

# The distribution contracts: an Iberian approach<sup>1</sup>

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## **Abstract**

*The contracts of commercial distribution are indispensable legal instruments to the development of the economic activity. The distribution, since the industrial revolution, acquired autonomy, given the necessity of specialized intermediation to distribute good and products. In this process, the structural organization of the distribution process suffered mutations, starting to assume a set of activities aiming at adjusting demand to supply, including, among others, clients canvassing, after-sales services, financing and assumption of risks, advisory services, promotion and advertising. The insufficiency of traditional contracts of purchase and sales and commission to satisfy the distributive needs caused by the industrial revolution will justify the development of new contractual schemes, such as agency contract, commercial concession and franchising. The obligation of the distributor to ensure the interests of the producer and to promote the distribution of the goods and services of the producer, in the context of a lasting relation of cooperation between the parts, through which the distributor is incorporated, with greater or minor intensity, in the producer distribution network, allowed us to sustain, as affirmed in the Portuguese and European literature, that distribution contracts could be framed in the same legal category. These contracts, as contracts that were shaped by praxis, do not have, with exception of agency contract, a legal framework in Portugal and Spain. It has been discussed in literature if agency contract legal framework can be applied, by analogy, to the contracts that fit in the legal category of distribution contracts. This paper aims at analyzing the legal framework of contracts of distribution in these legal systems, with the purpose to discuss the analogical application of the agency contract to these contracts.*

**Keywords:** *the distribution contracts, the concession contract, agency contract, franchise agreement*

**JEL Classification:** K12, K22

## **1. Introduction**

Commercial distribution, in the economic process, is the activity of intermediation between supply and demand, through which the producer, using intermediaries, delivers products and services to consumers, while at the same time seeks to determine and meet the needs of the latter.

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With the industrial revolution, this stage of the production process acquired autonomy, as the surpluses of mass production subordinated the production to the law of supply.<sup>3</sup>

Therefore, the commercial distribution is no longer centered on the physical distribution of products, performing a set of activities aiming at adjusting demand to supply, including, among others, clients acquisition, after-sales services, financing and assumption of risks, advisory services, promotion and advertising.<sup>4</sup>

The difficulties revealed by the traditional purchase and sales and commission contracts to answer to the demands of this complex distribution process will be the source of the development of new contractual schemes, such as agency contract, commercial concession contract and franchising.

These commercial distribution agreements are legal instruments necessary for the development of economic activity.

As models shaped by *praxis*, these contracts, with exception of the agency contract, do not have a legal framework in the Spanish and Portuguese legal systems.<sup>5</sup>

Only the agency contract, owing to the legal framework provided by the Directive 86/653/EEC, is regulated in both legal systems, being discussed, by literature and case law its application to distribution contracts owing to the analogy among the contracts.

## 2. Brief characterization of the contracts under analysis

### 2.1 Agency Contract

The commercial agent performs an economic activity, organized, that includes material acts of varied content, in a stable and autonomous way, in order to promote the conclusion of contracts, on behalf of the principal<sup>6</sup>, upon payment of retribution.

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<sup>3</sup> See Esperanza Gallego Sanchez, *La franquicia*, Trivium Editorial, Madrid, 1991, p. 29, note 88.

<sup>4</sup> See Ignacio Moralejo Menéndez, *El contrato mercantil de concesión*, Editorial Aranzadi, Navarra, 2007, p. 27. About the functions of distribution, see Enrique Díez de Castro, Antonio Navarro Garcia, *Naturaleza de la distribución*, “Distribución Comercial”, Enrique C. Díez de Castro (coord.), 3<sup>a</sup> ed., McGraw-Hill, Madrid, 2004, pp. 7 ff.

<sup>5</sup> In *Propuesta de Código Mercantil elaborada por la Sección de Derecho Mercantil de la Comisión General de Codificación*, the commercial distribution contracts, which included the contract *concesión mercantil* and the *contrato de franquicia*, were regulated in article 543. However, the *Anteproyecto de ley del Código Mercantil* no longer rules these contracts, only providing a legal framework to agency contract, that replicates the regulation enacted by *Ley 12/1992, de 27 de mayo* (LCA).

<sup>6</sup> The agency contract has its own legal framework, enshrined in *Decreto-Lei n° 178/86, de 3 de Julho*, as amended by *Decreto-Lei n° 118/93, de 13 Abril*, which brings into force Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. *Decreto-Lei n° 178/86, de 3 de Julho*, has enacted the concept already accepted in doctrine and in case law.

The agent acts on behalf of the principal, pursuing the interests of the principal, within a long-term relationship of collaboration between both, whose key feature is the obligation to promote the conclusion of contracts.<sup>7</sup>

The obligation to promote the conclusion of contracts is based on a multiplicity of material acts designed to seek potential buyers, to encourage and increase the conclusion of contracts relating to goods or services, collecting purchase orders and communicating them to the principal.<sup>8</sup>

Stability is another essential element, as a result of which the agent's activity is a series of acts intended to be carried out during the period for which the contract has been determined, within the framework of a long-term relationship.<sup>9</sup>

The economic results that the parties aim at achieving within the agency contract can only be attained in a stable and lasting relationship.

The autonomy of the agent is also an essential element of the agency contract, notwithstanding its obligations as regards to follow principal guidelines and to provide a regular report of its activity.<sup>10</sup>

We adopt, as the Portuguese legislator in *Decreto-Lei n° 178/86, de 3 de Julho*, the term *principal* to designate the agent's counterpart. See Pinto Monteiro, *Contrato de agência (Anteprojecto)*, BMJ n° 360, 1986, pp. 60-62. The Spanish legislator has adopted the term *empresario*.

<sup>7</sup> Pinto Monteiro, *Contrato de agência (Anteprojecto)*, cited above, p. 48, Martínez Sanz, *La indemnización por clientela en los contratos de agencia y concesión*, 2ª ed., Civitas, Madrid, 1998, p. 31.

The pursuit by the agent of the interests of principal led the German literature to include this contract in the category of *geschäftsbesorgungsvertrag*. See Canaris, *Handelsrecht*, 23. Aufl., Verlag C H Beck, München, 2000, p. 322.

See Pinto Monteiro, *Contrato de agência (Anteprojecto)*, cited above, pp. 54-55, Manuel Broseta Pont, *Manual de Derecho Mercantil*, Vol. II, Fernando Martínez Sanz (coord.), 15ª ed., Tecnos, Madrid, 2008, pp. 122 ff.

The agent performs in this contractual scheme obligations of means and result. On the one hand, the promotion, dissemination of products and clients acquisition seem to be obligations of means, on the other hand, the obligation to prepare contracts that will later be fulfilled by the principal seems to be an obligation of result, since the commission is indexed to contracts promoted by the agent and fulfilled by the principal. In the same sense, Roberto Baldi, *Il contratto di agenzia. La concessione di vendita. Il franchising*, 7ª ed., Giuffrè Editore, Milano, 2001, pp. 29-30, Marino Perassi, *Il contratto di agenzia*, "Trattato di Diritto Commerciale e di Diritto Pubblico dell'economia", Vol. XVI, "Contratti commerciali", Diretto da Francesco Galgano, Cedam, Padova, 1991, p. 423.

Galgano, *Diritto civile e commerciale*, Vol. III, Tomo I, Cedam, Padova, 1990, p. 13 and Saracino E/Toffoletto F, *Il contratto di agenzia*, "Il Codice Civile - Commentario", diretto da Schlesinger, Giuffrè, Milano, p. 40, sustain that is an obligation of means.

<sup>8</sup> Ghezzi, *Del contratto di agenzia*, "Commentario del Codice Civile a cura di A. Scialoja e G. Branca", Libro quarto: Delle Obbligazioni art. 1742-1753, Zanichelli, Bologna-Roma, 1970, p. 4, note 10.

<sup>9</sup> This is the hallmark of the agency contract towards the brokerage contract. See Roberto Baldi, *Il contratto di agenzia*, cited above, pp. 47-48, Maria Teresa Caracciolo, *Il contratto di agenzia*, "I contratti di distribuzione. Agenzia, mediazione, promozione finanziaria, concessione di vendita, franchising. Figure classiche e new economy", a cura di Giuseppe Cassano, Giuffrè, Milano, 2006, p. 156.

<sup>10</sup> This feature distinguishes the agency contract from the employment contract, characterized by the legal subordination of the employee towards the employer. See Pedro Romano Martínez, *Direito do Trabalho*, 7ª ed., Almedina, Coimbra, 2015, pp. 346 ff.

The agent always acts on behalf of the principal, unlike the franchisee and the dealer, who, as we shall see, act on their own account.

The agency contract assures the economic representation of the principal by an independent and autonomous trader in a contractual scheme that allows the construction of an integrated, flexible and stable distribution network, with obedience to the instructions of the principal, either the producer or the dealer, with a significant costs reduction when compared to the fixed distribution network based on employment contracts.<sup>11</sup>

This possibility of being able to direct the distribution of the products without bearing the costs intrinsic to the promotional activity rendered this contract very popular in the business environment.

In the agency contract, in addition to the obligations inherent to the duty to promote contracts that encumber the agent, such as the obligation to obey to the principal instructions, the obligation to provide information regarding customers, market conditions and accounts, it may be enacted exclusivity regarding a geographical area or a group of clients during the contract<sup>12</sup> and a non-compete obligation after the contract termination. It may also be foreseen a fixing resale price clause, attained by the prohibition of the agent to reduce its commission to lower the effective price paid by the customer, safeguarding the price legitimately established by the principal.<sup>13</sup>

The contract of agency can be inserted in the category of distribution contracts, given the fact that the main purpose of the stable and lasting relationship between the parties is the disposal of the products of the principal. The agent, in order to pursue the distributive purpose, has the duty to promote on behalf of the principal the conclusion of contracts.<sup>14</sup>

Throughout this process, the producer has also understood that, through distribution, it is not only possible to reduce the costs involved in bringing products

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<sup>11</sup> The agent, unless is granted power by the principal, cannot enter into the contracts promoted, which distinguishes the agent from commission merchant, who contracts with third parties in his own name, for the account of his principal. See Pinto Monteiro, *Contratos de Distribuição Comercial*, Almedina, Coimbra, 2002, p. 100, Manuel Broseta Pont, *Manual de Derecho Mercantil*, cited above, p. 123 and D. J. Hil, *The commission merchant at common law*, *The Modern Law Review*, Volume 31, Issue 6, p. 625.

<sup>12</sup> In Italian law, the exclusivity is considered an essential element of the contract, referred in art. 1742 of the *Codice Civile*.

<sup>13</sup> Although the recognition to the principal of the right to fix the sales price as he retains the ownership of the goods, the obligation that prevents or restricts the agent from sharing his commission, fixed or variable, with the customer, is considered a hardcore restriction for the purposes under art. 4, alt. a) Regulation (EU) No 330/2010 of 20 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. This agreement will not be qualified as an agency agreement for the purposes of art. 101, paragraph 1 of the FTEU. See European Commission *Guidelines on Vertical Restraints* (Text with EEA relevance) (2010/C 130/01), JO C 130 de 19.05.2010, p. 1, issue 49.

<sup>14</sup> See Baldi, Venezia, *Il contratto di agenzia: la concessione di vendita, il franchising*, 8<sup>a</sup> ed., Giuffrè Editore, 2008, pp. 23-24, Martinez Sanz, *La indemnización por clientela*, cited above, pp. 28-32, Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 91.

closer to the market, maximizing profits, but also distinguishing the product among the demand, adding value to the product.

In order to meet these requirements, other distribution schemes have emerged, among which the commercial concession and franchising contracts assume particular relevance. These contracts enable the producer to develop networks of merchants that acquire and resell the products, acting in their own name and undertaking the risk of their commercial activity.<sup>15</sup>

Next, we will analyze these contracts, whose contractual scheme, although distinct from the agency, shares some characteristics with it, including the purpose: to promote the purchase of the producer goods.<sup>16</sup>

## 2.2. Commercial concession agreement

The commercial concession contract<sup>17</sup>, considered by the literature a *contrat-cadre*<sup>18</sup>, is a commercial contract, through which it is established a

<sup>15</sup> The producer, through these contracts, creates distribution centers legally autonomous, whose performance can, with greater or lesser intensity, orient through instructions, see Santini, *Commercio e servizi, Due saggi di economia del diritto*, Il Mulino, Bologna, 1988, pp.160-161.

<sup>16</sup> Luminoso, *I contratti tipici e atipici*, Trattato di diritto privato a cura di G. Iudica e P. Zatti, Vol. I, Giuffrè Editore, Milano, 1995, p. 257.

<sup>17</sup> The commercial concession contract comes traditionally associated with the motor vehicle industry, but it is also used in the distribution of a very varied set of goods, particularly luxury products, such as beverages, perfumes, clothing, cosmetics, but also high technology products, such as computer equipment and home appliances. See Maria Helena Brito, *O contrato de concessão comercial*, Almedina, Coimbra, 1990, pp. 27 ff, Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 107.

<sup>18</sup> See Maria Helena Brito, *O contrato de concessão comercial*, cited above, p. 199, note 21 and Pinto Monteiro, *Denúncia de um contrato de concessão comercial*, Reimpressão, Coimbra Editora, 1998, p. 39, note 10, for bibliography references. On these contracts, see Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 108, *idem*, *Denúncia de um contrato de concessão comercial*, cited above, pp. 39-40, *idem*, *Contrato de Agência, Anotação ao Decreto-Lei nº 178/86*, 7ª edição, Atualizada, Almedina, Coimbra, 2010, pp. 64-65, Maria Helena Brito, *O contrato de concessão comercial*, cited above, pp. 197 ff.

The framework of the commercial concession contract into this category is justified by the fact that this contract foresees the conclusion and regulation of futures contracts to be entered into the grantor and between it and third parties. However, this *contrat-cadre* is also an independent source of other obligations to the parties. See Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 108, Maria Helena Brito, *O contrato de concessão comercial*, cited above, pp. 197 ff, Ulmer, *Der Vertragshändler*, G H Beck, München, 1969, p. 314, Ignacio Moralejo Menéndez, *El contrato mercantil de concesión*, cited above, p. 143. In Portuguese case law, see decision of *Supremo Tribunal de Justiça* (STJ) 21.04.2005, Case 05B603, of 13.04.2010, Case 673/2002.E1.S1, of 24.01.2012, Case 39/2000.L1.S1, of 29.04.2010, Case 2/081TVPR.T1.S1, available in [www.dgsi.pt](http://www.dgsi.pt).

