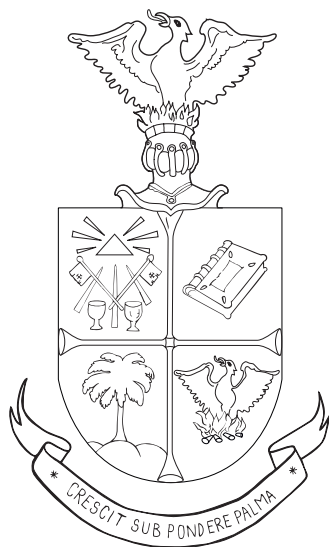


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DISTRIBUTION CONTRACTS IN HUNGARIAN LAW – THE RECOGNITION OF AN IMPORTANT VEHICLE OF TRADE RELATIONSHIPS BY THE CIVIL CODE

1. Introduction

Distribution contracts are among the most important contracts of today's economic relationships and have been continuously developing in Hungary since its transformation into a market economy in the 1990s. Over the recent decades, hundreds of business entities have classified themselves as distributors or dealers of one or more products made by other (mostly foreign) manufacturing or processing enterprises².

Distribution contracts as such were born in international trade, as one of the most important instruments involving foreign marketing organisations. This contract type, similarly to its “elder brother” contract, of agency, is fit for the purpose of significantly reducing the economic risks of a manufacturer or trader who wishes to enter a new market in another country. Before starting to sell its products or services in a given market, the economic enterprise has to examine the target country's economic, political and social characteristics, to seek potential buyers and to make detailed plans and schedules for deliveries. If these tasks are performed by the manufacturer or trader himself, he must bear all risks: he must handle language problems, the consequences of cultural, economic and legal differences between the target country and his home one and he must also face potential problems in choosing the right business partners. On the other hand, if the enterprise does not have the goal of establishing direct relationships with all potential partners, these tasks may be left to a distributor (or several), who would purchase the goods from him with the purpose of resale. This solution lets the enterprise avoid the costs of setting up a separate marketing division and building and maintaining a trade organisation. In addition, the risks attached to the resale of the products are undertaken by the distributor, whose knowledge of the particular market may be taken by the supplier as an advantage.

The existence of distribution contracts, as a distinct form in international business relationships, has been beyond doubt for a long time. Most monographs on international

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2 In Hungarian the terms “*forgalmazó*” or “*viszonteladó*” are commonly used.

trade contracts discuss them as an independent type of contract³, and distribution contracts were recognised by some Hungarian authors, too⁴.

2. Definition of the distribution contract, its distinction from other contract types

2.1. Definition of the distribution contract

As mentioned earlier, by concluding a distribution contract, the economic risks arising from not establishing the best route to identify and sell to potential buyers may be avoided or at least significantly reduced, since the supplier does not have to enter into negotiations with individual buyers or retailers, but only with one single distributor, relating to whom sufficient information on their credibility and solvability may be obtained much more easily.

Pursuant to a distribution contract, the supplier (the manufacturer or the trader) obliges himself to sell defined good(s), in the frame of a durable relationship, based on the common interest in the most effective distribution, to a buyer (distributor, dealer) who buys the said goods for the purpose of resale.

Based on this definition, the following may be identified as central elements of the distribution contract:

- the supplier's obligation to sell the goods to the distributor in consideration of payment of the purchase price;
- the aim of resale on the distributor's side;
- the durable character of the relationship; and
- the common interest of the parties in effective distribution.

3 See for example: Schmitthoff's Export Trade - The Law & Practice of International Trade 10th Edition (London, Stevens & Sons 1990 – Chapter 15, pages 259-271), Jean-Michel Jacquet - Philippe Delebecque: *Droit du commerce international* (Paris, Dalloz 1997, pages 191-193), or Hans van Houtte: *The Law of International Trade* (London, Sweet & Maxwell, 2002 – Chapter 5, pages 180-184).

4 The first article published specifically on the matter was written by the author of this article (*A forgalmazói szerződések, mint a piacszervezés eszközei* – Distribution agreements, instruments of market organisation – *Külgazdaság* 1996/6 - page 81). Professor Gábor Bánrévy devoted a separate chapter to this contract type for the first time in the second edition of his work on the law of international economic relations (*A nemzetközi gazdasági kapcsolatok joga* - Budapest, Szent István Társulat, 2001 – page 154) and he has carried on discussing it in later editions of the same work as well. It also appears as a form of contract of market organisation in Imre Vörös' work (*A nemzetközi gazdasági kapcsolatok joga* – KRIM Bt., 2004) on page 196.

2.2. Distinction of the distribution from other contracts

a) Distinction from sale contracts

It may be concluded from the above definition that distribution contracts are close relatives of contracts of sale, considering that in both cases the main obligation of the supplier (seller) is the transfer of ownership of the goods. Nevertheless, a distribution contract may not be considered a pure sale contract. It is rather a framework agreement that defines those rules that are generally applicable to the different sale agreements to be concluded successively by the supplier and the distributor during the term of the distribution contract⁵.

As another supplementary element, the distribution contracts also contain the aim of resale, unlike contracts of sale, where the purpose of taking title to the goods remains completely irrelevant. The distributor purchases the goods hoping that he, as seller, may resell them to his own customers.

The aim of resale is generally emphasised as a crucial element of distribution contracts in sources on international trade law⁶. Nevertheless, in some cases it is defined – from the supplier’s side – as a “sales concession”, which obliges the supplier “to allow the distributor to resell the products to end users for the duration of the contract”⁷. Others emphasise that a distribution contract may not be described as a “grant of sales licence” as it is sometimes referred to by traders, since it provides for “the conclusion of straightforward contracts of sale”⁸ and not for the granting any licences.

Finally, the distribution contract always creates a durable relationship, which is not the case in a sale, which generally remains a “single” transaction.

b) Distinction from framework sales agreements

A distribution contract may not be considered as a framework sales agreement either, since it not only contains the general rules applicable to future sales, but also provisions relating to the parties’ common interest in distribution.

In my view, this common interest is the crucial element that so distinguishes distribution from sale that it becomes an independent, sui generis type of contract.

5 Van Houtte: page 181

6 See e.g. Jacquet-Delebecque: page 193. Schmitthoff also points out that the seller may ask for a clause obliging the distributor to offer the supplier’s goods in the market (Schmitthoff: page 268).

7 Van Houtte: page 180.

8 Schmitthoff: page 262.

c) Distinction from sale pre-contracts

The distribution contract may not be considered as a pre-contract for sale either, since its conclusion does not create an obligation to enter into further contracts of sale. Nevertheless, in general, if the distributor does not order goods from the supplier within a specific period of time, it gives a reason for the supplier to terminate the distribution contract unilaterally.

