comply directly with the B-BBEE Codes of Good Practice, they may be affected by development and supplier contributions regarding beneficiary distributors.

### ***Exchange Control***

The payment of royalties by South African residents to non-residents for the license of intellectual property is regulated under South African Exchange Control, and such royalties require the prior approval of the South African Reserve Bank (“SARB”).

Distribution agreements often contain license provisions in respect of the licensing of intellectual property, such as in the case of products or

business trademarks/branding, and an allocated license fee/royalty in respect of such licenses rights.

It is important to bear in mind that such royalty payment would be subject to the approval of the SARB when the licensor is not a South African resident, and South African banks are required to withhold the payment of such royalties from the distributor to the licensor until such approval is obtained.

### ***Industry-Specific Requirements***

Depending on the specific category of goods in terms of which the distribution agreement is concluded, certain legislation may apply. For example, where distribution of technological goods containing data which reflects personal information is concerned, the distributor will have to comply with the Protection of Personal Information Act, 2013, and the Electronic Communications and Transactions Act, 2002.

#### ***2.1.3 Individual/Corporate Entity***

The CPA provides a definition for “distributor” which includes both juristic persons, and individuals (sole traders).

In this regard, a distribution agreement is similar to an agency agreement, except to the extent that a distributor is a principal. Irrespective of this, both agreements may be subject to the requirements outlined in the CPA, and thus the same considerations will apply when concluding a distribution agreement to appointing an agent. Similarly, bearing in mind the broad definition of an “employee” under the South African Labour Relations Act, it is important that the formal agreement which gives rise to the distributor and supplier relationship plainly illustrates that the relationship between the parties is one distributor/supplier, and not employer/employee.

#### ***2.1.4 Duration of Agreement***

The duration of a distribution agreement is not generally regulated by statute. The parties to the contract are free to negotiate and agree on





the duration of the agreement, which would then be considered a fixed term agreement. Where the agreement is silent on its duration, it will usually be for an indefinite period which may, in terms of the common law, be terminated on reasonable notice. The length of a distribution agreement may also be subject to performance by one or both of the parties (see 2.3 below).

## 2.2 Exclusive/Non-Exclusive

Like agency agreements, there are no restrictions on concluding an agreement on an exclusive or non-exclusive basis. However, distribution, license, supply, purchase, franchise and certain agency agreements, must comply with the Competition Act which prohibits certain anti-competitive behavior. In particular, the Competition Act prohibits any agreement between parties in a vertical relationship which has the effect of substantially lessening competition in a market. It further prohibits a “dominant firm” from engaging in an exclusionary act, if the anti-competitive effect of such act outweighs its beneficial gain. Thus, parties to an exclusive distribution agreement which effectively creates a “dominant firm” should be mindful of the provisions of the Competition Act.

If exclusivity is not dealt with in the distribution agreement, the agreement will be deemed non-exclusive.

## 2.3 Termination

### 2.3.1 *Formal Requirements*

The termination of distribution agreements in South Africa is predominantly governed by the common law, which determines that an agreement may be terminated:

- (a) upon completion of performance and discharge of the contractual obligations;
- (b) upon agreement between the parties, including instances of release, novation and settlement;

- (c) upon material breach of that is of such a nature that it cannot be remedied, or has not been remedied within a reasonable time;
- (d) where there is unilateral termination, provided for on agreement by the parties, or by operation of law;
- (e) where a party is placed in *mora* as a result of a breach of contract, whether material or not, and fails to remedy the breach within the stipulated timeframe; and
- (f) upon non-fulfilment of a suspensive condition, or fulfilment of a resolutive condition which, in terms of the agreement, would result in the contract being treated as though it never came into force.

It is common place in the case of distribution agreements in South Africa, for the parties to agree to circumstances surrounding termination. Accordingly, parties will usually agree on duration, the circumstances in which termination should be written, and the notice period for termination.

### 2.3.2 Notice Period

Because there is no single body of legislation which governs distribution agreements, parties are free to determine the notice period in the event of termination. As is the case under the common law of contract, parties may enter into a fixed term agreement, or a temporary agreement with a start and end date. It is preferable, however, for the distribution agreement to contain a clause which provides for a certain notice period for termination. Failing the presence of such a clause the common law dictates that a contract may be terminated upon “reasonable notice.”

The courts will determine, on a case-by-case basis, what constitutes “reasonable notice.” In this instance, the courts will take into account various factors which impact the time necessary to constitute “reasonable notice” before a contract is terminated. These factors



include, *inter alia*, the type of agreement, capital expenditure, and sufficiency of time to regulate affairs. The reasonableness of circumstances will be determined against the backdrop of the relevant circumstances, taking into account the agreement as a whole, and the industry norms applicable.

Despite the requirement to give a reasonable notice period before termination of a distribution agreement, the lack of reasonable notice will not render the termination invalid. The termination will have full force and effect, however the aggrieved party will have the right to seek recourse for damages against the terminator.

Where fixed term contracts are concerned, unlawful or early termination will usually result in a claim for damages by the party who is out of pocket, as it is not likely that the parties contemplated such termination, irrespective of whether it is “reasonable” or not, upon entering into a fixed term contract. In this instance, the aggrieved party will have a claim in terms of the profits which it would have made had the other party fulfilled its contractual obligations.

Whether a party may have a claim for compensation at termination depends on the terms of the agreement between the parties. If early termination of an agreement is contemplated, such release will need to be negotiated between the parties in terms of the agreement, and compensation under the contract may be payable.

### 2.3.3 *Liability of the Supplier on Termination*

Where a distribution agreement is terminated in accordance with the agreement, the distributor will not be entitled to recourse against the supplier, and will not be indemnified against the supplier.

Where termination occurs as a result of breach or cancellation, a distributor may have a claim for damages, which will be awarded where the distributor suffered loss as a result of the agreement not being terminated in accordance with its terms. Alternatively, a distributor may have a claim for damages where it has suffered loss, and where the court has implied a provision for termination by

reasonable notice in the agreement, which is different to the notice actually given by the terminating party.

The distributor may also be entitled to damages where there is an outstanding breach of contract by the supplier as at the date of termination, or in the event that the supplier fails to comply with post-termination obligations agreed upon in the contract.

There is no limitation period under the South African common law that applies specifically to distribution agreements. Where a claim arises in terms of a distribution agreement, the party wishing to bring the claim should be mindful of the 3 year prescription period which is of general applicability to claims in terms of agreements, such as distribution agreements, in South Africa.



## Spain

### 1. Agency Agreements

#### 1.1 General

Unless stated otherwise, article references in this section are to Law 12/1992, dated May 27, on Agency Agreements (referred to as the “Spanish Agency Law”).

##### 1.1.1 *Law Applicable*

The Agency Directive has been implemented in Spain by the Spanish Agency Law, which was the first specific regulation on agency agreements in Spain. The Spanish Agency Law contains a full and complete legal regime for agency agreements.

The provisions of the Spanish Agency Law apply to commercial agents, being any independent self-employed intermediary (either an individual or a corporate entity) who has continuing authority to negotiate transactions on behalf of its principal or to negotiate and conclude transactions in the name and on behalf of its principal in consideration for remuneration (Articles 1 & 2). Provisions of the Spanish Agency Law extend beyond the scope of the Agency Directive, including not only agents acting as intermediaries with respect to goods but also with respect to services. It does not apply to agents acting in official stock markets.

The Spanish Agency Law has been configured as mandatory. However, not all of the provisions of the Spanish Agency Law are mandatory, and therefore some of them may be substituted by the agreement of the relevant parties.

In Spain, an agency agreement is governed by the law expressly chosen by the parties. If the parties have not made a choice of law, the agreement shall be governed by the law of the country with which it is most closely connected. According to Spanish law, it is presumed

that an agreement is most closely connected with the country where the most characteristic consideration is performed.

Notwithstanding the express choice of a foreign law by the parties or the application of a foreign law in absence of explicit choice, as mentioned above, according to Spanish conflict of law rules, Spanish courts could apply Spanish law in a situation where such law is mandatory irrespective of the law otherwise applicable to the agreement. Although it is not a unanimous statement, Spanish mandatory rules (ie, those related to the compensation upon termination of the agency agreement) should only apply when the law applicable to the agency agreement does not provide the agent with a similar protection to the Spanish one.

### *1.1.2 Formal Requirements*

Spanish Agency Law, in accordance with the general principles of Spanish civil and commercial law, does not impose any formalities on an agency agreement. Therefore, it is not necessary that the agreement be in writing, nor registered with any public entity or registry. However, any of the parties may request that the agreement be in written form (Article 22). Additionally, if the agent is an individual and at least 75% of their compensation is paid by a sole principal, then the agent is considered as an economically dependent self-employee and therefore their agency agreement must be executed in writing and registered in a specific public registry (Law 20/2007 on 11 July 2007 on Self-Employees).

Finally, to be valid and binding on the parties, any non-compete covenant and/or assumption by the agent of the risk arising from the commercial transactions in relation to which the agent is involved must be in writing. In addition, any such risk-assumption covenant must specify the commission to be paid to the agent as compensation for such risk.

### *1.1.3 Individual/Corporate Entity*

An agent may be either an individual or a corporate entity.

Individuals employed by, or acting as sales representatives for, the principal shall not be considered agents (Article 2). This is because the relationship with the principal is not that of independent contractors.

If the agent is an individual and 75% or more of his compensation is paid by a sole principal, such agent will qualify as an economic dependent autonomous contractor under Law 20/2007 on 11 July 2007 on Autonomous Contractors. The main consequence in this case is that the competent jurisdiction to settle any dispute related to the agency agreement would not be the Civil Courts but the Employment Courts. Employment Courts are usually more favorable to the interests of the employees rather than to the employers' interests and this same position applies to the economic dependent autonomous contractors.

#### *1.1.4 Duration of the Agreement*

Agency agreements may be entered into for either a definite or an indefinite period (Article 23). Where there is no definite term agreed, it is deemed to continue indefinitely.

Indefinite-term agency agreements may be terminated by written notice (see section 1.5 below). If a definite term has been agreed on, the agency agreement will end at expiration. Nevertheless, if upon expiration both parties continue to perform the agreement, the agency agreement is deemed to be converted into an indefinite-term agency agreement.

### **1.2 Exclusive/Non-Exclusive**

The Spanish Agency Law does not govern the exclusivity of the agency.

The parties may determine the extent of the agency agreement and decide whether the agent shall have exclusive or non-exclusive agency rights. Since the exclusivity may refer to a particular

geographical area or to a particular group of clients, to ensure clarity, the level of exclusivity should be prescribed in the agency agreement.

In the absence of a specific choice, the agency is generally considered to be non-exclusive unless the agent proves “de facto” exclusivity.

### 1.3 Non-Compete

Unless stated otherwise in the agreement, the agent shall be free to render its services for entities other than the principal (Article 7).

However, an agent must obtain the prior consent of the principal to conduct business involving products or services competing with those of its principal. This mandatory restriction is required where the agent wishes to compete directly with the principal, carrying out competing business on his own behalf (ie, acting as distributor of such competing products or services), and also where the agent wishes to act on behalf of competing businesses.

The parties may also restrict or limit the professional activities to be carried out by the agent upon termination of the agency agreement (Article 20.1). The Spanish Agency Law sets out the following limits on post-contractual non-compete obligations:

- if the agency relationship has lasted less than two years, the non-compete covenant may not have a duration longer than one year from the date of termination of the agency agreement.<sup>1</sup> If the agency relationship has had a duration of over two years, the non-compete covenant may last up to two years.
- the covenant can only impose restrictions in respect of the geographical areas or the individuals for which the agent carried out its activities under the agency agreement, and may

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<sup>1</sup> This distinction is not included in Article 20.3 of the Agency Directive, which only sets a maximum duration of two years for the non-compete covenant.





only affect the kind of products or services provided by the agent under the scope of the agency agreement.

For the non-compete covenant to be enforceable, it must be in writing.

## 1.4 Commission

### 1.4.1 *Basic Principles*

The parties are free to agree on how remuneration is paid. Article 11 of the Spanish Agency Law sets forth that the parties may agree on either payment of a fixed amount, payment of a commission or a combination of both.

Where the parties have not specifically agreed on the remuneration of the agent, under the Spanish Agency Law the agent will be remunerated in accordance with the commercial practice of the place where its activity is carried out. If no particular practice exists, the agent should be remunerated in accordance with whatever is deemed to be reasonable in the circumstances. If the parties do not reach an agreement, it will be the court that determines what is reasonable.

The commission is defined by the Spanish Agency Law as any element in the agent's remuneration that varies with the number or value of completed business transactions.

The regulation of the commission made by the Spanish Agency Law, which does not apply in case the agent is paid a fixed fee for his services, requires that either of the following circumstances concur in order for the agent to be entitled to the commission:

- the transaction is concluded as a result of the agent's professional participation; and
- the transaction is concluded with a third party with which the agent has previously executed a similar transaction.

If a determined geographical area or a determined group of clients has been assigned exclusively to one agent, such agent will be

entitled to a commission for any transaction concluded by the principal with a person pertaining to such geographical area or group of clients while the agency agreement is in force, even if the agent has not participated in or concluded such transaction (Article 12.2).

Unless agreed otherwise, the agent is not entitled to reimbursement from the principal for any expenses incurred by the agent in carrying out its activities (Article 18).

#### *1.4.2 When Due and Payable?*

Spanish Agency Law provides that commission is due upon occurrence of any of the following (Article 14):

- the principal has performed its obligations under the transaction;
- the principal should have performed its obligations under the transaction or
- the third party has performed its obligations under the transaction.

Commission should be paid no later than the last day of the month following the calendar quarter in which such commission accrued (Article 16). The parties may agree in the agency agreement to a shorter period within which the commission is to be paid, but not a longer one.

#### *1.4.3 Extinction of Rights to Commission*

The agent will lose the right to the commission if the principal provides evidence that the transaction has not been concluded due to a reason for which the principal is not to blame (Article 17).

Any commission that the commercial agent has already received shall be refunded if the right to it is extinguished.

#### 1.4.4 *Accounting and Audit*

Spanish Agency Law sets out certain mandatory provisions regarding the agent's right to be informed of any commission accrued in the course of the agency relationship (Article 15). The principal is required to supply its agent with a statement of the commission accrued for each transaction, not later than the last day of the month following the calendar quarter in which such commissions had accrued. This statement must set out the main components used in calculating the amount of commission. The parties may agree on a shorter (but not longer) period within which the statement will be provided.

The agent is entitled to view the accounting records of the principal. This right is limited to any details that may be relevant for the purpose of determining the particulars of any commission due to the agent, and is to be exercised in accordance with the provisions of the Commercial Code regarding the right to view records.<sup>2</sup> In addition, the agent may request to be provided with any other information necessary to determine the amount of the relevant commission.

### 1.5 Termination

#### 1.5.1 *Formal Requirements*

Spanish Agency Law stipulates the following mandatory provisions in respect of termination (Articles 24 and 25):

- agreements entered into for a definite period of time terminate at the end of the term. However, should the parties continue performing their respective obligations under the agreement, it is automatically converted into an indefinite-term agency agreement; and

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<sup>2</sup> Articles 32 and 33 of the Commercial Code set out certain formal requirements concerning the right to review the records of a business, and stipulate the person entitled to request such a review, how and when may it be made, and what contents of the books may be reviewed.

- to terminate agreements entered into for an indefinite period of time, or fixed duration agreements that by operation of law have been automatically converted into indefinite-term agreements, written notice is required. Either party may provide such notice, without any cause for termination being required.

The agreement may be terminated in any event without prior notice being required in the following cases (Article 26, which is mandatory):

- lack of compliance by either party with its legal or contractual obligations. A simple contractual infringement will not be sufficient to terminate an agency agreement. The agreement can only be terminated if a party commits a material breach; or
- insolvency of either party.

In both cases, the agency agreement shall be deemed to terminate upon receipt by the non-compliant party of the written notice from the other party stating the occurrence of any of the above circumstances and its intention to terminate the agreement.

### *1.5.2 Notice Period*

Where the agency agreement is concluded for an indefinite term, the minimum statutory notice periods are as follows (Article 25):

- where the agreement has been in force for less than one year, the notice period shall be at least one month; and
- where the agreement has been in force for more than one year, the notice period shall be at least one month for each year of duration of the agreement, with a maximum period of six months.

Where the term has expired and the agreement has become an “indefinite-term agreement,” the expired term shall be taken into account in calculating the required notice period.

The parties may increase but may not reduce the minimum notice periods. Where different notice periods are agreed upon for the principal and the agent, the notice period of the agent cannot be shorter than that afforded to the principal.

The end of the notice period shall be the end of the applicable calendar month, unless the parties have agreed otherwise.

### **1.5.3 Liability of Principal on Termination**

Spanish Agency Law specifically acknowledges the right of the agent to be compensated for the termination of the agreement. Such provisions are mandatory and the parties are not allowed to agree on the contrary. Additionally, waiver of the agent's right to receive such a termination payment is null and void. Such a payment is intended to cover potential losses or damages suffered by the agent under two different concepts: loss of customers and compensation for investments made.

#### **Loss of Customers**

Provided certain requirements are met, the agent will be entitled to a termination payment in the form of an indemnity for the loss of customers upon termination of the agency agreement. The requirements are as follows (Article 28):

- the agent has introduced new customers or has significantly increased the volume of business with existing customers;
- the principal continues to benefit from the customers obtained by the agent after the agency agreement has been terminated; and
- the compensation is equitable to the circumstances of each case, taking into account matters such as the existence of a non-compete covenant, the loss of commission or any other circumstances.

Spanish Agency Law sets a maximum amount for the termination payment for loss of customers, being the sum equal to the average annual amount of remuneration received by the agent in the last five years of the agreement. Should the agreement have lasted less than five years, the reference shall be the average annual amounts received by the agent over the duration of the agreement (Article 28.3).

The agent has no right to the termination payment for loss of customers in the following circumstances (Article 30):

- where the termination of the agreement by the principal is due to breach of the agent's contractual or legal obligations;
- where the agent has requested the termination of the agreement, unless such request is based on a cause attributable to the principal or based on the age, illness or invalidity of the agent pursuant to which the agent cannot reasonably be required to continue with its activities; or
- where the agent has transferred its rights and obligations under the agency agreement to a third party with the consent of the principal.

The termination payment for loss of customers shall be due when the agreement is terminated, or on its expiry. It shall also be due if the agreement is terminated due to the death of the agent.

## ***Damages***

Where an agency agreement for an indefinite term is unilaterally terminated by the principal, the agent is entitled to receive compensation for loss and damage (Article 29)<sup>3</sup> arising as a result of

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<sup>3</sup> Article 17(3) of the Agency Directive, relating to compensation for damage, does not make a distinction between agreements for a definite duration and agreements for an indefinite duration. However, the Spanish Agency Law has limited the right to such compensation, which is to be applied only in one of the two cases contemplated by Article 17(3) of the Agency Directive (ie, the lack of amortization of the investments

the termination of the agreement, preventing the agent from fully amortizing the investments made in accordance with the instructions of the principal for the purposes of the agency.<sup>4</sup> The agency agreement must be for an indefinite term for this compensation to be payable.

The limitations set out above in the last paragraph of section 1.5.3 in respect of compensation for loss of customers apply equally to compensation for damages (Article 30).

### ***Other Damages***

In addition to the compensation referred to above, an agent may claim compensation for other damages occasioned by the unilateral termination of the agreement by the principal by application of Article 1101 of the Spanish Civil Code.<sup>5</sup>

### ***Post-Termination Commission***

Upon termination, and regardless of any compensation to which the agent may be entitled under Articles 28 and 29, the agent is entitled to collect commission for transactions completed after the agency agreement has been terminated in the following circumstances (Article 13):

- where the relevant commercial transaction was due to the activity of the agent while rendering its services and has been

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made by the agent), to agency agreements for an indefinite duration. This is due to the fact that when the agent agrees to a determined duration of the agreement, it is taking into account from the beginning the period of time during which it may amortize any investments made.

<sup>4</sup> Article 17(1) of the Agency Directive expressly entitles an agent to receive an indemnity in accordance with Article 17(2) or to receive compensation for damage in accordance with Article 17(3) of the Directive. An agent is entitled to claim for damages over and above any indemnity payment as long as such damages fall within Article 17(2)(c), but not if they fall within the meaning of compensation for damage as set out in Article 17(3). Interestingly in this particular country chapter, the language used to describe the type of damages available (in addition to the indemnity payment) appears to be based on the language used in Article 17(3), and not Article 17(2)(c) of the Agency Directive.

<sup>5</sup> This compensation would fall in article 17(2)(c) of the Agency Directive.

completed within three months following termination of the agency agreement; or

- where the principal or the agent received a request for the products or services from the customer prior to the termination of the agency agreement, provided that the agent would have been entitled to commission for such transaction if it had been completed while the agreement was in force.

### ***Damages in Lieu of Notice***

Spanish Agency Law does not refer to any obligation of the principal to pay compensation in lieu of notice. However, the Supreme Court has held that an agent will be entitled to obtain compensation where the notice period is non-existent or shorter than that which is required under Spanish Agency Law provided that the agent has proven the damage suffered as a consequence of such lack or shortfall of prior notice.

In practice, the amount of such compensation would be equivalent to the amount that the agent would have earned had the correct notice period been given.

## **1.6 Limitation Periods**

The right of the agent to claim compensation for damages and for loss of customers will be time-barred one year after the termination of the agency agreement (Article 31).

Compensation for other damages under the Spanish Civil Code would be time-barred five years after termination (Article 1964 of the Spanish Civil Code). Compensation for other damages which have arisen before 7 October 2015, would be time-barred the first of the following dates: (i) 15 years after termination; and (ii) 7 October 2020.





## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

There is no specific Spanish law applicable to distribution agreements. Instead, the general provisions on contractual matters contained in the Spanish Civil Code and Commercial Code govern distribution agreements. Accordingly, parties to a distribution agreement are free to agree on the contractual terms that will govern their relationship, provided that such terms do not contravene the law, public morals or public order.

