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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:

Law of 24 July 2014 on the specific rules applying to vertical distribution agreements in the automotive sector.

Luxembourg Consumer Code whose compliance is ensured by the Luxembourg Institute for Standardisation, Accreditation, Safety and Quality of Products and Services (ILNAS) which is a public administration under the authority of the Minister of Economy.

Luxembourg Commercial Code.

Law of 3 June 1994 on the organisation of the relationship between self-employed commercial agents and their principals (agency agreement) and transposing Council Directive 86/653/EEC of 18 December 1986*.

Law of 23 October 2011 on competition (coordinated version of 4 April 2017). The latter gives new powers to the Competition Council (*Conseil de la concurrence*). The latter is competent to take binding decisions to enforce competition law. The Council can take different types of decisions, namely interim decisions known as precautionary measures, decisions to accept commitments, or decisions imposing sanctions and decisions requiring undertakings to bring the infringement to an end. The purpose of these decisions is to prevent or stop an anti-competitive practice.

Law of 3 July 2018 on the award of concession contracts (in relation to public procurement).

Grand Ducal Regulation of 23 December 1974 on unfair competition.

*In concrete terms, only the figure of the commercial agent in Luxembourg has been the subject of a legal regime. There is no legal basis for distribution contracts.

b. Link(s) to official publication:

The French version of the Law of 24 July 2014 is accessible via this link.

The French version of the Luxembourg Consumer Code is accessible via this link.

The French version of the Luxembourg Commercial Code is accessible via this link.

The French version of the Law of 3 June 1994 is accessible via this link.

The French version of the Law of 23 October 2011 on competition is accessible via this link.

The French version of the Law of 3 July 2018 on the award of concession contracts is accessible via this link.

The French version of the Grand Ducal Regulation of 23 December 1974 on unfair competition is accessible via this link.

c. Link(s) to English translation:

No official English translation is 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. Luxembourg 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.

In Luxembourg law, the only form of distribution that has been legally enshrined is the Law of 3 June 1994 on the organisation of relations between independent commercial agents and their principals. There is no legal basis for concession contracts apart from the law of 24 July 2014 on the specific rules applying to vertical distribution agreements in the automotive sector.

In Luxembourg, the law of 17 May 2004 on competition (Art. 3) has taken up Art. 81 EC Treaty but without inserting specific provisions relating to selective distribution. In several decisions relating to selective distribution, Luxembourg judges have referred to this Community case law.

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)?

No.

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:

Art. 1382 and 1383 Luxembourg Civil Code

Art. 1134 paragraph 3 Luxembourg Civil Code

b. Information to be disclosed:

Art. 1382 and 1383 Luxembourg Civil Code. In line with French and Belgian law, Art. 1382 and 1383 Luxembourg Civil Code set out the general principles of extra-contractual liability and duty of care. Luxembourg case law recognises an obligation on the part of the contracting parties to provide information in the pre-contractual phase. the failure to do so constitutes a 'fault of contracting', a *culpa in contrahendo*, on the part of the debtor, sanctioned by the rules of tort liability as set out in Art. 1382 and 1383 Civil Code (TAL, 25 September 2009, no. 119725 of the roll)*.

*Decision available on the following link.

Art. 1134 paragraph 3 Luxembourg Civil Code.

Art. 1134, paragraph 3 Belgian Civil Code requires that each agreement has to be executed in good faith. This principle applies to every single phase of a contract, including 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.

c. Link(s) to official publication:

The Luxembourg Civil code is accessible via this link.

d. Link(s) to English translation:

No English translation 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?

Yes.

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

The general regime applies so that damages can be claimed.