On the other hand, although the clauses of the distribution contract relating to the are evidently dependent on the future conclusion of individual sales contracts, all restrictive clauses, such as exclusivity or non-competition, become immediately effective and remain in force during the whole contractual term, even if no individual sales are ever concluded⁹.

d) Distinction from agency contracts

In practice, the distributor acts as the *quasi* agent of the supplier, since the obligations of the supplier and the distributor relating to improving the efficiency of distribution are pretty similar to those fixed for the principal and the agent in an agency contract¹⁰.

The main difference between the two separate contract types is that the distributor purchases the goods from the supplier, takes title to them and resells them in his own name and at his own risk, while the agent in general does not conclude any sales contract; he only negotiates it, or, even if he is entitled to conclude contracts, it is always done in the name and at the risk of the principal.

The other important difference between the two contracts is that the remuneration for the agent's work is the commission paid by the principal on the sales contracts concluded by this latter with a customer introduced by the agent, while the distributor's "remuneration" is comes from the difference between the price paid by the distributor to the supplier and the resale price (i.e. the price received by the distributor from his own purchaser).

Of course, it cannot be ignored that the common interest of the parties in the distribution of the goods is an element that is found in both contract types. We will see later on, in the part introducing the applicable regulations of the different jurisdictions,

⁹ Schmitthoff: page 261.

¹⁰ Law-Decree 8 of 1978 on the application of the Hungarian Civil Code to foreign economic relationships (the "Foreign Trade Civil Code"), which fixed for the first time in Hungarian law the legal rules for commercial agency, contained such "*collateral obligations to improve distribution*" (Article 23 a) of the Foreign Trade Civil Code). Neither Act CXVII of 2000 on the independent commercial agency contract, nor Act V of 2013 on the Civil Code (the "Civil Code") took over these provisions. Nevertheless, it still remains undisputable that – especially in international trade relations – the agent must continuously survey the market situation and must perform market analysis, marketing and advertising activities.

that in many of them this characteristic led to the applicability of certain provisions to distribution originally related to agency by way of analogy.

e) Distinction from commission contracts

Distribution agreements have to be distinguished from commission contracts (*bizományi szerződés*) for similar reasons. In this latter case the commission agent (commissionaire) sells the goods in his own name but at the risk of his principal, while his remuneration is, similarly to that of the agent, the commission calculated and paid after the accomplished transactions.

As a conclusion of the foregoing, a distribution contract certainly means an independent and distinct type of contract that contains two major elements, the general (framework) provisions relating to the individual sales and the provisions relating to the obligations dictated by the common interest in the distribution of the goods.

2.3. A broader interpretation of distribution contracts

From the above definition, it may also be concluded that the distribution contract has a narrower and a broader interpretation, too. As compared to the narrower interpretation described above, when using a broader interpretation, the individual sales concluded in respect of the goods also belong to the distribution relationship. In any case, these individual transactions may not be totally separated from the distribution contract, since the general provisions that should be applied to all individual sales are determined in the distribution contract.

3. Parties to the distribution contract

Generally speaking, anybody may be party to a distribution contract. However, as distribution is a contract of business life, the parties to it are normally persons performing business activities.

On one side of the distribution relationship is always a business entity (enterprise) dealing with manufacturing, processing or wholesaling goods. In general, he does not sell the given product in a given territory directly to consumers or retailers; he sells it to a wholesaler (distributor). In a distribution contract, this party is generally referred to as the supplier (or, in some cases, as the seller)¹¹.

On the other side there is the wholesale trader, who generally sells the product to retail traders, or to end-users. This party is referred to as distributor or dealer (or in some cases, as buyer or purchaser)¹² in the distribution contract. Some scholars

11 In the Civil Code the legislator also uses the term “supplier” (*szállító*) to denote the party transferring the ownership of the goods to the other party.

12 In the Civil Code this party is called as distributor (*forgalmazó*).

emphasise that the distributor must be a merchant and independent of the supplier¹³.

It is to be noted that, in many cases, the conclusion of a contract with a distributor is subject to the existence of a certain distribution network under the control of the distributor which is in practice a network of sub-distribution relationships based on the logic and structure of the distribution contract¹⁴.

4. Indirect object of the distribution contract

The indirect object of the distribution contract is always a tangible thing that is manufactured by the supplier, or purchased by the supplier from the manufacturer for the purpose of distribution. In a distribution contract, the object may be defined in three different ways:

- one or several goods identified by its or their name(s), catalogue number(s), custom tariff number(s) or any other appropriate way,
- one or several group of goods, or
- in general, all of the goods manufactured (distributed) by the supplier.

In this latter case, in practice, it may be raised whether the distribution contract also covers the goods that the supplier starts to manufacture or distribute after the conclusion of the distribution contract. It is also a question whether the effect of the distribution contract ceases to apply in respect of goods that the supplier discontinues to manufacture or trade. These issues should be regulated in the contract itself.

5. Content of the distribution contract

Because, in most jurisdictions, this type of contract remains totally or partly unregulated, the drafting of distribution agreements in international trade remains very important. It is therefore not surprising that, in general practice (especially at the international level), distribution contracts are very detailed and exhaustive.

It is to be noted here that the distribution contract may be concluded not only in writing, but also orally or implicitly. Anyway, the lack of sufficient legal background generally results in the distribution contract being put in writing.

13 Jacquet-Delebecque: page 193.

14 Jacquet and Delebecque are of the opinion that the existence of a structured network is inevitable. Such network should be coherent and homogeneous in which the distributor (*le concessionnaire*) determines the network's general policy and defines the global strategy of the acquisition of clients (Jacquet-Delebecque: page 193).

a) Definition of the territory:

In the distribution contract the distribution territory (i.e. the territory where the trading rights are to be in effect) is generally defined by reference to one or more political units, which, in the case of international contracts, may be one or more different countries or groups of countries, while in domestic relations they can be even smaller geographical units, such as a town, a county, a state (province) or a region¹⁵.

With regard to the strict attachment of distribution rights to a well-defined territory, distribution contracts normally prohibit sales outside the territory. The definition of the territory thus does not only defend the distributor's position, but also limits his field of activity.

b) Provisions applicable to the individual sales contracts:

In the framework of the distributor relationship, sale transactions are in general embodied in sales contracts concluded in the form of orders and confirmations. Distribution contracts in most cases lay down the terms and conditions according to which orders and confirmations must be placed. In them, the parties determine the goods to be supplied, their quantities, the time and date of delivery, or, if a transporter or forwarder is used, this fact.

c) Determination of the price:

With regard to the fact that there are repeated sales between the supplier and the distributor, the determination of the price is a crucial element. In principle, price may be agreed upon in the orders and the confirmations, but this is not typical of consumer products. More often, price is determined in a general manner and to be applied to all sales, for example by reference to the price list of the supplier in force.

