

Q&A DOCUMENT | 17 April 2023

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:

The legislative framework of distribution agreements is not regulated in German law as a separate legal matter but is scattered throughout the German Civil Code (Civil Code) and the German Commercial Code (Commercial Code).

b. Link(s) to official publication:

The Bürgerliches Gesetzbuch, German Civil Code is accessible via this [link](#).

The Handelsgesetzbuch, German Commercial Code is accessible via this [link](#).

c. Link(s) to English translation:

The German Civil Code is accessible via this [link](#).

The German Commercial Code is accessible via this [link](#).

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)?

Yes.

If yes, which specific rules apply (a)? Where available, please also include a link to the official publication of the applicable rules (b) and, if available, to the English translation of the legislative framework (c).

a. Specific rules depending on distribution format:

Art. 93 Commercial Code et seqq. regulates the commercial broker.

These regulations state among other things the following:

- Whoever, on a commercial basis, undertakes on behalf of others the negotiation of contracts concerning the purchase or sale of goods or other commercial matters, without having continuing authority to do so by virtue of a contractual relationship, shall have the rights and duties of a commercial broker.

- The commercial broker shall in general supply each party with a contract note stating the parties, the subject-matter and terms of the transaction, and particularly in the case of sales of goods or securities the kind and quantity thereof, as well as the price and time of delivery.
- The commercial broker shall in general retain the sample of each piece of merchandise sold by sample as a result of his negotiation, provided such sample has been furnished to him, until the merchandise is accepted, or the transaction is settled otherwise.
- Where no agreement has been made between the parties as to who should pay the broker's fee, each party shall pay half in the absence of any local custom to the contrary

Art. 383 Commercial Code et seqq. regulates the commission agent.

These regulations state among other things the following:

- A commission agent is a person who, on a commercial basis, undertakes to buy or sell goods or securities in their own name for the account of another (the principal).
- The commission agent is obliged to execute the agreed transaction with the due care of a prudent merchant; in doing so, the commission agent is to look after the principal's interests and is to follow their instructions.
- The commission agent is obliged to surrender to the principal whatever the commission agent obtained from carrying out the transaction.
- If the commission agent concludes the transaction on more favourable terms than those set for the commission agent by the principal, then the resulting benefit will accrue to the principal.
- The commission agent will in general be entitled to demand the commission when the respective transaction has been executed.

b. Link(s) to official publication:

Art. 93 Commercial Code (commercial broker) is accessible via this [link](#).

Art. 383 Commercial Code (commission agent) is accessible via this [link](#).

c. Link(s) to English translation:

Art. 93 Commercial Code (commercial broker) is accessible via this [link](#).

Art. 383 Commercial Code (commission agent) is not available in English.

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:

Unfair B2B market practices (Gesetz gegen den unlauteren Wettbewerb – Act against Unfair Competition)

The German Act against Unfair Competition (“AUC”) provides, among other things, for regulation of unfair commercial practices between competitors. The Act covers unfair practices against all market participants, e.g. competitors and consumers.

According to Art. 3 para. 1 AUC, all unfair commercial practices are unlawful. This article is a general clause for the case that the following more specific articles do not apply even though one party uses unfair commercial practices. An example for the use of Art. 3 para. 1 AUC is to induce a party to breach its contract.

According to Art. 4 AUC, the following practices are deemed as unfair:

1. discrediting or denigrating the distinguishing brands, goods, services, activities, or personal or business circumstances of a competitor;
2. asserting or disseminating facts about the goods, services or business of a competitor or about the entrepreneur or a member of the management of the business, which are capable of harming the operation of the business or the credit of the entrepreneur, to the extent that the facts are not demonstrably true; if the communications are confidential and if the party making or receiving the communication has a legitimate interest therein, the action shall only be unfair where facts are asserted or disseminated contrary to the truth;
3. offering goods or services which are replicas of goods or services of a competitor if he:
 - causes avoidable deception of the purchaser regarding their commercial origin;
 - unreasonably exploits or impairs the assessment of the replicated goods or services; or
 - dishonestly obtained the knowledge or documents needed for the replicas;
4. deliberately obstructing competitors.

