Distribution Law Center
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TEGOS LAW FIRM

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Q&A Distribution agreements

Part I: Legislative framework

Q1. Please specify the legislative framework generally applicable to the conclusion and execution of distribution agreements (a)? Please include a link to the official publication of the applicable rules (e.g., relevant link to the Official Gazette) (b) and, if available, to the English translation of the legislative framework (c).

a. Legislative framework:

Competition Act (in Estonian: *Konkurentsiseadus*)

Grant of Permission to Enter into Vertical Agreements which Restrict or May Restrict Free Competition (Block exemption) (in Estonian: *Konkurentsi kahjustavate või kahjustada võivate vertikaalsete kokkulepete sõlmimiseks loa andmine (grupierand)*)

Law of Obligations Act (in Estonian: *Võlaõigusseadus*)

b. Link(s) to official publication:

The Estonian version of the Competition Act is accessible via this link.

The Estonian version of the Grant of Permission to Enter into Vertical Agreements which Restrict or May Restrict Free Competition (Group exemption) is accessible via this link.

The Estonian version of the Law of Obligations Act is accessible via this link.

c. Link(s) to English translation:

The English translation of the Competition Act is accessible via this link.

The English translation of the Grant of Permission to Enter into Vertical Agreements which Restrict or May Restrict Free Competition (Group exemption) is accessible via this link.

The English translation of the law of Obligations Act is accessible via this link.

Q2. Other than for agency agreements pursuant to Directive 86/653 (EEC) on the coordination of the laws of the Member States relating to self-employed commercial agents, are there specific rules depending on the distribution format (e.g. franchising, exclusive distribution)?

No.

Q3. Other than general contract law and competition law, are there other rules which may generally restrict the parties when drafting and concluding distribution agreements (e.g., rules in relation to unfair contract terms in B2B

contracts, specific requirements in the context of a prohibition of abuse of economic dependence)?

Yes.

If yes, which general rules apply (a)? Where available, please also include a link to the official publication of the applicable rules (b) and to the English translation of the regulatory framework (c).

a. General rules:

The Estonian law does not contain specific rules on distribution agreements, but the general contract law sets out that if the Law of Obligations Act (LOA) contains rules in relation to unfair contracts terms, these rules also apply to B2B agreements. In addition, the Restriction of Unfair Competition and Protection of Business Secrets Act (RUCPBSA) sets out a general prohibition on unfair competition, which should also be borne in mind in distribution relationships.

Invalidity of standard terms in B2B agreements

According to Art. 42 (1) LOA, a standard term is void if, taking into account the nature, content, manner of entry into the agreement, interests of the parties and other material circumstances, the term causes unfair harm to the other party, particularly if it causes a significant imbalance in the parties' rights and obligations arising from the agreement to the detriment of the other party. Unfair harm is presumed if a standard term derogates from a fundamental principle of law or restricts the rights and obligations arising for the other party from the nature of the agreement such that it becomes questionable whether the purpose of the agreement can be achieved. Invalidity of standard terms and the circumstances relating thereto is to be assessed as at the date of entry into the agreement.

A standard term is not deemed to be unfair if it relates to the main subject matter of the agreement or to the relationship between the price and the value of the services or goods to be supplied in exchange, or if the content of the term is based on mandatory law (See, Art. 42 (2) LOA).

Art. 42 (3) LOA lists a number of occasions when a standard term is considered unfair and therefore void when the other party is a consumer: e.g., terms that unfairly restrict liability, terms that preclude the use of legal remedies, terms that require the party to pay an unreasonably high contractual penalty, terms that restrict the party's statutory right to refuse acceptance of performance of obligations etc. If such a standard term is used in a B2B agreement, the term is presumed to be unfair (See, Art. 44 LOA).

This implies that the party relying on the term in civil litigation must prove that, under the given circumstances, the term is not unfair in the particular B2B context (Supreme Court ruling in civil matter 3-2-1-139-14).

b. Link(s) to official publication:

The Estonian version of the LOA is accessible via this link.

The Estonian version of the RUCPBSA is accessible via this link.

c. Link(s) to English translation:

The English translation of the LOA is accessible via this link.

The English translation of the RUCPBSA via this link.

Part 2: Pre-contractual phase

Q4. Are there mandatory provisions in relation to the disclosure of pre-contractual information prior to concluding and/or executing distribution agreements?

Yes.

