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Q&A DOCUMENT | 27 February 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:

Act No. 89/2012 Sb., Civil Code, as amended (the "Civil Code"), in particular:

- Book one, Title I, Chapter 1 – Private Law (contains in particular the basic principles of civil law);
- Book one, Title V, Chapter 1, Division 6 – Invalidity of Legal Acts;
- Book one, Title V, Chapter 3, Division 1 – Statute of Limitations;
- Book four, Title I, Chapter 2 – Contract;
- Book four, Title I, Chapter 7 – Extinction of Obligations;
- Book four, Title II, Chapter 2 – Purchase;
- Book four, Title II, Chapter 5, Division 5 – Commercial Agency;
- Book four, Title III, Chapter 1 – Compensation for Pecuniary and Non-pecuniary Harm;
- Book four, Title IV, Chapter 1 – Unjust enrichment.

Act No. 143/2001 Sb., on the Protection of Competition and on the Amendment of Certain Acts (Act on the Protection of Competition), as amended (the "Competition Act"), in particular, Art. 3 *et seq*.

Act No. 216/1994 Sb., on Arbitration and Enforcement of Arbitral Awards, as amended (the "Act on Arbitration").

b. Link(s) to official publication:

The Civil Code is accessible via this link. Since the Official Collection of Laws of the Czech Republic does not contain consolidated texts of laws, amendments should be consulted separately – a complete overview is available on the DLC website. An unofficial consolidated version is also accessible via this link.

The Competition Act is accessible via this link. Amendments should be consulted separately – a complete overview is available on the DLC website. An unofficial consolidated version is also accessible via this link.

The Act on Arbitration is accessible via this link. Amendments should be consulted separately – a complete

overview is available on the DLC website. An unofficial consolidated version is also accessible via this link.

c. Link(s) to English translation:

An English translation of the Civil Code is accessible via this link.

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

An English translation of the Act on Arbitration is 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:

Act No. 395/2009 Sb., on Significant Market Power in the Sale of Agricultural and Food Products and Unfair Trading Practices, as amended (the "SMPA") regulates the method of assessing and preventing unfair trading practices by buyers with significant market power in the agricultural and food chain, as well as the elements and form of agreements between buyers with significant market power and their suppliers. Please note that even unfair trading practices conducted abroad, if their effects have occurred or are likely to occur in the Czech Republic, will be assessed under the SMPA. The law governing the agreement between the parties is also irrelevant to the application of the SMPA.

The Czech Competition Authority is responsible for overseeing compliance with the SMPA.

As a result of the implementation of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, the significant market power is assessed primarily (but not exclusively) based on the turnovers of a supplier and a buyer in the context of a specific supplier-buyer relationship. Therefore, pursuant to Art. 3(1) SMPA, the following entities have significant market power:

a. a buyer whose annual turnover exceeds EUR 2 million vis-à-vis a supplier whose annual turnover does not exceed EUR 2 million;

b. a buyer whose annual turnover exceeds EUR 10 million vis-à-vis a supplier whose annual turnover exceeds EUR 2 million but does not exceed EUR 10 million;
c. a buyer whose annual turnover exceeds EUR 50 million vis-à-vis a supplier whose annual turnover exceeds EUR 10 million but does not exceed EUR 50 million;
d. a buyer whose annual turnover exceeds EUR 150 million vis-à-vis a supplier whose annual turnover exceeds EUR 50 million but does not exceed EUR 150 million;
e. a buyer whose annual turnover exceeds EUR 350 million vis-à-vis a supplier whose annual turnover exceeds EUR 150 million but does not exceed EUR 350 million; or
f. a buyer which is a State, a local authority, another legal person governed by public law or an association thereof, vis-à-vis a supplier whose annual turnover does not exceed EUR 350 million.

According to Art. 3(2) SMPA, the following entities also have significant market power:

a. a buyer whose annual turnover in the Czech Republic exceeds CZK 5 billion (approx. EUR 205 million),
b. a buyer who is a controlled person whose annual turnover in the Czech Republic does not exceed CZK 5 billion (approx. EUR 205 million), if its turnover together with the turnover of the controlling person exceeds CZK 5 billion (approx. EUR 205 million), or
c. a purchasing alliance where the combined turnover of the members in the Czech Republic exceeds CZK 5 billion (approx. EUR 205 million).

