



International Distribution Institute



Graf von Westphalen

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# Buyer-reseller or distributor

What is a distributor? When does  
the law (or jurisprudence)  
recognize its status as a provider  
of services?

# Common Definition

- A distributor is a merchant whose business is integrated in the system of distribution of the manufacturer, and who is committed to regularly promote and sell products in the contractually agreed territory and display advertisements and brand signs of the manufacturer, and who bears the commercial risks following from this.

# Definition focussing on the distributor contract

- A framework agreement or contract for services and business management that obliges the distributor to purchase and sell the supplier's goods in its own name and on its own account on the basis of independent contracts and that integrates the distributor into the system of distribution of the supplier.

# German Federal Court, 1958

- It is a contract of its own kind, a framework agreement by which the principal transfers the right of exclusive distribution of certain goods in a territory to a merchant and normally commits itself not to sell in the territory.
- ...by the clauses of the framework agreement, the merchant is integrated into the distribution system of the manufacturer and from a commercial perspective he fulfils the duties of a commercial agent.
- The manufacturer has imposed obligations on the merchants comparable to commercial agents, e.g. obligations to report, to comply with instructions of the manufacturer, non-competition, price fixing etc.



# Requirements

- Purchase agreement with a permanent commitment.
- Integration into the distribution system
- Obligation to promote the sale of the products.
- Contract characterised by service elements.

# Examples for indications

## German Federal Court

- Right of exclusive distribution
- Territory protection
- Prohibition to sell outside the territory
- Obligation to promote the interests of the manufacturer
- Duty to organise the business according to the instructions of the manufacturer
- Specifications regarding the sale and service rooms, furniture, layout and size
- Display of brands
- Duty of stock keeping
- Training of distributor's employees by the principal
- Minimum purchase commitment
- Prices published by the principal, even if nonbinding
- Right to obtain access to business and storage rooms
- Instructions regarding accounting
- Obligations to report
- Duty to comply with instructions on advertisements, including an agreed budget
- Non-competition

# Further indications

- Specific obligations regarding the organisation of the sales activities of the distributor
- Monitoring and supervision rights of the manufacturer

Not sufficient<sup>(1)</sup> and not required, but possibly an indication of the integration into the distribution system:

- Exclusive right of distribution in a territory or territory protection
- Non-competition clause

(1) BGH, 8.6.1988 - I ZR 244/86, NJW-RR 1988, 1305.

# Duty to sell and promote

- The distributor may not decide on a case to case basis to sell the products.
- He is obliged to market and intensely promote the marketing of the product.
- He bears the risks of reselling, of marketing, planning, storage and of credit to his buyers.



## Art. 4 para. 1 Rome I-VO

- Contract for the sale of goods, lit. a
- Or: distribution contract, lit. f:
- Protection of the weaker party,
- Service elements,
- Duty of the buyer (distributor) to support the interests of the seller (supplier)

# Draft Common Frame of Ref.

- Contains Principles, Definitions and Model Rules of European Private Law
- Based on Law of Member States and European Law
- Initiative of European legal scholars, funded by European Commission
- Preparation for Common Frame of Reference as a European Basis in Civil Law

# Draft Common Frame of Ref. (2009)

- Art. IV.E-5:101 DCFR: distribution contracts: under which one party, the supplier, agrees to supply the other party, the distributor, with products on a continuing basis and the distributor agrees to purchase them, or to take and pay for them, and to supply them to others in the distributor's name and on the distributor's behalf.

# Draft Common Frame of Ref.

## **Duties of supplier**

- Art. IV.E-5:201 DCFR obligation to supply, i.e. to conclude sales contracts
- Art. IV.E-5:203 DCFR duty to warn when the supply capacity will be low
- Art. IV.E-5:204 DCFR provide advertising material

## **Duties of distributor**

- Art. IV.E-5:301 DCFR reasonable efforts to promote the products
- Art. IV.E-5:304 DCFR follow reasonable instructions
- Art. IV.E-5:305 DCFR provide with reasonable access to premises to enable supplier to check compliance with standards and instructions



# Further elements of case law

- In many cases, the rights of the distributor in analogy to the provisions on commercial agents are in dispute.
- For this, a distributor needs to be incorporated into the distribution system of the principal like a commercial agent.
- The duty of the distributor to hand over its customers to the principal at contract termination is an indication for the analogy.

(BGH, 16.2.1961, VII ZR 239/59, NJW 1961, 662)



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