Art. 4a AUC provides examples of aggressive commercial practices such as harassment and coercion.

Furthermore, Art. 5 AUC provides that misleading commercial practices, which can lead to causing market participants to take a transactional decision which they would not have taken otherwise, are considered unfair.

A commercial practice is regarded as misleading if it contains false statements or other information suited to deception regarding for example the following circumstances:

- the main characteristics of the goods or services, such as availability, nature, execution, benefits, risks,

composition, accessories, method or date of manufacture, delivery or provision, fitness for purpose, uses, quantity, specification, after-sale customer assistance, complaint handling, geographical or commercial origin, the results to be expected from their use, or the results or material features of tests carried out on the goods or services;

- the reason for the purchase, such as the existence of a specific price advantage, the price or the manner in which the price is calculated, or the conditions on the basis of which the goods are supplied or the services are provided;
- the nature, attributes or rights of the entrepreneur such as his or her identity, assets, including intellectual property rights, the extent of his or her commitments, qualifications, status, approval, affiliation or connections, awards or distinctions, motives for the commercial practice or the nature of the sales process.

According to Art. 5a AUC, practices can be misleading by omission.

If a competitor engages in unfair practices, its competitors are entitled to demand termination thereof and are also entitled to damages.

If the competitor acts intentionally and makes a profit to the detriment of numerous purchasers, the competitor can be sued to pay such profit to the federal budget. This claim vests in certain qualified trade associations, qualified entities and chambers of industry and commerce.

b. Link(s) to official publication:

The Gesetz gegen den unlauteren Wettbewerb, Act against Unfair Competition is accessible via this [link](#).

c. Link(s) to English translation:

The Act against Unfair Competition is accessible via this [link](#).

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:

See, Art. 311 para. 2 Civil Code; Art. 241 para. 1 Civil Code

b. Information to be disclosed:

Formation of a pre-contractual relationship

The obligation to disclose pre-contractual information only applies if a pre-contractual relationship pursuant to Art. 311 para. 2 Civil Code has been established. In practice, such relationship comes into existence by entering into contract negotiations (i.e. non-binding conversations that could lead to the conclusion of a contract).

Scope of the pre-contractual disclosure of information

The scope of pre-contractual obligations is regulated in Art. 241 para. 2 Civil Code. The concrete scope of obligations of disclosure of information is defined but varies from case to case. The decisive factor is that the obligation to disclose information can be expected to be performed in good faith, taking into account market practices in the individual case.

In this respect, German case law has particularly focused on franchise agreements. The rulings can be applied to similar distribution agreements. For example:

- the franchisor must inform the franchisee about the actual situation of the business and the franchise system
- the franchisor is also obliged to disclose information about the profitability of the franchise system.

Failure to disclose the information can result in damages; under specific circumstances and before the pre-contractual relationship has started, the obligation to pay damages can be waived between the parties.

c. Link(s) to official publication:

Art. 311 para. 2 Civil Code is accessible via this [link](#).

Art. 241 para. 2 Civil Code is accessible via this [link](#).

d. Link(s) to English translation:

Art. 311 para. 2 Civil Code is accessible via this [link](#).

Art. 241 para. 2 Civil Code is accessible via this [link](#).

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)?

If the pre-contractual obligations are not respected the other party may sue for damages and if in meantime a

contract is concluded may withdraw from the contract.

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:

See, Art. 311 para. 2 Civil Code; Art. 241 para. 1 Civil Code

b. Conditions for precontractual liability:

According to German contract law, the termination of pre-contractual negotiations is not unlawful and is part of the principle of freedom of contract. As a general principle, any party is free to terminate pre-contractual negotiations. One is only liable, if he/she has created special confidence in the conclusion of the contract and the termination then takes place without good reason.

A further exception is the case where a party negotiated in bad faith and has pretended a willingness to conclude a contract which did not actually exist.

c. Consequences of precontractual liability:

The damaged party may be entitled to damages from the party held liable for the wrongful termination of the pre-contractual negotiations.