Under Art. 2(a) SMPA, a supplier is a party or an alliance of suppliers if it produces or sells agricultural and/or food products or receives or provides services related to the sale of agricultural and/or food products. A supplier is also a party who provides sales, production or related services to another supplier under an agreement. An alliance of suppliers is a group of parties formed by an agreement, another legal act or another legal fact which provides for cooperation between suppliers in connection with the production or sale of agricultural and/or food products or the receipt or provision of related services or has been formed for the purpose of such cooperation, whether or not the group has legal personality (See, Art. 2(c) SMPA).

Under Art. 2(b) SMPA, a buyer is a party or an alliance of buyers if it purchases agricultural and/or food products or receives or provides related services, or a party who provides such purchases or related services for another buyer under an agreement. A purchaser is also a State, a local authority, another legal pary governed by public law or an association thereof. An alliance of buyers is a group of parties formed by an agreement, another legal act or another legal fact, which provides for cooperation between buyers in connection with the purchase of agricultural and/or food products or the receipt or provision of related services or has been formed for the purpose of such cooperation, whether or not the group has legal personality (See, Art. 2(d) SMPA).

For the assessment of significant market power under Art. 3 SMPA, the annual turnover for the last completed accounting period of 12 months must be taken into consideration. The annual turnovers of buyers and suppliers must be calculated based on the annual turnover of the enterprise, the autonomous enterprise, the partner enterprise and the linked enterprise in accordance with the Commission Recommendation 2003/361/ES of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. For details (See Art. 3a SMPA).

Art. 3b SMPA sets out a form and the essential elements of an agreement concluded between a buyer with significant market power and a supplier, which concerns the purchase, sale, processing or distribution of agricultural and/or food products or the reception or provision of related services or the mediation of any of these activities. Such agreement must be agreed in writing and prior to the commencement of any of the afore-mentioned conduct. Electronic conclusion of agreements by various means is also permissible, provided that the prescribed requirements ensuring the authenticity of the origin and the integrity of the content of the legal act are met. Please note that the requirement for an agreement to be in writing applies to all stages of contractual negotiations (an offer to contract, its acceptance or rejection, amendment, termination of the agreement, etc.) and to the entire range of agreements concluded between the parties (i.e., including various types of partial agreements such as promotional agreements, changes to price lists, etc.). Immediately after the conclusion of the agreement, the buyer with significant market power must provide the supplier with at least one copy of the agreement. Regarding its content, in addition to the essential parts, the agreement must also specify:

a. the price, the amount of any price discount or the method for its determination, if any, the method of payment of the price and the maturity of the price, which must not exceed 30 days (subject to exceptions under Art. 3b(3) SMPA) from the invoice delivery date;
b. in the case of a purchase, the object of the purchase and the determination of the quantity thereof for a specified period or the quantity of an individual supply of the object of the purchase;
c. if the related services are agreed, and received and/or provided, the specification of the services in terms of the subject matter, scope, price or the method of its determination, method of its payment, its maturity, and the cost estimate, incl. the grounds on which the buyer with significant market power reached such estimate; and
d. the specification of the promotional campaign, if concluded, the estimated quantity of agricultural and/or food products to be covered by the promotional campaign, including the purchase price for those products and the duration of the promotional campaign.

Art. 4(1) SMPA prohibits unfair trading practices by the buyer with significant market power vis-à-vis its supplier. Art. 4(2) SMPA then lists the various facts of offences consisting in unfair trading practices, which are particularly as follows:

a. negotiating or applying contractual terms which create a significant imbalance in the rights and obligations of

the parties to the detriment of the supplier;

b. applying or obtaining any payment or discount where the amount, subject matter and scope of the consideration provided for that payment or discount has not been agreed in writing prior to the delivery of the agricultural and/or food products or the provision of the services to which the payment or discount relates, or adequate consideration has not been given for the payment or discount;

c. discriminating against the supplier by negotiating or applying different contractual terms for the purchase or sale of agricultural and/or food products or for the provision of related services at a comparable performance, without a just cause;

d. an arbitrary change in the contractual terms for the purchase or sale of agricultural and/or food products concerning the frequency, method, place, timing or quantity of individual supplies, quality standards, payment or price terms or the conditions of the related services provided, as well as the provisions enabling such a change;

e. making a consent to the conclusion of an agreement for the purchase or sale of agricultural and/or food products or the provision of related services on the condition of the purchase further performance;

f. a failure to comply with the written form of the agreement or a failure to stipulate an essential element of the agreement pursuant to Art. 3b(1) or (3) SMPA or a failure to provide the supplier with a copy of the agreement pursuant to Art. 3b(2) SMPA;

