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CONTRACT OF EXCLUSIVE CONCESSION

Abstract

The contract of exclusive distribution is the one by which the holder of a mark or the conceder sets himself under the obligation that he should not practice goods selling within a certain territory but to the co-contractor or someone else the concessionaire sets under the obligation of delivering the goods that are the object of concessionary contract, on the grounds of the policy of the conceder.

The exclusive character is the most important feature of the contract, exclusivity being sometimes of a double nature: on the one hand, the distributor sets himself under the obligation of not trading goods provided by another supplier, in his turn, agrees not to sell the products to another competitor distributor.

1. Definition and judicial characters

Also called, in the French theory and legislation¹ "contract of selling concession", the contract of exclusive distribution is the one by which the holder of a mark or the conceder has been set under the obligation of not trading his goods, as far as a certain territory or area of distribution is concerned with another co-contractor rather than the one assigned under agreement or with somebody, the concessionaire has set under certain deliverance requirements as the object of the concessionary contract, respecting the conceder's commercial policy.

The contract of exclusive distribution is characterized by the fact that the parties introduce a clause of exclusivity. By the clause of exclusivity, the distributor should obey the imposition of lawful restrictions and not sign contracts with other suppliers; likewise, the supplier is obliged not to involve other distributor contract parties.

The exclusivity can refer to the supplying or the selling and can be either unilateral or reciprocal. These clauses lead in all cases to a limitation of the co-contractor. On the one hand, they strengthen the commercial relations between parties and, on the other hand, the parties cannot get into contractual relations with third parties. For this reason, the clauses of

¹ R. Bout, C. Prieto, G. Cas, Lamy, Droit économique, 1998

exclusivity need to be viewed also from the point of the regulations of the competition.

Taking into consideration the nature of the clause of exclusivity, the distinction should be made among:

- The strengthened exclusivity/ the absolute territorial exclusivity, which gives the holder a monopoly of selling over a given geographical framework.
- The simple/ weakened exclusivity, featured by the fact that there is no exclusivity of selling for certain geographical areas, but only the exclusivity of prospecting for the given area.
- Exclusivity of trademark, by which the distributors is awarded the exclusive right to trade products under the respective trademark in a certain area.

The community right²¹ admits the agreements of exclusive distribution, giving them group exceptions from the application of norms establishing anticompetitive practices, when only two companies are involved, of which one is obliged not to deliver certain products but to the other one for the whole or only a part of the common market, to deliver certain products for reselling.

The restriction of the number of companies refers only to the agreement under discussion and does not prevent another such agreement to be concluded simultaneously with other resellers and distribution networks to be built.

The concession is used for consumer goods, such as beer, refreshments, oil products, cars, machines, equipment for agriculture etc. It allows the producer to trade efficiently their products and to supervise their distribution throughout the network, assuring the development of sales, the principle of reasonableness of the trade and warranting the quality of the product. The concessionaires themselves benefit from the trademark and the advantages granted by the conceder.

The features of the contract

In the contract of concession, a producer or a supplier grants a trader the right to trade products in their name and at their risk, thus it is similar to the contract of selling-buying, as the supplier is obliged to deliver

¹ CEE Regulation no. 1983/83 art. 1

the respective goods to the distributor, in a regular manner. The contract distinguishes from the selling operation as its object, assuring, on the part of the concessionaire, the exclusivity of the product distribution to the suppliers, in a given geographical area and a certain time period, moreover, being dissimilar from the contract of successive selling operation as well.

Similarly, the contract of exclusive distribution is not to be mistaken for the mandate, as the distributor act for themselves and at their risk.

The contract of exclusive distribution has the following judicial features:

- It is a complex reciprocal contract, implying an exchange and service assembly between the parties.
- It is a contract of supplying services.
- It is a frame-contract, allowing the subsequent concluding of individual contracts of application, giving the general conditions for the latter.
- It is a contract defined by exclusivity, which can be either simple, that is only for providing, or mutual, that is for providing and supplying.
- It is a consensual contract, which is concluded validly the moment an agreement of will is expressed, but in practice the written form is used.

The exclusive character is the most important feature of the contract. The exclusivity is sometimes double: on the one hand, the distributor is obliged not to get provisioned by another supply authority, and the supplier is obliged at the same time not to sell the products to competitor distributor. The distributor benefits thus from a monopoly of selling in the area provided in the contract, leading to the markets being closed, which is contrary to the competition right.

In other contracts, the clause of exclusivity is limited to the provisioning segment. This is the case of the contracts regarding oil products and some beverages. These contracts raise certain problems related to the establishing of prices, but also, from the point of view of the competition right, against the rejection of selling and the territorial protection.

