Restrictions imposed upon agents and distributors during the notice period

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Introducing The Problem:

Restrictions imposed upon agents and distributors during the notice period

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Practical issues during the notice period and how to tackle them in each jurisdiction

Friction between contractual theory and commercial reality

Scope of Permissible Restrictions During Notice Period

Distinction between legitimate protective measures and unlawful restraints.

Continued Duty of Loyalty and Good Faith

Reduced performance, passive selling, or “silent disengagement”.

Standards of good faith under different jurisdictions.

Transition to Replacement Network

Appointment of new distributors/agents before expiry of notice.

Coexistence conflicts during transition.

Cannibalisation and territorial overlap issues.

Customer and Market Contact Restrictions Legally valid?

Limits on contacting key customers during notice?

Restriction to access to CRM systems, customer databases, pricing tools

Risks of customer diversion and solicitation.

Inventory and Stock Management

Obligations to maintain minimum stock levels.

Refusal to replenish inventory during notice period.

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Pricing and Commercial Autonomy

Restrictions on discounts, rebates, or promotional campaigns.

Risk of indirect resale price maintenance.

Continued Use of Intellectual Property and Branding

Transition obligations and timing of de-branding

Confidentiality and Protection of Sensitive Information

Employee and Team Stability

Restrictions on poaching sales teams or key employees.

Risk of coordinated migration to competitors.

Enforceability of non-solicitation clauses.

Compensation and Financial Pressure Tactics

Suspension of bonuses, commissions, marketing support.

Financial leverage as a litigation trigger**.**

Digital Commerce and Online Sales

Restrictions on marketplace activity and online advertising.

Control over domain names and digital customer acquisition.

Geo-blocking and platform restrictions.

Competition Law and Abuse Risks

Potential abuse of economic dependence.

Practical Negotiation Approaches

Standstill arrangements or Transitional cooperation agreements.

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How the problem is tackled in Portugal in the absence of contractual provision:

Portuguese courts generally recognise continuing duties of loyalty during the notice period.

Any restriction should have to be:

- proportionate and reasonable;
- compliant with good faith (boa fé) + maintaining the economic equilibrium of the contract;

However, a total prohibition on commercial activity before expiry of the agreement may be problematic if the agent/distributor remains contractually bound to perform.

Removing all customers; stopping supply entirely; blocking systems/access; preventing meaningful trading during notice.

Portuguese courts may view this as:
bad faith; disguised immediate termination; breach of the economic equilibrium of the contract.

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Relevant case-laws and ways to address the "problem"

Speaker: Camilla Reggiani – Max Mara Corporate Legal Counsel

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The Exclusivity Trap (Commercial Agents)

Issue: Lack of a "step-in" clause allowing a successor to be introduced during the notice period.

Case details: An agent had zero incentive to push sales because their termination indemnity was secure (80% of clients had been handed to them by the company years prior).

Result: Since the agent refused to leave early, the company faced a six-month "blackout" where growth stalled completely to avoid violating exclusivity.

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The "Grey Area" of Preparatory Acts

Issue: Agents secretly signing with competitors and "seeding" their transition during the notice period.

Behaviors: Delaying major orders or subtly discouraging clients from long-term commitments.

Way to address it: Implementing a solid non-compete clause backed by a specific indemnity (e.g., those under Art. 1751-bis of the Italian Civil Code) to protect turnover and claim damages.

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The Danger of "De Facto" Contracts (Distribution)

Case details: A 5-year relationship running "de facto" in Japan after the written contract expired.

Risk: At termination, the distributor held massive inventory without written rules for stock disposal or a right of first refusal.

Result: To prevent the distributor from dumping stock into secondary markets and "polluting" the brand, the company was forced into a very expensive buy-back negotiation with almost no leverage.

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Disparity and Judicial Intervention on Notice Periods (Italian Framework)

Context: Agency notice periods are strictly non-derogable (Art. 1750 c.c., 1-6 months), whereas distribution notice periods allow more discretion.

Issue: Courts are increasingly stepping in to protect long-standing partners.

Case details: A judge extended a 6-month contractual notice period to 18 months for a 30-year relationship, ruling the distributor needed "three full seasons" to restructure their business.

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Disparity and Judicial Intervention on Notice Periods (English Law Position)

Context: Agency notice periods still flow from the EU directive so consistent with Member States (1-6 months). Distribution agreements – no minimum at law, so subject to negotiation between the parties. If no written agreement, courts will consider a 'reasonable' period.

Issue: If left to the courts, significant variation in decision making and very fact specific. Parties should ensure notice periods are agreed and set out in writing.

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Disparity and Judicial Intervention on Notice Periods (France)

- Agency contracts: minimum notice period
  - 1 month for 1 year of performance
  - 2 months for 2 years of performance
  - 3 months for 3 and more years of performance
- Distribution contracts
  - Contractual provisions + impact of the mandatory law prohibiting sudden termination of the commercial relationships and significantly imbalanced practices/clauses
  - As a principle, and unless exceptional circumstances, the commercial relationships should be performed the same way during the notice period as before
  - Validity/effectiveness of clauses changing the obligations of the parties during the notice period?

