The Situation of Distribution Contracts in Spain: Issues and Alternatives

Master Thesis International Business Law LLM
Tilburg School of Law

Anna Cano Clares
Emp. U1252504
ANR 597183

Supervisor: Ms. Jing Li
Professor: Mr. Erik P. M. Vermeulen
4.4. OPTION FOUR: mediation and arbitration *ex post* ................................................................. 36

4.5. OPTION FIVE: special forum for commercial contracts (at a national and/or European level) ........ 37

4.6. OPTION SIX: codes of conduct ............................................................................................. 38

4.7. OPTION SEVEN: do nothing ................................................................................................... 39

Table 4: Alternatives to improve the situation of the distribution contract in Spain ......................... 40

4.8. Conclusion of the alternatives .................................................................................................. 42

5. CONCLUSION ............................................................................................................................ 50

BIBLIOGRAPHY ............................................................................................................................ 52
0. PREFACE

The distribution contract in Spain is an unregulated figure that presents some challenges to the parties involved in its conclusion. Despite the freedom of choice that it embraces, the truth is that the lack of its regulation has created a lot of controversial situations. Therefore, the purpose of this work is not to analyze the distribution contract as such, but to determine what is its situation within the Spanish framework and to assess which measures should be implemented in order to improve it.

In order to do so, this work is structured as follows. The reader will be firstly introduced to the notion of a distribution agreement, which types it comprises and the clauses that usually embrace more litigation will be mentioned.

Afterwards it is going to focus on the current situation and the characteristics of distribution contracts in Spain. This section is subdivided into the following paragraphs: the importance of distribution contracts in the Spanish economy, the imbalance between parties, the lack of regulation and an analysis of the Spanish Supreme Court’s jurisprudence will be made.

The following section will analyze distribution contracts from an international scale. First of all, there will be an examination on whether there are some European Regulations or Directives that could be applicable to these agreements and what impact they have on them. Afterwards, this paper is going to briefly study and describe the situation of distribution contracts in different European countries in order to assess the necessity of a regulation at the Spanish or European level.

Finally, seven different alternatives will be introduced in order to improve the situation of the distribution contract in Spain and assess which ones are the most plausible and beneficial for the present situation.

This work will conclude with a personal opinion and conclusion of the situation of these contracts within the Spanish and European framework and an assessment of the best proposed alternative solution.
1. INTRODUCTION

1.1. What is a distribution contract?

Although the purpose of this work is not to analyze the distribution contract itself, it is important to give a definition and a general idea about what a distribution contract is and to which types will refer the present discussion paper.

The distribution contract is an autonomous agreement of collaboration, *sui generis*, without any regulation in Spain (although some believe that it has its origins in the art. 244 of the Spanish Commercial Code\(^1\)) in which a supplier and a distributor, who is selected *intuitu personae*, coordinate their behavior when selling the products or services of the first party\(^2\). These agreements can be done from a national perspective, that is, involving only parties and activities that take place in one legal jurisdiction or from an international one in which the arrangement would involve parties or/and activities which take place in different jurisdictions.

As later will be examined, this type of contract can entail different duties and obligations. However, the one that defines the existence of this contract consists in the obligation assumed contractually by the supplier to supply the distributor in a certain territory with certain products and/or services\(^3\). At the same time, the distributor shall agree to purchase a certain amount of these products or services during a determined period of time and to sell them in his own name and risk in exchange of a trade margin\(^4\). In this kind of contract the supplier has very few or none contact at all with the final consumers who usually deal exclusively with the distributor. The pros for each party in this kind of contract are that the supplier has no costs in creating a distribution structure (for instance, via a subsidiary company) in a certain territory in order to distribute his products or services. In addition, he does not have the obligation to maintain a relationship with the final client during the negotiations of the final sale, he does not need to bear the risks of the vending of its products and is not obliged to provide some kind of assistance on a post-vending basis\(^5\). On the other hand, the distributor has no obligation at all to manufacture the products for

\(^3\) According to the Judgment of the European Court of Justice in the case *Volkswagen v. Comission* (September 18\(^{th}\), 2003), the distribution of the territory consists in making “active” sales (active promotion in the territory, for instance). Indirect sales cannot be restricted even though they fall outside the scope of the territory designed in the agreement.
himself\textsuperscript{6}. Furthermore, the distributor has the liberty to choose his clients, to do the promotion of the products\textsuperscript{7} or services and to fix prices\textsuperscript{8}.

1.2. Types of distribution contracts

For the purpose of this work, the following contractual modalities will only be included as types of distribution contracts \textit{strictu sensu}\textsuperscript{9}: (1) non-exclusive distribution agreement, (2) exclusive distribution agreement, (3) sole distribution agreement and (4) selective distribution agreement\textsuperscript{10}.

The following paragraphs are going to highlight the most important features of each kind of distribution contracts. The first one, the non-exclusive distribution agreement, is characterized by the fact that the distributor is not the only person or company that sells the supplier’s products in a certain territory. In this case, the distributor must compete with other distributors from the same supplier\textsuperscript{11}. Conversely, through this modality of contract the supplier must also compete with other suppliers who can distribute as well their products or services to the distributor.