g. demanding any payment or other performance which does not relate to the purchase or sale of agricultural and/or food products or the provision of related services, or which is disproportionate to the value of the services provided;

h. a threat or imposition of retaliatory measures in the event that the supplier of the buyer with significant market power exercises its contractual or legal rights;

i. an unauthorized acquisition, use or disclosure of the supplier's trade secrets by the buyer with significant market power;

j. negotiating or applying price terms as a result of which the tax document for payment of the purchase price for the purchase or sale of agricultural and/or food products or for the provision of related services will not contain the final amount of the purchase price less all agreed discounts on the purchase price, except for pre-agreed quantity discounts;

k. negotiating or applying the maturity period of the purchase or sale price of agricultural and/or food products that is longer than the period set out in Art. 3b(1)(a) SMPA;

l. negotiating or claiming compensation from the supplier for a penalty imposed on the buyer with significant

market power by the supervisory authority without the supplier having caused the imposition of the penalty by the breach of its obligation;

m. carrying out an audit or other form of inspection of the supplier by the buyer with significant market power or a party authorised by it, including requesting an analysis of agricultural and/or food products at the supplier's expense;

n. negotiating or applying any payment or other performance for deterioration in the quality or loss of agricultural and/or food products not caused by a breach of the supplier's obligation, after the buyer with significant market power has taken possession of the agricultural and/or food product and/or ownership of the agricultural and/or food product has passed to it;

o. cancelling an order for perishable agricultural and/or food products less than 30 days before the date of delivery;

p. negotiating or claiming compensation for the costs of investigating a consumer complaint relating to agricultural and/or food products without the supplier having committed misconduct;

q. negotiating or exercising the right to the return of purchased agricultural and/or food products without payment by the buyer with significant market power for the unsold agricultural and/or food products or for their disposal;

r. negotiating or applying payment or other performance for marketing or storage of agricultural and/or food products, or for their listing or making them available on the market;

s. negotiating or applying payment or other performance for a construction or technological modification of premises for the sale of agricultural and/or food products;

t. a false indication of the country or place of origin of agricultural and/or food products or a false indication of the country or place of origin of one or more than one of the ingredients of an agricultural and/or food product which represent more than 50% of that product;

u. requiring the supplier to pay all or part of the cost of discounts on agricultural and/or food products sold by the buyer as part of its promotional campaign, unless the buyer specifies the period and the anticipated quantity of products to be ordered at a discount before the promotional campaign begins;

v. conditioning the supply by the use of third-party services, the terms and price of which are set by the buyer.

Art. 4(3) SMPA provides for additional unfair trading practices by the buyer with significant market power. These apply if, before the start of the delivery of agricultural and/or food products or the provision of related services, the conditions for their supply or provision have not been agreed in writing:

a. negotiating or applying payment or other performance for full or partial payment for the cost of a discount on agricultural or food products sold by the buyer as part of a promotion;

b. negotiating or applying payment or other performance for advertising agricultural and/or food products provided by buyer;

c. negotiating or applying payment or other performance for staff providing customisation of premises for the sale of agricultural and/or food products.

The obligations contained in Art. 3b and 4 SMPA are considerably general. Thus, to facilitate their interpretation, the Czech Competition Authority issues and regularly updates a series of interpretative opinions targeting potentially problematic issues. Nevertheless, it is one of the most problematic Czech laws in terms of its interpretation.

Violations of the SMPA are associated with very serious consequences. For a breach of the above obligations contained in Art. 3b and 4 SMPA, a buyer with significant market power may be fined up to CZK 10 million (approx. EUR 410 thousand) or 10% of the net turnover achieved by the buyer in the last completed accounting period of 12 months (See, Art. 8 SMPA). In addition, the Czech Competition Authority is obliged to prohibit a conduct that constitutes a violation of the SMPA (See, Art. 6(1) SMPA).

The harmed suppliers could also seek compensation for damage caused to them by the buyer with significant market power who has breached its obligations under the SMPA (according to the general rules on damages, See, Art. 2894 *et seq.* Civil Code).

The Czech Competition Authority updates its interpretative opinion relating to selected provisions of the SMPA from time to time. For the current version, see, https://www.uohs.cz/cs/vyznamna-trzni-sila/metodicka-cinnost.html; https://www.uohs.cz/cs/vyznamna-trzni-sila/metodicka-cinnost/vykladova-stanoviska-a-doporuceni.html (only in Czech).

