

Distribution & Agency

Contributing editor
Andre R Jaglom



2017

GETTING THE
DEAL THROUGH

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Contributing editor

Andre R Jaglom

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Netherlands

Tessa de Mönnink

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Direct distribution

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

Yes, under Dutch laws, a foreign supplier may establish its own entity in the Netherlands to import and distribute its products.

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

Yes, under Dutch laws, a foreign supplier may be a partial owner of a local company – situated in the Netherlands – of the importer of its products.

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

Importers owned by a foreign supplier may be subject to any form of business entity existing under Dutch laws, in particular: private limited liability companies (BVs); public companies (NVs); sole proprietorships; general partnerships; and limited partnerships. Private limited liability companies and public companies are legal entities. General partnerships, limited partnerships and sole proprietorships are non-legal entities. The question of whether a business entity is a legal entity or not affects the importer's liability.

The requirements for forming and maintaining a business entity depend on what form of business entity is incorporated. In the event that a private limited liability form is used by the importer, the following requirements apply: a statement of no objection from the Dutch Ministry of Justice and a notarial deed of incorporation including the articles of association.

The formation of business entities is, in particular, governed by:

- Book 2 of the Dutch Civil Code (DCC) for legal entities;
- Book 7A DCC; and
- the Commercial Code.

There are also several specific laws, for example:

- the Works Councils Act;
- the Commercial Register Act 2007; and
- the Commercial Register Decree 2008.

All business entities must be duly registered in the Commercial Register of the Dutch Chamber of Commerce. Further information can be found at www.kvk.nl/english/.

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

Business entities that are incorporated under foreign law, but are active on the Dutch market rather than within their own country, are subject to the Companies Formally Registered Abroad Act (the CFRA Act). The CFRA Act does not apply to members of the European Union (EU members) and countries that are members of the European Economic Area Agreement. All other entities will have to comply with certain requirements that also apply to Dutch entities (registration in the Commercial Register and the filing of annual accounts with the Commercial Register where the business entity is registered).

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

Yes, a foreign supplier may own an equity interest in the local entity that distributes its products in the Netherlands.

6 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?

In principle, taxable profits realised by corporate entities that are for tax purposes resident in the Netherlands – for example, Dutch limited liability companies (BVs and NVs) – are subject to the Dutch corporate income tax rate of 25 per cent insofar as their taxable profit is in excess of €200,000. The first €200,000 of taxable profit is taxed at a reduced rate of 20 per cent. Dividends received and capital gains derived from a shareholding to which the Dutch participation exemption applies are exempt from Dutch corporate income tax.

Dividends distributed by a Dutch tax-resident company are generally subject to 15 per cent Dutch dividend withholding tax. A reduced rate or an exemption from Dutch dividend withholding tax may be available; for example, as a result of the application of a tax treaty or if the Dutch participation exemption applies. In principle, dividends distributed to an EU shareholder holding more than 5 per cent are also exempt from Dutch dividend withholding tax. In general, Dutch corporate taxpayers can credit dividend tax withheld against corporate income tax due.

Individual shareholders holding more than 5 per cent in the nominal share capital of a company (substantial interest) are generally subject to Dutch individual income tax in respect of dividends received and capital gains derived from such substantial interest at a flat rate of 25 per cent. Individual shareholders holding less than 5 per cent in the nominal share capital of a company are generally subject to Dutch individual income tax at a flat rate of 30 per cent calculated over a deemed return of 4 per cent on the average value of such shareholder's total amount of savings and investments.

Individuals performing distribution activities in the Netherlands, either in the form of tax-transparent partnerships or as sole entrepreneurs, are generally subject to income tax at progressive rates, up to a maximum rate of 52 per cent. Dutch individual entrepreneurs may apply a number of beneficial tax facilities.

No taxes are levied upon the set-up of a business in the Netherlands.

Wages paid by a Dutch employer are subject to Dutch wage withholding tax and Dutch social security premiums. Dutch wage withholding tax is creditable against the Dutch individual income tax liability in full. Attractive tax benefits are available for foreign employees if these employees have certain specific skills that are scarce in the Netherlands.

Dutch value added tax (VAT) is currently 21 per cent. Reduced VAT rates of 6 per cent and zero per cent apply in respect of certain supplies, such as the supply of agricultural products. Imports performed by Dutch entrepreneurs generally are subject to Dutch VAT. In principle, the importing entrepreneur may credit or refund the VAT paid on the imported supplies. Exports from the Netherlands are generally exempt from Dutch VAT.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

All of the below distribution structures are available to a supplier in the Netherlands.

Distributors

Distribution agreements are agreements (or relationships) whereby the supplier provides its distributors the right (and also obliges them) to resell and distribute the relevant products or services in its own name and on its own account.

Commercial agents

Commercial agency agreements are agreements (or relationships) whereby the principal charges the commercial agent, which the latter undertakes, for a remuneration, to act as an intermediary in the realisation of contracts and possibly to conclude such contracts in the name and on account of the principal without being subordinate to the latter.