If yes, which mandatory provisions apply (a) and which information must be disclosed (b)? Where available, please also include a link to the official publication of the applicable rules (c) and, if available, to the English translation of the regulatory framework (d).

a. Mandatory provisions:

See, Art. 14 LOA.

b. Information to be disclosed:

According to Art. 14 LOA, parties engaging in pre-contractual negotiations or other preparations for entering into an agreement must take reasonable account of one another's interests and rights. Information exchanged by the parties in preparing the conclusion of the agreement must be accurate.

Parties engaging in pre-contractual negotiations or other preparations for entering into an agreement must inform the other party of all circumstances with regard to which the other party has, based on the purpose of the agreement, an identifiable essential interest. There is no obligation to inform the other party of circumstances of which the other party could not reasonably expect to be informed.

If information not subject to disclosure is provided to a party in the course of pre-contractual negotiations, this party must not disclose such information to other parties or use it in bad faith in its own interests, whether or not an agreement is ultimately concluded.

c. Link(s) to official publication:

The Estonian version of the LOA is accessible via this link.

d. Link(s) to English translation:

The English translation of the LOA is accessible via this link.

Q5. Is there a standstill obligation linked to the requirements imposed for the pre-contractual phase?

No.

Q6. Does the relevant regulatory framework impose sanctions if the pre-contractual obligations are not (fully) respected?

No.

Q7. Can a party be held liable if it terminates the pre-contractual negotiations?

Yes. There are no specific sanctions for not respecting the pre-contractual obligations, but the other party may invoke legal remedies under general contract law (e.g., demand compensation for damages).

If yes, on what grounds (a); under what conditions (b); and what consequences are generally linked to such liability (c)?

a. Grounds for precontractual liability:

See, Art. 115 LOA.

b) Conditions for precontractual liability:

If parties engaging in pre-contractual negotiations fail to reach an agreement, no statutory legal consequences arise for the parties. However, a party must not engage in negotiations in bad faith (e.g., if the party has no real intention of entering into an agreement), nor break off negotiations in bad faith. Therefore, pre-contractual liability for terminating the negotiations could occur when a party engages in or breaks off the negotiations in bad faith (See, Art. 14 (3) LOA). The Supreme Court has ruled that a party acts in bad faith when it conducts negotiations without the actual intention to negotiate or enter into an agreement, and the purpose of the negotiations is not in accordance with the principle of good faith (e.g., to prevent the other party from concluding an agreement with its competitor) (Supreme Court ruling in civil matter no 3-2-1-89-06).

Art. 14 (3) LOA regulates the party's obligations until the conclusion of a valid agreement, but if the agreement later proves to be invalid due to a breach of a party's pre-contractual obligations, that party can also be held liable pursuant to Art. 14 (3) LOA (Supreme Court ruling in civil matter no 3-2-1-89-06).

Based on the opinions expressed in the commentaries of the LOA (P. Varul et al. Law of Obligations Act I. Art. 1–207 commentaries, pp 91–92), bad faith in the termination of the pre-contractual negotiations is determined by assessing the length of the negotiations and the party's legitimate expectations in signing the agreement. Such legitimate expectation could arise in particular when the parties have agreed on the fundamental terms of the agreement, or a party has incurred costs or performances based on the negotiations.

In the Supreme Court's case law, the termination of the negotiations has been considered to be in bad faith when parties have signed a preliminary agreement, have drawn up a memorandum of understanding or have otherwise

indicated their intention to sign the agreement. The termination of negotiations is not considered to have been made in bad faith if there is a compelling reason for the termination. This must be assessed from the point of view of the other party. Therefore, the reason for the termination must be compelling to the other party and the termination must not undermine the other party's trust in that the agreement will be signed (Supreme Court ruling in civil matter 3-2-1-168-14).

c. Consequences of pre-contractual liability:

In case of improper termination of pre-contractual negotiations (i.e., when a party breaks off negotiations in bad faith), the damaged party may be entitled to compensation for damages on the basis of Art. 115 (1) LOA. The damaged party is to be placed in a situation as near as possible to the situation in which the party would have been if he had not relied on the terminated pre-contractual negotiations (See, Art. 127 (1) LOA). Therefore, the damaged party is compensated for the damages that occurred because he relied and depended on the pre-contractual negotiations. The damages may include travel costs, costs related to the time spent on negotiations, costs of drafting the agreement (P. Varul et al. Law of Obligations Act I. Art. 1–207 commentaries, pp 97–98), costs of preparing for the performance of the agreement and costs of restitution (Supreme Court ruling in civil matter no 3-2-1-89-06).