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 precontractual liability:

Art. 1382 and 1383 Luxembourg Civil Code

Art. 1134 paragraph 3 Luxembourg Civil Code

b. Conditions for precontractual liability:

It is accepted that as long as the parties are only at the stage of negotiations, the partners are in principle free not to contract. In certain circumstances, however, the termination of the negotiations might be wrongful. For this to be the case, one of the partners must have broken off the negotiations suddenly and unilaterally, without a legitimate reason. A wrongful termination is one which constitutes an abuse of the right to terminate negotiations. The criterion for abuse of the right is not the intention to harm since bad faith is sufficient to characterise the fault in the abusive termination of the negotiations. The circumstances surrounding the termination may reveal the bad faith of the perpetrator (abruptness, time of termination etc.). Legitimate confidence that is deceived constitutes the fault, and the partner's confidence legitimately increases as the negotiations progress. This trust is assessed differently depending on the qualification of the victim. If the victim is a professional, he can more easily be accused of having given his trust too easily (Luxembourg Court of Appeal, 5 March 2008, roll number 19272, cited by the Tribunal d'arrondissement de et à Luxembourg, 3 July 2014, roll number 132722)*.

As any fault is the breach of a pre-existing duty or obligation, pre-contractual fault is the transgression of a general duty of good faith.

Decision available on the following link.

c. Consequences of precontractual liability:

Compensation is payable by the co-contractor on the basis of the principle of pre-contractual liability in tort based on the general law of Art. 1382 and 1383 Civil Code.

The prejudiced party supports the burden of proof (Art. 1315 Luxembourg Civil Code).

As regards the repairable damage caused by the wrongful termination of the negotiations, it comes up against the principle of the freedom not to contract. Strict respect for this freedom means that the breach - in principle - can never be faulty.

Luxembourg law follows the developments of the French Court of cassation which speaks of fault in the exercise of the right to terminate. According to this theory, only the costs incurred by the negotiation and preliminary studies can give rise to compensation, including the cost of the intervention of third parties, the loss of time caused, in a word the 'negative interest', i.e. the interest the victim would have had in not engaging in the pre-contractual negotiations.

Other damages are possible, such as damage to reputation, damage to image, disclosure of know-how or confidential information.

The loss of a chance to conclude a contract with a third party can also be claimed, provided that the opportunity and sufficient probability of the possibility of concluding such a contract is demonstrated.

Finally, vexatious or unfair behaviour of the perpetrator may also be subject to compensation.

In Luxembourg law, the case law is less clear but allows the judge to decide according to the concrete circumstances of the case whether the prospect of gain deserves to be taken into account at least partially in assessing the compensation for the loss of a chance (Luxembourg Court of Appeal, 9 January 2013, no. 25595 of the roll).

Other decisions limit themselves to a restrictive conception of the reparable damage based solely on the costs incurred by the negotiation and preliminary studies (Luxembourg Court of Appeal, 13 February 2008, no. 32877 of the roll, Pas. 34, p. 155).

In any event, the breakdown of the negotiations cannot lead to the forced conclusion of the contract (G. RAVARANI, La responsabilité civile des personnes privées et publiques, 3e édition, Pasicrisie 2014, n°490).

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.

The requirement of a writing is not a condition for the validity of the contract and is therefore only necessary for the purposes of evidence.

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 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?

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.

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

The relevant principles are contained in the Law of 3 June 1994 dealing with commercial agency. Reference is made to the separate Q&A relating to commercial agency.

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?

No.

If only in certain instances, please explain when a distribution agreement that does not specify the term is

considered to be a contract of indefinite duration.

Art. 17 of the law of 3 June 2018 on the concession contract states that the duration of concessions is limited.

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'?

Only if the distribution agreement contains a renewal clause (Art. 4 of the law of 24 July 2014).Continuation means a continuation of the performance of the contract in a broad sense.

b. What should a party do to avoid this?

The parties must notify the other party at least six months in advance of its intention not to renew the agreement.

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?

No.

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?

At all times, except in the event of a serious breach of duty. The standard notice period is 6 months.

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?

Yes. The termination will continue to have effect, but damages will be awarded.