Two remarks must be made here. First, there may be circumstances influencing the parties' relationship during the whole contractual term, which the parties must take into consideration in the price determination process (e.g. inflation, worldwide market situation, etc.). Second, in many cases the distributor may be entitled to some reductions from the list price (rebate), especially regarding the purchased volume.

In distribution contracts, the so-called "m.f.c." price is applied very often. In this case the parties agree that the distributor shall pay the "most favoured customer" price, i.e. the best price which the supplier "*would obtain from another customer at the critical date*"¹⁶.

15 Schmitthoff: page 266

16 Schmitthoff: page 266

d) Exclusivity:

An exclusivity clause can be found in most distribution contracts. Its general meaning is that the supplier may not, in respect of the same goods and the same territory, appoint other distributors and it also undertakes not to sell directly, either. In this case, the contract is labelled an “exclusive” agreement. However, modern commercial usage also recognises a “sole” agreement, in which the supplier undertakes that it will not appoint other distributor in the specified territory, but direct sales may remain possible for him¹⁷.

In most jurisdictions, the terms “exclusive” and “sole” have not been clearly defined judicially, so it is always advisable for the supplier to specifically reserve for itself any rights it desires to sell in the specified territory.

The pure definition of the distribution territory does not automatically create exclusivity. Consequently, it may occur that several distributors are operating on the same territory. If the contract contains an exclusivity clause, its aim is to exclude the possibility of such double (triple, etc.) distribution.

e) Prohibition of parallel distribution:

Many distribution contracts contain also a non-competition clause, which means that the distributor may distribute the products of other manufacturers (distributors) only with some limitations, or may not distribute such products at all.

The situation is pretty much similar in respect of restraint of trade clauses applicable after the termination of the distribution contract.

f) Provisions relating to the quantities to order:

In practice, there are distribution contracts in which the supplier fixes a minimum quantity that the distributor must order in a given period. The non-fulfilment of the obligation to reach the minimum order level generally entitles the supplier to terminate the contract unilaterally.

The ordered quantity may have importance in the other direction, too. It is not unusual that, by reaching a certain quantity level, greater advantages are granted to the distributor (e.g. price reductions, extension of the contractual scope to other products or territories, etc.).

g) Specification of the resale price:

Distribution contracts sometimes might deal with resale prices, too, i.e. it is fixed at what price or with what margin the distributor may resell the products. Nevertheless,

¹⁷ Schmitthoff: page 260

such provisions are nowadays very rare due to competition legislation¹⁸. Consequently, in most cases the distributor may fix the resale prices at his own discretion.

h) Obligations to improve distribution:

Although the distributor is considered as an independent buyer and not an agent and he fully undertakes the risks of reselling the goods, evidently the supplier also remains interested in selling as many goods as possible in the given territory. Consequently, similarly to agency contracts, the following elements are normally fixed in the distribution contracts, too:

- the distributor is liable for performing adequate advertising and marketing activities and must continuously provide the supplier with information on the market situation, while
- the supplier is liable for providing the distributor with sufficient information, product samples, catalogues, brochures, etc. and in most cases also for bearing a certain part of the advertising costs.

It occurs quite often that the supplier also grants the distributor some licence to use patents and/or trademarks. In such cases, the distribution contract may contain the provisions of a licence agreement, too and the applicable legislation on the given industrial property must also be taken into consideration.

6. Termination of the distribution contract

Distribution contracts are usually concluded for an indefinite period of time and the right to ordinary termination is provided to both parties, generally to the end of the calendar year and with sufficient notice period. The non-performance of obligations relating to place a minimum value of orders for a fixed period, or purchases by the distributor falling below a certain volume normally give the supplier the right to ordinary termination.

A serious breach of contract is generally a valid cause for extraordinary termination as well. The violation of exclusivity on the supplier's side and late or non-payment or the violation of non-competition obligations on the distributor's side may qualify as such serious breaches.

Indemnity is an important question to be regulated in the distribution contracts. As we will see later on, some of the different jurisdictions emphasize the right of the distributor to adequate indemnity in the event of early termination by the supplier (excluding, of course, when the termination is caused by a breach by the distributor). Indemnity is

18 It would definitely be contrary to Hungarian competition law to fix resale prices under Article 11 (2) a) of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

generally fixed in terms of the annual turnover and the duration of the relationship.

In respect of the termination of the distribution contract, it is still to be noted that – although the ownership of the delivered goods is normally transferred to the distributor – many contracts provide for the return of the distributed goods to the supplier or the supplier's right of repurchase at the end of the relationship. The aim of these provisions is to assure smooth transfer from one distributor to another without disturbing potential customers (retailers) in the market by the existence of uncontrolled quantities of the distributed products.

7. Distribution contracts in the different legal systems

The spread of distribution contracts in international trade evidently has a significant effect on national legislation, too. Nowadays, many legal systems not only recognise the independent character of this contract type, but that it may also appear in purely domestic relationships; moreover, some of them may even have their own laws on the matter¹⁹. In general, the solutions of the different jurisdictions may be distinguished as follows:

a) Distribution in Anglo-American law:

In common law jurisdictions, there are normally no specific legal provisions that would apply to distribution contracts, other than those relating to competition. Consequently, courts have a general role in determining the applicable rules that are based on common law.

For example, in English law, if a contract that is concluded for an indefinite period of time does not contain any provision regarding its termination, it is terminable only after giving reasonable notice²⁰.

English common law does not provide indemnity for the distributor on termination. In many cases, even if such indemnity is fixed in the contract for a case of contractual breach, such a clause is interpreted by the courts as a penalty clause and therefore is unenforceable. However, if the clause imposing a payment of some kind of a consideration is purely to reflect a genuine pre-estimate of loss on termination then it will be allowed²¹.

In American law the basic notion of indemnification of a distributor upon termination is known as “recoupment”. The idea behind the recoupment doctrine is quite different from that behind indemnity in continental European laws: “*after the distributor has made a*

19 There are different monographs that discuss the applicable legal provisions of different countries to distribution contracts. One of the most important ones is the one edited by Agustín Jausàs, *Agency and Distribution Agreements - An International Survey* (London, Graham & Trotman). Any references made to this work herein are based on the first edition (1994).

20 *Decro-Wall S.A v. Marketing Limited* [1971] 1. W.L.R. 361

21 Jausàs: page 265

*substantial investment on the assumption that it will have access to the manufacturer's product line, the distributor should be allowed to recoup the investment even if the manufacturer has an unfettered right to terminate". As such investments may automatically be recovered in longer relationships, the recoupment "is usually confined to recovery of preliminary expenses for agreements that were terminated shortly after they were signed"*²².

b) In countries where commercial law is based on German law, the courts apply the legal provisions on commercial agency to distribution as well (especially in respect of exclusivity, termination and indemnity), by way of analogy when the distributor (*Vertragshändler*) is in a situation of economic subordination to the supplier, comparable to that of an agent²³. According to this strict principle in German law²⁴ the provisions of Article 89b of the Commercial Code on agency contracts are applicable if

- the distributor was integrated into the distribution system of the supplier, and likewise an agent and
- the distributor was contractually obliged to provide information on the names of his customers to the supplier.