Although a distributor acts in its own name and so cannot be considered a commercial agent as prescribed under the Spanish Agency Law, the Spanish courts have held that, in certain circumstances and under specific conditions, the provisions of the Spanish Agency Law are applicable by analogy to distribution agreements or, at least, that such provisions should be used as a guideline by the courts when assessing a distribution arrangement. However, this kind of analogy cannot lead to an automatic or direct application of the provisions of the Spanish Agency Law. Instead, it has to be proven that specific circumstances justify its application, particularly regarding the requirements and fairness of the compensation for the goodwill generated (Supreme Court Sentences 593/2010 of 20 September 2010, 647/2013 of 5 November 2013, 163/2016 of 16 March 2016 and 356/2016 of 30 May 2016).

#### 2.1.2 *Formal Requirements*

A distribution agreement is not subject to any formal requirements and may be made in writing or orally. The party claiming the existence of an oral agreement has the burden to prove its terms and conditions. For this reason and for the sake of legal certainty, it is best practice to have a written agreement. A distribution agreement does not need to be notarized nor registered in any special public registry. There is, however, an exception to this rule: for distribution agreements where

the product concerned is gas, electric energy or petroleum, the distributor must obtain prior approval from the relevant authorities to carry out its activities, and the distributor has to be registered with a special registry of the Ministry of Economy.

### *2.1.3 Individual/Corporate Entity*

The distributor may be either an individual or a corporate entity.

### *2.1.4 Duration of the Agreement*

Distribution agreements can be for a fixed period of time or for an indefinite period of time.

## **2.2 Exclusive/Non-Exclusive**

Under Spanish law, the parties are free to agree whether the distributor shall have exclusive or non-exclusive distribution rights. The exclusivity may refer to a geographical territory or to a particular group of customers. In this regard, the supplier may undertake not to sell the products in the exclusive territory through other intermediaries (distributors, commercial agents, etc.) and/or not to make direct sales in the exclusive territory. If the supplier has reserved for itself the option to make direct sales into the exclusive assigned territory, the parties should clarify whether such sales will give the distributor a right to receive some type of compensation (although under Spanish law, it is not mandatory to grant the distributor a right to compensation in such circumstances).

Exclusivity must be expressly identified and well defined (that is, by including a specific clause in the relevant agreement). Assignment of a particular territory to a distributor, or the existence of a sole distributor in a particular territory, does not imply that the distributor has the exclusive distribution rights for such territory. Where there is doubt, the courts will need to ascertain the real intention of the parties at the time of concluding the agreement and will take into consideration the circumstances of the case (for instance, the behavior of the parties) and all other relevant circumstances.

Please see the earlier chapter on EU competition law with regard to the effect of the same on exclusivity clauses, and other provisions.

## 2.3 Termination

### 2.3.1 *Formal Requirements*

The termination of a distribution agreement must be in accordance with the terms of the agreement. In the absence of written agreement, there are no special formalities for the termination of a distribution agreement. In order to meet the burden of proof, notice should be in writing and sent to the other party in any way that provides evidence of notification and receipt of the termination letter by the other party.

### 2.3.2 *Notice Period*

Any termination notice period included in a written distribution agreement will be binding on the parties.

Where there is an oral agreement for which no duration is agreed, Spanish case law provides that the parties cannot be bound in perpetuity. The agreement can be terminated at any time, provided that such termination is not made in an “abusive manner,” such as termination of an agreement with no advance termination notice. The termination notice should be “reasonable,” which will depend on how long the relationship has lasted and the level of integration between the principal and the distributor. The longer the relationship has lasted and the higher the level of integration, the longer the termination notice period should be.

Although the period of the termination notice to be given varies in each case, Spanish courts have afforded to distributors the protection offered by Spanish Agency Law. Accordingly, the terminating party should usually give at least one-month notice for each year of the relationship, but if the relationship has lasted a very long time and there is a high degree of integration between both parties, the cap of six months provided by the Spanish Agency Law may be considered too short. Nonetheless, the agency rules should not be mandatorily

applied, since the parties have autonomy and freedom to determine the notice period more appropriately (Supreme Court Judgment 378/2010 of 22 June 2010 and 163/2016, of 16 March 2016).

In December 1999, the Unfair Competition Act of 10 January 1992 was revised to include a new type of unfair behavior consisting of the abusive exploitation of a situation of economic dependence. It requires the terminating party to give a written notice of at least six months, unless such termination is based on a breach by the other party or based on an event of force majeure. The Unfair Competition Act is mandatory in Spain.

The Unfair Competition Act does not define a situation of “economic dependence” but refers to “not having an equivalent alternative.”

Therefore, a situation of “economic dependence” will exist whenever there are no equivalent alternatives for the clients (distributors) or for the suppliers (principal) in a particular market.

Therefore, before terminating a distribution agreement, prior analysis will have to be made to assess whether any of the parties finds itself in a situation of “economic dependence” with the other party. If economic dependence exists, then at least six months’ written notice of termination should be given to the other party.

Finally, any of the parties may terminate the agreement without giving prior notice, whenever there is a good cause. “Good cause” means a party committing a material breach of a substantial contractual obligation or an intentional or persistent gross negligent failure by the other party to carry out his contractual obligations.

### *2.3.3 Liability of Supplier on Termination*

If any of the parties terminates the relationship without giving the prior termination notice required by the written agreement or, in the case of an oral distribution agreement, terminates the relationship without providing a “reasonable” prior termination notice, the other party may be entitled to claim compensation for the losses and damages caused



by such termination. (Supreme Court Judgment 1236/2011 of 15 March 2011).

Under the principle of “damages suffered,” the distributor would probably include the non-amortized portion of the investments made in the development of the business, provided that such investments either were made on request of the principal or were reasonably taking into account the expected duration of the relationship. Under the principle of “loss of profit,” the Spanish courts would normally include the amount that the distributor would have earned, should the contractual or reasonable prior termination notice been given.

The burden of proof will be on the distributor to prove the actual losses and damages suffered, as well as the direct relationship between those losses and damages suffered and the unlawful termination of the relationship.

The Spanish Courts have recognized the right for a distributor to receive a termination payment in the form of an indemnity for loss of customers whenever the distributor has increased the number of clients or substantially increased the volume of transactions with existing clients, and the principal was able to continue to benefit from the same. This is irrespective of the fact that the relationship had been legally terminated or extinguished in an “abusive manner” (for example, by not giving the contractual or a reasonable prior termination notice), or whenever the relationship was terminated without just cause (in those situations where there is no justification to terminate the relationship. For instance, a termination without just cause would be the case where the distributor is fully complying with its contractual obligations but nevertheless the principal decides to terminate the relationship). In any event, the distributor bears the burden of proof.

The right of the distributor to receive such a termination payment for goodwill has been recognized mainly where the distributor is integrated into the sales organization of the principal, in respect of the tasks to be performed. Circumstances that the Spanish courts have

taken into account to consider that the distributor has been integrated within the sales organization of the principal are: (i) the distributor is granted an exclusive distribution right for a given territory; (ii) the distributor is not allowed to sell competing products or otherwise compete with the principal; (iii) the distributor is obliged to provide additional services (to render post-sale services to the customers, carry out advertising activities for the products, etc.); (iv) the principal has the right to control and supervise the distributor's activities; and (v) the percentage that the sale of the contractual products represents in the total turnover of the distributor (the higher the percentage, the more integration is likely to exist).

Spanish courts have applied by analogy the criteria of the Spanish Agency Law, according to which the termination payment for goodwill payable to an agent may not exceed the annual average remuneration received by the agent during the last five years of the relationship (or during the term of the relationship if it has lasted less than five years). As distributors do not receive any remuneration from the supplier, but obtain a margin with the resale of the products, Spanish courts have been calculating the distributor's compensation for goodwill using different terms, such as "gross margin," "net margin," "gross profit" or "net profit," each being a different concept. Thus, the existing case law was not uniform and, depending on the concept used by the court, calculation of the termination payment for goodwill differed.

However, in the Supreme Court's recent judgments, it has been clarified that the distributor's termination payment for goodwill should be calculated taking into account the distributor's net profit, ie, the percentage of profit that remains to the distributor once structure costs and taxes have been deducted (Supreme Court Sentences of 317/2017 of 19 May 2017 and 137/2017 of 1 March 2017).

The distributor must prove that it has increased customers and that the principal continues to benefit from them. Factors which will be relevant when assessing whether the principal continues to benefit from the goodwill are the existence of a post-contractual non-compete

obligation on the distributor, and the principal's knowledge of the distributor's customers (for example, during the relationship the distributor has been providing the principal with information regarding the identity of its clients). However, where the trademark of the distributed products is so well known that the distributor's efforts have not been crucial to market the products, the Spanish courts have moderated the amount of the termination payment for loss of customers.

Notwithstanding the above, the Spanish Courts may only apply the Agency Act by analogy for indemnification purposes when the distribution contract does not contain a clause that excludes compensation for loss of customers. If the agreement expressly excludes that indemnification (sometimes all indemnification is waived), the Spanish Courts will not be able to apply the Spanish Agency Act for indemnification purposes. This is so because Article 1255 of the Spanish Civil Code, establishes that what the parties agree on has the force of law between them (Supreme Court Sentences 862/2010, of 30 December 2010 and 267/2013 of 6 September 2013).

Finally, the distributor will not be entitled to receive a termination payment for loss of customers if the distribution agreement has been terminated for a breach by the distributor, such as non-payment of outstanding invoices.

### 2.3.4 *Return of Products*

The distribution agreement should provide for the return or repurchase of the contractual products. The repurchase price will be that which is stipulated in the agreement or, in the absence of an express term, the price that the parties may agree upon once the agreement is terminated. If the parties fail to reach agreement on price, such products will remain the property of the distributor.

## 2.4 Limitation Periods

According to the Spanish Civil Code, court actions arising from a contractual relationship have to be initiated within a maximum time limit of 15 years from the date such action could have commenced.





## Sweden

### 1. Agency Agreements

#### 1.1 General

Under the Swedish Commercial Agents Act (SFS 1991:351), which implements the Agency Directive, an agent is a person who, in the course of conducting a business, contracts with a principal to independently and enduringly act on behalf of the principal in the sale or purchase of goods (but not services) either through the solicitation of orders for the principal's goods, or through the conclusion of contracts in the principal's name.

Swedish law also provides for another commercial relationship similar to the one above. Under the Commissioned Agents Act, a commissioned agent is a person who has agreed with a principal to sell or purchase goods, securities or other chattels on behalf of the principal, but in its own name. The two commercial relationships are similar in some aspects, but different in others, such as the rights of third parties against the agent. The Commissioned Agents Act is not discussed further in this Chapter.

The Commercial Agents Act ("the Act") provides that the agent must safeguard the principal's interests and act loyally and honestly. The agent must in particular make reasonable efforts to procure offers and, if it is within the agent's authority, to conclude agreements as to matters that are covered by the agency agreement. The agent must also inform the principal about offers that have been procured and agreements that have been concluded as well as about other important circumstances of which the agent is aware. The agent must follow any reasonable instructions given by the principal and must take good care of goods and other items which belong to the principal and which are in the agent's possession. Such goods should be kept separate from other goods and the agent must carry requisite property insurance. If the agent is entitled to receive payment for goods sold,

monies received must be kept separate and the agent must render an account of its activities to the principal.

The principal must act loyally and honestly towards the agent and, in particular, must supply the agent with samples, descriptions, price lists and other necessary materials in respect of the goods to which the agency agreement relates and supply the agent with the information required for implementation of the agent's activities. The principal is also required to inform the agent, without undue delay, that an offer forwarded by the agent has been accepted or rejected or that an agreement brokered by the agent has not been fulfilled.

The principal must furthermore, without unreasonable delay, inform the agent if the volume of future business is expected to be substantially less than that reasonably assumed by the agent.

#### *1.1.1 Law Applicable*

In Sweden, rules governing the relationship between agents and their principals are found in the Act, which conforms to the Agency Directive.

The Act is applicable provided that the definition of an agent, as stated above, is fulfilled. Thus an agent is a person who, on an enduring basis, is authorized to either receive offers, or to negotiate and conclude agreements on behalf, and in the name, of the principal. The name which the parties give to their relationship will be irrelevant if the relationship is, in practice, one of agency as defined in the Act.

Primarily, the agency agreement will be governed by the law chosen by the parties. In the absence of an express choice of law, an agency agreement entered into between 1 July 1998 and 17 December 2009 will be governed by the law of the country with which the agency agreement is most closely connected. This is normally the law of the country where the agent has its place of business, provided that the agent performs most of its business in that country. An agency agreement entered into after 17 December 2009 will be governed by the law of the country where the agent has its habitual residence.



Choice of law clauses are generally considered to be valid unless they violate the Swedish *Ordre Public* doctrine, which protects certain fundamental principles of Swedish law. This doctrine has had limited application in Sweden and it is thus unlikely that a choice of law clause in an agency agreement will be disregarded by application of this doctrine.<sup>1</sup>

### 1.1.2 *Formal Requirements*

An agency agreement is not subject to any formal requirements. It may be concluded orally or in writing. However, the Act contains mandatory provisions according to which either party may require the agency agreement to be evidenced in writing. Furthermore, a non-compete clause in an agency agreement pertaining to the period after expiry or termination of the agency agreement must be in writing in order to be binding on the agent. There are no requirements for an agency agreement to be registered.

### 1.1.3 *Individual/Corporate Entity*

An agent may either be an individual or any form of legal entity, eg, a partnership or a limited liability company. However, in order to be applicable, the Act provides that the agent must be conducting a business, which is intended to be a durable and professionally conducted operation of an economic nature. Therefore, if the agent is a private individual, it is important that the agent has an F-tax certificate, evidencing that the agent is deemed by the Swedish Tax Authorities to be an independent business. If the agent does not have an F-tax certificate, there is a risk that the agent will be considered to be an employee of the principal, which exposes the principal to a requirement to pay social contributions and withhold income tax.

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<sup>1</sup> As mentioned in the Introduction, one important principle in international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities under the Agency Directive, notably those entitling the agent to compensation or an indemnity payment on termination.

#### *1.1.4 Duration of Agreement*

An agency agreement that has not been concluded for a fixed term may be terminated at any time by either of the parties, subject to a notice period, as discussed below. Unless the parties have agreed otherwise, an agency agreement is deemed to have been concluded for an indefinite term. Agency agreements that are concluded for the lifetime of one of the parties are normally regarded as concluded for an indefinite term. An agency agreement that has been concluded for a fixed term expires at the end of the agreed term. If the parties continue their relationship after the end of the fixed term, the agency agreement is regarded as an agency agreement concluded for an indefinite term.

### **1.2 Exclusive/Non-Exclusive**

The Act does not deal with the appointment of agents on an exclusive or non-exclusive basis. Consequently, it is up to the parties to agree on this issue. A distinction is sometimes drawn in Sweden between agents who have an exclusive agency in a territory and agents who have the sole right to sell or solicit orders within a territory. The difference between the two is that in the latter, the principal is also entitled to sell or solicit orders within the territory. This distinction is not dealt with in the Act. It should be noted that where the agent has been allotted a certain area or a certain group of customers, the Act provides - regardless of whether the contract in question is exclusive or not - that the agent should be paid a commission on contracts concluded with a third party belonging to such area or group of customers.

### **1.3 Non-Compete**

During the term of an agency agreement, the agent has an obligation to protect the interests of the principal and to act in a loyal and honest manner. This does not preclude the agent from being the agent for goods that compete with the goods of the principal. There is no general prohibition against an agent having competing agencies and



the parties are free to agree on whether the agent may or may not be an agent for competing goods. In certain circumstances and businesses, it has been deemed to be beneficial for the principal to have an agent who is also the agent for competing goods. The question of whether an agent who has a competing agency is in breach of the agency agreement for a failure to act in accordance with the duty of loyalty towards the principal and the duty to safeguard the principal's interests, is a matter of fact, to be decided on a case-by-case basis.

The Act contains a mandatory provision which limits the ability of the principal to bind the agent by a non-compete undertaking applicable after the expiration or termination of the agency agreement. According to this mandatory provision, a non-compete clause is valid against the agent only if it is in writing and if it concerns the area or group of customers allocated to the agent and the same type of goods as those under the agency agreement. Furthermore, a non-compete undertaking will not be valid for more than two years after the termination or expiry of the agency agreement. The requirement for the undertaking to be in writing does not require it to be in the agency agreement or to be agreed upon at the time when the agency agreement is entered into. A written non-compete undertaking which the parties have agreed upon after commencement of the agency agreement is generally valid. As a consequence of the requirement for the undertaking to concern the area or group of customers allocated to the agent, it is not possible to bind an agent to such an undertaking if no area or group of customers has been allocated to the agent.

## 1.4 Commission

### 1.4.1 *Basic Principles*

If the agent and the principal have not agreed upon the agent's remuneration, the agent must be compensated according to custom in the business in which the agent is involved. If there is no such custom, the agent will be paid according to what is reasonable in view of all relevant circumstances. It is often difficult to establish any custom, as

the level of compensation will vary depending on the business in which the parties are involved. The most common form of compensation is a percentage of, for example, the invoiced price of the goods that have been sold to third parties by the principal with the participation of the agent or within the agent's territory.

In some cases, any transportation costs or similar expenses of the principal may be deducted. Where the agent has been successful, he may also be entitled to additional compensation. If the parties have not agreed otherwise, the agent is entitled to commission on transactions concluded during the term of the agency agreement (i) which have arisen through the participation of the agent, (ii) without the agent's participation but with a third party previously procured as a customer by the agent, provided that the transaction is for goods of the same type as provided in the agency agreement, or (iii) with a third party belonging to a territory or group of customers that have been allocated to the agent. The provisions regarding commission are not mandatory and the parties are therefore free to agree on other methods for deciding the agent's commission.

#### *1.4.2 When Due and Payable?*

Commission becomes due when (i) the principal has fully performed the contract with the third party, (ii) the principal should have fully performed under the contract with the third party, or (iii) the third party has fully performed its obligations under the contract. The principal is considered to have fully performed its obligations under the contract with the third party when the goods are delivered to the purchaser or when the purchase price has been paid. In the case of partial payments, the commission becomes due on a pro rata basis when the partial payment is made. These provisions are mandatory and the parties may not agree that commission will become due later than the date the third party has fully performed its obligations or should have fully performed its obligations, if the principal has duly performed its obligations.



Where the agent sells goods on behalf of the principal, the third party will have fully performed the contract upon payment for the goods.

Where the agent purchases goods for the principal, the third party will have fully performed the contract when the goods are delivered to the principal.

Commission must be paid to the agent within one month of the end of the quarter during which the commission became due. This provision is mandatory for the benefit of the agent. Consequently, it is permissible to agree on a shorter, but not a longer, payment period. The reference to a quarter means a calendar quarter, although it is possible to agree on different quarters, for example, February to April.

#### *1.4.3 Extinction of Rights to Commission*

The agent loses the right to commission if an agreement between the principal and a third party fails to be implemented and the failure is not attributable to the principal or circumstances under its control.

However, the entitlement to commission is not affected where a third party does not fully perform under the agreement with the principal and where the principal has, without the consent of the agent, agreed with the third party to either suspend or rescind the contract. If a third party performs the agreement in part, the agent generally has the right to commission on a pro rata basis. These provisions are mandatory for the benefit of the agent.

#### *1.4.4 Accounting and Audit*

The principal must furnish the agent with a commission statement no later than one month after the quarter in which the commission became due. The statement should include information on how much commission was earned during the quarter and all information of significant importance for the calculation of the commission. If the agent has fully or partially lost its right to commission on an agreement with a third party, this must be detailed in the statement, together with the reason for the loss of the commission.

Furthermore, the agent is entitled to receive from the principal all information to which the principal has access, and which is necessary to enable the agent to verify that the commission statement contains all the commission amounts to which the agent is entitled. This includes a right for the agent to receive extracts from the principal's bookkeeping materials. If the principal does not furnish the agent with all such information within a reasonable time after request from the agent, the agent has the right to review the principal's bookkeeping to the extent necessary to determine the correct commission. The same also applies if the agent has reason to believe that the information in the commission statement is incorrect. These provisions on accounts and audit are mandatory and may not be deviated from to the detriment of the agent.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

There are no legal requirements in respect of the form of notice to terminate an agency agreement. The parties may, however, expressly agree on the requirements for the notice and may require the notice to be written. For reasons of clarity, and also in order to evidence notice of termination, it is preferable for such notice to be given in writing and in such a way that receipt of the notice is evidenced in writing, for example, by registered mail.

### 1.5.2 *Notice Period*

An agency agreement concluded for an indefinite term may be terminated on notice from the agent or the principal. Advance notice of one month, counted from the end of the calendar month during which it is given, is required during the first year of the agency agreement.

The notice period is then extended by one month for each further commenced year of the term of the agency agreement, up to a maximum notice period of six months. With one exception, the parties may not agree in advance on a notice period shorter than this. The exception is that the notice period may be limited to three months'





notice when terminated by the agent. If the parties agree to a longer notice period, the notice period required to be given by the principal may not be shorter than that required to be given by the agent. Finally, the parties may agree, when such a situation arises, to end their relationship before the end of the statutory minimum notice period.

An agency agreement concluded for a fixed time period expires at the end of the period. If the parties continue their relationship after that, the agreement is regarded as an agreement of indefinite term to endure until further notice and the notice periods described above will then be applicable.

In addition to the above, either party may terminate the agreement with immediate effect if (i) the other party has failed to fulfil its obligations in accordance with the agency agreement, the breach is sufficiently important to the party concerned and the other party furthermore has, or should have, realized this; or (ii) there is otherwise an important reason for renouncing the agreement prematurely. This latter ground relates primarily to situations of what is normally considered force majeure. This provision is mandatory for the benefit of the agent.

Finally, an agency agreement will also terminate upon the insolvency of either of the parties. If the agency agreement is terminated as a result of one party's insolvency, the other party is entitled to compensation for any losses arising thereby. Again, this is mandatory for the benefit of the agent.