According to German law (Art. 249 Civil Code et. seqq.), the damaged party can claim fidelity losses, i.e. the party that is held liable must restore the other party's financial situation as if no negotiations have taken place. In such case, the damaged party is entitled to damages for costs incurred, the loss of the opportunity to negotiate agreements with other parties or reputational damage.

He/she is not entitled to claim the restoration of his/her financial situation as if the pre-contractual obligations had been respected and an agreement had been concluded (i.e. loss of revenues). This would lead to an obligation of contract which stands in contrast to the principle of freedom of contract.

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'?

A continuation of the agreement is given if after the expiry turn, both parties express their consent with the continuation and the contract is actually executed (Art. 89 para. 3 Commercial Code analogous). The parties may express their consent by an implied conduct, for example, the execution of contractual work or contractual payment.

b. What should a party do to avoid this?

First of all, a party can avoid a continuation of the agreement by refraining from any behaviour described under a). Another possibility is to express the disagreement with any continuation of the agreement.

A contract clause that excludes a continuation of the contract is not sufficient. This clause can be changed by both parties even by implied conduct like described under a).

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?

Only in certain instances.

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

Any notice period set by a distribution agreement has to be in accordance with the principle of good faith (e.g. Art. 307 para. 1 Civil Code). If the principle of good faith is observed, depending on the details and specifics of the

case, there is no general rule that can be used. However, an immediate termination for convenience will be rarely in accordance with Art. 307 para. 1 Civil Code. It gives the other party very little time to adjust its business. In the most cases a reasonable notice period will be required.

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?

If a distribution agreement of definite duration provides for an immediate termination for convenience and this provision is not in accordance with Art. 307 para. 1 Civil Code then the provision about the termination for convenience is invalid. A termination for convenience would then not have any effect.

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

If one party is liable in damages depends on the details of the case. In general, that is only the case if an obligation was breached by one party (e.g. unlawful termination), this breach caused damages and if the party is responsible for these damages.

If one party is liable in damages, it must restore the situation that would exist if the termination had not occurred (restitution in kind). To the extent that a restitution in kind is not possible, the party must compensate the other party in money. The damage may also comprise lost profits. That are the profits that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken from the parties (e.g. investments), could probably be expected if the breach (e.g. the termination) would not have occurred.

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution agreements of indefinite duration

Q18. Can a distribution agreement of indefinite duration be terminated for convenience even if the agreement does not provide for termination for convenience?

Yes.

If yes, must a reasonable notice period be observed?

Yes.

If a reasonable notice period must be observed, how is this reasonable notice period calculated (e.g. 1 month per year) (a)? Should a minimum notice period be observed (b), is there a maximum notice period (c)?

a. How is this reasonable notice period calculated (e.g. 1 month per year)?

There is no fixed method for determining the duration of the notice period. The notice period must be determined taking into account the specific circumstances of the case. Among others, the following elements are generally

considered in this context: The amount of possible investments by the other party in the context of the distribution agreement, the time needed for the other party to find a new contracting party and the duration of the contractual relationship.

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

There is no fixed minimum notice period valid for all distribution agreements of indefinite duration. The notice period must be calculated in consideration of all details of the case (See, Q18.a.).

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?

There is no fixed maximum notice period valid for all distribution agreements of indefinite duration. The notice period must be calculated in consideration of all details of the case (See, Q18.a.).

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?

Any contractual notice period needs to be in accordance with the principle of good faith (e.g. Art. 307 para. 1 Civil Code). The courts decide on a case-by-case basis if a contractual notice period in a specific case is valid and take all circumstances in account (See, Q18.a.).

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?

If the terminating party does not comply with prescribed rules for the termination (e.g. sets a too short notice period), the termination notice will not end the contract at the date given by the too short notice period. However, the termination notice might be evaluated as a termination that ends the contract at the date that would have been provided by a valid notice period.

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

See, Q17.b.

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?

In general, not (if not required by the contract).

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?

