

THE SELECTIVE DISTRIBUTION AGREEMENT

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Abstract

The commercial distribution agreement and the framework agreement have been approached very rarely in our speciality literature¹. However, an analysis of commercial distribution as a modern form of long-term trade between suppliers and distributors reveals that these contracts are absolutely necessary in this process, where the middlemen make the trade more efficient, strengthen market positions, help penetrating new markets and attract and build customer loyalty.

The selective distribution system thus facilitates the producers` access to the extended market. The producers will choose those distributors that best meet objective qualitative, quantitative and non-discriminatory selection criteria. The selective distribution is most suitable for distributing branded finished products (e.g. luxury products and sophisticated devices). The main shortcoming of this system is its incapacity to cover the entire market; for this reason, the producer has to make sure that the final user/consumer can easily identify the distributors, otherwise they might miss the trade opportunity.

Of the utmost importance is the validity of the selective distribution system which depends on its compatibility with the free competition principle, a benefit of economy as a whole.

Key Words: selective distribution agreement, vertical agreement, luxury products and sophisticated devices, quantitative and qualitative selection criteria.

1. Introduction

We are living in a consumer society whose main purpose is not to produce but to sell items. Therefore, the role of distributors in this market and their use of the distribution agreement have become highly important. The commercial distribution has been and will continue to be an essential element of the producer`s commercial policy, which will help move the goods to the final consumer in the right quantity, and at the right place and time.

The commercial distribution agreements are a result of the business practice.

The use of various commercial distribution agreements is related to the concept of extended market (the producers` access to the extended market is facilitated by these agreements) and aims at developing long-term agreements that are meant to ensure constant consumers for the producer`s goods.

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¹ C. M Costin, *Distribuția comercială în rețea*, Rosetti Publishing House, București, 2004, Ș. Diaconescu, *Contractul-cadru de distribuție comercială*, Universul Juridic Publishing House, București, 2010;

This agreement becomes even more important if we consider the risk taken by the supplier in case he grants the distributor the exclusive right to sell his brand and products, usually for longer periods of time, as stipulated in the framework agreement.

2. Concept of selective distribution agreement

The selective distribution represents a contractual arrangement and is defined as a “*distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system*” – art. 1 letter e of the Commission regulation (EU) No. 330/2010 of 20th April 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.

The concept of selective distribution had been inexistent in the juridical practice before it was coined by the competition law². However, a resolution passed in 1982 by the France`s High Court of Cassation officially defined the selective distribution agreement as “*an agreement by which the supplier undertakes to sell goods within a determined territory to one or several distributors selected on the basis of specified qualitative, quantitative and non-discriminatory criteria and by which the distributor is authorized to sell other competitors` goods*”.³

The selective distribution agreement differs from the exclusive concession agreement in that the latter involves a mutual exclusivity that is not found in the selective distribution. Part of the doctrine considers that there are no differences between the distribution and exclusive concession agreements. Others believe that in spite of some similarities the selective distribution is defined based on qualitative competition criteria, whereas the concession relies on the market division which attributes each concessionaire a certain territory and its corresponding competition protection provided by the network creator.⁴ Moreover, another aspect separates the two agreements - the exclusivity stipulated by the concession contract, which is not an essential element in distribution agreements and involves mostly the exclusivity of supply. In conclusion, the concession agreements involve a mutual exclusivity while by a selective distribution agreement the supplier has the right to sell his goods to various other distributors who, at their turn, can buy from other suppliers, too⁵.

² M. Hocini, *Le contrat de distribution selective. Etude comparée*, p. 13, Ministère de l'Enseignement Supérieur et de la Recherche Scientifique, Université d'Oran, Mémoire présenté pour l'obtention du diplôme de magistère en droit comparé des affaires, sous la direction de pr. D. Zennaki, <http://www.univ-oran.dz/theses/document/TH3807.pdf>.

³ Cour de cassation (Chambre criminelle), 3 nov. 1982, cas Lanvin, Nina Ricci et Rochas, dans *Gazzete du Palais* 1982; J. M. Henriot-Bellargent, *Consécration de la distribution sélective des produits de parfumerie de marque aux plans économique et juridique*: *Gazzete du Palais*, July, 1985, pp. 2-3.

