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Franchise, Distribution and Agency in Europe

There are several options to expand your business in the Netherlands or Europe. For example, you can incorporate a Dutch legal entity (see our article in *The Primerus Paradigm*, Fall 2016, for more information). Another way to enter the Dutch market is to appoint a local European distributor, agent or franchisee. They have the knowledge of the local market and customs that could jump-start your business. It will allow manufacturers to do what they are good at: producing products and upholding the good reputation of the brand. Especially, if you want to do business abroad, the local

knowledge of agents, distributors and franchisees can be beneficial.

In this article, we will discuss the differences between and advantages of distribution, franchise and agency in the Netherlands, a country providing access to all European markets. We will deal with important issues, such as the termination of the contracts and liability resulting from these contracts. We will also take a closer look at several hot topics, including pricing arrangements and online sales (geo-blocking).

Appointing a Distributor, Agent or European Franchisee

Distributor agreements

A distributor is a separate entity buying goods or services from the foreign entrepreneur and selling them at its own risk to clients throughout Europe or in a specific European country (e.g., the Netherlands). The foreign entrepreneur will only have to agree upon a distribution agreement with the distributor but doesn't need a subsidiary in the Netherlands or any other European country. However, by selling products to a distributor, your business may be liable to tax in the Netherlands. Then you will have to register with the Tax and Customs Administration. Entry in the Commercial Register is not required.

There is ample freedom in concluding these agreements. There are no specific legal regulations for distributor agreements in the Netherlands. However, there are restrictions as to price fixing (see next page). Specific rules for termination of these agreements are based on case law. In principle, no compensation is due, but often a notice period will apply.

Agency agreements

Foreign business owners can also choose to appoint an agent (a corporate or natural person). This agent will mediate between the foreign company and possible new clients in the Netherlands and Europe and conclude contracts on behalf of the client (principal). The entrepreneurial risk will, therefore, remain with your own company. The agent will normally receive a commission for each new client he gains for the entrepreneur. You may agree that the agent will guarantee that customers he or she brought will pay their bills. You can thus prevent the agent from bringing insolvent customers in order to receive a higher commission.

If the entrepreneur agrees with the new client, there will be a written contract between these parties. If your business is liable to tax in the Netherlands, you will have to register with the Tax and Customs Administration. Entry in the Commercial Register is not required.

The Dutch Civil Code contains specific rules for the termination of agency agreements. Thus often goodwill compensation will have to be paid for customers the agent has brought. An agent may also be considered as an employee – if the work performed is sufficiently independent – in such cases the rules of Dutch dismissal law will apply.

Franchise agreements

Lastly, you can choose a franchise agreement with a European-based company. This company or franchisee will be allowed to use the formula, logo and knowledge of the foreign franchisor to sell products or services. The foreign entrepreneur will receive compensation



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from the Dutch or European company, which also bears the economic risks. In franchising, the business owner (franchisee) concludes an agreement with the owner of a trade formula (franchisor). This type of agreement is not provided for by legislation. You don't need to have a company in the Netherlands, but if you want to start a chain of stores it will be more practical to establish a Dutch branch. That way you will have more control of your brand.

There is a European code of conduct regarding franchising and also a Dutch Franchise Code; both have no legal status but are self-regulatory within the industry. They define which information the franchisor and franchisee have to provide to each other before the conclusion of a franchise agreement. The codes also provide franchisees with the right of consent regarding decisions of the franchisor that may impact their businesses, and it is laid down that franchisors and franchisees have to make arrangements about online sales. However, nothing is provided as to the content of these arrangements.

Hot Topics

E-commerce

Buying and selling products and services over the internet is increasingly important. This e-commerce also has consequences for the way a foreign company can

do business in Europe, especially if it has already appointed a European distributor, agent or franchisee. Under Dutch law, the manufacturer is allowed to sell its products in the market of the distributor, agent or franchisee. However, manufacturers, distributors, franchisees or agents can make other arrangements in their contracts, for example, agreeing that a manufacturer is not allowed to actively sell products in the agreed upon territory.

In the distribution agreement, parties can agree that distributors, franchisees or agents are not allowed to start an online shop to sell the products of the manufacturer or only under certain conditions. A typical condition is that distributors, franchisees or agents should take technical precautions so that active sale of products outside the agreed upon territory is prevented.

Geo-blocking

After December 3, 2018, it will no longer be allowed to prevent the sale of products to persons in other European Union (EU) member states (geo-blocking). However, delivery abroad may be prohibited, so customers will have to pick up their products. This is another move forward toward a "Digital Single Market," free movement in e-commerce, without borders. Geo-blocking does not apply to:

- copyright protected products, such as e-books, music and films;
- financial and audio-visual services;

- transport and healthcare services; or
- social services.

Pricing arrangements

Distribution agreements often contain arrangements about the price the distributor has to pay for the purchase of the products or services of the supplier. These arrangements are not unlawful pricing agreements and, therefore, can be made.

Sometimes supplier and distributor or franchisee also make arrangements regarding the resale price. This is the price at which the distributors or franchisees sell their products or services to their buyers. For arrangements regarding the resale price, strict requirements are in place. The supplier is allowed to impose a maximum resale price or give a recommended price for resale. However, arrangements made on minimum prices or fixed resale prices are considered to be unlawful pricing agreements.

Conclusion

There are many options to sell your products in the Netherlands and the EU without you having to take all risks in an unknown market and culture. Distribution, franchise or agency agreements may be especially good alternatives to establishing a company in the EU. 