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Agent, Distributor and Sales/Marketing Representative Laws (Belgium)

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Belgium has one of the most protective laws in Europe on exclusive distribution agreements and more importantly, their termination. It also has an extensive Agency Act, which is not so different from agency regulations in other EU countries. It is also rather protective of the agent.

Distribution agreements

In principle, each party (you - "the principal" - and the distributor) is free to enter into a distribution agreement and to arrange the details of cooperation.

However, there are mandatory laws to keep in mind:

- EU legislation on distribution relations prohibits some forms of price fixing and exclusivity, which can hinder free competition;

- If the Belgian Distribution Act applies, it is impossible to agree beforehand on a notice period in the event of ending the agreement.

When does the Belgian Distribution Act come into play?

The Belgian Distribution Act offers substantial protection to the exclusive Belgian distributor, who is generally deemed the "weaker" party, in the event of the principal unilaterally ending a distribution agreement (unless the agreement is ended because of serious misconduct on the part of the distributor). The distributor can launch a writ of summons before a Belgian court that will, in principle, apply the Distribution Act. In some cases, choice of law and jurisdiction can lead to the non-applicability of the Distribution Act.

For the Distribution Act to apply, the agreement must meet the following criteria:

- It is of indefinite term: an agreement is considered of indefinite term, not only if no fixed term was agreed at the outset but also if a fixed term agreement has been prolonged for a third time;

- It is exclusive or "quasi"-exclusive (the distributor sells all or "nearly all" your products in the contractually defined territory) or it involves such important obligations for the distributor that termination would result in considerable disadvantage to them. The actual economic situation and reality together with, and in some cases rather than, the contractual wording will be taken into account when determining the nature (exclusive or not) of the distribution relationship.

Ending a distribution agreement

When you end an agreement within the scope of the Distribution Act, a reasonable notice period must be given (unless the agreement is ended because of serious misconduct on the part of the distributor).

The following elements are taken into account when determining reasonable notice:

- Length of the agreement;

- Territory;

- Net profits of the distributor from the principal's products;

- Share of the principal's products in the global product range of the distributor;

- Special efforts made by the distributor in relation to the principal's products and the extent and the sophistication of the distributor's set-up in relation to the principal's products;

- The renown of the products and the possibility for the distributor to sell similar products.

If insufficient notice is given, a corresponding termination indemnity is calculated on the basis of an average "semi net profit" (net profit and non reducible overhead) over a reference period, that can vary between one and five year(s) preceding termination. The basic philosophy is that the distributor should be compensated for the advantages he/she would have otherwise gained during the notice period.

In addition, the distributor may be entitled to complementary indemnity consisting of three elements:

- Client indemnity for clientele generated by the distributor, that remains clientele of the principal after the agreement has come to an end;

- Cost reimbursement if such costs are to the advantage of the principal after the end of the agreement (a typical example is publicity costs);

- Staff indemnity (redundancy pay) if the distributor is forced to fire staff as a result of the principal ending the distribution agreement.

Finally, the principal is obliged to compensate the distributor for stock, except items that remain unsold due to a lack of effort on the part of the distributor and items that were ordered by the distributor after the end of the agreement.

Agencies

Any activity of an agent established on Belgian territory is automatically governed by the Belgian Agency Act, in itself the implementation of an EU Directive. Any dispute falls under the competence of the Belgian court, notwithstanding international treaties.

Like the Distribution Act, the Agency Act is considered mandatory Belgian law, but only partly. Articles of the Agency Act are mandatory if the mandatory nature is explicitly mentioned or is a necessary consequence of the nature of a clause. In some cases, choice of law and jurisdiction can lead to the non-applicability of the Agency Act.

Ending an agency agreement

Belgian agents are entitled to a reasonable notice period when an agreement is ended (unless it is ended because of serious misconduct on the part of the agent).

This notice period, as provided in a mandatory article of the Agency Act, can be no less than one month per commenced year, with a maximum of six months.

Parties remain free to fix a longer notice period.

If the notice period is insufficient, a termination indemnity must be paid. This is calculated on the basis of the monthly average of commission earned by the Belgian agent during the 12 (or all, if less than 12) months preceding the end of the agreement.

In addition, the agent may be entitled to complementary indemnity:

- Client indemnity for clientele generated by the agent. Client indemnity can be no higher than the remuneration of one year, based on an average of the five preceding years;

- Indemnity for real damage (forced termination of a lease for office space or car, forced staff redundancies, reimbursement of publicity costs, etc);

- Commission on transactions realised after the end of the agreement if these transactions are due to the agent's efforts during the term of the agency agreement and are concluded within 6 months of the end of the agency agreement.

Precontractual information

The recent Precontractual Information Act has introduced an obligation to provide information in the precontractual stage, at least for certain agreements. This Act intends to protect the – supposedly – weak contract party. Parliamentary comments clearly indicate that the Act does not want to govern the entire agreement.

The Precontractual Information Act is considered mandatory Belgian law and applies if the contract party receiving a right, performs his activity mainly in Belgium. In some cases, choice of law and jurisdiction can lead to the non-applicability of the Precontractual Information Act.

When does the Belgian Precontractual Information Act come into play?

Initially the Act was only intended to govern franchise agreements. However, the scope of the Act has been broadened and, as a result, is applicable to "commercial partnerships", defined by four criteria:

- The two parties involved act in their own name and on their own behalf, regardless of whether they are physical persons or legal entities;
- One party grants to the other party the right to use a commercial formula for the sale of products or the rendering of services;
- The other party pays a remuneration, of any kind whatsoever, directly or indirectly;
- The commercial formula relates to the use of a common trade name or a common signboard, the transfer of know-how or commercial or technical support.

Negotiations for all kinds of commercial relations (franchise, distribution, agency agreements but also joint-ventures and intragroup agreements) can fall within the scope of this Act, depending on the factual circumstances. A case by case evaluation is necessary.

Information obligation and possible sanctions

The pre-contractual information obligation is twofold:

- Firstly, the party granted the right to use a commercial formula, must receive a draft agreement at least one month before the entering into the agreement;
- Secondly, this party must also receive, within the same deadline, a separate document with legal (main contract clauses) and company-related (financial, commercial, …) information.

No obligation can be imposed and no remuneration, amount or compensation whatsoever can be requested or paid for until the expiry of one month following the handing over of the information document(s).

The non-respecting of these obligations can have serious consequences. In the "worst case scenario", the agreement can be declared void for up to two years after entering into the agreement.

Sales Representatives

For this employment law governed relationship, most relevant is the "clientele" indemnity given by an employer to compensate the commercial representative for damage incurred due to the loss of clientele brought to the employer. This right on top of the regular indemnifications for loss of employment is subject to four conditions. The amount payable is generally calculated on a lump-sum basis. If the employment period ranges from 1 to 5 years, the clientele indemnity equals 3 months' remuneration. This amount is increased by 1 month's remuneration after 5 years and by and additional month for each subsequent 5-year period. Important as well are the specific legal rules governing non-competition clauses in commercial representation agreements. Also, a commercial representative may claim commission for firm orders placed prior to the termination of the agreement.

Belgian Commercial & Trade Law Websites

The main official and free of charge legal trade resource in English is the website of the Federal Public Service Economy, SME's, Self-Employed and Energy (www.mineco.fgov.be) . One findes information on access to the profession, one-shop shops, Belgian establishment, professional cards, etc. Also the important Consumer Protection and Trade Practices Act can be found on that website, as well as resources on the Information Society, Inventory of administrative formalities and on the Crossroads Bank for Enterprises.