Study on commercial collaboration contracts and European law in the distribution sector

Abstract

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A. Introduction

Our study involved a review and comparison of the various national legislative frameworks most widely used and most relevant within the European Union in the field of distribution, with a view to putting them into perspective with regard to the rules applicable under European law, and aimed at a critical appraisal identifying the best practices which would enable the first steps to be taken towards a harmonised European approach. In addition to Belgium, we examined the situation in the following countries: France, Germany, the Netherlands, Italy, Luxembourg, Spain, Portugal, Austria, Hungary, Finland and Ireland.

B. Main types of distribution agreement

The distribution agreements regularly used internationally and in the European Union are:

- The commercial agency agreement
- The concession agreement
- The franchise agreement
- The commission agreement

Other forms of agreement also occur, such as management leases for businesses or contracts which are simply described as affiliation, brand licensing or partnership agreements.

C. The European legal context

At European level, distribution agreements have mainly been regarded from the perspective of competition law. Over the years, various successive exemption regulations have defined the conditions under which potentially restrictive distribution agreements may benefit from a block exemption. In the motor vehicle distribution sector, certain regulations (now repealed) contained rules relating to the term of the agreement or minimum notice periods to be respected. However, this approach was unsatisfactory because if one of these rules was breached, it was up to the national Court to decide the consequence of the breach.

Outside of competition law, only the agency agreement has received special attention. It was the subject of a Directive published on 18 December 1986 in response to the observation that the absence of a general framework led to significant complications - particularly in terms of legal certainty for agents and difficulties relating to competition. It was also designed to protect the commercial agent, who was considered to be the weaker party.

However, its transposition leaves some uncertainty as to its applicability to commission agreements.

Over the years, the Commission's exemption regulations for agreements which normally restrict competition have made a distinction between "genuine" and "fake" agents, depending on the extent of the financial risks which the agent has to bear. But what is the real difference between a "fake" agent (who bears a series of major risks) and a concessionaire - and why does the latter not enjoy similar protection?

Franchising, on the other hand, is only considered from the perspective of competition law.

With the exception of certain sectoral initiatives, the prohibition of unfair terms in relations with consumers is currently only envisaged at European level. Similarly, abuse of economic dependence (which is a separate concept from abuse of a dominant position) is not addressed.

One contribution which can be retained from these regulations is the definition of conditions for the validity of restrictive competition clauses, which are currently included in Regulation 2022/720 of 10 May 2022. However, as this approach is once again guided exclusively by competition law, it is once again a source of legal uncertainty - since insofar as the agreement in question does not affect competition, a non-competition clause which does not meet the conditions set would remain valid. This is particularly true of franchising.

D. National legislative frameworks

A comparison of the legal systems covered by the study shows firstly that the various national laws of the European Union do not deal with commercial distribution in a harmonious way, and secondly that existing legislation does not regulate distribution law in general but sometimes governs this or that type of agreement in particular - without any real cross-cutting approach other than through general provisions of civil or commercial law, applicable to all types of contract and not just to commercial distribution agreements.

To sum up, we can state that:

- Only in Belgium is the concession agreement or the consequences of its termination subject to specific regulations;
- France protects distributors by means of a generally applicable provision stipulating a notice period which takes into account the length of the established commercial relationship;
- Austria, Italy and Luxembourg have adopted specific legislation covering only motor vehicle distribution agreements;
- The rules governing agency agreements in Italy, Germany and Portugal apply by analogy to concession agreements,
- Only in Germany and Austria is the commission agreement clearly subject to special protection;
- Only in the Netherlands, Italy, Spain and, to a lesser extent, Hungary is the franchise agreement subject to specific regulations. With the exception of Hungary, these countries' laws also cover the issue of pre-contractual information;
- Apart from these three countries, only in Belgium and France is pre-contractual disclosure for franchise agreements or similar contracts subject to specific legislation;
- Only Belgium, France and Germany have adopted specific provisions penalising certain types of unfair terms, even though the prohibition of unfair behaviour is found in each country in more general terms, or is penalised through the regulation of unfair practices (as in Hungary);
- Protection against abuse of economic dependence is the subject of specific legislation only in Belgium, France, Germany and Italy.

In most of the countries examined, the issue of pre-contractual disclosure is therefore not considered in most of the countries examined. A distributor whose business is carried on outside an agency agreement enjoys no protection at the end of the latter - or only very weak protection resulting from the principles of common law or from an application by analogy of the agency regime, and there is no specific prohibition of unfair terms or protection against abuse of economic dependence.

If we consider that in a distribution agreement it is the distributor who will generally be the economically weaker party, this disparity in protection can therefore only be to their detriment, with an obvious risk of "forum shopping" and of the "stronger" contracting party choosing to impose the contractual conditions on their co-contracting party by choosing the law that is most favourable to them. For the agent, this was the reason for the adoption of the Directive of 18 December 1986.

E. Influence of private international law

This risk is all the more obvious now that the various European conventions on determining the applicable law and the choice of competent jurisdiction give priority to party autonomy, and the possibilities of overruling the parties' choice on the grounds that a national law is considered to be mandatory in the country of origin, have become virtually non-existent, both because of the definition of mandatory rules given in Article 7 of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) and because of developments in the case law of the Court of Justice, which, in a dispute relating to an agency agreement, held that the Court had to make *"on the basis of a detailed assessment, that, in the course of that transposition, the*

legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by the directive, taking account in that regard of the nature and of the objective of such mandatory provisions." (Unamar ruling).

