

Distribution Q&A: Ireland

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Ireland-specific information concerning key local and commercial issues that arise when appointing a distributor.

This Q&A provides country-specific commentary on *Practice note, Distribution: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

Regulation and legal formalities

1. Is distribution specifically regulated by national law? Are there any special rules or definitions applicable to:

- Exclusive distribution?
- Sole distribution?
- Non-exclusive distribution?
- Selective distribution?
- Is any legislation pending, which is likely to affect distributions?

Are there any formalities that a supplier must comply with when setting up a distribution network, for example, any registration or disclosure requirements?

No specific legislation regulates distribution agreements. Distribution agreements are governed by several different areas of law such as contract law, competition law and intellectual property law. Each of these will be instrumental in how a distribution agreement is drafted and applied in practice.

There are four types of distribution agreement:

- An exclusive distribution agreement is an agreement where a supplier agrees to sell their products to one distributor only for resale in a particular territory. In addition, the distributor typically will not be permitted to actively sell those products outside of that territory.

- Sole distribution refers to a situation where a supplier retains the right to sell to consumers directly in a territory while a sole distributor is also appointed to distribute the goods in the same territory.
- Non-exclusive distribution involves a situation where a supplier retains the right to sell to consumers directly in a territory while a distributor may be one of several third parties who can also sell in that territory.
- Under a selective distribution system the supplier undertakes to sell the contract goods or services, either directly or indirectly:
 - only to distributors selected on the basis of specified criteria; and
 - where these distributors undertake not to sell those goods or services to unauthorised distributors within the territory reserved by the supplier to operate the system.

Parties wishing to provide for sole, exclusive, non-exclusive or selective distribution systems should explicitly state so in their contracts. They should precisely define the rights and obligations of the supplier and distributor.

The Competition and Consumer Protection Commission (CCPC), Ireland's competition law enforcement agency, does not currently have the power to impose fines for breach of restrictions on anti-competitive agreements (including distribution agreements).

Only the Irish courts may issue fines, following criminal proceedings, for breaches of competition law (both the prohibition on anti-competitive agreements and on abuses of a dominant position). Fines for breaches of substantive competition law may be as high as the greater of EUR5 million or 10% of the annual turnover of the undertaking involved, and/or imprisonment. Only the Irish courts may grant orders for interim or permanent measures by way of injunction (following civil proceedings). Anti-competitive agreements are also deemed void and unenforceable by statute.

EU Directive 1/2019, which must be transposed into Irish law by February 2021, requires that national competition authorities be given the power to impose (or to request courts to impose) civil/administrative fines and interim measures on undertakings.

There are no registration requirements that specifically apply to distribution agreements.

2. Are there any laws, regulations or case law which apply to agency relationships that might be interpreted in such a way as to apply to a distributor relationship as well?

No. Distribution agreements are distinct from agency agreements. A distributor under a distribution agreement acts on its own account, and its relationship with the supplier is subject to competition laws.

An agency agreement will not contravene competition law rules, provided it is a genuine agency arrangement. The labels which the parties to the agreement apply to the agreement will not determine whether or not it is an agency agreement. Rather, the CCPC and the European Commission, as well as the EU and Irish courts, will look at the actual arrangements between the parties to determine if the relationship gives rise in reality to an agency agreement.

An agent will typically have the power to enter into agreements that are binding on the principal, and will bear only a very limited risk in relation to the agreements they conclude on behalf of their principal.

To help avoid any confusion it is, however, advisable to include language expressly disclaiming an agency relationship in the distribution agreement, and to ask the distributor to make it clear to its customers that it is a distributor and not an agent.

Competition law

3. Are there any national laws or regulations that would affect the following business practices:

- Grant of exclusive territory?
- Tied selling?
- Territorial restrictions?
- Customer restrictions?
- Resale price maintenance?
- Minimum purchase targets?
- Imposition by the supplier of restrictions on the sources of supply to distributors?
- Refusal to deal?

Irish and European Union competition law apply to all of the above-mentioned business practices.

Section 4 of the Competition Act 2002 (as amended) is the Irish law equivalent to Article 101 of the TFEU. Given their similarity, it is helpful to consider both section 4 and Article 101 in tandem.