Q8. Are there other relevant rules and/or restrictions that apply during pre-contractual negotiations between supplier and distributor?

No.

Part 3: Contractual phase

A. Form of distribution agreements

Q9. Must a distribution agreement be executed in writing to be valid and enforceable?

No, never.

Q10. Are there any (other) requirements as to the form of the distribution agreement for it to be valid and enforceable?

No.

B. Content of distribution agreements

Q11. Other than restrictions imposed by EU competition law (including Regulation (EU) 330/2010), do specific rules and/or restrictions apply in distribution agreements with respect to

- the territory in which or the customers to whom the goods/services will be sold;
- an exclusivity granted to the distributor;
- (exclusive) sourcing/purchasing obligations;
- resale prices;
- non-compete clauses?

No.

Q12. Do specific rules and/or restrictions apply in distribution agreements with respect to

- obligations of the supplier vis-à-vis the distributor, including in relation to the remuneration of the distributor;
- obligations of the distributor vis-à-vis the supplier or vice versa;
- a non-solicitation clause during and/or after the term of the distribution agreement;
- minimum sales quota imposed on the distributor;
- specific sector rules?

Yes, specific rules apply with respect to specific sector rules.

If yes, what do these specific rules and/or restrictions entail?

In general, we do not have extra specific competition law rules for distribution agreements. For clarity, however, from the EU law we have transposed the Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

C. Term and termination

1. Term

Q13. Is an oral or written distribution agreement that does not specify the term always considered to be an agreement of indefinite duration?

Yes.

Q14. Does a distribution agreement of definite duration that is continued after its expiry turn into a distribution agreement of indefinite duration?

Yes.

If yes, what is meant by ‘continuation’ (a) and what should a party do to avoid this (b)?

a. What is meant by ‘continuation’?

Continuation refers to a situation where a distribution agreement is expired, but the parties continue to perform the agreement in the same way as they did before. In this case, parties have implicitly indicated their intention to continue the agreement by their actions (General Part of the Civil Code Act art 68 (5)) under the same terms as the expired agreement was concluded.

b. What should a party do to avoid this?

The easiest way to avoid conversion of the agreement from a fixed-term to an indefinite term is to end contractual and commercial relationships at the time when the agreement ends. If the parties want to continue commercial relationships, they should conclude a new fixed-term agreement before the previous one ends.

2. Termination

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution agreements of definite duration

Q15. Can a distribution agreement of definite duration be terminated for convenience?

Yes.

If yes, is an express provision allowing for termination for convenience necessary?

Only in certain instances.

If only in certain instances, please explain when a reasonable notice period is in any case required?

The basic principle for agreements of definite duration is that they cannot be terminated for convenience. However, the agreement may provide otherwise. If the parties wish to allow for termination for convenience, it is, however, advisable to expressly provide for this in the distribution agreement.

Q16. Must a reasonable notice period be observed in order for the termination to be valid even if the distribution agreement provides for the immediate termination for convenience?

No.

Q17. What are the consequences for the terminating party if it does not comply with prescribed (statutory, contractual, case law) rules for termination (e.g. in relation to the notice period)? Does the termination continue to have effect (a)? Will damages have to be paid and, if yes, how are those damages calculated (b)?

a. Will the termination continue to have effect?

The conditions depend on whether it is to be terminated by ordinary or extraordinary notice. Generally, agreements of definite duration can be terminated only with an extraordinary notice (unless agreed otherwise in the agreement). A fixed term agreement may be terminated by either party without notice, in particular if the terminating party cannot reasonably be required, in all the circumstances and in the interest of both parties, to

continue the agreement until the agreed date or the end of the period of notice (extraordinary termination). As a general rule, if the request for termination does not comply with the conditions, the termination has not taken place, i.e. the agreement is not terminated.

b. Will damages have to be paid, and, if yes, how are those damages calculated?

Acting in breach of the rules on termination does not give rise to an automatic obligation to pay damages. However, if the other party suffers damage as a result of a breach of the rules, payment of compensatory damages may be required. The calculation of damages depends on the exact damage incurred and the parties' contribution to it. The most general principle of damages is that a person shall be put in the position he would have been if the damage had not occurred.