According to article 7:428 of the Dutch Civil Code, an agency relationship exists when:

- the agent is self-employed;
- the relationship between agent and principal is not of an incidental nature;
- the agent does not act on his own behalf but acts for the account of and in the name of his principal; or
- the agent acts as intermediary in the conclusion of contracts between the principal and third parties, or concludes contracts himself for the account of and in the name of his principal.

Use of (employed) sales representatives

Employment agreements are agreements whereby the sales representative is working, in general for a monthly salary, according to specific instructions and in the name and for the account of the employer.

Franchising

Franchise agreements are agreements (or relationships) whereby the franchisor provides its individual franchisees with the right (and also obliges them) to exploit a business following a business concept of the franchisor. In the course of the contract's duration, the franchisee has the right and duty to make use of the franchisor's brand name, know-how, the technical and business methods, the method of working and other matters that fall under the industrial and intellectual property of the franchisor. The franchisor supports the franchisee with some continuous commercial and technical support. Part of a franchise contract may be a distribution/resale agreement for products or services.

Some franchise agreements are lengthy documents with handbooks prescribing in detail how the franchisee should use the franchise formula; other franchise agreements are short and concise. In theory a franchise agreement may also be established based on an oral agreement. In practice, it is common to conclude a franchise agreement in writing.

Right to sell under a private label

A supplier may also provide a third party the right to resell and distribute its products or services under the third party's private label. Such sales are on the third party's own account and in its own name.

Trademark licensing

Trademark agreements are agreements whereby the licensor grants the licensee the right (and may also oblige it) to exploit the relevant trademark for certain products or services in a certain territory. The licence can be granted on a pending application or a registered trademark right, and can be limited in time or perpetual, exclusive or not exclusive, limited in scope (for certain use only), for free or for consideration. A trademark licensing agreement can be (very) similar to a franchise agreement.

Joint venture

A supplier may also work closely with a local distributor in the form of a contractual business undertaking (without any partnership or incorporation) as a joint venture or set up a business entity with the local distributor.

8 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?

Distribution, franchising and trademark licensing

Distribution, franchising and trademark licensing are, from a civil law point of view, not specifically regulated under Dutch laws. Instead, the general laws of contract apply as well as Dutch court decisions. Book 6 DCC sets out the requirements relating to the formation of contracts. These provisions must be read in conjunction with the more general rules regarding juridical acts; that is, acts intended to invoke legal consequences provided in Book 3 DCC.

There are no industry-regulatory constraints for distributors or licensees in general. However, franchisors that are members of the NFW are bound by the rules in the European Code of Ethics for Franchising (the Code) drawn up by the European Franchise Federation (www.eff-franchise.com). Furthermore, a Dutch Franchise Code was presented to the Minister of Economic Affairs by the Drafting Committee on 17 February 2016. The Minister stated he is in favour of transforming the current Dutch Franchise Code into franchise law in the Dutch Civil Code. According to the Minister this should be effectuated as soon as possible. As the definition of 'franchise' in the Dutch Franchise Code is rather broad, those developments could, besides franchise relationships, also affect distribution and licence relationships in the Netherlands.

There are no specific government agencies that regulate the relationship between a supplier and its distributor, franchisor or licensee.

When dealing with distribution, franchise and licence agreements – and other vertical agreements – competition laws and more particularly, Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the applicability of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices) are applicable. The Authority for Consumers and Markets (ACM, www.acm.nl/en) ensures compliance in the Netherlands with competition laws (for more detail see question 21).

Commercial agency

The relationship between the principal and its agent is governed by section 4 of Book 7 DCC (articles 7:428 BW up to and including 7:445 BW and articles 7:401, 402, 403, and 426(2)). There are no specific government agencies that regulate the relationship between a principal and its commercial agent.

Employed sales representatives

The relationship between a supplier and an employed sales representative is governed by section 10 of Book 7 DCC (articles 7:610 up to and including 7:691) and several other employee-related legislation such as the Working Hours Act, the Minimum Wages and Holiday Allowance Act, etc. The employment relationship can furthermore be governed by the conditions laid down in a collective labour agreement.

9 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?

Distribution agreement

Dutch laws do not restrict or limit the right to terminate a distribution agreement. However, this does not mean that a party can always terminate the agreement and even if it can, it may be obliged to respect a certain notice period or pay compensation or indemnity, or both. A contract with an indefinite term may in principle be terminated for convenience. This is the prevailing opinion, affirmed by the Dutch Supreme Court. However, under certain circumstances a party may have to show cause to terminate the agreement.

In any case, a reasonable notice period must always be observed, the length of which depends on the circumstances of the matter. Although standard practice was that courts granted notice periods of six to 12 months, some recent higher court decisions imposed notice periods of two to three years, even when the contract stated a shorter period.

If the contract term expires, and the supplier decides not to renew the distribution relationship, it depends on the provisions in the contract if the minimum notice periods as set out above apply. In case of automatic renewal, the same provisions apply. In the case of automatic termination, there is, in principle, no need to observe a minimum termination notice period (unless the supplier has indicated towards the distributor (explicitly or implicitly) that it wants to continue the agreement, also after expiration).