### 1.5.3 *Liability of Principal on Termination*

In certain circumstances, the agent has the right to commission on contracts that are concluded after expiry or termination of the agency agreement. If the parties have not agreed otherwise, the agent is entitled to commission on transactions concluded after the agency agreement has ended (i) where the transaction was concluded under circumstances which would have given the agent a right to commission during the term of the agency agreement and the agent

or the principal obtained the offer from the third party during the period of the agency agreement, or (ii) which arose mainly through the agent's efforts during the period of the agency agreement and which were concluded within a reasonable time after expiry or termination of the agency agreement.

Furthermore, upon termination of an agency agreement, the agent is entitled to a termination payment in the form of an indemnity if, and to the extent that, the agent has introduced new customers to the principal or has substantially increased trade with the existing group of customers and the principal will benefit substantially from these new customers or increased trade. It should be noted, however, that payment of an indemnity must be reasonable in the circumstances, taking into account in particular the loss of commission from the new customers or the increased trade that the agent has created.

If an indemnity payment is appropriate, it will be an amount not exceeding one year's commission, calculated on the basis of the average commission for the past five years or, if shorter, the performance period of the agency agreement.

If the agency agreement is terminated with immediate effect due to the agent's intentional or negligent breach of contract or insolvency, or if the agent, with the principal's consent, has assigned the agency to another party, the agent will lose the right to an indemnity payment.

If the agent terminates the agency agreement, the agent will be entitled to an indemnity payment only if the agency agreement has been lawfully terminated in circumstances entitling the agent to terminate the agency agreement with immediate effect. Furthermore, if the agent is a private individual, he is also entitled to an indemnity payment if he cannot continue his business due to personal circumstances, such as illness or age.

## 1.6 Limitation Periods

The agent must claim any termination payment to which it is entitled within one year of the termination of the agency agreement. A failure



to do so will result in the loss of the right to receive such a payment. If a party wishes to claim damages relating to the agency agreement, it must notify the other party without undue delay after the time the party knew or should have known of the circumstances constituting the basis for the claim for damages. A failure to comply with this requirement results in the loss of the right to damages, save where the other party has been grossly negligent or has acted in bad faith.

## 2. Distribution Agreements

### 2.1 General

A distributor is a commercial entrepreneur who purchases goods from a manufacturer or wholesaler and resells the goods in its own name and for its own account. Although the distributor usually sells goods bearing the supplier's trade mark, the distributor is independent of the supplier and does not act as its agent. Ownership of the goods is transferred to the distributor at the time of purchase and the distributor profits from the difference between the purchase price and the price charged to the customer. The distributor bears all risks normally associated with the sale of goods, including non-payment by a customer. The distributor is generally required to maintain inventory and warehousing facilities at its own cost and to deliver the goods to the end-user. The distribution agreement will generally impose other obligations on the distributor such as marketing, minimum sales and after-sales support. Accordingly, most distributors must have marketing, sales and support personnel.

#### 2.1.1 *Law Applicable*

No specific legislation on distributors exists in Sweden. A distributor's rights are governed mainly by the distribution agreement and to some extent by general principles of Swedish contract law. The relationship between the distributor and the supplier may, insofar as it pertains to the sale of goods, be governed by the Swedish Sale of Goods Act.

Furthermore, it has been suggested that some of the provisions of the Commercial Agents Act, such as the duty of the agent to actively

promote the sale of the principal's goods and the agent's duty to inform the principal, apply by analogy to exclusive distribution agreements. The same has been suggested for some of the provisions in the Commissioned Agents Act. However, these questions have not yet been settled by the courts.

Although not regulated by law, it could be argued that a distributor has an implied duty to conduct its business in order to safeguard the interests of the supplier. Rules relating to confidentiality and the obligation to provide the principal with certain information may also be derived by analogy from the agency legislation.

A distribution agreement will be governed by the law chosen by the parties. As mentioned above in relation to agency agreements, choice of law clauses are generally considered to be valid unless they violate the Swedish *Ordre Public* doctrine.

In the absence of an express choice of law, the applicable law will be determined according to Swedish conflict of laws provisions. The applicable law will then be decided taking into account factors such as the main characteristics of the distribution agreement and whether the cause of the dispute is more closely related to the part of the distribution agreement pertaining to the distributor's purchase of goods from the supplier, or to the part of the distribution agreement pertaining to the distributor's obligation to act in the interests of the supplier, as with agents (for example, regarding marketing, etc.). Depending on how the distribution agreement and the dispute is characterized, either the Swedish Act on Applicable Law Regarding International Sales of Goods or the Swedish Act on Applicable Law on Contractual Obligations (agreements entered into between 1 July 1998 and 17 December 2009) alternatively Regulation 593/2008 (agreements entered into after 17 December 2009) will apply. If the Swedish Act on Applicable Law Regarding International Sale of Goods applies, the law of the country in which the supplier has its established place of business is most likely to apply, or if different, the law of the country where the supplier received orders and in which the



supplier is registered or domiciled. Should the Swedish Act on Applicable Law on Contractual Obligations apply, the distribution agreement will be governed by the law of the country to which the distribution agreement is most closely connected. If the distribution agreement is exclusive, it is probable that the law of the country where the distributor has its place of business will apply whereas, if the distribution agreement is not exclusive, it is more uncertain which law will apply. If Regulation 593/2008 applies, the distribution agreement will be governed by the law of the country where the distributor has its habitual residence.

### *2.1.2 Formal Requirements*

A distribution agreement is not subject to any mandatory formal requirements and may thus be concluded orally or in writing. It is preferable for reasons of certainty to document the agreement between the parties in writing. There are no requirements to register a distribution agreement with any public authority or register.

### *2.1.3 Individual/Corporate Entity*

A distributor may either be a private individual or any form of legal entity, eg, a partnership or limited liability company. If the distributor is a private individual, it is important that the distributor has an F-tax certificate, evidencing that it is deemed by the Swedish Tax Authorities to be an independent business. If it does not have an F-tax certificate, there is a risk that the distributor will be considered to be an employee of the supplier, which exposes the supplier to a requirement to pay social contributions and withhold income tax.

### *2.1.4 Duration of Agreement*

There is no Swedish legislation relating to the duration of a distribution agreement. It is therefore up to the parties to agree on this issue. In the absence of any agreement on its duration, a distribution agreement is likely to be deemed an agreement for an indefinite term.

## 2.2 Exclusive/Non-Exclusive

It is possible to agree that the distributor shall have an exclusive right in relation to the supplier's other distributors and in relation to the supplier itself. The distribution agreement should deal with this as there is no legislation as to the default position. It should be noted that Swedish and EU competition regulations limit the ability to agree on exclusive distribution agreements (see the earlier chapter on EU competition law for a fuller discussion of this issue).

## 2.3 Non-Compete

There are no specific legal provisions on this issue. The parties are free to agree on the extent to which the distributor may market goods which are in competition with those of the supplier. In the absence of contractual provisions dealing with this issue, the supplier would be forced to argue that an inherent duty of loyalty prohibits the distributor from selling goods that compete with those of the supplier.

## 2.4 Compensation

A distribution agreement is characterized by the fact that a distributor purchases goods from a supplier and resells these goods, presumably at a profit. The distributor's compensation is thus the difference between the price at which it bought the goods from the supplier and the price at which the distributor sells them. The extent to which the distributor is to be entitled to additional compensation, for example, for marketing activities, must be agreed upon between the parties.

In the absence of an agreement in relation to payment for the goods that the distributor purchases from the supplier, this issue is decided by the Sales of Goods Act. According to the Sales of Goods Act, if the distribution agreement is silent on when payment is to be made, a purchaser must pay for the goods upon the seller's demand for payment. However, the purchaser is not obligated to pay until the goods have been made available or are placed at the purchaser's disposal in accordance with the distribution agreement.



## 2.5 Accounting and Audit

There are no legal provisions in Sweden that give a party to a distribution agreement a right to review accounts or perform audits of the other party's bookkeeping. It has been argued that the provisions of the Commercial Agents Act which deal with a party's duty to inform the other party on economic issues and the market should be applied by analogy to exclusive distribution agreements. However, this has not yet been decided by the Swedish courts.

## 2.6 Termination

### 2.6.1 *Formal Requirements*

There are no legal requirements in respect of the form of notice to be given to terminate a distribution agreement. Consequently, a notice of termination may be given orally or in writing. However, for reasons of clarity and for evidential purposes, a notice of termination should be given in writing and in such a way that receipt of the notice is evidenced in writing, for example, by registered mail.

### 2.6.2 *Notice Period*

Swedish law does not stipulate a minimum notice period to be given on termination of a distribution agreement. However, in respect of termination of distribution agreements entered into for an indefinite term, the Swedish Supreme Court has held that in the absence of a contractual clause on notice period, the party who terminates the agreement must observe a reasonable notice period. Furthermore, contractual clauses which stipulate an unreasonably short notice period may be modified or set aside by a court pursuant to Section 36 of the Swedish Contracts Act. Whether a notice period is of reasonable length should be decided taking into account, among other factors: the time the contractual relationship has lasted; reasonable investments made, and the time it will take to find a reasonable alternative; and usages.

### *2.6.3 Liability of the Supplier on Termination*

There is no legislation in Sweden entitling a distributor to a termination payment upon termination of a distribution agreement. Provided that the supplier complies with an agreed (or reasonable) period of notice, the supplier should not have to pay any compensation to the distributor. It should be noted, however, that it has been argued that the distributor may be entitled to a termination payment if it has registered a large number of customers or otherwise has made contributions to the benefit of the supplier, by analogous application of the Commercial Agents Act. Even though this possibility cannot be ruled out, no case law supporting this position currently exists.

### *2.6.4 Return of Products*

The issue of how remaining stock in the possession of the distributor should be dealt with on and after the termination of a distribution agreement is unregulated under Swedish law. If the distribution agreement is silent on this issue, the parties are free to negotiate how to handle the stock, but as the distributor owns the stock, the distributor is free to dispose of it.

## **2.7 Limitation Periods**

There is no limitation period under Swedish law that relates specifically to distribution agreements. The Sale of Goods Act contains provisions which obligate a purchaser to bring a claim in respect of defective goods within a specific period of time in order to avoid forfeiting the right to bring such a claim. These provisions may be of relevance to a distribution agreement where the Sale of Goods Act is applicable.

In addition to the above and to the extent that the above provisions of the Sale of Goods Act are not applicable, the provisions of the Swedish Limitations Act will apply to claims under a distribution agreement. Under this statute, claims will generally become statute-barred 10 years after the date on which the cause of action arises.





## Switzerland

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law Applicable*

Under Swiss law, an agent is a person that undertakes to act on a continuous basis as an intermediary for one or more principals in facilitating or concluding transactions on their behalf and for their account without entering into an employment relationship with them. The rules that govern the relationship between commercial agents and their principals are contained in Articles 418a-418v of the Swiss Code of Obligations (hereinafter referred to as the “Code”). The activities of an agent must be distinguished from those of a broker or a commission agent. In contrast to an agent, which permanently acts for a particular principal, the broker is only active in one or more specific transactions for the principal. For brokers, who facilitate the conclusion of a contract for the principal, the statutory provisions on brokerage contracts (Articles 412-418 of the Code) are applied in addition to the general provisions governing agency contracts. On the other hand, commission agents buy or sell chattels or securities in their own name but for the account of the principal. For them, the statutory provisions on commission agency (Articles 425-438 of the Code) are applicable in addition to the general provisions governing agency contracts.

Furthermore, certain provisions concerning the mandate (Articles 394-406 of the Code) may also apply to the relationship between commercial agents and their principals. In respect of post-contractual non-compete obligations for the agent, the rules concerning employment contracts (Articles 340-340c of the Code) apply. Finally, agency agreements concerning insurance contracts are subject to a specific regulation.

In international settings, agency agreements are governed by Swiss law if such law was chosen by the parties (Article 116 PILA) or, in the

absence of a choice of law clause, if the contract has a close connection to Switzerland. Such close connection is presumed to exist when the characteristic performance is rendered by a party having its habitual residence or place of business in Switzerland. In other words, in agency agreements, the law of the country in which the agent has its residence will generally apply in the absence of a choice of law clause.

If an agency contract is subject to Swiss law, certain statutory provisions are mandatory. Such mandatory provisions are, for instance, the agent's claim for adequate special compensation if the agent bears the risk that customers may not pay (Article 418c para. 3 of the Code) or if the contract includes a post-contractual non-compete undertaking (Article 418d para. 2 of the Code). Other mandatory provisions of the Code concern the agent's right to a retention of title (Article 418c para. 1 of the Code), the principle of equal notice periods for the agent and the principal (Article 418q para. 3 of the Code), the right to terminate the agency with immediate effect for cause (Article 418r of the Code) or the agent's claim for a termination payment in the event that it substantially increases the principal's customer base (Article 418u para. 1 of the Code).

Since Switzerland is not part of the European Union, the Agency Directive does not apply in Switzerland. Likewise, the EU competition law rules, and in particular the Verticals Regulation, are not directly applicable in Switzerland, although they are likely to apply to agents that deploy their activities in EU Member States. However, Swiss competition law on vertical restraints in most respects mirrors the EU competition law rules. Please see the earlier chapter on EU competition law for further information.

### *1.1.2 Formal Requirements*

An agency contract is not subject to any formal requirements; it may be concluded orally or in writing. Even without an explicit written or oral agreement, it is possible that an agency relationship may be created impliedly by way of conduct, for example, where one party



regularly acts as an intermediary for another party for which it solicits customers.

However, in the commercial world, written agency contracts are the rule, in particular because certain clauses imposing obligations on the agent need to be in writing in order to be valid. Examples include an obligation to take responsibility for collecting accounts receivable, an undertaking to act exclusively for the principal (and not for other principals as well), or post-contractual non-compete undertakings. Similarly, where a certain territory is allocated to an agent, the agent is, unless otherwise agreed in writing, considered to be an exclusive agent and is entitled to receive commissions on all business realized in the territory, irrespective of the agent's contribution. Agreements providing for a due date for commission owed to the agent other than the date of the conclusion of the contract with the customer, for the deferral of the due date for commissions in case of termination of the agency or for a notice period of less than one month for terminating the agency contract also need to be in writing.

### 1.1.3 *Individual/Corporate Entity*

Parties to agency contracts may be individuals or corporate entities, such as collective partnerships or corporations, but also cooperatives or even associations.

Individuals who act as a commercial agent are obliged to register with the local Commercial Register even if the business volume generated from the agency relationship does not exceed CHF 100,000, ie, the threshold generally required for the registration of sole proprietorships in the Commercial Register.

In the absence of any contractual provision to the contrary, the commercial agent is entitled to appoint sub-agents or to have employees assisting it in the performance of its duties.

#### *1.1.4 Duration of Agreement*

An agency contract may be concluded for a fixed or an indefinite period of time. If the parties have agreed on a fixed period of time, the agency contract generally expires at the end of the fixed period, unless both parties continue to perform the agreement; in this case, the agency relationship is deemed to be renewed for the same fixed period, but only up to a maximum of one year.

If the agency contract has been concluded for an indefinite period of time, it may be terminated by way of regular notice (see below).

#### **1.2 Exclusive/Non-Exclusive**

A commercial agent may be appointed as an exclusive or non-exclusive agent. The extent of the agency relationship should explicitly be defined in the agency contract, and the parties should preferably stipulate not only whether or not the principal may use other commercial agents in the contractual territory, but also whether the principal itself must refrain from effecting direct sales of the products in the territory.

If the contract is silent as to exclusivity but allocates a certain territory or a certain group of customers to the agent, the agent is deemed to have been appointed on an exclusive basis, which entails the right to receive commissions on all transactions concluded with relevant customers domiciled in the contract territory, even if such transactions were not solicited by the agent.

#### **1.3 Non-Compete Undertaking**

The agent may commit in writing to act exclusively for a principal during the term of the agency relationship. Failing such written agreement, the commercial agent is, in general, entitled to act for several principals. However, the agent's duty of loyalty prohibits it to negotiate or conclude transactions for competitors of the principal.



A non-compete clause for the time after the termination of the agency contract requires a written agreement in accordance with the statutory rules concerning employment contracts (Articles 340-340c of the Code). Only in exceptional circumstances may the non-compete covenant be agreed for more than three years after the termination of the agency contract. The non-compete clause must also be limited geographically (ie, to the contractual territory or to the group of customers allocated to the agent) and with regard to a business sector (ie, in general to the kind of goods covered by the agency contract). In addition, the agent has an inalienable right to additional compensation, which becomes due at the time of termination and which is intended to indemnify the agent for losses incurred as a result of the non-compete restriction. It is not necessary to stipulate the amount of compensation in the contract, although this is customary and highly recommended. Failing such agreement, the amount of compensation will be determined by the courts, taking into account all relevant circumstances. As the payment is intended to compensate the agent for its losses, the agent has the burden of proof for demonstrating to what extent it was damaged by the contractually agreed restrictions. It is unclear and controversial to what extent other income earned by the agent during the same time period is to be deducted from the compensation.

The principal can waive the non-compete obligation of the agent upon termination of the contract. While this does not automatically annul the duty to pay compensation, the waiver may nevertheless have an impact on the amount of compensation and will be considered by the judge. It is also possible to contractually grant the principal a right to waive the non-compete clause with a reasonable notice period (which should not be less than three months). It is unclear and controversial whether the compensation for the non-compete obligation is due in circumstances where the agency contract is terminated for a reason for which the agent is responsible. In the event that the contract is terminated without fault of the agent, or if the agent has terminated the contract for cause, the non-compete restriction may not be enforced by the principal.

If the agent, after termination of the agency contract, does not comply with the non-compete restriction, the principal is entitled to reclaim the compensation paid. In addition, the principal may claim for damages, or, if this has been agreed in writing, for a penalty. The specific enforcement of a non-compete restriction by the principal is only possible if such a remedy has been agreed in writing, and if the interests of the principal and the conduct of the agent justify such enforcement.

## 1.4 Commission

### 1.4.1 *Basic Principles*

The commercial agent has the inalienable right to receive the agreed or the customary commission on all commercial transactions which were solicited or concluded during the term of the agency contract. Unless otherwise agreed in writing, the agent is also entitled to a commission on transactions which were concluded without its involvement and its efforts, if the agent previously promoted transactions of this kind to the customer. Generally, therefore, the right to commission depends on a link between the agent's activities and the conclusion of the transaction. However, the agent may also claim commission on sales where the customer comes from a geographical territory or from a group of customers that had been allocated to the commercial agent on an exclusive basis.

In general, the commission of an agent is calculated as a fixed percentage of the price paid by the customer to the principal for the transaction in question, respectively on the entire business volume generated by the principal due to the activities of the agent. In the absence of any agreement between the parties, the agent is entitled to a customary remuneration which may be determined by referring to local tariffs issued by associations active in the relevant business sector. In addition to the commission owed as a result of transactions concluded, the agent may be entitled to further commissions for having agreed to collect payments from customers or for bearing the collection risk.



Unless otherwise agreed, or in cases where it is customary, the commercial agent, as a self-employed entrepreneur, is not entitled to a reimbursement of expenses which generally accrue in the ordinary course of its business. The agent also has no right to an advance on the (future) commissions that may be due to it by the principal.

However, if expenses were incurred by the agent upon the special instruction of the principal or in order to safeguard the principal's interest — when the agent, for instance, pays freight costs or customs duties — the principal has a duty to indemnify the agent accordingly.

#### 1.4.2 *Maturity of Commissions*

Unless otherwise agreed in writing, the claim for commission arises when the transaction with the customer is concluded in a legally binding manner. The parties can agree that the commission becomes due at another point in time, for instance, when the principal has received payment from the customer.

Unless otherwise agreed or customary, the commission is payable at the end of the calendar half year (ie, for the period from January to June, or for the period from July to December) in which the transaction between the principal and the customer was concluded or in which the commission became due, if an alternative due date is agreed. In the insurance sector, the commission is due after payment of the first yearly premium.

Upon termination of the agency contract, all accrued claims for commission become immediately due, except commissions for transactions which are to be completed only after termination of the agency contract; with respect to such transactions, the parties may agree in writing on a later due date.

#### 1.4.3 *Extinction of Rights to Commission*

The agent loses its right to receive a commission if, and to the extent that, the transaction between the principal and the customer is not executed for a reason for which the principal is not responsible.

The right to commission is also extinguished in cases where the principal has already made deliveries or rendered services to a customer and the customer fails to comply with its payment obligations, as it is deemed to be unreasonable to require the principal nevertheless to pay a commission to the agent.

#### *1.4.4 Accounting and Audit*

No later than each (statutory or contractually agreed) payment date, the principal is obliged to render an account of the commissions due. However, the parties are free to agree that the agent (and not the principal) shall submit, on a regular basis, calculations of the commissions to which the agent is entitled.

The agent is entitled to demand that it is given access to the principal's books concerning all business transactions on which it may claim commission. The agent may check or request an extract from the books with respect to everything that is necessary and important for the calculation of its commission; this right is inalienable. In order to secure its claim for commission, the agent also has an inalienable right to retain those assets of the principal which are in its possession, such as payments which the agent has (pursuant to an authority granted in the agency contract) obtained from customers, or moveable goods or securities.

### **1.5 Termination**

#### *1.5.1 Formal Requirements*

There are no formal requirements for the termination of an agency contract unless the parties have agreed otherwise in the contract. It is, of course, recommended that the notice of termination should be given in writing and in a way that enables the terminating party to prove receipt of the notice. A notice of termination, once given, cannot be revoked and can also not be made dependent upon a condition on which the receiving party has no influence.





### 1.5.2 *Notice Period*

Even if the contract is concluded for an indefinite period of time, it may be terminated during the first year by the end of a calendar month, with a notice period of one month. A shorter (but not a longer) notice period requires an agreement in writing. In the event that the agency contract has lasted for at least one year, it may be terminated by the end of a calendar quarter by giving two months' notice. The parties may agree to a longer notice period or to other termination dates (eg, the end of the month or the end of the calendar year). It is, however, not permitted to agree to different notice periods for the agent and the principal.

