Distribution Law Center
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PAVIA e ANSALDO
STUDIO LEGALE
PeA

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Q&A on Distribution Agreements

Part I: Legislative framework

Q1. Please specify the legislative framework generally applicable to the conclusion and execution of distribution agreements (a)? Please include a link to the official publication of the applicable rules (e.g., relevant link to the Official Gazette) (b) and, if available, to the English translation of the legislative framework (c).

a. Legislative framework:

Italian Civil Code, Book IV, Title V, Chapter V, supply agreements

Law no. 129/2004 on Franchising

Italian Civil Code, Book IV, Title II, general rules applicable to agreements

b. Link(s) to official publication:

The Italian Civil Code is accessible here.

Law no. 129/2004 is accessible here.

c. Link(s) to English translation:

Not available.

Q2. Other than for agency agreements pursuant to Directive 86/653 (EEC) on the coordination of the laws of the Member States relating to self-employed commercial agents, are there specific rules depending on the distribution format (e.g. franchising, exclusive distribution)?

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:

Under Italian Law, distribution agreements are 'atypical', meaning that the Italian Civil Code does not provide for the distribution agreement as a specific format of agreement. Therefore, specific rules may apply depending on the format of agreement used. Reference has to be made, in particular, to the provisions of the Italian Civil Code on supply agreements and to franchising, where applicable to the implemented distribution format.

Supply Agreements

Art. 1559-1570 Italian Civil Code regulate supply agreements.

The supply agreement is the agreement whereby one party undertakes, in return for a price, to perform, for the benefit of the other, periodic or continuous supply of things.

If the amount of the supply is not determined, the amount agreed is that corresponding to the normal needs of the party entitled to it, with regard to the time of the conclusion of the agreement. If the parties have only established the maximum and minimum limits for the entire supply or for the individual services, it is up to the party entitled to the supply to establish, within these limits, the quantity due. If the amount of the supply is to be determined in relation to the needs and a minimum quantity has been established, the party entitled to the supply is obliged to pay the quantity corresponding to the needs if this exceeds the minimum.

In periodic supply agreements, the price is paid at the time of the individual services and in proportion to each of them. In the case of continuous supply, the price is paid according to the usual due dates.

The term established for the individual services is presumed to have been agreed in the interest of both parties. If the party entitled to the supply has the right to fix the expiry date of the individual services, he must give the supplier adequate notice.

If the duration of the supply is not established, either party may terminate the agreement, giving notice within the agreed period or within the period established by custom or, failing that, within a reasonable period having regard to the nature of the supply.

In the event of non-performance by one of the parties in relation to individual services, the other party may request the termination of the agreement, if the non-performance is of considerable importance and is such as to undermine confidence in the accuracy of subsequent performance. If the party entitled to supply is in default and the non-performance is of minor importance, the supplier cannot suspend the execution of the agreement without giving reasonable advance notice.

Parties may agree to include in the agreement a covenant of preference by which the party entitled to the supply undertakes to give preference to the subcontractor in the stipulation of a subsequent agreement for the same object. Such covenant is valid as long as the duration of the obligation does not exceed the term of five years. If a longer term is agreed, this is reduced to five years. The party entitled to the supply must inform the supplier of the conditions proposed to him by third parties and the supplier must declare, under penalty of forfeiture, within the established term or, failing this, within the term required by circumstances or customs, whether he intends to avail himself of the right of preference.

Parties may also include an exclusive clause in the agreement.

If an exclusive clause is agreed in favor of the supplier, the other party may not receive services of the same nature from third parties, nor, unless otherwise agreed, may they use their own means to produce the things that are the subject of the agreement. If the exclusivity clause is agreed in favour of the party entitled to supply, the

supplying party may not carry out, in the area for which the exclusivity is granted and for the duration of the agreement, either directly or indirectly, services of the same nature as those which are the subject of the agreement.

Franchising Agreements

Law no. 129/2004 on Franchising regulates franchising agreements in Italy.

According to Art. 3 of Law no. 129/2004 on Franchising the agreement must be in writing, otherwise the agreement is null and void. If the contract has a fixed term, the franchisor must guarantee the franchisee a minimum duration of not less than 3 years and the right to early termination for non-performance.