The prevention of abuse of economic dependence is also the subject of regulation contained in Act No. 526/1990 Sb., on Prices, as amended (the "Act on Prices"). The Act on Prices concerns the application, regulation, and control of prices of products, performances, works, and services intended for the Czech market, including prices of imported goods and prices of goods intended for export.

The Act on Prices provides for the possibility of sanctions for the sale of unregulated goods or services if a more advantageous economic position is abused by the seller or the buyer to gain disproportionate material benefit either by selling for a price including unjustified costs or unreasonable profit by applying a higher selling price than what is the usual price or purchasing for a price significantly below justified costs or lower than what is the usual price. This is a situation in which the seller or the buyer causes harm to the other party by applying a price that is higher or lower respectively than the price they would achieve in a situation of being exposed to substantial price competition (See, Art. 2 Act on Prices).

The usual price for the purposes of the Act on Prices is the price identical or, in terms of the use of comparable or mutually substitutable goods, freely negotiated between sellers and buyers who are independent of each other in economic, financial (capital) and personnel terms and operate on the market that is not threatened by the effects of restrictions on competition. If the usual price on the market cannot be established, the price to define the abuse of a more advantageous economic position is determined by calculating economically justified costs and a reasonable profit (See, Art. 2(6) Act on Prices).

The costs that are considered to be economically justified are the costs of acquiring the appropriate quantity of direct material, labour and other personnel costs, technologically necessary other direct and indirect costs and circulation costs. The assessment of economically justified costs is based on the long-term usual level of these costs in similar economic activities, considering the specific characteristics of the goods in question. A profit that is considered to be reasonable is the usual profit achieved on a long-term basis through comparable economic activities and ensuring reasonable return of the used capital within a reasonable period of time (See, Art. 2(7) Act on Prices).

Under Art. 2(4) Act on Prices, a seller or buyer who negotiates prices on the market without facing substantial price competition is in a more advantageous economic position. Its position is assessed in relation to a particular buyer or seller as the weaker contracting party (the ability to behave independently of other undertakings or consumers in general, as is usually the case when assessing dominance, does not need to be demonstrated). To prove abuse of a more advantageous economic position, it must be demonstrated that the seller or the buyer gained disproportionate material benefit to the detriment of the other party.

The supervisory authority (the Specialised Tax Office) may impose a fine of up to five times the amount of the disproportionate material benefit or up to CZK 10 million (approx. EUR 387 thousand) if it is impossible to determine the amount of the disproportionate material benefit (Art. 16 Act on Prices).

A harmed buyer or seller could also seek compensation for damage caused to them by the seller or the buyer committing the offence of abuse of a more advantageous economic position (according to the general rules on damages, See, Art. 2894 *et seq.* Civil Code).

Limits on damages which apply generally to any rights to damages mentioned in the Q&A):

Under Art. 2898 Civil Code, a stipulation which excludes or limits in advance the duty to provide compensation for harm caused intentionally or due to gross negligence is disregarded. In these cases, the right to compensation may also not be lawfully waived.

b. Link(s) to official publication:

The SMPA is accessible via this link. Since the Official Collection of Laws of the Czech Republic does not contain consolidated texts of laws, amendments should be consulted separately – a complete overview is available on the

DLC website. An unofficial consolidated version is also accessible via this link.

The Act on Prices is accessible via this link. Amendments should be consulted separately – a complete overview is available on the DLC website. An unofficial consolidated version is also accessible via this link.

c. Link(s) to English translation:

An English translation of the SMPA is accessible via this link.

An English translation of the Act on Prices is 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:

Art. 1728(2) Civil Code.

b. Information to be disclosed:

The so-called pre-contractual liability is based on the principle of good faith (Art. 7 Civil Code), good morals (Art. 1(2) Civil Code) and particularly on the principle of fairness (Art. 6 Civil Code). Accordingly, everyone is obliged to act fairly in legal relations, and no party may benefit from an unfair or unlawful act or from an unlawful situation which it caused, or over which it has control.

When negotiating the agreement, the parties are obliged to consider the legitimate interests of the other party, not to conceal or misrepresent facts relevant to the other party's decision. The parties are obliged to act in accordance with the expectations they have created by their previous conduct.

Art. 1728(2) Civil Code imposes general information requirements when negotiating all agreements, irrespective of their type, the method of their conclusion, the means used or the nature of the contracting parties. When negotiating an agreement, the contracting parties must disclose to each other all the factual and legal circumstances (e.g., characteristics of a thing, legal impediments to disposal) of which they know or must know, so that each of the parties can verify the possibility to conclude a valid agreement and the interest of each party in concluding the agreement is evident to the other party. However, the provision does not imply an obligation to

search information for the other party.

