


Distribution in the UK and the EU

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In this article, we look at the different ways in which brands can structure their distribution network in the UK and the EU, and what the legal considerations are.

Exclusive, sole and non-exclusive distribution

Brands often appoint distributors at the wholesale level when entering a new market. Appointing a distributor can be an ideal way to test the market in a new country to see how the brand fares. Obviously, the key for the brand is finding the right distribution partner or partners which have the experience, relationships with target retailers, and logistics capabilities to properly service the market.

A distributor can be appointed as an exclusive distributor (the natural meaning of which is that the brand cannot itself sell the products in the territory and cannot appoint anyone else to do so either). Often terms such as 'exclusive' and 'sole' are used to mean the same thing, although they technically mean different things – sole distributor usually means the brand won't appoint another distributor within that territory, but the brand reserves the right to sell the products itself within the territory. Because of the confusion around these terms, the distribution contract must spell out what is intended to be the scope of the appointment (including critically whether and to whom the brand may sell within the territory) because if the contract is not clear it could lead to a dispute.

The quid pro quo for granting the distributor the exclusive right to sell the products at wholesale in the territory should be that the distributor is required to purchase a minimum value of stock per season or year from the brand, and to use its best efforts to promote and increase the sale of the brand's products in the territory. An exclusive distributor will likely want the contract to have an initial lock-in period during which neither side can terminate the contract other than due to serious breach. This is to allow the distributor the time to make a return on its investment – it takes time to build up a brand which is new to the territory.

From the brand's point of view, the distribution agreement should carefully define the extent of the exclusive territory (or customer group) and the products which the distributor can sell. This will avoid disputes down the road if the brand introduces a new collection or product line which it does not want to sell to the distributor.

Brands must also carefully consider the scope of any carve-outs from the distributor's exclusivity. Typically, the brand will reserve the right to sell the products directly to certain key retailers in the territory, and to sell direct to consumers via its own ecommerce website. If the brand sells its products on online marketplaces such as Amazon, that should also be addressed in the contract.

Selective distribution

Instead of appointing exclusive distributors at the wholesale level, brands may choose to operate a selective distribution system at the retail level across the EU and UK. The brand will set certain criteria for retailers who want to join its selective distribution system – these criteria will often be qualitative (intended to maintain a certain level of quality in product presentation, promotion and sale) but may also be quantitative (limiting the number of retailers admitted to the system). For example, brands will often set quality based criteria dictating how an authorised retailer's store must be fitted out and maintained, where the store must (or must not) be located, the brand positioning and brand adjacencies within the store, and the expectations in terms of staff training.

The main advantage of selective distribution is that the brand has more control over the distribution of its products because authorised retailers are only permitted to sell to consumers and to other authorised retailers. This significantly reduces the risk of a brand finding its

products for sale in an undesirable store, because the system is a closed one.

Brands will usually have separate criteria for brick and mortar and online sales, although criteria for online sales must not be designed to deter the retailer from selling online.

Competition law considerations

Before appointing distributors in the UK and EU, the brand should ensure it understands the competition law regimes in the UK and the EU (which are similar but not identical) and the sorts of practices it must avoid.

There are various activities which will constitute automatic breaches of competition law, such as a brand dictating or 'encouraging' distributors to sell at minimum prices, preventing or doing anything which discourages a distributor from selling the products online, or preventing distributors from selling into other territories (although there are limited exceptions to this rule to protect exclusive distributors in other territories and to protect the closed nature of selective distribution systems). These rules are relevant to the contract, but the bigger risk area is ensuring that the day-to-day dealings which the brand's sale team has with distributors and retailers do not cause the brand to be in breach of competition law.

The consequences of breaching competition law are very serious (including fines of up to 10% of group global turnover) and brands will often put in place training and guidance for their sales teams to avoid informal conversations and emails/messages that step the wrong side of the law.

What happens on termination?

A brand's key concern on termination will be controlling what happens to the stock held by the distributor and avoiding a situation where the distributor sells it in a fire sale. Brands also often face issues getting their outstanding invoices paid by the distributor on termination, and for that reason should be wary of allowing distributors large credit lines. The distribution contract should set out clearly what the brand's rights are in respect of stock and payment on termination and should require the distributor to cease using the brand's IP immediately (unless the distributor has a sell-through period for remaining stock).

Finally, brands should be aware that in some EU countries (but not in the UK), distributors have rights on termination to 'goodwill compensation' payments which are akin to the rights which commercial agents have on termination. Before terminating the distribution contract with a distributor, therefore, the brand should consider its exposure to claims from the distributor.

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