

Q&A DOCUMENT | 4 October 2021

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:

- Chapter 1 Competition Act 1998 ("CA98") contains the law relating to agreements. Art. 2 CA98 mirrors Art. 101(1) TFEU.
- [Art. 10 CA98](#) provides that EU block exemption regulations will apply in parallel in the UK.
- Following the UK's exit from the European Union, the VBER and TTBE were retained in UK law - see [Guidance on the functions of the CMA after the end of the Transition Period \(paragraphs 4.31 to 4.36\)](#).
- The Sale of Goods Act 1979 ("SGA") sets out the terms that are implied into contracts for the sale of goods. In practice the contract will usually contain express terms which will override the majority of the SGA terms, but there are some SGA terms that cannot be excluded (e.g. the implied term that the sellers have title to the goods they are selling) and others that can only be excluded or limited if it is reasonable to do so (e.g. the implied terms as to quality of goods).

The Unfair Contract Terms Act 1977 sets out the rules on the extent to which you can limit or exclude certain types of liability.

b. Link(s) to official publication:

- Competition Act 1998 ("CA98") is accessible via this [link](#) (full legislation)
- Competition Act 1998 ("CA98") Chapter 1 is accessible via this [link](#). (Chapter 1 relating to agreements)
- Guidance on the functions of the CMA after the end of the Transition Period (paragraphs 4.31 to 4.36) is accessible via this [link](#).
- CMA's guidance on vertical agreements is accessible via this [link](#).
- Sale of Goods Act 1979 ("SGA") is accessible via this [link](#).

- Unfair Contract Terms Act 1977 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)?

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

There are various laws in the UK which parties should consider when drafting and concluding distribution agreements relating to the UK. These are listed below.

Bribery Act 2010 ("BA 2010")

Under Art. 7 BA 2010, a commercial organisation commits an offence if a person associated with it bribes another person, intending to obtain or retain business or a business advantage for the commercial organisation. A person (A) is associated with a relevant commercial organisation (C) if A is a person who performs services for or on behalf of C (Art. 8 BA 2010).

Art. 7 is a strict liability offence. However, a commercial organisation will not be liable if either:

- it can show that it had in place "adequate procedures" designed to prevent bribery by a person associated with it; or
- the associated person's bribe was not intended to obtain or retain business or a business advantage for the commercial organisation.

As a distributor does not typically provide services for a supplier, the risk of an Art. 7 offence in a distribution arrangement is low. However, it is prudent for a supplier to put in place adequate procedures to protect itself from the risk that its distributors commit bribery and trigger liability under Art. 7. Furthermore, many suppliers will have anti-bribery policies in place, and include an anti-bribery clause in their distribution agreements for ethical reasons.

Criminal Finances Act 2017 ("CFA 2017")

Parties entering into a distribution agreement should take steps to prevent the facilitation of UK tax evasion (Art. 45 CFA 2017) and foreign tax evasion (Art. 46 CFA 2017), as these are corporate criminal offences in the UK. The offences are committed where a party acting on behalf of a “relevant body” (e.g. a corporate entity or partnership) deliberately or dishonestly facilitates a tax evasion offence.

A defence is available if the relevant body has put in place reasonable prevention procedures designed to prevent its “associated person” from committing the tax evasion facilitation, or that it was not reasonable in all of the circumstances to expect the relevant body to have any prevention procedures in place. As with Art. 7 BA 2010, a distributor may, in certain cases, be classed as an “associated person” of the supplier for the purposes of Art. 45 and 46 CFA 2017. Therefore, it may be prudent for suppliers to include wording in their distribution agreements to protect against the risk of criminal liability.

Modern Slavery Act 2015 (“MSA 2015”)

Art. 54 MSA 2015 requires commercial organisations carrying on business in the UK with a turnover of £36 million or more to complete a slavery and human trafficking statement every financial year, setting out the steps they have taken to ensure that there is no slavery or human trafficking in their business or supply chains. As such, it may be prudent for suppliers to include anti-slavery and anti-trafficking obligations in their distribution agreements.

b. Link(s) to official publication:

- BA2010 is accessible via this [link](#).
- Art. 7 BA2010 is accessible via this [link](#).
- BA2010 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing is accessible via this [link](#).
- CFA 2017 is accessible via this [link](#).
- Art. 45 and 46 CFA 2017 are accessible via this [link](#).
- MSA 2015 is accessible via this [link](#).
- Art. 54 MSA 2015 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:

There are mandatory provisions in relation to public contracts where public procurement rules apply.