⁴ D. Ferrier, *Droit de la distribution*, Litec Publishing House, 4 éd., 2006, p. 281.

⁵ Ph. Le Tourneau, *Les contrats de concession*, Litec Publishing House, collection Affaires finances, 2003, p. 8 in M. Hocini, *op. cit.*, p. 33.

The term *concession* (concession agreement is a convention between a supplier who sells a certain product to a restricted number of buyers under particular terms and conditions) used for this type of agreements is not specific to the French private law but borrowed from the administrative law⁶.

3. Selective distribution

Selective distribution is commonly used to supply branded finished products. These products are durable items, luxury products, sophisticated devices, more or less standardized industrial and professional goods, which require considerable know-how from the producer (they come in a more limited range, their assimilation by the market requires more time and training courses), perishable food products (*e.g.* chocolate), goods that require special preservation conditions (*e.g.* beer, cigarettes, perfumes, cosmetics) as well as auxiliary services (*e.g.* design, mounting, maintenance)⁷.

This system acts like a niche business. It is usually characterized by the high value of a transaction and not by the great number of transactions. The margins applied to selective distribution are higher than those applied to intensive distribution and the figures are limited by the relatively small market segment involved. What separates the suppliers of similar products is the type and quality of the services provided as well as the flexibility of the commercial policy. The product promotion is achieved by specialized distribution channels⁸.

The *distribution channels* are short and organised on one (direct importer and service provider) or two (local distributor and service provider) levels. The width of the distribution channels is also small or medium and there is a rather limited number of producers for similar products. The market division depends on geographical coverage, product quality or final consumer criteria.

4. Choice of middlemen in selective distribution

The initiator of selective distribution (producer, importer, exporter, wholesaler, group of retailers) will select from a larger number of middlemen available within a certain territory a *limited number* of middlemen that will distribute his own products (imported/exported/purchased products) which are thus made less available on the market.

This is a suitable system for those products that need price and quality comparisons. By limiting the number of middlemen (retailers) the producer intends to strengthen his cooperation with each of them and finally to improve his own distribution channel.

⁶ Ph. Le Tourneau, *La concession commerciale exclusive*, Economica, 1994, p. 6. in M. Hocini, *op. cit.*, p. 31.

⁷ Cf. R. Kovar, *Les produits de luxe et la distribution sélective*, Mélanges C. Gavaldà, Dalloz, 2001, in D. Mainguy, *Les contrats de distribution*, 2013, on http://ddata.over-blog.com/les-contrats-de-distribution-_3_-2013.pdf.

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The middleman selection is based mainly on *qualitative criteria* (applied to the selection of the supplier's outlet) and to a smaller extent on *quantitative criteria*⁹.

These criteria help defining the supplier's number of operations, service quality, interest in a producer's brand, technical equipment (an important criterion for non-standardized products), competence, loyalty, fame and image.

The selected middlemen are supposed to create a good custom for the supplier and to hire the adequate personnel in order to meet the consumers' needs. Also, these products (*e.g.* audio-video equipment, luxury perfumes) shall be traded only in special locations¹⁰. Furthermore, no personality or qualification requirement is imposed to distributors (France's Competition Authority amended a supplier's request to impose a pharmacist qualification to all cosmetics distributors).

The selective distribution agreements reduce the number of licensed distributors and prohibits sales to unlicensed distributors. Thus, the only potential clients of the licensed distributors remain the other selected distributors and the final consumers.

Distributors keep their juridical autonomy. This type of contract helps the supplier to keep control over the resale of his goods to final consumers by imposing well-defined standards to distributors (to strengthen the channel cohesion and maintain the brand image) within the framework agreement. The European jurisprudence has established that the initiator shall observe directly or by his distributors the obligations arising from the creation of a distribution channel for luxury products or sophisticated technical devices.

At the end of the distribution channel lies the final customer, which can be an individual or a legal entity. The contact with the final customer is accomplished directly and requires visits to a show-room or the use of presentation catalogues. Also, a well-designed web portal could facilitate the first contact with the final customer.

