

Review

Commercial & Dispute Resolution



Agency and Distribution Arrangements in the Eurozone

At Hammonds, we recognise that whilst European law harmonisation has, by and large, made it easier for our clients to trade through Europe, one area of law that has not been fully harmonised is the law governing the relationship between companies and their distribution channels, whether agents, distributors or other forms of partner. This presents clients with a dilemma when deciding how to structure their distribution network as a uniform approach may not necessarily be best.

We have therefore produced a comprehensive guide which addresses the legal and commercial issues facing organisations that are appointing, terminating or otherwise dealing with agents and distributors in the UK, France, Spain, Germany and Belgium. The guide can be accessed via the following link: <http://www.hammonds.com/agencyguide/default.pdf>

In addition to the guidance in this publication, Hammonds' offices throughout the Eurozone have extensive experience in guiding clients on how best to maximise the opportunities of the legal market whilst minimising legal risk in doing so. Each office works closely with the others to ensure that clients can use one 'port of call' to get advice on how to achieve their aims across each Eurozone country. A list of the specialist lawyers in each Eurozone country is set out at the end of this note.

OVERVIEW OF THE AGENCY AND DISTRIBUTION GUIDE

The guide is aimed at clarifying some of the key issues and differences affecting the operation of agents and distributors within the Eurozone countries. Whilst each country within the European Economic Area has enacted legislation intended to harmonise the rights of commercial agents across the various jurisdictions there still remain key differences in the approach taken by each country. For example, there are notable differences in the approach taken to determining the lump sum payment which is payable to an agent upon termination. Whilst the guide goes into detail on these differences some of the most significant differences are summarised in the table below.

In contrast, save for the development of competition law policy which may operate to restrict the content and operation of distribution agreements, there is little or no harmonisation of the laws relating to distributors. Significant differences therefore exist between each jurisdiction in their treatment of distribution arrangements. Whilst the guide explains these differences in detail, some of the differences are summarised the table below.

The guide also deals with competition law considerations which may arise in relation to agency and distribution channels.

DISTRIBUTION OR AGENCY?

There are a number of commercial, legal and practical factors to be considered in deciding whether to appoint an agent or distributor. Generally, distribution agreements are more likely to encounter issues of competition law than agency agreements. However, the agency route invites other risks, particularly the potential for a lump sum to be payable to the agent upon termination. Our team works with clients to help them evaluate which route will deliver the most commercially advantageous result for them.

Key differences exist in the approach each country takes with respect to agents and distributors.

Some of the advantages and disadvantages of appointing a distributor as opposed to an agent are as follows:

ADVANTAGES	DISADVANTAGES
Supplier generally not liable to end customers	Less control over the distributor
Reduced administration costs	Supplier cannot determine re-sale pricing
Minimal supervision by the supplier	Generally not appropriate for the provision of services
Distributor assumes the risk of establishing its business in the territory	Supplier does not build up any goodwill with the end customers
Minimal EU regulation	Higher risk from competition law

Agency

Some of the key differences between the approach each country has taken to commercial agents which fall under Council Directive 86/653 are summarised as follows:

	Goods and/or Services?	Written agreement required?	Indemnity	Compensation and/or damages
Germany	Both.	No, but each party is entitled to receive, on request, a signed written document setting out the terms.	Agent may be entitled to an indemnity after termination of the agreement, capped to 1 year's average commission calculated over the preceding 5 years.	No compensation as an alternative to the indemnity payment. Agent may be able to claim damages for unlawful termination of the agency.
Spain	Both.	No, but each party is entitled to receive, on request, a signed written document setting out the terms.	Agent may be entitled to an indemnity after termination of the agreement, capped to 1 year's average commission calculated over the preceding 5 years.	No compensation as an alternative to the indemnity payment. Agent may be able to claim damages for unlawful termination of the agency.
Belgium	Both.	No, but each party is entitled to receive, on request, a signed written document setting out the terms.	Agent may be entitled to an indemnity after termination of the agreement, capped to 1 year's average commission calculated over the preceding 5 years. Agent may also be able to claim an indemnity in lieu of notice where the agency is terminated without proper notice being given.	No compensation as an alternative to the indemnity payment. If the agent can prove that it has suffered harm in excess of the indemnity then it can bring a claim against the principal in damages for the difference.
France	Both.	No, but each party is entitled to receive, on request, a signed written document setting out the terms.	Agent may be entitled to an indemnity after termination of the agreement. There is no cap on the amount of indemnity awardable but the French courts approach is that it will generally amount to 2 years' average commission calculated over the preceding 2 or 3 years.	No compensation as an alternative to the indemnity payment. Agent may claim additional damages for unlawful termination of the agency.
UK	Goods only.	No, but each party is entitled to receive, on request, a signed written document setting out the terms.	An indemnity is available as an alternative to compensation but the parties must expressly elect for the indemnity to be payable. Where it is not selected, the agent will be entitled to compensation (not an indemnity) on termination/expiry. Indemnity is capped to 1 year's average commission calculated over the preceding 5 years and is only payable in certain circumstances.	Compensation is available as an alternative to the indemnity payment. Compensation is payable to the agent where the parties have not expressly elected for the indemnity to be payable. Compensation is assessed on the basis of the value hypothetical value of the agency at termination (assuming that the agency would continue as a going concern). The agent may also be able to claim damages for unlawful termination of the agency.