Also, if representations are made by a party in the pre-contractual phase and they are relied upon by the other party to enter into the distribution arrangement, the latter could have a claim under Art. 2(1) Misrepresentation Act 1967.

b. Information to be disclosed:

The award of public agreements is governed by the Public Contracts Regulations 2015 ("PCR 2015"). Agreements which exceed certain monetary thresholds must be advertised on the UK e-notification service and awarded following one of the procedures mandated in the PCR 2015.

A misrepresentation is an untrue statement of fact or law made by one party to a agreement (Party A) (or his agent acting within the scope of their authority) to another party (Party B) which induces that party to enter into the agreement and causes them loss. Therefore, the parties to a distribution agreement should refrain from making untrue statements of fact or law in the pre-contractual phrase.

c. Link(s) to official publication:

- Public Contracts Regulations 2015 are accessible via this [link](#).
- [The law relating to misrepresentation is contained in case law and in the Misrepresentation Act 1967](#)

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)?

Although there is no relevant regulatory framework in the UK for pre-contractual obligations, breach of Art. 2(1) Misrepresentation Act 1967 could result in the rescission of the distribution agreement or damages.

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:

English law does not imply a duty of good faith in contractual negotiations. Pre-contractual negotiations are not normally legally binding on the parties and, in general, either party may terminate negotiations when they choose, without liability. If, however, the parties enter into a pre-contractual exclusivity arrangement, breach of that agreement may entitle the non-breaching party to damages if they can prove loss caused by the breach.

b. Conditions for pre-contractual liability:

See above.

c. Consequences of pre-contractual liability:

See above.

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

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 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 and non-compete clauses.

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

The common law restraint of trade doctrine, developed in case law, applies to all restrictions imposed in distribution agreements, in particular, restrictions relating to the grant of exclusivity and non-compete clauses.

Restraint of trade clauses are regarded as void and unenforceable unless they:

- are designed to protect a legitimate business interest;
- are no wider than reasonably necessary to protect that interest; and
- are not contrary to the public interest.

In order for a restraint to be reasonable to protect a legitimate business interest, it must be reasonable as to each of:

- the term of the restriction;
- the geographical area covered; and
- the scope of the activities covered.

At common law, most restraint of trade clauses operating for the duration of the distribution agreement are likely to be enforceable. However, post-termination restrictions may be problematic including post-termination non-compete obligations and non-solicitation obligations. The UK courts consider the relationship of the parties, their respective bargaining positions and the nature of the restriction to determine whether the restraint goes no further than is necessary to protect a legitimate business interest and is reasonable as between the parties.

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 and/or restrictions apply in distribution agreements with respect to a non-solicitation clause during and/or after the term of the distribution agreement and minimum sales quota imposed on the distributor.

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

Please see our response to question 21 above.

C. Term and termination

Q13. Are there particular rules and/or restrictions in relation to the term (incl. renewal) of distribution agreements?

No.

Q14. Are there any specific rules and/or restrictions with respect to the termination of distribution agreements (e.g. minimum notice period, statutory right to compensation (goodwill or other))?

No.

Q15. Is it possible to terminate the distribution agreement based on certain grounds for termination (breach or other) included in the distribution agreement?

Yes.

If yes, is prior judicial intervention required in order for the termination of the agreement to take effect?

No.

Part 4: Post-contractual phase

Q16. Is the supplier required to repurchase the stock that is still at the distributor's disposal when the distribution agreement ends?

No. Unless expressly stated in the agreement.

Q17. 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

Q18. 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?

Rome I and II apply in the UK and govern the choice of law. The Hague Convention 2005 on Choice of Court Agreements ("Hague Convention") applies in the UK. However, the Hague Convention only applies in circumstances where there is claim arising out of a commercial agreement containing an exclusive jurisdiction clause. Unless the agreement and clause fall within these narrow bounds, an application for permission to serve out of jurisdiction will still have to be made.

On 6 April 2021, the UK Civil Procedure Rules were amended to allow claimants to serve out of jurisdiction in circumstances where there is a non-exclusive jurisdiction clause in a disputed agreement. Rule 6.33(2B)(b) provides that:

"The claimant may serve the claim form on the defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form ... a contract contains a term to the effect that the court shall have jurisdiction to determine that claim."

A court in the UK may refuse to hear a dispute if it has no connection with the UK under private international law.

Q19. 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.

Q20. What is the statute of limitations applicable to claims regarding the performance of a distribution agreement?

The law on limitation periods in the UK is found in the [Limitation Act 1980](#). For contract claims, the cause of action accrues on the date of the breach of contract and the six-year limitation period for such claims runs from this date (Art. 5). However, the parties can agree to diverge from this limitation period.