Distribution Law Center
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Q&A on 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:

Book IV comprising the Belgian Competition Act

Book VI comprising the rules on market practices and consumer protection

Book X, titles 1 to 3 Belgian Code for Economic Law, comprising the following rules:

- Title 1: Agency Agreements
- Title 2: Pre-contractual Information in the context of commercial collaboration agreements
- Title 3: Unilateral termination of exclusive distribution agreements with an indefinite duration

Art. I.6, I.8, I.11 Belgian Code for Economic Law, which holds the definitions relevant to, respectively, Book IV, Book VI and Book X Belgian Code for Economic Law.

b. Link(s) to official publication:

The Dutch version of the CEL is accessible via this link.

The French version of the CEL is accessible via this link.

c. Link(s) to English translation:

Not available.

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

By means of the Law of 4 April 2019, the Belgian legislator introduced new rules in relation to B2B relationships. These rules consist of 3 parts: (1) unfair contract terms in B2B contracts, (2) unfair B2B market practices, and (3) abuse of economic dependence. The new rules have been incorporated in Book VI Belgian Code of Economic Law ("CEL").

On the basis of these rules, the following should be taken into account in all B2B contracts, including distribution agreements:

1. Unfair contract terms in B2B contracts (Art. VI.91/1-VI.91/10 CEL)

The new B2B rules have a broad scope, as they apply to virtually all B2B contracts concluded, renewed or amended after 1 December 2020, except for (i) agreements relating to financial services and (ii) public procurement agreements or agreements executed in the framework thereof (Art. VI.91/1 CEL).

First, all written contract provisions must be drafted in a clear and comprehensible way (Art. VI.91/2 CEL). Second, as a general principle, any clause that creates a manifest imbalance between the rights and duties of professionals is prohibited (Art. VI.91/3 CEL). The so-called 'core clauses' – i.e. clauses determining the actual object of an agreement and the balance between a price and the corresponding goods/services – are exempted from this general principle, provided they are sufficiently transparent. More specifically, this prohibition is translated into a black and grey list of clauses.

The black list contains four types of clauses that are always unlawful and thus prohibited (Art. VI.91/4 CEL):

- Clauses that provide for an irrevocable obligation on the part of one company, while the performance of the other party's obligations is subject to a condition that depends exclusively on the latter's will (*irrevocable versus potestative obligations*);
- Clauses that give a company the unilateral right to interpret a contract (*unilateral interpretation clauses*);
- Clauses that require one company to waive any recourse against the other company as soon as the latter contests such recourse (*self-administered justice clauses*);
- Clauses that irrefutably establish the knowledge or acceptance of certain clauses, even though a company was not made aware of them prior to the conclusion of the contract (*irrefutable knowledge or acceptance clauses*).

The grey list contains eight clauses that carry a presumption of unlawfulness. They are prohibited unless proof to

the contrary is provided (Art. VI.91/5 CEL):

- Clauses that give a company the right to unilaterally amend the terms of a contract without a valid reason (*unilateral amendment clauses*);
- Clauses that tacitly extend or renew a limited-term contract without providing for a reasonable notice period (*tacit renewal*);
- Clauses that, without consideration, impose the economic risk on one company, although that risk would not customarily rest upon it (*shifting of the risk*);
- Clauses that inappropriately limit or exclude the legal rights of one company if the other company does not fulfil its contractual obligations (*inappropriate limitation or exclusion of legal rights*);
- Clauses that bind the parties without specification of a reasonable notice period (*no reasonable notice period*);
- Clauses that release a company from its liability for its wilful misconduct or serious fault or for its failure to fulfil the essential obligations of the contract (*certain exoneration clauses*);
- Clauses that limit the evidence on which the other party may rely (*limitation of evidence*);
- Clauses that establish damage amounts that are manifestly disproportionate to the harm suffered (*manifestly disproportionate damages clauses*).