The extent of the information obligation is determined by the need of the other contracting party to ascertain the possibility of concluding a valid agreement and its willingness to conclude the agreement under the circumstances. If one of the parties has information about the reasons for invalidity or nullity of the agreement being concluded or of the circumstances in which the other party would not have entered into the agreement, it is required to disclose such information to the other party. There may be different reasons relating both to the subject matter of the agreement being negotiated (e.g., prohibition of disposal, unsuitability of the thing for the previously communicated purpose), to the agreement itself (e.g., incapacity of the contracting party to conclude the agreement) or to the process of concluding the agreement (e.g., need for prior consent). The reasons may be on both sides.

The information obligation is not fulfilled in cases in which information is not provided at all, or in which false or incomplete information is provided.

The information obligation may be fulfilled through any communication relating to the negotiation of the agreement. Therefore, all required information does not necessarily have to be provided directly in the agreement.

The information must be provided before the conclusion of the agreement so that the other party can make an informed decision. Since the acceptance of the first offer cannot be ruled out, to avoid the risk of liability, the relevant information should be provided at the latest together with the offer.

c. Link(s) to official publication:

For information regarding the Civil Code, See, Q1.b. and Q3.a.

d. Link(s) to English translation:

For information regarding the English translation of the Civil Code, See, Q1.c).

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 Civil Code does not provide for any legal consequences related specifically to pre-contractual liability arising from breach of the information obligation. In general, however, the aggrieved party has the right to damages (Art. 2910 *et seq.* Civil Code). Both actual damage and loss of profits are covered.

Failure to comply with the information obligation, whether intentional or negligent, by which the other party to the

agreement was misled and the misleading information concerned a decisive circumstance (i.e., a circumstance where knowledge of the true state of affairs would have led the contracting party not to enter into the agreement at all or to enter into it on substantially different terms), renders the agreement void (Art. 583 Civil Code). It is a so-called relative invalidity of the agreement which may be invoked by the party acting in error (Art. 586 Civil Code). A party who has caused an agreement to be invalid is obliged to compensate the damage caused to the party who was not aware of the invalidity (Art. 579(2) Civil Code).

If an error concerns a secondary circumstance which neither party has declared decisive, the agreement is valid, but the misled party is entitled to claim appropriate compensation from the party who caused the error (Art. 584(1) Civil Code). However, if an agreement in error was entered into because of trickery, the agreement is invalid, even if the error only concerns a secondary circumstance (Art. 584(2) Civil Code).

A breach of an information obligation does not necessarily result in damage, e.g., a party received adequate consideration, but would never have entered the agreement if the information obligation had been fulfilled. The legal rules on error and the information obligation are therefore complementary.

In certain circumstances, Art. 2950 Civil Code, which provides for a right to compensation for damage caused by the provision of incomplete or incorrect information or harmful advice, may apply. This concerns information and advice provided for consideration by a party who offers professional performance as a member of a profession, or otherwise acts as an expert, in a matter related to his expertise or skill.

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. 1728 and 1729 Civil Code.

b. Conditions for pre-contractual liability:

Under Art. 1729(1) Civil Code if contract negotiations between parties reach a point where the conclusion of the agreement seems highly probable, the party which terminates the negotiations without a just cause despite reasonable expectations of the other party to conclude the contract acts unfairly.

The prerequisite for the right to compensation for damages is that the process of negotiating the agreement has reached a stage where the other party to the agreement can reasonably expect to conclude the agreement – the conclusion of the agreement is highly probable, *de facto* certain. A situation in which the parties have reached an agreement in substance on the content of the agreement can be such a stage of negotiations. This will often be

the case when the content of the agreement is agreed and the last step remains to be fulfilled – achieving the required form, proving the fulfilment of a certain condition, with which the unfairly acting party associates its consent to the conclusion of the agreement (e.g., proving an expert opinion, financial capacity).

For pre-contractual liability to arise, the party's reasonable expectation that the agreement will be concluded must be created by the other party. E.g., a reasonable expectation within the meaning of Art. 1729(1) Civil Code that a new agreement will be concluded cannot be inferred from the mere fact that the previous agreement is about to expire.

The refusal of further negotiations on the conclusion of the agreement, the inaction of the unfairly acting party, but potentially also a proposal for a substantial change in the already agreed content of the agreement is considered as the termination of the contract negotiations.

