

# DISTRIBUTION & AGENCY

## Belgium



# Distribution & Agency

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Quick reference guide enabling side-by-side comparison of local insights, including into ownership structure and tax considerations for foreign suppliers in a direct distribution model; models involving local distributors, commercial agents and other representatives, including the general framework, rights of contract termination, and the transfer of rights of ownership; regulation of distribution relationships, including issues such as confidentiality, distribution of competing products, pricing, online sales and parallel imports; governing law and dispute resolution mechanisms; and recent trends.

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## DIRECT DISTRIBUTION

### Ownership structures

May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

A foreign supplier may establish its own entity in Belgium to import and distribute its products in Belgium.

*Law stated - 12 January 2022*

May a foreign supplier be a partial owner with a local company of the importer of its products?

A foreign supplier may be a partial owner with a local company of the importer to import its products in Belgium.

*Law stated - 12 January 2022*

What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

The most appropriate business entities for foreign suppliers to import products are entities that limit the liability of the shareholders. In Belgian law two different forms of business entities enable this:

- the Besloten Vennootschap (BV) or Société à Responsabilité Limitée (SRL) – no minimum capital requirement; and
- the Naamloze Vennootschap (NV) or Société Anonyme (SA) – minimum capital of €61,500.

The NV or SA is the company form most suited for entities that are listed on the stock exchange and the BV is the most suited form for the entities that are not listed on the stock exchange.

The law that governs entities established after 1 May 2019 is the Belgian Company and Associations Code ( Wetboek van vennootschappen en verenigingen / Code de droit des sociétés et associations ). Some parts of the old Belgian Company Code ( Wetboek van vennootschappen / Code de droit des sociétés ) might still apply to companies established before this date.

Both these company forms are established by a notary deed that will need to be published partially in the Belgian State Gazette. This publication will also contain the by-laws of the company. With the new Belgian Company and Associations Code, the capital requirements changed and thus the importance of the financial plan grew.

*Law stated - 12 January 2022*

### Restrictions

Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Belgium does not limit foreign business from operating in its jurisdiction, nor does it limit foreign investment or ownership of domestic business entities. In some specific regulated sectors, such as banking, some specific requirements may apply.

**Equity interests**

May the foreign supplier own an equity interest in the local entity that distributes its products?

A foreign supplier may own an equity interest in a local entity that distributes its products in Belgium, as long as this does not infringe competition law.

Law stated - 12 January 2022

**Tax considerations**

What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

When importing products into the European Union, an import tax will have to be paid on the product. In Belgium, Value Added Tax will also have to be charged to the clients and transferred to the VAT administration. The general VAT rate in Belgium amounts to 21 per cent, but for some products the VAT amounts to 6 per cent or 12 per cent.

When a company that is owned by a foreign business has an establishment in Belgium, it will have to pay corporate tax, which amounts to 25 per cent as of 2020 and is lowered to 20 per cent for the first €100,000 of profit. However, the Belgian Income Tax Code allows for many deductions, such as costs, investments, etc, before this percentage is applied.

A foreign individual will not be subject to corporate tax, but to income tax in Belgium according to the double tax treaty that Belgium concluded with the origin state of that individual. If the individual operates through a company, then the individual will have to pay an advance levy on income derived from dividends.

Law stated - 12 January 2022

**LOCAL DISTRIBUTORS AND COMMERCIAL AGENTS****Distribution relationships**

What alternative distribution relationships are available to a supplier?

Belgium is characterised by the freedom of trade. Therefore, traders may establish the distribution relationships as they deem appropriate taking, however, into consideration that some formulas may be regulated. The most common options are the following.

Several distribution relationships are available to a supplier in Belgium. Suppliers of products or goods can choose from the following distribution options:

- First, suppliers can choose for direct sales to customers without any involvement of third parties. As the case may be, they could opt to make sales through either in-house commercial representatives or a designated sales team. Note that commercial representatives can benefit from certain rights, for instance a clientele indemnity when their employment agreement would be terminated for convenience.
- Second, suppliers can opt to commercialise their goods or products through the intermediation of commercial agents. A commercial agent is a self-employed intermediary who negotiates a sale or purchase of goods or services on behalf of another person, called the principal. The benefit of working with an agent is that the supplier

retains direct contact with its customers and also has greater control over elements such as prices and marketing efforts.