Both the agent and the principal may terminate the agency contract at any time without a notice period (ie, with immediate effect) for good cause. However, immediate termination for good cause is permitted only restrictively and, in general, requires that the terminating party cannot reasonably be expected to wait until the end of the term of the contract or until the ordinary notice period has expired. In addition, termination for cause must be made within a reasonable (and usually short) period after the terminating party has learned of the existence of the cause.

The party that terminates the agency contract with immediate effect, but without having sufficient reason to do so, may have to pay damages, eg, it has to compensate the other party for any consequent loss of profit until the end of the ordinary notice period. It is debatable (and controversial) whether the statutory provisions applicable to employment contracts — which grant the employee a special indemnity in the event of an invalid termination for cause — apply by analogy to agency agreements.

### 1.5.3 *Liability of Principal on Termination*

Upon termination, all claims of the agent for commissions (and, if relevant, reimbursement of expenses) become due. For transactions which the agent has procured during the term of the agency contract

but which are executed only after the termination of the contract, the agent is entitled to a commission. For re-orders from a customer acquired by the agent during the term of the agency contract, commissions are due only if the orders were placed before the termination of the agency relationship. The parties can agree in writing that the due date for commissions on transactions which are to be completed only after the termination of the agency contract may be deferred to a later date.

In addition, the agent has an inalienable right to claim a termination payment in the form of an indemnity if the following statutory requirements are met:

- the agent must show that it has, through its activity, substantially increased the principal's clientele in the contractual territory and that, after termination of the agency relationship, the principal can still benefit substantially from the business relations with the acquired clientele;
- the payment of an indemnity would not be inequitable; and
- the agency contract was not terminated for a reason for which the agent is responsible.

Assuming the above conditions are satisfied, the agent is, as a matter of mandatory law, entitled to an indemnity. The amount may not exceed the net earnings for one year derived by the agent from the contractual relationship, as calculated on the basis of the average during the last five years or, as the case may be, during a shorter term of the agency contract.

While the agent's right for an indemnity for clientele cannot be waived or limited in the agency contract, an agreement on the indemnity claim is possible after the termination of the agency contract. It is controversial whether an agent, on termination of the agency contract, is entitled to claim an indemnity for clientele as well as compensation for a non-compete restriction.



## 1.6 Limitation Periods

Claims arising out of an ongoing agency contract become time-barred five years from the date on which the relevant party became entitled to claim. In contrast, the agent's claim to an indemnity for clientele is considered to be a one-off payment and, therefore, becomes time-barred in accordance with the ordinary limitation period, ie, 10 years after the date of termination of the agency contract.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

The Swiss Code of Obligations does not contain any provisions relating to distribution agreements. The rules applicable to such agreements have been developed by the courts and by legal doctrine. As some aspects of the relationship between suppliers and distributors may, depending on the exact circumstances, be somewhat similar to an agency contract or come close to a partnership, the statutory provisions for agency (Articles 418a-418v of the Code), or for ordinary partnership (Articles 530-551 of the Code) can apply by analogy, in particular with respect to the termination of a distribution agreement.

In international transactions, a distribution agreement is, as in the case of an agency contract, subject to the law chosen by the parties or, failing such choice of law, governed by the law determined in accordance with Article 117 PILA (providing for the law of the country with which the contract has the closest connection). It is generally accepted that the distributor performs the characteristic obligation which means that, in the absence of an express choice of law, the law of the country in which the distributor has its place of business is applicable to international distribution agreements.

Since Switzerland is not part of the European Union, the EU competition law rules, and in particular the Verticals Regulation, are

not directly applicable in Switzerland. However, Swiss competition law in many respects mirrors EU competition law requirements with respect to vertical agreements, as was affirmed by the Swiss Federal Supreme Court in the Gaba case. Please see the earlier chapter on EU competition law for further information.

### *2.1.2 Formal Requirements*

Distribution agreements are not subject to any formal requirements.

### *2.1.3 Individual/Corporate Entity*

The distributor may perform its business as an individual or may act in the form of a corporate entity. Unless otherwise agreed in the distribution agreement, the distributor is usually allowed to appoint sub-distributors.

### *2.1.4 Duration of Agreement*

Distribution agreements can be concluded for a fixed or an indefinite period of time.

## **2.2 Exclusive/Non-Exclusive**

The parties are generally free to determine the extent of the distribution right of the distributor. Hence, they can either agree that the distributor shall have an exclusive or a non-exclusive distribution right. The supplier may commit not to sell the contractual products within the contractual territory either itself or through other distributors. It should be noted, however, that restrictions imposed on the distributor with regard to its ability to sell the contractual products (in terms of territory, prices or customers) may conflict with competition law rules. In particular, Swiss competition law requires the principal to tolerate passive sales to customers from outside the agreed territory.



## 2.3 Termination

### 2.3.1 *Formal Requirements*

Unless otherwise agreed by the parties in the distribution agreement, there is no requirement to terminate a distribution agreement in writing, and notice of termination may be given orally. However, as with agency contracts, it is advisable to terminate the agreement in writing and in a way that enables the terminating party to prove the other party's receipt of the termination notice.

### 2.3.2 *Notice Period*

If the distribution agreement is concluded for a fixed term, it generally expires at the end of the fixed term, unless both parties continue to perform the agreement. In this case, the distribution agreement is deemed to have been converted into an agreement for an indefinite period of time and it may then be terminated with reasonable advance notice. Of course, the parties are free to agree on the notice period that shall apply in the event of termination of their agreement.

In the absence of an expressly agreed notice period, it is generally held that a party must give the other a reasonable notice period of termination. The question of what constitutes reasonable notice will be determined having regard to the facts existing at the time when notice is given. Swiss courts have also applied, by analogy, the rules applicable to agency contracts (providing for a notice period of one or two months), or to the ordinary partnership (providing for a notice period of six months). Thus, depending on the duration of the contractual relationship, a notice period between one and six months is, in general, considered to be fair and reasonable. A distributor wanting to challenge the termination of the distribution agreement may try arguing that the distributor had reason to believe that it could distribute the supplier's products for a certain minimum period of time, ie, that the parties had tacitly agreed on a minimum duration, with the consequence that the supplier, prior to the expiration of this tacitly agreed term, has no right at all to terminate the distribution agreement. Whether or not such an argument is successful will

depend on the communications concretely exchanged between the parties, for example with respect to specific investments that the supplier may have requested of the distributor.

In a case brought before the Swiss Federal Supreme Court, a supplier of beer and mineral water had, in 1973, agreed with the owner of a restaurant that the latter would “always” take the beverages from it; in return, the supplier had paid the costs for the installation of a bar in the restaurant. When the restaurant owner, eleven years later in 1984, terminated the distribution agreement, the supplier sued for damages. The Federal Supreme Court held that Swiss law does not allow for the conclusion of everlasting contracts as this would unduly infringe an individual’s personal rights and that, therefore, the restaurant owner’s obligation to “always” take the beverages from the same supplier was invalid. The Federal Supreme Court further stated that, if the parties had known that an “eternal” contract was invalid, the supplier would only have been prepared to finance the installation of the bar in the restaurant if it could be sure that the costs will be amortized over a certain period of time. The Federal Supreme Court concluded that a reasonable amortization time would have been twenty years, and that the parties therefore, would have agreed that the distribution agreement should last from 1973 to at least 1993.

Apart from this, both parties are entitled to terminate the distribution agreement for cause if circumstances arise that make it impossible or unreasonable for the terminating party to wait until the end of the ordinary notice period or the end of the agreed term of the agreement.

### *2.3.3 Liability of Supplier on Termination*

According to the Code, only commercial agents are entitled to a statutory compensation for clientele upon termination of the agreement. Over many decades, the Swiss Federal Supreme Court and various cantonal courts took the position that the compensation for clientele provision of Article 418u of the Code should not be applied by analogy to distribution agreements. In 2008, the Swiss Federal Supreme Court revisited this issue and awarded an indemnity



to an exclusive distributor that had introduced trademark protected perfumes in the Czech Republic and in Slovakia, when these markets opened up for Western products after the fall of the Iron Curtain.

The distributor had been active for almost ten years and had built up a new market and relationships with approximately 200 customers. Based upon this specific situation, the Swiss Federal Supreme Court found that an indemnity for clientele was justified because most of the customers serviced by the distributor seemed primarily interested in the trademark under which the products were sold, as opposed to the distributor's advice and other sales-related services. In the view of the Swiss Federal Supreme Court, the customers were likely to continue purchasing the products from the supplier even after the termination of the distribution agreement, whether directly or through a new intermediary. Therefore, the supplier could be expected to continue benefiting from the distributor's marketing efforts well beyond the term of the distribution agreement. This seemed all the more likely as the supplier was in possession of the names and addresses of the customers because the distributor had to make these customer particulars available on a regular basis. Furthermore, the supplier had also regularly instructed the distributor in respect of promotional and sales activities, and the distribution agreement granted the supplier even the right to unilaterally modify certain contractual terms. For these reasons, the Swiss Federal Supreme Court held that in this particular case the distributor should be compensated for having developed a customer base loyal to the trademark and to the supplier. The indemnity may amount to up to one year of the distributor's net earnings, unless the supplier proves specific facts justifying a reduction or exclusion of the indemnity.

This decision has led to an increase in indemnity claims by distributors across industries, but it has not marked a clear shift in the practice of Swiss courts and tribunals. In a subsequent decision, the Swiss Federal Supreme Court declined to apply the agency law provisions to a distributor, arguing that the distributor bought and sold the products in its own name and for its own account, and essentially acted as an

independent reseller, ie, with considerably more freedom than an agent. Hence, successful claims by distributors for compensation for clientele remain rare under Swiss law. Where indemnities are paid, it is often in exchange for additional services and assistance by the distributor for the transfer of the business, and not just because there is a likelihood that the supplier, or a newly appointed distributor, may be approaching the same customers after the end of the distributorship.

#### *2.3.4 Return of Products*

Once notice of termination has been given, the supplier generally remains obliged to accept orders from the distributor and to supply it with those products which the distributor may reasonably be expected to sell within the ordinary course of business until the expiry of the notice period. Unless otherwise agreed in the distribution agreement, the terminating supplier may not request that the distributor pays for the ordered products by means of a letter of credit or other secured means of payment. It is, therefore, important that a terminating supplier, which has significant accounts receivables against a distributor, reduces the level of its accounts receivables from the distributor to the lowest level possible prior to notifying the distributor of the termination of the agreement; otherwise, in many cases, the distributor will refuse to pay the accounts receivables, often by claiming that it is entitled to a termination indemnity.

It is controversial whether or not the distributor is entitled to demand from the supplier the repurchase of the products not sold prior to the expiry of the distribution agreement. Such a contractual duty of the supplier may exist in cases where the distributor is contractually obliged to keep a stock of products; it may then be reasonable to demand from the supplier that the agent repurchases those products which are unused, undamaged and still in their original packaging. However, in general, there is no such obligation in the absence of an agreement to this effect.





## 2.4 Limitation Periods

With respect to distribution agreements, the normal statutory limitation periods apply. Thus, claims arising out of distribution agreements become time-barred after 10 years.

# Turkey

## 1. Agency Agreements

### 1.1 General

#### 1.1.1 *Law Applicable*

The Turkish Commercial Code (“**TCC**”) includes rules specific to agencies under Articles 102 through 123.

If the TCC has no specific rules addressing the particularities of a case, the Turkish Code of Obligations’ (“**TCO**”) articles on brokerage apply to agencies that serve as intermediaries. Similarly, in the absence of specific TCC articles, TCO rules on commissioners apply to agencies that enter into agreements on behalf and account of principals. Lastly, if neither the TCC nor the brokerage or commissioner sections of the TCO have specific terms that address the case at hand, the TCO’s articles on representation apply.

There are also rules specific to carriage, maritime trade, insurance and tourism that may apply to agencies in these sectors.

#### 1.1.2 *Formal Requirements*

An agency agreement is not subject to any formal requirements. The agreement can be concluded orally or in writing, and may arise implicitly from the parties’ conduct. However, to avoid evidential difficulties in the event of a dispute between the parties, the terms of the agency agreement should be documented in a formal agreement.

Certain provisions, if to be included in an agency agreement, however, need to be in writing. For instance, appointment of the agent on a non-exclusive basis requires written agreement. If the agent will be permitted to conduct agency activities for competing principals, this also requires to be agreed in writing. Additionally, granting power to agent to enter into agreements with customers, accept payments or goods, renew receivables or make amendments to the amounts of receivables on behalf of the principal also require written agreement.



Lastly, post-termination non-compete restrictions on the agent are required to be in writing (see Section 1.3 below).

There are no requirements to register an agency agreement with, or to obtain authorization from, any public authority.

### *1.1.3 Individual/Corporate Entity*

An agent may be an individual or a legal entity. For agents operating as individuals, the principal must consider whether, on balance, the nature of the relationship may result in the agent inadvertently falling within the legal definition of an employee. Although this will enable the principal to avoid the TCC's specific provisions on agencies, it also means the principal will be subject to all legal and tax consequences arising from its employer status.

### *1.1.4 Duration of Agreement*

An agency agreement can be concluded for a fixed or an indefinite term. If the agreement is silent on duration, it will be deemed to have been entered into for an indefinite period, and will usually be terminable upon notice (see Section 1.5.2 below). An agency agreement concluded for a fixed term will expire at the end of the term. If, however, the parties continue to comply with the agreement terms after the terms have expired, the agreement may continue to be valid and binding even after its expiry, and be deemed an agreement with an indefinite term.

## **1.2 Exclusive/Non-Exclusive**

Applicable law imposes no restrictions on a principal's ability to appoint an agent on an exclusive or a non-exclusive basis. Absent a written provision that renders the agency agreement non-exclusive, the agent will be deemed exclusive. Therefore, if the principal intends to appoint the agent on a non-exclusive basis, it should execute a written agreement with the agent stating explicitly the agent is appointed on a non-exclusive basis.

According to the Turkish Competition Board's Guidelines on Vertical Agreements (the "**Vertical Guidelines**"), agency agreements where the agent takes on no financial or commercial risks (i.e., the "true" agents) do not fall under competition law scrutiny. If, however, the agent assumes these risks, it is not deemed a "true" agent, and the agency agreement is subject to competition law rules on vertical agreements. In this case, if the agent is appointed on an exclusive basis for Turkey, the agreement will fall outside the scope of the Vertical BEC if the agent's market share exceeds 40%. Consequently, the agreement would be subject to more stringent competition law rules, require a more profound competition law analysis and most likely an individual exemption application to the Competition Authority.

### 1.3 Non-Compete

Parties are free to agree on whether an agent can be an agent for competing goods. Unless the parties agree otherwise in writing, the agent is prohibited from carrying out agency activities in the same region for competing principals. If the agent, however, is not a "true" agent, a non-compete provision must not exceed five years according to the Vertical BEC.

The TCC takes a reciprocal approach to exclusivity and the non-compete obligation. If the agent is appointed on a non-exclusive basis and the agreement is silent on whether the agent is under a non-compete obligation, the agent may be deemed no longer under the obligation. In this case, an explicit written agreement on the agent's non-compete obligation is recommended.

Post-termination non-compete clauses for true agents are valid only if they are in writing, relate to the geographical area or the group of customers allocated to the agent under the agreement, and concern the same type of goods covered by the agent's mandate.

Furthermore, a non-compete obligation will not be valid for more than two years after the agency agreement's termination or expiry. A copy of the written agreement containing the non-compete obligation's terms and conditions, signed by the principal, must be provided to the



agent. The principal must pay a reasonable compensation to the agent for restricting its sales with the non-compete obligation. Moreover, if either party terminates the agreement due to the other party's fault, within one month of the termination s/he may notify the other party in writing that s/he is not bound by the non-compete obligation. Any contractual term contradicting the foregoing rules is deemed invalid insofar as the term is detrimental to the agent.

In case the agent is not a true agent under competition law, post-termination non-compete clauses are in principle not in line with the Vertical BEC. However, limited to a term of one year and to the place of activity of the agent, a post-termination non-compete can be applied if it is required to protect the principal's know-how and only relates to the relevant goods or services.

## 1.4 Commission

### 1.4.1 *Basic Principles*

Where an agency agreement is silent on commission/remuneration, the law requires an agent receive the "customary" amount of remuneration for its work. In the absence of a customary amount, remuneration will be decided by a court.

Commission is payable not only for transactions concluded within the term of the agency, but also (i) where a transaction is made within a reasonable time after the agency relationship has ended but the agent has intermediated and prepared the transaction; or (ii) the customer communicated its request for the transaction to the agent before the end of the agency relationship.

Where the transaction is made with a customer belonging to a specific geographical area, or group of customers to which the agent has an exclusive right, the agent is entitled to remuneration even if it has not intermediated the transaction.

If the agent, according to the principal's instruction, also collects on behalf of the principal the amounts to which the principal is entitled, the agent is also entitled to a "collection commission."

#### *1.4.2 When Due and Payable?*

Unless the parties agree otherwise, commission becomes due as soon as the principal or the customer executes the transaction. Even if the parties change the payment due date by mutual agreement, the agent becomes entitled to a reasonable advance payment due on the last day of the month following the principal's execution of the transaction. In any event, the latest due date the parties can agree to is the date on which the customer executes its part of the transaction (e.g., pays for the goods).

#### *1.4.3 Extinction of Right to Commission*

The agent loses its right to commission if it is established that the contract between the customer and the principal will not be executed, and the principal is not to blame. This may happen where the principal becomes entitled to terminate the sale contract agreed with the customer due to the customer's material breach of that contract; or where unforeseen circumstances arise, compromising the principal's ability to perform its obligations, such as a force majeure event.

Moreover, if the principal replaces an agent with a new agent, and the former agent is still entitled to post-termination commission on certain transactions (see Section 1.4.1 above), the new agent will not be entitled to commission for these transactions unless, under the circumstances, it is equitable to share the commission between the two agents. This way, the principal is protected from having to pay double commission during the transitional stage of a new agent's appointment.

#### *1.4.4 Accounting and Audit*

The principal is under obligation to provide the agent information on important matters and copies of its books and records relating to the



agent's commission calculation. This rule cannot be altered by agreement in the agent's disadvantage.

## 1.5 Termination

### 1.5.1 *Formal Requirements*

Termination notices between merchants must be served via a notary public, registered mail, telegram or registered email bearing an electronic signature. These formal requirements may be extremely important in a dispute regarding termination or the agent's rights upon termination. The foregoing formal requirement is, however, a "condition of evidence" rather than a "condition of validity." This means the notice will still be deemed duly given if the serving party does not comply with these formal requirements, but can still evidence delivery.

In Turkish practice, notices are mostly given via notary public. The notice can be served by the relevant party or its attorneys. If the notice is served by the relevant party's attorney, that party must grant its attorney a notarized (and if notarized abroad, also legalized) power of attorney.

### 1.5.2 *Notice Period*

An agency contract for an indefinite period can be terminated with three months' prior notice in writing. This notice period applies for both parties. If the contractual termination notice period is longer, the contractual notice period will apply. Some scholars argue that a contractual notice period detrimental to the agent is not legal. In this regard, the contractual notice period for termination by the principal must not be shorter than three months.

The above minimum notice periods do not apply to fixed-term agreements, which simply expire at the end of the fixed term. If, however, the parties continue to perform a fixed-term agreement after the end of the fixed term, the agreement will be deemed to have an indefinite term, and the above notice period will then apply.

The parties cannot contract out of the minimum notice periods if those periods apply. If either party attempts to terminate an indefinite-term agency agreement with insufficient notice, the other party will have the right to claim damages due to the non-completion of the transaction initiated prior to the termination.

It is possible to terminate an agency agreement without observing the above notice periods if, for example, one of the parties has committed a sufficiently serious breach of the contract that, as a matter of law, justifies termination. In this case, the non-breaching party is required to give to the other party a reasonable cure period; and if the breach is not cured, the non-breaching party is entitled to terminate the agreement. In exceptional cases, for instance, if the breaching party clearly will not or cannot cure the breach, the non-breaching party can terminate the agreement immediately without giving any cure period.

#### *1.5.3 Liability of Principal Upon Termination*

Unsurprisingly, a principal is obligated to pay an agent commission that has become due and payable prior to termination, where the agreement's termination occurs before the commission payment's due date.

As explained above under Section 1.4.3, if a sale is made to a customer within a "reasonable period" after the agency agreement's termination, and the sale is mainly attributable to the agent's efforts during the agreement's term, the agent will be entitled to a commission proportionate to its efforts on that sale. This is whether or not the agent is involved in the particular transaction and even if the transaction is entered into weeks, or even months, after termination. Moreover, if a customer previously solicited by the agent makes an offer, and the offer reaches either the agent or the principal prior to the agency agreement's termination, the agent is still entitled to commission for that transaction.

As discussed above, a replacement agent will not be entitled to commission to the extent the commission is due to the previous agent.





### ***Damages in Lieu of Notice***

As discussed above (see Section 1.5.2), if sufficient notice is not given to terminate an agency agreement, this may be an additional head of damage forming part of any claim by an agent.

### ***Goodwill Compensation***

Under Article 122/1 of the TCC, at the end of an agency relationship, if

- (a) the principal continues to materially benefit from the agent's customer portfolio,
- (b) the agent loses, as a result of the termination, its entitlement to payments under existing customer agreements or those to be executed in the near future, and
- (c) these payments would be equitable,

the principal must pay goodwill compensation to the agent.

The agent, however, is not entitled to goodwill compensation if: (i) the agent terminates the agreement without legitimate cause attributable to the principal, or (ii) the principal terminates the agreement with legitimate cause due to the agent's fault.

Goodwill compensation rules are triggered at the end of the contractual relationship. Turkish laws make no distinction between termination or expiry. Therefore, the agent may be entitled to goodwill compensation even if the contract has ended upon its expiry, provided the above conditions are satisfied.