The result is that the possibility of setting aside the choice of applicable law (sometimes imposed by a party) in order to rely on a more protective national law is considerably restricted. This may apply to provisions governing notice periods or customer indemnity at the end of a contract, as well as to questions relating to any clauses which a national legislator might consider unfair - or even to national provisions relating to a pre-contractual disclosure obligation.

F. Recommendations

Any choice of reform will obviously be based on a political choice. Our study shows that apart from the agency agreement, most countries do not really provide any protection for the status of distributor. It seems to us that all the considerations which led the European Council to regulate the agency agreement also apply to other distribution methods. It therefore seems appropriate to recommend harmonising European legislation on distribution agreements rather than approaching the latter strictly from the perspective of competition law.

It also seems preferable to us not to envisage regulating the matter by type of agreement but to adopt a cross-cutting approach covering all distribution agreements, mainly in order to prevent the creativity of the business world and legal experts from allowing the implementation of distribution methods which would escape the strict framework of contract definitions or the very restrictive conditions of application of certain laws if we opted for regulation by type of agreement. This approach obviously presupposes the development of a general framework which is sufficiently flexible to take account of the variety of distribution agreement methods and risks incurred by the distributor, and does not rule out more specific legislation for certain sectors.

G. Possible content of a general regulation

We therefore advocate legislation which would apply to all distribution agreements. We propose to define the latter as follows:

*"**§ 1**. For the purposes of this law, a commercial distribution agreement is an agreement between two or more parties governing the marketing and distribution of products or services under which the distributor receives remuneration or is authorised to resell the contractual products or services.*
***§2.** Distribution agreements include concession agreements, agency agreements, commission agreements and franchise agreements. This list is not exhaustive.*
***§3.** The distribution agreement refers to any form of commercial relationship which is continuous and organised, making it possible to distinguish it from the simple succession of acts of purchase and resale, and resulting in the imposition on the distributor of specific obligations other than the obligation to pay for the goods or services delivered, such as (but not limited to):*

- *the obligation on the distributors to make specific investments for the distribution of products or services,*
- *the obligation on the distributors or members of their staff to undergo specific training,*
- *the obligation on distributors to achieve minimum sales or purchase volumes,*
- *the obligation on distributors to submit regular reports,*
- *the obligation on distributors to spend on advertising,*
- *the obligation on distributors to retain certain stocks,*
- *the obligation on distributors to provide after-sales service;*
- *the obligation to distribute only the supplier's products or services or to obtain the supplier's agreement to distribute competing products or services.*

***§4.** The agreement may be written or verbal. In the absence of a written agreement, the existence of a distribution agreement may be proven by any legal means."*

Once the distribution agreement has been defined, we suggest that this legislation be inspired both by the regime applicable to agency agreements and by the "best" examples drawn from the comparative law analysis we have performed. It would therefore seem appropriate to consider:

1). **the pre-contractual phase**, but also providing for certain obligations on the part of the distributor,
2). **certain aspects of the contractual phase**, being:
    a). the affirmation of a general obligation to act loyally and in good faith,
    b). a definition of remuneration,
    c). a minimum system of regular settlement of sums due during the course of the agreement, with no possibility of prohibiting offsetting,
    d). a framework for the possibility of modifying certain aspects of the contractual relationship during the term of the agreement,
    e). a restriction on the possibility for a supplier to terminate all the agreements of its distribution network in order to offer a less advantageous agreement without liquidating the rights acquired by distributors under previous agreements,
    f). a ban on provisions considered to be unfair,
    g). protection against abuse of economic dependence,
    h). recognition of the right of any association representing the members of a distribution network to take legal action on behalf of its members to ensure compliance with the foregoing provisions,
    i). the requirement for a distributor representing several brands to keep analytical accounts.
3). **the end of the agreement, providing that**:
    a). except in the case of serious misconduct or exceptional circumstances, any open-ended contract may only be terminated subject to a notice period of one month for each year of service, up to a minimum of 6 months, after which the duration of the notice period is determined in an equitable manner - taking into account parameters such as the scale of the investments made by each party that have not yet been amortised, the costs incurred by the party affected in dismissing members of its staff following the termination of the contract, the importance of this contract in the formation of its overall turnover, the risks incurred by the distributor during the performance of the agreement, its possibilities for retraining, the economic situation of both parties and the reasons which led one party to terminate the agreement,
    b). following the example of the Directive of 18 December 1986, an evicted distributor may, under certain conditions, be entitled to compensation for eviction or loss of customers.
    c). post-contractual non-competition clauses are only valid under certain conditions, in particular by making their application subject to the payment of a specific indemnity to the distributor,
    d). the supplier is obliged to take back the stock at the end of the agreement,
    e). an option clause to purchase the distributor's business or a pre-emption clause may not oblige the distributor to sell its business at less than market value,
    f). a clause providing that the contract is concluded *intuitu personae* on the part of the distributor cannot prohibit them from transferring their business to another member of the network.
4). Affirmation of the mandatory nature of the law.

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