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution agreements of indefinite duration

Q18. Can a distribution agreement of indefinite duration be terminated for convenience even if the agreement does not provide for termination for convenience?

Yes.

If yes, must a reasonable notice period be observed?

Yes.

If a reasonable notice period must be observed, how is this reasonable notice period calculated (e.g. 1 month per year) (a)? Should a minimum notice period be observed (b), is there a maximum notice period (c)?

a. How is this reasonable notice period calculated (e.g. 1 month per year)?

Unless otherwise provided for by law or agreed between the parties, according to subsection 195 (3) LOA, either contracting party may terminate, with reasonable notice, an agreement for the performance of a continuing obligation or an agreement for the performance of recurring obligations concluded for an indefinite term. Usually, a reasonable notice period is defined in the agreement itself. There is no minimum or maximum notice period following from statutory law or case law. A reasonable notice period depends on the circumstances and is determined on a case-by-case basis.

b. Should a minimum notice period be observed? If yes, how long is this minimum notice period and are the parties allowed to contractually deviate from this minimum notice period

There is no minimum notice period.

c. Is there a maximum notice period? If yes, how long is this maximum notice period and are the parties allowed to contractually deviate from this maximum notice period?

There is no maximum notice period.

Q19. Is a contractual notice period always legally valid and enforceable?

No.

If not, which rules of mandatory law can have an impact on this?

The law specifies that if the request for termination has not been made within a reasonable period, the period is extended to a reasonable time and the agreement terminates after the expiry of the reasonable period.

Q20. What are the consequences for the terminating party if it does not comply with prescribed (statutory, contractual, case law) rules for termination (e.g. in relation to the notice period)? Does the termination continue to have effect (a)? Will damages have to be paid and, if yes, how are those damages calculated (b)?

a. Will the termination continue to have effect?

As a general rule, if the request for termination does not comply with the conditions, the termination has not taken place, i.e. the agreement is not terminated. If the request for termination has not been made within a reasonable period, the period is extended to a reasonable time and the agreement terminates after the expiry of the reasonable period.

b. Will damages have to be paid, and, if yes, how are those damages calculated?

Acting in breach of the rules on termination does not give rise to an automatic obligation to pay damages. However, if the other party suffers damage as a result of a breach of the rules, payment of compensatory damages may be required. The calculation of damages depends on the exact damage incurred and the parties' contribution to it. The most general principle of damages is that a party shall be put in the position he would have been if the damage had not occurred.

Q21. Must the terminating party comply with certain formalities?

Yes.

If yes or only in certain instances, when is a written notice required (a), must the notice contain a motivation in order for the termination to valid (b) and what are the consequences if any of the formalities are not observed (c)?

a. Is a written notice required? If yes, is a registered letter (or similar) required?

Formal termination of the agreement requires, in particular, the submission of a notice of termination to the other party. According to LOA Art. 195 (1), a party to a fixed term agreement can terminate the agreement by submitting a notice of termination to the other party. The law does not prescribe any formal requirements for the notice of termination. Thus, an agreement may also be terminated by an implied termination notice within the meaning of Art. 68(3) of the Civil Code (See the judgment of the Supreme Court of 19 April 2006 in civil case No 3-2-1-29-06, p. 20). However, if the parties have agreed formal requirements for the notice of termination in the agreement, it shall be followed.

b. Must the notice contain a motivation in order for the termination to valid?

No.

c. What are the consequences if any of the formalities are not observed?

In general, if the formalities are not observed, the termination is invalid, but if the request for termination has not been made within a reasonable period, the period is extended to a reasonable time and the agreement terminates after the expiry of the reasonable period.

Q22. Can the parties stipulate the formalities in the distribution agreement?

Yes.

If yes, what are the consequences if those formalities are not observed?

The termination is invalid unless otherwise agreed between parties.

Q23. Is the terminated party entitled to damages or another type of compensation even if the correct notice period has been observed?

Only in certain instances

If yes, does this concern goodwill compensation or another type of compensation? Do the legal consequences vary depending on the type of agreement (definite/indefinite duration; exclusive/non-exclusive; franchise etc.)?

Compensation for damages depends only on whether a party has suffered damage and whether the other party has caused the damage, and whether there is a causal link between the act and the damage. Damages do not depend on the type of agreement.