Agency agreement

If the agency agreement does not include a notice period, the required minimum notice periods are:

- four months during the first three years;
 - five months during the fourth, fifth and sixth years; and
 - six months during the following years.
- (Article 7:437(1) DCC.)

In the event the (written) agency agreement does include a notice period, the minimum of such notice period is:

- one month during the first year;
 - two months in the second year; and
 - three months in the following years.
- (Article 7:437(2) DCC.)

In the event of a termination of an agency agreement, it should be terminated at the end of a calendar month.

If the contract term expires, and the principal decides not to renew the agency relationship, it depends on the provisions in the contract whether the minimum notice periods as set out above apply. In case of automatic renewal, the agency agreement automatically becomes an agreement for an indefinite term. In case of automatic termination, there is, in principle, no need to observe a minimum termination notice period. A goodwill compensation may, however, still be payable by the principal (see question 10).

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

Distribution agreement

In the event of termination of a distribution relationship, the supplier may be required to pay an indemnity for investments or costs made by the distributor, in case these investments cannot be earned back due to the termination of the contract and the supplier was aware – or should have been aware – of the investments made. So far, a higher court in the Netherlands has not granted a goodwill compensation to a distributor upon the termination of a distribution agreement.

Commercial agency

In the event of a termination of a commercial agency relationship, the principal may have to compensate its agent for goodwill and investments or costs made, which the agent may lose as a result of the termination.

Under Dutch law, an agent is entitled to a client compensation (also well known as goodwill compensation) upon the end of the agency agreement if certain requirements have been met. These requirements are:

- the agent has brought the principal new customers or an increasing number of agreements with existing clients;
- the agreements with such customers still provide the principal a substantial advantage; and
- and such payment is reasonable given the circumstances of the case (article 7:442 1 DCC).

The amount of this compensation cannot, unless otherwise agreed, exceed the equivalent of one year's compensation, based on the average earnings over the previous five years, or, if less than five years, over the actual duration of the contractual relationship (article 7:442 2 DCC).

According to article 7:442 paragraph 4 DCC, no goodwill compensation is due if:

- the agreement was terminated by the principal and the reasons for termination can be attributed to the agent;
- the agreement was terminated by the agent, unless the agent terminated for reasons that can be attributed to the principal; or

- if the termination is justified by age or illness of the agent, with a view to which the agent cannot reasonably be expected to continue his or her work as an agent.

Goodwill compensation is also not due if the agent transfers the rights and obligations related to the agency agreement to a third party following an agreement relating thereto with the principal.

It should be noted that the right to receive goodwill compensation expires if the commercial agent fails to invoke the rule within one year after termination of the agency agreement (article 7:442 paragraph 3 DCC).

11 Will your jurisdiction enforce a distribution contract provision prohibiting 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?

Yes, under Dutch laws, a contract provision prohibiting the transfer of the distribution rights is enforceable.

Regulation of the distribution relationship

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

Confidentiality covenants in distribution agreements are enforceable under Dutch law.

Distribution contracts in the Netherlands may include a financial penalty provision that can be invoked in the event of the other party violating the confidentiality clause. The courts shall have the right to mitigate such penalties. This mitigation right cannot be contractually excluded.

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

Distribution agreement

Following Dutch and European competition rules, it is not permitted to impose any direct or indirect non-competition obligations on the distributor (such as restrictions on the distribution of competing products) if the duration of these obligations exceeds a duration of five years. Non-competition obligations that are tacitly renewable for a period of five years or more are considered to be concluded for an indefinite period and are thus also not allowed.

Non-compete arrangements are arrangements that result in the buyer purchasing from the supplier (or a designated third party) more than 80 per cent of the buyer's total purchases of the contract goods and services. However this five-year limitation does not apply when the goods or services are resold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer.

Following Dutch and European competition laws, it is not always allowed to agree upon non-compete obligations on the distributor after the distribution agreement has been terminated. Such non-compete obligation is only allowed when it is deemed indispensable to protect know-how transferred by the supplier to the buyer, is limited to the point of sale from which the buyer has operated during the contract period and is limited to a maximum period of one year.

Commercial agency

Following article 7:443 DCC, it is not allowed to impose a non-compete obligation if the duration of such obligation exceeds a duration of two years after the duration of the contract. Furthermore, it can only relate to the goods (or services) and territory that are the subject of the agency agreement. The non-compete provision has to be in writing.

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

Distributor

No; a supplier may not control the prices at which its distribution partner resells its products. As in all other EU member states, Commission

Regulation 330/2010 and the EC Guidelines thereto provide the relevant framework for the competition law assessment of all vertical agreements with an effect on trade between the member states. This Regulation, inter alia, prohibits resale price maintenance as well as certain restrictions regarding the territory or group of customers that can be served.

Commercial agent

Yes, a principal may control the prices at which it sells its products to its customers. When the agent promotes the products it can be obliged to adhere to the principal's price list and conditions. However a principal may not control the resale prices the customers use in their (re) sales channel.