The exclusivity of supplying in a contract of exclusive distribution allows the supplier to reject the concluding of other contracts with traders

outside the distribution network. The French judicial system¹ agrees that the refusal is justified from the point of view of the competition right, as long as the contract contributes to the amelioration of the consumers' condition.

2. Specific obligation of parties

The contract of exclusive distribution/ of concession creates many obligations for the parties, deriving from the selling, the will agreement bases, as well as from the cooperation agreed upon by the parties and from the clause of exclusivity.

Obligations of the supplier/ conceder

- The conceder must supply the products in the manner agreed upon. In case they do not carry out this obligation accordingly, the concessionaire/ distributor can claim indemnifications, but they can also request support for the forced execution. If the products offered are not competitive, the responsibility of the supplier is not questioned, as each of the parties takes the commercial risks upon their shoulders.

- The conceder must respect the exclusivity areas established. He cannot sell, directly or indirectly, to another person or grant the distribution right in that area and he conveys, to the distributors, all the orders he gets for the respective area, so that the latter can negotiate directly with the persons who are interested. This is the case of the obligation of non-competition, which the conceder has to the distributor. In other words, this is the only obligation that can be imposed on the supplier from the point of view of the competition right, according to the CEE Regulation 1983/83.

- The conceder bears the responsibility of assisting the distributor. This assistance represents the essence of the contract and may consist of technical, commercial or financial assistance criteria.

- The distributor is granted the free and secure use of the product's trademark by the conceder who is responsible for the process being carried out. This is not the case of a trademark license, as the

¹ R. Bout, C. Prieto, G. Cas, Lamy, Droit économique, 1998

distributor cannot apply the mark on the products; it is a simple transmission of usage.

Obligations of distributor/concessionaire

- The distributor is under more and tougher contract obligations than the conceder does. These give him a certain safety, but at the same time they put him in a position of economic dependence. Not carrying out the obligations he took upon himself leads to either action of cancelling or to action in contractual responsibility.

- The distributor must acquire the products of the supplier, applying the cause of quota share. This clause, which stimulates the competition, implies as a rule the obligation to acquire a pre-established quantity of products, but can also be analysed for the benefit of the distributor, as an obligation of means, being a goal the latter has in view. Often, the contract establishes the obligation of the distributor to have stocks and to maintain them, in order to respond to the needs of the clients. He has to acquire the products at the price agreed upon and to resell them as the supplier indicates.

- The distributor must take all the necessary measures in order to keep the unity of the network and to defend the image of the conceded trademark. He is obliged to respect the law for the commercial policy of the supplier, the sale methods of the latter and to arrange the selling spaces so that the clients should be able to identify the participants in the network, and the personnel must be qualified and trained to give appropriate post-sale services. He cannot disclose the economic, technical or financial information which can favour the competition. For this, the contracts contain penalty clauses or severe commissioning pacts.

- The distributor must respect the sale practices carried in a given area. He is under the obligation of not acting outside this territory, practicing an active policy outside the exclusivity area, which implies a number of problems from the point of view of the competition right.

- The distributor has, therefore, the obligation of non-competition and of loyalty to the supplier. The French juridical system¹ admitted that, in such cases, the supplier can invoke the exception of non-execution of the contract, refusing to deliver the quantities of products agreed upon by the parties and initiating the procedure of direct sale. The

¹ R. Bout, C. Prieto, G. Cas, Lamy, Droit économique, 1998

distributor must respect the clauses of the contract by which he is forbidden to sell directly or indirectly the product or to favour their sale. If he trespasses the exclusive territory of other distributors in the network willingly, he will be the one liable to penalty in the area.

This solution does not comply with the norms of the competition right, because the distributor is not free to compete with others. This is the meaning of the notion of absolute territorial protection.

The CEE Regulation 1983/83 establishes the restriction framework for the competition that can be imposed upon the exclusive distributor:

- the interdiction of manufacturing or distributing the products in competition with those provided in the contract;
- the obligation, according to the contract, of not buying the products in order to resell them from another one than the one involved in the agreement;
- the interdiction of advertizing the contract products, of setting up any branch or keeping any warehouse for their distribution outside the conceded area.

The agreements of exclusive distribution are not anti-competitive if they contain clauses by which the distributor is set under the obligation of buying a minimum quantity of products or sets of products, to sell the products provided in the contract under the marks or presentation indicated by the supplier, to take measures of promoting the sale (advertising, maintaining a sale network or a stock, assuring the service and warranty for the clients, use of specialized personnel).