These provisions prohibit anti-competitive agreements between undertakings, as well as concerted practices. Section 4(5) of the Competition Act 2002, which is the equivalent of Article 101(3) of the TFEU, permits agreements which would otherwise be prohibited under section 4(1) in certain circumstances. To be permitted, an agreement must:

- Improve the production or distribution of goods or the provision of services, or promote technical or economic progress.
- Grant consumers a fair share of the resulting benefit.
- Not either impose on the undertakings concerned terms which are not indispensable for the attainment of those objectives, or allow the undertakings concerned the possibility to eliminate competition.

Section 4(3) of the Competition Act 2002 allows the CCPC to approve categories of agreement by written declaration if the CCPC is of the view that the agreement complies with section 4(5). In that regard, the CCPC has adopted a Declaration dealing with Vertical Agreements and Concerted Practices (Decision D/10/001), together with a Notice in respect of Vertical Agreements and Concerted Practices (Decision N/10/01).

The Declaration and Notice are largely based on the European Commission's Regulation 330/2010 on Block Exemptions for Vertical Agreements (VBER) and its companion Guidelines on Vertical Restraints. There are two exceptions:

- There is no equivalent of Article 2(2) of the VBER (the exemption for retailer buyer pools, where no individual member of a buyer pool, or its connected undertakings, has an annual turnover in excess of EUR50 million).
- There is also no equivalent of the European Commission's De Minimis Notice in Ireland, meaning that there is also no Irish equivalent of paragraphs 8-11 of the Guidelines on Vertical Restraints.

Both the VBER and the Declaration dealing with Vertical Agreements and Concerted Practices provide that, where neither the distributor's nor the supplier's market share exceeds 30% on an individual basis, Article 101(1) of the TFEU and section 4(1) of the Competition Act 2002 will not apply. This is conditional on the distribution agreement not containing hardcore restrictions, such as requiring a distributor to charge a minimum price (resale price maintenance), along with other ancillary restrictions such as the requirement that any non-compete clause does not exceed five years in length (*Article 4, Declaration dealing with Vertical Agreements and Concerted Practices*).

In addition to section 4(1) of the Competition Act 2002 and Article 101(1) of the TFEU, consideration must also be given to section 5(1) of the Competition Act 2002 and Article 102 of the TFEU. These provisions prohibit a dominant undertaking from abusing its dominant position. Abuse of a dominant position includes the following practices:

- Imposition of unfair purchase or selling prices.
- Predatory prices (selling at a loss).
- Discrimination between trading customers.
- Refusing to supply or deal.
- Tying the sale of one product to another of the dominant firm's products.

As a general guideline only, a dominant undertaking is generally considered to be a firm with at least a 40% market share. However, this can vary depending on the industry in which the firm is active.

Because of its high market share, a dominant firm will not be able to benefit from exemptions for distribution agreements in the VBER or the Declaration dealing with Vertical Agreements and Concerted Practices. This means, for example, that selective distribution agreements entered into by a dominant firm cannot enjoy certain presumptions of lawfulness.



4. Is there specific competition or anti-trust law regulation of exclusive and selective distribution? Describe briefly.

The full panoply of Irish and EU competition law rules will apply to exclusive and selective distribution agreements. Exclusive distribution and selective distribution are permitted by the Declaration dealing with Vertical Agreements and Concerted Practices and the VBER. However, combining exclusive or selective distribution with additional restrictions may result in withdrawing the protection of the Declaration dealing with Vertical Agreements and Concerted Practices and the VBER from an agreement.

Exclusive distribution is permitted by the VBER and the Declaration dealing with Vertical Agreements and Concerted Practices where only active sales outside the exclusive territory or customer group are prohibited. The distributor must always have a right to make passive sales in response to requests from customers. It is likely that the CCPC would follow the Guidelines on Vertical Restraints and not permit a combination of selective distribution and territorial exclusivity.

A supplier also has the right to restrict:

- Sales by a distributor that is a wholesaler directly to end users.
- Sales in a selective distribution system to unauthorised distributors.
- Sales by distributors of components provided to the distributor for incorporation to anyone who would then use those components for the manufacture of competing goods.

A supplier in a selective distribution system cannot restrict sales to end users by its customers who are retailers (but can restrict operations from an unauthorised location) and cannot restrict cross-supply between distributors in a selective distribution system.