- Furthermore, suppliers also have the choice to sell their products or goods to distributors, who resell these goods or products to customers. In this case, the sales are realised first between the supplier and the distributor, and afterwards between the distributor and the customer. Distributors may benefit from legal protection. The determining factor of a distribution agreement lies in the presence of a sustainable and structured cooperation, following which those sales are made. Hence, mere consecutive sales are insufficient to qualify as sales made in the framework of a distribution agreement.
- Finally, suppliers or manufacturers can also opt for franchising, based on which distributors would manufacturers or resell products while using the franchisor's trade name or business formula. Through franchising, suppliers can significantly increase their presence and growth in a specific market while minimising their economic risks and investments as these are materially borne by the franchisee. In exchange for a franchise fee, the franchisee then benefits from a certain company formula and knowhow, together with permanent assistance and close cooperation with the franchisor. Usually, the franchisee has to comply with numerous obligations of the franchise laid out in a manual.

*Law stated - 12 January 2022*

### **Legislation and regulators**

What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

The Book X of the Code of Economic Law ( Wetboek van Economisch Recht / Code de Droit Economique ) regulates the relationship between a supplier and its distributor, agent or other representative. It provides also for some pre-contractual obligation for some specific commercial partnership.

*Law stated - 12 January 2022*

### **Contract termination**

Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

There are restrictions for suppliers to terminate a distribution relationship in some cases. In general, on the one hand a contractual relationship of an agreement of a definite term cannot be ended without cause before the end of this term, unless the agreement provides for such a termination. On the other hand, agreements of an indefinite term can be ended at all times without cause, given a reasonable notice period, as parties cannot be bound to an agreement forever.

Indefinite and definite term agreements can also be ended for cause. A party may not decide this by itself, but must introduce court proceedings so that the judge will end the agreement in question. However, as we will indicate below, for commercial agency agreements special provisions apply. A commercial agency agreement can be terminated for cause exceptionally when any further cooperation between the parties becomes definitively impossible or when one of the parties commits a material breach. This termination right is restricted by party short and strictly defined delays and formal requirements.



For agency agreements (articles X.1 to X.25 Code of Economic Law) and for exclusive distribution agreements legislation (articles X.35 to X.40 Code of Economic Law) another more protective regime is applicable that we will discuss below.

As stated above, for exclusive distribution agreements, title 3, Book X of the Code of Economic law does not provide for specific mandatory notice period but contains some mandatory rules on the termination. These specific provisions only apply to exclusive agreements concluded for an indefinite period of time. However, when a distribution agreement for a fixed term has been renewed or modified on two occasions, any further renewal or modification is deemed to have been accepted for an indefinite period.

According to article X.36 of the Belgian Code of Economic law, a principal can only terminate an exclusive distribution agreement concluded for an indefinite period of time by notably respecting a reasonable notice period or paying a compensatory indemnity, unless the distributor has committed a 'serious breach'. Article X.36 of the Belgian Code of Economic Law provides also that parties can only agree on the duration of the notice period once the agreement has been terminated by one of the parties.

The notice period should be 'reasonable', which means that it has to allow the distributor to reorganise its activities. To determine a reasonable notice period, the Court will take into account several aspects of the distributorship, such as: the duration of the distributorship, the importance of the distribution activity in the overall activities of the distributor, the size of the territory, the specific investments made by the distributor that are linked to the distributorship and the market share of the brand and the distributed products. On the basis of such criteria, the notice period granted by the Belgian courts usually range between three months to 24 months, with a few exceptional cases where 36 and more were granted (for instance, in the automotive sector when the distributorship represents the entire activities of the distributor).

As stated above, a fixed-term exclusive distribution agreement cannot in principle be terminated before its expiry date. Under mandatory law, in the case of a fixed-term exclusive contract that would be terminated before its normal expiry date, the distributor is entitled to compensation for costs incurred and loss of profit, so as to make up for the situation it would have been in if the principal had not wrongfully terminated the agreement.

Finally, commercial agency agreements with an indefinite term can be terminated without cause by granting a minimum notice period that varies according to the duration of the agency agreement. Per started year, one month's notice should be granted with a maximum of six months. This principle also applies to agency agreements of a definite duration, when the principal is contractually able to terminate the agreement earlier than the end of the definite term. In the case of agency agreements, the same principle applies as with the exclusive distribution agreements of an indefinite term: when the notice period is not respected, the principal must pay a termination indemnity.