- 15 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?**

Distributor

A supplier may suggest resale prices, but, as also set out in question 14, he or she may not in any way impose minimum or fixed prices. The distributor should be free to establish the resale prices and may only be held not to exceed a certain maximum price.

Commercial agent

Yes, when dealing with a commercial agent a principal may in general control and influence the prices. In fact, those are not 'resale' prices as the principal contracts with the customers itself, or the agent does this on its behalf and on its account.

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

Distributor

A supplier may not set minimum resale prices; however, the supplier may be allowed to give its distributor or reseller a 'lowest price guarantee'. Please note, however, that such 'across platform parity agreements' (also referred to as APPA clauses), clauses between suppliers and retailers that specify a relative relationship between prices of competing products or prices charged by competing retailers, have recently been scrutinised by the European Commission as clauses such as this can have an anticompetitive effect, especially with large, dominant, players in the market. APPAs are characterised by two elements: (i) a vertical element, because they involve firms at different levels in the value chain, and (ii) a horizontal element, because they link prices of competing goods and/or of competing retailers. Another peculiarity is that the parties to such agreement are suppliers and retailers, while buyers are not and are often not even informed of their existence, even though these agreements concern the prices the buyers are paying. As those clauses may be anticompetitive and therefore prohibited, it is advisable a lawyer is consulted before inserting clauses like this.

Commercial agent

The principal may control the sales prices to its customers and is also allowed to offer its customers a 'lowest price guarantee'. However a principal should be careful when it implements APPAs; see also under 'Distributor'.

- 17 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?**

In principle, no. However, within certain - selective - distribution systems, a supplier should not establish conditions in a 'discriminatory or subjective' manner.

- 18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are the limitations on such conduct enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?**

Distributor

Within the Netherlands (and the EU), practices that restrict trade are prohibited. The Commission Regulation on vertical agreements, inter alia, prohibits certain restrictions regarding the territory or group of customers that can be served. A supplier may restrict the geographic areas or categories of customers to which a distributor resells and it may also reserve certain customers to itself. Exclusive territories and exclusive customers are permitted, provided that 'passive sales' may not be restricted, which includes sales via the internet. Passive sales are sales where a distributor responds to unsolicited requests from individual customers about the products. A supplier may, however, prohibit its distributors from actively approaching customers outside its exclusive territory by targeted marketing (eg, by sending direct emails, visits, or by advertisements on its website specifically targeted at a group of customers outside its territory) (active sales).

Commercial agent

A principal may in general restrict the geographic areas or categories of customers to which its commercial agent offers the products on behalf of the principal.

- 19 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?**

To restrict a distributor to sell to a customer outside its (exclusive) territory is in general not allowed as this prohibits 'passive sales' (as set out in question 18). However, within a selective distribution system, a selective distributor can be restricted from selling the products or services outside the selective distribution system. Furthermore, in commercial agency relationships the agent can be obliged to verify the creditworthiness of a customer and the principal may refuse customers to its discretion. Finally, the supplier may not allow the sale to certain customers when this damages its brand or reputation or when the supplier wants to keep certain customers (eg, international companies or department stores) for itself. Whether those restrictions are allowed depends on all factual circumstances of the matter.

- 20 Under which 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?**

Acquiring rights of distribution in itself is unlikely to constitute a merger but where an entity, rights plus a brand name plus assets and contracts - and possibly employees who transfer too - are acquired this may constitute the transfer of a business (and the so-called transfer of undertaking rules may apply).

- 21 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?**

EU Commission Regulation 330/2010 and the EC Guidelines thereto provide the relevant framework for the competition law assessment of all vertical agreements with an effect on trade between the member states. The Regulation, inter alia, prohibits resale price maintenance as well as certain restrictions regarding the territory or group of customers that can be served. It is prohibited to limit 'passive sales' by a distributor or franchisee, which includes sales via the internet. It also restricts the duration of a contract where it contains a non-compete clause. As regards purely domestic distribution agreements, the Regulation equally applies by virtue of article 13a of the Dutch Competition Act.

There are no additional Dutch competition laws relating to distribution agreements.

The ACM is charged with competition oversight, sector-specific regulation of several sectors, and enforcement of consumer protection laws. The ultimate goal of the ACM is to create a level playing field, where all businesses play by the rules, and where consumers exercise their rights.

For the ACM, fines are an important way to sanction violators. Fines can be as high as €450,000 or 10 per cent of the relevant turnover. However, the ACM has many other instruments at its disposal, including:

- Orders subject to periodic penalty payments. In order to end violations, the ACM has the ability to impose orders subject to periodic penalty payments on companies. A company is given a deadline before which it must have adjusted its practices. If it fails to do so, it will have to pay the penalty payments until it has made the necessary adjustments.
- Binding instructions. If a company violates a statutory standard, the ACM has the option of giving it a binding instruction. In the instruction, the ACM explains how the law should be interpreted in practice.
- Commitments. Companies can make commitments to the ACM, promising to adjust their practices in order to avoid further enforcement actions.
- Education. Education is an important instrument to make sure that businesses and other organisations comply with the rules. That is why the ACM publishes its decisions, vision documents and interpretations of the rules on its website. The ACM additionally published studies and advisory papers such as market scans and informal opinions (see www.acm.nl/en). Furthermore, consumers themselves can take action. With consumer awareness' campaigns on ConsuWijzer, the ACM seeks to influence consumer behaviour. ConsuWijzer is a portal for consumers in the Netherlands. For more information about ConsuWijzer (in Dutch), see: www.consuwijzer.nl.