The nullity of a clause on the black list cannot be disputed, but that of a clause on the grey list can. A grey clause can be salvaged if the party wishing to enforce the clause can demonstrate that it does not lead to a manifest imbalance. Thus, a grey clause can be lawful due to the nature of the product or service, the specific circumstances concerning the conclusion of the contract, the commercial customs and relations, the sector involved or the coherence with other clauses.

2. Unfair B2B market practices (Art. VI.105 – VI.109/3 CEL)

The prohibition of unfair market practices includes misleading (Art. VI.105 and 105/1 CEL) and aggressive (Art. VI.109/1-109/2 CEL) market practices.

A misleading market practice is a practice involving false information which is therefore untruthful, or, even if the information is factually correct, deceives or is likely to deceive a professional counterparty in any way, and causes or is likely to cause it to take a transactional decision that it would not have taken otherwise.

This includes possible deception with regard to the existence or nature of the product, the main characteristics of the product, the scope of the company's obligations, the price or the way in which the price is calculated, etc.

According to Art. VI.105/1 CEL, a market practice is also misleading if essential information is omitted which the other company requires to take an informed decision, and which causes or may cause it to take a decision that it

would not otherwise have taken.

An aggressive market practice is a market practice which, in its factual context, taking account of all its characteristics and circumstances, by means of harassment, coercion, including the use of physical force, or inappropriate influence, significantly limits or may significantly limit a company's freedom of choice or conduct with regard to a product and thereby causes or may cause it to take a transactional decision that it would not have taken otherwise.

According to Art. 109/1 CEL, the notion of “inappropriate influence” is interpreted as the exploitation by one company of its dominant position in relation to the other company in order to exercise pressure, even without using or threatening to use physical force, in a manner which significantly limits its ability to take an informed decision.

Art. 109/2 CEL provides a list of circumstances that should be taken into account to assess whether a market practice includes harassment, coercion (including the use of physical force) or inappropriate influence

3. Abuse of economic dependence (Art. IV.2/1 and IV.70 CEL)

Art. VI.2/1 CEL prohibits the abuse of economic dependence. This is a new form of so-called “relative” abuse between trading partners.

Every supplier or purchaser holding a position of power vis-à-vis a trading partner must be vigilant in the light of the new prohibition of abuse of economic dependence, as any company in a position of economic dependence may rely on the protection of Art. IV.2/1 CEL.

Within the framework of distribution agreements, some distributors might be regarded as being in a situation of economic dependence vis-à-vis their supplier. That is particularly the case in franchising, subcontracting and exclusive dealership relations.

There is economic dependence in the case of “relative domination” of one company vis-à-vis another. This requirement is distinct from that of a dominant position on the relevant market, which only arises if the company holds a market share greater than 40%. The fact that the abuser is responsible for a relatively large part, if not all, of the total revenue generated by his trading party, can be considered as a strong indication of such “relative domination”. Also, look at the paragraph above concerning the cases that are particularly sensitive. The prohibition of abuse of economic dependence applies irrespective of the size and market share of the trading partners, as long as the abuse is capable of affecting competition on the Belgian market (or a substantial part thereof).

Therefore, three cumulative conditions must be fulfilled:

- there must be a position of economic dependence (which is not prohibited per se);

- there must be an abuse thereof; and
- the abuse must be capable of affecting competition on the Belgian market (or a substantial part thereof).

The list of practices that qualify as abusive in a situation of economic dependence includes all of those that the law foresees in the event of dominant position, to which are added the refusal of a sale, a purchase or other transaction terms.

The Belgian Competition Authority monitors compliance with the prohibition and, in the event of violation of the prohibition, will be able to impose fines of up to 2% of the company's turnover, and periodic penalty payments up to 2% of the average daily turnover per day of delay in bringing the infringement to an end.

b. Link(s) to official publication:

The Dutch version of CEL is accessible via this link.

The French version of the CEL is accessible via this link.

c. Link(s) to English translation:

Not available.