*Law stated - 12 January 2022*

### Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

When an exclusive distribution agreement of an indefinite term is ended without cause, the principal should grant the distributor a reasonable notice period. Should this notice period appear to be insufficient, the distributor will be entitled to a compensatory indemnity. Generally, this 'compensation in lieu of notice' or 'compensatory indemnity' is calculated on the basis of the 'semi-gross profit'. The semi-gross profit is generally calculated on the basis of the average net profits generated over the last three years before the notice of the dealer's distributor before taxes, increased with the irreducible overhead costs which the distributor cannot avoid or eliminate upon termination of the agreement by the principal. The latter cost could include items such as rent, heating, lighting, maintenance of premises and equipment, insurance, etc. The semi-gross profit per month will then be multiplied with the amount of months corresponding to the missing months of the 'reasonable' notice period.

Furthermore, for distribution agreements that fall within the scope of Title 3, Book 10 of the Code of Economic law. Pursuant to articles X.36-X.37 of the Code of Economic law, the distributor might be entitled to additional indemnities (goodwill indemnity, reimbursement of costs and investments, redundancy costs of employees):

- Reimbursement of costs and investments, incurred by the distributor within the scope of distributorship, which will continue to benefit the principal after termination (eg, investments for long-term advertisement, conferences);
- Goodwill indemnity or loss of clientele: this compensates the value of the clientele built up by the distributor provided that there is a significant increase in the clientele or business and that those customers will remain with the principal after termination of the distribution agreement.
- The Code of Economic law does not set out any calculation criteria. When determining this indemnity, the courts take into account several parameters such as the evolution of the turnover and the number of clients brought by the distributor, the duration of the agreement. It is to be noted that the court may adjust this indemnity 'in fairness' (ex aequo et bono). It usually amounts between 1 per cent to 10 per cent of the annual turnover of the distributorship or between three to 12 months gross profit of the distributorship, sometimes it is calculated on the basis of the net profit, in which case it can be up to 24 months net profit. This is generally calculated from the distributor's average annual profit generated with the contract products over the last three years before the notice;
- Redundancy cost of employees that distributor had to dismiss as a direct result of the termination of the agreement. These costs are only to be compensated if the employees are dismissed by the distributor due to the termination by the principal of the agreement and that their notice period is longer than the notice period granted by the principal.

The terminated distributor needs to prove that a certain employee had to be laid off because of the termination, which means that that personnel was specifically hired and active for distributing the relevant products in Belgium. Partial compensation could be claimed in case it is not all related to the terminated distribution. Such termination costs can be high depending on the factual circumstances. The distributor must, in principle, give notice to the personnel as soon as the distribution is terminated, although there could be exceptions where it is acceptable that the distributor waits because he or she needs the qualified staff to reorganise its business.

When a commercial agency agreement of an indefinite term is ended with an insufficient notice period without cause, the party terminating must pay a termination indemnity. This indemnity consists of the agent's remuneration, calculated on the basis of the average amount of commissions earned during the 12 months prior to termination, which would have been due if the notice period had been granted. A goodwill indemnity may be due if certain conditions are met. The latter is limited to one year of commission calculated on the basis of the average amount of commission earned during the five years prior to the termination. If the company terminates a commercial agent for convenience reasons, this agent may also claim an additional compensation, in addition to a notice period (or compensatory damages) and goodwill indemnity. This could include specific investments (that are not yet written off), costs of terminating personnel and terminating subagents. As very often agents are individual persons or small companies and in addition only need to find customers for the company, not sell or deliver the actual goods, not provide the aftersales services, etc, additional compensations are not often granted in practice. Discussions with terminated agents are mostly focused on the goodwill indemnity criteria.

*Law stated - 12 January 2022*

### Transfer of rights or ownership

Will your jurisdiction enforce a distribution contract provision prohibiting or restricting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

A distribution contract provision prohibiting or restricting the transfer of the distribution rights to a third party will in principle be allowed.

*Law stated - 12 January 2022*

## REGULATION OF THE DISTRIBUTION RELATIONSHIP

### Confidentiality agreements

Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

There are no restrictions for the enforcement of confidentiality provisions in distribution agreements in Belgium. It is even good practice to include confidentiality obligations in distribution agreements as a confidentiality obligation is one of the measures needed to ensure trade secret protection in Belgium.

