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European Business Lawyers

Commercial distribution as a tool for the international promotion of goods and services

Panel on Commercial Law
for the Anglo-Spanish Legal Conference, London

Agenda

1. Introduction
 - Build, buy or ally? Distributorship - build example
2. Comparison with commercial agency
 - Summary of advantages and drawbacks
 - Types of distributorship arrangement
3. Competition law and regulation
 - Vertical agreements falling within Art 101(1)
 - Application of Art 102 to vertical agreements
4. Online commerce
5. Bribery Act 2010
6. Conclusions?

- Build, buy or ally?
- Models of international trade
 - Branch office / place of establishment
 - Subsidiary
 - Agency
 - Distributor
 - JV
 - Franchise
 - Alliance with local player

Comparison with commercial agency

■ Summary of advantages and drawbacks

<u>Advantages</u>	<u>Drawbacks</u>
<ul style="list-style-type: none">• Supplier (S) passes on a large degree of the risk associated with the products.• Distributors (D) more motivated to sell the stock purchased from the supplier since he takes a greater risk.	<ul style="list-style-type: none">• S has less control over activities of D.
<ul style="list-style-type: none">• S not generally liable for any liability incurred as a result of D's activities.• Avoids S having an established place of business within the distributor's territory.	<ul style="list-style-type: none">• Where Exclusive Distributor for a territory, S's entire credit risk in respect of sales is concentrated on D, rather than with each customer.
<ul style="list-style-type: none">• S will not need to monitor accounts with a number of customers, only with D.• UK: No compensation or remedy for termination of a Distribution contract.	<ul style="list-style-type: none">• Far more likely to be at risk from competition law problems than an agency agreement.

Comparison with commercial agency

- Types of distributorship arrangement

- **Exclusive Distributorship**

- **Sole Distributorship**

- S has complete freedom both to sell directly

- **Non-Exclusive Distributorship**

- S has complete freedom both to sell directly and to appoint other Distributors within the territory.

- **Selective Distributorship**

- S will appoint additional D's only if they meet certain criteria.

- Vertical agreements falling within Art 101(1) TFEU
Agreements that prevent, restrict or distort competition in the EU.
 - The supplier or buyer has a **market share in excess of 30%**
 - **Two or more parties who operate at the same level of the production and distribution chain for the purposes of the agreement** (for example, between a supplier and several distributors).
 - The distribution agreement contains **hard core restrictions** (irrespective of the market shares of the parties).
 - E.g. Price fixing, territorial / customer sales restrictions
- Competition Act 1998 (from 1 March 2000)

Online Commerce

- **A website: form of passive selling . May not impose requirements such as:**
 - Any actual or de facto ban on internet sales
 - That D must limit internet sales as a proportion of its total sales
 - That D must prevent customers located in certain territories from viewing its website
 - Higher prices for products intended to be resold over the internet

- **Certain types of online (and offline) marketing activity by a distributor will be viewed as active sales, and can therefore be restricted within an exclusive distribution:**
 - Sending of unsolicited emails
 - General advertising or promotion in any format that involves investments that are attractive only because they reach customers outside the distributor's exclusive territory or customer group
 - Territory-based banners on 3rd party websites
 - Paying a search engine or search engine optimiser to make a website more easily found in a particular territory or by a particular customer group.

- **Supplier can impose quality standards on online dealers**

Bribery Act 2010

- BA 2010 came into force on 1 July 2011
- Introduces strict liability offence which may affect suppliers in distribution arrangements:
 - section 7, 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 organisation.
 - The only defence available to the commercial organisation is if it can show that it had in place "**adequate procedures**" to prevent a person associated with it bribing others.
 - Have policy / Communicate / Update / Monitor
- A distributor may not fall within the definition of "associated person", since he does not (as such) supply services to the supplier under the distribution agreement, but supplier might fall within.

- Distributorship as a significant commercial model
- Ideal for many mid-sized businesses
 - Especially if cautious about local investment
- But take care
 - Loss of control, especially over pricing
 - Online restrictions are integral to the risk model
 - Train & monitor D about Bribery Act compliance

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