In any case, the amount of goodwill compensation awarded cannot exceed the average annual commission that has been paid to the agent for the past five years. If, however, the agency relationship lasted less than five years, the average of the entire term serves as the basis for calculation.

Court precedent, moreover, indicates that calculation of an “appropriate” amount, as determined by a court-appointed expert, must take into consideration: (i) the term of the contractual relationship; (ii) the agent’s market share; (iii) the agent’s efforts to market the goods; (iv) the nature of the goods; and (v) the quality and reliability of the goods and trademarks.

An agent’s advance waiver of goodwill compensation is invalid. Waivers after an agency agreement’s execution are valid, provided the waiver is given freely by the agent.

### ***Indemnification and Compensation***

The agent is entitled to indemnification upon termination if the agent terminates the agreement due to the principal’s breach or if the principal terminates the agreement illegitimately. The amount of indemnification may be substantial and may include: lost profits; the severance and notice payments made to the agent’s personnel hired solely to serve the principal’s business; cost of the agent’s investments made in anticipation of a longer relationship; etc.

If the agency agreement is terminated, and initiated transactions cannot be completed due to the agent or principal’s death, loss of capacity or bankruptcy, the agent or his/her successors are compensated by an amount proportionate to the commission the agent would be entitled to had the agreement not been terminated.

Evidently, indemnification and compensation rules are triggered under specific conditions. Therefore, the agent is not entitled to any indemnification or compensation if the contract has ended by its expiry. Please note however that goodwill compensation may still be triggered upon expiry (see our explanations above on the goodwill compensation).

## **1.6 Limitation Periods**

The agent must file a lawsuit for its goodwill compensation claims within one year of the agency agreement’s expiry or termination;



otherwise, the agent will lose all rights to bring a claim. Receivables arising from agency agreements must be claimed within five years from the date they become due and payable.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

There is no specific legislation in Turkey that regulates the relationship between suppliers and distributors. TCO rules on the sale of goods and services, however, generally apply to this relationship. TCC rules on agencies also apply by way of analogy.

#### 2.1.2 *Formal Requirements*

A distribution agreement is not subject to any formal requirements and can be concluded orally or in writing; or it may arise implicitly from the parties' conduct. To avoid evidential difficulties in a dispute between the parties, documenting the terms of the distribution relationship in a formal agreement is recommended.

There are no requirements to register a distribution agreement with, or to obtain authorization from, any public authority.

#### 2.1.3 *Individual/Corporate Entity*

A distributor can be an individual (merchant/sole trader) or a legal entity.

As with agents, consideration should be given to the nature of a supplier's relationship with an individual distributor to ensure that, on balance, the distributor cannot be classified as an employee of the supplier.

#### 2.1.4 *Duration of Agreement*

Turkish law does not regulate the duration of a distribution agreement; this is a matter for the parties to agree upon. If the agreement is silent

on this issue, the agreement will be deemed an agreement for an indefinite term and is likely to be terminable upon reasonable notice (see Section 2.4 below). A distribution agreement concluded for a fixed term will expire at the end of the term. If, however, the parties continue to comply with the terms of the agreement after the terms have expired, the agreement may continue to be valid and binding even after its expiry, and be deemed an agreement with an indefinite term.

## 2.2 Exclusive/Non-Exclusive

Subject to competition law, a distributor may be appointed on an exclusive or a non-exclusive basis. It is not clear whether the distributor will be deemed an exclusive distributor if the agreement is silent on this matter. In a case highly criticized by scholars, the Turkish High Court of Appeals stated the dealer/distributor is deemed appointed on an exclusive basis unless otherwise agreed among the parties. Therefore, a written agreement stating the distributor is appointed on a non-exclusive basis, if this is the parties' intent, is highly recommended.

For distribution agreements where the distributor is appointed on an exclusive basis for Turkey, the agreement cannot benefit from the Vertical BEC if the distributor's market share exceeds 40%. Consequently, the agreement would be subject to more stringent competition law rules, require a more profound competition law analysis and probably an individual exemption application to the Competition Authority.

## 2.3 Non-Compete

Distribution agreements fall under the scope of the Vertical BEC, which provides a block exemption from competition law rules for vertical agreements, including distribution agreements, if they fulfil block exemption conditions. For instance, non-compete obligations in distribution agreements lasting longer than five years are prohibited. If the agreement is executed with an indefinite term or includes an



automatic renewal provision beyond five years, it will be deemed an agreement with a term of more than five years. Therefore, non-compete provisions valid for such agreement's term will fall outside the scope of the Vertical BEC, violate competition law, be deemed invalid and result in competition fines.

In terms of competition law, agreements requiring the distributor to buy more than 80% of its previous year's purchases in the same product market from the supplier, or third parties appointed by the supplier, are also regarded as non-compete obligations. Therefore, these (indirect) non-compete obligations will also be subject to the five-year limitation, as explained above.

Post-termination non-compete provisions in distribution agreements are, in principle, invalid. However, limited to a term of one year and to the place of activity of the distributor, a post-termination non-compete can be applied if it is required to protect the supplier's know-how and only relates to the relevant goods or services.

Agreements where the supplier has a market share of more than 40% do not benefit from the exemption regime provided by the Vertical BEC.

Specific types of non-compete provisions are prohibited even if the agreement benefits from the Vertical BEC. For instance, passive sales to a specific region or customer group cannot be restricted. Active sales can be restricted only to the specific regions or customer groups allocated exclusively to the supplier or other distributors.

Selective distribution systems are subject to a number of specific rules. For example, in selective distribution systems, sales outside the system (except for end users) can be restricted.

In sum, distribution agreements that include provisions restricting competition, such as non-compete provisions, must be carefully examined from a competition law perspective to ensure compliance.

## 2.4 Termination

### 2.4.1 *Formal Requirements*

Termination notices between merchants must be served via a notary public, registered mail, telegram or registered email bearing an electronic signature. These formal requirements may be extremely important in a dispute regarding termination or the distributor's rights upon termination. The foregoing formal requirement is, however, a "condition of evidence" rather than a "condition of validity." This means the notice will still be deemed duly given if the serving party does not comply with these formal requirements, but can still evidence delivery.

In Turkish practice, notices are mostly made via notary public. The notice can be served by the relevant party or its attorneys. If the notice is served by the relevant party's attorney, that party must grant its attorney a notarized (and if notarized abroad, also legalized) power of attorney.

### 2.4.2 *Notice Period*

Each party to a distribution agreement is free to terminate an indefinite-term agreement with prior notice. In the absence of an agreed upon notice period, there is no clarity as to the notice period. Some scholars argue that rules applicable to agencies, which require a three months' notice, are applicable; while others argue the six months' notice period applicable to simple partnerships with an indefinite term should apply. Absent clarity, we believe a reasonable notice period enabling the other party to reorganize its business should be granted for termination. This notice must not be shorter than three months.

Parties can agree on a notice period in the contract. Contractual provisions enabling the supplier to terminate an indefinite-term distribution agreement with a notice shorter than three months, however, may be deemed invalid.



### 2.4.3 *Liability of Supplier Upon Termination*

#### **Goodwill Compensation**

Turkish law rules on goodwill compensation also apply to exclusive distribution relationships. Please see our explanations on *Goodwill Compensation* under Section 1.5.3 above. Principals are, therefore, advised to appoint distributors on a non-exclusive basis. That said, under certain circumstances Turkish courts may conclude that a non-exclusive distribution agreement was, in practice, an exclusive one. This would be the case where there are no other distributors appointed and the supplier has made no direct sales in the region. Suppliers are therefore encouraged to appoint more than one distributor, or conduct direct sales themselves.

The TCC sets out an upper limit for agents' goodwill compensation entitlements, but does not do so for distributors. One can argue, by way of analogy, the upper limit for an exclusive distributor's entitlement to goodwill compensation may be the distributor's average annual gross profit.

Some legal authors, however, believe using the distributor's average annual gross profit as a basis for calculation will produce an inequitable result. This is because distributors incur expenses and carry risks they would not incur/carry conducting the same business under an agency model (e.g., marketing expenses, and stock, distribution, credit/collection and price fluctuation risks). Consequently, distributors generate, normally, higher gross profits compared to the commission entitlements of an agent conducting the same business. Therefore, some legal authors propose the following method for calculating the upper limit, which we find more reasonable and equitable: The upper limit of distributors' goodwill compensation entitlement must be the average of the last five years' annual commission entitlement of an agent conducting the same business under an agency model, rather than a distributorship model. So, to ensure equitable application of the agency provisions to distribution relationships, the amounts corresponding to the distributor's foregoing

expenses, and risks an agent would not incur/carry, must be deducted from the distributor's gross profits. The expenses (e.g., marketing expenses) can be directly deducted from the distributor's gross profits. Regarding the risks, however, the insurance premium amounts that were or would be paid to cover these risks must also be deducted from the distributor's gross profits.

The criteria set out under Section 1.5.3 to calculate the actual goodwill compensation amount, however, would also apply to distributors' goodwill compensation entitlements.

### ***Indemnification***

Damages may be awarded upon termination if the terminating party had no just cause for termination.

#### ***2.4.4 Return of Products***

In the event of termination, there is no clear obligation under Turkish law for a supplier to buy back unsold products from a distributor, and conversely, there is no obligation for a distributor to return any unsold products to the supplier. The distributor is obligated to return products in its possession to the principal if those products are waiting to be sold to third parties and are owned by the principal.

Some scholars argue that, particularly if the distributor was under obligation to keep a certain amount of stock during the term of the agreement, the supplier must repurchase the distributor's stock upon termination.

Some scholars further argue that the distributor can request repurchase of the goods subject to the agreement based on the principal's duty to act faithfully post-termination. If the distributor makes this request, it needs to explain why the term between the notice and the agreement's termination was not long enough to sell the products. The distributor cannot request a repurchase of goods that could not be sold for reasons attributable to the distributor. Regardless, the principal is not obligated to repurchase the goods if





the agreement has been terminated due to the distributor's fault. If the principal is found to be at fault regarding the agreement's termination, s/he is obligated to repurchase the goods as part of his/her compensation duties.

Parties can mutually agree upon a contractual provision regulating the return regime. That said, the parties must consider competition law issues if they intend to impose absolute obligations on the distributor to resell unsold products to the supplier upon termination.

## 2.5 Limitation Periods

The distributor must file a lawsuit for its goodwill compensation claims within one year of the distribution agreement's expiry or termination; otherwise, the distributor will lose all rights to bring a claim.

There is no limitation period under Turkish law that applies specifically to distribution agreements. As the rules on agencies apply to distribution agreements by way of analogy, parties must claim any receivable arising from the distribution agreement no later than five years from the date the receivable becomes due and payable.

# Ukraine

## 1. Agency Agreements

### 1.1 General

Relationships between a representative and a principal in:

(i) "representation arrangements" (which is analogous to the common law concept of agency for a disclosed principal); and (ii) "commission arrangements" (which is analogous to the common law concept of agency for an undisclosed principal) are governed by the provisions of the Civil Code of Ukraine (the "Civil Code") and the Commercial Code of Ukraine (the "Commercial Code") dated 1 January 2004.

The Civil Code provides for more detailed regulation for both types of arrangements described above. In addition, it presents a concept of "commercial representation," which is deemed a sub-category of the concept of "representation" (or "general representation" for the purposes of this publication), but provides for a number of important peculiarities, which distinguish "commercial representatives" from "general representatives."

The Commercial Code provides for a concept of "commercial intermediation" (or "agency relationship") which is very close to the concept of "commercial representation" introduced by the Civil Code. For the purposes of this publication, both the "commercial representation" concept and the "commercial intermediation" (or "agency relationship") concept will be referred to collectively as "commercial representation."

In view of the fact that, under Ukrainian law, one may structure agency relationships using any of the general representation, commercial representation (ie, either the proper commercial representation or the commercial intermediation) and/or commission concepts, all of these concepts will be covered by this chapter.

Irrespective of the differences between the respective common law and civil law concepts, for convenience purposes, the above three



types of agency relationship will be referred to as follows: (i) “general agency” (for “representation”); (ii) “commercial agency” (for “commercial representation”); and (iii) “commission agency” (for “commission”). Again, for convenience, all of the “general agency,” “commercial agency,” and “commission agency” concepts of Ukrainian law will be deemed constituent parts of a more general concept of “agency relationships.” This generalization will be made here in order to avoid this chapter becoming overly complex. However, please note that there are some important differences between the concepts described above, and it should not be assumed that they are interchangeable.

### *1.1.1 Law Applicable*

The Civil Code and Commercial Code provide for specific rules governing agency relationships of all three types listed above.

It should be noted that some aspects of agency relationships are governed by international agreements that have been ratified by the Ukrainian Parliament. Pursuant to the Constitution of Ukraine, any such international agreement is deemed an integral part of applicable Ukrainian legislation, on a par with Ukrainian domestic legislation. However, the overview below is based only on Ukrainian domestic legislation governing the respective agency relationships and disregards the provisions of the respective international agreements of Ukraine.

### ***General Agency***

“General agency” is a relationship for the duration of which one party (the agent) is either obliged to, or has a right to, enter into agreements with third parties on behalf of the other party (the principal). A general agency relationship may be based either on an agreement, on the respective provisions of law, on an act of a legal entity (such as an authorization to act as agent granted by a board resolution) or otherwise. In the case of a general agency relationship based on an

agreement, the Civil Code provides that an agent is obliged to perform certain legal acts on behalf of at the expense of its principal.

### ***Commercial Agency***

Pursuant to the statutory definition, “commercial agency” is the relationship for the duration of which one party (the commercial agent) acts as an intermediary on behalf, in the interest, under the control, and at the expense of the other party (the principal) for the purpose of facilitating the principal’s business activity. A commercial agency relationship may be based only on an agreement between the parties.

The law implies that the principal difference between a commercial agent and a general agent is that (i) the former is habitually engaged in the business of providing the respective intermediary services, while the latter is not primarily in the business of providing such services; and (ii) the former acts for a principal, which is a business entity, and for the purposes of the principal’s business activity, while the latter may act for any type of principal and not necessarily in relation to the principal’s business activities.

As discussed earlier, there are two concepts of commercial agency: “commercial representation” (in the Civil Code) and “commercial intermediation” (in the Commercial Code). Both concepts are being referred to in this publication jointly as “commercial agency.” The statutory definition of “commercial agency” provided in the Commercial Code is broader than the one provided in the Civil Code because it also includes agents that simply broker commercial agreements on behalf of the principal, while the definition provided in the Civil Code is restricted to those commercial agents who have the authority to enter into commercial agreements on behalf of their principals.

The Commercial Code provides that insofar as an aspect of a commercial agency relationship is not regulated by the Commercial Code, the general rules of the Civil Code governing agency relationships shall apply.



A commercial agent may act on behalf of multiple principals within the scope and for the purpose of the same business transaction if all such principals agree to such a representation. A commercial agent may not enter into commercial transactions between itself and its principal.

### ***Commission Agency***

The Civil Code provides that “commission agency” is the relationship by which one party (the commission agent) is obliged, for a fee, to enter into agreements with third parties on its own behalf, but in the interest of and at the expense of the other party (the principal).

#### ***1.1.2 Formal Requirements***

Every agency relationship of the types listed above must take the form of an agency agreement. The Civil Code provides that any agreement may be entered into in the legal form elected by the parties thereto, unless any particular legal form (eg, a notarized document) is specifically required by law for a particular type of agreement.

The Commercial Code provides that any commercial agency agreement must be entered into in writing. Applicable Ukrainian legislation does not provide for any similar specific requirement with respect to any other type of agency agreements. However, many agency agreements are likely to fall within the Commercial Code’s definition of a “commercial agreement” (primarily agreements between business entities), in which case the agency agreement must be in writing (preferably in a single document) and must bear the seals or stamps of the contracting parties.

Whether or not the agency agreement qualifies as a commercial agreement or a commercial agency agreement under the relevant Articles of the Commercial Code, the parties would be well advised to enter into a written agreement.

Ukrainian law does not require that agency agreements be notarized, although the parties may wish to have the agreement notarized.

Under the Civil Code, an agent under a general agency agreement or a commercial agency agreement may act on the authority of either the respective agency agreement or a power of attorney. In addition, there is an implication that a commercial agent may act on the authority of another unspecified document. In any event, a commercial agency agreement should specifically state the source of the authority under which a commercial agent will act for the principal.

Commission agents may only act on the basis of a commission agency agreement; they may not act pursuant to a power of attorney. Any power of attorney must follow the same legal form as the agency agreement.

If a power of attorney for an agent is issued abroad, it must be notarized in the country of its issuance and legalized/apostilled in order to become valid and effective in Ukraine.

#### *1.1.3 Duration of Agreement*

Principals are authorized to appoint general agents, commercial agents and/or commission agents for a fixed or an indefinite period of time. Likewise, powers of attorney may be issued in Ukraine for a fixed or an indefinite period of time (ie, until the principal cancels the power of attorney). A power of attorney issued outside Ukraine must comply with any rules of the jurisdiction in which it was created in respect of its duration.

### **1.2 Exclusive/Non-Exclusive**

The Civil Code provides that a general agent and/or a commercial agent may be provided with exclusive rights to act on behalf of its principal (i) with respect to a particular subject matter; (ii) for a certain period of time; and/or (iii) within a certain territory.

Alternatively, the Commercial Code provides that a principal may appoint multiple commercial agents provided it gives notice to its other commercial agents when appointing a new one. Similarly, and in the absence of any non-compete clause (see section 1.3 below), a



commercial agent may act for multiple principals if their interests are not in conflict.

A commercial agency agreement must clearly define the scope of the commercial agent's territory. If the agreement fails to do so, the whole country will be deemed to be the agent's territory, which could cause problems for the principal if, for example, the agent is given exclusivity but there are already existing agents in other parts of the country. Pursuant to the Civil Code, a commission agent may be granted exclusivity in accordance with the terms of a commission agency agreement.

There should not be any competition law issues with regard to potentially anti-competitive clauses in agency agreements, such as exclusivity clauses, or non-compete clauses (as discussed below). As is the case in the EU, Ukrainian competition law does not apply to agency relationships, provided they are "genuine." However, for an agency agreement to be declared non-genuine, it would have to be declared by a competent court to be a "sham" agreement intended to disguise a de facto distribution agreement. Given this hurdle, the Ukrainian competition authority does not, as a matter of practice, scrutinize agency relationships, and there are no indications that the authority will do so in the near future.

In the event that an agency agreement is declared to be non-genuine, Ukrainian competition law in relation to vertical agreements will apply (see section 2.2 below).

### 1.3 Non-Compete

The Civil Code is silent on whether a non-compete clause may be provided either in a general agency agreement or in a commercial agency agreement. However, the Commercial Code provides that the parties to a commercial agency agreement may provide for "monopoly" relationships pursuant to which a commercial agent is precluded from acting for other principals.

Although the Civil Code does not directly deal with this issue with respect to a commission agent, it does state that a commission agent is obliged to enter into commercial agreements in the best interests of and in accordance with the instructions of its principal. Therefore, one may conclude that the Civil Code indirectly implies that a non-compete clause may also be included in a commission agency agreement.

Furthermore, neither the Civil Code nor the Commercial Code directly prohibits non-compete clauses in agency agreements. Therefore, one may conclude that even where non-compete clauses are not expressly permitted (eg, in the case of general agency agreements), such clauses are permissible provided that they comply with the requirements of applicable Ukrainian competition legislation.

The above discussion applies both to non-compete clauses during the term of the agency agreement, and to those applying post-termination.

## 1.4 Commission

### 1.4.1 *Basic Principles*

The Civil Code provides that an agent (whether general or commercial) is entitled to remuneration for its services to the principal, unless the agency agreement provides otherwise. In the event that the agency agreement (whether general or commercial) fails to provide for the amount of remuneration and/or for the manner of payment, remuneration is due and payable upon the completion of an assignment and shall be calculated on the basis of “usual prices” for such services. Under Ukrainian legislation, the term “usual price” refers to the “fair market price,” ie, the price that would be agreed by unassociated and well-informed parties for a similar transaction in the absence of duress. Normally, the “usual price” may be determined on the basis of information about similar agreements for similar services provided under comparable conditions.

Under the Civil Code, the principal is obliged to reimburse its agent (whether general or commercial) for all of the latter’s expenses





incurred as a result of the agent's performance under the agency agreement, unless the agency agreement provides otherwise.

The Commercial Code provides that a commercial agency agreement must provide for the amount and the terms of payment of commercial agency fees. It also provides that parties to a commercial agency agreement may provide for additional remuneration if the commercial agent enters into a *del credere* agreement on behalf of and in the interest of its principal, whereby the agent stands as guarantor for any monies owed to the principal by its customer.

Despite the default rules above, there is arguably nothing to prevent an agent from agreeing to provide its services for significantly below the "usual price" or even for no payment at all, but a principal would be well advised to seek Ukrainian tax advice in order to avoid adverse tax consequences for either the principal or the agent.

With regard to commission agency, the Civil Code provides that a commission agent performs its obligations (i) for a fee; and (ii) at the expense of the principal. Under a commission agency agreement, a principal is obliged to pay:

- fees to its commission agent in the amount and in the manner provided for in the commission agency agreement;
- additional fees to its commission agent if the latter enters into a *del credere* commercial agreement;
- fees to its commission agent in full if the commercial transaction with the third party was not carried out through the fault of the principal; and
- fees owed to its commission agent for the agency services actually rendered to the principal, in the event of an early termination of the respective commission agency agreement.

If a commission agency agreement fails to specify the amount of fees payable to a commission agent, such fees are due and payable to the

commission agent upon the completion of the respective assignment and in the amount determined on the basis of “usual prices” for such services. The Civil Code further provides that a commission agent has a right to reimbursement of expenses incurred in performing its obligations up to the date of termination of the agreement, even if the agreement is terminated due to a breach by the agent.

If a principal wishes to agree with a commission agent that the agent be paid nothing, or well below the “usual price” for his/her services, the same warning regarding adverse tax consequences applies (see above).