Sustaining that the *contrat-cadre* is the most appropriate structure to shelter the heterogeneity of distribution contracts, see in Italian literature, Roberto Pardolesi, *I contratti di distribuzione*, Jovene, Napoli, 1979, pp. 268-269, 287 ff, in German literature, Ulmer, *Der Vertragshändler*, cited above, pp. 300 ff, in Spanish literature, Paz Ares, *Recension a Santini: il commercio*. Saggio di Economia del Diritto, RDM, 1979, pp. 153 ff, Dominguez Garcia, *Aproximación al régimen jurídico de los contratos de distribución. Especial referencia a la tutela del distributore*, RDM, 1999, Jan-Dez, pp. 429-430.

complex and lasting relationship, under which the grantor undertakes to sell an amount of goods to the dealer and the latter to purchase it, for resale, assuming the risk of its commercialization.

The integration of the dealer, contracting in own name and for its own account, into the grantor's network, is ensured by the fulfillment of certain obligations relating to trade policy<sup>19</sup> and promotional services and after-sales, under the control and supervision of the grantor.<sup>20</sup>

The concession contract began as a purchase and sale agreement between the producer and the trader, acting in his own name and on his own behalf, characterized by the existence of an exclusivity clause in favor of the latter and the obligation to acquire certain quantity of goods.<sup>21</sup>

This negotiation scheme suffered, however, changes due to the greater integration of the distributor in the grantor's network, enabled by the complex web of rights and duties that bind the parties. Throughout this process, the exclusivity

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<sup>19</sup> The commercial policy outlined by the producer includes, among others, rules to be observed by the dealer with respect to sales methods, advertising, organization of the activity, facility features, information duties, fixing or recommendation resale prices. See Maria Helena Brito, *O contrato de concessão comercial*, cited above, pp. 65 ff, Pinto Monteiro, *Denúncia de um contrato de concessão comercial*, cited above, pp. 41-42, Moralejo Menéndez, *El contrato mercantil de concesión*, cited above, pp. 249 ff.

In European Union law, the minimum resale price clause is a *hardcore restraint* that precludes the application of the Block Exemption Regulation. See under art. 4, alt. a) Regulation (EU) No 330/2010. See our note *infra* 61.

<sup>20</sup> We follow very closely the notion provided by Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 108, *Denúncia de um contrato de concessão comercial*, cited above, p. 39 ff, which we consider the most complete.

<sup>21</sup> The literature identifies, as the origin of the concession commercial contract, the agreements that producers or distributors entered into with owners of cafes and restaurants (*Bierlieferungsverträge*) or with merchants who assumed the obligation to bottle the beer and to sell it to restaurants and cafes (*Bierverlagsverträge*), during the XVIII century, whose distinguishing feature is the exclusivity in favor of both parties. As traders are forced to purchase beer only to the producer, the latter undertook not to sell beer to other restaurants and cafes within a given geographical area, or, when he kept that right, by recognizing the trader a certain percentage. See Ulmer, *Der Vertragshändler*, cited above, pp. 50 ff, Garcia Herrera, *La duración del contrato de distribución exclusiva*, Tirant lo Blanch, Valencia, 2006, pp. 168-169. In Portuguese literature, Maria Helena Brito, *O contrato de concessão comercial*, cited above, pp. 34 ff, Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 106. The exclusivity clause was extended to other sectors during the nineteenth and twentieth centuries, rendering common exclusive dealing agreements. Within these contracts the trader had the obligation to buy for a certain period, a certain amount of products only to the manufacturer, who in return, recognized the trader the exclusive right to sell the products within a certain geographical area and during a given period. This feature explains why the contract was known as *vendita esclusiva* in Italy, *vente à monopole* in France and *distribución exclusiva*, in Spain. See Oreste Cagnasso, *Concessione di vendita e franchising*, *Trattato de Diritto Commerciale e do Diritto Pubblico dell'Economia* "Trattato di Diritto Commerciale e di Diritto Pubblico dell'economia", cited above, p. 382.

clause, until then considered an essential element of the contract social type, become one of the possible clauses of the contract, losing the mandatory feature.<sup>22</sup>

As this contract is legally an atypical contract, but a socially typical contract in the legal systems under analysis, we will synthetically highlight the most relevant clauses of the contract.<sup>23</sup>

From the concession contract arises, first, the obligation of the grantor to conclude purchase and sale futures contracts with the dealer, whose conditions, as a rule, are described in an annex to the contract.<sup>24</sup>

To this obligation to sell corresponds the dealer's obligation to buy goods to the grantor.<sup>25</sup>

<sup>22</sup> See Ulmer, *Der Vertragshändler*, cited above, pp. 77-78, Baldi, Venezia, *Il contratto di agenzia*, cited above, p. 112, Pardolesi, *I contratti di distribuzione*, cited above, p. 223, Santini, *Commercio e servizi*, cited above, p. 171, Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 106, Maria Helena Brito, *O contrato de concessão comercial*, cited above, p. 38.

As a consequence of this change suffered by the contract, the name evolved to *concessione di vendita (vendita commerciale)* in Italy. See Oreste Cagnasso, *Concessione di vendita e franchising*, cited above, p. 383. Similarly, Ulmer, *Der Vertragshändler*, cited above, p. 78. In Portuguese literature, Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 106. In France the change of the *concession exclusive* for *concession commerciale* only intended to circumvent the suspicions of monopoly, as referred by Guyénot, *Les contrats de concession commerciale: droit français et communautaire de la concurrence*, Librairie Sirey, 1968, p. 23.

In Spain, together with the designation *distribución exclusiva*, it began to be used the name *concesión mercantil*. However, the literature continues to explain the integration and dependence of the dealer on the basis of exclusivity, which is considered, along with the acting in his own name and on his own, one of the distinctive features of the contract. See Iglesias Prada, *Notas para el estudio del contrato de concesión mercantil*, "Estudios de Derecho Mercantil en homenaje a Rodrigo Uría", Civitas, 1978, p. 255, Díaz Echegaray, *El contrato de distribución exclusiva o de concesión*, "Contratos Mercantiles", Bercovitz Rodríguez-Cano, Clazada Conde (coord.), Thomson, Arazandi, Navarra, 2004, pp. 552, 555-556, Domínguez García, *Aproximación al régimen jurídico de los contratos de distribución*, cited above, pp. 426-427. Alicia García Herrera, *La duración del contrato de distribución exclusiva*, cited above, pp. 166-168, referring this author that exclusivity is the consideration given to the concessionaire to assume the risks of marketing.

Exclusivity was considered a typical note of the contract in the concept adopted in art. 543-2 from the *Propuesta de Código Mercantil elaborada por la Sección de Derecho Mercantil de la Comisión General de Codificación*.

Some authors accept, however, that the contract may not contain the exclusivity clause, Martínez Sanz, *Contratos de distribución comercial: concesión y franchising*, Scientia Iuridica, XLIV, 1995, n° 256/258, p. 348, *idem*, *La indemnización por clientela en los contratos de agencia y concesión*, cited above, p. 318, n. 706. Ricardo Alonso Soto, *Los contratos de distribución comercial*, "Curso de Derecho Mercantil", Aurelio Menéndez Menéndez, Rodrigo Uría González (coord.), Tomo II, 2ª ed., Civitas, Navarra, 2007, p. 197, Broseta Pont, *Manual de Derecho Mercantil*, in charge of Martínez Sánchez, cited above, p. 130, Ignacio Moralejo Menéndez, *El contrato mercantil de concesión*, cited above, pp. 117-119.

<sup>23</sup> For further developments, see Franceschelli, *Natura giuridica della compravendita con esclusiva*, RDCom, Vol. 37, Parte Prima, 1939, p. 252, Maria Helena Brito, *O contrato de concessão*, cited above, pp. 54 ff, Guyénot, *Concessionnaires et Commercialisation des Marques. La Distribution Intégrée*, LJNA, Paris, 1975, pp. 137 ff.

<sup>24</sup> See Maria Helena Brito, *O contrato de concessão*, cited above, pp. 59 ff.

<sup>25</sup> This requirement may be accompanied by the obligation to purchase a minimum quantity of products for a certain period or to sell for a certain period a minimum amount of products to

Exclusivity, when agreed, arises usually associated with these obligations. This clause can be bilateral or unilateral, depending if binds both parties and only one of these.<sup>26</sup>

The dealer may assume the obligation to purchase products from the grantor together with the obligation of not purchasing products from third parties, nor to promote the commercialization of third party products, which may be limited to competing products or cover all types of products.<sup>27</sup>

It is of particular importance for the socio-economic function of the commercial concession contract and should therefore be considered an essential element of the contractual type, the obligation assumed by the dealer to promote the resale of the grantor's products, allowing the grantor to accompany the distribution of the products, transferring to the dealer the trade risks.<sup>28</sup>

This contract has as main purpose to increase the demand for the goods as a result from the promotional activity of the dealer.

This obligation is one of the essential characteristics of the commercial concession agreement<sup>29</sup>, together with the fact that the dealer contracts in own

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customers. The requirement of minimum purchase products may still arise associated with an obligation to maintain a certain level of goods in stock. The devolution of stock, on termination of the contract, has posed problems that the absence of regulation under the agency contract tends to intensify. See our note *infra* 58.

<sup>26</sup> The grantor can be committed, along with the obligation to sell products to the concessionaire, to not supply products to third parties within certain temporal and territorial limits. This clause is very common in the commercial concession agreement. In other cases, the grantor keeps the right to sell products to third parties within the dealer's territory, recognizing the dealer the right to a percentage. Baldi, Venezia, *Il contratto di agenzia*, cited above, p. 112. Cartella, *Concessione di vendita*, "Dizionari del Diritto Privato", a cura di Natalino Irti, Carnevalli, Diritto Commerciale e Industriale, Giuffrè Editore, Milano, 1981, p. 317. This exclusivity clause or single branding clauses tend not to be subject to the scope of art. 101, paragraph 1 of the TFEU, since it is justified by the transfer of know-how performed by the commercial concession contract, in particular, where it concerns the provision of after-sales services. See *Guidelines on Vertical Restraints*, 2010, paragraph 148.

<sup>27</sup> Baldi, Venezia, *Il contratto di agenzia*, cited above, pp. 112-113. Exclusivity is considered a vertical restriction of competition as it prevents other suppliers to distribute their products through that distributor, the distributor from obtaining supplies from other suppliers and other distributors to distribute products in a certain territorial area or to a particular customer group, producing effects on competition between economic operators at different levels of the production process. See Ghidini, *Restrizioni negoziali della concorrenza: profili di diritto interno*, Riv. trim. dir. proc. civ., 1979, pp. 984 ff, Delli Priscoli, *La restrizioni verticali della concorrenza*, Casa Editrice Giuffrè, Milano, 2002, pp. 117 ff. Vertical restraints, however, may be justified by the protection of the networks from *free riding*, the protection of specific investments of the producer and the independent distributor. Therefore, it has raised some questions in the context of competition, in view of the provisions of art. 101 FTEU. See Richard Posner, *The next step in the antitrust treatment of restricted distribution: per se legality*, U. Chi. L. Rev, Vol. 48, 1981, pp. 22 ff.

<sup>28</sup> In favour of the resale obligation under the commercial concession contract, see Ulmer, *Der Vertragshändler*, cited above, p. 184 e Pardolesi, *I contratti di distribuzione*, cited above, p. 279.

<sup>29</sup> See Pinto Monteiro, *Denúncia de um contrato de concessão comercial*, cited above, p.41, *Contratos de Distribuição Comercial*, cited above, p. 109, Maria Helena Brito, *O contrato de concessão comercial*, cited above, pp. 61 ff, Iglesias Prada, *Notas para el estudio del contrato de*



name and for its own account. Therefore, it is considered, by literature, the basic duty of this contractual scheme.<sup>30</sup>

The purpose of this contractual scheme is not only to sell the goods, but also to meet the market's requirements as regards to the guarantee and assistance provided by the producer, which is intensified when are involved luxury, technology and mechanic products.<sup>31</sup>

The commercial concession contract also includes, with different degrees of intensity, the use by the dealer of the grantor's distinctive signs and other intellectual property rights, namely the trademark, logo and know-how, under the condition of observing the instructions and requirements set by the grantor.<sup>32</sup>

The greater is the integration of the dealer in the grantor's network, the greater is the need to control his performance, not only with regard to the producer intellectual property rights, but also in other aspects, such as the presentation of products, promotional activity, advertising, quality of services, factors that may have a negative impact on the network, jeopardizing the grantor and the remaining dealers as well.<sup>33</sup>

The contract, usually, prevents the dealer to distribute, store, promote and represent products that compete with the grantor's products during the contract, in order to protect the network and prevent the practice of unfair acts.<sup>34</sup>

The integration of the dealer in the network or distribution chain is achieved by these obligations that go far beyond the obligation to purchase for resale, assuming particular importance the obligation to promote the commercialization of products.<sup>35</sup>

### 2.3. The franchise agreement

The franchise contract or franchising is associated, both in Europe and the United States, where this contracts has aroused, to periods of economic recession,

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*concesión mercantil*, cited above, p. 256, Martínez Sanz, *Contratos de distribución comercial*, cited above, p. 349, *idem*, *La indemnización por clientela*, cited above, p. 318, Moralejo Menéndez, *El contrato mercantil*, cited above, p. 226.

<sup>30</sup> Martínez Sanz, *La indemnización por clientela*, cited above, p. 318.

<sup>31</sup> Santini, *Commercio e servizi*, cited above, pp. 404-405.

<sup>32</sup> Moralejo Menéndez, *El contrato mercantil de concesión*, cited above, pp. 195-206.

<sup>33</sup> Pardolesi, *I contratti di distribuzione*, cited above, pp. 75 ff.

<sup>34</sup> For protection of technical knowledge transferred during the contract, a non-compete obligation may be determined to prevail after the termination of the contract. The EU Competition Law has been very strict with this obligation, subjecting its legality to tight requirements on the basis of the adverse effects on competition. See art. 5 Regulation (EU) No 330/2010.

<sup>35</sup> See Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 106. See Ignacio Moralejo Menéndez, *El contrato mercantil de concesión*, cited above, pp. 226 ff, Baldi, Venezia *Il contratto di agenzia*, cited above, pp. 121 ff, Zuddas, *Somministrazione, Concessione di vendita, Franchising*, Giappichelli Editore, Torino, 2003, p. 277, Martínez Sanz, *Contratos de distribución comercial*, cited above, p. 349, *idem*, *La indemnización por clientela*, cited above, pp. 318-319, Manuel Broseta Pont, *Manual de Derecho Mercantil*, cited above, pp. 130-131.

It is the obligation to promote the distribution of producer goods that justifies the insertion of this contract into the distribution contracts category.

where the excess supply demands the conquer of new markets, but the lack of money render difficult to distribute directly, leading the producers to deliver the distributive activity to independent distributors.<sup>36</sup>

The concept of *franchising* contract implemented in Europe does not correspond to the American franchising, assuming the outlines dictated by the profile of the contracting parties, the demands of markets and consumer preferences.<sup>37</sup>

However, on both continents, the modern *franchising* presents itself as a business expansion strategy and a technic to attract foreign markets through the creation and control of distribution channels, with risk management.

