

## PRACTICAL GUIDE

### TAPPING INTO THE FRENCH MARKET: SHOULD YOU USE A COMMERCIAL AGENT OR A DISTRIBUTOR?

Tapping into the French market is a highly strategic matter. Unknown products, unknown trademarks have to conquer new markets, and seduce many new consumers. As such, the choice of a supplying process for your products is paramount. Traditionally, foreign companies introducing their products into the French or European markets choose either distribution agreements or commercial agency to canvass and prospect for new clients.

The purpose of this document is to help your company decide whether it should choose a commercial agent or a commercial distributor for supplying products to France. This document offers a brief outline of French regulations on commercial agency and distribution agreements, as well as a few questions to help you evaluate which of these two approaches best suits your company's needs.

#### ➤ WHAT ARE THE PRIMARY DIFFERENCES BETWEEN COMMERCIAL AGENTS AND DISTRIBUTORS?

**Distributors:** Through distribution agreements, distributors are entitled to purchase your company's products and to sell these products independently in France under specific conditions jointly defined between the distributor and your company.

Thus, your company may be able to place certain contractual restrictions on the distributor's activities. However, the distributor remains free to choose its own profit margins, terms, and conditions.

**Commercial Agents:** Commercial agents are independent under French law, but they act on behalf of your company. The commercial agent must be granted commissions for each contract he executes on behalf of your company (articles L.134-5 and article L.134-6 of the French Commercial Code). You may also negotiate with the agent to set up a basic salary in addition to, or in lieu of, the legal commissions. Such provisions must be reviewed very carefully, however, because they may change the legal classification of the agreement.

Generally, you can mandate that your agent negotiates and signs contracts on your behalf. Under Article L134-1 of the Commercial Code, you may even allow the agent to conclude contracts on your behalf, as long as you stipulate this in the agreement. Despite these regulations, under French law you still cannot impose clients on the agent. Although your company may advise the agent and give minor instructions, the agent always has full power to choose the clients to be canvassed.

#### ➤ HOW MUCH CONTROL DO YOU WANT TO HAVE OVER YOUR SUPPLY CHAIN IN FRANCE?

This question calls for sub-questions such as:

- Do you seek a long-term relationship with your French supplier?
- Do you prefer a strict or more flexible business arrangement?
- Do you owe liability to French consumers?

*Distributors:* If your company prefers to exercise less control over the supply of goods, it may prefer to use distributors. If you use a distributor, you will mostly ensure that your brand and your company's name get known, without the burden of managing a whole distribution network. On top of that, you will have the flexibility to give that distributor either conditional or exclusive rights to supply goods in France.

Besides, if your manufacturing company wishes to avoid liability to the consumer, it may be wise to choose a French distributor. Even though the distributor is an independent actor, it purchases your products upon its own terms and receives full title to the goods. Therefore the distributor assumes all liability to the consumer.

*Commercial Agents:* If your company prefer more control over the supply chain, it may be best to use a commercial agent. This is because an agent acts on your company's behalf. As such, he executes his missions independently and shall not exceed the scope of his duty. Indeed, the agent owes your company a duty of loyalty and information throughout the life of the contract (article L.134-4 of the French Commercial Code).

Such control is guaranteed by the fact that the agent also depends on your company for commissions, and that the agent can transfer his contract to a new agent only if your company gives prior consent.

Otherwise, as a French commercial agent would act on your company's behalf, you would therefore be directly liable to the consumer for any of the agent's actions. By using commercial agency for the supplying of its products, your company would practically be at the head of the French supply chain, and thus supposed to entirely control it.

### ➤ WOULD YOUR CONTRACT INCLUDE SPECIFIC PROVISIONS?

Although the French legal system honours the parties' freedom to contract, some specific regulations may interfere when drafting commercial agreements.

*Distributors:* For example, distribution agreements often include **trademark licensing**. Such agreements must abide by specific rules applying to intellectual property rights. The duration of the agreement shall be limited and depend on the existence of the trademark; the geographic area shall depend on the area covered by the trademark; the agreement shall be registered, etc.