The distributor is entitled to claim an indemnity (*Ausgleichsanspruch*) after the termination of the distribution contract if and to the extent that

- the supplier substantially benefits from the business relationships acquired by the distributor even after the termination of the distribution contract,
- the distributor loses income as a result of the termination of the distribution contract, which, had the contractual relationship been continued, he would have gained on the basis of already signed or future contracts with clients acquired by him, and
- the payment of compensation, in consideration of all circumstances, is just and equitable²⁵.

The same applies in Austria²⁶, where the analogous application of agency law to distributorship corresponds to the consistent practice of the Supreme Court²⁷. As a precondition for the application of legislation on commercial agency²⁸, the distributor must form part of the vertical sales network in the same way that agents normally do.

22 Jausàs: page 276

23 Van Houtte: page 184

24 Jausàs: page 118

25 Article 89b (1) of the Commercial Code (*Handelsgesetzbuch*)

26 Jausàs: page 28

27 Judgment of 22 April, 2009 OGH 3 Ob 44/09f, Judgment of 5 May, 2009 OGH Ob 10/09s

28 *Bundesgesetz über die Rechtsverhältnisse der selbständigen Handelsvertreter* - Federal Law Concerning the Legal Relations of Self Employed Commercial Representatives [Agents] (*Handelsvertretergesetz* - HVertrG 1993)

In Swiss law, one may experience some uncertainty in respect of the matter. Agency and distribution contracts are generally treated similarly with respect to term and termination. With respect to open ended distribution contracts, courts usually apply the legal provisions for agency²⁹ by analogy. Fixed-term distribution contracts are terminated without further notice upon expiry of the fixed term³⁰. In connection with fixed-term agency agreements, the law explicitly provides that a tacit continuation at the end of the term entails a renewal of the agency agreement for the same period of time, but not for more than one year³¹. It is uncertain whether the same rule applies to distributorship agreements by analogy. Until 2008, the case law consistently denied the analogous application of provisions of agency law on indemnity³². Finally, in a decision of 22 May 2008, the Swiss Supreme Court decided that a distributor may be entitled to goodwill compensation for his clientele like an agent³³, if certain conditions were met.

c) In countries influenced by the French Civil Code, issues relating to distribution are partly covered by specific legislation.

In France, provided that some conditions are met, distributors are protected by the provisions of Article L330-3 of the Commercial Code that requires pre-contractual information from the supplier to be given to the distributor in respect of the circumstances of the distribution at least twenty days before execution of the contract. The content of such information is fixed by decree³⁴. Another article of the *Code de Commerce* prohibits the “brutal interruption” (*rupture brutale*) of a permanent commercial relationship. It is mandatory to set a notice period, the length of which depends on the duration of the relationship, the commercial usages and the interprofessional accords³⁵.

Exclusivity has been specifically regulated in French law since 1943. In 2000, the relevant provisions were inserted in the Commercial Code. With regard to exclusive supply systems that oblige a distributor to buy exclusively certain products from the supplier, exclusivity must not exceed a period of 10 years³⁶.

The French court practice created a sanction for “abusive interruption” (*rupture abusive*) of a distribution contract which, in certain cases, allows the distributor to claim from the supplier the reimbursement of those investments that could not be

29 Article 418q of the Code of Obligations (*Obligationenrecht*)

30 Article 418p (1) of the Code of Obligations

31 Article 418p (2) of the Code of Obligations

32 Jausàs: page 254

33 Swiss Supreme Court decision 134 III 497

34 *Décret n°91-337 du 4 avril 1991 portant application de l'article 1^{er} de la loi n° 89-1008 du 31 décembre 1989 relative au développement des entreprises commerciales et artisanales et à l'amélioration de leur environnement économique, juridique et social*

35 Commercial Code article L442-6 paragraph 5

36 Commercial Code article L330-1

recovered due to the termination of the contract³⁷. This intervention by the judge is motivated by the goal of achieving a balance in the contract by adjusting the asymmetry originating from the different economic power of the parties³⁸. On the other hand, the jurisprudence has remained silent about the eventual claims by the distributor relating to the loss of clientele.

Belgium is one of the very few countries in the world with a specific legal regime for the termination of certain distribution contracts. The Law of 27 July 1961 on the unilateral termination of exclusive distribution contracts of indefinite duration³⁹ often gave rise to surprise in other countries. In 2014, its provisions were inserted in Book X of the Code of Economic Law⁴⁰. For such provisions to apply, the distribution rights should be exclusive, for a territory including (part of) Belgium and for an indefinite duration⁴¹. It should be noted that all fixed-term distribution agreements are, starting from their third renewal, considered to have become agreements of indefinite duration⁴². The Law provides that distribution contracts to which it applies, in the absence of a serious breach, may only be terminated by giving reasonable notice or by paying compensation in lieu of notice⁴³. The law also provides that, if certain conditions are met, distributors are entitled to claim additional compensation from the suppliers, irrespective of whether reasonable notice was given or not. This additional compensation is to cover goodwill, costs and investments incurred by the distributor and distributor staff redundancy costs⁴⁴.

8. International and EU regulations on distribution

8.1. International regulations

Distribution contracts are not covered by any specific international convention, such as those relating to international sale⁴⁵ and agency⁴⁶. In international practice, it is

37 *Cass. com.*, 20 jan. 1998, n° 96-18.353 <https://www.legifrance.gouv.fr/affichJuriJudi.do?id-Texte=JURITEXT000007041221>

38 Dávid Sobor: *A disztribútor védelme a forgalmazási szerződés megszűnése esetén* (The protection of the distributor in case of termination of the distribution contract) – *Gazdaság és Jog* 2014/12 page 16

39 *La loi du 27 juillet 1961 relative à la résiliation des concessions de vente exclusive à durée indéterminée*

40 *Code de Droit Economique du 28 février 2013*

41 It does not matter whether it is also appointed as the distributor in other territories but case law agrees that the protective clauses in the Code of Economic Law should apply only to its “Belgian” activities. Conversely, it is argued that a foreign distributor will also be entitled to protection under the law if, and to the extent that he is (also) active in Belgium.

42 Article X.38 of the Code of Economic Law

43 Article X.36 of the Code of Economic Law

44 Article X.37 of the Code of Economic Law

45 United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980

46 UNIDROIT Convention on Agency in the International Sale of Goods, Geneva, 1983

questionable whether any of the said conventions are applicable to distribution⁴⁷.

