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A Game of Thrones: Interaction Between Manufacturer and Distribution Channels



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DISTRIBUTION AGREEMENTS: GRANT OF TERRITORY

I. GRANT OF TERRITORY

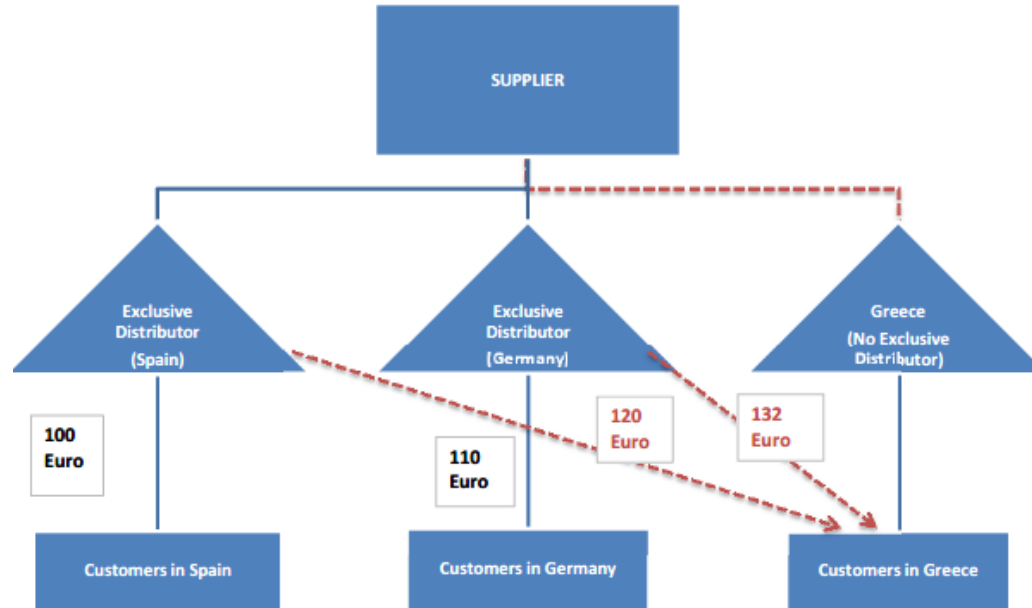
“Supplier hereby appoints Distributor as its exclusive distributor to market and sell the Products in the Territory [for example, Spain] to retailers located within the Territory for a period of ten (10) years. Distributor is permitted to sell the Products to retailers outside the Territory so long as Supplier has not appointed an exclusive distributor for such geographic area [for example, Greece]. Any Products sold outside the Territory must be sold at a price that is twenty percent (20%) higher than its sales price within the Territory.”

Distribution Agreement with Non-Price (Territory or Customer) Vertical Restraints:

- USA – Legal
- EU -- Prohibited



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Commission Regulation (EU) No 330/2010 – Vertical Agreements Block Exemption Regulation (“BER”):

- 1) The market shares of both the supplier and distributor cannot exceed 30%.
- 2) The agreement cannot contain any “hardcore” restrictions:
 - No RPM.
 - No territory or customer partitioning (except active sales may be prohibited if a territory is assigned to another exclusive distributor).
 - In selective distribution, no restriction of active or passive sales by selected distributors to end-users.
 - In selective distribution, cross-supplying must be permitted (selected distributors must be free to sell or purchase the contract goods to or from other appointed distributors).
 - End-users and independent repairers cannot be restricted from purchasing spare parts.



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- 3) The agreement cannot contain any “excluded restrictions”:
- In-term non-compete obligation (or exclusive purchasing obligation) exceeding 5 years.
 - Post-term non-compete obligation (unless indispensable to protect supplier’s know-how, limited to competitive goods/services, limited to POS, and limited to 1 year).
 - Obligation not to sell competing brands, except in selective distribution system.



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DISTRIBUTION AGREEMENTS: EXCLUSIVE DISTRIBUTION NOT REQUIRED

II. EXCLUSIVE DISTRIBUTION NOT REQUIRED

“Distributor is permitted to market and sell products that are competitive with the Products. However, if Distributor sells competitive products:

- Distributor will not be eligible to receive additional territories;
- Distributor will not be eligible to carry new products offered by the Supplier;
- Distributor will not be eligible to receive promotional incentives; and
- Distributor will not be eligible to receive price discounts.”



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DISTRIBUTION AGREEMENTS: EXCLUSIVE DISTRIBUTION NOT REQUIRED

BER Article 1(d):

“Non-compete obligation” means an direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer’s total purchases of the contract goods or services and their substitutes



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DISTRIBUTION AGREEMENTS: INTERNET SALES

III. INTERNET SALES

“Distributor is permitted to sell the Products on its website so long as: (a) Distributor’s internet sales do not exceed 25% of its total sales; and (b) Distributor does not sell on the internet at a lower price than its non-internet sales.”

(a) 25% limit:

- USA – Legal
- EU – Prohibited

(b) Uniform pricing

- USA – Legal
- EU - Prohibited



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DISTRIBUTION AGREEMENTS: RESALE PRICE MAINTENANCE

IV. RESALE PRICE MAINTENANCE

“Distributor may advertise the Products only at or above the Supplier’s Suggested Resale Price. Distributor may sell the Products at any price it desires, in its sole discretion.”

- RPM is legal (Rule of Reason) under US federal law (but is per se unlawful under some state laws, including California).
- RPM is a hardcore restriction under EU law.
- Minimum Advertised Price (MAP) Policy above:
 - US – Legal under Rule of Reason
 - EU – Probably considered to be a variant of RPM