The protections of the Declaration dealing with Vertical Agreements and Concerted Practices and the VBER do not apply to a selective distribution system if the distributors are restricted from selling the brands of competitors of the supplier.

5. Are there any national provisions relating to the imposition of minimum or maximum prices?

Resale price maintenance is prohibited as a hardcore restriction of competition (*section 4, Competition Act 2002*; and *Article 101, TFEU*). It cannot be exempted under the VBER or the Declaration dealing with Vertical Agreements and Concerted Practices.

Maximum or recommended prices are allowed, so long as they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any party.

Minimum pricing is allowed in very limited circumstances (*section 4(5), Competition Act 2002*; and *Article 101(3), TFEU*).

The European Commission's Guidelines on Vertical Restraints (paragraph 225) are instructive in this regard, as they provide examples of when minimum pricing could be justified. These scenarios include the introduction of a new product as a promotion technique or in a franchising context for a short term low price campaign lasting two to six weeks. A minimum price might also be justified where the extra profit margin is used to provide the customer with pre-sale services (where complex products are being sold).

6. Can a supplier impose minimum purchase obligations or targets on a distributor?

Minimum purchase obligations require a distributor to purchase a set percentage of the contract goods or services from the supplier. This is permitted, so long as it is compliant with competition law. This obligation will be classed as a non-compete obligation under the Declaration dealing with Vertical Agreements and Concerted Practices and the VBER if the distributor has to purchase 80% or more of the contract goods or services from the supplier in a given year. In addition to falling under the 30% market share limit, to benefit from the VBER and the Declaration dealing with Vertical Agreements and Concerted Practices, an obligation must not exceed five years in duration.

Additional considerations apply when the firm involved is a dominant undertaking. Minimum purchase obligations and targets (including target-related rebates) may be classed as abuses of a dominant position. Note also that distributors in a selective distribution system must be permitted to cross-supply goods with other distributors in the system.

The distribution agreement can provide that, where any minimum purchase obligations are not achieved, a termination right or loss of exclusivity can apply.

For the potential consequences or sanctions for breach of competition law in respect of minimum purchase obligations, see [Question 1](#).

7. Can a supplier impose exclusive purchase obligations on a distributor?

This is classed by the Declaration dealing with Vertical Agreements and Concerted Practices as a non-compete clause, which can be justified if the relevant market share thresholds (see [Question 6](#)) are not exceeded and the exclusivity clause does not exceed five years. However, such an obligation is prohibited with regard to selective distribution systems, as distributors must be able to obtain the contractual goods or services from other members of the selective distribution system.

8. Are there any laws or regulations relating to restrictive covenants or covenants not to compete during the distribution agreement? To what extent is it possible to continue the restrictions after the agreement has expired? In particular, to what extent does the geographical extent and or the length of time of the restriction affect its enforceability?

Both the VBER and the Declaration dealing with Vertical Agreements and Concerted Practices allow for non-compete clauses both during and after the expiry of the agreement.

A non-compete clause during the agreement must not exceed five years in length (see [Question 6](#)). Restrictions on cross-supplies between distributors in a selective distribution system are also prohibited.

In relation to post-agreement obligations, a restriction on the manufacture, purchase, sale or resale of goods and services may be allowed if:

- The obligation relates to goods or services which compete with the contractual goods or services.
- The obligation is limited to the premises and land from which the distributor operated during the contractual period.
- The obligation is essential for the protection of the supplier's know-how which was transferred to the distributor.
- The duration does not exceed one year post-expiry of the agreement.

A restriction on the use of a supplier's know-how which has not been made public may be unlimited in duration.

If the VBER or the Declaration dealing with Vertical Agreements and Concerted Practices do not apply, then covenants will need to be individually reviewed in line with section 4 of the Competition Act 2002 and Article 101 of the TFEU.

In addition, regard must be had to the common law prohibition on restraints of trade, which takes a restrictive view of these clauses. To be enforceable, they must protect a legitimate interest. The clause can only apply for a reasonable period of time and to the geographical area in which the business is operating.

Additional considerations apply when the firm involved is a dominant undertaking, as these clauses could be classed as abuses of a dominant position.