The main shortcoming of this system is its incapacity to cover the entire market; for this reason, the producer has to make sure that the final user/consumer can easily identify the distributors, otherwise they might miss the trade opportunity.

By a selective distribution agreement the producer accepts from the very beginning to limit the product availability in order to reduce the distribution costs and improve his cooperation with the distributors in the following ways:

sharing the advertising and marketing costs;

- accepting new products and items that are not best-selling on the market;
- accepting larger quantities;
- guaranteeing services and getting the producer informed.

5. Selective distribution in the commercial competition environment

⁹ The Exemption Regulation of 2002 on the car distribution established an exemption for a 40% threshold as compared with 30% in the exclusive distribution, and a 100% exemption for all cases in the qualitative distribution.

¹⁰ Ghe. Gheorghiu, coord., A. Tutuianu, L. Mocanu, R. Postolache, S. Brebeanu, E. Bulea, *Contracte comerciale speciale*, Lumina Lex Publishing House, București, 2008, p. 90.

The validity of the selective distribution system depends on its compatibility with the free competition principle, which is a benefit of economy as a whole. This validity is closely related to the Treaty establishing the European Economic Community (March 1957), entered into force in January 1958 (Treaty of Rome¹¹), amended by the Treaty of Lisbon (December 2007)¹², entered into force in December 2009. Art. 101 of Treaty of Lisbon reproduces art. 81 of TCE (Title VII. Regulations concerning competition, legislative taxation and harmonization, chapter Competition Rules).

The exclusive distribution channels can reach a leading position on the market and even abuse it by their pricing policy, preventing other businesses to penetrate the market, or applying discriminatory criteria to other distributors. The violation of the competition principle results from vertical and horizontal agreements.

The success of this system is provided by its strengths in ensuring economic progress, which is a benefit of both consumers and channel members. A balanced selective distribution channel depends on the measures adopted by the members to protect it from unlicensed distributors.

This agreement may be *detrimental to free competition* as it limits the number of traders and does not generate a decrease in prices. As mentioned before, distributors are selected by suppliers based on well-established criteria. They are prohibited to sell the products to other unlicensed distributors. The distributor can serve several suppliers and sell any product that the agreement concluded with the supplier has not decided as being prohibited to sell.

5.1. As for the *object* of these contracts, the European Community tends to associate the luxury products with sophisticated technical devices in order to explain the creation of this channel.

When it comes to luxury products their fame and the need to keep this fame require a selective distribution system¹³. Yet, the E.C. jurisprudence has clearly emphasized that it is the product quality that prevails and not necessarily the brand fame.

Selling sophisticated technical products like cars, computers or electronic devices used for entertainment needs specially designed locations, specialized equipment and qualified salesmen and personnel so that these products can better reach the consumer. The European jurisprudence has demonstrated throughout the years that a selective distribution system is the most suitable in case the products need a particular distribution system. For instance, due to their technical intricacy, watches can be sold only by specialized stores and personnel, generally locations that can store and display such products.

In recent years, the range of products that require a selective distribution system has widened and included different less technical goods that must be sold only

¹¹ Renamed Treaty on the functioning of European Union, following the amendment process (TFUE).

¹² Official Journal of the E.U. 2007/C 306/01, improved version, on http://europa.eu/pol/pdf/qc3209190roc_002.pdf.

¹³ In Chanel/Boulogne distribution case, it was stated that selling Chanel products by unqualified personnel in unsuitable locations, as forbidden by company standards, creates a negative image to a brand that is about luxury and refinement.

in special conditions.¹⁴

5.2. *The selection criteria* concerning the qualities of distributors and company personnel have not been considered restrictive by the competition. A Commission Decision of 1985 holds that the imposition of criteria concerning the professional qualification of distributors and personnel is a pre-requisite in the luxury cosmetics commerce. At the same time, the Court incriminated the Vichy cosmetics company which imposed the pharmacist qualification to its distributor¹⁵.

Regarding the prohibition of the distributor to sell other goods than luxury and sophisticated technical products that could bring about the brand depreciation, a law case highlights an agreed retailer that was prohibited to sell along with Yves Saint Laurent products other items that are susceptible to affect the image of the first¹⁶.