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

The compensation corresponds to what the party suffering unilateral termination should have received if the contract had continued. Generally, judges award the equivalent of two years' compensation, calculated on the

basis of the last three years.

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)?

Vertical motor vehicle distribution agreements of indefinite duration may only be terminated with a notice period of at least two years (Art 5 Act of 24 July 2014).

It is therefore a legal minimum that can be negotiated upwards depending on the circumstances and the economic capacities of the parties involved. The law does not specify how it is calculated.

Apart from car distribution contracts and any gross misconduct, the case law has indicated that the length of the notice period must be assessed according to the nature of the broken relationship, its duration (seniority), the intensity of the relationship and the reputation of the products or services.

The turnover and profit margins generated by the dealer therefore have an impact on the calculation of the length of notice (Tribunal d'arrondissement de et à Luxembourg, 2 mars 2011, n°118686 et 250/2011 du role).

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

2 years minimum, for vertical motor vehicle distribution agreements. This period may be reduced to 1 year if the supplier terminates the agreement because of the need to reorganise the whole or a substantial part of the distribution network (Art. 5 law of 24 July 2014).

Otherwise, no minimum is applicable.

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?

For vertical motor vehicle distribution agreements, the minimum notice period is mandatorily 2 years, as the parties cannot derogate from the law of 24 July 2014 (Art. 2 and 5).

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?

No.

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

The damages to be awarded in the event of failure to give sufficient notice of an otherwise non-abusive termination are intended to compensate for the loss suffered as a result of such failure, namely the loss of the right to use the contract. damages are intended to compensate for the loss suffered as a result of such non-compliance and which consists of the loss of profit that could have been profit that could have been made during the period of notice not respected (Cour d'appel, 6 juillet 2011, n°35365 du role).

Therefore, only compensation for notice is granted.

The latter is calculated as the difference between the length of the notice period granted and the length of the notice period determined by the judges, taking into account the circumstances of the case. The excess period will be used as the basis for calculating the compensation in lieu of notice.

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?

Yes.

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

Yes. Any notice of termination must be in writing, specifying the objective and transparent reasons for the decision to terminate (Art. 5 law of 24 July 2014).

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

If evidence of the termination of the vertical agreement for the distribution of motor vehicles is provided, based on grounds considered to be restrictions within the meaning of Commission Regulation (EU) No 330/2010 of 20 April 2010, such termination shall be considered null and void (Art. 6 law of 24 July 2014).

In the case of a simple lack of motivation, the law does not indicate what the sanction for this violation will be. Luxembourg case law has not yet been called upon to decide on this issue.

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

Yes.

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

For vertical motor vehicle distribution agreements, the provisions of the law of 24 July 2014 are mandatory.

Otherwise, the parties are free to provide for their own rules. In case they do not comply with the formalities specified and in the absence of an express provision in the contract, the judge will decide on the sanction to be given to the violation of the said formality. The trend in case law is towards compensatory damages rather than compulsory execution of the contract.

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.)?

In the event of a serious breach, the prejudiced party may claim additional damages.

If the period of notice stipulated in the contract is manifestly insufficient, the judge can compensate for this by awarding compensation for notice on the basis of the facts of the case.

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?

Case law has qualified certain breaches as serious. Serious misconduct is defined as that which makes it impossible to maintain the contractual relationship (Tribunal d'arrondissement de et à Luxembourg, 17 janvier

2002, n°49886).

In particular, but not exclusively, the following have been declared to constitute serious breaches:

- On the part of the dealer, the breach of the commitment to obtain supplies exclusively from the licensor,
- on the part of the licensor, complicity in parallel imports into the licensed territory and violation of the exclusivity violation of the exclusivity granted to the dealer (Tribunal d'arrondissement de et à Luxembourg, 16 novembre 2001, n°47940 du rôle).

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?

Yes.

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?

Yes, it is based on case law under the principle of equality and it entails full compensation for damage.

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

This compensation is calculated by the judge, according to the elements of appreciation of the case.

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.