As demonstrated by the various types that this contract has assumed in Europe and the United States, this contract enables the franchisor to explore an idea or a formula that allowed the trademark to achieve commercial success, and the franchisee to benefit from the commercial success and know-how of the franchisor, saving investment costs and preserving legal independence.<sup>38</sup>

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<sup>36</sup> See Aldo Frignani, *Il franchising di fronte all'ordinamento italiano: spunti per un'indagine comparatistica*, "Factoring, leasing, franchising, venture capital, leveraged buy-out, hardship clause, countertrade, cash and carry, merchandising, know-how, securitization", G Giappichelli Editore, Torino, 1996, p. 206, Esperanza Gallego Sanchez, *La franquicia*, cited above, pp. 19 ff.

The first manifestation of this phenomenon dates from the middle of the century XIX. The first known contract was used by the *Singer Sewing Machine Company*, 1982. See Gallego Sanchez, *La franquicia*, cited above, p. 22.

In the early twentieth century, this formula has been extended to the auto industry, *General Motors*, *Ford*, *Western Auto* and the oil sector to support the spread of gas stations. It will be, however, in the 50s, in the post-World War II, that *franchising* will reach its peak, extending to several areas of production and services, such as *McDonald's*, *Baskin-Robbins*, *Holiday Inn*, *Burger King*, *Midas*. See Aldo Frignani, *Il franchising di fronte*, cited above, p. 206, Gallego Sanchez, *La franquicia*, cited above, p. 20.

In the eighties, the saturation of markets of the 70s will drive several European companies, including the *Monoprix*, *Prisunix*, *Prenatal*, *Pronuptia*, *Benetton*, to resort to this agreement. On the evolution of *franchising*, see. Aldo Frignani, *Nuove riflessioni in tema di "franchising"*, in *Giur. it.*, 1980, IV, pp. 269 ff, *idem*, *Il franchising di fronte*, cited above, pp. 206 ff, Gallego Sanchez, *La franquicia*, cited above, pp. 19 ff. Between us, Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, pp. 12 ff, Maria de Fátima Ribeiro, *O Contrato de franquia, (Franchising). Noção, natureza jurídica e aspectos fundamentais de regime*, Almedina, Coimbra, 2001, pp. 12 ff.

<sup>37</sup> Aldo Frignani, *Nuove riflessioni in tema di "franchising"*, cited above, p. 271, underlines two different psychological reasons that distinguish European franchising from the American franchising: the Americans value in franchising the ability to be a self-employed, with easy profit, while Europe focuses on reducing the risk.

<sup>38</sup> Santini, *Commercio e servizi*, cited above, p. 178. Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, p. 18, stresses that, at first, the franchisor will not be guided by the need to distribute products, but to take advantage of the reputation of the trademark. The author, *O Contrato de franquia*, cited above, pp. 18-19, 153-154, identifies the commercial formula with the "the trademark image license" that comprises know-how license and non-confidential technical knowledge of the franchisor. The trademark image license seems to us, however, limited. Hence, in our view, it is more appropriate the term "commercial image", which includes trademark, patents, logos and know-how. See Pinto Monteiro, *Contrato de Agência, de Concessão e de Franquia ("Franchising")*, "Estudos em homenagem ao Prof. Doutor Eduardo Correia", III, BFD, Coimbra, 1984, p. 321, *idem*, *Contratos de Distribuição Comercial*, cited above, p. 120.

In this paper, we only approach distribution franchise, which is characterized by the sale, by the franchisee, of the franchisor products in its store, under the franchisor trade name and trademark.

In this traditional type of franchising, which some literature matches with the US product franchise,<sup>39</sup> the franchisee store is simply a channel through which the franchisor's trademark products reach the consumer.

In the service franchise, the franchisee rather than sell products, offer services under the trademark of the franchisor, following his instructions.<sup>40</sup>

In the production franchise, the franchisee itself makes, according to the franchisor's instructions, the products marketed under the franchisor's trademark.<sup>41</sup>

This is the EU classification, supported by the Court of Justice in 1986, *Pronunptia case law*, which, however, has been accepted by the literature and was enshrined in Regulation (EEC) No 4087/88 of 30 November 1988 on the application of article 85 (3) of the Treaty to categories of franchise agreements.<sup>42</sup>

Before attempting to offer a notion of a franchise agreement, a task which, given the complexity of the contract and the diversity of modalities that it may assume, is not easy, a brief analysis of the most frequent clauses in this contract is required, as it remains a legally atypical contract, but socially typical among us and in Europe.<sup>43</sup>

<sup>39</sup> Gallego Sanchez, *La franquicia*, cited above, p. 41, Menezes Cordeiro, *Do contrato de franquia («Franchising»): autonomia privada versus tipicidade negocial*, ROA, Ano 48, Lisboa, 1988, p. 69, note 16. Carlos Olavo, *O contrato de franchising*, “Novas Perspectivas do Direito Comercial”, Almedina, 1988, pp. 163-164.

<sup>40</sup> This contract is very popular in restaurants, in hotels, in dry-cleaners, hairdressers, car rental. It is one of the types with higher growth, given the relatively low cost of investment required to the franchisee. *Mcdonald's, Pizza Hut, KFC, Burger King, 5 à sec, Press to, Novotel, Holiday Inn, Avis, Sixt, Hertz, Wallstreet, Mod's hair, Century 21, Laforêt immobilier, Pronunptia, Benetton* are examples of this type of franchise.

<sup>41</sup> Thus is accompanied by the trademark license, know-how license and patent so that the franchisee may produce the goods to which the contract relates. As example, we may refer Coca Cola, Pepsi-Cola, Yoplait.

<sup>42</sup> Canaris, *Handelsrecht*, cited above, p. 380, Baldi, Venezia, *Il contratto di agenzia*, cited above, pp. 151 ff, Zuddas, *Somministrazione*, cited above, p. 293 ff, Mauro Bussani, Paolo Cendon, *I Contratti Nuovi. Casi e materiali di dottrina e giurisprudenza, Leasing, Factoring, Franchising*, Giuffrè Editore, Milano, 1989, pp. 414 ff, Leloup, *La franchise. Droit et pratique*, 4<sup>e</sup> ed., Delmas, Paris, 2004, pp. 27 ff, Gallego Sanchez, *La franquicia*, cited above, pp.41 ff, Ricardo Alonso Soto, *Los contratos de distribución comercial*, cited above, pp. 204 ff, Menezes Cordeiro, *Manual de Direito Comercial*, Vol. I, Almedina, Coimbra, 2001, p. 517. Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, pp. 212 ff, Isabel Alexandre, *O contrato de franquia (franchising)*, O Direito, Ano 123<sup>o</sup>, 1991, II-III, pp. 351 ff, Carlos Olavo, *O contrato de franchising—Novas perspectivas do Direito Comercial*, cited above, p. 163, Gorjão-Henriques, *Da Restrição da Concorrência na Comunidade Europeia: a Franquia de Distribuição*, Almedina, Coimbra, 1998, pp. 279 ff.

This classification is not exempt from criticism, of course, because, strictly speaking, in all these types we find the service franchise. See Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, p. 216.

<sup>43</sup> See the Italian literature, Zuddas, *Somministrazione*, cited above, p. 332, Frignani, *Il franchising di fronte all'ordinamento italiano*, cited above, p. 210-211, Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 62, Menezes Cordeiro, *Do contrato de franquia*

Usually, the franchisor undertakes the following obligations: transmission of the right to use the trademark and other distinctive signs, transmission of know-how; to grant territorial exclusivity; provision of technical assistance; to take back stocks, to provide accounting and financial assistance services. The franchisee assumes: the obligation to create a point of sale or production, supporting the inherent investments; the obligation to use the franchisor's distinctive signs and know-how in the course of business; the Stock obligation; the secrecy obligation; exclusive supply obligation; single branding; location clause; obligation to pay a fee and/or *royalties*; acceptance of the control of his activity by the franchisor.<sup>44</sup>

In the franchise agreement, the franchisee is always granted the right to use the trademark owned by the franchisor, usually accompanied by other distinctive

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(«Franchising»): *autonomia privada versus tipicidade negocial*, cited above, pp. 76-77, Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, p. 140, Pestana Vasconcelos, *O Contrato de Franquia (Franchising)*, Almedina, Coimbra, 2000, p. 18, Isabel Alexandre, *O contrato de franquia*, cited above, p. 372, Gorjão Henriques, *Da Restrição da Concorrência na Comunidade Europeia: a Franquia de Distribuição*, cited above, p. 250.

In the European Union Competition Law stands out Regulation (EEC) No 4087/88 of 30 November 1988 on the application of article 85 (3) of the Treaty to categories of franchise agreements, Case Law *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*. 28 January 1986, Case 161/84. European Court Reports 1986-00353, C 87/14/EEC: Commission Decision of 17 December 1986 relating to a proceeding under article 85 of the EEC Treaty (IV/31.428 to 31.432 - Yves Rocher) OJ L 8, 10.1.1987, p. 49-59, 87/407/EEC: Commission Decision of 13 July 1987 relating to a proceeding under article 85 of the EEC Treaty (IV/32.034 - Computerland) OJ L 222, 10.8.1987, 88/604/EEC: Commission Decision of 14 November 1988 relating to a proceeding under article 85 of the EEC Treaty (IV/32.358 - ServiceMaster) OJ L 332, 3.12.1988, p. 38-42, referring to 89/94/EEC: Commission Decision of 2 December 1988 relating to a proceeding under article 85 of the EEC Treaty (IV/31.697, Charles Jourdan) OJ L 35, 7.2.1989, p. 31-39. For more developments on the most common clauses, including the most relevant to EU Competition Law, see Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, pp. 143-144, 157 ff, Pestana Vasconcelos, *O Contrato de Franquia*, cited above, pp. 126 ff, Isabel Alexandre, *O contrato de franquia*, cited above, pp. 337 ff, Frignani, *Contributo ad una ricerca sui profili dogmatici del franchising (con particolare riferimento all'Italia)*, “Factoring, Leasing, franchising, venture capital”, cited above, pp. 244-245, Joanna Goyder, *EU distribution law*, Hart Publishing, Oxford and Portland, Oregon, 2011, pp. 176 ff.

In Spain, there was an attempt to regulate aspects of pre-contractual liability, in particular with regard to the franchisor duties of information and the franchisors register through art. 62, paragraph 1 of the Ley de Ordenación del Comercio Minorista (LOCM), de 15 de enero de 1996, subsequently regulated by the RD 2485/1998, of 13 November, which, however, was modified by RD 419/2006, of 3 April. See, for further developments, Manuel Antonio Domínguez García, *El contrato de franquicia*, “Contratos Mercantiles”, Tomo I, Bercovitz Rodríguez-Cano, Calzada Conde (coord), Thomson, Arazandi, Navarra, 2004, pp. 579-580, which points out that despite this legislative effort, the contract remains socially typical and legally atypical.

<sup>44</sup> See, Frignani, *Il franchising di fronte all'ordinamento*, cited above, pp. 210-211, Zuddas, *Somministrazione*, cited above, p. 314 ff, Mauro Bussani, Paolo Cendon, *I Contratti Nuovi*, cited above, pp. 419 ff, Gallego Sanchez, *La franquicia*, cited above, pp. 44 ff, Maria de Fátima Ribeiro, *O contrato de franquia*, cited above, p. 144, Pestana Vasconcelos, *O Contrato de Franquia*, cited above, pp. 25 ff.

signs, such as the trademark and trade name. Trademark is the distinguishing sign that allows attracting or maintaining customers.<sup>45</sup>

As we have already noted, the franchise agreement is focused on the promotion and preservation of the franchisor's commercial image, with a special emphasis on trademark image, which must be common to the entire network.

However, the assignment of the use of the trademark is insufficient if not accompanied by the transmission of the operating method adopted by the franchisor based on which the trademark achieved notoriety.<sup>46</sup>

In this sense, the transfer of know-how which was the source of the trademark's reputation is essential.<sup>47</sup>

The know-how provided by the franchisor will allow the franchisee to repeat, with autonomy, the successful experience of that.<sup>48</sup>

The franchise agreement is not limited, however, to a know-how license, as it involves other essential elements: trademark license (and possibly other distinctive signs) and the provision of technical assistance.<sup>49</sup>

The franchisee has the duty to carry out the activity foreseen in the franchise agreement, using the distinguishing marks of the franchisor and exploiting the franchisor know-how, according to its instructions.

This obligation is essential for the achievement of the franchisor's objectives: the expansion of the business and trademark image. The breach of this obligation not only harms the franchisor, but also the rest of the network.

The franchisee has also to make a payment to the franchisor, which is divided into two groups: *initial fee (droit d'entrée)* and periodic payments (*royalties*). In some agreements, both are due and in other agreements only one of these payments is due. Royalties usually correspond to a

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<sup>45</sup> The trademark is, however, already has to be implemented in the market with success, although it is not required of course, that is already implemented on the market where is going to be exploited, as that may be the reason for the option by the producer for franchising. In this sense, Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, p. 159.

<sup>46</sup> As Virassamy *Les contrats de dépendance, essai sur les activités professionnelles exercées dans une dépendance économique*, L.G.D.J., 1986, pp. 83-84, following Saint Alary, *Le contrat de franchise*, p. 83, notes that the operating method that the franchisor will convey to the franchisee must correspond to method that has already been tried with success, in order to ensure the franchisee a minimum standard of success, after accepted the franchisor's instructions, justifying thus the payment of the *entry fee* and *royalties*.

<sup>47</sup> Virassamy *Les contrats de dépendance*, cited above, pp. 83-84, following Saint Alary, *Le contrat de franchise*, cited above, p. 83, requires that the know-how provided is reliable, so that renders possible to attain a minimum *standard* of quality in all the traders that are part of the network.

<sup>48</sup> See Bessis, *Le contrat de Franchise*, LGDJ, Paris, 1990, p. 34. The transfer of know-how verified under the franchise agreement has been classified by the literature as a real know-how license. See Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, pp. 176-177.