9. Is the supplier free to impose on the distributor an obligation to buy and keep a full stock of each of the products comprised in the range of products which are the subject of the distribution agreement?

Such an obligation is not specifically restricted by the VBER or the Declaration dealing with Vertical Agreements and Concerted Practices. Therefore, an agreement benefiting from the protections of the VBER or the Declaration dealing with Vertical Agreements and Concerted Practices may include it.

In agreements outside the VBER and the Declaration dealing with Vertical Agreements and Concerted Practices, this provision will have to be individually assessed for competition law compliance. In the groceries sector, specific regulations imposed on large groceries undertakings may affect these practices.

10. Where a distribution network involves trading online how is this regulated?

Online trading is coming under greater scrutiny from the European Commission. Online arrangements will need to comply with the fundamental principles of competition law. Generally speaking, outright restrictions on online sales by distributors are prohibited.

However, in exceptional circumstances, limited restrictions on online sales may be permitted, such as where the supplier of luxury goods protects the luxury image of the goods by limiting the ways in which a distributor may resell the goods (for example, the Coty ban on sales of its products on Amazon, upheld by the CJEU).

Of particular relevance is the European Union's Geo-Blocking Regulation, which came into force on 3 December 2018. Geo-blocking involves discriminating between consumers based on their geographical location. It is prohibited by the Regulation unless it can be justified (for example, where there is a duty to comply with a legal obligation).

Intellectual property

11. Does a distributor enjoy an implied licence to use the supplier's intellectual property rights in performance of its obligations under the distribution agreement?

Depending on the contract terms, an Irish court may imply such a licence (for example, to give business efficacy to the distribution rights granted). However, an express licence grant should be included in the distribution agreement, so that both parties are clear as to the precise scope of the licence and any obligations on the distributor in relation to intellectual property. It is also advisable (for the supplier) for the agreement to state that any goodwill from use of the intellectual property will be for the benefit of the supplier.

12. Is registration of intellectual property licences possible? Does this give any added protection?

It is possible to register licences of registered trade marks (*sections 29(2)(c) and 32, Trade Marks Act 1996, as amended*). It is preferable to register a licence grant as soon as practicable. Non-recordal of a trade mark licence results in a number of disadvantages, in particular for a licensee:

- Unless and until registration is made, the licensee is unable to enforce its rights against a person acquiring a conflicting interest in ignorance of them (*section 29(3), Trade Marks Act 1996, as amended*).
- A court is not entitled to award costs to the licensee in infringement proceedings unless (*section 29(4), Trade Marks Act 1996, as amended*):
 - an application for registration of the licence was made not later than six months from the date of the licence transaction; or
 - the court is satisfied that it was not practicable for the licence grant to be registered, and that an application was made as soon as practicable after the expiry of that period.

13. If the supplier is based abroad, does the distributor need to be registered as owner or user of the trade mark to be able to import goods bearing the trade mark?

No.

14. Does the distributor become entitled to any rights in a trade mark (or any other intellectual property right) by virtue of selling the trade-marked products in its territory?

Generally no. However, there is a risk that, unless the distribution agreement expressly states that trade mark goodwill will benefit the supplier, the distributor may acquire goodwill in relation to the trade marks it uses in its distribution activities. It is therefore advisable that the contract expressly regulate this.

15. Are there any competition law or anti-trust implications of licensing intellectual property rights?

The VBER and the Declaration dealing with Vertical Agreements and Concerted Practices exempt the licensing by the supplier of intellectual property (IP) rights as long as the licensing of those rights is not the primary purpose of the agreement.

If the supplier is a dominant undertaking, then a refusal to grant a licence for the use of IP to another company might be deemed to be an abuse of a dominant position, particularly if the IP at issue is essential for the development of a new product.

16. Can the supplier impose restrictions on the use of the supplier's confidential information by a distributor either during or after the expiration of the distribution agreement?

Yes, subject to competition law and the common law concerning permissible restraints of trade.

Employment law

17. Is there a risk that distributors may be treated as employees of the supplier?

This will not usually be a material risk (on the assumption that the supplier and distributor are corporate entities operating separately, each with their own employees), but depending on the nature of the relationship there could in theory be a risk of the TUPE regulations (see [Question 18](#)) applying (for example, if the distributor provides related services to the supplier, this may trigger TUPE on termination of the agreement).