On the other hand, the international practice of distribution contracts is profoundly influenced by the model contracts elaborated by the International Chamber of Commerce, namely *The ICC Model Distributorship Contract – ICC No. 518*⁴⁸ and *The ICC Model International Sale Contract Manufactured Goods Intended for Resale – ICC No. 556*⁴⁹. These texts evidently may not be considered as mandatory legal instruments, but are still of great help for practicing lawyers and businessmen to draft distribution contracts.

8.2. European competition law policy

Without deeper analysis, it must be noted that matters of distribution in the European Union are, for most commercial purposes, considered under Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”)⁵⁰. Anti-competitive provisions that might be found in distribution agreements include retail price fixing, customer restrictions, export bans, non-competition, exclusivity and minimum purchase obligations. However, in compliance with the principles developed by the Court of Justice of the European Union, the European Commission acknowledges that Article 101(1) TFEU is not applicable where the impact of the agreement on competition or trade between Member States is not appreciable⁵¹.

The prohibition contained in Article 101(1) TFEU is not absolute. Any anti-competitive agreement that falls within the scope of Article 101(1) may benefit from an exemption under Article 101(3). Such exemption is generally available, if the pro-competitive advantages of the agreement outweigh its anti-competitive effects. There

47 As for France for example, a case is reported where the *Cour de Cassation* declared inapplicability of the Hague Convention 1955 to distribution contracts. Consequently, the Vienna Convention would not apply to them either (*Cass. 1^{re} civ., 15 mars 1988*, Bull. civ. I, n° 83 - Jacquet-Delebecque: page 192).

48 *ICC Egyedárusítói Mintaszerveződés*

49 *ICC Mintaszerveződés vizsgálatására szánt feldolgozott áruk nemzetközi adásvételére*

50 Article 101 of the TFEU generally prohibits all agreements between companies that may affect trade between countries within the European Economic Area (“EEA”), and which have as their object or effect the restriction, prevention or distortion of competition within the EEA. This prohibition applies not only to horizontal agreements, but also to vertical agreements, including agreements between enterprises acting at different levels of the distribution or production chain.

51 In the Commission’s “De Minimis Notice” (Notice on Agreements of Minor Importance of 25 June 2014 - OJ 2014/C 291/01), the Commission indicates the circumstances in which it considers that agreements do not constitute an appreciable restriction of competition with the help of market share thresholds. Consequently, vertical agreements where neither party holds a market share of more than 15%, are presumed not to breach Article 101(1) TFEU, provided that they do not have as their object the prevention, restriction or distortion of competition within the internal market).

are two types of exemption: (i) an exemption following an individual self-assessment and (ii) a block exemption.

Distribution is also covered by a block exemption regulation⁵² and the accompanying Vertical Restraints Guidelines⁵³. Their scope of application covers all agreements between economic operators at different economic levels: these are so-called “vertical” agreements entered into between a supplier (even from outside the EU) and a distributor that have an economic effect within the European Union. Another block specific exemption regulation is in force in respect of the motor vehicle sector⁵⁴.

8.3. Distribution agreements in the European harmonisation process

The issue of regulating the distribution agreement as a specific contract was also raised in the course of the process of European harmonisation of private law. The European Parliament requested the creation of a European Civil Code as early as in 1989. In 1997 the Dutch Government, as then Chair of the European Union, held a conference titled ‘Towards a European Civil Code’. In the same year, among other academic groups, The Study Group on a European Civil Code was formed, chaired by Professor Christian von Bar at the University of Osnabrück. The Study Group began its work in 1998. From the outset, it was envisaged that at the appropriate time its results would be presented in an integrated complete edition, but finally the results were published in a separate series. One of them, the so-called PEL CAFDC, published in 2006, deals with commercial agency, franchise and distribution⁵⁵.

Two years later, the Study Group on a European Civil Code and the Research Group on Existing EC Private Law presented, for the first time, the Draft of a Common Frame of Reference (DCFR) on Principles, Definitions and Model Rules of European Private Law. In 2009, the revised and final version came out⁵⁶. The DCFR follows the structure of the PEL CAFDC and in its Part E it deals with commercial agency, franchise and distributorship.

52 Commission Regulation (EU) No. 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 2010, OJEU L 102/1

53 Commission Guidelines on Vertical Restraints, 2010, OJEU C 130/1

54 Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector

55 Principles of European Law. Study Group on a European Civil Code. Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC). Prepared by Martijn W. Hesselink, Jacobien W. Rutgers, Odavia Bueno Díaz, Manola Scotton, Muriel Veldmann (Sellier European Law Publishers GmbH, Munich 2006)

56 Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR) Outline Edition - Sellier European Law Publishers GmbH, Munich 2009

Among the general rules, the DCFR provides for the pre-contractual information duty of the parties, the common obligation of the parties to cooperate and to inform each other and the obligations relating to confidentiality⁵⁷.

It regulates in detail the issues of termination of the contractual relationship and its consequences⁵⁸. The main elements are as follows:

- In the case of a contract for a definite period of time, there is no obligation of renewal. The contract will only be renewed, for an indefinite period of time, if the parties so agree.
- In the case of a contract for an indefinite period of time, both parties have the right to terminate the contractual relationship by giving notice to the other. If the notice period is of reasonable length, no damages are payable.
- Whether a period of notice is of reasonable length depends on the circumstances, but a period of notice of one month for each year during which the contractual relationship has lasted, with a maximum of 36 months (6 months of notice for the supplier) is presumed to be reasonable.
- Where a party terminates a contractual relationship without giving a reasonable period of notice the other party is entitled to damages, the general measure of which is such sum as corresponds to the benefit that the other party would have obtained during the extra period for which the relationship would have lasted if a reasonable period of notice had been given.
- Termination for non-performance is only allowed if such non-performance is fundamental.
- When the contractual relationship comes to an end for any reason, a party is entitled to an indemnity from the other party for goodwill if and to the extent that the first party has significantly increased the other party's volume of business and the other party continues to derive substantial benefits from that business, provided that the payment of the indemnity is reasonable.
- If the contract is voided, or the contractual relationship terminated by either party, the party whose products are being brought onto the market must repurchase the other party's remaining stock, spare parts and materials at a reasonable price, unless the other party can reasonably resell them.

The DCFR further contains a definition of “distributorship” and provides the obligations of both the supplier and the distributor. Pursuant to the DCFR, distribution contracts are 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*”

57 DCFR Articles IV.E. – 2:101-2:104

58 DCFR Articles IV.E. – 2:301-2:306. There are also some further provisions on the right of retention and the right of both parties to receive a written and signed statement setting out the terms of the contract (Articles 2:401-2:402).

and on the distributor's behalf⁵⁹. The DCFR recognises three different specific forms of the distribution contract:

- the exclusive distribution contract “*under which the supplier agrees to supply products to only one distributor within a certain territory or to a certain group of customers*”;
- the selective distribution contract “*under which the supplier agrees to supply products, either directly or indirectly, only to distributors selected on the basis of specified criteria*”; and
- the exclusive purchasing contract “*under which the distributor agrees to purchase, or to take and pay for, products only from the supplier or from a party designated by the supplier*”⁶⁰.