#### *1.4.2 When Due and Payable?*

Under the Civil Code, agency fees (whether under a general agency agreement or a commercial agency agreement) are due and payable upon (i) the completion of an agent’s assignment, unless the respective agency agreement provides otherwise; and (ii) the termination of an agency agreement. There are no provisions regarding time limits within which the above payments are required to be made, leaving that issue at the complete discretion of the parties to a general agency agreement or a commercial agency agreement.

Under the Commercial Code, commercial agency fees are due and payable after the third party has paid the principal pursuant to the terms of a contract that was entered into with the assistance of the commercial agent, unless the commercial agency agreement provides otherwise. As with the Civil Code, the Commercial Code does not provide any time limits during which the above payments must be made, thus leaving the above issue at the discretion of the parties to the commercial agency agreement.

The Civil Code provides that a commission agent shall be authorized to set off any commissions owed to him/her against any sums in the agent’s possession which are payable to the principal, provided that no third party has a priority claim with respect to any such sums. The above provision is mandatory and may not be overruled contractually



by the parties to a commission agency agreement. As a result, the agent is given some control over the payment of commission to him.

Neither the Civil Code nor the Commercial Code specifies the timing for the reimbursement of general agents, commercial agents and/or commission agents for their expenses incurred on behalf of their principals. Therefore, it would be advisable to follow the above rules regarding the payment of agency fees.

#### *1.4.3 Extinction of Rights to Commission*

The Civil Code is silent on whether the agent's rights to agency fees may be extinguished, so this issue should be dealt with in the respective agency agreement. However, the following peculiarities must be taken into account when drafting the agreement.

The Civil Code provides that a principal under either a general agency agreement or a commercial agency agreement shall not be bound by the terms of a commercial agreement entered into by a general agent or a commercial agent if such an agent acted beyond its authority in entering into the respective commercial agreement. The Civil Code further provides that a principal will become bound by the terms of such a commercial agreement only if it approves it. Therefore, neither a general agent nor a commercial agent will have the right to be paid agency fees if it acted beyond the scope of its capacity and the principal refused to approve its actions.

Although the Civil Code is silent on this issue, the Commercial Code imposes an obligation upon a principal to pay a commercial agent once the principal has received payment from the third party, unless the commercial agency agreement provides otherwise. Therefore, the commercial agent's right to be paid may be extinguished if the third party never pays the principal. However, there is an exception to this rule. The principal is obliged to pay the commission due to the agent if the principal is in breach of the commercial agency agreement.

With regard to commission agents, the Civil Code is also silent on the issue of extinguishing rights to commission. Therefore, up to a point,

the parties are free to agree their own terms on this matter. However, as with commercial agents, the commission agent must be paid if the principal is in breach of the commission agency agreement.

#### *1.4.4 Accounting and Audit*

The Civil Code does not impose any obligations on a principal to provide general agents, commercial agents or commission agents with any commission statements, extracts from the company books, or any other documentary evidence of the amount of agency fees due and payable by the principal. It leaves all those issues to the complete discretion of the parties to the respective agency agreement. However, commercial agents are given a right to demand such documentation by virtue of a provision of the Commercial Code.

Additionally, the Commercial Code does state that it is the obligation of the principal to calculate the amount of commercial agency fees due and payable under a commercial agency agreement.

None of the Civil Code the Commercial Code, or any other provision of Ukrainian law entitles commercial agent to audit the books of its principal.

### **1.5 Termination**

In addition to the general rules regarding termination of commercial agreements (eg, where the parties agree) the Civil Code provides that any party to a general agency agreement or a commercial agency agreement may unilaterally terminate it at any time.

In relation to commercial agents, the Commercial Code is more restrictive, stating that a commercial agency agreement may be unilaterally terminated by either party only if the agreement is not entered into for a fixed period of time.

In relation to commission agents, the Civil Code states that: (i) a principal may unilaterally terminate any commission agency agreement at any time; and (ii) a commission agent may unilaterally



terminate a commission agency agreement, provided it has been entered into for an indefinite period of time.

### *1.5.1 Formal Requirements*

In the event that a general agency agreement, a commercial agency agreement and/or a commission agency agreement is unilaterally terminated by either party, the terminating party is required to notify the other party of its decision.

In the event that a general agency agreement or a commercial agency agreement is terminated upon the death of an agent (if a natural person), or by the liquidation of an agent (if a legal entity), the respective notice must be served upon a principal by heirs of the deceased or by the liquidator of the legal entity, as the case may be.

If the agreement is to be terminated by the mutual consent of the parties, the party wishing to terminate the agreement is obliged to send an offer to enter into a termination agreement to the other party to the agency agreement.

The legal form of both a termination notice and a termination agreement must follow the legal form of the agency agreement, unless the latter provides otherwise.

### *1.5.2 Notice Period*

Under the Civil Code, the terminating party is required to give the other party to a general agency agreement or a commercial agency agreement a notice period of at least one month (unless the parties are contractually bound by a longer notification period, in which case the contractual notice period will apply) if the general agent or commercial agent is a business entity. However, where a commercial agent that is a legal entity is liquidated, a principal retains the right to terminate a commercial agency agreement without complying with the above minimum notice period.

With regard to commission agents, a principal may unilaterally terminate a commission agency agreement at any time. If, however, the commission agency agreement has been entered into for an unlimited period of time, a principal is required to give the commission agent a notice period of at least 30 days. The Civil Code implies that there is no minimum notice period for the termination by a principal of a fixed term commission agency agreement.

However, a commission agent may only terminate a commission agency agreement that has been entered into for an unlimited period of time and only by giving the principal a notice period of at least 30 days.

If a party to an agency agreement sends a notice to the other party offering to enter into a termination agreement, the termination agreement shall be deemed to be entered into if the offering party receives a notice accepting the offer from the other party within the time period stated in the offer or, if the offer fails to provide for such a time period, then within a reasonable period of time.

However, if the agency agreement qualifies as a commercial agency agreement for the purposes of the Commercial Code, then the other party is obliged to inform the offering party either of its acceptance or its rejection of the offer within 20 days from the day of its receipt of the offer. If the other party rejects an offer to terminate the agency agreement or fails to respond in time, the terminating party may initiate legal action against the other party, seeking a court decision that the agreement has been terminated.

### *1.5.3 Liability of Principal on Termination*

Upon the termination of a general agency agreement or a commercial agency agreement, a principal is liable to pay the outstanding amount of agency fees (if any) to its general agent and/or commercial agent together with any outstanding expenses due to it and which have been incurred by the general agent and/or commercial agent during the term of and for the purposes of the agency agreement. The Civil



Code also provides that both a general agent and a commercial agent shall be entitled to outstanding expenses and a portion of the agency fees (if any) due to them for the agency services actually delivered to the principal in the event of a unilateral termination of the agency agreement by the principal. Neither a general agent nor a commercial agent shall be entitled to any expenses or to agency fees in respect of services performed after they have become aware or should have become aware that the agency agreement has been terminated.

A principal is also liable to pay damages to its commercial agent if the principal unilaterally terminates a fixed term commercial agency agreement or terminates an indefinite term commercial agency agreement with an insufficient notice period. However, unlike in EU countries, the agent has no statutory right to claim a termination payment in circumstances where a fixed term agreement expires, or the principal gives the agent the required amount of notice to terminate an indefinite term commercial agency agreement, ie, there is no right to claim solely for the loss of agency rights arising from the termination.

Upon termination of a commission agency agreement a principal is liable under the Civil Code to pay to its commission agent the following amounts:

- the outstanding amount of its commission agency fees;
- the outstanding amount of any additional commission agency fees due and payable to the commission agent in the event that it is a *del credere* agreement for the benefit of the principal;
- the portion of the commission agency fees for services actually rendered to the principal if the commission agency agreement has been terminated unilaterally ahead of time;

- the full outstanding amount of the commission agency fees if the reason that the commission did not become due was the fault of the principal; and
- the outstanding amount of expenses due to the commission agent incurred in the course of its performance under the commission agency agreement.

In the event of an early termination of the commission agency agreement by the principal, the latter is required to dispose of any of its assets that were held by the commission agent within the time period provided in the commission agency agreement or immediately upon the termination of the commission agency agreement if it fails to provide for such a time period. If the principal fails to comply with the above requirement, the commission agent is authorized either (i) to transfer such assets to the custody of a third party at the expense of the principal; or (ii) to dispose of such assets for the benefit of the principal at the best price.

In the event of an early termination of the commission agency agreement by the commission agent, the principal is required to dispose of any of its assets which are held by the commission agent within 15 days of receipt of the commission agent's termination notice. If the principal fails to do so, the same rules apply as provided in the paragraph above.

## 1.6 Limitation Periods

There is a general limitation period of three years for bringing up any claims under any commercial agreement. A reduced limitation period applies to bringing up claims for contractual penalties. An extended limitation period of five years applies to bringing up claims to invalidate commercial agreements entered into under duress or deceit. A further extended limitation period of 10 years applies to claims that a commercial agreement is void.





## 2. Distribution Agreements

### 2.1 General

Ukrainian law does not recognize distribution agreements as a separate type of commercial agreement. Nevertheless, distribution agreements are a popular legal vehicle for doing business in Ukraine.

Given the fact that, unlike an agent, a distributor operates in its own name, for its own benefit and at its own expense, a distribution relationship bears almost no risk of creating a permanent establishment in Ukraine for a non-Ukrainian supplier. However, prior Ukrainian tax advice should be sought if the planned distribution structure could be confusingly similar to an agency relationship.

#### 2.1.1 *Law Applicable*

Although distribution agreements have no special legal status under Ukrainian law, the raft of general Ukrainian legislation governing commercial agreements and, in particular, sale of goods and/or supply agreements, applies to distribution relationships. Depending on the particular type of goods to be distributed, other rules of Ukrainian domestic legislation (eg, rules governing the sale of agricultural products and/or the supply of utilities) may also apply to distribution agreements. However, such sector-specific rules are beyond the scope of this chapter.

The Civil Code and the Commercial Code are the primary Ukrainian legislative acts governing distribution agreements. However, other Ukrainian laws in areas such as competition, intellectual property, currency control, international commerce, tax, product registration, product certification, product liability and consumer protection may also apply to a distribution relationship in the respective parts thereof.

There are some international agreements that have been ratified by the Ukrainian Parliament and which govern the same or similar issues. These agreements are deemed an integral part of applicable Ukrainian legislation on a par with Ukrainian domestic legislation.

However, this overview is based only on Ukrainian domestic legislation governing, primarily, the sale of goods/supply agreements and disregards the provisions of international agreements.

### *2.1.2 Formal Requirements*

The Commercial Code provides that every commercial agreement must be (i) in writing and (ii) signed by the parties. For the purposes of this provision, any distribution agreement will qualify as a commercial agreement because it will always be entered into between business entities.

Ukrainian law does not require that a distribution agreement be put into notarized written form although the parties may wish to have the agreement notarized.

Ukrainian legislation does not provide for any filing, notification, authorization or similar requirements for ensuring the validity of distribution agreements. Any such distribution agreement shall be deemed valid and binding upon its parties provided it has been duly entered into thereby in the required legal form (which would mean that the agreement is at least in writing), and contains all material terms prescribed by the Ukrainian legislation to be considered an enforceable contract.

### *2.1.3 Duration of Agreement*

The Civil Code is silent on the issue of duration of a distribution agreement. However, the Commercial Code provides that a distribution agreement (ie, a supply agreement, under the Commercial Code) must be entered into for a fixed term. If it is not entered into for a fixed term, it shall be deemed to have been entered into for one year only.

Moreover, the Commercial Code provides that if a long-term agreement (ie, in excess of one year's duration) sets out terms for the supply of goods only for an initial duration term (ie, one year or less), the agreement must provide for a specific mechanism on how to



determine the terms for all subsequent supplies of goods. Should such mechanism be omitted from an agreement, by virtue of law, the respective agreement shall also be deemed to have been entered into for one year only.

## 2.2 Exclusive/Non-Exclusive

With the exception of competition legislation, Ukrainian law does not regulate the issue of exclusivity in the context of distribution relationships. Therefore, subject to any competition concerns, the parties to a distribution agreement are authorized to agree that the distributor will be either exclusive or non-exclusive, and that either the distributor will be free to purchase competing goods or will be prohibited from doing so.

Since Ukraine is not a member of the EU, the comments in the specific chapter on competition law do not apply in Ukraine. However, Ukrainian competition legislation sets out rules similar to those in Article 101 of the Treaty of the Functioning of the European Union (TFEU).

In accordance with the Law of Ukraine “On Protection of Economic Competition” of 2001 (the “Competition Law”), which is the principal legislative act regulating competition in Ukraine, some arrangements in distributorship relations may be considered concerted actions of business entities. The Ukrainian Competition Law generally prohibits any concerted actions which cause or may cause prevention, restriction or distortion of competition (anti-competitive concerted actions).

In particular, the Competition Law prohibits the following actions:

- fixing prices or any other purchase or sale conditions;
- limiting or controlling production, markets, technical development or investment;

- sharing markets or sources of supply under territorial principle, goods assortment, sale or purchase volumes, range of purchasers, sellers or consumers or on the basis of any other features;
- removal from the market or limitation of entry to the market (exit from the market) of other business entities, purchasers or sellers;
- application of different conditions to equivalent transactions with other business entities, thereby placing them at a competitive disadvantage;
- conclusion of the contracts subject to acceptance by other business entities of additional obligations which, by their nature or according to trade and other fair business practices, are irrelevant to the subject matter of such contracts; and
- material limitation of competition abilities on the market of other business entities without objective grounds.

Therefore, concerted actions of business entities (particularly in the form of distributorship relations) may require the prior approval of the Antimonopoly Committee of Ukraine (the “AMC”), which is the Ukrainian competition authority, to become effective and enforceable in Ukraine. However, the Competition Law together with a number of AMC regulations which further develop the regulation of concerted actions, provide for general exemption (the “General Exemption”) and vertical exemption (the “Vertical Exemption”) under which, if the parties qualify, they will not need to obtain AMC approval in order to make such arrangements enforceable under the Competition Law.

The General Exemption is provided in Article 8 of the Competition Law, pursuant to which the provisions of Article 6 of the Competition Law shall not apply to concerted actions with respect to supply and/or use of goods, where a participant in concerted actions imposes restrictions upon another participant in concerted actions in respect of:



- the use of goods supplied by a participant or other suppliers;
- the purchase of other goods from other business entities or the sale of other goods to other business entities and/or consumers;
- the purchase of goods, which, by their nature or according to trade and other fair business practices, are irrelevant to the subject matter of such contracts; and
- the formation of prices or other conditions of sale of the supplied goods to other business entities or consumers.

The General Exemption will apply only to the extent that the concerted actions satisfy all of the following conditions:

- they result neither in the material restraint of competition on the market (or a considerable portion thereof) nor in the monopolization of the relevant markets;
- they do not restrict the access of other business entities to the market; and
- they result neither in the economically unjustifiable price increases nor in the shortage of respective products on the market.

If any of the above conditions is not satisfied, the General Exemption will not apply. The respective arrangements in a distribution agreement will fall back within the scope of Article 6 of the Competition Law and will require prior AMC approval.

There is also a block exemption (the “Block Exemption”) based on which vertical concerted actions are allowed and do not require the AMC approval if:

- the appropriate market shares held by the supplier or buyer do not exceed 30% in the markets on which they sell or purchase the goods or services;

- subject to the preceding paragraph:
  - concerted actions are carried out between an association of undertakings and its members, with the condition that all its members are retailers of goods and if no individual member of the association has a total annual turnover for the preceding fiscal year exceeding EUR 25 million;
  - concerted actions contain provisions relating to the buyer's provision or use of intellectual property rights (under certain conditions); and/or
- concerted actions are carried out between a contractor and subcontractor (in certain cases).

Vertical concerted actions are not allowed and require prior AMC approval (with some exceptions) if they:

- are carried out between competing undertakings;
- include hardcore restrictions (for example, restrictions relating to the determination of the sale price, territory or customer group);
- include a non-compete obligation concluded for more than five years or for an indefinite period;
- include any obligations forcing the buyer not to manufacture, purchase, sell or resell goods or services after termination of the agreement;
- include any obligations forcing the members of a selective distribution system not to sell the brands of particular competing suppliers; and/or
- are performed by different (unrelated) undertakings in parallel networks, and such networks cover more than 50% of an appropriate market.



In order to obtain AMC approval for concerted actions, the parties to the distribution agreement are required to prove a positive effect of their planned concerted actions on the market, ie, that such concerted actions contribute to one or more of the following:

- improvements in the manufacture, acquisition or sales of products;
- technical, technological and economic development;
- the development of small and medium businesses;
- the optimization of export/import of goods;
- the development and application of unified technical specifications and standards for goods; or
- the streamlining of the production process.

The benefit to the parties to a distribution agreement of being able to rely either on the General Exemption or the Block Exemption is that the parties will not need to seek prior approval of the relevant clauses (eg, the exclusivity clause) from the Ukrainian competition authority before they are able to perform the agreement.

## 2.3 Termination

### 2.3.1 *Formal Requirements*

The parties to a distribution agreement are authorized to expressly provide for the right of unilateral termination of the agreement.

In the absence of an express right to terminate, it may be terminated only (i) by agreement between the parties; (ii) by a court decision; or (iii) by any other mechanism or for any other reason typically available under civil legislation. The terminating party is obliged to send a notice of termination to the other party. If the terminating party has a right to unilaterally terminate the distribution agreement pursuant to its terms, then such notice will be deemed a termination notice and will result in

the termination of the distribution agreement. If the terminating party does not have such a right under the distribution agreement, then such notice will be deemed an offer to the other party to enter into a termination agreement.

The legal form of both a termination notice and a termination agreement must follow the legal form of the distribution agreement, unless the latter provides otherwise. As long as a distribution agreement is put in simple written form, the respective termination notice or termination agreement must also be put in simple written form or, if a distribution agreement is put in notarized written form, the respective termination notice or termination agreement must also be put in notarized written form, unless the distribution agreement provides otherwise.

### *2.3.2 Notice Period*

A distribution agreement must stipulate the required notice period in the event that any party thereto has a right unilaterally to terminate the agreement. Unlike the position in the EU, there is no default notice period under Ukrainian law.

If a party to a distribution agreement sends a notice to the other party offering to enter into a termination agreement, then the other party is obliged to inform the offering party either of its acceptance or its rejection of the offer within 20 days from the day of its receipt of the offer. If the other party rejects an offer to terminate the distribution agreement or fails to respond in time, the terminating party may initiate legal action against the other party seeking a court order for termination of the agreement.

### *2.3.3 Liability of Supplier on Termination*

In addition to any outstanding contractual liabilities, on termination of a distribution agreement, a supplier continues to be liable to the distributor for the quality of the goods it has already supplied.





However, there are no default rights for a distributor to claim compensation from a supplier on termination, in the absence of any express contractual rights.

#### 2.3.4 *Return of Products*

There is no default obligation on a distributor to return its inventory of products to the supplier on termination of the distribution agreement. Such an obligation must therefore be expressly set out in the agreement if required.

Notwithstanding the above, a supplier may be able to demand the return of products which have been delivered to the distributor if the distributor fails to pay for them in accordance with its obligations.

### 2.4 Limitation Periods

There is a general limitation period of three years for claims under any commercial agreement. A reduced limitation period applies to claims for contractual penalties depending on the kind of penalty. An extended limitation period of five years applies to claims to invalidate commercial agreements entered into under duress or deceit. A further extended limitation period of 10 years applies to claims to declare a commercial agreement void.

The parties to a commercial agreement may contractually extend the above statutory limitation periods. Any such agreement between the parties must be in writing.

## United Arab Emirates

### 1. Agency and Distribution Agreements in the United Arab Emirates

#### 1.1 General

Foreign investors may decide to use an agent to represent their interests in the United Arab Emirates (“UAE”) instead of establishing a permanent presence. There is no distinction between agents and distributors under UAE law and the discussion in this chapter on agents applies equally to distributors.

#### 1.2 Regulation of Commercial Agency

Agency relationships in the UAE are governed by:

- Federal Law No. 18 of 1981, as amended (the “Commercial Agency Law”), which regulates and governs the appointment of agents in the UAE. The Commercial Agency Law defines a commercial agency as any arrangement whereby a foreign company is represented by an agent to “distribute, sell, offer, or provide goods or services within the UAE for a commission or profit.”<sup>1</sup> The UAE Ministry of Economy and Commerce (“MOEC”), the authority empowered to regulate commercial agencies, has taken the position that franchise agreements are also subject to the Commercial Agency Law. The Commercial Agency Law requires, among other things, that agents in the UAE be UAE nationals (or a company wholly owned by UAE nationals), and that agents must have a license to operate an agreement in each Emirate in which they operate.
- Federal Law No. 18 of 1993, (the “Commercial Code”), which augments the Commercial Agency Law and establishes the regulatory framework for the various types of commercial

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<sup>1</sup> Article 1.

agencies permitted under the law. The most common type of agency is a contract agency, whereby the agent undertakes “on a permanent basis and in a specific area of activity, the instigation and negotiation of the conclusion of deals, to the advantage of the principal and in return for payment.”<sup>2</sup> Agency contracts are treated like contracts agencies when they involve one agent as the exclusive agent.<sup>3</sup>

- Federal Law No. 5 of 1985 on Civil Transactions (the “Civil Code”) regulates in general the contractual relationship between the parties.

### 1.3 Characteristics of Commercial Agency

The primary requirements and characteristics of commercial agency in the UAE are:

- commercial agents must be UAE nationals or companies incorporated in the UAE and owned entirely by UAE nationals;
- commercial agents should (rather than must) be registered with the MOEC to engage in commercial agency activities;
- commercial agents are entitled to an exclusive territory encompassing at least one Emirate for the specified products;<sup>4</sup> and
- unless otherwise agreed, commercial agents are entitled to receive commissions on sales of the products in their designated territory irrespective of whether such sales are made by or through the agent.<sup>5</sup>

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<sup>2</sup> Article 217.

<sup>3</sup> Commercial Code, Article 227.