The powers of the ACM have been laid down in laws and regulations. These rules determine what the ACM can and cannot do. In several procedures and policy rules, the ACM has clarified how it exercises its powers in practice.

Many investigations launched by the ACM have been prompted by solid leads (tip-offs). These tip-offs may have been submitted by businesses or to ConsuWijzer, but they may have also been submitted by anonymous informers. ACM officials have the authority to enter premises, to request information, to demand access to documents, and to take along data. Such authority does not only apply to business premises, but also to homes. Furthermore, everyone is required to cooperate with ACM investigations. If the ACM comes across correspondence between lawyers and their clients, the ACM will leave such correspondence outside the investigation (legal professional privilege). This applies to both correspondence found at a law firm as well as at the company under investigation.

On 20 April 2015, the ACM published a paper on vertical agreements. With this publication, the ACM provides insight into its strategy and enforcement priorities with regard to vertical agreements. In its enforcement actions, the ACM particularly focuses on those agreements that negatively affect consumers. The paper can be found via: www.acm.nl/en/publications/publication/14226/ACMs-strategy-and-enforcement-priorities-with-regard-to-vertical-agreements.

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

If an owner of a trademark has put a product under that trademark on the European market either him or herself or with his or her consent, there is little he or she can do about further commercial exploitation, such as resale, etc, on the European market, unless the parallel import is done in such a manner that it damages the reputation of the trademark, for example because it is an upscale brand being sold at dump prices or under dump conditions.

23 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 share in its cost of advertising?

See also question 18. A supplier may prohibit its distributors from actively approaching customers outside its exclusive territory by targeted marketing (eg, by sending direct emails, visits or by advertisements on its website specifically targeted at a group of customers outside its territory) (active sales). A supplier may pass (part of) its cost of advertising on to its distribution partner.

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

A supplier may safeguard its intellectual property from infringement (by its distributors and third parties) by monitoring any unauthorised use and by taking the appropriate legal actions, once infringement has been noted. In case of use of a licensee, distributor or agent it is safer to restrict the possible independent legal actions of that party by contract and to preserve all decision-making powers in case of a (possible) infringement. Also, the right to sub-license should be excluded or at least made subject to approval by the trademark owner.

Furthermore, a supplier should ensure that all the relevant IP rights are registered for the relevant territory, keep a record of each (registered) IP right, including ownership and payment of renewal dates, etc, and make sure that all employment contracts deal with IP ownership and vest rights in the company.

Patents

A supplier must ensure that before the application of a patent is filed, employees and all relevant third parties (such as possible licensees) sign a non-disclosure agreement. Patent searches can reduce the likelihood of infringement (consider patent monitoring).

Trademarks

A supplier must ensure the copyright of any logo is assigned to the trademark owner. If the trademark is licensed it is important that the trademark owner maintains a degree of quality control over how the mark is used and on what goods and that the goods bearing the trademark meet the quality standards of the trademark owner.

Copyright

A supplier must ensure there are systems in place to prevent unauthorised use of the copyrighted materials. The copyright sign is not required to obtain any copyright but can certainly be helpful as a warning to third parties.

Trade secrets and know-how

All licensees, distributors and agents should sign a confidentiality agreement. Upon termination of each licence, distribution, agency or other agreement, all relevant confidential information and documents should be returned to the company or destroyed. All information that is confidential should be marked as such.

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

Following the European Directive on Consumer Rights (2011/83/EC), the consumer protection laws have recently been reinforced in the Netherlands (as implemented in the DCC (Books 6 and 7) and in the Consumer Protection Enforcement Act. Many of the (new) provisions are relevant for both a supplier and a distributor. Among others, there is a 'cool-off period' for consumers and the information obligations have been reinforced and extended. These obligations apply to sales in a shop, in an online store and outside (eg, on the street).

The following rules apply for consumers in the Netherlands in relation to the purchase of products or services (summarised):

Conclusion of agreements

Since June 2014, consumers are better protected. They need to confirm in writing or digitally an agreement concluded by telephone.

Cool-off period of 14 days

When a consumer purchases something online or at the door or by telephone, a mandatory cool-off period exists of 14 days instead of the previous seven days. A consumer can return something within this period without any reason or motivation and is entitled to be reimbursed.

Guarantee on products

Consumers are entitled to a statutory guarantee when they purchase a product. The product needs to be in conformity of what one can expect. When a product is faulty, the consumer is entitled to a repair without charge, a new product or be reimbursed.