The DCFR further specifies the following obligations of the supplier:

- The obligation to supply the products ordered by the distributor “*in so far as it is practicable and provided that the order is reasonable*”.
- The obligation to inform the distributor during the performance of the characteristics, prices and terms of supply of the products, any recommended prices and terms, any relevant communication with customers and advertising campaigns.
- The obligation to warn the distributor of decreased supply capacity.
- The obligation to provide advertising materials at a reasonable price.
- The obligation to make reasonable efforts not to damage the reputation of the products⁶¹.

As far as the distributor's obligations are concerned, provided that the contract is exclusive or selective, the DCFR contains the following provisions:

- The obligation to distribute, which means that the distributor “*must, so far as practicable, make reasonable efforts to promote the products*”.
- The obligation to inform the supplier during the performance concerning any third party claims or infringements of the supplier's intellectual property rights.
- The obligation to warn the supplier of decreased supply requirements.
- The obligation to follow the reasonable instructions of the supplier “*which are designed to secure the proper distribution of the products or to maintain the reputation or the distinctiveness of the products*”.
- The obligation to provide the supplier with reasonable access to the distributor's premises to enable the supplier to check the distributor's compliance with the standards agreed upon.
- The obligation to make reasonable efforts not to damage the reputation of the products⁶².

59 DCFR Article IV.E. - 5:101 (1)

60 DCFR Article IV.E. – 5:101

61 DCFR Articles IV.E. – 5:201-5:205

62 DCFR Articles IV.E. – 5:301-5:306

9. Distribution contract in Hungarian law

9.1. Development before 2014

Recent practice clearly shows that distribution contracts have been becoming increasingly important for economic relations in Hungary. The number of distribution contracts has been increasing, even purely domestic ones, but evidently this type of contract still remains typical of international trade relations. Anyway, it is increasingly common for bigger Hungarian manufacturer companies to sell their products, domestically or internationally, by way of distribution contracts.

However, the practical spread of this contract type, at least up to the entry into force of the new Civil Code⁶³, had not been followed by the appearance of applicable legislation, and – apart from the works of Bánrévy and Vörös referred to above – the legal scholarship has not addressed this issue in detail. Monographs discussing the individual contract types in domestic law remained silent about distribution. This, however, does not deny that distribution contracts were already present in the economic life and that their legal reality would have required a more serious analysis and specific legal rules.

As with all other types of contract having no specific applicable legislation, the general provisions of the former Civil Code⁶⁴ on obligations applied. Beside that – and especially because of the lack of specific rules – jurisprudence had some importance in determining the legal provisions on distribution.

From some earlier published case law, one may conclude that the acting panel could not really deal with the issue. For example, the Arbitration Court attached to the Hungarian Chamber of Trade and Industry, in judging a contract that was subject to Hungarian law between a Hungarian supplier and his Italian distributor⁶⁵ stated that, in the case of a distribution agreement that “contains sales and agency elements as a mixture”, a distinction must be made “between the framework agreement that may largely be described by elements of an agency contract, and the individual contracts containing mainly elements of a sales contract”. As a result of the above, the Arbitration Court separated the distribution contract into two parts and applied the Vienna Convention to the individual sales contracts, while other elements of the (framework) agreement were judged pursuant to the provisions of the old Civil Code and the provisions of the Foreign Trade Civil Code⁶⁶ on agency.

In 1998, *Katalin Székely* analysed another relevant court case in her article published

63 Act V of 2013 on the Civil Code (*a Polgári Törvénykönyvről szóló 2013. évi V. törvény*)

64 Act IV of 1959 on the Civil Code of the Republic of Hungary (*a Magyar Köztársaság Polgári Törvénykönyvéről szóló 1959. évi IV. törvény*)

65 VB 9638; BH 1997/10

66 Law-Decree 8 of 1978 on the application of the Civil Code of the People's Republic of Hungary on foreign economic relations (*1978. évi 8. tvr. a Magyar Népköztársaság Polgári Törvénykönyvének a külgazdasági kapcsolatokra történő alkalmazásáról*)

in *Külgazdaság*⁶⁷. This time, the ordinary court had to establish whether an exclusive distribution agreement validly existed between a Hungarian and a foreign company. As a preliminary issue, the court had to decide which country's law had to be applied and, somewhat unexpectedly, established that the party required to provide the most characteristic performance was the distributor and therefore the court applied the law of the country in which the distributor had its establishment⁶⁸. With this remarkable decision, the court admitted that a distribution agreement was a contract that was not mentioned in Law-Decree 13 of 1979 on private international law and which must be distinguished from sale. As far as the substantive law is concerned, the court applied the general provisions of the Civil Code on obligations⁶⁹.

A very Hungarian old court statement also mentioned "exclusivity". Statement n° GKT 23/1973 – modified several times – said that if the supplier sells the product to a third party with no respect for the exclusivity granted to the buyer, by this *"he fails to fulfil one of his obligations. If, as a consequence of such failure, the other party loses his interest in the contract as a whole, impossibility of performance may occur in respect of the transaction, in its integrity"*. From this reasoning of the court one, might conclude that, in the case of a violation of exclusivity, the contract may even terminate according to the provisions on impossibility of performance, if the other party does not wish to maintain the contract; in other words, there is no need to terminate the contract formally. The Statement also added to the above that if the supplier is liable for the impossibility of performance, the other party may claim for damages under the Civil Code. Although the Statement clearly seems to provide guidelines for distribution contracts, we did not find any case law evidencing that such application had ever been made⁷⁰ and, in addition to this, it was declared inapplicable by the Supreme Court itself in 2006⁷¹.

Other court decisions qualified the distributorship as a mixed contract containing elements of the sale, the supply and the mandate contracts⁷².

In any case, the term "distribution" (*forgalmazás*) seemed to appear with increasing frequency in Hungarian legislation and also in the domestic jurisprudence. Apart from the fact that distribution is becoming more common in economic life, European legislation that has been followed by the Hungarian Parliament and Government for a

67 Dr. Katalin Székely: *A nem nevesített szerződések és a kizárólagos forgalmazásra irányuló megállapodás* (Külgazdaság Jogi Melléklete, 1998/4 – Innominate contracts and the agreement on exclusive distribution)

68 It is to be noted that this solution is completely in line with international practice. In most cases, the distributor's law is applied to the contract (van Houtte: page 161).