<sup>49</sup> We agree with Gabriela Figueiredo Dias, *A Assistência Técnica nos Contratos de Know-How*, *Studia Iuridica* 10, BFD, Universidade de Coimbra, Coimbra Editora, Coimbra, 1995, p. 172, when the author sustains that technical assistance is an accessory duty to the main obligation, mandatory whenever it is indispensable to the effective use that the licensee intends to make of the acquired know-how.

percentage of the turnover in the period to which they relate, even though it is fixed a minimum.<sup>50</sup>

The initial fee has been generally understood as a consideration for the trademark license and/or the right to use other distinctive signs, transmission of know-how and technical assistance provided, which represent the successful formula, which is the core of franchise agreement.<sup>51</sup>

This contract, in view of the need to protect the commercial image of the franchisor, which grounds the network, is characterized by the strong and intense interference of the franchisor in the activity of the franchisee, who has to comply with franchisor instructions and to accept the control and supervision by the franchisor, in areas concerning financial, administrative and accounting issues, methods of production and sales, marketing, merchandising and after-sales service.<sup>52</sup>

The right to control the franchisee activity is not only a right, but duty, as it aims at ensuring uniformity and homogeneity of the network, while preserving the attractive capital of the business image that is on contract foundation.<sup>53</sup>

The franchise contract usually goes together with a location clause, through which the store can only be transferred with the franchisor's consent. The criteria for choosing the location include the know-how, as the corporation image of the franchisor is inseparable from the location and type of store where the goods are sold and services provided.<sup>54</sup>

The prohibition of the sale of products to resellers not belonging to the network is usual in franchise agreement. This clause aims at avoiding the sale of products, without observing the instructions and the know-how of the producer, jeopardizing the reputation of the trademark and commercial image of the network. The *intuitu personae* nature of the contract, as well as the general rules on assignment of contractual position, justify the prohibition of assignment without the consent of the franchisor.<sup>55</sup>

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<sup>50</sup> In the United States tends to be charged an *initial fee* higher, while in Europe there is a tendency to pay higher *royalties*, explained by the attitude of the franchisee towards risk, franchisor assistance and autonomy. See Gallego Sanchez, *La franquicia*, cited above, p. 22, Frignani, *Nuove riflessioni in tema di "franchising"*, "Factoring, Leasing, franchising, Venture Capital, leveraged", cited above, p. 271.

<sup>51</sup> See Pestana Vasconcelos, *O Contrato de Franquia*, cited above, p. 34, Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, p.187, Gorjão-Henriques, *Da Restrição da Concorrência*, cited above, p. 297.

<sup>52</sup> See Gallego Sanchez, *La franquicia*, cited above, pp. 57 ff.

<sup>53</sup> They may act against the franchisor on the grounds of contractual liability and they can sue the defaulting franchisee, based on tort.

<sup>54</sup> See Leloup, *La franchise*, cited above, p. 206, whereas the contract is concluded *ratione loci*.

<sup>55</sup> This clause was already safeguarded under art. 3, paragraph 2, alt. j) Regulation (EEC) No 4087/88, and was considered welcome in Regulation (EC) No 2790/1999 of 22 December 1999 on the application of article 81(3) of the Treaty to categories of vertical agreements and concerted practices, as referred in the *Guidelines on Vertical Restraints*, 2000, paragraph 44, alt. g). This solution remains, after Regulation (EU) N° 330/2010, in paragraph 45, alt. g) of the *Guidelines on Vertical Restraints*, 2010.

In the franchise agreement is also common to be agreed territorial exclusivity, although this clause is not an essential element of the contract.<sup>56</sup>

Exclusivity can be set in favor of the franchisor, the franchisee or both, as the distribution franchise is a fertile field for different combinations.<sup>57</sup>

This clause has received from the literature benevolent treatment owing to the fact that it aims at compensating the limitations imposed on the franchisee, allowing, especially in the initial period of the contract, the investment recovery by the franchisee.<sup>58</sup>

This contract is usually accompanied by a non-compete clause that may be enacted even after the contract termination.<sup>59</sup> On the other hand, it strengthens the obligation of secrecy that goes with the transmission of know-how.<sup>60</sup>

<sup>56</sup> Frignani, *Contributo ad una ricerca*, cited above, p. 244, considered a phenomenon present in all contracts, moderating, however, the position in the work *Il contratto di franchising*, Giuffrè Editore, Torino, 1999, p. 79, stating that this is common in most contracts. In the Italian case law it has been discussed the *naturale negotii* nature of this clause, as stated by Frignani, *Il contratto di franchising*, cited above, p. 83 and Zuddas, *Somministrazione, Concessione di vendita, Franchising*, cited above, pp. 319 ff. This was denied both from the point of view of business practice or the cause of the contract. Since exclusivity is not a natural element of the contract, its enforceability by the franchisor is dependent on its written provision.

<sup>57</sup> The most common type is mutual, under which the franchisor will not supply goods to other franchisees, while the franchisee will not to sell goods that compete with the franchisor's goods within a given geographical area.

As referred by Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, p. 200, note 542, is, however, necessary to safeguard the passive sales to customers outside the contract area that spontaneously seek the franchisee in order to avoid obstacles by competition law.

The Regulation (EU) No 330/2010, art. 4, alt. b), n. i) excludes from the exemption agreements containing restrictions on territory or on the customers to whom the buyer may sell the contract goods or services, but allows active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer. This is very important in the European Union given the effect of this practice on market segmentation, undermining market integration.

The *Guidelines on the application of paragraph 3 of article 81 of the Treaty (2004/C 101/08)*, JO C 101 of 24.04.2007, p. 97, paragraph 31, consider that restrictions that are objectively necessary for the proper functioning of the Agreement, as is the case of the obligations aimed at protecting the uniformity and reputation of the franchise system, are also not covered by paragraph 3 art. 101. See *Guidelines on Vertical Restraints*, 2010, paragraph 190, alt. b) exclude from art. 101, paragraph 1 of the TFEU the non-compete obligation on the goods or services purchased by the franchisee when the obligation is necessary to maintain the common identity and reputation of the network.

<sup>58</sup> Frignani, *Il contratto di franchising*, cited above, p. 80, referring that the higher the investment, the greater must be the sphere of protection, following the case law *Pronuptia* from CJEU. See Gallego Sanchez, *La franquicia*, cited above, pp. 27, 54-55.

<sup>59</sup> The Regulation (EU) 330/2010, art. 5, paragraph 3, alt. d) limits the duration of such non-compete obligation for a period of one year after termination of the agreement, but requires that the non-compete clause relates to goods or services which compete with the contract goods or services is limited to the premises and land from which the buyer has operated during the contract period and indispensable to protect know-how transferred by the supplier to the buyer. It is allowed the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.

Under this contract, it is often determined a minimum of sales, assuming the franchisee the risk of not achieving the results set.<sup>61</sup>

This clause results from the general obligation of the franchisee to promote the franchisor sales and provide contractual services.<sup>62</sup>

The resale price maintenance clause, usually, inserted in the franchise agreements, raises some competition issues.<sup>63</sup>

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The main purpose of this clause is to prevent the franchisee from using the know-how provided by competing activities and spending resources in similar activities. Notwithstanding recent doubts raised under competition approach, this clause is a consequence of the fiduciary and cooperation relationship inherent to the contract.

<sup>60</sup> The non-compete obligations during the contract and after its termination also deserve a more benevolent treatment in the franchise agreement owing to the transfer of know-how, according to art. 5, paragraph 3, alt. c) and the *Guidelines on Vertical Restraints*, paragraph 148.

This non-compete obligation has also connection with the *stock take back obligation* by franchisor, which has raised many issues related to the termination of the contract, as usually is not foreseen in most contracts, capturing the attention of literature and case law. This is intensified by the fact that the application of the legal framework of the agency contract does not contain any provision that proves applicable, given the absence of acquisition of products by the agent. Therefore, literature has suggested including a contractual provision regarding *stock take back obligation* or granting authorization to the franchisee to sell goods after the termination of the agreement within a certain period. The latter solution, however, as refers Gallego Sanchez, *La franquicia*, cited above, p. 49, may be ineffective in the absence of franchisor distinctive signs and the activity of another distributor in the same territorial area.

Gallego Sanchez, *La franquicia*, cited above, p. 49, admits, however, that the *stock take back obligation* may be a mere faculty of the franchisee that, in terms of effectiveness, will not be very different from the authorization to resale of products.

Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 170, recommends, regarding commercial concession, that the parties insert a clause in the contract governing this matter, owing to the absence of a legal provision. Nevertheless, when the termination of the contract is due to the fault of the franchisor, the author sustains that the franchisee may claim the losses regarding the stock in the compensation to which he is entitled. This would be extended to franchising. For further developments, see Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, pp. 170 ff.

<sup>61</sup> This is a royalties minimum guarantee clause that may be associated with a penal clause granting the franchisor a certain amount if the *royalties minimum* is not reached by franchisee.

<sup>62</sup> Baldi, *Venezia Il contratto di agenzia*, cited above, p. 189.

<sup>63</sup> Resale price maintenance concerns agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer. See *Guidelines on Vertical Restraints* (2010/C 130/01), paragraph 48.

This clause, through the final price stabilization, intends to enact a *non-price competition* that encourages network members to compete in the services that go with the product, such as delivery, credit repair, advertising, promotions. Telsler, *Why Should Manufacturers Want Fair Trade*, J.L. & Econ, Vol. 3, 1960, p.86. Later, it will be referred reasons such as quality certification by retailers within the network, Marvel, McCafferty, *Resale Price Maintenance and Quality Certification*, RAND J. ECON, Vol. 15, 1984, p. 346. Roberto Pardolesi, *I contratti di distribuzione*, cited above, pp. 54-55, believes that this pricing system is intended to ensure the consideration necessary to induce the merchant to accept vertical integration.

Notwithstanding recent economic advantages described above, this minimum resale price maintenance clause has, however, been considered a restrictive practice under art. 101 TFEU, integrating, in the successive regulations, the *black list*, i.e. the group of clauses that are considered to be severe restrictions of competition because of the likely harm they cause to



Outlined the main features of the franchise agreement, we may sustain the notion offered by Pinto Monteiro, according to which this is the “*contrato pelo qual alguém (franquiador) autoriza e possibilita que outrem (franquiado), mediante contrapartidas, actue comercialmente, produzindo e/ou vendendo produtos ou serviços de modo estável, com a fórmula de sucesso do primeiro (sinais distintos, conhecimentos, assistência) e surja aos olhos com a sua imagem empresarial, obrigando o segundo a actuar nestes termos, a respeitar as indicações que lhe forem sendo dadas e a aceitar o controlo e fiscalização a que for sujeito*”.<sup>64</sup>

This notion, by its scope, is the one that best to shelter the multiple features of this contract, referring the characteristics that we considered that are common to this contract: the integration of the franchise in the franchisor network and the homogeneity of the network, obtained by the use the franchisor trademark and the obligation of the franchisee to follow the franchisor guidelines and instructions.

### 3. The autonomy of distribution contracts

The recognition of a legal category presumes the existence of common elements in contractual types that allow drawing the outlines of the legal category.

After analyzing the shapes assumed by these contracts, we may conclude that the promotion of the trade of the other party in the context of a lasting and stable relationship is a common obligation to all these contracts.<sup>65</sup>

Also common to all these contracts is the fact that legal autonomy coexists with integration, in a lesser or greater degree, in the commercial policy of the

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consumers. Regarding these clauses, is denied the general presumption of positive effects on vertical restraints identified in art. 101, paragraph 3 TFEU. See art. 4, alt. a) of Regulation (EU) No 330/2010. The provision of a list of recommended prices or maximum prices by the supplier to the buyer is not considered in itself as leading to RPM, as it may prevent the “*double marginalization*” resulting from the too high pricing by the retailer. See *Guidelines on Vertical Restraints*, paragraph 107, alt. f).

Fixed resale prices, and not just maximum resale prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform distribution format a coordinated short term low price campaign (2 to 6 weeks in most cases) which will also benefit the consumers. See *Guidelines on Vertical Restraints*, paragraph 225. The possible competition risk of maximum and recommended prices is that they might be followed by most or all of resellers and may soften competition or facilitate collusion between suppliers. See *Guidelines on Vertical Restraints*, paragraph 227.

<sup>64</sup> Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 121. In a free translation it means that franchising is “*the contract by which one (franchisor) authorizes and enables others (franchisee), by consideration, to act commercially, producing or selling products or services, with stability, benefiting from the successful formula of the first one (distinctive signs, know-how, assistance) and to appear with its corporate image, imposing to the second one the obligation to follow within this terms, respecting the instructions that are given and accepting the supervision and control performed by the first one*”.

<sup>65</sup> Martinez Sanchez, *La indemnización por clientela*, cited above, p. 31, Moralejo Menéndez, *El contrato mercantil de concesión*, cited above, pp. 56-57. Pinto Monteiro, *Contratos de Distribuição*, cited above, p. 71.

counterparty, and, therefore, with the acceptance to its control and supervision. Independence comes combined with interdependence.<sup>66</sup>

Moreover, is common to all these agreements the economic representation of the producer interests.<sup>67</sup>

Following Pinto Monteiro, the presence of these characteristics, in a long-term contractual relationship, it is enough to sustain the autonomy of the distribution contracts even though the levels of intensity may vary.<sup>68</sup>

This legal category appears anchored in the obligation of promotion the producer products, within a stable and lasting relationship, as a fundamental obligation of distribution.<sup>69</sup>

As refers Pinto Monteiro, the common denominator between the distribution agreements matches the concept of agency contract, which thus allow considering this contract a pattern for establishing a legal framework for the other contracts.<sup>70</sup>

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<sup>66</sup> Gallego Sanchez, *La franquicia*, cited above, p. 31.

<sup>67</sup> Ferri, *Vendita con esclusiva*, Dir Pratt Comm, 1933, p. 72.

<sup>68</sup> The classification of franchising as a distribution contract has raised several doubts among the authors given the multiplicity of shapes that this contract may assume. Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, pp. 43-44. It is common ground that, the contract may be entered into by persons who occupy the same stage in the production process, but that fact does not compromise the vertical nature of the franchise agreement, recognized by the dominant literature. Baldi, *Il diritto della distribuzione commerciale nell'Europa comunitaria*, CEDAM, Milano, 1984, pp. 7, 123 ff, Baldi, Venezia, *Il contratto di agenzia. La concessione di vendita. Il franchising*, cited above, pp. 157 ff, Frignani, *Il franchising*, Utet, 1990, pp. 78-79, Baldassari, *I contratti di distribuzione, Agenzia, Mediazione, Concessione di vendita*, Franchising, Cedam, Padova, 1989, p. 507.

The franchise, as shown by the analyzed clauses, is the quintessence of trade integration between producer/distributor and distributor, revealing the vertical relationship between the parties, although the franchisee maintains its autonomy and judicial independence.

It is also present in franchising the obligation of the franchisee to promote the business of the other party, with the integration of the franchisee in the franchisor structure, as in the commercial concession and agency contracts, pursuing the common interest in expanding network, with increased sales. Baldi, Venezia, *Il contratto di agenzia*, cited above, p. 159, Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, pp. 71-72.