Another law case concluded that luxury perfumes are high quality sophisticated products and thus, need to be sold in special locations that satisfy the customers. The properties of these products go far beyond their material features, including at the same time the consumers' perception of them¹⁷.

In *Metro I* case, the European Court of Justice held that the qualitative criteria must be non-discriminatory, that is, equally applied to all potential distributors¹⁸.

Concerning the quantitative criteria, according to European legislation, a selective distribution system subjected to conditions that exceed a simple objective qualitative selection, falls under the prohibition of Art. 101 (former Art. 81) of TFUE¹⁹.

The outlet location is another permissible criterion in the distributors' selection on condition that the supplier makes proof that the nature of product requires such location.

The supplier cannot impose the retail price or any unjustified quantitative restrictions (no law forbids the establishment of prices by only one party unless it is arbitrary, otherwise this case is incriminated by the France's Court of Cassation as an abuse in the pricing policy).

¹⁴ 85/616/CEE: E.U. Decision of 16th December 1985 relating to a proceeding pursuant to Art. 85 of the EEC Treaty in Villeroy & Boch case, on <http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:31985D0616&from=EN>.

¹⁵ <http://eurlex.europa.eu/legalcontent/FR/TXT/HTML/?uri=CELEX:61991TJ0019&from=E>.

¹⁶ Court of First Instance, 12th December 1996, Edouard Leclerc/CE, T-19/92 – Selective distribution system – Luxury cosmetics (Arrêt du Tribunal de première instance du 12 décembre 1996. Groupement d'achat Edouard Leclerc contre Commission des Communautés européennes. - Système de distribution sélective-Produits cosmétiques de luxe.-AffaireT-19/92), on <http://eur-lex.europa.eu/legalcontent/FR/TXT/HTML/?uri=CELEX:61992TJ0019&from=FR>.

¹⁷ Decision of Court of First Instance, 12th December 1996, Edouard Leclerc vs. EEC, Selective distribution system – Luxury cosmetics, T-19/92, on <http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:61992TJ0019&from=FR>.

¹⁸ Court Decision of 25th October 1977 - Metro SB-Großmärkte GmbH & Co. KG vs. EEC, Selective distribution system, 26-76, on <http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:61976CJ0026&from=FR>.

¹⁹ Court Decision of 10th July 1980, SA Lancôme and Cosparfrance Nederland BV vs. Etos BV and Albert Heyn Supermart BV. – Competition – Perfumes, 99/79, on <http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:61979CJ0099&from=FR>.

The European legislation bans the preliminary establishment of the resale price but this situation can be sanctioned only in case it considerably affects the trade between the member states²⁰.

From a competitive perspective, these clauses tend to reduce the intra-brand competition²¹, to facilitate secret agreements between suppliers or buyers and to exclude one or more categories of distributors, especially if several parallel selective distribution channels activate in the market.

In a selective distribution agreement, the clauses regarding the control exercised on the distributors` management and their obligation to take part in advertising campaigns can limit the distributor`s autonomy in establishing the resale price²².

As for the refusal to sell, which is condemned by the competition law, the French jurisprudence highlights the case of a supplier who won the case against a distributor that the first refused to do business with because the distributor had not accepted to provide after-sale service of the products (high-tech Dietrich devices)²³.

Other clauses are allowed in these agreements, that forbid the active sale²⁴ of a new product in the exclusive coverage area controlled by a certain distributor and where the respective item hasn`t been launched yet. The supplier must operate his business freely and thus, he has the right to limit the sale of his products in certain territories based on the strategy that he adopts.

The supplier is at the same time the one that has to demonstrate if the selective distribution system is legal or not (he has to provide proof in this respect).

The selective distribution system requires the supplier to sell his products only to carefully selected distributors and therefore, a selective distribution agreement

²⁰ In 1963, France prohibited the unprofitable sale with the purpose of protecting the small-size enterprises against the increasing power of commercial distribution. Subsequently, by Galland Law of 1996 on fairness and balance of powers in commercial relationships, the French Commercial Code introduced *le seuil de revente à perte (SRP)*, the so-called resale threshold which included the invoice price plus transportation and other fees. Yet, the European Court of Justice displayed a certain flexibility in terms of the price established in the selective distribution; thus, a minimum limitation of the competition should be inherent in all selective distribution systems, because the qualified traders in this channel activate in a more restrained area than the unqualified ones. ECJ, 22nd October 1986, case 75/84, Metro SB-Großmärkte GmbH & Co. KG/ECC, pp. 3086, on <http://curia.europa.eu/juris/showPdf.jsf?Text=&docid=92988&pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&cid=141469>.