69 Székely: page 55

70 Except Case BH1990.69 where the role of the Statement was only marginal

71 2/2006. (V. 22.) PK vélemény az ítélkezés elvi irányítása korábbi eszközeinek felülvizsgálatáról (Opinion on the reconsideration of former instruments of discipline-based guidance of judicature)

72 Budapest Metropolitan Court (*Fővárosi Bíróság*) G. 41.192/2002/201, G. 41.743/2007/74. Budapest Metropolitan High Court (*Fővárosi Ítéltábla*) Gf. 40.534/2010/4.

long time has also a significant effect in this respect. European competition legislation is duly implemented in Hungary⁷³ and distribution matters must be dealt with by the Competition Office.

I consider the entry into force of the Rome I Regulation⁷⁴ as a very important milestone in the recognition of the distribution contract in Hungary as a distinct contract type. Article 4 paragraph 1 sets forth specific provisions on the applicable law to different contracts, including distribution. Pursuant to point f) of the said paragraph, such contract “*shall be governed by the law of the country where the distributor has his habitual residence*”. This provision had a very important consequence: as in many cases Hungarian substantive law might be applicable (when the distributor has his habitual residence here), there arose a greater need to determine provisions that may be relevant and applicable to distribution.

9.2. Distribution contract in the Civil Code

The Concept of the new Civil Code⁷⁵ did not mention distribution contracts and it could not be found in the experts’ proposal either. Therefore it was somehow “unexpected” that this type of contract appeared in the final text⁷⁶.

The insertion of the distribution contract into the Civil Code was not welcomed by everybody. Lénárd Darázs even considered this contract type, similarly to the franchise contract, as a “*foreign body*” in the code, regarding that these contracts “*are extremely colourful in practice, having different economic and legal content, compared to which, the regulation contains unjustified restrictions*”. In addition to this, he argues, the relevant provisions of the Civil Code are “*abortive*” as they incorrectly catch the nature and essence of these legal relationships and have nothing to do with business life⁷⁷.

73 See Act LVII of 1996 on the prohibition of unfair market practices and limitation of competition (*a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról*), Government Decree 205/2011 (X.7.) on the exemption of certain groups of vertical agreements from the prohibition of limitation of competition (*Korm. rendelet a vertikális megállapodás egyes csoportjainak a versenykorlátozás tilalma alóli mentesítéséről*) and Government Decree 204/2011. (X.7.) on the exemption of certain groups of vertical agreements from the prohibition of limitation of competition in the motor vehicle post-market (*Korm. rendelet a gépjármű utópiacra vonatkozó vertikális megállapodások egyes csoportjainak a versenykorlátozás tilalma alól való mentesítéséről*)

74 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

75 *Az új Polgári Törvénykönyv koncepciója* (Magyar Közlöny 2002/15 – January 31, 2002)

76 András Osztovits ed.: *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja*, Opten Informatikai Kft., Budapest, 2014, Volume III, page 877

77 Lénárd Darázs in Ferenc Petrik ed.: *Polgári jog – Kötelmi jog – Az új Ptk. magyarázata*, HVG-Orac Lap- és Könyvkiadó Kft., Budapest, 2013, Volume VI, page 237

The official reasoning of the Civil Code⁷⁸ refers to the DCFR as a source taken into consideration at the drafting of the legal text and other commentators also emphasise this connection⁷⁹. However, if we look the structural place of this contract type in the Civil Code, we may already find a significant difference: while both the PEL CAFDC and the DCFR regulate the distribution and the franchise contracts together with the contract of agency, this third contract type was separated by the Hungarian legislator and its rules were set forth under another title. Péter Gárdos explains this difference with the intention of the legislator to stress the resale of the product or service by the distributor or the franchisee on his own behalf and for his own benefit, instead of the cooperation in relation to the conclusion of the contract⁸⁰.

a) Definition of the distribution contract:

Article 6:372 of the Civil Code defines the distribution contract as follows: “*Under a distribution contract, the supplier shall sell certain specified movables (for the purposes of this Chapter: products) to the distributor, and the distributor shall buy the product from the supplier and sell it on his own behalf and for his own benefit.*” This definition is quite similar to the one provided in the DCFR, as it also contains the supplier’s obligation to sell the products and the distributor’s obligation to buy and resell them, on his own behalf and for his own benefit. However, another article further specifies that the provisions relating to distribution must be applied not only to sale and resale of goods, but also with regard to “*the provision of services*”⁸¹, which is not the case with the DCFR. As a consequence of this extension of the scope of application of the relating provisions, they are applicable not only to the so-called intertwined (chain) contracts of sale, aiming to forward the goods from the producer to the consumer, but also to those to ensure that services can reach users who may not be in direct contact with the original service provider⁸². Darázs feels that, in practice, the acquisition of services for the purpose of resale can hardly be imagined, as the service provider provides its own services to the consumers⁸³.

As far as the parties’ main obligations are concerned, some of them are identical to those of a contract of sale (to “sell” by the supplier, i.e. to transfer the ownership of the product and to “buy” by the distributor, i.e. to take over the product and to pay

78 *A Polgári Törvénykönyvről szóló 2013. évi V. törvény indoklása*

79 Péter Gárdos in Lajos Vékás – Péter Gárdos ed.: *Kommentár a Polgári Törvénykönyvhöz: kommentár a Polgári Törvénykönyvről szóló 2013. évi V. törvényhez*, Wolters Kluwer, Budapest, 2018, page 2102

80 Gárdos: page 2103

81 Article 6:375 of the Civil Code

82 Péter Miskolczi Bodnár in Judit Barta – Zoltán Fazakas – Gyöngyi Harsányi – Péter Miskolczi Bodnár – Róbert Szuchy – Edit Ujváriné Antal: *Kereskedelmi szerződések alapvető szabályai* (Basic rules of commercial contracts -Patrocinium, Budapest, 2016) page 72

83 Darázs: page 240

its purchase price), but there is an important third element added: to (re)sell it by the distributor on his own behalf and for his own benefit. Darázs feels that, by an “extreme” interpretation of the law, the distributor would breach the contract if he does not resell the product⁸⁴, but Miskolczi points out that emphasis is rather added to a resale “on his own behalf and for his own benefit” and not to the resale itself. According to the latter, the aim of the legislator was to distinguish clearly the distribution contract from the other types of intermediary contracts⁸⁵. Other commentators feel that, in respect of the obligation to resell, the distributor has no “liability for a result”; his task is only to attempt the resale⁸⁶.

Apart from its definition, the Civil Code regulates only four matters relating to the distribution contract, namely

- the common obligation of the parties to protect the good reputation of the product;
- the obligation of the supplier relating to advertising;
- the right of the supplier to instruct; and
- the right of the supplier to inspect the performance of the contract.

b) Protection of the product’s good reputation:

Pursuant to Article 6:373 (1) of the Civil Code it is the parties’ common obligation to “*protect the good reputation of the product*”. Miskolczi argues that this provision does not require active conduct from the parties, only abstention⁸⁷, but I do not share this opinion: in my view, “protecting” shall also include any positive acts aiming at safeguarding the product from any harmful action (i.e. initiating a trademark infringement or passing off procedure etc.).