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Relevant case-laws and ways to address the "problem" (France)

- **French supreme Court 10 February 2015: the unilateral withdrawal of the territorial exclusivity during the notice period, not provided by the contract, shall be considered as a sudden termination of the commercial relationships**
- **French supreme Court 24 June 2020: the withdrawal of the territorial exclusivity, together with the reciprocal withdrawal of exclusive supply commitment, provided by a contractual clause, should not be considered as a sudden termination of the commercial relationships**
- **French supreme Court 7 October 2014: a significant decrease of the turnover during the notice period can be considered as a sudden termination of the commercial relationships**

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Relevant case-laws and ways to address the “problem”

The Exclusivity Trap (Commercial Agents)

Issue: Lack of a "step-in" clause allowing a successor to be introduced during the notice period.

Case details: An agent is served notice to terminate the agreement, which it was not expecting. Agent is not happy with the termination and out of frustration “downs tools” during the notice period, re-allocating its best staff to other accounts. Principal is outraged and wants its new agent to take-over, but due to the exclusivity is restricted from doing so. Principal serves notice to terminate agreement for ‘material breach’.

Result: Lose / lose situation for both agent and principal. Agent lost commission revenue due to the disruption and principal suffered damage to its goodwill and an uncertain transition.

Learnings: (1) Expressly cover service levels and obligations during Notice Period, so there is clarity. (2) Consider how to incentivize agent during notice period to support with transition. (3) Exceptions to exclusivity during notice period, but be fair to the agent (additional service fee, share of commission, etc.).

Note, developing concept of ‘good faith’ under English law.

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The "Grey Area" of Preparatory Acts

Issue: 'Seeding' can also be an issue for the agent. E.g. Principal has decided to terminate and bring customers in-house or allocate to a new agent. During the notice period, principal stops co-operating with the agent.

Behaviors: Failure or delay in providing new season samples, refusing to give consent to trade shows. Can lead to agent failing to meet performance targets or reducing calculation of agent's termination payment.

Way to address it: Solid contractual clauses, with clarity on principal's obligations during notice period.

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Conclusion and Call to Action

(Speaker: PCM – 2 minutes or less)

Recap
Final Thoughts
Presentation of a Sample Contractual Clause

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Sample Contractual Clause

Notice Period Conduct and Transitional Measures

Upon service of notice of termination or non-renewal of this Agreement by either Party, the Agreement shall remain fully in force during the applicable notice period and the Parties shall cooperate in good faith to ensure an orderly and commercially reasonable transition.

During the notice period:

a) The Distributor/Agent shall continue to use commercially reasonable efforts to promote, market and sell the Products in the ordinary course of business and in accordance with the standards previously applicable under this Agreement;

b) The Distributor/Agent shall not actively solicit, on behalf of competing products or services, those customers with whom it maintained material business relations concerning the Products during the twelve (12) months preceding the notice of termination;

c) The Distributor/Agent shall maintain the confidentiality of all commercial, technical, pricing, customer and strategic information relating to the Supplier and shall not copy, extract or transfer customer databases, CRM data or commercially sensitive information other than as strictly necessary for the ongoing performance of this Agreement;

d) The Supplier may implement reasonable and proportionate restrictions concerning access to internal IT systems, pricing tools, reporting systems and commercially sensitive information, provided that such measures do not materially impair the Distributor's/Agent's ability to continue performing its obligations during the notice period;

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Sample Clause (continuation)

e) The Distributor/Agent shall continue complying with the Supplier's reasonable branding, presentation, quality and marketing guidelines and shall not undertake abnormal discounting, liquidation sales or promotional practices likely to materially damage the reputation, positioning or market value of the Products or trademarks;
f) The Parties shall cooperate in good faith regarding ongoing customer orders, quotations, tenders and commercial opportunities initiated prior to the notice of termination, with the objective of avoiding disruption to customers and unnecessary commercial prejudice to either Party;
g) Unless otherwise agreed in writing, the Supplier shall continue supplying the Products in quantities reasonably consistent with prior trading levels, taking into account seasonality, market conditions, available stock and the remaining duration of the notice period;
h) The Distributor/Agent shall maintain appropriate inventory levels for the ordinary continuation of the business and shall not accumulate abnormal or speculative stock quantities following notice of termination;
i) The Supplier may appoint a replacement distributor, agent or commercial partner during the notice period for purposes of transition planning, provided that such appointment does not intentionally deprive the Distributor/Agent of the practical benefit of the remaining notice period;
j) Neither Party shall make misleading, disparaging or commercially harmful statements regarding the other Party or regarding the termination of the Agreement, and any material customer communication concerning the termination shall, where reasonably practicable, be coordinated between the Parties;

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Sample Clause (final)

k) The Distributor/Agent shall not knowingly solicit for employment those employees of the Supplier directly involved in the management of the distribution network during the notice period, and the Supplier shall equally refrain from knowingly soliciting the Distributor's/Agent's dedicated sales personnel, except through general market recruitment processes not specifically targeted at such personnel;
l) Upon expiry or termination of the Agreement, the Distributor/Agent shall promptly cease all use of the Supplier's trademarks, trade names, domains, marketing materials and other distinguishing signs and shall return all confidential materials, samples, technical documentation and other property belonging to the Supplier.
Nothing in this Clause shall prevent the Agent/Distributor from continuing the ordinary performance of this Agreement during the notice period nor prevent either Party from internally preparing its post-termination commercial organisation or business activities, provided that no act of unfair competition, unlawful customer diversion, misuse of confidential information or breach of the continuing obligations under this Agreement occurs prior to the effective termination date.

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