²¹ Competition between the distributors or retailers of the same branded product, in terms of price or other conditions (*e.g.* a pair of jeans can be sold at a lower price in a discount store than in a large store, but most offer, without the after-sale service provided by the latter).

²² The French supervising authorities have always attempted to sanction the clauses that impose minimum resale prices, with the main purpose of ensuring the free functioning of the market and protecting the distributors against the suppliers. However, the contractual clauses that prohibit distributors to sell the product at lower prices or use promotions, by putting pressure on them, are illegal - Conseil de la Concurrence, Décision n° 01-D-45 du 19 juillet 2001 – Casino France vs. Bausch & Lomb, in the distribution of Ray-Ban sunglasses, on <http://www.autoritedelaconcurrence.fr/pdf/avis/01d45.pdf>.

²³ M. Hocini, *op. cit.*, p. 134.

²⁴ The distinction between active and passive sale has been introduced in competition law to strengthen the validity of territorial exclusivity commonly used in the selective distribution contracts. Therefore, the Court of Appeal of Paris held that the interdiction of active sale is natural and legitimate, that is, in its absence the exclusivity becomes useless, in CA Paris, 7th June 1990, BOCCRF, 20th June, p. 213.

can justify the supplier's refusal to sell goods to third parties outside the channel, that is, to unlicensed distributors, in order to keep the distribution channel closed. Yet, this agreement does not justify unfair competition against a third party in the channel that sells goods acquired by other means, as long as no fraud has been committed by this third party (e.g. the third party has purchased the goods from an importer that the producer could not refuse to sell products to). If the third party has purchased the goods from a distributor that infringes a distribution agreement and the resale has tarnished the product image, the first shall be liable for his actions.

The geographical coverage is an element that may raise issues in this type of agreement. The supplier's objective is to make the most out of his business so he will not grant any exclusivity to his partner; at the same time, the distributor seeks to obtain a large geographical coverage in order to gain the expected profit.

The selective distribution agreement also contains clauses that regulate the objectives to be reached by the selected distributors, such as a *minimum turnover*. This is also a quantitative criterion as the channel initiators' justification is to select those distributors that can provide certain guarantees for the business. In the Guerlain case, France's Court of Cassation held that the imposition of this quantitative criterion represents a limitation of the distributors' contractual freedom.

Another law case showed that ignoring quantitative criteria can ensure a more efficient selection from a qualitative perspective (Yves Saint Laurent of December 16th 1991 – in making this decision, the Court complied with the CJCE jurisprudence which has constantly upheld the idea that a selective distribution channel penetrated based on quantitative criteria cannot be justified²⁵).

Of the same importance is also the reduction of selected distributors in a certain geographical area. The Commission has incriminated this practice to limit the number of selected distributors, based on quantitative criteria²⁶. The Commission regulation 1400/2002 on the application of Art. 81 paragraph (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector was amended by the introduction of a clause that imposes exclusively qualitative criteria in the distributors' selection (Art. 7. „It can therefore be presumed that in general, vertical agreements have such advantages where the supplier concerned has a market share of up to 30 % on the markets for the distribution of new motor vehicles or spare parts, or of up to 40 % where quantitative selective distribution is used for the sale of new motor vehicles”).

6. Juridical character of the selective distribution agreement

²⁵ Court Decision of 10th July 1980, SA Lancôme and Cosparfrance Nederland BV vs. Etos BV and Albert Heyn Supermart BV. – Competition – Perfumes, 99/79, on <http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:61979CJ0099&from=FR>.