The agreement must expressly specify:

- The amount of investment and entry-level expenses that the franchisee must incur, if any, prior to commencement of the business;
- The methods of calculation and payment of royalties, and the possible indication of a minimum amount to be collected by the franchisee;
- The scope of any territorial exclusivity;
- The specification of know-how provided by the franchisor to the franchisee, if any;
- The methods of recognition of the contribution of know-how by the franchisee, if any;
- The characteristics of the services offered by the franchisor in terms of technical and commercial assistance, planning and setting up, training;
- The conditions of renewal (express or tacit), termination (e.g.: express termination clause) or possible assignment of the agreement.

The exclusivity clause is not an essential element of the agreement, and therefore may not be provided for.

The agreement may also provide for a non-competition clause, whereby the franchisee undertakes not to carry out activities in competition with those exercised by the franchisor also for a certain period of time following the termination of the agreement. The non-competition clause is not an essential element of the agreement.

b. Link(s) to official publication:

The Italian Civil Code is accessible via this link.
Law no. 129/2004 on Franchising is accessible via this link.

c. Link(s) to English translation:

Not available.

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

Abuse of economic dependence

According to Art. 9 Law no. 192/1998 (on the abuse of economic dependence) the abuse of a client's or supplier's state of economic dependence in regard to one or more business is forbidden.

A state of economic dependence exists when a business finds itself in a position to bring about excessive imbalances in the rights and obligations pertaining to its commercial relations with another business. The assessment of economic dependence also accounts for any real possibility for the abused subject to find satisfactory alternatives elsewhere in the market.

An abuse may consist in the refusal to sell or refusal to buy, the imposition of unjustifiably burdensome or discriminatory contract conditions or the arbitrary interruption of established commercial relations.

Any agreement aimed at abusing economic dependence is null and void.

The Italian Competition Authority is entitled to issue warnings and impose penalties against any company found liable for abuse of economic dependence which is relevant to the protection of competition and the free market, in response to complaints from third parties and after using its own investigative powers.

Please note the Annual Competition Law (2022), modifying mentioned in Art. 9, introduced a rebuttable presumption on abuse of economic dependence by digital platforms on companies using their intermediary services. The rebuttable presumption applies to digital platforms playing a “key role” in reaching end users or suppliers, including in terms of network effects or data availability. The Annual Competition law also attributed exclusive jurisdiction over the related judicial matters to the civil courts’ special division for business matters and intellectual property.

b. Link(s) to official publication:

The official publication is accessible via this link.

The amended Art. 9 Law no. 192/1998 is accessible via this link.

c. Link(s) to English translation:

The English translation 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:

(i) Art. 1337 Italian Civil Code; (ii) Art. 1338 Italian Civil Code; (iii) Art. 4 and Art. 6 Law no. 129/2004

b. Information to be disclosed:

General Rules

Art. 1337 Italian Civil Code requires that the parties, in the conduct of negotiations and in the formation of the agreement, must behave in good faith.

According to Art. 1337 Italian Civil Code the party who, being aware or having to be aware of the existence of a cause of invalidity of the agreement, has not given notice to the other party is obliged to compensate the damage suffered by the latter for having relied, without its fault, on the validity of the agreement.

Franchising Agreements

According to Art. 6, Law no. 129/2004 on Franchising, the franchisor must promptly provide any data and information that the franchisee deems necessary or useful for the purposes of entering into the agreement, unless such information is objectively confidential or the disclosure of which would constitute a violation of the rights of third parties and give reasons for any failure to provide the information and data requested by the same.

The prospective franchisee must provide the franchisor, in a timely manner and in an accurate and complete manner, with all information and data whose knowledge is necessary or appropriate for the purposes of entering into the agreement, even if not expressly requested by the franchisor.

According to Art. 4, Law no. 129/2004 on Franchising at least 30 days before the signing of an agreement, the franchisor must deliver to the prospective franchisee a copy of the agreement, together with the following annexes:

- principal data relating to the franchisor, including the name and capital stock and, at the request of the prospective franchisee, a copy of the financial statements for the last three years or from the date of

commencement of business, if less than three years have elapsed;

- an indication of the trademarks used, with the details of the registration or deposit, or of the license granted to the franchisor by the third party who may have ownership of the same, or the documentation proving the concrete use of the trademark;
- a brief illustration of the elements characterizing the affiliated activity;
- a list of the franchisees currently operating in the system and of the franchisor's direct points of sale;
- an indication of the annual variation in the number of franchisees and their location over the last three years, or from the date of commencement of the franchisor's business, if this has been less than three years;
- a summary description of any legal or arbitration proceedings brought against the franchisor which have been concluded in the last three years in relation to the commercial affiliation system under review, whether by affiliates, private third parties or public authorities.

c. Link(s) to official publication:

The Italian Civil Code is accessible via this link.

