

### EXCLUSIVE DISTRIBUTORSHIP AGREEMENTS UNDER TURKISH LAW

An exclusive distributor is an independent “merchant assistant” who continuously sells the products of the company they represent on their own behalf, acting as a monopoly/ sole distributor in the region assigned to them. In this regard, the exclusive distributor has three distinguishing features: **(i)** acting on its own behalf and account, **(ii)** performing its work on a continuous basis, and **(iii)** having exclusive rights to a region.

This Brief Note aims to summarize the important issues to consider in an exclusive distributorship agreement. The key points to consider when executing an exclusive distributorship agreement (“**Agreement**”) are as follows:

- 1. Exclusivity Clause, Territory, Applicable Law and Competent Court:** This Brief Note has been written on the assumption that **(i)** applicable law is the Turkish law and **(ii)** Turkish courts have been granted jurisdiction under the Agreement. Regarding the designated region, Türkiye is chosen in almost all agreements. However, if the intention is to grant a regional monopoly right, rather than the entirety of Türkiye, this should be carefully and precisely worded in the Agreement.
- 2. Sales Targets and Performance Criteria:** The Agreement should clearly list the products to be sold (this can be included as an annex to the agreement). More importantly, the Agreement should include a clear monthly/annual sales target. The sales targets can be ambitious, but they must also be attainable and align with the market conditions. These matters will be particularly important with regard to termination of the Agreement, which will be elaborated below.
- 3. Agreement Term:** If the main company is entering into a commercial relationship with an exclusive distributor for the first time, the Agreement should stipulate a definite agreement term (e.g., 1 year). Pursuant to Turkish Commercial Code No. 6102 (“**TCC**”), if the Agreement is executed with a definite agreement term without an auto-renewal clause, then no termination notice is required upon the expiration. Furthermore, even if the parties specify an agreement term, if they continue to fulfil the Agreement after the expiration date, the Agreement becomes indefinite-term agreement. If **(i)** the definite term expires and there is an auto-renewal clause or **(ii)** the Agreement becomes indefinite term resulting from the parties’ performance of it, a termination notice must be given 3 months in advance in order to terminate the Agreement, unless there is ground for immediate termination for just cause. Also, the exclusivity between the parties continues during this 3-month notice period.
- 4. Termination Conditions:** The conditions for “termination for just cause,” should be included in the Agreement. Since TCC only refers to “termination for just cause” without specifying its meaning, the judges have wide discretion on what constitutes “just cause” in case law. Again, in case law, gross negligence such as failure of the agent to remit the money collected on behalf of the principal, breach of loyalty, incorrect invoicing of commissions, and disclosure of trade secrets may be considered as termination for just cause. Failure to achieve turnover and sales targets set in written agreements may also be considered as termination for just cause, but this is assessed on a case-by-case basis.
- 5. Portfolio Compensation:** As is the case in many legal systems, the exclusive distributor may claim certain types of compensation after the Agreement has concluded. Apart from these, Article 122 of TCC

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also regulates “portfolio compensation”. Simply, the portfolio compensation is a balancing remedy introduced for the exclusive distributor, resulting from the fact that the execution of the Agreement enables the exclusive distributor to create a customer base that the main company can continue to benefit from if/when the Agreement is terminated.

To be eligible to claim portfolio compensation, the Agreement must not be terminated unjustifiably by the exclusive distributor, nor terminated by the main company by just cause due to the exclusive distributor’s fault. If these conditions are met, the exclusive distributor may claim portfolio compensation, provided that **(i)** the main company derives substantial benefits from the new customers, **(ii)** loses the right to claim remuneration for work to be done with customers brought to the main company by it, and **(iii)** the claim is equitable and appropriate, considering the circumstances of the case.

Portfolio compensation is **non-waivable**, and its amount shall not exceed the average of the annual commissions (or other payments) received by the exclusive distributor for its activities for the last 5 years.

- 6. Antitrust Compliance:** Compliance with the Protection of Competition Law No. 4054 and related legislation and guidelines are also important. Specifically, related clauses in the Agreement shall be carefully drafted and reviewed under the Turkish Vertical Agreements Communique No. 2002/2. In this regard, the most important points are **(i)** the parties' market share not exceeding 30% as a rule, **(ii)** the Agreement not exceeding 5 years, and **(iii)** the Agreement not dictating resale prices, or the Agreement would be considered anti-competitive conduct under Article 4 of the Protection of Competition Law No. 4054. The only exception for the last point is that the main company is allowed to set an overall advisory / recommended maximum sales price, provided that this does not result in a fixed or minimum sales price due to pressure or encouragement from either party.
- 7. IP Rights:** The conditions and limitations for the exclusive distributor’s use of the brand, logo, advertising, and promotional materials should be clearly stipulated and regulated in the agreement, such as registrability of the license, exclusivity, sublicensing rights, termination/ quality control conditions, and sublicensing conditions.
  - 7.1. Brand Registration:** Especially if the main company’s brand does not have WIPO protection, it is highly important that the exclusive distributor does not register the main company’s brand with the Turkish Patent Office on its own behalf.
  - 7.2. Trade Name:** Since trade names registered with registry offices are separate from the trademark/patent process under Turkish regulations, the Agreement should strictly prohibit the exclusive distributor from using the brand name as a trade name under the trade registry.
- 8. Other Issues:** As with any exclusive distribution agreement, customs, tax, and logistics must be clarified (since the foreign supplier brings goods into Türkiye); compliance with any special legislation applicable to the product in Türkiye must also be ensured, and warranty conditions must be carefully defined. Furthermore, attention shall be paid to Turkish regulations on consumer protection, data privacy, commercial advertising and other relevant sector-based regulations while executing the Agreement.

Should you have any inquiries regarding this Brief Note, please do not hesitate to contact us.

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