Some of the authors point out that the use of the notion of “good reputation” is somewhat unfortunate, as it is normally attached to natural and legal persons, as personal right⁸⁸, while a product has no “good reputation”⁸⁹. This makes this category “empty” and its violation remains without sanctions⁹⁰. Other commentators think that the “good reputation” in Article 6:373 is not identical to that of the persons, but “*the good reputation created for a product, as goodwill, emits to both the producer and the distributor*”⁹¹.

84 Darázs: page 237

85 Miskolczi: page 75

86 Gárdos: page 2105

87 Miskolczi: page 76

88 Article 2:45 (2) of the Civil Code

89 Miskolczi: page 75, Darázs: page 238

90 Darázs: page 238

91 Gárdos: page 2108

c) *Advertising:*

On the other hand the supplier's obligation to inform the distributor of advertisements concerning the product and to transfer to the distributor, for a fee, the necessary advertisements⁹² definitely requires the active conduct of the supplier. Although the Civil Code remains silent about the tasks of the distributor related to advertising, Miskolczi points out that the above mentioned provision, beyond the parties' general obligation to cooperate, *de facto* creates a common obligation for the parties to advertise the product in the most effective way⁹³.

Darázs vehemently criticises these provisions of the Civil Code. He claims that the legislators forgot to define what should be considered "advertisements" and it is also not clear how an advertisement may be "transferred"⁹⁴. This is definitely true. However, it has to be stated in favour of the legislators that these provisions clearly came from the DCFR⁹⁵.

d) *Instruction:*

Article 6:374 (1) of the Civil Code provides for the supplier's right "*to instruct with regard to the appropriate distribution of the product*". This provision clearly distinguishes the distribution contract from a sale, where the former owner evidently cannot give any instruction to the new one. This issue, again, divides the authors: While according to Darázs the provision of the right of instruction is groundless⁹⁶, Miskolczi thinks that, with regard to distribution, it is reasonable to authorise the supplier to provide a smooth and the most effective way of the product reaching consumers by way of setting up special requirements e.g. in respect of the storage or treatment of the product⁹⁷. Nevertheless, the exercise of this right of instruction may not make the performance of the contract significantly harder for the distributor and the instructions must be in line with the professional usages. Gárdos explains this provision with the intention of the legislator to consider the interests of the supplier as more important than those of the distributor. In addition, this right of instruction is limited to the "*appropriate way of distribution of the product*", including the presence of the distribution site, the placing, packaging of the product or the provision of product samples⁹⁸.

92 Article 6:373 (2) of the Civil Code

93 Miskolczi: page 76

94 Darázs: page 239

95 See Articles IV.E. – 5:204 – 5:205, Article IV.E. – 5:306

96 Darázs: page 240

97 Miskolczi: page 77. Others also argue that when providing the supplier with the right of instruction, the Civil Code considers that the interests of the supplier deserve protection more (Gárdos: page 2109)

98 Gárdos: page 2109

The Civil Code contains, in respect of the distribution contract, the provisions automatically attached to the right to instruct in other types of contract, too: if the supplier gives inappropriate or unprofessional instructions, the distributor shall warn him of this. However, contrary to other contract types, such as mandate or agency where there is a right to cancel the contract, the distributor is obliged to perform such inappropriate or unprofessional instructions if, despite the warning, the supplier maintains them. This stricter rule is partially compensated by the rule providing for the supplier's liability for any damage arising from performing the instructions. The other special rule for distribution contracts is that the distributor has no right, but is rather required to refuse to follow the instruction if performing it would lead to the violation of a law or an authority decision, or would endanger the person or property of others⁹⁹.

e) Inspection:

Finally, pursuant to Article 6:374 (3) of the Civil Code the supplier may inspect the performance of the contract and the instructions. This right of inspection extends to the performance of the contract and compliance with the instructions. In line with the principle of the generally expected standard of conduct, the exercise of this right by the supplier may not unnecessarily disturb the distributor's activities¹⁰⁰.

f) Other issues:

Compared to the DCFR, the Civil Code does not contain any specific provision on the termination of the distribution contract. Gárdos laconically explains this with the view that, with regard to distribution contracts the aspects requiring adequate time limits for the termination are "*less determinant*" than those relating to the franchise and distribution contracts¹⁰¹.

Dávid Sobor points out that, in the absence of specific provisions on the matter, the general contract rules become applicable, which provide some protection for distributors, though its level of does not reach the level provided by the Belgian, French or German national regimes¹⁰².

Pursuant to Article 6:213 (3) of the Civil Code „*contracts giving rise to permanent legal relationships and concluded for an indefinite period of time may be unilaterally terminated by any of the parties while applying an appropriate notice period*". Evidently, the length of the notice period may only be determined on a case by case basis. Sobor hopes

99 Article 6:374 (2) of the Civil Code

100 Gárdos: page 2110

101 Gárdos: page 2106

102 Sobor: page 16

that the analysis of the foreign rules would give points of reference to the courts¹⁰³.

The Civil Code does not contain any provision relating to the reimbursement of the distributor's investment costs in the case of termination. While some argue that the Hungarian courts may apply the relevant rules on agency by analogy¹⁰⁴, Sobor does not share this optimism, considering the lack of any legal provision allowing such a measure. On the other hand, the application of the principles of good faith and fair dealing and the obligation of cooperation may provide some instruments for the distributor to claim for reimbursement of his costs¹⁰⁵.

The Civil Code remains silent on the compensation to be paid for the transfer of clientele, too. It is evident that, following the termination of the distribution contract, the continuous operation of the distribution system by the supplier or a new distributor is based on the foundations built by the former distributor. Here, Sobor argues, the rules on unjustified enrichment might be the basis of a compensation claim¹⁰⁶.

10. Conclusion

Distribution is one of the contracts in business law that is developing significantly in our days. Despite this, and although its existence is broadly admitted all over the world, distribution, with some minor exceptions, is not subject to specific legislation in either national legislations or international legal instruments. As a consequence, jurisprudence has an important role in determining the legal background to it.

There is no doubt that distribution is already present in the Hungarian legal thinking and therefore its recognition by the Civil Code as a distinct type of contract is warmly welcomed. It is somewhat unfortunate that the regulation of such contracts remained incomplete. It does not fully follow the European harmonisation initiatives and did not take into consideration the new trends of national legislations, and the inadequate provisions of the Civil Code must therefore be completed by the courts.

103 Sobor: page 16

104 Ádám Fuglinszky – Attila Menyhárd: *Európai jogalkotás és nemzeti törvényhozás* (European law making and national legislation – Polgári Jogi Kodifikáció, HCG-Orac, Budapest 2002/5-6) page 45

105 Sobor: page 17

106 Sobor: page 17