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:

(i) Art. 1382-1383 Belgian Civil Code; (ii) Art. 5.14-5.17 of the (New) Belgian Civil Code; (iii) Art. X.26-X.34 CEL.

b. Information to be disclosed:

(i) Art. 1382 and 1383 Belgian Civil Code sets out the general principles of extra-contractual liability and duty of care. Case law confirms that damages claims resulting from a violation in the conclusion of an agreement is based on the extra-contractual legal regime.

(ii) Art. 5.15 and 5.16 (New) Belgian Civil Code sets out the principle of pre-contractual good faith. During the term of the contract, the principle of good faith is governed by art. 5.71 (New) Belgian Civil Code. This latter Art.

requires that all agreements are executed in good faith. This principle also applies to the pre-contractual phase and requires each party to inform the other party of the elements that should allow the future partner to make an assessment that is as objective as possible of the commercial risk that the commercial cooperation entails.

(iii) Art. X.26-X34 CEL impose additional pre-contractual information requirements prior to concluding 'commercial cooperation agreements'. A commercial cooperation agreement is an agreement concluded between two or more parties whereby one grants the other the right to use a commercial formula for the sale of products or delivering services. A commercial formula can consist of either the use of a trade name or logo, a transfer of know-how or providing technical or commercial assistance (Art. I.11, 2° CEL).

Excluded from the scope of Art. X.26-X.34 are insurance agency agreements and banking agency agreements (Art. X.26 CEL).

The pre-contractual information must include (i) a copy of the draft commercial cooperation agreement and (ii) a separate pre-contractual information document or "PID". The PID must contain 2 parts. Part 1 of the PID must set out all the important contractual provisions of the commercial cooperation agreement. Part 2 of the PID concerns a series of socio-economic data necessary for the correct assessment of the proposed commercial cooperation.

Reference is made to the English translation of Art. X.28 CEL (here) for a complete list of the pre-contractual information that must be included in the PID.

c. Link(s) to official publication:

(i) Book 5 (New) Belgian Civil Code

The Dutch version is accessible via this link.

The French version is accessible via this link.

(ii) Art. X.26-X34 CEL

The Dutch version is accessible via this link.

The French version is accessible via this link.

d. Link(s) to English translation:

Not available.

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

Yes.

If yes, what does this standstill obligation entail (how long, specific procedural requirements, etc.)?

The pre-contractual information must be provided one month before the execution of the commercial cooperation agreement together with an execution copy of the cooperation agreement. With the exception of the conclusion of

a non-disclosure agreement, no commitments may be entered into and no other compensation, amount or security may be requested or paid before the expiry of the standstill period (Art. X.27 CEL).

In the event of (i) the renewal of a commercial cooperation agreement concluded for a fixed period, (ii) the conclusion of a new commercial cooperation agreement between the same parties or (iii) the amendment of a commercial cooperation agreement that is being executed and has been concluded since at least 2 years, the party granting the right shall provide the other party with a draft agreement and a simplified PID at least one month before the renewal or conclusion of a new agreement or the amendment of the current commercial cooperation agreement. Reference is made to the English translation of Art. X.29 CEL (here) for a complete list of the pre-contractual information that must be included in the simplified PID.

However, if a commercial agency agreement concluded since at least 2 years is amended during its execution at the request of the party acquiring the right, the party granting the right shall not be required to provide a draft agreement or a simplified PID.

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

Yes.

If yes, which sanctions apply (e.g., nullity of contract, penalty payment)?

Agreements executed in disrespect of this obligation can be declared null and void upon request of the party that is granted the right to use the commercial formula. The nullity of the agreement must be invoked within a period of 2 years after the conclusion, renewal or amendment of the commercial cooperation agreement (Art. X.30, paragraph 1 CEL).

If Part 1 of the PID does not contain the required information with respect to important clauses of the commercial cooperation agreement (see, Q6.b) above), the nullity of said clauses may be invoked without limitation in time (Art. X.30, paragraph 2 CEL).