18. Could employment liabilities of an outgoing distributor be transferred to a new distributor or to the supplier itself?

This may be a concern where, after the termination of the distribution agreement, the supplier proposes to appoint another distributor as a replacement or to set up an in-house distributor. Where there is a service provision change, the contracts of employment of the employees assigned to provide the services are not terminated but are transferred to the replacement service provider.

Under S.I. No. 131/2003 European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (TUPE), if there is a service provision change of this type, the employees of a previous distributor could be held to be employees of the replacement distributor (or of the supplier where the distribution services move in-house).

Tax

19. Will a foreign supplier who appoints a distributor directly in the national territory be regarded as carrying on business for tax purposes in that territory?

A distributor typically has independent status acting in the ordinary course of its business, and will therefore not be a permanent establishment of the foreign supplier. In these circumstances, the foreign supplier will generally not be regarded as carrying on business for tax purposes in Ireland.

20. Are any withholding or other taxes levied in the territory on remittance monies? When and by whom are they payable?

Remitting monies received under most commercial arrangements by a distributor will not give rise to any Irish withholding taxes. However, withholding taxes can be levied in Ireland in some circumstances, (for example):

- Payment of rent to non-resident landlords.
- Payment of interest on bank deposits (DIRT).
- Disposal of certain capital assets by non-residents.

- Payments made by a principal contractor to a sub-contractor in the construction, forestry or meat processing industries.
- Payment of patent royalties.
- The making of certain pure-profit annual payments.
- Distributions made by Irish resident companies.
- Payments of employment income.

21. Will there be any difficulties in a domestic distributor making payment to a foreign supplier, either in local currency or in the currency of the supplier's country? Are there any exchange controls in operation?

There should be no difficulty with an Irish distributor paying a foreign supplier either in Euros (the local currency in Ireland) or in the currency of the supplier's country. There are no exchange controls in operation in Ireland. There are also no restrictions on the repatriation of earnings, capital, interest or royalties. Repatriation payments can be made in any currency. Approval is not needed for foreign investment or capital importation.

Product liability

22. To what extent is it possible to exclude liability as between the distributor and supplier for the supply of defective goods or services? To what extent can a distributor be indemnified against product liability claims?

Under the Unfair Terms in Consumer Contracts Regulations 1995, in a business to consumer contract, a term which has the object or effect of excluding or limiting the seller or supplier's legal liability in the event of a consumer's death or personal injury resulting from an act or omission of that seller or supplier is unenforceable against the consumer. However, there is no equivalent legislative provision that applies in the case of business to business contracts.

In general, parties do not seek to exclude or limit liability for death or personal injury caused by negligence. It is possible that if they purported to do so, then a court would not uphold such an exclusion or limitation, on public policy grounds.

In addition, liability under the Liability for Defective Products Act 1991 for the supply of defective products cannot be limited or excluded (*section 10, Liability for Defective Products Act 1991*). A party will be liable in tort for damage caused wholly or partly by a defect in its products under the provisions of that Act if that person:

- Is the producer of the goods.
- Is the importer of the goods into the EU.
- Has held itself out as the producer by putting its name or trade mark on the products.
- Fails to identify the importer or producer within a reasonable time following a request from a person who has suffered damage.

The distributor may consider requesting one or more specific indemnities from the supplier.

The distribution agreement

23. Are any particular formalities required in relation to distribution agreements?

There are no required formalities for distribution agreements in Ireland. The general principles of contract law will apply. An appropriate bespoke written contract should be negotiated and agreed which sets out the relevant rights and obligations of the parties.

24. Is it possible to incorporate the supplier's standard conditions of sale into the distribution agreement? What do such standard conditions normally cover?

Yes. Subject to certain limitations (namely competition law), it is up to the parties to the agreement to decide its contents. Standard terms and conditions of sale (as opposed to the distribution agreement generally) typically cover:

- Description, specification and price of goods in question.
- Payment mechanism and timeframes.
- Any discounts allowed.
- Obligations as regards time and place of delivery of the goods.
- Any insurance obligations in relation to the goods.

- When risk and title to the goods will pass.
- Consequences of any defects in the goods (including repair, replacement and limitation of liability).
- Ordering procedure and cancellation rights in connection with any orders for goods.
- IP ownership and any licensing issues.