<sup>69</sup> Underpins this legal formula the distributor representative performance, from an economic perspective, of the producer's interests, through which the integration of the distributor in the commercial producer network is justified. See Baldi, Venezia, *Il contratto di agenzia: la concessione di vendita, il franchising*, cited above, p. 1, Galgano, *I contratti di impresa. I titoli di credito. Il fallimento*, Bologna, 1980, pp. 3 ff, Martinek, *Aktuelle Fragen des Vertriebsrecht*, 3<sup>a</sup> ed., Kohl, 1992, pp. 1, 18-20, Fernando Martinez Sanz, *Contratos de distribución comercial: concesión y franchising*, cited above, p. 346, *idem*, Martinez Sanz, *La indemnización por clientela en los contratos de agencia y concesión*, cited above, pp. 28 ff, Moralejo Menéndez, *El contrato mercantil de concesión*, cited above, pp. 56-57, n. 48. Among us, Maria Helena Brito, *O contrato de concessão comercial*, cited above, pp. 10-11.

<sup>70</sup> *Contratos de Distribuição Comercial*, cited above, pp. 71 ff. Similarly, Martinek, *Aktuelle Fragen*, cited above, p. 18, considered agency “*eine Leitbildfunktion für das Vertriebsmittlungsrecht*”. See Menezes Cordeiro, *Manual de Direito Comercial*, cited above, pp. 495-496.

#### 4. The legal framework of the agency contract

The distribution agreements, despite the distributor's autonomy and independence from the producer, are characterized by a relationship of interdependence that is particularly prominent in the termination of the contract, owing to the fact that, given the subordination of the distributor to the commercial policy pursued by the producer, the distributor is, in most situations, economically dependent on the producer, in particular when non-compete obligations are enforced.

The imposition of rules governing the termination of the contract and its consequences, in particular with regard to the period of notice, to the causes underlying the termination of the contract, the amount of the indemnity due for termination of contract, is the only way to address this weakness of the distributor.<sup>71</sup>

These contracts, in the various European jurisdictions, which include Portuguese and Spanish, are social types, as they emerge from the business practice. Some are regulated by law, while others remain atypical, nevertheless the uniformity emerging from business practice.<sup>72</sup>

In Portugal, the agency agreement is ruled by *Decreto-Lei n° 178/86, de 3 de Julho*, as amended by *Decreto-Lei n° 118/93, de 3 de Abril*, bringing into force

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<sup>71</sup> The agency contract has been regulated for the first time in Germany in § 84 HGB, under the assumption of the equality of parties. Luís Menezes Leitão, *A indemnização de clientela no contrato de agência*, Almedina, Coimbra, 2006, p. 14.

<sup>72</sup> This uniformity allows us to consider these contracts socially typical. Maria Helena Brito, *O contrato de concessão comercial*, cited above, p. 170 ff, Pinto Monteiro, *Denúncia de um contrato de concessão comercial*, cited above, p. 49. In Spain, Ignacio Moralejo Menéndez, *El contrato mercantil de concesión*, cited above, pp. 79 ff, Ricardo Alonso Soto, *Los contratos de distribución comercial*, "Curso de Derecho Mercantil", cited above, p. 197, Chulià Vicent, Beltran Alandete, *Aspectos jurídicos de los contratos atípicos*, Vol. II, Bosch Editor, SA, Barcelona, 1995, pp. 333-334, Echegaray, *El contrato de distribución exclusiva o de concesión*, "Contratos Mercantiles", cited above, pp. 551-552 sustain that the commercial concession contract, is legally atypical, but socially typical. Regarding the franchising in Spain, see Chulià Vicent, Beltran Alandete, *Aspectos jurídicos de los contratos atípicos*, I, cited above, p.176. Gallego Sánchez, *La franquicia*, cited above, p. 40, Ricardo Alonso Soto, *Los contratos de distribución comercial*, "Curso de Derecho Mercantil", cited above, pp. 203-204. Already after the entry into force of art. 62 of the *Ley 7/1996, de 15 enero* that regulated the pre-contractual regime of the franchise agreement, Dominguez Garcia, *El contrato de franquicia*, "Contratos Mercantiles", cited above, p. 580. In Portugal, Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 62, Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, p. 140, Luís Miguel Pestana Vasconcelos, *O Contrato de Franquia*, cited above, p. 20.

In Spain, as already noted, in the *Propuesta de Código Mercantil elaborada por la Sección de Derecho Mercantil de la Comisión General de Codificación* commercial distribution contracts, which included the commercial concession agreement and the franchise agreement, were regulated in art. 543, but these contracts are excluded in *Anteproyecto de ley del Código Mercantil*.

the Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.<sup>73</sup>

The Directive intended, essentially, to remove restrictions on freedom of establishment and to ensure equal conditions for competition between Member States, to protect the commercial agent, to enhance the security of commercial transactions, by harmonizing the different national legislations.<sup>74</sup> As main concern, deserves to be emphasized, the retribution and the rights of the commercial agent, the termination of the contract, namely through the regulation of a period of notice in case of termination of a contract for an indefinite period and the indemnity for the termination of agency contract by the principal for any reason other than for a default by the agent. This issue clearly reflects an attempt to conciliate the solutions enacted in legal systems of the Member States by allowing in article 17 the option between the German and French models of indemnity of the agent.<sup>75</sup>

The notion of agency contract provided by art. 1 of *Decreto-Lei n° 178/86, de 3 de Julho*, very similar to the notion enshrined in art. 1742 *Codice Civile* in Italy, was amended by *Decreto-Lei n° 118/93, de 13 de Abril*, in order to exclude the definition of an area or a circle of clients from the essential elements of the contract.<sup>76</sup>

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<sup>73</sup> In Spain, the agency contract was initially governed by labor law. In 1962, art. 6 of *Ley de contrato de trabajo* was amended to cover the agent, subject to labor jurisdiction. Later, it was regulated by *Real Decreto 2033/1981 de 4 de septiembre 1981* which governed the contract of “*intermediación mercantil*”, which was later amended by *Real Decreto 1438/85 de 1 de agosto de 1985*, that inserted the indemnity for the termination of contract. The inclusion of agents in labor law was criticized by the literature, that based on the agent's autonomy, denied the equivalence to dependent workers. In order to bring into force the Directive, was approved the *Ley 12/1992, de 27 de mayo de 1992*, that ruling the agency contract, inserted it into the commercial law under criticism by labour authors. See E. Chulià Vicent, Beltran Alandete, *Aspectos jurídicos de los contratos atípicos*, II, cited above, pp. 381 ff, Martínez Sanz, *La indemnización por clientela*, cited above, p. 27, underlying that, until 1992, this agreement remained atypical.

<sup>74</sup> Baldassari, *I contratti di distribuzione, Agenzia, Mediazione, Concessione di vendita*, cited above, p. 25. The *DL n° 178/86, de 3 de Julho*, was prior to the Directive, but as it closely followed proposal for a Council Directive to co-ordinate the laws of the Member States relating to (self-employed) commercial agents COM (78) 773 final, 22 January 1979, respected the Directive, only requiring minor changes. Unfortunately, the legislator, as usual, made also unnecessary changes. See Pinto Monteiro, *A proteção do agente no direito português e europeu*, BFD, Vol. LXXI, Coimbra, 1995, p. 99.

<sup>75</sup> Art. 17 gave to the State Members the possibility to opt between the French indemnity and the German compensation (*Ausgleichsanspruch*) for the loss of costumers, without requiring proof of damage (art. 89, alt. b) of the HGB).

The Directive did not determine the *quantum* of indemnity, only setting as a limit of the indemnity an amount equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration received by the agent during the last five years. If the contract goes back less than five years, it will be calculated on the average for the period in question. Portuguese and Spanish legislators enacted, in art. 33 of *DL n° 178/86* and in art. 28 of the LCA, the German compensation. See Martínez Sanz, *La indemnización por clientela en los contratos de agencia y concesión*, cited above, pp. 82 ff.

<sup>76</sup> This notion is not very different from that offered by the art. 22 of the LCA. In both systems, the agency contract is not subject to written form, even though any of the parties may require a

According to this provision, the essential elements of the agency contract are: the obligation of the agent to promote the conclusion of contracts, action on account of principal, autonomy, stability and retribution.<sup>77</sup>

The obligation of the agent to promote the conclusion of contracts includes all the necessary measures to attract customers, publicize and promote the products, in order to prepare the conclusion of contracts, at which stage the agent will, as a rule, no longer intervene.

The agent only enters into contracts with third parties, if the principal has granted him powers to do it, in accordance with art. 2 of *Decreto-Lei n° 178/86, de 3 de Julho*.<sup>78</sup>

The agent also acts on the account of the principal, which is why this contract will be inserted by German literature in the category of *geschäftsbesorgungsvertrag*.<sup>79</sup>

The agent, as we have already mentioned, is independent, and it is possible for him, unless otherwise agreed, to use subagents (art. 5 of DL 178/86) and to exercise of the activity (art. 20 of DL 178/86).<sup>80</sup>

written contract. See art. 1 of DL n° 178/86 and art. 22 of the LCA. The concept provided by art. 1742 of the *Codice Civile* considers the definition of an area an essential element from agency contract.

<sup>77</sup> These elements are also present in art. 1 of LCA. See Raul Bercovitz Álvarez, *El contrato de agência*, “Contratos Mercantiles”, cited above, pp. 508-510.

<sup>78</sup> The Spanish law establishes an identical solution in art. 6 of LCA. See Raul Bercovitz Álvarez, *El contrato de agência*, “Contratos Mercantiles”, cited above, p. 510.

<sup>79</sup> See note *supra* 5.

<sup>80</sup> See Pinto Monteiro, *Contrato de agência*, cited above, p. 56. LCA, in art. 5, also provides the possibility of the use of subagents, although dependent on the express permission of the principal. On the difference between dependent workers and subagents, see Raul Bercovitz Álvarez, *El contrato de agência*, “Contratos Mercantiles”, cited above, p. 514. It also falls on the agent, unless otherwise agreed, the expenses resulting from the activity developed, in terms of art. 18 of the LCA.

Art. 7 of DL n° 178/86, as well as art. 9 of LCA, places on the agents a duty to respect the instructions of the principal, provided they do not undermine the autonomy, to provide information regarding accounting and the market and to perform a good management.

The principal, under art. 13 of DL n° 178/86 and arts. 10 and 15 of the LCA, has the duty to provide all information necessary to the performance by the agent of its activity concerning contracts concluded and commissions and, if necessary for the commissions reckon, information regarding accounting.

The art. 6 of DL n° 178/86, like art. 3 of the Directive, establishes a general principle based on good faith regarding the agent's obligations. On the basis of good faith, but deserving special attention of the legislator, are enshrined in arts. 11 and 14, respectively, the obligation of the agent to notify the principal when unable to temporarily fulfill the contract, and, on the principal, the duty to notify the agent when he realizes that he will not be able accomplish the business volume agreed or expected business. Arts. 9 and 10 of LCA also enshrine a duty of good faith in the fulfillment of obligations by the agent and the principal and the principal duty to warn the agent whenever the turnover is lower than expected. The Spanish law, in art. 10, paragraph 3, determines that the principal has to accept or deny the contract suggested with in within fifteen days. This issue regarding rights and duties of agent and principal is in line with arts. 3 and 4 of the Directive. These provisions are mandatory, according to the art. 5 of the Directive.

The Portuguese legal system, like the Italian legal system, considered exclusivity in favor of the agent over a particular territorial zone or group of clients a natural element of the contract. It was not, however, an essential element as it could be overridden by the parties.<sup>81</sup>

The exclusivity in favor of the agent, after the amendment introduced in art. 4, by *Decreto-Lei n° 118/93, de 13 de Abril*, is dependent on the written agreement of the parties.<sup>82</sup>

According to this article, the principal, in the absence of a contractual provision, may use other agents to perform competing activities, preserving, however, an exclusive right towards the agent.<sup>83</sup>

The agency contract is an onerous contract. The retribution, an essential element of the contract, is reckoned in accordance with the turnover obtained by the agent.<sup>84</sup>

Usually, the retribution is a commission, corresponding to a certain percentage over turnover. It may be agreed, though, the payment of a fixed amount together with the commission.<sup>85</sup>

According to art. 9, it can be can also be foreseen a non-compete obligation following the termination of the agency, provided that it is concluded in writing, does not exceed two years and is limited to the geographical area or the

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<sup>81</sup> Pursuant to art. 1742 *Codice Civile*, exclusivity is a natural element of the contract, but not essential. Baldi, Venezia, *Il contratto di agenzia*, cited above, p. 69. This is similar to what happened in Portugal, before the amendment introduced by DL n° 118/93, de 13/4 in art. 4. See Pinto Monteiro, *Contrato de agência*, cited above, p. 75.

<sup>82</sup> See Raul Bercovitz Álvarez, *El contrato de agência*, “Contratos Mercantiles”, cited above, p. 520, sustaining the same, regarding art. 12 of the LCA.

The principal, while recognizing the agent as the exclusive agent, may use other agents, in different economic activities, or, in the same economic activity, outside the circle of costumers or area assigned to the agent. See Pinto Monteiro, *Contrato de agência*, cited above, p. 78.

The exclusive agent, according to paragraph 2 of art. 16, is entitled to a commission, even though he has not prepared the contract, but because costumers are located in the territorial zone or are part of the circle of costumers granted to the agent. This provision follows art. 7, paragraph 2 of the Directive. In Spanish law, see, in the same sense, art. 12, paragraph 2 of the LCA.

<sup>83</sup> Indeed, despite the silence of the law, the agent is prohibited from engaging in competing activities without the consent of the principal owing to the agent’s obligation to look after the interests of the other part enshrined in art. 6 and the good faith principle. Spanish law, in art. 7, foresees that the agent will not carry out competing activities on its own account or on behalf of a third party, requiring for it the consent of the principal. See Raul Bercovitz Álvarez, *El contrato de agência*, “Contratos Mercantiles”, cited above, p. 520.

<sup>84</sup> Pursuant to art. 15, the agent is entitled to a compensation, in the absence of agreement by the parties, that will be determined the usages and, in its absence, by equity. In the same sense, see art. 11 of the LCA.

<sup>85</sup> Under paragraph 1, art. 16, as well paragraph 1, art. 1 of the LCA the agent is entitled to a commission concerning the contracts promoted and contracts concluded with costumers acquired by the agent, thus dissuading the principal from negotiating directly with costumers brought into business by the agent. This provision is in line with art. 7 of the Directive.

Among us, commission is considered the typical form of retribution of agent activity. It can be combined with a fixed amount. See Pinto Monteiro, *Contrato de agência*, cited above, pp. 99-100 and Raul Bercovitz Álvarez, *El contrato de agência*, “Contratos Mercantiles”, cited above, p. 524.

group of customers and the geographical area assigned to the agent and to the kind of goods covered by the contract.<sup>86</sup>

The agent, according to art. 16, paragraph 3, is entitled to a commission regarding the contracts concluded after the termination of the contract, provided that are concluded within a reasonable period after termination of the contract and the agent proves that its conclusion was due to his activity.<sup>87</sup>

The commission shall become due in the terms and conditions provided by art. 18, which, after being amended by *Decreto-Lei n° 118/93, de 3 de Abril*, replicates art. 10 of the Directive.