*Law stated - 12 January 2022*

### Competing products

Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Distribution agreements often contain non-compete obligations, which are generally enforceable to a certain extent. Such obligations may not limit the freedom of trade and industry too drastically (case law and legal authors argue that any non-compete arrangement should therefore be limited in time, territory and type of business). Moreover, Commission Regulation (EU) No. 330/2010 (the block exemption regulation for vertical agreements) excludes certain non-compete arrangements (such as non-compete obligations, which are imposed for more than five years).

For commercial agency agreements specifically, the Belgian Code on Economic Law provides that non-compete clauses will only be valid if and to the extent that:

- they are stipulated in writing;
- they are limited in scope: they should relate to the type of goods entrusted to the commercial agent by the principal;
- they are limited in territorial scope: they should be limited to the geographical area entrusted to the commercial agent by the principal; and
- they are limited in time: they may not extend beyond a period of six months after the termination of the contract.

*Law stated - 12 January 2022*

## Prices

**May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?**

Determining (minimum) prices is a hardcore restriction under the Commission Regulation (EU) No. 330/2010 (the block exemption regulation for vertical agreements). Suppliers should not restrict the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

However, in the case of a commercial agency agreement, the principal may, in principle, determine the resale prices (considering the agent contracts in the name and on behalf of the principal).

The prohibition to determine (minimum) prices is enforced by the competition authorities (national and EU).

*Law stated - 12 January 2022*

**May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?**

Determining (minimum) prices is a hardcore restriction under the Commission Regulation (EU) No. 330/2010 (the block exemption regulation for vertical agreements). Suppliers should not restrict the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

The presumption of incompatibility of imposed resale prices extends to indirect price-fixing mechanisms, such as clauses making the granting of rebates or refunds subject to compliance with a recommended price level, clauses fixing the distributor's margin, etc. Arguably, a refusal to deal with customers who do not follow a pricing policy will result in indirect price-fixing and thus be prohibited.

*Law stated - 12 January 2022*

**May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?**

A distribution agreement may include a clause that stipulates that the price offered to a distributor is no higher than the lowest price offered to other distributors.

*Law stated - 12 January 2022*

**Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?**

A seller may in principle charge different prices to different customers, if it does not act contrary to competition law (eg, if it does not constitute an abuse of a dominant position), consumer law or other specific provisions that might apply (depending on the circumstances).

However, it is recommended to justify price differentiation with objective reasons in order to avoid accusations (and possibly even litigation) of discrimination, abuse of rights, etc.

Moreover, new legislation regarding the abuse of economic dependence has recently come into effect in Belgium. The new provisions explicitly state that there may be an abuse of economic dependence when a seller is applying different conditions to equivalent services with respect to economic partners, thereby placing them at a disadvantage in competition.

*Law stated - 12 January 2022*

### **Geographic and customer restrictions**

May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

In general, the restriction of the territory into which or of the customers to whom a distributor may sell the contract goods or services, is prohibited. Such restrictions, through both direct obligations or through indirect measures (eg, refusal to grant rebates or refunds, refusal to deliver, etc), are presumed to infringe competition law (and constitute hardcore restrictions).

However, Commission Regulation (EU) No. 330/2010 (the block exemption regulation for vertical agreements) provides for certain exceptions to said presumption.

In particular, the restriction of active sales (as opposed to passive sales) into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, is allowed where such a restriction does not limit sales by the customers of the buyer. Active selling means actively prospecting customers located within the exclusive territory or belonging to the exclusive customer group of another distributor. Consequently, passive sales (in response to unsolicited requests from customers) may not be restricted. The restriction of internet sales, which are perceived as passive, is therefore also prohibited.

Moreover, the restriction of (active and passive) sales to end users by a distributor operating at the wholesale level of trade is allowed. This allows a supplier to keep the wholesale and retail level of trade separate.

*Law stated - 12 January 2022*

If geographic and customer restrictions are prohibited, how is this enforced?

The prohibition of geographic and customer restrictions is generally enforced by the relevant (national and EU) competition authorities, but private legal action (with an aim to obtaining damages) is also possible.

*Law stated - 12 January 2022*

### **Online sales**

May a supplier restrict or prohibit e-commerce sales by its distribution partners?

In general, the restriction of the territory into which or of the customers to whom a distributor may sell the contract goods or services, is prohibited. Such restrictions, both through direct obligations or through indirect measures (eg, refusal to grant rebates or refunds, refusal to deliver, etc) are presumed to infringe competition law (and constitute hardcore restrictions).

Commission Regulation (EU) No. 330/2010 (the block exemption regulation for vertical agreements) provides for certain exceptions to said presumption.