<sup>4</sup> Commercial Agency Law, Article 5(1).

<sup>5</sup> Commercial Agency Law, Article 7.

## 1.4 Rights and Entitlements of Commercial Agents

Commercial agents are entitled to prevent products subject to their agency from being imported into the UAE if the agent is not the consignee. Where the agency agreement is registered, commercial agents who are terminated without substantial justification are entitled to receive compensation. Where the agent's term has not been renewed, the agent can prevent the foreign principal from appointing a replacement agent.

Many UAE commercial agents will insist on a registered arrangement in order to avail themselves of the protection of the Commercial Agency Law. Notwithstanding whether the agency agreement is registered and therefore subject to the protections provided in the Commercial Agency Law, foreign entities should note that the Commercial Code may also affect the relative rights and duties of the parties as noted above. Consequently, foreign parties should consider carefully the application of the Commercial Agency Law and the Commercial Code in drafting any agreement to engage a UAE party to perform any type of marketing, sales or other "commercial" activity in the UAE.

## 1.5 Registration of Agency Agreements

### 1.5.1 *Registration Requirements*

A number of supporting documents must accompany the application for registration, including a notarized and authenticated copy of the commercial agency agreement together with an official Arabic translation. If the commercial agent is to conduct commercial agency activity in more than one Emirate, the registration application must also be submitted to the MOEC's office in the Emirate where the commercial agent's main commercial establishment is located.

Failure to follow certain formalities in connection with the execution of an agency agreement, such as lack of translation into Arabic or lack of notarization and authentication, would make it difficult to register as a commercial agency agreement under the Commercial Agency Law. In

addition, certain provisions in an agency agreement may render it difficult to register if such provisions are objectionable to the MOEC, such as those:

- specifying that the relationship is non-exclusive for the territory covered;
- providing for foreign governing law, forum and/or arbitration; and
- specifying that the relationship is not a commercial agency.

It is also worth noting that in 2006, the MOEC issued a resolution permitting registration of a commercial agency agreement only if the agreement contains a clause evidencing the parties' consent to such registration, or if the commercial agent attaches a letter from the principal evidencing such consent. Such MOEC resolution seeks to remedy prior instances where a UAE commercial agent registered its agreement without the principal being aware of that registration or the UAE legal implications.

### *1.5.2 Registration Versus Non-Registration*

The conventional wisdom historically has viewed the Commercial Agency Law as requiring, by its terms, the registration of all commercial agencies with the MOEC. The Commercial Agency Law does not impose any penalty on the principal for non-registration. Though it does provide for certain penalties against the person carrying out commercial agency activities not in accordance with its terms, we are not aware of any such penalties being imposed on a commercial agent which has not registered its commercial agency agreement.

In practice, the language of the Commercial Agency Law appears to be interpreted as "should" register rather than "must" register since the MOEC essentially does not appear to enforce a requirement of registration. Further, recent amendments to the Commercial Agency Law and changes in policy at the MOEC point to a stronger trend in

that direction. For example, until 2006, registration could be prevented or at least made much more difficult only if:

- the agency agreement was expressly non-exclusive; and
- the foreign principal declined to legalize its signature on the agreement. Another tactic often used to prevent registration was to appoint an agent that was not wholly owned by UAE nationals.

The MOEC will not register more than one agreement for the same products and territory at the same time. The responsibility for registering a commercial agency agreement falls solely upon the UAE agent. Although failure to register an agreement is technically a violation of the Commercial Agency Law, no sanctions are applicable against either the agent or the foreign principal and non-registration does not, in practice, prevent commercial agents from operating effectively in the Emirates. For this reason, many foreign companies enter into agency arrangements in the UAE on the basis of unregistered agreements.

### *1.5.3 Benefits of Registration for the Agent*

Registration does give an agent a certain status that it would not otherwise have in dealing with local ministries and other government agencies, particularly in sales to the government and in liaison with government departments (including the trademarks and customs authorities).

Registration may also, as a practical matter, enhance the agent's ability to sell to government agencies, not so much perhaps to Dubai government agencies, but to the Federal and Abu Dhabi government agencies. While we are not aware of any legal requirement mandating such agencies to purchase products only from a registered agent, the procurement policy of these agencies is to contract with a registered agent whenever possible, which means that an unregistered agent will be at a potential disadvantage when competing with a registered agent for government contracts. A registered agent may also be able

to assist in the protection of the foreign principal's intellectual property rights, but such assistance is less important now with the promulgation in the UAE of intellectual property laws giving foreign companies standing to take action in their own right.

#### *1.5.4 The Treatment Of Unregistered Agents in the UAE*

An unregistered agent should not, technically, have any special rights vis-a-vis the foreign principal. For example, the Commercial Agency Law provides that unregistered agency agreements will not be recognized and claims based thereunder (eg, for termination indemnities) will not be heard by local courts. However, local practitioners advise that an action should lie under general contract law (regardless of whether or not it is registered) and be accepted and heard by UAE courts.

Article 6 of the Commercial Agency Law gives exclusive jurisdiction to the UAE courts to hear any dispute which might arise between the principal and the agent relating to the interpretation of a registered agreement, excluding the application of any other agreement providing to the contrary.

Federal Law No. 2 of 2010 amending the Commercial Agency Law introduced the Committee of Commercial Agencies (the "Committee") which is competent to hear any dispute arising from a commercial agency registered with the MOEC. Parties may not bring a claim before a court until after the dispute is referred to the Committee of Commercial Agencies.

The Committee's decision may be challenged before the competent court within 30 days from the date on which the Committee's decision is communicated; otherwise, the Committee's decision shall be final and not subject to further challenge.

We also understand that there seems to be a trend in the Emirate of Abu Dhabi to apply, at least in part, the protective features of the Commercial Agency Law to unregistered agreements. There have reportedly been some instances where disputes relating to the

termination of an unregistered agency in Abu Dhabi were not adjudicated strictly in accordance with the terms of the agreement and the foreign principals were required to pay at least some compensation upon termination. If this trend holds, the distinction between registration and non-registration from the foreign principal's standpoint would become less critical, at least in Abu Dhabi. It is quite unlikely, however, that even an Abu Dhabi court would extend the same protection to an unregistered agent who is not a UAE national or a wholly UAE-owned entity.

#### *1.5.5 Parallel imports*

Registration enables the agent to block parallel imports, including imports from free trade zones in the UAE, such as the Jebel Ali Free Trade Zone. Notwithstanding this, in 2006 the Commercial Agency Law was amended to reduce the scope of the agent's right to block parallel imports of certain categories of goods (eg, certain food products) provided that the categories of products are identified in UAE cabinet decisions.

### **1.6 Exclusivity and Territory**

The Commercial Agency Law provides that an agent must be exclusive for the applicable territory and product line(s) covered by the agency agreement. Consistent with this rule, a principal could appoint a separate agent for each Emirate or combination of Emirates, and/or for different product lines. To bolster this exclusivity requirement, the Commercial Agency Law entitles an agent to compensation for all sales made within the agent's specified territory of the product line(s) covered under the agency agreement, regardless of how the sales are made. In principle, exclusivity (either for the UAE as a whole or for individual Emirates) is a pre-requisite for registration of an agency agreement, but in a few instances influential agents have been able to register non-exclusive agreements.



## 1.7 Termination/Non-renewal Protection

### 1.7.1 *General*

The Commercial Agency Law provides various forms of protection to registered agents, in the event the principal terminates the agency agreement in substance without cause. In particular, it provides that “the principal may not terminate the agency contract unless there are valid reasons justifying its termination.” As a matter of local public policy, it is not possible to contractually waive this provision. Similarly, until 2006, if a principal refused to renew an agency agreement without justification, the agent was entitled to “fair compensation” if it was able to prove that:

- (i) its efforts had resulted in successful distribution and promotion of the principal’s products; and
- (ii) that non-renewal was detrimental to or deprived it of its income. However, in an effort by the UAE to weaken some of the compensation benefits enjoyed by agents, the UAE amended the Commercial Agency Law in 2006 to provide that principals are no longer required to pay compensation to agents upon expiration (ie, non-renewal) of the commercial agency agreements.

It is very difficult in practice to convince the MOEC or the courts that justifiable reasons exist for termination, even where the agent is clearly in breach of contractual obligations. Unless the agency agreement terminates by the mutual agreement of the parties, expires or the MOEC is satisfied that there are justifiable reasons for the termination, no new agent may register with the MOEC and the terminated agent will remain registered. With the exception of parallel imports (see section 1.5.5 above), until the terminated agent is deregistered, an agent is in a position to block importation of the foreign principal’s products. Under Articles 17 and 23 of the Commercial Agency Law, the customs authorities are not to clear imports of goods that are imported by an unregistered agent without

the agreement of the registered agent and the MOEC.

Notwithstanding the above, as a result of the amendments made to the Commercial Agency Law in 2006 and certain resolutions issued by the MOEC, the MOEC appears to be slightly more flexible and willing to cancel the agent's registration upon expiration of the registration without the parties' consent to renew or a letter from the principal indicating that it will not renew the agency agreement. In practice, however, the deregistration generally is time consuming and difficult, in particular, as a result of agents being allowed to file with the MOEC oppositions to the deregistration. In addition, the deregistration does not necessarily prevent agents from claiming the payment of damages against principals in those cases where principals terminate the agency agreements wrongfully.

Termination provisions in an agreement may include a number of elements, such as compensation for loss of anticipated profits (this is usually a multiple of the average profits derived from the agency for the last few years prior to termination), reimbursement of some portion of the agent's investments in promoting and marketing the products, and an order that the foreign principal repurchases the agent's unsold inventory.

### *1.7.2 Compensation/Damages*

Under the Commercial Agency Law, compensation is payable if a registered commercial agency agreement is terminated in the absence of any "justifiable" reason. The Commercial Agency Law does not specify how compensation is to be calculated, but it is widely considered to be related to both the actual investment of the commercial agent in the conduct of the commercial agency (eg, capital investment, personnel recruitment and salaries, lease of office and warehouse space, advertising, purchase of inventory, etc.) as well as the commercial agent's reasonable expectation of future profits from the commercial agency. Past performance can be relevant to the commercial agent's reasonable expectations of future profits, and evidence of poor past performance can reduce the amount of future profits that the commercial agent could have reasonably expected to

receive. Another component of damages available to a commercial agent which is entitled to the special protections of the Commercial Agency Law is commissions on sales of products in its designated territory, irrespective of whether such sales are made by or through the agent. The amount of compensation that may be awarded to a particular commercial agent in a given relationship is difficult to quantify in advance. Essentially, compensation will depend on the facts of the case and whether a breach is involved. The amount of appropriate compensation for reasonable expectations of future profits which might be awarded if a breach is not established is difficult to predict. Two to three times the net annual value of the commercial agency to the commercial agent (ie, profits and commissions) based on recent years is a possible range, but this could be increased or decreased depending on the judicial perception of the equities. In a long-term relationship, the judicial authorities would likely look at a longer period to determine such compensation even though recent years may have been unproductive.

In the context of unregistered agreements, compensation under the Commercial Code is due if the commercial agency agreement is terminated without prior notice or at an inappropriate time by either party or if an agreement of specific duration is terminated in the absence of sound and acceptable reasons. The Commercial Code also provides little or no guidance on compensation. If a court were to take jurisdiction and review a case under the Commercial Code, it might apply the same approach as under the Commercial Agency Law, particularly if the agreement does not specify how compensation is to be determined. Note, however, that Article 218 of the Commercial Code provides that a “contracts agent ... shall bear the expenses necessary for the management of his business.” This could possibly be used by a principal to try to limit compensation claims under the Commercial Code by a “contracts agent” for such things as capital investment, personnel recruitment and salaries, lease of office and warehouse space, advertising, purchase of inventory, etc.

The measure of liability under a particular agreement essentially would turn on whether or not the commercial agent has managed to register the agreement under the Commercial Agency Law. If the commercial agent manages to register the agreement in question under the Commercial Agency Law, it is likely that a UAE court reviewing the matter would consider termination of the agreement by the principal to be valid and final only if it has been done for “justifiable” reasons. The Commercial Agency Law does not define “justifiable” reasons and in interpreting the same the UAE courts historically generally have considered anything less than gross misconduct by the registered commercial agent to be an insufficient justification. If, however, an agreement is not so registered, the principal should be able to terminate or refuse to renew the agreement in accordance with its terms. In such a case, the local party would likely be able to bring an action in the UAE under general contract law if the relationship under the agreement is considered not to be a commercial agency. However, a party may be precluded from being able to bring such an action if the relationship is considered to be an unregistered commercial agency; but even in such a case, there is a possibility that the local party might still be able to bring an action under the Commercial Code or under general contract law. In either such case, if a UAE court decides to hear the case, it would likely limit its views to the specific terms of the agreement.

As to verbal agreements, given that the Commercial Agency Law requires commercial agency agreements to be written and registered, it is likely that no compensation would be payable under the Commercial Agency Law to a local party on termination of a verbal agreement. However, it is unclear how a court might view such a matter under the Commercial Code, as it is largely untested.

### *1.7.3 Judicial and Administrative Protections*

The judicial and administrative protections granted to a qualified UAE commercial agent under the Commercial Agency Law are generally considered to reflect local public policy and, as such, may not be waived in advance through provisions in the commercial agency



agreement or otherwise. The Commercial Code does not provide for any such agent protections in the case of unregistered commercial agency agreements. In the latter case, the unregistered commercial agent must substantiate its claim for compensation in the event the relationship is terminated. In other words, unlike the rule under the Commercial Agency Law, an unregistered commercial agent does not have a presumptive extra-contractual right to compensation under the Commercial Code.

## United Kingdom

### 1. Agency Agreements

#### 1.1 General

##### 1.1.1 *Law Applicable*

The law of agency in the UK is a combination of case law (ie, “common law”) and the UK’s implementation of the Agency Directive.

The Agency Directive was implemented in Great Britain by the Commercial Agents (Council Directive) Regulations 1993, SI 3053/1993 (the “Regulations”), which have since been amended by two further statutory instruments: SI 3173/1993 (simply correcting a mistake in the Regulations) and SI 2868/1998 (a substantive amendment dealing with the application of the Regulations to agents based outside Great Britain and operating under agreements governed by English law). Northern Ireland has its own separate but almost identical regulations.

Please note that this section on agency agreements focuses on the Regulations and, unless otherwise stated, any rules set out in the rest of this section are to be found in the Regulations rather than common law. Therefore, they apply only to agents classified as “commercial agents” (defined further below). Where the Regulations apply, they do not oust the common law rules, which coexist alongside the Regulations. However, the Regulations prevail over common law to the extent that there is any overlap or inconsistency between them.

#### ***The Regulations***

The Regulations came into force in Great Britain on 1 January 1994 (and the regulations for Northern Ireland came into force on 13 January 1994). They are retrospective and therefore apply to agency contracts entered into before 1 January 1994, although they do not affect the rights and liabilities of the agent or the principal to the extent that those rights or liabilities accrued before this date.



In accordance with the Agency Directive, the Regulations apply only to “commercial agents,” defined as self-employed agents who have continuing authority to negotiate (or to negotiate and conclude) the sale or purchase of goods on behalf of the principal.

This definition can be broken down into its constituent parts:

- “goods” – although many EU Member States have gone beyond the requirements of the Agency Directive and extended its scope to include agents for services, the UK has not done so. The Regulations apply only to agents negotiating the sale or purchase of goods and do not protect agents that negotiate the sale or purchase of services. One interesting question relates to the provision of software and whether it can be described as goods or services. In a recent case, the English High Court held that a digital software product that was downloaded and stored on a computer was equivalent to goods for the purposes of the Regulations. The court considered that although the software product was intangible and delivered electronically, it could only operate on a tangible environment and had to be loaded on a permanent storage system and run on a computer. It was therefore akin to digital content and possesses functional equivalent to goods;<sup>1</sup>
- “self-employed” – the Regulations refer to the agent being “self-employed.” However, case law has confirmed that the Regulations do not just protect individual agents; agents operating as legal entities, such as partnerships or limited companies also fall within the ambit of the Regulations; and
- “continuing authority to negotiate” – as noted above, the agent must have “continuing authority to negotiate or to negotiate and conclude” sale or purchase contracts on behalf of the principal for the Regulations to apply. The courts have

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<sup>1</sup> The Software Incubator Limited v. Computer Associates UK Limited [2016] EWHC 1587 (QB).

adopted a purposive approach and interpreted this phrase broadly. It is clear from case law that it covers agents who develop goodwill in the principal's business even if they have no actual authority to negotiate, or to negotiate and conclude sale or purchase contracts. "Negotiate" has also been interpreted to mean "to deal with, manage or conduct." It is important to note, however, that agents appointed for a single transaction are not likely to be covered. Agents with authority to contract will be deemed "commercial agents" only if they have the authority to contract (and do contract) in the name of the principal (ie, as opposed to in their own name).

An additional factor that determines the application of the Regulations is the issue of "secondary activities." The Agency Directive gives EU Member States the right to exclude certain agents from the protection of the Agency Directive where their agency activities are considered "secondary." Although not all EU Member States have implemented this additional criterion, the UK has done so, and the Regulations will not apply if the agent's activities are considered "secondary" in accordance with the criteria set out in the schedule to the Regulations.

In a "classic" agency situation, where an agent is appointed, with or without other agents, to sell the principal's products in a particular jurisdiction and thereby build up goodwill in the principal's business, it is unlikely that the agent's activities will be considered secondary.

That said, the criteria in the schedule to the Regulations should be considered in each case. It sets out those factors which indicate whether or not the agent's activities are secondary. In practice, the schedule is difficult to apply, not least because there is no guidance given as to the weight to be applied to each of the factors in the schedule. Further, despite the term "secondary activities," only one of the factors in the schedule relates to the amount of time devoted by the agent to agency work when compared with its other activities. The drafting of this part of the Regulations can also be difficult to follow and has been criticized by the courts.





## ***Conflict of Laws***

Subject to the discussion below, the Regulations apply only to the activities of commercial agents in Great Britain (as noted above, the jurisdiction of the Regulations does not extend to Northern Ireland, although an almost identical set of regulations applies to Northern Ireland).

However, the Regulations do not apply if, despite the agent operating in Great Britain, the governing law of the agency agreement is that of another EU Member State. In these circumstances, the law of the relevant EU Member State, including its implementation of the Agency Directive, applies. Nevertheless, an English court, whilst applying the law of the other EU Member State, is still entitled to apply certain mandatory English laws (excluding the Regulations) even if they conflict with the law of the relevant EU Member State.

If the parties choose the governing law of a country other than an EU Member State, an agent operating in Great Britain will nevertheless be entitled to claim the protection of the mandatory provisions of the Regulations, notably those entitling the agent to compensation or indemnity on termination.<sup>2</sup>

With regard to an agency agreement governed by English law, where the agent's territory is not Great Britain but is elsewhere in the EU, an English court will apply the Regulations, provided that the law of the agent's territory permits such a choice of law in its implementation of the Agency Directive.

Where an agency agreement is governed by English law, but the agent's territory is not Great Britain or elsewhere in the EU, the Regulations will not apply.

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<sup>2</sup> As mentioned in the Introduction, one important principle in international agency agreements is that a choice of non-EU governing law will not entitle a principal to evade liabilities under the Agency Directive, notably those entitling the agent to compensation or an indemnity payment on termination.

### *1.1.2 Formal Requirements*

An agency agreement is not subject to any formal requirements. It may be concluded orally or in writing and may arise impliedly from the conduct of the parties.

However, in order to avoid evidential difficulties in the event of a dispute between the parties, it is clearly advisable that the terms of the agency agreement are documented in a formal agreement. In addition, under the Regulations, either of the parties to an agency agreement is entitled to require from the other party a signed written document setting out the terms of the agreement, including any terms subsequently agreed.

There are no requirements to register an agency agreement with, or to obtain authorization from, any public authority.

### *1.1.3 Individual/Corporate Entity*

An agent may be either an individual or a legal entity (such as a partnership or a limited liability company). As noted above, for the agent to be classified as a commercial agent within the scope of the Regulations, the only requirement is that the agent is “self-employed,” which subsequent case law has confirmed includes both individuals and legal entities. In the context of agents operating as individuals, the principal must consider whether, on balance, the nature of the relationship may result in the agent inadvertently falling within the legal definition of an employee. Although this will enable the principal to avoid the provisions of the Regulations, it also means that the principal will be subject to all of the legal and tax consequences arising from its status as an employer.

There is a shortlist of specialized agents who are specifically excluded from the ambit of the Regulations, such as agents operating on commodity exchanges and Crown Agents.



#### 1.1.4 *Duration of Agreement*

An agency agreement may be concluded for a fixed or an indefinite term. If the agreement is silent on the issue of duration, it will be deemed to have been entered into for an indefinite period and will usually be terminable on notice (see section 1.5.2 below). An agency agreement concluded for a fixed term will expire at the end of the term.

### 1.2 Exclusive/Non-Exclusive

Neither case law nor the Regulations impose any restrictions on the ability of a principal to appoint an agent on an exclusive or a non-exclusive basis. If this issue is not dealt with in the agency agreement, the agent will be deemed non-exclusive. Principals should note that a distinction is often drawn between agents appointed as a sole agent and those appointed as an exclusive agent within a particular territory. The difference between the two is that, where a sole agent is appointed, the principal remains entitled to sell or solicit orders directly to or from customers within the agent's territory. Therefore, principals should be careful not to describe an agent as "exclusive" if they wish to reserve the right to make direct sales or approaches to customers within the agent's territory. In any event, the agreement should state precisely what level of exclusivity is being granted to the agent and the parties should not rely on the words "sole" or "exclusive" without further clarification.

One other point to note is that, under the Regulations, if a commercial agent is granted exclusivity in respect of a specific geographical area or a specific customer group, the agent's rights to commission will be extended (see section 1.4.1 below).