On the other hand, the exclusive distribution agreement is categorized as an agreement in which one of the parties must comply with the exclusivity clause. For instance, the supplier may be prohibited to sell its products directly or indirectly in the territory of the distributor\textsuperscript{12} or to a certain group of costumers providing the distributor with an intra-brand protection\textsuperscript{13}. On the other hand, the distributor can also be exclusive in the sense that he has the prohibition to buy

\textsuperscript{6} Nevertheless, some big distributors have concluded some agreements with their suppliers in order to distribute the product of the supplier under the label of the distributor. See for instance the case of Carrefour, Auchan or Albert Heijn. For more information, see Comisión Nacional de la Competencia. "Informe sobre las Relaciones entre Fabricantes y Distribuidores en el Sector Alimentario". P. 34.
\textsuperscript{7} However, in some cases the distributor is obliged to distribute the products or services within previous clients of the supplier or to follow some publicity standards imposed by the supplier.
\textsuperscript{8} According to art. 4 of 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, suppliers cannot restrict the ability of the producer to fix prices. However, the supplier can impose a maximum sale price or recommend a sale price. See also Marta de la Fuente, Alberto Echarri. \textit{Modelos de Contratos Internacionales}. 3. Madrid: Fund. Confemetal, 1999. See also Sánchez Calero, F. \textit{Instituciones de Derecho Mercantil}. Madrid, 2006.
products from other suppliers. In general, this exclusivity shall be determined for a certain period of time and space\textsuperscript{14}.

Similarly to the exclusive distribution agreement, in the sole distribution agreement the supplier cannot appoint any other distributor in that territory but, if it were the case, he would be able to conclude direct sales for himself\textsuperscript{15}.

Finally, the last type of distribution agreement is the selective distribution. The specialty in this contract relies in the fact that the supplier only sells its products to those distributors in a territory who possess certain qualities or qualifications that the supplier believes are good for distributing his product. This kind of selection can be made by using qualitative (qualified employees, good reputation, good technical and financial resources, etc.) or quantitative criteria (great amount and variety of products in stock, large number of employees, etc.)\textsuperscript{16}. It is important that the criteria chosen by the supplier are uniform, without any kind of discrimination for all potential distributors\textsuperscript{17}.

\textbf{1.3. Duties of the parties}

In the distribution contract the duties of the parties are settled in the very same contract and they will depend upon the will of the participants. This paragraph will only mention the duties of the parties that usually carry controversial issues and that they should be defined within the contract in order to avoid litigation.

First of all, it is necessary to define within the contract those products or services that will be the object of the contract, its territory, the paying method\textsuperscript{18} and, if necessary, the minimum sales quotas, as well as the responsibility of obtaining any administrative authorizations or licenses and their protection (including IP rights)\textsuperscript{19}. Other duties of the parties that need to be defined within the contract are the exclusivity of the distribution of the product/service, the remuneration of the distributor (which usually consists in a discount of the price and/or the margin that he makes of sales), periodical information, product sourcing, as well as the methods or qualities that

the distributor needs to have (also, investments to be made) in order to distribute the products to the final clients\(^\text{20}\).

**1.4. Termination of the contract**

The termination of the contract is one of the subjects that creates most of the litigation. In much cases, termination and its effects are not defined within the contractual clauses. Therefore, this section is going to point out which are the clauses that in general are the most controversial.

First of all, parties should regulate those circumstances according to which the contract shall end before the initial term (which should also be concretized). For instance, these clauses should include, among others, the breach of the contract or substantial changes in the supplier or distributor’s circumstances\(^\text{21}\).

Other issues regarding the termination of the contract that should be defined in order to avoid litigation should be, among others, the compensation for clientele, compensation for damages and prejudices, compensation for specific investments, the repurchase of the unsold products or the forewarning of the parties that want to end an indefinite contract\(^\text{22}\).


2. THE SITUATION OF THE DISTRIBUTION CONTRACT IN SPAIN

After having determined which are the contracts that will be included within the scope of this paper and their main clauses that cause most of the litigation between parties, it is important to analyze what is the current situation in Spain. This analysis is important in order to determine whether there should exist a regulation for distribution contracts or not, and which other alternatives are available to improve the actual situation.

2.1. Importance and characteristics of the distribution sector in Spain

Distribution contracts are a typology of contracts that are commonly used among Spanish companies. Indeed, they represent a 27% of the GDP in Spain, 256,000 millions of Euros and 425,000 companies\(^ {23}\) (which 90% of them are SMEs that occupy more than 60% of the active population\(^ {24}\)). Within the distribution sector, the most important area is the distribution of vehicles\(^ {25}\).

Now it is time to analyze the main characteristics of the distribution sector in Spain. In order to do so, this paper has elaborated a table (see Table 1) based on the information revealed in the Report about the Problematic of Distribution Contracts of the General Direction of Commercial Politics, 2009\(^ {26}\). This report analyses the situation of the main sectors of distribution in Spain (automobile, construction, petrol stations, information technologies and press) in order to give a response to the Congreso de los Diputados (Spanish Congress) on whether there was a necessity or not to approve a law that regulated those contracts. The methodology used in elaborating this table consists in attributing a number 1 in the cases that satisfied the condition stated in the vertical edge, 0 to the ones who did not fulfill it and a (-) to the cases in which the report did not mention anything. In the end, a total average percentage of the results found has been made.