In particular, the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, is allowed where such a restriction does not limit sales by the customers of the buyer. However, passive sales (sales in response to unsolicited requests from customers, such as in particular internet sales) may not be restricted.

The restriction of active and passive sales (ie, including internet sales) to end users by a distributor operating at the wholesale level of trade is allowed. This allows a supplier to keep the wholesale and retail level of trade separate.

Moreover, the European Court of Justice has ruled that competition law does not preclude a contractual clause:

which prohibits authorised distributors in a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods from using, in a discernible manner, third-party platforms for the internet sale of the contract goods, on condition that that clause has the objective of preserving the luxury image of those goods, that it is laid down uniformly and not applied in a discriminatory fashion, and that it is proportionate in the light of the objective pursued

(ECJ 6 December 2017, C-230/16, ECLI:EU:C:2017:941). Therefore, a supplier may apply some strict restrictions to the online sales.

*Law stated - 12 January 2022*

**May a distributor or agent restrict a supplier's sales through e-commerce intermediaries into the distribution partner's territory? May it require the supplier to obtain reports of such sales by territory and a payment of 'invasion fees' or similar amounts to the distribution partner?**

In the Guidelines on Vertical Restraints, issued by the European Commission, the latter states that restrictions of the supplier's sales are not a hardcore restriction, as article 4(b) of the Commission Regulation (EU) No. 330/2010 (the block exemption regulation for vertical agreements) only concerns restrictions of sales by the buyer (distributor) or its customers. Hence, arguably, the distributor may require reports and a payment of invasion fees or similar amounts.

However, article 4(e) of the Commission Regulation (EU) No. 330/2010 (the block exemption regulation for vertical agreements) prohibits the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods. Consequently, an agreement between a manufacturer of spare parts and a distributor who incorporates these parts into his own products, may not, either directly or indirectly, prevent or restrict sales by the manufacturer of these spare parts to end users, independent repairers or service providers.

*Law stated - 12 January 2022*

## **Refusal to deal**

**Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?**

A supplier should be careful when it refuses to deal with particular customers, since such action could be contrary to

competition law (eg, if it constitutes a restrictive practice or an abuse of a dominant position) or could be qualified as an abuse of rights (ie, an abuse of the freedom to contract).

Moreover, new legislation regarding the abuse of economic dependence has recently come into effect in Belgium. The new provisions explicitly state that there may be an abuse of economic dependence in the event of a refusal of a sale, a purchase or other transaction.

Consequently, we recommend suppliers to justify every refusal to deal with objective reasons in order to avoid accusations (and possibly even litigation) of discrimination, abuse of rights, etc.

Under the Commission Regulation (EU) No. 330/2010 (the block exemption regulation for vertical agreements), a supplier may prohibit:

- active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer where such a restriction does not limit sales by the customers of the buyer;
- sales to end users by a buyer operating at the wholesale level of trade;
- sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system; and
- the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.

*Law stated - 12 January 2022*

## Competition concerns

Under what circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

A distribution or agency agreement could be a reportable transaction under Belgian law if it leads to a lasting change of control resulting, in particular, from:

- the merger of two or more previously independent undertakings or parts of such undertakings;
- the acquisition, by one or more persons already controlling at least one undertaking or by one or more undertakings, of direct or indirect control, over one or more other undertakings or parts thereof; or
- the creation of a joint venture performing all the functions of an autonomous economic entity on a lasting basis.

However, note that such a distribution or agency agreement will only be considered a reportable transaction if certain thresholds (ie, certain turnover thresholds of the undertakings concerned) are met.

Authorities will generally check whether the transaction could harm the functioning of the market (i.e. competition), for example, by creating or strengthening a dominant position (however, any significant impediment to effective competition below the threshold of dominance can lead to a decision of incompatibility).

*Law stated - 12 January 2022*

Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?



In addition to the general principles of competition law (which are widely known), new legislation regarding the abuse of economic dependence has recently come into effect in Belgium.

In general, competition law (including the abuse of economic dependence) is enforced by national and EU competition authorities.

However, a Belgian Act of 6 June 2017 inserted Title 3 Action for damages for breach of competition law in Book XVII of the Belgian Code on Economic Law, which enables natural or legal persons who have been harmed by a breach of competition law to claim damages before the Belgian courts.