25. Does national law impose any obligations on the supplier or the distributor? Are there any obligations of either party which are typical due to local custom?

There are various general obligations on manufacturers and suppliers of goods.

The Sale of Goods Act 1893 (as amended by the Sale of Goods and Supply of Services Act 1980) provides that, in any sale of goods, certain terms are implied as to title, price, delivery and quality. The most important is that the goods must be of satisfactory quality and fit for their purpose.

There are further requirements under the European Communities (General Product Safety) Regulations 2004, which imposes a duty on manufacturers to ensure that products placed on the market are safe and do not pose a risk to the health or safety of consumers.

The common law tort of negligence will also apply. This creates civil liability if losses are a reasonably foreseeable consequence of the supplier or the distributor taking less than reasonable care.

There are also many product-specific regulations for areas such as foods and medicinal products which will apply on a sector by sector basis.

26. Are any terms implied by law as to the supplier's title to the goods? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

Yes. It is an implied condition of a sale of goods contract that a seller has the right to sell the goods (*section 12(1)(a), Sale of Goods Act 1893, as amended*). There is also an implied warranty that the goods are free from undisclosed charges and encumbrances (*section 12(1)(b), Sale of Goods Act 1893, as amended*).

Parties to a contract are not permitted to exclude this, and any attempt to do so may render the relevant clause void. However, there is an exception to this general rule which states that nothing prevents the parties to such a contract from excluding or varying any right, duty or liability which is imposed by sections 12 to 15 of the Sale of Goods Act

1893, as amended, in relation to "a contract for the international sale of goods" (*section 61(6), Sale of Goods Act 1893, as amended*).

Buyers of goods are only able to improve on these implied title/encumbrance warranties where they have the bargaining power to do so.

27. What term is commonly agreed for a distributorship? Does national law regulate the length of notice periods?

Under common law in Ireland, there is no set or common term for a distribution agreement. A distribution agreement can run for any specific period agreed between the parties or for an indefinite period.

If a contract is silent on the term and on termination without cause, the agreement will be terminable on the giving of reasonable notice by either party to the other party. However, it is prudent to provide expressly for the term of the agreement and also to set out expressly the circumstances in which the agreement can be terminated. This is however subject to competition law principles, which may require a term of no longer than five years (see [Question 3](#), [Question 6](#) and [Question 7](#)).

28. What events will be regarded in law as justifying termination of the distribution agreement? Do any statutory obligations arise on termination? What provision is usually made in the agreement for termination?

Apart from any express termination rights set out in the contract, the common law provides that the right to terminate will arise where the breach amounts to a repudiatory breach, where the breach is fundamental (that is, it goes to the root of the contract so as to deprive the innocent party of the commercial benefits envisaged) or where there is a breach of a condition.

However, it is standard practice for parties to negotiate specific express termination provisions rather than relying (exclusively) on common law provisions. The parties should decide whether either or both the supplier and the distributor should be granted each express termination right. The following are common termination events:

- For convenience and on notice, possibly after an initial term.
- Material breach.
- Insolvency of the other party.
- On a change in control or ownership of the other party.

- Non-compliance with (particular) applicable national laws or where a relevant regulatory consent is no longer held (for example, a marketing authorisation for a drug).

To preserve the common law rights to terminate, any express rights to terminate should be expressed to be without prejudice to the parties' other rights and remedies.

The agreement should also set out the consequences of termination (for example, the return of confidential information, and any transitional period to allow the distributor to sell up remaining stocks).

29. What rights does the distributor have to compensation on termination of the distribution agreement or discontinuation of supply of the products? How is compensation for termination / discontinuation of supply calculated?

Outside the application of the law on commercial agents (which ordinarily ought not to apply to distribution agreements as distributors are not usually given authority to negotiate the sale and purchase of goods or to conclude transactions on behalf of the supplier), Irish law does not provide for a distributor to be compensated on termination or discontinuation of supply, except where the termination by the terminating party is in breach of the relevant contract, and therefore a wrongful termination. Compensation will be calculated as damages by reference to normal contractual principles (for example, taking into account the remoteness of the loss and the extent to which the non-terminating party has mitigated its losses).