That depends on the reason for the formality and on the respective provision of the contract.

If a formality required by the contract (e.g. written communication) is not observed the termination might be invalid.

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

Yes.

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

That depends on the formality, on the reason for the formality and on the respective provision of the contract.

If a formality required by the contract is not observed the termination might be invalid.

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.)?

Both parties may claim for compensation under the circumstances explained under Q17.b.

Furthermore, Art. 89b Commercial Code provides a claim for compensation for the dealer after the ending of the agreement (due to a termination or otherwise). Actually, the article only applies to contracts with commercial agents. However, it applies to other distribution agreements analogously if the circumstances of the contract are similar.

Similar circumstances may be given in the case of a distribution agreement between a manufacturer and an authorised dealer. If the authorised dealer for example extends the market of the manufacturer and hereby provides the manufacturer with potentially permanent benefits that last after the end of the contractual relationship of the parties, Art. 89b Commercial Code will be relevant.

Art. 89b Commercial Code provides mainly the following:

- The commercial agent shall be entitled to demand a reasonable indemnity from the principal, after termination of the agency agreement, if and to the extent that:
 - the principal continues to derive substantial benefits, even after termination of the agency agreement, from business relations with new customers brought by the commercial agent, and
 - the payment of an indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.

The indemnity shall amount to a reasonable compensation considering all details of the case.

- The claim to indemnity shall not arise if
 - the commercial agent has terminated the agency agreement, unless the conduct of the principal gave justified grounds for doing so, or the commercial agent cannot reasonably be expected to continue his activities on account of his age or of illness, or
 - the principal has terminated the agency agreement and there was a compelling reason for such termination owing to culpable conduct on part of the commercial agent, or
 - a third party enters into the agency agreement in place of the commercial agent on the basis of an agreement between the principal and the commercial agent; such agreement cannot be made prior to the termination of the agency agreement.

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?

Art. 314 Civil Code provides for an immediate extraordinary right of termination:

- Each party may terminate the contract for the performance of a continuing obligation for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period.
- If the compelling reason consists in the breach of a duty under the contract, the contract may be terminated

only after the expiry without result of a period specified for relief or after a warning notice without result. Under certain circumstances there exist a dispensability of specifying a period for such relief and of a warning notice. The dispensability must be assumed, if:

- the obligor seriously and definitively refuses performance or
 - the obligor does not render performance by a date specified in the agreement, in spite of the fact that, according to a notice given by the other party to the obligor prior to conclusion of the contract, the performance as per the date specified is of essential importance to the other party.
- The party entitled to terminate the contract according to Art. 314 Civil Code may give the termination notice only within a reasonable period after obtaining knowledge of the reason for termination.

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?

If a court would consider the extrajudicial termination of the distribution to be unlawful, the termination of the agreement will be without effect. In such case, the distribution agreement shall continue to remain in full force and effect. The terminating party might be liable in damages.

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?

This right is based on statute law: Art. 280 para. 1, Art. 281, 282, 283 Civil Code provides the right to compensation of damages. Beside that, Art. 323 Civil Code provides the right of withdrawal.

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, Q17.b. and Q23.

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.

If yes, which obligations apply?

Returning documents received in connection with the contract, such as brochures, advertising material, customer lists, etc.; Art. 667, 675 Civil Code.

Part 5: Dispute resolution

Q30. Do specific rules and/or restrictions apply as regards the choice of forum and/or jurisdiction?

No.

Q31. Can the parties opt for arbitration?

Yes.

If yes, are there any rules and/or restrictions as regards the enforceability of arbitration clauses in distribution agreements?

No.

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

Any claim for damages for breach of performance of a distribution agreement is limited to 3 years (Art. 195 Civil Code). The period begins to run after the end of the year in which (1) the claim arose and (2) the debtor became aware of the circumstances giving rise to the claim or would have become aware without gross negligence (Art. 199 para. 1 Civil Code). The limitation period cannot be longer than 10 years after the claim arose or 30 years from the date on which the act, the breach of duty or any other event causing the damage occurred.