Rights when one is being sent a product without asking for it

When a company sends a consumer a product without the consumer asking for it, the consumer may keep the product without paying for it. When a consumer chooses to return the product to the company, the company will have to bear the costs for returning the product.

Rights when loaning money

Consumers have rights in relation to loaning money, among others they may terminate a loan agreement within 14 days after conclusion thereof. Furthermore the lender, like a bank, needs to give the consumer clear information up front.

Misleading trade practices

A misleading trade practice means when a seller provides wrong, insufficient or misleading information or uses aggressive sales techniques. According to the law, misleading and aggressive sales are prohibited. Consumers can nullify such transaction or file a complaint with ConsuWijzer.

Help and advice for consumers

At ConsuWijzer (part of the ACM) consumers receive free advice and information about their rights.

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

Following EU Regulation 178/2002/EC, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, all (possible) unsafe food products must be recalled within a very short period of time after detection. Both the supplier and the distributor are responsible for carrying out such recall. Such responsibility cannot be designated to a particular party. However, as professional parties, they can agree with each other who bears what costs in connection with the recall.

27 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?

Following article 6:187 DCC, the producer of a product cannot exclude or limit its liability for its products towards end customers or natural persons. A party that imports goods into the EU is also considered a 'producer'. However, as professional parties, the supplier and the distributor can agree between themselves who will ultimately bear the costs of a product liability claim. Any such arrangement will not have an effect towards the end customer or natural person as product liability provisions in the DCC are mandatory laws one cannot exclude or limit.

28 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?

Yes, there are indeed restrictions on the exchange of information on customers and end-users. In case of a distribution relationship, the distributor will generally be the owner of such information. The information cannot just be exchanged with the supplier, unless, for example, the exchange of specific information is necessary for the handling of an order. The Dutch Data Protection Act (DPA) is applicable.

The DPA defines personal data in line with the standard definition of personal data as any information relating to an identified or identifiable natural person. The DPA primarily applies to and imposes restrictions and obligations on data controllers. Nevertheless, the DPA provides that the data processor is liable as regards the data subject where its activities result in infringements of the DPA and damages, and requires the data processor to ensure the confidentiality of the data. A data controller must provide the fair processing information to data subjects prior to obtaining the personal data from them or from third parties, unless this information is already known to the data subject. If the personal data has been obtained from a third party and providing the fair processing information would be impossible or take a disproportionate effort or is required by law, this obligation does not apply. The DPA requires the data controller to implement the general data security obligations. The data controller may, in deciding the appropriate level of security, take into account not only the state of the art but also the costs of implementation.

The processing of personal data by a data processor must be in accordance with a written contract containing the standard processor obligations and the data controller is required to supervise compliance with these obligations, eg, via contractually agreed audits.

Additional obligations arise under the Breach Notification Law from 1 January 2016. This imposes a general obligation to notify the Data Protection Authority and data subjects of data security breaches that are reasonably likely to result in serious adverse consequences for the protection of personal data. The Data Protection Authority will provide further detail of what constitutes 'serious adverse consequences'.

The notification to data subjects must include the nature of the infringement, the institutions that can provide more information concerning the breach and recommend measures to mitigate the negative effects of the security breach. The notification to the Data Protection Authority must include the information above and also include the technical details and background of the breach, a description of the probable consequences of the infringement on the processing of personal data and the measures taken or proposed by the data controller in order to remedy the consequences.

The obligation to notify the data subjects does not apply if the data controller has taken the appropriate technical protection measures to protect the data. However, the Data Protection Authority can still request the data controller to notify the data subject, if the Data Protection Authority has reasons to believe that the breach may have adverse consequence for their privacy. Failure to comply with the Breach Notification Law can lead to with administrative fines of up to €810,000 or 10 per cent of the annual net turnover of the company.

Under the DPA transborder dataflows may take place where they satisfy the standard conditions for transborder dataflow. Where consent of the data subject is relied on, this consent should be unambiguous. There is no obligation to notify the Data Protection Authority of any transborder dataflow that satisfies the standard conditions for transborder dataflow. Where these conditions are not met, an individual licence must be obtained. Binding corporate rules are accepted in the Netherlands and it is a member of the mutual recognition club. There is no specific procedure for mutual recognition. Binding corporate rules must be submitted with an application for a licence for transborder dataflow.

In the Netherlands the Data Protection Authority is the authority charged with supervising compliance with the DPA and related legislation. In order to promote compliance, the Data Protection Authority deploys a variety of instruments in the area of supervision, enforcement and communication.

Supervision

The Data Protection Authority is not in a position to investigate every alleged violation of the law. It has therefore developed a set of criteria to determine whether to conduct an investigation. The Data Protection Authority will conduct an investigation when there is a suspicion of serious and structural violations that affect a lot of people, that can be addressed by using its competences and if the issue at stake falls within the priorities it sets annually.

