

Q&A DOCUMENT | 6 March 2023

Q&A on Distribution Agreements

Part 1: 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:

Danish law stipulates a rather broad scope for free negotiations and freedom of contract. There is, however, a legal framework for contract law and there are some specific rules that are relevant when working with distribution agreements. These include the following:

- The Danish Contracts Act
- The Danish Sale of Goods Act
- The Danish Competition Act
- The Danish Trade Agent Act.

The Danish Trade Agent Act is only relevant when dealing through a commercial agent. The rules are covered in detail by "Q&A - agency agreement DK".

b. Link(s) to official publication:

Danish Contracts Act is accessible via this [link](#).

Danish Sale of Goods Act is accessible via this [link](#).

Danish Competition Act is accessible via this [link](#).

Danish Trade Agent Act 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:

The Danish Act on Unfair Trading Practice in Agricultural and Food Supply Agreements imposes some restrictions. The act implements the EU Directive on unfair trading practices (2019/633/EU of 17 April 2019). The Act contains prohibitions against a number of specific trading practices imposed on a supplier by a buyer (turnover thresholds apply). Some forms of unfair trading practices are prohibited (black listed), while others are only lawful, if a clear and unambiguous agreement has been concluded between the parties (grey listed).

The Act also contains rules on the buyer's maximum payment period. An agreement concerning longer payment periods will be considered an unfair trading practice contrary to the Act.

b. Link(s) to official publication:

Danish Act on Unfair Trading Practice in Agricultural and Food Supply Agreements 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:

Not applicable.

b. Information to be disclosed:

Generally, the parties are completely free during the pre-contractual period as to how they behave. There are no

special rules about the subject for distribution agreements.

There are no mandatory rules which state that specific information must be provided by the parties to each other in the pre-contractual phase. However, a principle regarding the seller's loyal duty of disclosure applies. The seller's loyal duty of disclosure is based on the general principles of Danish law regarding contract law and liability. Further, the principle can be deduced from Art. 30, 33 and 36 Danish Contracts Act. It implies that the seller has a duty to loyally inform the buyer of special circumstances which the seller knows or should have known, and which the seller must assume may be relevant to the buyer's decision to enter into the distribution agreement.

Besides this, the parties will often agree on how the parties must behave in the pre-contractual phase in a letter of intent.

The parties can always be liable in accordance with the general rules for Danish tort law, more specifically, the fundamental principles regarding liability in Danish tort law. In that case, the legal conditions for claiming damages must be met, including liability, causal connection, foreseeability and loss.

c. Link(s) to official publication:

Not available.

d. Link(s) to English translation:

Not available.

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?

No.

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 specific rules apply.

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?

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'?

Because of the broad scope for free negotiations and freedom of contract in Denmark, a continuation of an agreement occurs when the parties continue to perform the agreement (tacitly) as if it had not expired. The continuation does not appear from any written law but is regulated as a principle of law and in Danish case law.

b. What should a party do to avoid this?

If the party wants to avoid or interrupt the continuation, it is necessary to clarify that intention to the other party. Either by a verbal or written retirement.

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?

Under Danish law, there is no legislation about this subject. However, according to the general principles of Danish contract law termination of a distribution agreement must be done within a reasonable notice period.

Generally, this time limit – the reasonable notice – for termination of distribution agreements depends on a concrete assessment of the case in question. Therefore, what constitutes a reasonable notice is not specifically prescribed as a given number of months or estimated on the basis of a specific average. Instead, the concrete assessment of the time limit may depend on factors such as i) the duration of the collaboration, ii) custom practice for term of notice, iii) consequences for the party who is given notice to terminate, and iv) the relative strength between the parties.

The Danish courts have in some cases decided that one party could terminate the agreement, even though it was

not regulated, neither by agreement nor law, typically, when one of the parties has significantly violated the 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?

In instances where the distributor has violated the agreement significantly, it is possible to terminate the agreement without a notice period, unless the agreement stipulates otherwise. Whether an act is characterised as a significant violation is based on the contract conditions and the general principles of Danish contract law.

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 parties are liable to continue the agreement during the notice period. If the agreement is terminated because of a significant violation from the other party, there is no notice period.

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

The distributor terminates: The distributor is liable for the damages that the supplier suffers from the breach of contract. The damages are calculated as if the agreement was fulfilled. In general, there is a duty to minimize the loss.

The supplier terminates: The supplier is liable for the damages of lost gross profit in the reasonable notice period. In some cases, the supplier is also liable for damages of lost investments.

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)?

Under Danish law, there is no legislation about this subject. However, according to the general principles of Danish contract law, the termination of a distribution agreement of indefinite duration must be done within a reasonable notice period considering the parties' trade history.

Generally, this time limit – the reasonable notice – for termination of distribution agreements depends on a concrete assessment of the case in question. Therefore, what constitutes a reasonable notice is not specifically prescribed as a given number of months or estimated on the basis of a specific average. Instead, the concrete assessment of the time limit may depend on factors such as i) the duration of the collaboration, ii) custom practice for term of notice, iii) consequences for the party who is given notice to terminate, and iv) the relative strength between the parties.

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?

Yes.

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?

Yes.

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

See, Q17.b. The distributor is not entitled to get goodwill replaced. The customers are typically the dealer's clientele, which is why the distributor does not suffer any loss in that regard.

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?

A written notice is recommended, but not required.

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

No, but it may be an advantage to write a motivation for the termination. More factors are crucial for the determination of the notice period and the compensation, which is why a motivation for the termination may be applicable.

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.

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

No.

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 is possible when the distributor has showed material breach of the agreement.

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

No.

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 court will determine a notice period. The terminating party is liable for the damages that the other party has suffered through this period because of the immediate termination.

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 is based on case law where the court determines an appropriate notice period. The period is determined based on the duration and the character of the agreement, including what is common in the industry. The damage is typically determined considering the previous year's revenue.

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, Q26.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?

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?

Yes.

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

Generally, the parties are free to choose the applicable law and jurisdiction. However, for agreements that are covered by the Danish Act on unfair trading practice in agricultural and food, the Danish rules on unfair trading practice will always apply if both parties are established in Denmark. The minimum provisions set out in the EU Directive on Unfair Trading Practices (Directive 2019/633/EU) will apply in any event.

Q19. 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?

Yes.

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

Disputes concerning legal matters, which the parties can agree on, including distribution agreements, but excluding matters related to Danish family law or some public law matters, may be settled by arbitration.

Q20. What is the statute of limitations applicable to claims regarding the performance of a distribution agreement?

The limitation period is a combination of a general limitation period and a maximum limitation period. The general limitation period is three years, which may be interrupted or suspended up to a maximum limitation period of ten years, cf. Art. 3 Danish Limitation Act.

Part 6: Additional comments

Even though Danish law stipulates a rather broad scope for free negotiations and freedom of contract, there is an outer limit to what the parties can reasonably agree on. This is set out in Art. 36 Danish Contracts Act. An agreement may be amended or set aside, in whole or in part, if it is considered unreasonable or contrary to fair conduct to execute the agreement. The circumstances of the conclusion of the agreement, the content of the agreement and subsequent circumstances are taken into account.

Art. 36 Danish Contract Act applies in addition to other mandatory legislation. It is rarely applied and mainly when there is an imbalance between the parties, which may be the case in distribution agreements. However, the threshold for potential application in relation to business relationships is high