### 1.3 Non-Compete

There is no general prohibition against an agent having competing agencies, and the parties are free to agree whether the agent may be an agent for competing goods. However, under the Regulations, a commercial agent is obliged to look after the interests of its principal

and act dutifully and in good faith. Case law indicates that if an agent enters into a transaction (eg, for the sale of competing goods) in which its personal interest, or duty to another principal, conflicts with this “good faith” duty, this may give rise to a right for the principal to terminate the agreement unless the principal has full knowledge of all of the material circumstances.

With regard to non-compete clauses, the principal’s ability to restrict a commercial agent in this way is limited by the Regulations. Such a non-compete clause is valid only if it is in writing, relates to the geographical area or the group of customers allocated to the agent under the agreement, and concerns the same type of goods covered by the agent’s mandate. Furthermore, a non-compete undertaking will not be valid for more than two years after termination or expiry of the agency agreement.

Please note that clauses relating to matters such as exclusivity and/or non-compete obligations may also raise issues under EU and UK competition law. Please see the earlier chapter on EU competition law for a fuller discussion in this respect.

## 1.4 Commission

### 1.4.1 *Basic Principles*

Where an agency agreement is silent on remuneration, the Regulations require that an agent receive the “customary” amount of remuneration for its work or, in the absence of such custom, “reasonable” remuneration.

Most agents are paid, either wholly or partly, by way of commission (defined in the Regulations as any part of the remuneration which varies with the number or value of business transactions). Where an agent is remunerated by way of commission, the Regulations provide that commission is payable not only for transactions concluded as a result of the agent’s actions but also (i) where a transaction is made with a third party previously “acquired” by the agent for transactions of the same kind; and/or (ii) where the transaction is made with a



customer belonging to a specific geographical area or group of customers to which the agent has an exclusive right.

However, case law suggests that the parties to an agency agreement may be able to derogate from these rules and agree on alternative circumstances in which the agent will become entitled to commission, eg, restricting commissions to transactions resulting wholly from the agent's actions, or overriding (ii) above to state that the agent will not be paid commission on sales to "house accounts" within the agent's exclusive territory which the principal has reserved for itself.

In addition to commission, it is permissible to agree to pay the agent a regular retainer (but there is no obligation to do so). Also, the principal has no default obligations to reimburse the agent for any expenses incurred in carrying out its duties.

#### *1.4.2 When Due and Payable?*

Unless the parties agree otherwise, commission becomes due as soon as the principal or the customer executes the transaction, or on the date the principal is contractually obliged to execute the transaction, whichever is sooner. In any event, the latest due date that the parties can agree to is the date on which the customer executes its part of the transaction (eg, pays for the goods) or the date on which the customer would have done so had the principal performed its obligations under the contract (eg, delivered the goods to the customer). Any attempt to agree on a later date, to the detriment of the agent, will be void.

Once commission becomes due to the agent, it must be paid no later than the last day of the month following the quarter in which it is due. Again, any attempt to agree on a longer period for payment, if detrimental to the agent (which is highly likely), will be void.

#### *1.4.3 Extinction of Right to Commission*

The agent may lose its right to commission, and may have to refund any commission already received, if it is established that the contract

between the customer and the principal will not be executed, and this occurs in circumstances where the principal is not to blame. Examples of such circumstances may be where the principal becomes entitled to terminate the sale contract agreed with a customer due to the customer's material breach of that contract, or where unforeseen circumstances arise, compromising the principal's ability to perform its obligations, such as an event of force majeure. The Regulations state that this is the only circumstance where the agent may lose its right to commission. Any attempt to derogate from this provision to the detriment of the agent will be void.

If the principal replaces an agent with a new agent, and the former agent is still entitled to post-termination commission on certain transactions (see section 1.5.3 below), the new agent will not be entitled to commission in relation to such transactions unless it is equitable under the circumstances to share the commission between the two agents. The presumption is in favor of the old agent. In this way, the principal should be protected from being required to pay double commission during the transitional stage of a new agent's appointment.

#### *1.4.4 Accounting and Audit*

The principal is required to provide the agent with statements detailing the commission due and setting out the main calculations involved. Such statements must be provided no later than the last date of the month following the quarter in which the commission has become due. In addition, the agent is entitled to receive all the information it needs to verify the amount of commission due to the agent, including extracts from the principal's accounts.

Any contractual provisions derogating from the agent's rights to such information, or to receive commission statements, will be void.



## 1.5 Termination

### 1.5.1 *Formal Requirements*

There are no formal requirements for terminating an agency agreement, save for any which may be stipulated in the agreement itself. However, it is obviously preferable to provide a written notice of termination so that the terminating party's intention to terminate is clear, as is the date on which termination is to take effect and the reasons for such termination. Such matters may be extremely important in the event that there is a dispute regarding the termination itself or regarding the agent's rights upon termination.

### 1.5.2 *Notice Period*

An agency contract for an indefinite period (see section 1.1.4 above) may be terminated on notice. The Regulations provide that the minimum notice is one month in the first year of the agreement, two months in the second year and three months in the third and all subsequent years of the agency. These notice periods apply whether it is the agent or principal that is terminating the agreement, and they are minimum periods only. Therefore, if the contractual notice periods are longer, the contractual periods will apply. However, the period of notice to be observed by the principal must not be shorter than that to be observed by the agent. Unless otherwise agreed by the parties, the end of the notice period must coincide with the end of a calendar month.

It is possible to terminate an agency agreement without observing the above notice periods if, for example, one of the parties has committed a sufficiently serious breach of the contract which, as a matter of law, justifies immediate termination.

The above minimum notice periods do not apply to fixed term agreements, which simply expire at the end of the fixed term. However, if the parties continue to perform a fixed term agreement after the end of the fixed term, the Regulations provide that the agreement will be deemed an agreement for an indefinite term, and

the above notice periods will then apply. In these circumstances, the entire term of the contract needs to be taken into account when calculating the length of notice required to be given under the above rules (ie, the fixed term plus the period after expiry of the fixed term during which the parties continued to perform the agreement).

The parties may not contract out of the minimum notice periods if they apply. However, it is likely that if a principal attempts to terminate an indefinite term agency agreement with insufficient notice, the notice will be effective but the agent will have the right to claim damages in lieu of notice.

### *1.5.3 Liability of Principal on Termination*

Unsurprisingly, a principal is obliged to pay an agent commission that has become due and payable prior to termination, where termination of the agreement occurs before the due date for the payment of commission to the agent.

However, it may be that while the agent has done what is required of it in order to secure commission on a transaction prior to termination of the agreement, the commission does not become due before termination. For example, the agreement may provide that commission will become due only when the principal accepts an order, or even that it will not become due until the principal receives payment from the customer for the goods. If the agent secures a sale and forwards the purchase order to the principal the day before the agency agreement is terminated, the liability to pay commission to the agent may not therefore arise prior to termination (and certainly will not arise if commission becomes due only on payment by the customer). Accordingly, the Regulations provide that, where the customer's order reaches the principal or the agent before termination of the agency agreement, the agent will also be entitled to commission on that transaction, even if the sale contract is not concluded until after termination.





The Regulations also provide that, if a sale is made to a customer within a “reasonable period” after termination of the agency agreement, and the sale is “mainly attributable” to the agent’s efforts during the term of the agreement, the agent will be entitled to a commission on that sale, whether or not the agent is involved in the particular transaction and even if the transaction is entered into weeks, or even months, after termination. The liability of the principal under this provision of the Regulations could be substantial. In one case, an agent was appointed for a fixed term of one year, at the end of which he claimed post-termination commission. The court held that some of the sales made by the principal for up to 12 months after expiry of the agreement could be said to be “mainly attributable” to the agent’s efforts during the term of the agreement. Although the court then applied the “reasonable period” criterion to reduce the period from 12 months, the agent was nevertheless held to be entitled to the equivalent of 9 months’ commission.

As discussed above (see section 1.4.3), a replacement agent may not be entitled to commission to the extent that the commission is due to a previous agent.

Case law suggests that it may be possible to contract out of the rules in the Regulations regarding post-termination commission.

### ***Damages in Lieu of Notice***

As discussed above (see section 1.5.2), if sufficient notice is not given to terminate an agency agreement, this may be an additional head of damage forming part of any claim by an agent.

### ***Compensation/Indemnity***

All EU Member States are obliged by the Agency Directive to provide agents with a legal right to be paid either compensation or an indemnity (in addition to the sums discussed above) on termination of an agency agreement.

Most of the other EU Member States have chosen one of these two remedies and the parties to an agency agreement are given no choice between them. However, in the UK, (unless one of the exceptions in the Regulations applies) the agent is entitled to either an indemnity or compensation on termination of the agency agreement, ie, the parties can choose which one will apply. Unless the agency agreement specifically gives the agent a right to be indemnified, the agent is by default entitled to compensation.

The principal may not derogate from the agent's right to compensation or indemnity to the agent's detriment before the agency contract is terminated. Therefore, it is not possible to contract out of these rights via a provision in the agency agreement (or any other agreement). It also means that settlement of an agent's claims for indemnity or compensation may be concluded only after the agreement is terminated.

Case law has established that entering into a fixed term (rather than an indefinite term) agreement will not assist the principal, as the compensation and indemnity remedies apply even if the agreement is not actively terminated but simply expires at the end of a fixed term.

### ***Indemnity***

If the indemnity option is chosen, the agent is entitled to an indemnity where it has built up the principal's business (either by finding new customers or by increasing the principal's volume of business with existing customers) and the principal continues to derive substantial benefits as a result, provided that payment of the indemnity is equitable in all of the circumstances. The amount of the indemnity is capped at a sum equal to one year's remuneration, calculated by reference to the agent's average annual remuneration over the preceding five years or over the period of the contract, if this is less than five years. The agent's right to an indemnity is expressed to be without prejudice to the agent's right to seek damages for other losses (eg, for breach of contract).



## Compensation

If the indemnity option is not expressly chosen, the agent is entitled to compensation on termination of the agency agreement if it suffers consequent “damage” as a result of the termination. Pursuant to the Regulations, the agent is deemed to suffer such damage particularly if (i) it is deprived of commission to which it would otherwise have been entitled in circumstances where the principal has obtained substantial benefit; or (ii) termination means the agent has not been able to amortize costs and expenses incurred in the performance of the agency on the principal’s advice.

The UK courts have historically not been consistent in their approach to the calculation of compensation. There was disagreement over whether to adopt the French “tariff” system, whereby a benchmark of two years’ commission is established as a starting point and then reduced or increased as appropriate, depending on the relevant factors in each case. While some judges felt constrained to follow the tariff approach, others did not, and looked more to balance up all the relevant factors of the case in determining a fair level of compensation.

However, the method of assessment for the UK has now been clearly laid down in the House of Lords’ decision in *Lonsdale v Howard & Hallam Ltd.* (2007), which supersedes all earlier authority. This decision treats compensation as a share in the goodwill of the principal’s business which the agent has helped to create. Essentially, the decision means that to determine the compensation payable, a valuation needs to be carried out of the income stream which the agency would have generated. This should be done “by reference to the value of the agency on the assumption that it continued; the amount which the agent could reasonably expect to receive for the right to stand in his shoes, continue to perform the duties of the agency and receive the commission which he would have received.” So, for example, if business at the applicable agency was declining and the agency would not have been sold for a material amount, the

court could be justified in awarding no compensation. Almost inevitably, however, the calculation of compensation requires input from an accountant or a similarly skilled or qualified professional in order to determine the value of the agency. In contrast to indemnity payments, there is no cap on amounts payable as compensation.

### ***Which One?***

Before entering into an agency agreement, the principal and agent must consider which of the compensation and indemnity remedies are (from the perspective of the principal) less onerous or (from the perspective of the agent) more advantageous on termination of the agreement.

From the principal's perspective, there are pros and cons in either expressly electing for an indemnity in the agency agreement or paying compensation by default. Electing for an indemnity in the agency agreement provides certainty for the principal that it will be liable for no more than one year's commission to the agent. There are also criteria that the agent must satisfy when seeking an indemnity which do not apply in the context of compensation. The agent must establish that it has substantially increased the principal's customer base, or its business with the existing customers, and the principal must derive substantial benefits from such customers following termination. There is also a requirement that an indemnity payment be equitable in all circumstances.

However, one possible disadvantage of an indemnity for a principal is that the parties are required positively to elect the remedy in the agency agreement, which may have the effect of alerting the agent to the existence of a right of which the agent may otherwise be ignorant. That said, this argument is perhaps now less compelling than previously - as time passes, the requirements of the Regulations are better known and agents are generally more aware of their rights.

The agent will not be entitled to compensation or an indemnity if (i) the principal terminates the agency for a breach by the agent that as a



matter of law is serious enough to warrant immediate termination; (ii) the agent, with the principal's consent, transfers the agency to a third party; or (iii) the agent terminates the agency and its termination is not justified either by circumstances attributable to the principal or by the age, illness or infirmity of the agent. A recent Scottish case has also suggested that partial termination of an agency agreement will not give rise to an entitlement to compensation or an indemnity.

## 1.6 Limitation Periods

Under the Regulations, the agent must notify the principal of its intention to bring a claim for compensation or indemnity within one year of the expiry or termination of the agency agreement; otherwise, the agent will lose all rights to bring a claim. There are no such restrictions with regard to any claims arising out of the other rights granted to agents by the Regulations. Such claims will simply have to be brought within the applicable limitation periods under English law.

There is no limitation period under English law that applies specifically to agency agreements. However, the provisions of the Limitation Act 1980 apply to contractual claims under agency agreements in the same way that they apply to claims brought under other contracts. Therefore, a principal or agent, if claiming for breach of contract, must bring any claim no later than 6 years from the date the cause of action accrues. In the event that the agency agreement is executed as a deed, a claimant has a period of 12 years from the date on which the cause of action accrues in which to bring a claim.

## 2. Distribution Agreements

### 2.1 General

#### 2.1.1 *Law Applicable*

There is no specific legislation in the UK that regulates the relationship between suppliers and distributors. The Regulations do not apply to distribution agreements, and distributors in the UK do not benefit from equivalent protection. A distribution agreement between a supplier

and its distributor is governed by the ordinary principles of English contract law, which are a product of both statute (eg, the Unfair Contract Terms Act 1977) and common law. Accordingly, the parties to a distribution agreement have the freedom to agree on the contractual terms which will govern their relationship, provided that such terms do not contravene rules of public policy, EU and UK competition law or any other mandatory laws. The common law also contributes some rules that are specific to distribution agreements (eg, in relation to what will constitute “reasonable notice” for the termination of a distribution agreement).

### *2.1.2 Formal Requirements*

A distribution agreement is not subject to any formal requirements and may be concluded orally or in writing, or may arise impliedly from the conduct of the parties. However, in order to avoid evidential difficulties in the event of a dispute between the parties, it is advisable that the terms of the distribution relationship be documented in a formal agreement.

There are no requirements to register a distribution agreement with, or to obtain authorization from, any public authority.

### *2.1.3 Individual/Corporate Entity*

A distributor may be either an individual (sole trader) or a legal entity (such as a partnership or a limited liability company).

As with agents, consideration should be given to the nature of a supplier’s relationship with an individual distributor to ensure that, on balance, the distributor could not be classified as an employee of the supplier.

### *2.1.4 Duration of Agreement*

English law does not regulate the duration of a distribution agreement, and this is a matter for agreement between the parties. If the agreement is silent on this issue, the agreement will be deemed an



agreement for an indefinite term and is likely to be terminable on reasonable notice (see section 2.3 below).

## 2.2 Exclusive/Non-Exclusive

Subject to any competition law issues, a distributor may be appointed on either an exclusive or a non-exclusive basis.

The need to be careful in the use of the phrases “sole” and “exclusive” (see section 1.2 above) applies equally in the context of distribution agreements.

Exclusive distribution agreements (including sole distribution agreements) often impose more restrictions or obligations on the distributor than non-exclusive distribution agreements where the supplier has the freedom to sell in the territory through other distributors and possibly via direct sales to customers.

Exclusivity may also be agreed in favor of the supplier, in which case the distributor agrees not to act as a distributor in the contract territory for any other supplier. Alternatively, this restriction may be diluted to a non-compete clause whereby the distributor agrees not to distribute products for any other supplier, to the extent that they compete with the supplier's products.

As stated above, any exclusivity and/or non-compete provisions will be subject to the requirements of EU and UK competition law. Please see the earlier chapter on EU competition law for further details in this respect.

## 2.3 Termination

### 2.3.1 *Formal Requirements*

English law does not require compliance with any formalities in order to terminate distribution agreements. For the sake of contractual certainty, it is usual for the parties to a distribution agreement to agree that all notices of termination shall be in writing, but there is no obligation to do so. However, even without any such contractual

obligation, it is advisable to ensure that any notice of termination is given in writing and in a manner that generates a proof of receipt (eg, recorded delivery). This may avoid subsequent disputes over, for example, whether notice to terminate was ever given, the length of the notice period, or the effective date of termination.

General principles of contract law apply in relation to termination of the agreement. The parties are free to contract in relation to termination provisions and may agree on all relevant terms, such as the circumstances in which termination may be effected, the required period of notice of termination, and the consequences of termination. Termination rights may be unilateral or mutual.

### *2.3.2 Notice Period*

As mentioned above, the parties are free to agree on the notice periods which apply in the event of termination of a distribution agreement. Where the agreement is for an indefinite term, in the absence of an agreed notice period in respect of the termination event in question, the courts will usually imply a provision requiring each party to give the other “reasonable notice” of termination.

If an indefinite term agreement expressly provides a notice period in relation to a particular termination event (eg, termination for cause) but not another (eg, termination at will), the courts are also likely to imply a provision for termination by reasonable notice in respect of the latter termination right. It will, however, be irrelevant that any express notice period falls short of what a court would determine to be a reasonable notice period; terms expressly agreed by the parties in the distribution agreement will stand and, where termination is effected in accordance with an express provision, a claim for damages in respect of the termination will not succeed.

The question of what constitutes “reasonable” notice will be determined on a case-by-case basis, having regard to the facts existing at the time the notice is given. In determining what constitutes “reasonable” notice, the courts will take into account all of the





applicable circumstances. Case law in this area has identified a number of relevant factors to be considered, including the length of the parties' relationship, the strength of the relationship between the customers and the distributor and the time it will take for the parties to reposition themselves in the marketplace.

The proportion of a distributor's business made up by the supplies under the distribution agreement being terminated will also be considered. Where such supplies make up a large percentage of a distributor's main business, it is more likely that the period of time the court will consider "reasonable," will be longer than where supplies make up only a small proportion of the business. In a case where the supplies represented 83% of a distributor's main business, the required notice period was found to be 12 months, since the sudden stoppage of supplies would have produced disastrous results for the distributor. Conversely, in another case, the fact that the supplier's business accounted for only 20% of the distributor's overall turnover was a relevant factor in the Court of Appeal's conclusion that a lengthy notice period would be inappropriate.

In the latter case, the Court of Appeal held that, whilst a notice period of one month was not reasonable to terminate a distribution agreement that had existed for over 15 years, the lower court's decision of 12 months was too long to be considered reasonable, and this decision was therefore overturned. The court held that a reasonable period would have been between three and six months. In reaching this conclusion, the court considered a number of factors, including some of those referred to above. In addition, the court suggested that the less formal the distribution relationship, the shorter the "reasonable" notice period may be (in this case, the parties' relationship was governed by a mere exchange of letters). The absence of a restrictive covenant preventing the distributor from acting for competitors of the supplier, either during or after the term of the agreement, was also a relevant factor in reducing the length of the notice period.

The Court of Appeal decision was subsequently cited by the High Court in determining that nine months' notice constituted "reasonable notice." In this case, although the arrangements between the parties were also relatively informal and the parties had been doing business together for only two-and-a-half years, the goods supplied represented just under 50% of turnover, the distributor had invested a considerable amount of time, money and effort in the relationship (for example, new employees were taken on, new vehicles were acquired and a new warehouse was brought into operation), and the parties acknowledged that, although it was not formally documented, the distributor did not (and was not expected to) sell products that would compete with those of the supplier.

Even if the period of notice given is found not to be "reasonable," the termination itself will remain valid but the aggrieved party will be entitled to a remedy in damages.

With regard to fixed term agreements, it is likely to be very difficult to argue that a provision as to termination on reasonable notice should be implied into the contract - the whole point of a fixed term agreement is that the parties are committed to both the contract and to each other for a specified period of time. If there is no evidence that the parties originally intended to have a right to terminate on reasonable notice and one party unlawfully terminates the agreement, the other party will be entitled to claim damages based on the profits it would have made during the remainder of the fixed term, even though the amount of notice given might have been considered reasonable in the context of an indefinite term agreement.

### *2.3.3 Liability of Supplier on Termination*

Unlike the position in relation to agency, a distributor is not entitled to any statutory compensation or indemnity where a distribution agreement is terminated in accordance with its terms or expires by effluxion of time.



The only remedy available to the distributor is damages, which may be awarded if the distributor suffers loss as a result of the contract not being terminated in accordance with its terms, or where the court implies a provision for termination by reasonable notice into the agreement, and the period of notice given is found not to be “reasonable.” The distributor may also be entitled to damages in respect of any outstanding breaches of contract by the supplier as at the date of termination, or in the event that the supplier fails to comply with post-termination obligations set out in the contract.

#### 2.3.4 *Return of Products*

In the event of termination, there is no obligation under English law for a supplier to buy back unsold products from a distributor and conversely there is no obligation for a distributor to return any unsold products to the supplier. However, the parties are free to agree otherwise under the distribution agreement itself. That said, the parties may need to consider EU and UK competition law issues if they are looking to impose absolute obligations on the distributor to resell unsold products to the supplier on termination.

### 2.4 Limitation Periods

There is no limitation period under English law that applies specifically to distribution agreements. However, the provisions of the Limitation Act 1980 apply to contractual claims under distribution agreements in the same way that they apply to claims brought under other contracts. Therefore, a supplier or distributor, if claiming for breach of contract, must bring any claim no later than six years from the date the cause of action accrues. Where a claim arises under a distribution agreement which is executed as a deed, a claimant has a period of 12 years from the date the cause of action accrues in which to bring a claim.

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