The presence of other restrictive obligations of the distributor lead to the loss of the benefit of group exception for the respective agreement, as a whole, the exception not being possible other but on an individual basis, if the advantages given are superior to the disadvantages resulting from the limitation of the free competition.

Taking into consideration the provisions of the CEE Regulation 19/65, the agreements of exclusive distribution are considered anti-competitive practices when:

- the products in the contract are not the subject of the effective competition of identical or similar products, in the conceded area;
- the access of other suppliers in different steps of distribution is substantially restricted;

- the intermediaries and users cannot procure the products from the distributors outside the conceded area, under the conditions these distributors practice regularly on the market;
- the exclusive supplier either exclude, without good reason, the delivery within the conceded area of categories of buyers rather than not being able to honestly trade the products or applies different prices or sale conditions, or even sells for excessive prices the products included under the contract.

3. Cessation of the contract

The duration of the contracts of exclusive distribution is freely established by the parties, taking into consideration the provisions of the competition right, which limits to 5 years the duration of the clauses of exclusivity. According to these provisions, the contracts of exclusive distribution concluded for unlimited duration or for more than 5 years are reduced to such a time period. The contract concluded for limited duration shorter than 5 years ceases on the date agreed upon by the parties.

For the contracts of unlimited duration, any of the parties can cancel unilaterally the contract, without this action being considered abusive, if there are justified reasons and respecting a notification term, either established by the parties, or another justified reason.

A problem related to the ceasing of the contract concerns the product stocks. The question is whether the supplier is obliged to receive the products acquired by the distributors which have not been sold during the contract time period, the moment he gets out of the network. As a rule, the distributor is the owner; the French courts decided, on the other hand, that the ex-distributor who sells the products under the mark of the supplier acts as an un-loyal competitor; the courts cannot oblige the conceder to take over the stocks, as the distributor runs for the commercial risk. As a rule, the parties establish in the contract clauses these situations, either authorizing the distributor to sell these stocks after the cessation of the contract or the supplier taking them over.

Considering the clause of price, there appears the issue of respecting the principles of free competition. This issue appeared in the Volkswagen case:

The Volkswagen car company forbade its German concessionaires to reduce the price of the new Passat model, recommending a unique sale

price. The board considered that this practice infringes upon the principles of free competition provided by the agreement and applied a fine of € 30.96 million to the Volkswagen company.

Volkswagen overturned the decision of the Board in the superior Court, for the reason that the common principles regarding the free competition were not infringed upon, as the limiting of the sale price of the new Passat model was unilateral, the producer and the concessionaire not having an agreement for that sort of thing..

According to TCE art. 1, par. 1, concerning the agreements between companies: "Any agreements between companies, any decision of the groups of companies, as well as any practices between companies, which affect the trade between the member states having as an object or as an effect preventing, limiting or distortion of the competition within the domestic market, especially the direct or indirect statement of price for selling or buying or other conditions of commercial transactions are incompatible with the common market and are therefore forbidden".

TPI cancelled the decision of the Board to apply a fine to the Volkswagen company, saying that it can't be proved that the car producer and its concessionaires from Germany concluded an agreement of will, in order to impose a certain sale price, the agreement being no more than a unilateral act of the Volkswagen company. Thus, the Board couldn't prove the effective acceptance on the part of the concessionaires of the price recommended by the producer.

To state the limitation of the free competence sanctioned by article 81 TCE, it is necessary to prove that there is an agreement between the two companies, that is an agreement of will between the two parties, and not a simple unilateral decision of a company.

The argument of the Board stating that the agreement of will between the producer and the concessionaire, in order to impose a certain sale price results from the contract of concession itself between these parties will be rejected because, by concluding this contract, the concessionaire would accept implicitly the condition that can be imposed afterwards by the conceder, even if these do not conform to the common disposition.

The court considers that the act of signing a contract of concession cannot be taken as a tacit acceptance, in advance, of some further initiatives of the conceder, able to oppose the common principles concerning the free competition within the domestic market.

To apply the protection of article 81, par. 1, TCE, the Board must prove that the concessionaire agrees with the anti-competition initiative of the conceder, in other words, there is an "agreement" between the two parties.

The Romanian legislation contains a similar provision¹: "It is forbidden to reach any express or tacit agreements between economic agents or association of economic agents, any decisions of association or practices between them, having as an object or effect the limiting, preventing or modification of competition on the Romanian market or on a part of it, especially practices that lead to the direct or indirect statement of prices for selling or buying, for tariffs, discounts, increases, as well as any other unjust commercial conditions; (...)"

¹ Law 21/1996 art. 5 modified by OUG 121/2003