*Law stated - 12 January 2022*

## **Parallel imports**

Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

In general, distributors should make sure to address the parallel or 'grey market' import issues that might arise (eg, other companies not respecting the prohibitions with regards to active sales in certain territories or towards certain customers) to the supplier, instructing the latter to tackle such issues. If the supplier refuses to tackle the issue or does not assist the distributor, the latter could consider litigation. In order to obtain a strong position in (possible) litigation, we recommend the distributor to explicitly stipulate the supplier's obligations (to tackle certain issues or to assist in the case of certain issues) in the contract.

*Law stated - 12 January 2022*

## **Advertising**

What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or require them to share in its cost of advertising?

In general, suppliers and distributors may advertise and market the products they sell as long as these advertisements respect the advertisement legislation. A supplier may also pass all or part of the advertising costs to its distribution partners. However, in the case of commercial agency, such an obligation must be part of the precontractual information made available to the agent.

*Law stated - 12 January 2022*

## **Intellectual property**

How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology transfer agreements common?

Suppliers can safeguard their intellectual property rights by filing for registrations for patents, trademarks and designs. Other intellectual property rights do not require registration, but still benefit from protection. These are copyright and trade secrets.

When communicating or letting distributors use intellectual property rights, distributors should include licence agreements (so-called technology transfer agreements) to the distribution agreements that grant the distributors the right to use the different intellectual property rights of the supplier without the ownership being transferred. Such a



licensing agreement can also include the obligation for the distributor to notify third-party infringements of the supplier's intellectual property rights. Furthermore, such a licence agreement can contain a clause that provides that intellectual property rights developed by the supplier in the context of the distribution relationship will be transferred to the supplier and that the distributor will provide assistance with such a transfer and the potential registration.

*Law stated - 12 January 2022*

## Consumer protection

### What consumer protection laws are relevant to a supplier or distributor?

The supplier and distributor must take into account Book VI of the Code of Economic Law and articles 1649-bis to 1649-octies of the Civil Code on consumer protection. However, the section of the Civil Code regarding consumer protection is currently under revision and will be part of the new Book 5 of the Civil Code.

*Law stated - 12 January 2022*

## Product recalls

### Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and bearing the cost of a recall?

Manufacturers or suppliers must only bring safe products and services on the market (article IX. 2 Code of Economic Law). If a product or service contains a risk for a consumer, then the supplier must notify the Belgian authorities of this risk. The severity of the risk is not relevant for this notification obligation. This can be done through the Product Safety Business Alert Gateway , which has the advantage that notifications can be made to multiple European member states at once.

Parties may allocate the costs for a recall in their agreement. However, both the distributor and the supplier are responsible to notify the authorities when they know or should know that a product or service is not safe (article IX.8, §4 Code of Economic Law). Parties may allocate the responsibility of this notification obligation and we recommend that the party that notices the risk first must notify the authorities and provide the other party with a copy of that notification.

*Law stated - 12 January 2022*

## Warranties

### To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

A supplier may not completely limit its warranties towards the distributors as this would hollow out the distribution agreement and would thus be presumed to be an abusive prohibited clause (article VI.91/5, 3° Code of Economic Law). This does not mean that the supplier may exclude its warranty obligation partially.

Under Belgian consumer law, the seller of a product is held to the legal warranty of two years. Thus, the distributor selling to consumers will be held to respect the legal warranty.

*Law stated - 12 January 2022*

## Data transfers

Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end users of their products? Who owns such information and what data protection or privacy regulations are applicable?

There are restrictions on the exchange of information between a supplier and its distribution partners about the customers and end users when these data are personal data. In that case the General Data Protection Regulation and the Belgian implementing laws are applicable, which means that the processing of these data must be fair, lawful and transparent (article 5 GDPR). It is important to note that personal data are owned by the data subjects (the natural persons they relate to) and thus are not owned by the distributor or the supplier.

Exchanges of these data to third countries, which are countries that are not part of the European Economic Area, are subject to additional safeguards as the GDPR or similar legislation does not apply there. In that case, additional contractual safeguards may be necessary. We can advise further in case a supplier or distributor wishes to transfer personal data outside the EEA.

*Law stated - 12 January 2022*

What requirements apply to suppliers and their distribution partners with respect to protecting the security of customer data they hold?

Suppliers and customers must protect the security of customer data by taking appropriate technical and organisational measures (article 24 GDPR). The extent of these measures depends on the context, the nature of these data, the scope of processing, etc. Note that one of the main principles of the GDPR is accountability. It is thus important that the distributor or supplier can demonstrate that it took, and is taking, the necessary measures.