See further on the law applicable to commercial agents in Ireland at Country Q&A, Agency: Ireland.

30. Where the distributor holds stock or money or other property belonging to the supplier, can the supplier assert its rights of ownership against third parties:

- In the event of insolvency of the distributor?
- In the event that the distributor has dishonestly disposed of them to third parties?

Generally, monies due to the supplier in such a situation will be actionable and potentially recoverable only as a debt claim against the distributor. If there is no robust retention of title clause in the agreement, the distributor will commonly take title to the products before selling them on its own behalf, resulting in the supplier not being able to maintain a proprietary claim in respect of the goods.

A supplier may be able to alter this situation by means of a suitable retention of title clause, so that title does not pass until full payment is made. This will not prevent the distributor from passing title to a person buying them in good faith (*section 25, Sale of Goods Act 1893, as amended*).

31. What limitations and exclusions of liability might be appropriate?

The relative bargaining position of the parties dictates the limitations and exclusions of liability which will be agreed. Commonly negotiated terms would include a cap on the liability of the supplier under the contract, which takes account of the expected overall value of the contract. It would also be usual for parties to seek to agree exclusions in relation to certain heads of loss (for example, loss of profit, goodwill and revenue). Parties typically also seek to exclude liability for indirect or consequential losses.

Breach of certain obligations (for example, a breach of confidentiality) or liability under certain contractual indemnities included in the distribution agreement may also be carved out from the general cap on liability, or may be subject to a discrete higher cap.

For further information on excluding and limiting liability in goods contracts (including statutory restrictions), see [Country Q&A, Supply of Goods: Ireland](#).

32. Could any terms be implied under local law which regulate the supplier's ability to increase prices to the distributor during the term of the agreement?

No. However, if the relevant terms of the agreement are clear, precise and allow for it, there is no reason that the supplier could not periodically (for example, annually) increase prices charged to the distributor. Competition law principles will still apply, and the distributor must be free to price its goods competitively.

33. Are bank or parent company guarantees, letters of credit or other forms of security common practice in your jurisdiction?

To ensure appropriate protection, especially in situations where the assets of a distributor may be low, a supplier may request a parent company guarantee or other form of credit support to cover any credit terms offered to a distributor. The respective bargaining and financial positions of the parties will be decisive in determining whether any such credit support is sought and achieved.

34. Would it be permissible to include a clause (referred to as a retention of title clause in common law jurisdictions) to ensure the supplier retains ownership (title) of the products until payment has been received from the buyer?

Yes, retention of title clauses are common in Irish distribution agreements.

35. Are there any local laws, rules or practices in relation to set-off?

It is not uncommon in distribution agreements to find a clause which allows the distributor to set-off against a sum it is obliged to pay under the contract against any amount owing to it by the supplier (and vice versa). The bargaining power of the parties and the commercial situation will be highly relevant here.

36. Will any customs duties be payable under the agreement for any products that are received by a distributor in your jurisdiction? Would the supplier or the distributor typically be responsible for paying any customs duties?

This will depend on a number of variables, including:

- The jurisdiction of the supplier.
- Where the jurisdiction of the supplier and distributor are different, the origin of the goods.
- The nature of the goods.

Specific advice should be sought, depending on the distribution agreement's subject matter, on a case by case basis.

37. Are there any compliance obligations on either party under your local laws?

In general, compliance obligations will be highly specific to the nature of the goods and the identity and jurisdiction of the parties under the distribution agreement. However, it is common to see an obligation or a warranty that either party will comply with applicable law and regulation.

As to compliance with supplier policies, it would be common to require the distributor to comply with the brand guidelines (from time to time) of the supplier when making use of the relevant trade marks of the supplier.

With respect to anti-bribery and corruption, the main anti-bribery law in Ireland is now the Criminal Justice (Corruption Offences) Act 2018. Compliance with this is commonly referred to specifically in the contract.

38. Should the distributor be solely responsible for compliance with import licensing laws?

The distributor is usually made contractually responsible as between the parties for arranging, and bearing the cost of, all necessary import licences. However, this contractual position is not mandatory and could be reversed. Either way, it is advisable for the parties to set out clearly which party is responsible for import licensing and permits (or similar) and any associated costs.