If any information of Part 2 of the PID is missing, incomplete or incorrect of if any information of Part 1 of the PID is incomplete or incorrect, the party acquiring the right may invoke the ordinary law provisions relating to defects of will or quasi-delictual (tort) liability and such without prejudice to the right to invoke the nullity of said clauses (Art. X.30, paragraph 3 CEL).

The party acquiring the right may only validly waive the right to claim the nullity of the commercial cooperation agreement or of one of its provisions after the expiry of a period of one month after the conclusion of this agreement. Such waiver shall expressly state the reasons for waiving the nullity (Art. X.30, paragraph 4 CEL).

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

Yes.

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

a. Grounds for pre-contractual liability:

- Art. 5.17 (New) Belgian Civil Code (obligation to compensate damage caused by wrongful conduct during the negotiating phase of a contract)
- Art. 1382 Belgian Civil Code (obligation to compensate damage caused by an act)
- Art. 1383 Belgian Civil Code (obligation to compensate damage caused by negligence or carelessness)

b. Conditions for pre-contractual liability:

Any party is in principle free to terminate pre-contractual negotiations, but it is required to negotiate in good faith. According to Belgian case law, terminating pre-contractual negotiations in itself is not wrong, unless the party terminating the pre-contractual negotiations is acting in bad faith and terminated the negotiations wrongly (e.g. on the basis of deceptive behaviour, by means of very limited motivation or demonstrably untimely).

c. Consequences of pre-contractual liability:

The damaged party may be entitled to damages by the party that is held liable for the improper termination of the pre-contractual negotiations.

Most Belgian case law quantifies such damages as the costs incurred, damages for the loss of the opportunity to negotiate agreements with other parties or reputational damage, if the termination goes against the principles of reasonableness and fairness. This means that the party that is held liable must restore the other party's financial situation as if no negotiations have taken place.

Other Belgian case law quantifies such damages as the loss of revenue, if the damaged party had legitimate expectations that an agreement would be concluded. In such case the party that is held liable must restore the other party's financial situation as if the pre-contractual obligations had been respected and an agreement had been concluded. This is now laid down in art. 5.17, §2 of the (New) Belgian Civil Code.

The court shall assess each case on a case-by-case basis, taking into account the obligation to negotiate in good faith and the freedom of each party to terminate pre-contractual negotiations on the basis of justified reasons.

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?

Only in certain instances.

If only in certain instances, please explain when a written agreement is required.

When concluding commercial cooperation agreements (see, Q6.b) above).

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?

Yes specific rules apply to (i) the territory in which or the customers to whom the goods/services will be sold, (ii) an exclusivity granted to the distributor and (ii) (exclusive) sourcing/purchasing obligations.

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

With respect to territory, exclusivities and exclusive sourcing/purchasing obligations, the mandatory provisions of Book X, Title 3 CEL apply to certain types of distribution agreements. As the protection offered by the provisions of Book X, Title 3 CEL cover the termination of such distribution agreements, reference is made to Part III.C below.

Q12. Do specific rules and/or restrutions 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?

No specific rules apply.

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 occurs when the parties continue to perform the agreement as it had not expired. In such case, the parties are deemed to have tacitly agreed to enter into a new distribution agreement of indefinite duration of which the terms and conditions will be identical to the expired distribution agreement (Art. 5.78 Belgian Civil Code).

It should be noted that, since the continuation constitutes a renewal (and not an extension) of the original distribution agreement, the validity of the new distribution agreement must be assessed at the time of the renewal.