*Law stated - 12 January 2022*

## Employment issues

May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

As the employment agreements and management agreements are concluded between the distributor and its personnel, the supplier cannot end the agreement. However, it could be included in the distribution agreement that the supplier has a say in the personnel of the distributor. Such key-person clauses ( *intuitu personae* ) are often used in practice but should be carefully drafted.

*Law stated - 12 January 2022*

Are there circumstances under which a distributor or agent, or its employees, would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

If it appears that the supplier has the factual authority over an agent or a distributor and the latter two are in a

subordinate position towards the supplier, then the distribution relationship may be requalified to an employment agreement, which means that the supplier is considered as the employer of that distributor or agent. This entails that the supplier is responsible of respecting Belgian labour law and must pay the salary, social security, taxes of the employees retroactively. These costs in themselves risk being quite high, but the supplier may also be subject to administrative and criminal fines.

The supplier must thus make sure not to exercise too much control on how a distributor or agent organises its activities but the distribution agreement could surely contain clauses relating to the respect of labour laws and provide for its termination in the case of compliance.

*Law stated - 12 January 2022*

## **Commission payments**

**Is the payment of commission to a commercial agent regulated?**

A commercial agent must be compensated for its intermediation for the principal, but parties can freely decide on the type of compensation. Usually, the negotiation of sales is made in exchange for a commission, but it is also possible to agree to a fixed remuneration or a combination of both a fixed and variable remuneration. In that regard, there is very recent case law of the court of appeal of Ghent confirming that the compensation should not necessarily be linked to the negotiations itself.

*Law stated - 12 January 2022*

## **Good faith and fair dealing**

**What good faith and fair dealing requirements apply to distribution relationships?**

The Belgian Civil Code contains a general obligation for parties to perform agreements in good faith (article 1134 Civil Code). Moreover, Books IV and VI of the Code of Economic Law contain provisions that provide with some guidance as to what is an unfair or abusive practice. In addition, the Code of Economic Law also provides for some disclosure obligations in a commercial partnership that are also aimed at establishing a fair relationship between the parties.

*Law stated - 12 January 2022*

## **Registration of agreements**

**Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?**

A distribution agreement does not need to be registered or approved by any Belgian government agency.

However, the supplier or the distributor can only invoke its trademark or patent licence against third parties if it has been registered in the relevant register. More concretely, a copy of the licensing agreement signed by both parties or an extract thereof must be submitted. A trademark licence must be registered with the Benelux Office for Intellectual Property and a patent licence must be registered with the Service of Intellectual Property of the FPS Economy.

*Law stated - 12 January 2022*

## Anti-corruption rules

To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

Suppliers and their distribution partners must respect the anti-bribery and anti-corruption laws of the Belgian criminal code.

*Law stated - 12 January 2022*

## Prohibited and mandatory contractual provisions

Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

The mandatory law provisions applicable to commercial agency agreements and exclusive distribution agreements do not need to be included in the distribution agreement to apply to the parties' relationship, such as provisions relating to precontractual information, termination, indemnities, etc. Moreover, Book VI of the Code of Economic Law contains stipulations on contract clauses that are prohibited or presumed to be prohibited when they are abusive.

*Law stated - 12 January 2022*

## GOVERNING LAW AND CHOICE OF FORUM

### Choice of law

Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

Belgian law provides for a high protection of distributors in the event of unilateral termination of an exclusive or quasi-exclusive distributorship concluded for an indefinite duration.

The legal protection is established by the Title 3, Book X of the Code of Economic law, titled Unilateral termination of exclusive distribution agreement of indefinite duration. These provisions are qualified as overriding mandatory law ( loi de police ) but not as public order law and therefore not as international public order law.

A distributor engaged in a distributorship having effect in all or part of Belgium may always submit its claim to the Belgian courts and the latter are obliged to apply the Distribution Law or Title 3, Book X of the Code of Economic law to a distributorship agreement notwithstanding any clause to the contrary (article X.39 of the Code of Economic Law or article 4 of the former Distribution Act) (article 9.2. Rome I Regulation).