Immediate extrajudicial termination on account of serious breach or exceptional circumstances

Q24. Is immediate extrajudicial termination possible even if the distribution agreement does not provide for early termination?

Yes.

If yes, on what grounds (a)? Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement (b)?

a. On what grounds?

A fixed term agreement may be terminated by either the contracting party for good cause without observing the notice period, in particular if the terminating contracting party cannot reasonably be required to continue the agreement until the agreed deadline or the expiry of the notice period, taking into account all the circumstances and the interests of both parties (extraordinary termination) (LOA Art. 196 (1)). If there is good cause for the other party to the agreement to be in breach of a contractual obligation, the agreement may be terminated only after the

expiry without result of a reasonable period of time fixed for the cessation of the breach. It shall not be necessary to set a time limit in the cases provided for in points (2) to (4) of subsection 116 (2) LOA. The party entitled to terminate the agreement may do so only within a reasonable time after becoming aware of the circumstances giving rise to the termination (LOA Art. 196 (3)).

In general, material breaches of contract are not exhaustively covered by the law. Below is a list of examples:

LOA Art 116 (2) specifies that a breach of contract is fundamental in particular if:

1. non-performance of an obligation substantially deprives the injured party of what the party was entitled to expect under the agreement, except in cases where the other party did not foresee such consequences of the non-performance and a reasonable person of the same kind as the other party could not have foreseen such consequences under the same circumstances;
2. pursuant to the agreement, strict compliance with the obligation which has not been performed is the precondition for the other party's continued interest in the performance of the agreement;
3. non-performance of an obligation was intentional or due to gross negligence;
4. non-performance of an obligation gives the injured party reasonable reason to believe that the party cannot rely on the other party's future performance;
5. the other party fails to perform any obligation thereof during an additional term for performance specified in Art. 114 of this Act or gives notice that the party will not perform the obligation during such term.

b. Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement?

Yes.

Q25. Will an (extrajudicial) termination continue to have effect if the court rules that the agreement was wrongfully terminated on account of serious breach and/or exceptional circumstances?

No.

If not or only in certain instances, what are the consequences of the termination not being upheld?

The agreement is still valid until it has been correctly terminated. Usually, the difference between ordinary and extraordinary termination is that extraordinary termination may also be immediate, but ordinary requires a reasonable notice period. If the court stipulates that the extraordinary termination was invalid, the termination is considered to be ordinary, and the agreement ends after a reasonable notice time has passed.

Q26. Does the terminated party have a right to compensation if it appears that the agreement was wrongfully terminated or dissolved on account of serious breach and/or exceptional circumstances?

Yes.

If yes, is this right based on statute or case law (a) and how is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill) (b)?

a. Is this right based on statute or case law and what this right entail?

The right and the obligation to compensate for damage are statutory and compensation can only be claimed if the damage has actually occurred or there is an agreed contractual penalty for a case.

b. How is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill)?

The calculation of the damages depends on the exact damage suffered and the parties' contribution of it. The most general principle of damages is that a damaged party shall be put in the position he would have been if the damage had not occurred. As an additional compensation the parties may agree on a penalty, which is the obligation of a party to an agreement who has acted in breach of a contractual obligation, to pay to the injured party a sum of money specified in the agreement.

Q27. If a party believes that the distribution agreement has been wrongfully terminated or dissolved, can it apply to the judge in interim relief proceedings to have the effects of the termination suspended?

Yes.

Part 4: Post-contractual phase

Q28. Is the supplier required to repurchase the stock that is still at the distributor’s disposal when the distribution agreement ends?

No.

Q29. Are there other post-contractual obligations that generally apply to either of the parties in the context of the termination of the distribution agreement?

No.

Part 5: Dispute resolution

Q30. Do specific rules and/or restrictions apply as regards the choice of forum and/or jurisdiction?

No.

Q31. Can the parties opt for arbitration?

Yes.

If yes, are there any rules and/or restrictions as regards the enforceability of arbitration clauses in distribution agreements?

No.

Q32. What is the statute of limitations applicable to claims regarding the performance of a distribution agreement?

According to Art. 146 General Part of the Civil Code Act (in Estonian: *Tsiviilseadustiku üldosa seadus*), the limitation period for a claim arising from a transaction is three years. The limitation period is ten years if a party intentionally violated its obligations.

The Estonian version of the General Part of the Civil Code Act is accessible via this link.

The English version of the General Part of the Civil Code Act is accessible via this link.