Exclusive distribution agreements with a fixed term are, for the purposes of the mandatory provisions of Book X Title 3 CEL, considered distribution agreements of indefinite duration if the distributor was not terminated by registered letter between 6 and 3 months prior to the expiry of the fixed term (Art. X.38, first paragraph CEL). Fixed term exclusive distribution agreements that, irrespective of whether they were slightly modified, are renewed for a third time are considered as of then to constitute exclusive distribution agreements of indefinite duration to which the mandatory provisions of Book X Title 3 CEL apply in case of termination (Art. X.38, second paragraph CEL).

b. What should a party do to avoid this?

If the tacit continuation of the distribution has not been contractually excluded, the party must oppose the continued performance of the expired distribution agreement by the other party (Art. 5.78 Belgian Civil Code).

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 an express provision is required?

The basic principle for contracts of definite duration is that they cannot be terminated for convenience. However, Art. 5.76 Civil Code stipulates that the law (see for example the principal who can revoke his mandate in accordance with Art. 2004 Civil Code), the contract or customs (for example, due to the special relationship of trust between a lawyer and his client, there is a custom in favour of the lawyer, who may waive the assignment entrusted to him by his client, provided that his decision is not taken prematurely and that the lawyer is certain that his client will be able to be assisted by another lawyer) 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?

Only in certain instances.

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

A reasonable notice period is required if, in absence thereof, the immediate termination of the distribution agreement of definite duration could be considered to be abusive (see also hereafter, Q17.a).

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 termination shall be without effect and the distribution agreement shall continue to remain in full force and effect if the termination is irregular or abusive (Art. 5.76 Civil Code). However, the terminating party can undo the irregular termination if (i) the terminated party in the meantime did not accept the irregular termination and (ii) this right to undo the termination is not exercised abusively.

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

The terminated party may be entitled to damages by the terminating party for the loss suffered by the terminated party (losses incurred and loss of profit).

In determining the damages, a Belgian court shall place itself at the time of the termination of the contract and take into account, among other things, the duration of the contract and the specific investments made and costs incurred by the terminated party in the context of the distribution agreement.

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)?

There is no fixed method for determining the duration of the notice period. The notice period must be determined taking into account the specific circumstances. The following elements are generally considered in this context: the time needed for the other party to find a new contracting party or to find a comparable source of income, the specific investments made by the other party in the context of the distribution agreement and the duration of the cooperation.

Specific rules apply to exclusive distribution agreements of indefinite duration (see hereafter, Q19).

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

No.

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?

No.

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?

Under mandatory B2B legislation, a contractual notice period which is manifestly unreasonable can be declared null and void. Whether or not the notice period could be considered to be manifestly unreasonable will depend on the specific context, taking into account e.g. the commercial practices in the relevant sector and the nature of the products and services.

In addition, specific mandatory rules apply to certain types of distribution agreements of indefinite duration (or of definite duration as of a third renewal, see, Q14.a)) (Art. X.35 CEL):

- Exclusive distribution agreements, i.e. agreements where the distributor is the only seller of the supplier's products in a defined territory.
- Quasi-exclusive distribution agreements, i.e. agreements where the distributor sells 80% or more of the supplier's products in the territory.
- Distribution agreements where the supplier imposes important obligations on the distributor, which are strictly and specifically linked to the distribution agreement and the burden of which is so heavy that the distributor would suffer a significant disadvantage in the event of termination of the distribution agreement.

Such agreements may only be terminated with a reasonable notice period, except in the event of material breach (Art. X.18 CEL) (see Q36.a on the interpretation of "reasonable").

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?

A notice of termination for convenience generally irrevocably and definitively ends the (obligations arising from a) agreement of indefinite duration, at least upon expiry of the notice period (if given). However, if a court finds the notice period to be inadequate, the court may impose an additional notice period (Art. 5.75 Civil Code). The terminated party may also initiate interim proceedings in order to obtain certain measures (e.g. a suspension of the termination) to preserve its contractual rights.

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

See Q17.b.

In addition, with respect to exclusive distribution agreements of indefinite duration (see Q19), the following mandatory provisions apply in case of termination with a (sufficiently long) notice period:

- The terminated party (irrespective of whether this is the supplier or the distributor) will be entitled to an indemnity payable for the number of months falling short of what is considered to be a reasonable notice period ("indemnity in lieu of notice").