Law no. 129/2004 is accessible via this link.

d. Link(s) to English translation:

Not available.

Q5. Is there a standstill obligation linked to the requirements imposed for the pre-contractual phase?

No.

Q6. Does the relevant regulatory framework impose sanctions if the pre-contractual obligations are not (fully) respected?

Yes.

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

According to Art. 8 of Law no. 129/2004 on Franchising if one party has provided false pre-contractual information, the other party may request the annulment of the agreement as well as compensation for damages.

According to Art. 1338 Italian Civil Code the party who, being aware or having to be aware of the existence of a cause of invalidity of the agreement, has not given notice to the other party is obliged to compensate the damage suffered by the latter for having relied, without its fault, on the validity of the agreement.

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. 1337 Italian Civil Code.

b. Conditions for precontractual liability:

Any party is free to terminate pre-contractual negotiations, but it is required to negotiate in good faith. Therefore, terminating pre-contractual negotiations in itself is not wrong, unless the party terminating the pre-contractual negotiations is acting in bad faith and terminated the negotiations wrongly (e.g. on the basis of deceptive behaviour, by means of very limited motivation or demonstrably untimely).

c. Consequences of precontractual liability:

The damaged party may be entitled to damages by the party that is held liable for the improper termination of the pre-contractual negotiations.

The damages for breach of the duty of good faith cover the expenses and losses incurred in negotiating or entering into the agreement (the so called *danno emergente*) and the loss of benefit that the party could have obtained from another, more advantageous agreement (the so called *lucro cessante*).

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

No.

Part 3: Contractual phase

A. Form of distribution agreements

Q9. Must a distribution agreement be executed in writing to be valid and enforceable?

Only in certain instances.

If only in certain instances, please explain when a written agreement is required.

When concluding franchising agreements (see, Q2).

Q10. Are there any (other) requirements as to the form of the distribution agreement for it to be valid and enforceable?

No.

B. Content of distribution agreements

Q11. Other than restrictions imposed by EU competition law (including Regulation (EU) 330/2010), do specific rules and/or restrictions apply in distribution agreements with respect to

- the territory in which or the customers to whom the goods/services will be sold;
- an exclusivity granted to the distributor;
- (exclusive) sourcing/purchasing obligations;
- resale prices;
- non-compete clauses?

No.

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

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

Yes, specific sector rules.

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

Legislative Decree No. 198/2021, entered into force on December 15, 2021 (the "UTP Decree"), implemented the EU Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (Directive (EU) 2019/633) (the "UTP Directive"), by introducing certain specific contractual conditions and listing certain unlawful practices, in view of protecting the allegedly weaker contract party, which in this sector is usually the supplier (that is farmers and, more in general, agro-food producers). Among others, the new sector rules affect contracts forms (written, *ad substantiam*), contracts duration (providing a minimum term), maximum payment terms, etc. Although pre-eminently aimed at protecting weak suppliers, to some extent, the rules also protect buyers (e.g. prohibition to impose either buying or selling unjustified burdensome conditions, prohibition to impose contractual constraints to maintain product stocks, etc.).

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'?

'Continuation' means the situation in which, notwithstanding the expiration of the agreement, the parties put in place so called *facta concludentia* (conclusive facts), *i.e.* a reciprocal behaviour factually showing the continuation of the economic relationship regulated by the expired agreement. Usually, an allegedly expired agreement is considered continued when the parties keep on acting according to, and complying with, the same conditions previously provided. As such, in case of continuation by the parties, an agreement of definite duration may turn into an agreement of indefinite duration, depending on the nature of the contractual relationship and on the specific circumstances of the case (e.g. in case of periodic supply). Conclusive facts are not however sufficient to continue the expired agreement when the written form of the agreement is required *ad substantiam* (e.g. franchising or subcontracting agreements).

b. What should a party do to avoid this?

Not acting or complying with the conditions previously provided and regulated by the expired agreement is the first requirement to avoid continuation. Furthermore, the express opposition to the counterparty's behaviour aimed at continuing the agreement is also suggested in order to avoid the tacit acquiescence to any continuation of the latter.

Please note that the prohibition of tacit renewal provided by the agreement may not be sufficient to avoid continuation, where conclusive facts can demonstrate an opposite will of the parties (unless the written form is required *ad substantiam* – See, Q14.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?

Yes.

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?