The acquisition of the right to the commission, following the initial version of this provision, depends on the fulfillment of the contract, in order to avoid that the agent, driven by the greed of receiving more commissions, loses interest for the contracts, after concluded, or promotes contracts with insolvent or with poor credit history costumers.<sup>88</sup>

The art. 18, paragraph 2, following paragraphs 2 and 4 of art. 10 of the Directive, considers that the commission is always due when the third party has complied with the contract or should have done, if the principal had fulfilled his obligation. This rule cannot be overridden by the parties.<sup>89</sup>

In the event of a *convention del credere*, the agent is entitled to a commission, after the conclusion of the contract, since, through this agreement, he guarantees to the principal the due compliance of the contract by the third party.<sup>90</sup>

<sup>86</sup> This obligation has, as consideration, the compensation provided for in alt. g) of art. 13. This article is in compliance with art. 20 of the Directive following the solution of § 90 HGB, which was foreseen in the proposal for a Council Directive to co-ordinate the laws of the Member States relating to (self-employed) commercial agents in 1979, as refers Pinto Monteiro, *Contrato de agência*, cited above, p. 88. An equal solution is enacted, by Spanish law, in arts. 20 and 21 of the LCA.

<sup>87</sup> The use of an indeterminate concept as reasonable period, without accurate determination of the term, is a technique that follows the art. 8 of the Directive. The Spanish legislator, unlike the Portuguese legislator, set a deadline of three months, in art. 13 of the LCA.

<sup>88</sup> In the same sense, see art. 14 of LCA. See Raul Bercovitz Álvarez, *El contrato de agência*, "Contratos Mercantiles", cited above, pp. 526-527.

The commission is not, however, exclusively dependent on the fulfillment of the contract by the costumer. The compliance of the contract by the principal or non-compliance when the principal should have complied with the contract, according to his agreement with the third party, render the commission due.

Pinto Monteiro, *Contrato de agência*, cited above, p. 107, defends the proportional reduction of the commission in case of partial fulfilment of the contract. This solution is expressly enacted in art. 1748 do *Codice Civile*.

<sup>89</sup> Art. 18 must be articulated with art. 19 recognizing the acquisition of commission by the agent, in situations where the customer does not fulfill the contract for reasons ascribed to the principal. The Italian law advocates, in art. 1749 *Codice Civile*, an identical solution. In this sense, *vd.* Baldi, Venezia, *Il contratto di agenzia*, cited above, pp. 257-258. This also results from art. 17 of LCA *a contrario*.

<sup>90</sup> The *convention del credere* entitles the agent, pursuant to art. 13, alt. f), to a special commission, which is also due, after the conclusion of the contract. See, Pinto Monteiro, *Contrato de agência*, cited above, pp. 96-97. The LCA, in similar terms to those of Portuguese law, also provides, in art. 19 of LCA, the agent right to an extra commission, explained by the fact that agent assumes

The regulation and harmonization of the termination of the agency agreement, the moment of the contract where the agent's vulnerability, in most legal systems, is intensified, was one of the objectives of the Directive.

Portuguese legislator, in 1986, brought in force to the agency contract the causes of termination of contracts in general, regulating, in articles 25 to 31, the way each of them is processed.<sup>91</sup>

Pursuant to art. 27, the agency contract is, in the silence of the parties, a contract for an indefinite period and shall be deemed renewed for an indefinite period if the fixed-term contract continues to be executed by the parties after the expiry of a fixed term.<sup>92</sup>

The termination is allowed in indefinite duration contracts, by written communication to the other party, provided they are in compliance with the notice periods set out in art. 28.<sup>93</sup>

One of the most important aspects is the indemnity for termination of contract, which, strictly speaking, corresponds to a compensation of the agent for the benefits that the principal has attained and continues to obtain from the agent's activity, after termination of the contract, regarding the costumers that the agent into business for the principal.

This indemnity received particular attention from the Directive, even though art. 33 of *DL n° 178/86, de 3 de Julho*, had already adopted the same terms provided by the Directive.<sup>94</sup>

The indemnity is dependent on the cumulative verification of three conditions<sup>95</sup>: the agent has attracted new customers or substantially increased the

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an additional responsibility. See Raul Bercovitz Álvarez, *El contrato de agência*, "Contratos Mercantiles", cited above, pp. 523-524.

The payment of the commission, in the absence of *convention del credere*, as provided for paragraph 3 of art. 10 Directive, must occur not later than on the last day of the month following the quarter in which it became due. Similarly, see art. 16 of the LCA.

<sup>91</sup> In art. 24 are displayed the forms of termination: the parties' agreement, the termination by notice, termination with just cause and termination expiry of a fixed term. See for further developments, Pinto Monteiro, *Contrato de agência*, cited above, pp. 134-137.

<sup>92</sup> In the same sense, see arts. 23 and 24 of LCA.

<sup>93</sup> The legislator in 1993, amended in compliance with the Directive, the notice periods set out initially, which were longer than the one, two, three months referred, in art. 15 of the Directive, to contracts that lasted one, two, three or more years, respectively.

However, the national legislator, inexplicably, squandered the possibility of extending the periods of notice up to six months for contracts lasting for six or more years, having opted for a maximum period of notice of three months, unlike the Spanish legislator, in art. 25, paragraph 2 of the LCA. As stated by Pinto Monteiro, *Contrato de agência*, cited above, p. 127, the parties must predict longer periods of notice. The period of notice of the principal cannot be shorter than the agent period of notice, in accordance with art. 28, paragraph 3 of DL n° 187/86.

<sup>94</sup> The indemnity foreseen in art. 33 of DL n° 178/86 is mandatory, in accordance with art. 19 of Directive 86/653/EEC. In Spain, art. 3 of LCA expressly affirms the imperative nature of the rules governing agency contract.

<sup>95</sup> About the mandatory proof of all these requirements, in our case law, see decisions of the *Supremo Tribunal* of 23.02.2010, Case 1404/04.0TBRRG – A.CI.SI, of 20.10.2009, Case 91/2000.S1, of 4.6.2009, Case 08B0984, of 7.03.2006, Case 06A027, available at [www.dgsi.pt/jstj](http://www.dgsi.pt/jstj).



business turnover with the existing customers; that the other party will benefit considerably, after the termination of the contract, from the activity of the agent; and that the agent ceases to receive any remuneration for contracts negotiated or concluded after the termination of the contract with new customers.<sup>96</sup>

The legislator in 1986, given the complexity of the issue regarding the effect of the termination of the contract by the agent or for reasons ascribed to him in the right for the indemnity, decided to leave this matter absent from the agency contract legal framework.<sup>97</sup>

*Decreto-Lei n° 118/93, de 3 de Abril*, in compliance with art. 18 of the Directive enshrines that the termination of the contract for reasons ascribed to the agent, in particular, the default, or when he terminates the contract, exclude the right of the agent to the indemnity.<sup>98</sup>

<sup>96</sup> It has been questioned whether it fulfill the requirement foreseen in alt. a) if the agent only maintain the level of costumers under a very unfavorable background. Pinto Monteiro, *Contrato de agência*, cited above, p. 144, admits that it must be considered the requirement fulfilled, although exceptionally. Denies the fulfillment of this requirement, Martinez Sanz, *La indemnizacion por clientela*, pp. 165-166. Pinto Monteiro, *Contrato de agência*, cited above, p. 145, following Canaris, *Handelsrecht*, cited above, p. 350, sustains that is not demanded that the principal receives the benefits of the agency directly. It may receive it through an intermediary. The indemnity foreseen in the art. 28 of LCA demands these requirements, referring also in paragraph 2, that the death of the agent will not prevent the heirs to claim and receive it. In the same way, art. 33, paragraph 2 of DL n° 178/86. The agent and the heirs, in accordance with paragraph 4 of art. 33, have one year, after the termination of the contract, to communicate to the principal the aim to receive the indemnity. The lawsuit action must be filed within one year after this communication. In the same way, *see* art. 31 of the LCA.

<sup>97</sup> It is clear from the comparative law study performed by Pinto Monteiro, *Contrato de agência*, (*Anteprojecto*), cited above, pp. 116 ff, that the majority of authors, including the German and Italian literature, considered the termination of the contract by the agent an obstacle to the payment of the indemnity. We agree with the authors that consider that, since the indemnity has the scope to compensate the agent for the benefits that the principal will continue to attain from the agent activity after the termination of the contract, there is no justification to deny the right to receive it, even if the contract is terminated by the agent. *See* Pinto Monteiro, *Contrato de agência*, (*Anteprojecto*), cited above, p. 117, *idem*, *Il contratto di agenzia rivisitato. La direttiva CEE 86/653*, *Rassegna di Diritto Civile*, Anno 17, 1996, pp. 889-890.

<sup>98</sup> In the same way, *see* art. 30 of LCA. Bearing in mind alt. b), art. 18 of the Directive, it should not be considered reasons ascribed to the agent for this purpose, the termination of the contract due to reasons attributed to the principal, the disease or the agent's age that reasonably justify the termination of the contract.

Valerio Sangiovanni, *Contratto di agenzia, cessione di azienda e indennità di fine rapporto*, *Corriere Giuridico* N. 5/2008, p. 640, Francesco Basenghi, in the note to art. 1751° of the *Codice Civile*, in AAVV, *Contratto di agenzia*, a cura da Francesco Basenghi, Giuffrè Editore, Milano, 2008, pp. 267-268, sustain, as already has been referred by Italian literature, that right to the indemnity remains if the contract is terminated by mutual agreement, regardless of whether it has been the agent's initiative. *See* Martinez Sanz, *La indemnización por clientela*, cited above, p. 255, Menezes Leitão, *A indemnização*, cited above, p. 60.

The right to an indemnity is also preserved if the contract expires owing to the rejection by the agent of an extension. The same solution will no longer be applied if the contract is automatically renewed, since, in this hypothesis, the opposition to renewal by agent causes the termination of the contractual relationship for reasons attributed to the agent. *See* Martinez Sanz, *La indemnizacion por clientela*, cited above, p. 255, Menezes Leitão, *A indemnização*, cited above, p. 60.

The indemnity, taking into account its nature, is subject to equity, having been replicated by art. 34 of *Decreto-Lei n° 118/93, de 3 de Abril*, the art. 17, paragraph 2, alt. b) concerning the limit for the indemnity.<sup>99</sup> Fairness requires the appraisal of all the circumstances of the case in the indemnity calculation.<sup>100</sup>

Pinto Monteiro claims that this indemnity is fundamentally a compensation of the agent for the benefits that the principal, after termination of the contract, continue to obtain from the activity of the agent, regarding the costumers that the agent attained for the principal, concluding, therefore, that is not a true indemnity. In this context, the author states that this indemnity is closer to the unjust enrichment than to contractual liability, emphasizing the compensatory nature of it.<sup>101</sup>

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<sup>99</sup> The indemnity, as we have already referred, may not exceed an amount equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration received by the agent during the last five years. If the contract goes back less than five years, it will be reckoned on the average for the period in question. See Pinto Monteiro, *Contrato de agência*, cited above, p. 155. The Directive, in this issue, follows § 89 b) HGB, establishing the same limit.

Regarding the possibility to interpret article 17, paragraph 2, alt. a) of the Directive to the effect that the value of the losses suffered by the agent as a result of termination of the contract will automatically be the limit for the indemnity, even when the advantages from the agent activity retained by the principal are superior, the CJEU, considering that the loss of commissions by the agent is another factor to be taken into account in equity appraisal, maintained that this rule “is to be interpreted to the effect that it is not possible to automatically limit the indemnity to which a commercial agent is entitled by the amount of commission lost as a result of the termination of the agency contract, even though the benefits which the principal continues to derive have to be given a higher monetary value” (see Judgment of the Court of 26.03.2009, *Turgay Semen contra Deutsche Tamoil GmbH*, Case C-348/07, Colect 2009, p. I-02341, paragraphs 23 a 25).

<sup>100</sup> Portuguese courts have, however, sought objective elements to reckon the indemnity, often using the average remuneration received by the agent in the last years of the contract and the limit laid down in art. 33. See decisions of the *Supremo Tribunal* of 4.6.2009, Case 08B0984, available at [www.dgsi.pt/jstj](http://www.dgsi.pt/jstj), of *Relação de Coimbra* of 14.12.1993, CJ, 1993, V, p. 46 and *Relação do Porto* of 18.10.1994, CJ, 1994, IV, p. 218.

The decision of the *Supremo Tribunal* of 16.06.2009, Case 128/09.1YFLSB, concerning the agency agreement, the decision of 5.3.2009, Case 09B0297, of 13.09.2007, Case 07B1958, the concerning the commercial concession, available at [www.dgsi.pt/jstj](http://www.dgsi.pt/jstj), establish, as basis to reckon of the indemnity, the maximum legal limit of the indemnity, notwithstanding repudiate its automatic enforcement. The rulings of the *Supremo Tribunal* of 16.06.2009, of 5.03.2009, of 13.09.2007, all cited above, and 31.03.2004, Case 04B545, available at [www.dgsi.pt/jstj](http://www.dgsi.pt/jstj), considerer the contract duration relevant to the reckon of the indemnity. Other decisions give particular emphasis to the annual value of commissions earned, as the decision of *Relação de Coimbra* of 14.12.1993, cited above, p. 46.

<sup>101</sup> *Contratos de Distribuição Comercial*, cited above, pp. 150-152. This will not mean, however, that the author justifies the right to this indemnity to prevent unjust enrichment. Indeed, Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 159, gives several reasons to sustain the incompatibility of this indemnity with the unjust enrichment by first drawing attention to the fact that the benefit attained by the principal just has to be potential. It is not necessary to recognize the right to the indemnity that the principal actually have attained benefits from the agent activity regarding costumers. It is only required that he have the opportunity to do so. The author also points out the importance of the agent default, the use of equity to reckon of the indemnity and the fact that the enrichment of the principal has a cause, as it is grounded in the agency contract executed by the parties. The author, *Contratos de Distribuição*, cited above,

Following Pinto Monteiro, we accept that this indemnity aims at compensating the agent for the commissions that he would have received in the future from his activity, but that he will not receive, owing to the contract termination (*deferred compensation*), while at same time aims at protecting the agent.<sup>102</sup>

We considered that this approach is the most appropriate to shelter the different purposes of the indemnity.

After analyzing the main aspects of the legal regime of the agency, it must be studied and defined the legal treatment to be given to distribution agreements under analysis.