The only way to escape the implementation of the mandatory provisions of Title 3, Book X of the Code of Economic law to the termination of the agreement having effect in all or part of Belgium is to provide for the application of the law of another member state and for a jurisdiction clause according to Regulation (CE) No 44/2001 or Regulation (CE) No. 1215/2012, providing for the jurisdiction of other courts than the Belgian ones. There is an established case law acknowledging the jurisdiction of the foreign EU court if the jurisdiction clause is valid on the basis of the above Regulations. In the absence of such jurisdiction clause, the Belgian judge will be obliged to declare itself with jurisdiction and to apply the mandatory provisions of Title 3, Book X of the Code of Economic law or of the Distribution law.

It should be noted that this tips to avoid the application of Belgian law does not work regarding an issue in the precontractual phase as the agreement cannot be considered as concluded yet. Therefore, whenever possible, it is advisable to provide in the receipt of acknowledgement of the PID a jurisdiction clause such as the one contained in the distribution agreement itself.

On the basis of Rome I Regulation and, more particularly, article 9.3 of such Regulation, the distributor could try to argue that the rules in Title 3, Book X of the Code of Economic law are overriding mandatory law and have to be applied by the foreigner judge but the latter is usually reluctant to do so when the parties have chosen the law of his or her state to rule over the relationship. In addition, this argument could also be challenged on the basis of the fact that the rules in Title 3, Book X of the Code of Economic law only concern the termination of the distribution agreement and are not such as to render the performance of the agreement unlawful (ie, the situation provided in article 9.3 of Rome I Regulation).

*Law stated - 12 January 2022*

### **Choice of forum**

Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Parties can include a jurisdiction clause in the distribution agreement. However, several decisions of the Supreme Court have found that an arbitration clause in an exclusive distribution agreement of an indefinite term subject to the Belgian protective law is not enforceable.

*Law stated - 12 January 2022*

### **Litigation**

What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

The Belgian Commercial Courts have jurisdiction for disputes between companies. It takes between six months to two years to obtain a decision however, parties can appeal the decisions taken by the latter before the Court of appeal. The Belgian judiciary system is underfinanced, which results in very long procedure times, especially in the case of an appeal where this can amount to a period of 10 years. Thus, the option of settling or alternative dispute resolutions can be interesting.

There are no restrictions to make use of courts and procedures for foreign businesses. As Belgium is part of the Council of Europe, parties can expect a fair trial under article 6 of the ECHR.

A litigant can require the opposing party to disclose documents. It is important to note that if that information is confidential, then the disclosing party can require the confidentiality of these documents under the new trade secrets legislation.

A Belgian litigant may however require some financial guarantee from the claimant established abroad if the latter does not establish sufficient income or belongings in Belgium to guarantee the payment of the proceedings' costs and damages in the case of failure of its claim.

**Alternative dispute resolution**

Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

An agreement to mediate or arbitrate or mediate will generally be enforced in Belgium. Lawyers are even obliged to propose to their clients to settle the dispute amicably before turning to judicial procedures. However, an arbitration clause, if it deprives the distributor of the protection of Belgian law, will not be enforceable in exclusive distribution agreements.

The advantage of arbitration is that parties can choose the arbitrators, and these can have technical skills in a specific sector. Arbitration will also be much faster and can be confidential. These advantages may compensate its expensive nature.

Law stated - 12 January 2022

**UPDATE AND TRENDS****Key developments**

Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? Are there any other current developments or trends that should be noted?

The Civil Code is currently under review and is being transformed in an instrument consisting of different books, such as the Code of Economic Law. This revision is not limited to a formal revision as the content is also being reviewed. The Civil Code does not contain specific provisions relating to distributorship, but it does contain general contract law.

The European Commission has also organised a consultation on the Vertical Block Exemption Regulation and its accompanying Vertical Guidelines until 26 March 2021. The Commission intends to revise these instruments before 31 May 2022.

Law stated - 12 January 2022

## Jurisdictions

	<b>Austria</b>	DORDA
	<b>Belgium</b>	Lydian
	<b>Brazil</b>	Vaz e Dias Advogados & Associados
	<b>Canada</b>	Lapointe Rosenstein Marchand Melançon LLP
	<b>China</b>	Ribeiro Hui
	<b>Finland</b>	ADVOCARE Law Office
	<b>Germany</b>	Taylor Wessing
	<b>India</b>	G&W Legal
	<b>Netherlands</b>	Russell Advocaten
	<b>Portugal</b>	Victoria Associates
	<b>Switzerland</b>	MLL Meyerlustenberger Lachenal Froriep Ltd
	<b>USA</b>	Plave Koch Plc