²⁶ The French Competition Authority held that in the Rolex watch distribution, the introduction of the clause on the local sale potential represents a subjective and discriminatory criterion. The Rolex Company justified this condition by the impossibility to supply the distributors in the French or EU territory, Competition Council Decision no. 96-D-72 of 19th November 1996, on <http://www.autoritedelaconurrence.fr/pdf/avis/96d72.pdf>. The Court of Appeal of Paris maintained the Competition Authority Decision on the same grounds - BOCCRF (Bulletin Officiel de La Concurrence, de La Consommation et de La Répression des Fraudes) of 9th December 1997.

- a. Innominate contract agreement (it is not regulated by law but EU Regulations contain some elements on its application but not on its juridical character);
- b. Synallagmatic agreement (arises rights and obligations for both parties);
- c. Consensual agreement²⁷;
- d. Onerous agreement (both parties seek to obtain profit);
- e. Continuing contract (executed over long periods of time);
- f. Dependent contract (the supplier has a more important position than the distributor and imposes certain obligations that the latter cannot negotiate);
- g. Integrated contract (the distributor is integrated into the supplier's channel);
- h. National or international contract.

The contract shall be signed for an undefined period (according to competition law the exclusivity clauses shall be limited to 5 years²⁸) and both parties can terminate the contract in case of breach of contract. It will be concluded in written form and the parties can decide upon an authentic form of this contract. It can also be concluded consensually as the written form is required only *ad probationem*. The supplier shall inform the distributor on his duties and the structure of the distribution channel.

In the French jurisprudence, relative to the substantive condition of the consent, especially fraud and violence as defects in consent, the Court of Cassation held that the simple use of a dominant position against a contractor cannot be treated as violence or something illegal and based on the economic liberalism (contractual freedom), each party is presumably strong enough to resist the pressure from the others and not to enter into a contract that might prejudice him. After the legislative reform of 1996 and Law of 15th May 2001, the French lawmaker has increased the protection of the weaker party, the distributor and considered violence a defect in consent only if the other party abusively uses his dominant position²⁹.

Just like the franchise or concession agreements, the selective distribution agreement may contain performance clauses like *quota* or *minimis* (purchasing goods of a minimum quantity or value). Such clauses may bring about the contract termination due to failure in the contract execution, or even the refusal of contract extension.

According to France's Court of Cassation and the EU legislation, the supplier can require selected distributors to sell his products only in specially designed locations and prohibit their sale on the Internet³⁰. Also, he can consent to the

²⁷ Regarding the sale contracts, *Art. 11* of the Vienna Convention of 1980 (on the international sale of goods) established that the principle of consensualism is traditional in domestic and international sales, although the practice of these transactions and the attempt to provide a certain security require a written form – Romania joined the Convention by *Law 24* of 6th March 1991, M. Of. no. 54/19.03.1991 (The sale contract must neither be concluded or approved in written form, nor subjected to any other condition. It can be acknowledged by any means, including witnesses).

²⁸ This type of contract can be detrimental to free competition, by limiting the number of salesmen without facilitating a reduction in price, in Ghe. Gheorghiu, coord., *op. cit.*, p. 90.

²⁹ M. Hocini, *op. cit.*, p. 64.

³⁰ In Yves Saint Laurent case of 17th May 2001, the European Commission established that the interdiction to sell on the Internet products that are the object of a selective distribution agreement

distributors` decision to sell other luxury brands along with his luxury products, but cannot absolutely impose this clause.

7. Obligations of the parties in the selective distribution agreement

The supplier`s obligations:

- to provide information³¹;
- to share with the distributor some of his rights: know-how, trademark;
- to supply the products in the terms and conditions decided upon by contract and to provide the distributor a warranty against eviction and hidden flaws;
- to organise advertising campaigns for his brand;
- to provide technical, business and financial support³².

The distributor`s obligations:

- to respect the supplier`s brand and business strategy (the distributor shall follow the supplier`s instructions, set up the outlet locations as desired by the supplier, have qualified personnel, practice a particular pricing policy, avoid any deed that might prejudice the supplier`s brand image);
- to sell products only in locations agreed by the supplier;
- to sell products only to traders agreed by the supplier;
- to avoid any kind of competition with other channel distributors;
- to sell the goods only in the geographical area determined by the distribution contract;
- to provide service for all products purchased from the supplier through the distribution channel;
- to return the supplier all trademarks protected by the intellectual property law, in order to avoid the consumers` confusion following the termination of contract;
- to avoid any kind of competition with the supplier following the termination of the distribution contract (post-contractual non-compete clause which in order to become valid must not be detrimental to the contractual freedom and must be limited in time, space and scope)³³.