### 5. Extending the legal regime of the agency contract to other distribution agreements

The question that has been placed by literature, about the legal framework of these distribution agreements, is whether it is possible to apply by analogy the rules of the agency contract, as it is the nearest legally typical contract to these contracts, in particular, with regard to the rules concerning the termination of the contract.

The analogy, as a legal instrument to solve matters on which there is no previous regulation, requires, firstly, that the rules to be applicable by analogy regulate interests and purposes identical to the situation on which there is no previous regulation.<sup>103</sup>

Thus, it is necessary to verify whether these contracts have common interests and fulfill the same purposes.

The dealer and franchisee are different from the agent, as they are traders who buy for resale, contracting in own name and for its own account, assuming the risk of commercialization.

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p. 159, also refers that, in certain circumstances, for instance, when the principal is unable to maintain the customers, without having any major benefit from it, the payment of the indemnity is due.

<sup>102</sup> *Contratos de Distribuição Comercial*, cited above, p. 160. Sustain the nature of deferred compensation, in German literature, Karsten Schmidt, *Handelsrecht*, 5<sup>a</sup> ed., Carl Heymanns Verlag KG, Köln, Berlin, Bonn, München, 1999, § 27 V, 2, pp. 740-741, Raimond Emd, *Vertriebsrecht: Kommentierung zu §§ 84 bis 92c HGB. Handelsvertreterrecht, Vertriebsrecht. Kommentierung zu §§84 bis 92 c HGB: Handelsvertreterrecht - Vertragshändlerrecht - Franchiserecht*, De Gruyter, 2009, p. 861, considering this indemnity an *Vergütungsanspruch sui generis*. In Spain, Martinez Sanz, *La indemnización por clientela*, cited above, p. 115, *idem*, *Contratos de distribución comercial: Concesión y franchising*, cited above, p. 357, also seems to support this nature of the indemnity.

<sup>103</sup> Regarding distribution agreements, in particular the commercial concession and franchising, see Pinto Monteiro, *Contratos de Distribuição*, cited above, pp. 64-69, the application of the agency legal framework is not automatic, *idem*, *Contrato de agência*, cited above, pp. 67-69. *Idem*, *Denúncia de um contrato de concessão comercial*, pp. 77-78, Menezes Cordeiro, *Manual de Direito Comercial*, cited above, n° 206, p. 494, Pestana de Vasconcelos, *O Contrato de Franquia*, cited above, pp. 73-74, Martinez Sanz, *La indemnización por clientela*, cited above, p. 122.

Nonetheless these differences, these contracts, as it has been already mentioned, are intended to fulfill the same economic and social function of agency contract, ie, the distribution of producer goods. Indeed, in all these contracts falls upon the distributor the obligation to look after the interests of producers and to promote the distribution of producer goods.<sup>104</sup>

This obligation to promote the business of the other party allowed us to justify the autonomy of distribution contracts as a legal category.

On the other hand, it is also true that, internally, the relationship established between the grantor and the franchisor and its counterpart is very similar to the relationship established between the agent and the principal.

As we mentioned above, all these contracts are characterized by a lasting relationship of cooperation between the parties by which the distributor is integrated in the producer's distribution network. This integration is accompanied by the distributor submission to the instructions and guidelines of the producer and supervision power.

These common characteristics, despite the different intensity in each of these contracts, authorize, therefore, the application of the agency contract by analogy.<sup>105</sup>

However, it is also necessary to verify that the *ratio legis* of the rule to be applied is appropriate to the case.<sup>106</sup>

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<sup>104</sup> Pinto Monteiro, *Contratos de Distribuição*, cited above, p. 66. Martinez Sanz, *La indemnización por la clientela*, cited above, pp. 318-319, underlying, about commercial concession, the common nature of *geschäftsbearbeitungsvertrag* and the structural role of the duty to promote the distribution, recognizing the author, *La indemnización por la clientela*, cited above, p. 348, a supporting role to the market prospecting and to the costumers acquisition.

<sup>105</sup> Menezes Cordeiro, *Manual de Direito Comercial*, cited above, n° 206, p. 494, states that the agency may be a reference to distribution agreements, thus justifying the application of most of the agency contract rules to distribution agreements.

<sup>106</sup> Pinto Monteiro, *Contratos de Distribuição*, cited above, p. 66-67. In same sense, Martinez Sanz, *La indemnización por clientela*, cited above, p. 323, demanding the presence of *identidad de razón*.

Pinto Monteiro, *Contrato de agência*, cited above, p. 133, emphasizes the existence of rules only applicable to the agency contract, referring the art. 29, paragraph 2, of Decreto- Lei n° 178/86 regarding the option by the monthly remuneration average concerning the notice period, as both in the commercial concession and franchise contract, distributors purchase products for resale, benefiting from profit. The author, *Contratos de Distribuição*, cited above, p. 67, expresses reservations regarding the application to the commercial concession contract of the rules of the agency contract regarding the commission, namely, art.16, paragraph 2 of DL n° 178/86 concerning the right to the commission in the event of the breach of the exclusivity granted to the distributor, as the concessionaire benefits from profit produced by the resell of goods.

As referred by Pinto Monteiro, *Contrato de agência*, cited above, p. 133, courts have extended the art. 29, paragraph 2 to commercial concession, assuming net income the role of the commission. Similarly, about the franchising, see Pestana Vasconcelos, *O Contrato de Franquia*, cited above, pp. 83-84.

It is accepted by literature the mandatory written form of the non-compete obligation provided for in those contracts, by the application by analogy of art. 9 of DL n° 178/86. See Maria de Fátima Ribeiro, *O contrato de franquia (franchising)*, DJ, Vol. XIX, Tomo I, 2005, p. 103.

European Union has been deeply concerned with the distributor protection in distribution agreements, as it is considered that the safeguarding of the distributor's independence from the producer represents a mean to overwhelm restrictions on competition and preserve the competitive condition of the distributor.<sup>107</sup>

The application by analogy of the legal framework of the agency contract, in particular the rules governing the termination of the contract, is justified by the fact that the absence of legal regulation poses major issues in this phase of the contract, rendering more evident the similarity between these contracts.<sup>108</sup>

However, the application by analogy of the rules governing the indemnity to the concession commercial contract and the franchise contract has raised some doubts in the literature and case law. The absence of consensus on the nature of the indemnity renders this issue even more complex.<sup>109</sup>

Firstly, it must be verified if the rules recognizing to the agent the right to an indemnity, provided by the arts. 33 and 34 of *Decreto-Lei 178/86, de 3 de Julho*, oversee interests similar to those of the commercial concession contract and franchise contract.<sup>110</sup>

<sup>107</sup> Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 1.8.2002, p. 30-41, besides maintaining the contract duration and the minimum period of notice established in art. 5, paragraph 2 of Regulation (EC) 1475/1995, demanded in art. 3, paragraph 4 that the termination of the contract by the producer must have been written, giving account of the detailed, objective and transparent reasons for the termination in order to prevent a supplier from ending a vertical agreement with a distributor or repairer because of practices which may not be restricted under this Regulation.

<sup>108</sup> The legislator, in paragraph 4 of the preamble to the DL n° 178/86, expressly states the application to the commercial concession contract of the agency contract legal framework, by analogy, "when and to the extent that it occurs, especially on termination the contract". See Pinto Monteiro, *Denúncia de um contrato de concessão comercial*, cited above, p. 78.

The Spanish law, revealing a more restrictive approach, extends, through the disposición adicional primera of LCA, the agency contract legal framework to the distribution contracts for cars and industrial vehicles, considering this legal framework mandatory until specific legislation regarding these contracts is approved. So far there is no specific legislation to these contracts.

<sup>109</sup> The debate on the application by analogy in German literature of § 89 b) is comparable, in intensity, to the discussion on the legal nature of the indemnity. See Martinez Sanz, *La indemnización por clientela*, cited above, p. 310. Pinto Monteiro also points out that this particular problem of the application by analogy of agency contract legal framework was particularly discussed by the German literature. See Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p. 161, note 304.

It also emphasizes the lack of consensus on the nature of the indemnity, Martinez Sanz, *La indemnización por clientela*, cited above, pp. 336-340.

<sup>110</sup> We consider that these provisions are not exceptional. Consequently, it is removed the obstacle, contained in paragraph 3 of art. 10 of the Código Civil, concerning the prohibition of applying, by analogy, exceptional rules. Similarly, under Spanish law, Martinez Sanz, *La indemnización por clientela*, cited above, pp. 323 ff, which for this purpose relates in detail the discussion in the German literature on this issue.

We will not exam the discussion about the qualification of the application of these rules by analogy *legis* or *iuris*, described by Martinez Sanz, *La indemnización por clientela*, cited above, pp. 326-327, even though we agree that underlying the application of these rules is analogy *legis*.

This means, following Pinto Monteiro, to ascertain, initially, whether the grantor or franchisor's activity can be compared to the agent activity in order to find common interests and identical functions that justify the application by analogy of the provisions under analysis.

This association to the agent presumes that these distributors have taken care of the interests of the counterparty, promoting their goods and increasing customers or turnover.<sup>111</sup>

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However, as referred by Ignacio Moralejo Menéndez, *El contrato mercantil de concesión*, p. 314, n. 95, the *Tribunal Supremo*, despite the analogy *legis* with art. 28 of LCA, continues to consider, in several decisions, the right to an indemnity a mechanism to prevent the unjust enrichment of the producer.

<sup>111</sup> Following closely Pinto Monteiro, *Contratos de Distribuição*, cited above, pp. 163-164. As the author notes, in this first moment, is already proved the requirement demanded in alt. a), paragraph 1 of art. 33 of DL n° 178/86, de 3 de Julho. See, in the same sense, Martínez Sanz, *La indemnización por clientela*, cited above, pp. 340 ff.

In this assessment, it is necessary to taken into account the degree of integration of the distributor in the network, the submission to instructions and to supervisory powers over the obligations undertaken regarding the grantor or franchisor interests and the promotion of the grantor or franchisor products. The more intense these characteristics are, the greater is the dependency of the distributor on the grantor or franchisor. Nevertheless it is said that when the integration of distributor in the network is deep, the distributor role in attracting costumers is smaller, it is also true that in a deeper integration is more likely the maintenance of the costumers in the sphere of the grantor and the franchisor, rendering even more justified the payment of the indemnity provided by agency contract legal framework. Following, once again, Pinto Monteiro, *Denúncia de um contrato comercial*, cited above, p. 86, n. 94, *Contratos de Distribuição Comercial*, cited above, p. 164, n. 307.

The difference concerning the remuneration between the agent and the dealer, also present in the franchising, is not sufficient to exclude the application by analogy of the indemnity. Portuguese case law treats as equivalent to the remuneration of the agent, the net income received by the concessionaire. In this sense, see decision of the *Supremo Tribunal* of 23.11.2006, Case 06B2085; 15.11.2007, Case 07B3933; of 13.9.2007, Case 07B1958, of 10.12.2009, Case 763/05.7TVLSB.S1, of 17.05.2012, Case 99/05.3TVLSB.L1.S1, all published in www.dgsi.pt/jstj. In this sense, decision of the *Relação de Lisboa* of 22.10.2009, Case 1911/04.0TBCSC-2; of 12.05.2009, Case 763/05.7TVLSB-7; of 17.03.2009, Case 8340/2008-7; of 29.03.2007, Case 2985/06-6, published in www.dgsi.pt/jrtl. This seems to be the solution sustained by Pinto Monteiro, *Contrato de agência*, cited above, p. 155.

Martínez Sanz, *La indemnización por clientela*, cited above, pp. 362-364, following some German authors, suggests that the indemnity is calculated from the dealer margin, after deducting all funds that aimed at repaying the risk assumed by the dealer, so that it only compensates, as in agency, "*o labor de abertura o creación de mercado*". In this approach, it is identified by the author, *La indemnización por clientela*, cited above, p. 364, the conversion of the profit margin in a commission appropriate to compensate the concessionaire for the advantages that the grantor will receive, after the termination of the contract, from activity of the concessionaire, especially the costumers. The author, however, recognizes the difficulties in practical terms of this reckon, admitting a possible increase in litigation and in uncertainty. However, the author does not considered these difficulties sufficient to prevent the legislator to draw up a set of criteria, as it has been done in respect to the indemnity within the agency contract. Elsa Vaz Sequeira, *Contrato de franquia e indemnização de clientela*, "Estudos Dedicados ao Prof. Doutor Mário Júlio de Almeida Costa", Universidade Católica Portuguesa, Lisboa, 2002, p. 485, also expresses this concern, recommending that the determination of the indemnity must respect equity in order to reduce the excessively high profits of the franchisee.

Secondly, it is necessary to assess whether the *ratio legis* of the arts. 33 and 34 is compatible with the contract to be regulated.

The justification for the application by analogy of these provisions requires, similar to what happens with the recognition of the right of the agent to the indemnity, the fulfillment of legal requirements: acquiring new customers or a substantially increase in turnover and the benefit by the producer, after termination of the contract, of the distributor activity.<sup>112</sup>

This last requirement fulfillment has raised major difficulties, since, unlike the agency contract in which the principal enters into contracts with customers, in the commercial concession contract and franchising, the distributor contracts with costumers in his own name and on his own behalf.

Indeed, in these contractual arrangements, it is extremely difficult to the counterparty to benefit from the customers, after the termination of the contract.

This requirement may, however, be considered fulfilled if the counterparty, on termination of the contract, has effective access to customers of the distributor.<sup>113</sup>

This reasoning, although initially limited by the literature and case law to the commercial concession agreement can also be extended to franchise agreements.<sup>114</sup>

<sup>112</sup> Without ground, in our opinion, it was sustained, concerning the first requirement, that in concession commercial contract and, in particular, in franchising, costumers were not brought into business by the distributor activity, but by the attractive power of the trademark (*Sogwirling der Marke*). In this sense, Fiammetta Coggi, *Le condizioni di fine rapporto*, "I contratti di franchising. Organizzazione e controllo di rete", Luciano Pilotti, Roberto Pozzana (coord.), Egea, Milano, 1990, pp. 138 ff. The literature has considered that this assertion cannot succeed, as the agent also benefits from trademark notoriety, without jeopardizing the fulfillment of this requirement, and, as pointed out by Pinto Monteiro, *Contratos de Distribuição*, cited above, p. 167, note 316, it is not legally required that the agent activity is the only factor responsible for acquiring new customers or increasing business turnover. It will be, however, one factor to consider when determining the requirement demanded by alt. a) of paragraph 1 art. 33 of Decreto-Lei n° 178/86 and, in particular, in determining the indemnity. See Martinez Sanz, *La indemnización por clientela*, cited above, pp. 157, 347-349.