Distribution

Some of the key differences between the approach each jurisdiction has taken to distributorships are summarised as follows:

	Written agreement required?	Termination	Termination payment	Specific legislation for distribution agreements?
Germany	No.	<p>Where the distributor is involved in sales activities of the supplier to a level comparable to a commercial agent the notice provisions as apply to agents shall apply.</p> <p>Where a distributor is not so involved then, where no notice provisions have been agreed, "reasonable notice" is required which will likely be longer in exclusive distribution agreements.</p>	<p>Generally, no. However, where a distributor has been involved in the activities of the supplier to a level comparable to a commercial agent, the distributor may be entitled to claim an indemnity.</p> <p>Note that the distributor may be able to claim damages where the agreement is terminated in breach of the agreement, under general contracting laws.</p>	No.
Spain	No.	Parties are free to agree their own notice provisions. However, where no notice provisions have been agreed, the parties are required to give "reasonable" notice, which may be longer in exclusive distribution agreements.	<p>Currently there is no right to compensation upon expiry or termination.</p> <p>Note that there is some discussion as to whether an indemnity payment should be payable upon termination in the same way as for a commercial agent but there is currently no consensus on this.</p> <p>Note that the distributor may be able to claim damages where the agreement is terminated in breach of the agreement, under general contracting laws.</p>	No.
Belgium	No, but there is a requirement on the supplier to disclose certain pre-contractual information to the distributor.	<p>A number of distribution agreements fall within the provisions of the Law of 27 July 1961 on the Unilateral Termination of Certain Categories of Distribution Agreements (1961 Act).</p> <p>Where the distribution agreement is of indefinite duration and falls under the 1961 Act the parties are required to give "reasonable notice" or else pay an indemnity in lieu.</p> <p>Where the distribution agreement is originally entered into for a definite duration the parties must give at least 3 months and no more than 6 months notice. Note that if such notice is not given or where such agreement is renewed more than twice it will be deemed to be of indefinite duration and the provisions above will apply.</p> <p>For agreements not falling under the 1961 Act parties are free to agree their own provisions. Where no notice provisions have been agreed, the parties are required to give "reasonable" notice.</p>	<p>Where the distribution agreement does not fall under the 1961 Act the distributor has no right to a termination payment. However, note that the distributor may be able to claim damages where the agreement is terminated in breach of the agreement, under general contracting laws.</p> <p>Where the distribution agreement does fall under the 1961 Act the distributor may be entitled to a supplementary indemnity to compensate for its losses where the agreement is terminated unilaterally for reasons other than a serious failure on its part. The distributor may also be entitled to an indemnity in lieu of notice where insufficient notice has been given.</p>	Often governed by specific legislation.
France	No, but there is a requirement on the supplier to disclose certain pre-contractual information to the distributor.	Parties are free to agree their own notice provisions. However, where no notice provisions have been agreed, the parties are required to give "reasonable" notice, which may be longer in exclusive distribution agreements.	<p>No.</p> <p>However, the distributor may be able to claim damages where the agreement is terminated in breach of the agreement, under general contracting laws.</p>	No.
UK	No.	Parties are free to agree their own notice provisions. However, where no notice provisions have been agreed, the parties are required to give "reasonable" notice, which may be longer in exclusive distribution agreements.	<p>No.</p> <p>However, the distributor may be able to claim damages where the agreement is terminated in breach of the agreement, under general contracting laws.</p>	No.

Contacts

For a copy of the guide please go to the link stated above or else, if you have any queries relating to this note or agency and distribution generally, please contact the appropriate individual from the list below.

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