Shall these obligations not be respected the contract can be terminated unilaterally.

represents a restriction that cannot be exempt, according to Regulation 2790 of 2009, but the same Commission also stated that this interdiction can be admitted if it is well-argued.

³¹In the French legislation, the principle on the obligation to provide information of the common law has been enforced in distribution contracts. Law Doubin of 31st December 1989 stipulates that the supplier shall provide 20 days before the conclusion of the contract, a document containing various information (*e.g.* supplier`s experience, channel`s prospects and market value, contract duration, renewal conditions, cession and exclusivity clauses) that should allow the future distributor to sign the contract well-informed.

³² C.M. Costin, *Principalele obligații ale furnizorului, inițiator sau promotor al rețelei de distribuție comercială*, *Drept comercial* 1/2003, p. 71.

³³ M. Hocini, *op. cit.*, p. 97. In the application of the post-contractual non-compete clauses, the French jurisprudence also mentions the principle of proportionality, which relates the producer`s interests to the selective distributor`s freedom.

A new question raises in terms of the goods purchased by the distributors that left the channel, but which have not been sold during the execution of the contract, as stipulated by agreement. Basically, the owner of these goods is the very distributor. Yet, the French Court has decided that the former distributor that sells products under the supplier's brand is liable for unfair competition. Despite that, the Court cannot force the supplier to take the products back because it is the distributor who takes the business risk. It is advisable that all these aspects should be stipulated by contract.

The selective distribution agreement is not legally binding to third parties.

8. Termination of the selective distribution agreement

The provisions of Civil Code on the general theory of obligations help to identify the best way to terminate a selective distribution agreement. Thus, upon contract expiration, a unilateral cancellation can be resorted to as agreed by contract.

The contract can be renewed by mutual agreement of the parties. Neither party can be forced to extend the contract but in the French jurisprudence there have been cases of suppliers sanctioned for having imposed unreasonable duties to distributors, as a condition to extend the contract (*e.g.* large investments compared with the object of contract). Of abuse has also been accused the supplier who pretended to extend the contract and determined the distributor to make additional investments but eventually, he has not proceeded to the renewal of contract anymore.

As a synallagmatic agreement, the unilateral cancellation can be resorted to only for objective reasons (some selective distribution agreements whose object are perfumes contain such clauses that regulate the anticipatory cancellation³⁴).

In case of abusive cancellation by the supplier, he shall pay the distributor damages to reorganise his business³⁵. An equally important issue is also the stock of goods acquired by the selective distributor, as once with the termination of contract, he is forbidden to sell these products. To avoid such problems, the selective distribution contract may contain clauses that determine the supplier to buy back the distributor's remained stock following the unilateral cancellation of contract. In absence of such clauses, a Decision of the Chamber of Commerce of France's Court of Cassation of 9th October 2007 established compensations for a distributor based on *Art. 1371* of French Civil Code on the principle of unjust enrichment. Shall the unilateral cancellation resulted from a breach of contract by the distributor, the supplier cannot be obliged to buy these stocks.

9. Conclusions

Although across the years, selective distribution agreements have been accused to restrict the freedom of competition, these vertical restrictions have been admitted by authorities due to their proven efficiency with luxury products and sophisticated technical devices. These advantages must be regarded mainly from the consumer's perspective. Therefore, owing to the qualitative and quantitative criteria

³⁴ M. Hocini, *op. cit.*, p. 93.

³⁵ G. Virassamy, *Les contrats de dépendance*, LGDJ, 1986, p. 223.

used to select the distributors, these will become specialized dealers, qualified to provide consumers with the best possible advice and information. The merchandise is supposed to be diverse as there are no exclusive purchase clauses stipulated by this type of contract. The service quality and after-sale service are positive elements to the benefit of the final consumer. The selective distribution agreements facilitate the economic growth

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