A party will only be acting unfairly if there is no just cause which, when objectively assessed in the light of previous conduct, justifies the termination of contract negotiations – the other party cannot expect to conclude the agreement in the presence of such a reason. This will often involve a change in circumstances, e.g., loss of the ability of the contracting party to meet its obligations properly and on time (a plant burns down, serious quality deficiencies are discovered, doubts about the solvency of the other party).

Beyond the above-described liability related to the termination of pre-contractual negotiations, Art. 1728(1) Civil Code provides for the pre-contractual liability of a party who commences or continues to negotiate an agreement without intending to enter into the agreement. Such a party is acting unfairly.

The motives for such unfair conduct may be various, e.g., to expose the business (especially pricing) policy of a competitor, to prevent the conclusion of an agreement with a competitor, to cause harm to a competitor, to view goods that a party intends to purchase elsewhere.

Liability arises when the party concerned (already) knows that it will not conclude the agreement and yet negotiates or continues to negotiate it. The provision does not apply to situations where a party does not know whether it will eventually conclude an agreement (it is common that the negotiations are conducted to see if the parties are able to find the consensus necessary to conclude an agreement), but to situations where the party knows (and it is its intention) that it will not conclude an agreement, but nevertheless negotiates it.

c. Consequences of pre-contractual liability:

Pre-contractual liability pursuant to Art. 1728(1) Civil Code is linked to the right to compensation for damages pursuant to the general provisions of Art. 2910 *et seq.* Civil Code associated with a breach of statutory obligations (i.e., also fault must be proven). Both actual damage and loss of profits (e.g., profit lost because of the aggrieved party's failure to contract with another party because of unnecessary negotiations with the unfairly acting party) will be compensated.

In the event of a breach of the obligation provided for in Art. 1729(1) Civil Code, the special liability regime under Art. 1729(2) Civil Code applies. A party who acts unfairly will compensate the other party for the damage (both actual damage and lost profits), but only to an extent not exceeding the loss from failing to conclude an agreement in similar cases. The claim can only be made for damage incurred from the time when the aggrieved party had a reasonable expectation of concluding the agreement.

The reason for limiting the damages is that by not concluding the agreement, the contracting party loses the performance of the other party, but at the same time it does not perform either. Thus, the loss from the non-execution of an agreement should consist of the costs incurred in negotiating such an agreement and the loss of profit from such an agreement. The aggrieved party should not be in a better position than if it had concluded the agreement. The provision prevents speculative inflation of the costs of negotiating the agreement. Similar cases mean cases within a similar industry, between similarly situated entities, with similar subject matter and similar contractual arrangements.

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

Yes.

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

Under Art. 1730(2) Civil Code, if a party obtains confidential information or communication about the other party during negotiations of an agreement, it is required to take care that such information or communication is not unlawfully misused or disclosed. If a party breaches this obligation and is enriched thereby, it will surrender to the other party what constitutes such enrichment. Other damage will be compensated according to the general provisions (See, above on Art. 2910 *et seq*. Civil Code).

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 written form of the agreement, namely the form of a public instrument or the form of a private instrument with authenticated signatures, is necessary for the reservation of the right of ownership to be effective with respect to the buyer's creditors. The reservation of the right of ownership means that if a seller reserves the right of

ownership, the buyer is deemed to become the owner only upon the full payment of the purchase price. However, the risk of damage to the thing passes to the buyer as early as upon its takeover (See, Art. 2132 Civil Code).

A written form is also required for a licence agreement if the licence is exclusive or is to be registered in the relevant public register. A licence agreement means an agreement by which the licensor grants the licensee the right to exercise intellectual property rights (a licence) within the stipulated limited or unlimited extent and the licensee undertakes, unless otherwise stipulated, to pay remuneration to the licensor (See, Art. 2358 Civil Code).

The written form may also be required in other specific cases required by the Civil Code or special laws.

As for the sector-specific regulation, the written form is mandatory for agreements between a buyer with significant market power and a supplier, which concerns the purchase, sale, processing or distribution of agricultural and/or food products or the reception or provision of related services or the mediation of any of these activities, as regulated by the SMPA (See, Q3.a.).

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

Q.11 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 non-compete clauses.