The Data Protection Authority may also choose, for example, to send a warning letter to an organisation or to speak with it on the matter at hand. This will mainly be done with regard to possible violations that do not meet the criteria mentioned above. Such a letter or conversation

Update and trends

At the beginning of 2015, the Ministry of Economic Affairs appointed a drafting committee for a Dutch franchise code, consisting of two members representing franchisee interests, two members representing the interests of franchisors, and assisted in this by two members provided by the Ministry of Economic Affairs. The activities of the Drafting Committee initially led to the presentation on 16 June 2015 of a consultation version of the Franchise Code, after which stakeholders were given a period of (only) six weeks to submit their input to this code. This procedure has led to a great deal of criticism on the part of franchisors, who felt they were not consulted and who had given no mandate for the far-reaching obligations contained in the particular code. Other parties too, such as branch associations and similar organisations, objected to the draft code. The Minister then decided work on the Franchise Code should be continued, with greater support from the Ministry. This has led to the present version of the Franchise Code, presented to the Minister by the Drafting Committee on 17 February 2016. In October 2016, the Minister stated he is in favour of transforming the current Franchise Code into franchise law in the Dutch Civil Code. According to the Minister this should be effectuated as soon as possible. As the definition of 'franchise' in the Franchise Code is rather broad, those developments could, besides franchise relationships, also affect distribution and licence relationships in the Netherlands.

may already be enough to bring the violation to an end. If an organisation refuses to cooperate or if the Data Protection Authority receives further complaints against this organisation, it may decide to investigate.

Enforcement

When the Data Protection Authority has, in an investigation, established violations that are still continuing, it can start enforcement action. The Data Protection Authority is competent to impose a conditional fine on organisations, subject to a penalty for non-compliance. They will be given a certain period to terminate the violations. When the organisation fails to do so, it will have to pay the financial penalty set, which can amount to up to (currently) €820,000.

Communications

External communication is also an important instrument in reaching compliance with the law. The Data Protection Authority maintains contact with the media, it meets with branch organisations and other stakeholders and gives presentations on a regular basis. In addition, the Data Protection Authority provides information by telephone and on its website: www.autoriteitpersoonsgegevens.nl/en.

29 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?

Yes, it is possible to arrange this in the contract.

30 Are there circumstances under which a distributor or agent 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?

In principle, distributors or agents are deemed independent entrepreneurs. Hence, no labour and employment considerations apply. However, they may qualify as 'employees' on the basis that the relationship between the distributor or agent and the supplier does not correspond with the agreement as it is in fact an employment relationship. If the agreement is considered an employment agreement, the distributor or agent is, inter alia, entitled to minimum wage, holiday allowance and payment during illness. Also, laws regarding termination of the employment agreement, including payment of severance, apply. According to tax law, the supplier is required to withhold income tax and social security benefits where the tax authorities deem the relationship between parties a (fictitious) employment relationship. Each agreement is considered on its own merits. The name and wording of the contract between the parties is not decisive. The courts look at the intention of the parties when entering into the agreement, as well as the way in which the parties have given substance to their relationship. If it is established

that the distributor or agent is obliged to perform the agreed duties in person, the supplier pays the distributor or agent, directly or indirectly, for these duties and a relationship of authority can be established which manifests itself in the right of the supplier to give specific instructions which the distributor or agent must follow, an employment relationship can be assumed. The following criteria prove to be important: equivalence of the contracting parties, the ability of the distributor or agent to let someone else perform the duties (eg, third parties or employees of the supplier), the distributor or agent bearing the business risk and economic independence of the distributor or agent.

As long as the distributor or agent truly acts as a distributor or agent, pursuant not only to the contract but also to its day-to-day activities, no employment relationship should be deemed to exist. Particularly if the distributor or agent is contracted via his or her Dutch limited liability company, the risk of an employment relationship is limited, at least from a civil law perspective. The tax authorities have a different view on this. However, to minimise the risk from a tax law perspective, the supplier could ask the distributor or agent to submit a declaration of independent contractor status, which the distributor or agent can obtain through the Dutch tax authorities. If a distributor or agent can produce such a declaration, the tax authorities will in principle not assume a (fictitious) employment relationship.

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

Yes, this has been regulated in the DCC. An agent is entitled to commission for orders confirmed by the principal after termination of the contract, where the conclusion of that agreement was mainly attributable to the efforts of the agent and such confirmation took place within a reasonable period of time after termination (article 7:431(2) DCC). A provision that makes payment of commission dependent on the execution of the order (and payment by the customer) must be made explicitly (article 7:432(2) DCC).

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

There is a general legal obligation on parties to deal with each other in good faith. Under Dutch laws, general civil law is governed by the principle of reasonableness and fairness. The principle of reasonableness and fairness may not only supplement the existing contract and relationship (based on article 6:248(1) DCC), but may also derogate from the contract that the parties agreed upon at an earlier stage, in the event such provision is, in the given circumstances according to the principle of reasonableness and fairness unacceptable (based on article 6:248(2) DCC). The standard to derogate from an agreed provision is high. This said, a (very) large supplier should be especially aware that a provision in an existing contract that is very one-sided (eg, a provision that the distribution relationship may be terminated by the supplier at any given moment, respecting a notice term of only 30 days), especially when dealing with a (very) small distributor could be set aside by the principle of reasonableness and fairness, if such provision is unacceptable in the given circumstances. It is not possible to predict what kind of provisions may be set aside, if any, since the court will consider all relevant circumstances, including the economic power of each party, the dependency of the parties on each other, the duration of the contract, the investments made by either party, what each party could reasonably expect from the other party and all other relevant circumstances. As a general rule, Dutch courts have a tendency towards protecting a 'weaker' (smaller) party at the expense of an economically stronger (larger) party.