In principle, failure to comply with prescribed notice period rules for termination does not, *per se*, make the termination ineffective, but exposes the terminating party to damages compensation to the other party.

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

Damages compensation covers the general damages and the loss of profits caused to the other party, who however has to provide evidence of the damages suffered.

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)?

The reasonable notice period has to be calculated taking into account the commercial practice and the nature of the agreement, on a case-by-case basis. In general, the notice period is deemed reasonable where allowing the other party to prevent the potential negative effects of the contract termination (e.g. allowing the other party to find a substitute for the supply of the contract products/services or as an alternative acquirer).

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 minimum notice period. However, also considering the immanent good faith principle, a reasonable period of notice (to be calculated on case-by-case basis, See, Q18.a.) is in any case deemed necessary. Failure to apply a reasonable notice period may result in a contractual abuse and in an abuse of economic dependence in the form of arbitrary interruption of ongoing business relations.

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 case law, courts are not entitled to question the contractual notice period agreed by the parties. However, termination of a agreement, even in compliance with the stipulated terms and conditions, may amount to a breach of contract in the form of rights. Therefore, the scrutiny on the contractual notice period may question the legitimate exercise of the termination right, although not the duration agreed by the parties.

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?

In principle, failure to comply with the contractual notice period does not, *per se*, make the termination ineffective, but exposes the terminating party to damages compensation to the other party.

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

The non-terminating party is entitled to compensation if the termination lacks notice or if the notice period is not reasonable (however, see, Q19 on the scope of scrutiny). Damages compensation covers the general damages and the loss of profits caused to the other party, who however has to provide evidence of the damages suffered.

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?

The written notice is required only if a contractual provision establishes such a formality. A registered letter is required where so provided by the agreement, but is in any case suggested.

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?

Termination not complying with the established contractual formalities is null and void, therefore ineffective.

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

Yes.

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

Failure to comply with contractually prescribed termination formalities may result in the ineffectiveness of the termination. In addition failure to comply with contractually prescribed termination formalities may also amount to a breach of contract, exposing the terminating part to contractual liability and related compensation claims.

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.)?

Damages compensation covers the general damages and the loss of profits caused to the other party, who however has to provide evidence of the damages suffered.

Immediate extrajudicial termination on account of serious breach or exceptional circumstances

Q24. Is immediate extrajudicial termination possible even if the distribution agreement does not provide for early termination?

Yes.

If yes, on what grounds (a)? Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement (b)?

a. On what grounds?

Immediate extrajudicial termination is allowed in case of serious breach by one of the parties, which generally occurs when the non-performance of the contractual obligations is of material importance and likely to impair trust in the correctness of the parties in the performance of the agreement.

Please note that, when early termination is not provided by the agreement, immediate extrajudicial termination is possible upon written intimation to the other party to perform the relevant obligation.

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?

Yes.

Q26. Does the terminated party have a right to compensation if it appears that the agreement was wrongfully terminated or dissolved on account of serious breach and/or exceptional circumstances?

Yes.

If yes, is this right based on statute or case law (a) and how is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill) (b)?

a. Is this right based on statute or case law and what this right entail?

Full compensation (see below) is provided by the Italian Civil code (Art. 1233 on contractual damages compensation) and by the case law applying general contractual damages compensation rules to distribution agreements.

Please note that, in case of (consciously) wrong claim for judicial termination, the terminated party is also entitled to claim, in turn, the termination of the agreement, as the other party's wrong termination claim is deemed as a serious contractual breach.

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

Damages compensation covers the general damages and the loss of profits caused to the other party. Please note that no additional compensation is provided (in this reference, the case law has expressly excluded the application of goodwill compensation, provided for agency agreements, to distribution agreements).

Q27. If a party believes that the distribution agreement has been wrongfully terminated or dissolved, can it apply to the judge in interim relief proceedings to have the effects of the termination suspended?

Yes.

Part. 4: Post-contractual phase

Q28. Is the supplier required to repurchase the stock that is still at the distributor's disposal when the distribution agreement ends?

No.

Q29. Are there other post-contractual obligations that generally apply to either of the parties in the context of the termination of the distribution agreement?

No.

Part 5: Dispute resolution

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

Yes.

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

According to Art. 1341 Italian Civil Code any clause derogating the ordinary forum or jurisdiction must be specifically approved in writing.

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?

According to Art. 1341 Italian Civil Code arbitration clauses must be specifically approved in writing.

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

According to Art. 2946 Italian Civil Code any damages claim for breach of performance of an agreement is limited to 10 years.