Distribution agreements also often include **non-competition clauses**. Your company must take great precautions when drafting non-competition clauses, because they are strictly regulated under French and European competition laws.

European Commission regulations strictly prohibit manufacturers from setting up selective distribution networks that are anti-competitive. Pursuant to EC regulations 2790/1999, are so described agreements that may contain one of the following provisions:

- non-competition provisions whose duration exceeds five years,
- provisions restraining the free flow of products, such as provisions aiming at setting quotas,

- provisions restraining the distributor's freedom of trade,
- etc.

These criteria have to be perused according to the whole practical context of the commercial operation. Indeed in most situations, a non-competition provision shall not impeach the distributor to exercise its activity for more than two years. It is therefore paramount to carefully analysis the market and the interests of each party in order to assess a reasonable duration for such provisions.

*Commercial Agents:* Commercial agency contracts often include similar non-competition provisions by which the agent usually waives to exercise any similar activity after the termination of the agreement and for a limited duration.

Obviously, such provisions shall abide by the same EC regulations are they are likely to be construed as vertical anticompetitive agreements.

### ➤ HAVE YOU ANTICIPATED THE CONSEQUENCES OF THE CONTRACT'S TERMINATION?

This questions calls for sub-questions such as:

- Should your agency contract be a limited term or an unlimited term agreement?
- What would be the financial consequences of the termination of the contract?

*Distributors:* Termination of distribution agreements is barely regulated. As freedom of contract prevails, parties are free to choose the duration of the agreement, as such as the termination conditions.

Most distribution agreements provide for a limited duration. Consequently, once the contract is terminated, both parties are free to enter into new commercial agreements without competing with each other, provided that they respect usual confidentiality obligations, etc.

Moreover, unless otherwise provided in the agreement, the distributor is not per se entitled to any financial compensation in the event of termination of the contract, even in an exclusive agreement.

When the contract is concluded for an unlimited duration, the distributor shall not be entitled to any compensation either, unless, pursuant to article L.442-6 of the French Commercial Code, the manufacturer has not given "reasonable" notice prior to the termination. Such reasonable notice depends on the duration of the contractual relationship, of the ease of finding a new trading partner, etc.

On top of that, under specific circumstances, distributors may sometimes obtain specific compensation, if, for example, they have invested in equipment solely for the purpose of distributing the product.

*Commercial Agent:* If the contract is a limited term agreement, the contract is over as soon as the agent has discharged his duties.

However if the contract is an unlimited term agreement, one of the parties can terminate it by giving advance notice that is not less than (article L.134-11 of the French Commercial Code):

- 1 month for the first year of agency;
- 2 months for the second year of agency;
- 3 months for three or more years of agency.

Each of these terms may be increased in the contract. However, no advance notice is required when terminating an agency for a major breach of contract.

The most significant issue related to the termination of commercial agency is related to the termination indemnity owed to the agent. Indeed, it is extremely tough to dismiss an agent under French law.

Unless initiated by the agent or provoked by his fault, the termination of the agreement entitles the agent to a considerable amount of compensation. The indemnity must be equal to the commissions lost because of the termination of the contract. Such compensation depends on both the nature and the duration of the contractual relationship. According to French caselaw, an indemnity equal to two years of commissions (calculated as the average amount paid over the last three years) seems to be a standard indemnity amount.

#### ➤ DO YOU HAVE A CHOICE OF LAW PROVISION?

Your company generally has a choice regarding which country's laws will govern commercial distribution and commercial agency agreements. An agreement may be drafted in English, Mandarin, Arabic, or any other language.

However, in the event that it is submitted to the French courts, the French translation will always prevail in the judge's eyes. Therefore it is advisable to consult a French lawyer when drafting and translating the contract.

*We hope this information has been helpful to your company. The details provided here are general in nature. The law on this subject is complex and is best navigated with the help of a French attorney. If you have specific questions, we invite you to consult us so we may provide a legal solution that is tailored to your company's needs.*

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