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

There are no particular requirements for distribution agreements or intellectual property licences. Both agreements can even be granted orally, although a written agreement is always preferable for evidentiary purposes. Trademark licences can only be invoked against a third party after registration with the relevant register (holding the registration of the licensed intellectual property right). This is not the case for a distribution agreement.

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

Unlike the UK Bribery Act, the Netherlands does not have specific anti-bribery laws, except for the general obligation for companies to do business in a responsible manner.

35 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?

Distribution agreements

There are no other specific restrictions on provisions in distribution contracts or limitations on their enforceability. However, the principles of reasonableness and fairness play an important role in Dutch contract law. See also question 32.

Commercial agency agreement

All mandatory law restrictions on provisions in agency contracts are contained in articles 7:428 up to and including 7:445 DCC and 7:401, 402, 403 and 426(2), including the following obligations: the principal must assist the commercial agent to perform its activities, provide the agent with the necessary information, give a warning where it foresees that a forecast changes and inform the agent in a timely manner where it will not conclude an agreement as provided by that agent (7:430 DCC).

Governing law and choice of forum

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

Distributor

There are no restrictions on the parties' contractual choice of a country's law to govern a distribution contract.

Commercial agent

There are no restrictions on the parties' contractual choice of a country's law to govern a commercial agency contract. Nevertheless, a mandatory rule of law contained in article 7:442 DCC (based on articles 17 and 18 of European Directive 86/653/EEC) entitles the commercial agent to a goodwill compensation, if the commercial agent performed its activities in the Netherlands (or any other European member state). It is not possible to exclude this goodwill compensation by a contractual choice of law of a different country.

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

There are no restrictions on the parties' contractual choice of courts or arbitration tribunals.

38 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?

In cases where there is no valid arbitration provision, disputes can be resolved before a civil judge. The sub-district court is competent in smaller claims (under the amount of €25,000) and for particular issues, such as employment and rent-related disputes. Larger claims may be brought before the civil judge of the district court.

In cases where the contract contains a valid arbitration provision, or parties agree upon arbitration after the dispute has started, disputes can be resolved before an arbitrator. The choice for arbitration has to be made in writing. The Netherlands Arbitration Institute (NAI, www.nai-nl.org/en/) is well regarded and is in general less expensive than the more internationally well-known ICC arbitration.

Foreign businesses are not restricted in their ability to make use of these courts and procedures and can expect fair treatment. In principle, there is no difference in the treatment of foreign and domestic business. A disadvantage for a foreign business, however, can be that Dutch court proceedings will be conducted in the Dutch language.

Dutch laws do not provide a general obligation to allow the other party access to all relevant documents it has in its possession as a preparation for proceedings. Following article 843a of the Dutch Code of Civil Procedure Rules, there is only an obligation to disclose documents if the three cumulative conditions set out in this article are met: a party must prove that it has a legitimate interest in disclosure; the request is made for 'certain documents'; and the documents requested relate to a legal relationship to which the requesting party is a party. A litigant can also try to get a testimony from an adverse party. Witness examinations are held on the basis of a court order. This will usually be in the form of an interim judgment. A party to the conflict who is called as a witness is obliged to appear in court and to give testimony. Persons who could criminally implicate themselves by their testimony have the right to refuse to give evidence.

39 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?

Yes, a written agreement to mediate or arbitrate disputes will generally be enforced in the Netherlands and a Dutch court will declare itself incompetent in such event. That said, on 3 June 2014, the High Court of Amsterdam declared itself competent in a matter where Subway (an international restaurant chain) and its Dutch franchisee had signed an agreement in which the parties had chosen to deal with the dispute through arbitration in New York. The High Court ruled that such choice

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of law clause, under applicable Liechtenstein laws, was too burdensome on the side of the franchisee, especially because the franchisee is economically a much smaller party.

The main advantages of arbitration are:

- arbitration offers a choice regarding the language of proceedings – the regular courts in the Netherlands only accept the Dutch language;
- it offers the possibility of agreeing on the country and area in which the proceedings will be conducted;
- it offers the possibility of choosing the number of arbitrators and the time limitations;
- it is, generally speaking, concluded more quickly than regular court procedures;

- it may be dealt with by appointed experts instead of or in addition to lawyers; and
- parties can agree to observe secrecy in arbitration. Regular court proceedings are public.

The main disadvantages of arbitration are:

- in general, it is much more expensive than regular court proceedings;
- regular court proceedings offer the possibility of appeal; and
- the quality of arbitration may not always be secured, depending on the actual arbitration forum, although NAI and ICC arbitration in general should be of good quality.

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