39. Is the supplier, distributor or both parties responsible for ensuring products can be sold in the defined territory: (i) before the start of the start if the agreement; and (ii) during the term of the agreement?

This responsibility will depend on the nature of the goods themselves and what they are to be used or sold for. However, a supplier may seek to rely on a distributor's local legal knowledge to ensure products can be sold in the defined territory.

The legal and regulatory position will need to be considered in each specific case as, irrespective of the terms of the contract, the supplier and distributor may face legal or regulatory sanctions if the applicable laws and regulations applicable to sales of particular products are not adhered to.

In case of any doubt, local legal advice should be sought.

40. Would it be common practice in your jurisdiction for a supplier to include a clause / clauses stating that it makes no warranty or representation: (i) as to the validity or enforceability of trade marks; or (ii) as to whether the trade marks infringe any third party intellectual property rights?

No, it would not be common practice. If a distributor were to accept these clauses (that is, if it had very weak bargaining power), it would be important for it to carry out its own on-going due diligence to make sure that it would not be at risk of infringing the trade marks of third parties.

Depending on the scope of any registered trade mark protection, and certainly in the supplier's home or usual markets, it would be more common for the distributor to seek and obtain a warranty that the use of the trade marks in the sale of the products in accordance with the agreement does not infringe the intellectual property rights of any third party. An indemnity covering associated losses, liabilities and costs to the distributor is also commonly sought and obtained.

Division of this risk and responsibility is more complex when international distribution is being undertaken, especially in a country where the supplier does not currently market any such products or have relevant registrations.

41. In your jurisdiction, to what extent can a distributor incur personal liability to a customer?

In addition to general negligence principles, a party will be liable in tort for damage caused wholly or partly by a defect in its product if it:

- Is the producer of the goods.
- Is the importer of the goods into the EU.
- Has held itself out as the producer by putting its name or trade mark on the products.
- Fails to identify the importer or producer within a reasonable time of a request from a person who has suffered damage.

(Section 10, *Liability for Defective Products Act 1991*.)

42. Does the law in your jurisdiction dictate which governing law and jurisdiction will apply to the distribution agreement?

No, parties in Ireland are free to choose the governing law of the contract and the jurisdiction as they wish. Irrespective of the choices in the agreement, a supplier or distributor located in, or with relevant activities in, Ireland will nevertheless be subject to applicable Irish law in relation to its trading activities.

43. Does the agreement need to be in a language other than English for it to be valid and enforceable?

No, the agreement does not need to be in a language other than English for it to be valid and enforceable. For practical reasons, it is best for a contract governed by Irish law, and subject to the jurisdiction of the Irish Courts, to be written in English.

44. How does this agreement need to be executed to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

Execution formalities

There are no specific execution requirements that apply to distribution agreements, which can be signed as simple contracts.

Registration formalities

There are no specific mandatory registration formalities that apply to distribution agreements.

45. Are there any clauses in *Standard document, Distribution agreement: Cross-border* that would not be legally enforceable or not standard practice in your jurisdiction?

Yes. As there is no equivalent to the Contracts (Rights of Third Parties) Act 1999 in Irish law, *Standard document, Distribution agreement: Cross-border: clause 28* should not be included. Linked to this, and as a result of a traditional approach to privity of contract, parties contracting under Irish law should be aware that third parties which are not party to the distribution agreement are not entitled to enforce the benefit of any of the terms of the contract against the promisor under the contract.

46. Are there any other clauses that would be usual to see in a distribution agreement and/or that are standard practice in your jurisdiction?

No.

Brexit

47. From the point of view of your jurisdiction, what points do you anticipate might arise in relation to a distribution agreement which either: (i) contains an express choice of English law as the governing law; or (ii) has a UK-incorporated supplier or distributor as a party and is governed by the laws of your jurisdiction, if, during the life of the agreement, the UK were to cease to be a member of the European Union?

It is possible that Brexit may have an impact on the existing body of laws relating to distribution agreements and arrangements. For more information on the implications of Brexit on the law relating to distribution see *Practice note, Brexit: implications for commercial law: Distribution*.

48. In relation to any points identified in [Question 47](#), would you recommend that any adjustment should be made now to the standard document if it were to be used as an agreement governed by the law of your jurisdiction, in order to address those points in advance?

See [Question 47](#).

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