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

Art. 2975 Civil Code contains a general regulation of the non-compete clause. It provides that if a stipulation which prohibits another party from engaging in competitive activities does not determine the territory, range of activities or group of parties subject to such a prohibition, the non-compete clause will be disregarded. A non-compete clause stipulated for an indefinite period or for a period longer than five years is prohibited – if this prohibition is breached, the non-compete clause will be deemed to have been agreed for five years. A non-compete clause restricting the obligated party more than is required by the necessary protection of the beneficiary

party is prohibited – if this prohibition is breached, a court may, on the application of the party affected, restrict or cancel the non-compete clause, or declare it invalid.

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

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

Yes specific rules apply to specific sectors.

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

The SMPA contains sector-specific regulation of relations between a buyer with significant market power and a supplier, which concerns the purchase, sale, processing or distribution of agricultural and/or food products or the reception or provision of related services or the mediation of any of these activities, See, Q3.a.

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.

If the duration of an agreement is not determined by agreement of the parties, or if the duration does not stem either from the law or from the nature of the obligation, the agreement is deemed to be of indefinite duration.

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

No.

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?

Yes.

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

No.

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

a. Will the termination continue to have effect?

The termination will be invalid for contravening the law (See, Art. 580 Civil Code). The party that received the notice of termination will invoke invalidity of the notice. Then, the distribution agreement will continue to remain in full force and effect. However, the terminating party can revoke the termination if the revocation reaches the other party no later than at the same time as the termination (See, Art. 572 Civil Code).

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

The Civil Code does not contain any special regulation for damages and their calculation in this case. The aggrieved party could seek compensation for damage caused by the invalid termination of the agreement pursuant to the general provisions of Art. 2894 *et seq.* Civil Code. The statutory conditions for liability for damages are (i) an unlawful act or a harmful event, (ii) the occurrence of damage, (iii) a causal link between the unlawful act or the harmful event and the damage caused, and, where applicable, (iv) fault. In the case of a breach of contractual obligations, fault does not have to be proven, as opposed to the breach of statutory obligations. Both actual damage and loss of profits could be compensated.

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)?

First, please note that the rules set out in the answers to Q18 apply only to agreements of indefinite duration that oblige at least one party to engage in continuous or repeated activity (i.e., not to engage in one-time activity) or to tolerate such activity. Distribution agreements (which are not a special type of agreement in Czech law) of indefinite duration therefore meet these characteristics.

Such agreements could be terminated at the end of a calendar quarter by giving at least 3 months' notice period.

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

Yes, the minimum notice period of 3 months should be observed. However, the parties may contractually deviate both from the minimum notice period and the rule of termination of the agreement at the end of the calendar quarter (See above).

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?

According to the legal theory, an agreement on the length of the notice period should not contradict the spirit of the provision, i.e., an agreement on an excessively long notice period which would effectively exclude the termination of the obligation, would be invalid.

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?

The termination will be invalid for contravening the law (See, Art. 580 Civil Code). The party that received the notice of termination will invoke the invalidity of the notice before the court. Then, the distribution agreement will continue to remain in full force and effect. In the meantime, the terminated party may initiate interim proceedings in order to obtain certain measures (e.g., continuation of performance under the agreement) to preserve its contractual rights (See, Art. 74 *et seq.* of the Act No. 99/1963 Sb., the Civil Procedure Code).

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

See, Q17.a.

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?

Written notice is required for agreements that must be concluded in writing by law or by agreement of the parties. As for the latter, written notice is required if it has been expressly agreed for the amendment or termination of the agreement.

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

No.

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

The party that received the notice of termination will invoke the invalidity of the notice before the court. Then, the distribution agreement will continue to remain in full force and effect.

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, Q.20.a and Q.20.b.

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?

A party may withdraw from the agreement without undue delay on the following grounds:

- Material breach of the agreement by the other party, i.e., a breach of which the breaching party, at the time of conclusion of the agreement, knew or should have known that the other party would not have concluded the agreement if it had foreseen such a breach (See, Art 2002(1) Civil Code);
- The conduct of the other party undoubtedly indicates that the party is about to commit a material breach of the agreement and if it fails to provide a reasonable security after being requested to do so (See, Art. 2002(2) Civil Code);
- Because of default by the other party. If, by its default, a party materially breaches its contractual obligation, the other party may withdraw from the agreement if it notifies the party in default accordingly without undue delay after learning of the default (See, Art. 1977 Civil Code).

Please note that unlike termination by notice, upon withdrawal from the agreement, the obligation is rescinded from the outset (subject to certain exceptions – e.g., in relation to withdrawal with prospective effects only in the case of agreements involving continuous or repeated performance; See Art. 2004 and 2005 Civil Code).