Regarding commercial concession was pointed out by some Italian literature that this indemnity, whose origin is found in the collective bargaining agreements, prior to the *Codice Civile*, emerged in a particular context, with the purpose of protecting the agent, arguing that this rule, owing to the fact that is protective and mandatory, cannot be extended to the commercial concession agreement. On the other hand, it is also underlined that one of the obligations of the agent is to increase the demand for goods, belonging the costumers to the principal, while in the commercial concession, the distributor acts in own name and for its own account. See Oreste Cagnasso, *Concessione di vendita*, cited above, pp. 388-389.

These grounds will be to rejected to the extent that the mandatory and specific protection rules can be applied by analogy since the interests to protect are identical. Regarding the second argument, it is important to state that the dealer will only be entitled to the indemnity if he effectively loses the costumers with the termination of the contract. If he preserves the costumers, obviously there is no place to an indemnity. It is also required in the commercial concession that the grantor benefit, even potentially, from the costumers of the dealer.

<sup>113</sup> See Pinto Monteiro, *Contratos de Distribuição*, cited above, pp. 165-166, Martinez Sanz, *La indemnización por clientela*, cited above, pp. 350-351.

<sup>114</sup> The recognition of the right to a indemnity to the dealer is established in case law and national doctrine. See decisions from the *Supremo Tribunal* of 5.3.2009, Case 09B0297; of 31.03.2004, Case 04B545; of 21.04.2005, Case 05B603 and Case 04B3868, 3.05.2000, available at [www.dgsi.pt/stj](http://www.dgsi.pt/stj). Pinto Monteiro, *Contratos de Distribuição*, cited above, p. 164, *idem*, *Contrato de agência*, cited above, pp. 137-139, Menezes Cordeiro, *Manual de Direito Comercial*, cited above, p. 514, Menezes Leitão, *A indemnização de clientela no contrato de agência*, cited above, p. 84, Rui Pinto Duarte, *Tipicidade e atipicidade dos contratos*, Almedina, Coimbra, 2000, p. 195, pointing out that this will only be justified if the commercial concession contract is similar to the agency agreement. The author also sustains this opinion in *A jurisprudência portuguesa sobre a aplicação da indemnização de clientela ao contrato de concessão comercial. Algumas observações*, Themis, II, Almedina, 2001, pp. 320-321. Francisco Javier Valenzuela Garach, *El contrato de concesión mercantil y su extinción por denuncia unilateral*, RDM, 225, 1997, pp. 1319 ff, Martínez Sanz, *La indemnización por clientela*, cited above, pp. 346, 357, Ignacio Moralejo Menéndez, *El contrato mercantil de concesión*, pp. 317-321.

Admit the right to an indemnity concerning the franchise contract, Pinto Monteiro, *Contratos de Distribuição*, cited above, pp. 167-168, *idem*, *Contrato de agência*, cited above, p. 49, highlighting the difficulties of the issue, Menezes Cordeiro, *Manual de Direito Comercial*, cited above, p. 520, though dependent on a concrete assessment, which is a change in relation to the author's position, in Menezes Cordeiro, *Do contrato de franquia*, cited above, p. 83, where the application by analogy was rejected on the grounds that the costumers were attracted by the trademark; Isabel Alexandre, *O contrato de franquia (franchising)*, cited above, p. 369, suggesting a case by case analysis, Carlos Olavo, *O contrato de franchising*, "Novas perspectivas do Direito Comercial", cited above, pp. 171-172, Elsa Vaz Sequeira, *Contrato de franquia e indemnização de clientela*, cited above, pp. 482-483, Luís Miguel Pestana Vasconcelos, *O Contrato de Franquia*, cited above, pp. 96 ff, referring p. 98, that the *praxis* qualifies mixed contracts for provision of services and trademark license as franchising agreements, in which the false franchisee might be similar to an agent, thus justifying the analogy. Luís Menezes Leitão, *A indemnização de clientela*, cited above, p. 89, rejects the application by analogy, in franchise agreement, arguing that costumers belong to franchisee, rejecting the existence of benefits, given the lack of agreement between costumers and franchisor, adding that the franchisee does not suffer any remuneration loss with termination of the contract, since it explores directly the business, having to pay to the franchisor a remuneration as consideration for the license granted. However, he admits that the distribution franchise agreement may justify the payment of the indemnity, as it is possible in this type to attract costumers that, after the termination of the contract, revert to the franchisor.

Martínez Sanz, *Contratos de distribución comercial: concesión y franchising*, cited above, pp. 366-367, although expressing reservations, *La indemnización por clientela*, cited above, p. 303, n. 673, Gallego Sanchez, *La franquicia*, cited above, pp. 112-113, Karsten Schmidt, *Handelsrecht*, cited above, pp. 771 ff, Martinek, *Moderne vertragstypen*, Band II-Franchising, Know-how -Verträge, Management und Consultingverträge, Verlag CH Beck, München, 1992, pp. 155-158, Canaris, *Handelsrecht*, cited above, pp. 388 ff.

On the other hand, deny the right to indemnity, Maria de Fátima Ribeiro, *O contrato de franquia (franchising)*, DJ, cited above, pp. 93, *idem*, *O Contrato de franquia*, cited above, pp. 273, 284-285, Manuel Pereira Barrocas, *O contrato de franchising*, ROA, 1989, pp. 159-160, Bussani, Cendon, *I Contratti Nuovi*, cited above, pp. 471-472, Cagnasso, *Concessione di vendita e franchising*, cited above, p. 339, although these Italian authors recognize a right to the indemnity when a not-compete clause prevents the franchisee from performing a competing activity.

Regarding the franchising, it has been argued by the literature that, since the franchisee already has a pre-existing clientele, any benefit will be assignable to the franchisor, ignoring that the franchisee pays the franchisor the benefits granted by the contract. In this sense, Pinto Monteiro, *Contratos de Distribuição*, cited above, p. 168, note 318. However, as mentions Pinto Monteiro, *ibidem*, following Canaris, it is also in this distribution agreement, where the influence of the



The case law and Portuguese and European literature<sup>115</sup>, verified the requirements of analogy, admit the application by analogy of the agency contract legal framework to these contracts, in particular the provisions governing the termination of the contract, preserving, nevertheless, the particularities of contracts.<sup>116</sup>

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producer in shaping franchisee's activity is greater, with deeper network integration, that the resemblance to the agent is more accurate.

<sup>115</sup> Accordingly, see the decisions of *Supremo Tribunal* of 5.3.2009, Case 09B0297; of 15.11.2007, Case 07B3933; of 09.01.2007, Case 06A4416; of 12.4.2005, Case 04A4685; of 6.7.2005, Case 04B4598; of 21.4.2005, Case 05B603; of 21.04.2005, Case 04B3868 and 05.06.1997, Case 96B817, all available in [www.dgsi.pt/jstj](http://www.dgsi.pt/jstj).

In the Spanish case law, see the decisions of the *Tribunale Supremo* of 12 junio 1999 (RJ 1999, 4292), 14 febrero 1997 (RJ 1997, 1418), of 26 April 2002 (RJ 2002, 5244), 26 de junio de 2003 (RJ 2003/4308), of 5 de mayo (RJ 2006/4050).

There are, however, cases where the *Supremo Tribunale* rejects the application by analogy of the indemnity to the commercial concession contract, as follows from 2004 5 febrero decision (RJ 2004, 639).

<sup>116</sup> In this sense, Pinto Monteiro, *Contrato de agência*, cited above, pp. 67, 148-151, *idem*, *Denúncia de um contrato de concessão comercial*, cited above, n<sup>o</sup>s 3 e 5, pp. 49 ff, 75 ff, respectively, *idem*, *Contratos de Distribuição Comercial*, cited above, pp. 64-69, Menezes Cordeiro, *Manual de Direito Comercial*, cited above, n<sup>o</sup> 206, pp. 207, 212, 219, Maria Helena Brito, *O Contrato de concessão comercial*, cited above, pp. 124-125, Pestana de Vasconcelos, *O Contrato de Franquia*, cited above, pp. 73 ff, Fátima Ribeiro, *O Contrato de franquia*, cited above, pp. 142-143. In European doctrine, *vd.* Martinez Sanz, *Contratos de distribución comercial: concésion e franchising*, cited above, pp. 348-350, 365-367, Karsten Schmidt, *Handelsrecht*, cited above, pp. 769 ff, Canaris, *Handelsrecht*, cited above, pp. 388 ff.

Admits the application by analogy with reluctance, see Raul Bercovitz Álvarez, *El contrato de agência*, "Contratos Mercantiles", cited above, pp. 535-536.

We agree with José Alberto Vieira, *O Contrato de Concessão Comercial*, Coimbra Editora, 2006, p. 127, in maintaining the mandatory nature of arts. 33 and 34, even if applied by analogy. See Pinto Monteiro, *Contratos de Distribuição*, cited above, p. 155, *Contrato de agência*, cited above, pp. 145-146, on the mandatory nature of these provisions, considering null, pursuant to art. 809 Código Civil and art. 19 of the Directive, waive of this right in advance. The Author admits, however, that the amount of indemnity may be at reasonable terms determined, by a prior or subsequent agreement.

On the other hand, denies mandatory nature of the indemnity, when applicable to commercial concession by analogy, for the absence of grounds justifying the injunctive nature of the provision in the agency agreement, Martinez Sanz, *La indemnizacion por clientela*, cited above, pp. 330-331. The author, *op cited above*, p. 330, points out that the application of the agency contract legal framework by analogy is derived from faulty contractual regulation by the parties. Similarly, regarding the franchise agreement, following Martinez Sanz, see Elsa Vaz Sequeira, *Contrato de franquia e indemnização de clientela*, cited above, pp. 483-484, even though the author considers that the absence of a mandatory nature does not prevents the application of the general principles of law, in particular, the Civil Code provisions concerning the vices of will, the good faith and, above all, the general terms of business contracts, given that, as a rule, these contracts are formed by General Terms of Business.

Pedro Pais de Vasconcelos, *Contratos atípicos*, Almedina, Coimbra, 2002, p. 370, also argues that the provisions with injunctive nature can be derogated if thwarted by the contract provisions, affirming the prevalence of the rules over the contract regulation to when the contract is typical.

However, the author admits the injunctive nature of those provisions, when, given the circumstances, the case under analysis and legally atypical contract present the same grounds of

Following Pinto Monteiro, we also consider that the periods of notice provided for in art. 28 are not applicable to distribution contracts, although it may act as a reference. These contracts demand from the distributor a level of investment that is not compatible with the short periods provided in for the agency contract. The periods of notice agreed by the parties shall be assessed casuistically, under the good faith principle.<sup>117</sup>

In the light of the above mentioned, we sustain, provided the legal requirements are proved, the application by analogy of the agency contract legal framework, including the indemnity, to commercial concession contract and franchise contract.

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public policy that justified the mandatory nature of the provisions concerning the typical contract. The mandatory nature is explained by public policy. Martínez Sanz, *La indemnización por clientela*, cited above, p. 331, admits maintaining the injunctive nature of the indemnity when applicable by analogy to the commercial concession, if, from an abstract perspective, the need for protection of the dealer is identical to the agent. The author denies it general, although admits that it can to occur occasionally. In the same way, see Ignacio Moralejo Menéndez, *El contrato mercantil de concesión*, pp. 324-325.

Our case law has considered null and void the waive in advance of the indemnity regarding commercial concession contract, as is clear from de decisions of *Relação de Lisboa* of 17.03.2009, Case 8340/2008-7; of 29.03.2007, Case 2985/06-6 and 12.05.2009, Case 763/05.7TVLSB-7, available at [www.dgsi.pt/jtrl](http://www.dgsi.pt/jtrl). In the Spanish case law, it has been admitted the validity of these clauses, as reports Ignacio Moralejo Menéndez, *El contrato mercantil de concesión*, p. 324.

There is a case law trend that defends the nullity of waiving in advance of the indemnity, claiming that this clause, as a General Terms of Business, was not negotiated by the dealer. See decisions of *Supremo Tribunal* of 15.11.2007, Case 07B3933; of 05.03.2009, Case 09B0297, published in [www.dgsi.pt/jstj](http://www.dgsi.pt/jstj) and *Relação de Lisboa* of 10.02.2011, Case 5484/09.9TVLSB.L1-2 available at [www.dgsi.pt/jtrl](http://www.dgsi.pt/jtrl).

<sup>117</sup> See Pinto Monteiro, *Contratos de Distribuição Comercial*, cited above, p.138. The same can be affirmed about the longer periods of art. 25 of the LCA. The majority if the authors has held that art. 28 of the Decreto-Lei nº 178/86 shall not apply to commercial concession and franchise contracts, not only because it foresees short periods, but owing to the fact that these contracts demand greater investments by the dealer and franchisee, than those usually demanded to the agent. The periods of notice provided for in art. 28 of DL nº 178/86, are only a reference. See Maria de Fátima Ribeiro, *O Contrato de franquia*, cited above, p. 243 and Pestana de Vasconcelos, *O Contrato de Franquia*, p. 82. This appraisal has been followed by Portuguese case law, as held by the decisions of the *Supremo Tribunal* of 9.1.2007, Case 06A4416, while acknowledging that the established periods of notice can be used as references, of 21.4.2005, Case 05B603; of 13.05.2004, Case 04A381; of 4/2/2003, Case 02A744; of 10.10.2001, Case 02A744, available at [www.dgsi.pt/jstj](http://www.dgsi.pt/jstj). Upholding that art. 28 of DL nº 178/86 set the limits for period of notice of the commercial concession contract of indefinite duration, although in some cases the good faith may impose an extension of the mentioned periods, see the decision of the *Supremo Tribunal* of 12.04.2005, Case 04A4685, available at [www.dgsi.pt/jstj](http://www.dgsi.pt/jstj). The decision of *Relação de Lisboa* of 2.02.2006, Case 9219/2004-6, available at [www.dgsi.pt/jtrl](http://www.dgsi.pt/jtrl), does not question the inadequacy of the periods of notice set out in art. 28 applying it to the commercial concession contract.

## Conclusion

The agency contract, under the influence of the European Union, is typified in Portuguese and Spanish legal systems, raising many doubts about its application by analogy to the commercial concession contracts and franchise contract, which remain legally atypical in both legal systems.

In order to contribute to the clarification of this discussion, we concluded, after a brief characterization of agency contracts, commercial concession and franchise, for the existence of an autonomous category of distribution contracts, as affirmed by the national and European literature, based on requirement that the distributor must ensure the producer interests and to promote the distribution of the goods and services of the producer within a lasting relationship of cooperation between the parties. Through this relationship, the distributor is integrated, with greater or lesser intensity, into the distribution network of the producer.

The comparison of the legal framework of the agency contract in the Portuguese and Spanish legal systems revealed an obvious similarity, explained by the Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

The recognition to these contracts of same economic and social function, as already supported by literature and courts in Portugal and Spain, justified the application, by analogy, of the agency contract legal framework to commercial concession and franchise contracts, in particular the rules governing the termination of the contract, including the indemnity.

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