- The method most commonly used for calculating the indemnity in lieu of notice, particularly in case of unlawful termination by the supplier, is the so-called semi-gross margin generated by the distributor:
- The 'semi-gross' margin corresponds to the gross profit of the distributor, decreased with the recoverable fixed and variable costs that are attributable to the terminated distribution activities. The recoverable costs are the costs the distributor no longer needs to support subsequent to the termination of the distribution activities (i.e. the costs of the distributor which immediately or rapidly after termination no longer apply).
- The reference period for calculating the average semi-gross margin varies between 1 year and 5 years prior to the date of termination.
- The average monthly semi-gross margin amount is then multiplied with the number of months falling short of what is considered a reasonable notice period. In case of litigation, the amount is typically determined by an independent expert.

If the terminated party is the distributor, it may also be entitled to a "fair additional compensation" for (i) clientele built up by the distributor ("goodwill"), (ii) specific costs that the distributor incurred within the framework of the distribution agreement from which the supplier will continue to benefit after termination (e.g. advertising costs), and (iii) termination costs for personnel.

Q21. Must the terminating party comply with certain formalities?

Only in certain instances.

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?

No. However, as it is required that the will to terminate the distribution agreement is unambiguous and clear from the (oral or written) notice, a written termination notice is recommended.

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

No. However, if there is a risk that the termination could be challenged as being abusive, a (non-exhaustive) motivation may be considered.

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

Not applicable.

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

Yes.

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

See Q20.a-b.

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.)?

See Q20.b.

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?

Immediate extrajudicial termination of a distribution agreement is possible in the following instances:

- In exceptional circumstances if it is clear that (i) the other party, having been given a (oral or written) notice to perform its obligations properly within a reasonable time, will not perform its obligations in time and (ii) the consequences of such non-performance are sufficiently serious for the terminating party (Art. 5.90, paragraph 2 Civil Code) (termination for 'anticipatory breach').
- In case of a sufficiently serious breach by the other party, and after having taken useful measures to establish the alleged breach of the agreement; the termination can in such a case only be exercised by means of a written notice which sets out the alleged breaches of the agreement (Art. 5.93 Civil Code) (termination upon written notice).

With respect to exclusive distribution agreements of indefinite duration (see Q19), the breach must render any further cooperation between the parties impossible. The terminating party must terminate the agreement immediately upon discovery of the breach.

- If the distribution agreement includes a clause which grants the right to a party to terminate the agreement on certain grounds without the prior intervention of the court; the termination can only be exercised by providing a (oral or written) notice to the other party, which notice must state the alleged breaches of the agreement (Art. 5.92 Belgian Civil Code) (express termination clause).

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?

If a court would consider the extrajudicial termination of the distribution to be unlawful or abusive, the termination of the agreement will be without effect (Art. 5.94 Civil Code). In such case, the distribution agreement shall continue to remain in full force and effect and the sanctions for breach of contract and contractual liability shall apply (see below, Q26).

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 to compensation is based on statue (Art. 5.83 Civil Code), which lists the sanctions available in case of breach of contract by the other party. The sanctions are as follows:

- The right to performance of the obligation in kind;
- The right to compensation of the damages;
- The right to dissolution of the agreement;
- The right to a price reduction;
- The right to suspend the performance of his own obligation.

Unless the parties agreed otherwise in the distribution agreement, the terminated party may request the court to undo the wrongful termination (see above, Q25).

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

See above, Q17.b.

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?

Yes.

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?

Any damages claim for breach of performance of a distribution agreement is limited to 10 years (Art. 2262bis, §1 Belgian Civil Law Code).

Part 6: Additional comments

Belgian competition law adheres to the principles established under EU competition law so that there are no specific deviations in the law or the case law to be reported.