Immediate extrajudicial termination by notice is not possible unless the agreement provides for such early termination.

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 termination of the distribution agreement to be invalid, the termination of the agreement will be without effect. In such case, the agreement will continue to remain in full force and effect and the sanctions for breach of contract and contractual liability will apply (See, 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 statute (Art. 2894 *et seq.* Civil Code). See, Q20.b.

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, Q20.b.; claim for additional compensation (e.g., goodwill) might be applicable subject to the specific circumstances 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?

Yes.

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?

There is no general rule limiting the contractual freedom of the parties to choose a forum and/or a jurisdiction.

As regards the sector-specific regulation of relations between a buyer with significant market power and a supplier relating to the purchase of food for resale and related services, in its interpretative opinion, the Czech Competition Authority (see, the link in Q3.a. points out to clauses negotiated to the disadvantage of the supplier in relation to the choice of forum and/or jurisdiction. Such clauses are not unlawful by themselves. However, together with other terms of the agreement, they may cause a significant imbalance in the rights and obligations between the parties within the meaning of Art. 4(2)(a) SMPA – See, Q3.a.

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?

Yes.

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

For an arbitration agreement (clause) to be valid and enforceable, it must comply with the general rules set out in the Act on Arbitration. In particular, the arbitration agreement must be in writing and can only be concluded on the subject matter of the dispute, which is of a proprietary nature and on which the parties could reach an amicable settlement.

If an arbitration clause negotiated to the disadvantage of the supplier (possibly together with other terms of the agreement) results in a breach of the SMPA, in particular in the form of a significant imbalance in the rights and obligations between a buyer with significant market power and a supplier relating to the purchase of food for resale and/or related services, the Czech Competition Authority will prohibit such an arbitration clause. For details, See, Q18, or Q3.a.

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

The length of a limitation period is three years from the date on which the right could be asserted for the first time (general subjective limitation period). A right may be asserted for the first time once the entitled party became aware of the circumstances decisive for the start of the limitation period or when he/she should and could have learnt thereof (See, Art. 629(1) in conjunction with Art. 619 Civil Code).

Circumstances decisive for the commencement of a limitation period for a right to

- compensation for damage include knowledge of the damage and the party liable to provide the compensation for the damage (See, Art. 620(1) Civil Code);
- restitution of unjust enrichment includes knowledge of the occurrence of the unjust enrichment and of the party obliged to surrender it (See, Art. 621 Civil Code);

In the case of a right created because of a complete destruction or loss of a transported thing, the limitation period commences on the date the consignment was to be delivered to the recipient. However, if the transported thing was only damaged or if it was delivered late, the limitation period commences on the date on which the consignment was delivered (See, Art. 625 Civil Code).

A property right becomes time-barred no later than after ten years from the date on which it became due (general objective limitation period), unless a statute specifically provides a different limitation period (See, Art. 629(2) Civil Code).

Art. 636 and 638 Civil Code provide for special objective limitation periods for the right to compensation for damage or other harm, or restitution of unjust enrichment, respectively. These rights become time-barred no later than ten years after the date the damage or harm was incurred, or the unjust enrichment occurred. Where damage or harm has been caused, or unjust enrichment was acquired intentionally, the right to compensation becomes time-barred no later than fifteen years after the date on which the damage or harm, or the unjust enrichment, occurred.

Under Art. 639 Civil Code, if a debtor acknowledged his debt, the right becomes time-barred ten years after the date on which the debt was acknowledged. However, if the debtor specifies in the acknowledgement a period within which he will discharge his debt, the right becomes time-barred ten years after the last day of the period specified.

Under Art. 630 Civil Code, the parties may agree on a shorter or a longer limitation period commenced from the date on which the right could have been asserted for the first time than that provided for by the Civil Code, but with a minimum duration of one year and a maximum duration of fifteen years. A shorter limitation period in relation to a right arising from a wilful breach of obligation shall be disregarded.

The sector-specific regulation of relations between a buyer with significant market power and a supplier relating to the purchase of food for resale and related services may also be relevant in this respect. According to the interpretative opinion of the Czech Competition Authority (See, the link in Q3.a., a limitation period arrangement to the disadvantage of the supplier may (together with other terms of the agreement) create a significant imbalance in the rights and obligations of the parties in violation of Art. 4(2)(a) SMPA – See, Q3.a.

Part 6: Additional comments

Compliance with EU competition law:

Czech 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.