

CLIENTS COMPENSATION UNDER SPANISH DISTRIBUTION LAW - BIRD & BIRD

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Distribution agreements are not specifically regulated under Spanish Law. This lack of regulation implies that relations between the parties are based on (i) the terms and conditions agreed by the parties (whether written or oral); and (ii) interpretation by Courts, which is very casuistic and tend to apply the Act 12/1992 of 27 May, on Agency Agreement ("Agency Act").

This application may prejudice suppliers, since the Agency Act recognises some economic rights of the agent upon the termination of the agreement. In fact, the main matter of dispute is the possibility of the distributor claiming compensation for clients against the supplier by the application of article 28 of the Agency Act.

The Spanish Supreme Court addresses this issue in its important judgment of 15 January 2008, ruling that article 28 of the Agency Act is not automatically applicable to distribution agreements. Besides, it is necessary to meet the following requirements for its application: (i) the agreement must not have excluded its application; (ii) there should be an analogy between the position of the agent and the position of the distributor (a relevant criterion may be a high level of integration of the distributor in the commercial network of the supplier); and (iii) the distributor must meet the requirements provided in article 28:

- a) The distributor must have procured new clients for the supplier or materially increased the transactions with pre-existing clients;
- b) The activities conducted by the distributor should continue to produce substantial advantages to the supplier after the termination of the agreement; and
- c) The compensation is considered "equitable" based on the existence of contractual obligations limiting competition, commissions that the distributor may fail to receive or any other concurring circumstances.

Another important discussion in this kind of dispute is the total amount that the distributor is entitled to claim for the compensation for clients. The Agency Act set forth a ceiling to the compensation: it may not exceed the annual average amount of remuneration received by the agent during the last five years (or during the entire term of the agreement, if shorter). The problem is that in distribution agreements the distributor does not obtain remunerations from the supplier, but a profit margin after the sale of the products. This issue provokes discussions in Spanish Courts regarding which should be the right calculation: the distributor's "gross margin", "net margin", the "gross profit" or "net profit", each of them considered as different concepts. The use of one concept or another would make the calculation of the final compensation completely different.

Recent judgments of the Spanish Supreme Court have provided some legal certainty adopting a criterion close to the concept of distributor's "net profit". Thus, the Supreme Court, in its judgment of May 19 2017, has repeated its case law doctrine, confirming that the "net profit" is an adequate criterion to calculate the compensation for clients payable to the distributor. The key point here is that the Supreme Court includes within the calculation the structure costs and even payable taxes by the distributor which in fact is to be considered as part of the concept of "net profit". Indeed, this provokes a huge reduction of such compensation to the detriment of the distributor.

In our opinion, the criterion followed by the Spanish Supreme Court could be contrary to the economic and commercial reality underlying distribution agreements. This position considers issues that are not directly linked to the goodwill (clients) generated by the distributor, which should be the real purpose of compensation. We believe that the right concept to be used for such calculation should generally be the distributor's "net margin" (which in simple words is the amount which is left to the distributor after reselling the products).

In any case, it would be advisable that the parties regulate, in the distribution agreements to be governed by Spanish law, the consequences arising from its termination, excluding the compensation (when the supplier is the dominant party in the negotiation) or at least providing a clear criterion for its calculation in order to avoid potential disputes between the parties upon termination of the agreement.

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