\(^{25}\) In 2009 it represented a 4.5% of the GDP in Spain and a total of employment of 2% of the active population. See Dirección General de Política Comercial. *Informe sobre la Problemática de los Contratos de Distribución*. Ministerio de Industria, Turismo y Comercio, 2009. P. 6.

### Table 1: Characteristics of the distribution sector in Spain

| Written contracts | Automobile | Construction | Petrol Stations | Information technologies | Press | Total %
|-------------------|------------|--------------|------------------|--------------------------|-------|---------
|                   | 1          | 0            | 1                | -                        | 0     | 50      |
| Contracts assessed individually | 0          | -            | 0                | 0                        | 0     | 0       |
| Distributor bears the risk | 1          | 1            | 1                | -                        | -     | 100     |
| Conditions imposed unilaterally by the supplier | 1          | 1            | 1                | 1                        | 1     | 100     |
| Successive deals but denial of antiquity | 1          | -            | -                | -                        | -     | 100     |
| **Intuitu Personae** | 1          | -            | 1                | 1                        | 1     | 100     |
| Discrimination when selecting | 1          | -            | -                | -                        | 1     | 100     |
| Supplier has to be aware and express conformity about changes of the contract | 1          | -            | -                | -                        | -     | 100     |
| Quality Standards imposed by the supplier | 1          | -            | 1                | -                        | 0     | 66,66   |
| Unilateral changes made by the supplier | 1          | -            | 1                | 1                        | 1     | 100     |
| Short period of adaptation to changes | 1          | -            | -                | -                        | -     | 100     |
| Supplier has access to the clients' information of the distributor | 1          | 1            | 1                | 1                        | -     | 100     |
| Supplier imposes a minimum number of sales | 1          | -            | -                | -                        | -     | 100     |
| Direct sales of the supplier in the territory of the distributor | 1          | 1            | -                | 1                        | 1     | 100     |
| Higher compensation in benefit of the supplier | 1          | -            | -                | -                        | -     | 100     |
| Unilateral resolution made by the supplier | 1          | -            | -                | 1                        | -     | 100     |
| Not compensation for the distributor in case of unilateral resolution made by the supplier | 1          | 1            | -                | 1                        | -     | 100     |
| Renounce of the rights of the distributor | 1          | -            | -                | -                        | -     | 100     |
| Dispute resolution: arbitrage (1st choice) | 1          | -            | -                | 1                        | -     | 100     |
| Dispute resolution: competence of the tribunals (2nd choice) of the supplier's domicile | 1          | -            | -                | 0                        | -     | 50      |
| Supplier benefits from the promotion made by the distributor | 1          | 1            | -                | 1                        | -     | 100     |
| Payment deadlines harm distributors | -          | 1            | 1                | 1                        | 1     | 100     |

Source: compiled with hand-collected data in accordance with the information provided in Dirección General de Política Comercial, 2009. Informe sobre la Problemática de los Contratos de Distribución, s.l.: Ministerio de Industria, Turismo y Comercio.
As a consequence of the analysis of this table, the following characteristics can be found across the aforementioned sectors in the Spanish distribution segment:

- Only 50% of the sectors conclude contracts in written support, which means that another 50% are concluded mostly in an oral way, with the uncertainty that it implies.
- None of the aforementioned sectors tends to assess the distribution contracts in an individual way.
- In all sectors it is understood that the distributor is the party who bears the risk.
- In all sectors the majority of contracts are concluded unilaterally by the supplier. In two sectors the supplier imposes quality standards; in four sectors the supplier is able to introduce unilateral changes of the conditions of the contracts and only in two sectors the supplier has the ability to terminate unilaterally the contract. Furthermore, in three of the sectors the distributor has no right of obtaining any kind of compensation in case of unilateral rescission of contract made by the supplier.
- All sectors negotiate their contracts *intuitu personae*. This means that they are negotiated and concluded in accordance to a personal relationship within the two parties that take into account their specific features such as infrastructure, trust, clients, etc.
- In almost all sectors the supplier has access to all kinds of information that belong to the distributor, especially regarding clients. The supplier also benefits from all the promotion of the products or services made by the distributor.
- As for the sales, only the automobile sector imposes a minimum of sales. In four of the five sectors the supplier has the ability to conduct direct sales in the territory of the distributor.
- Almost in all sectors payment deadlines are detrimental for distributors.
- Finally, in most of all examined sectors the supplier denies the need of a regulation while the distributor argues on the contrary. Only the media distributors deny the necessity of such regulation.

According to the above-mentioned characteristics one thing is clear: suppliers are the ones who are totally benefiting from this lack of regulation by imposing unilaterally, discriminating and unfair conditions without an individual negotiation to their distributors. In such a scenario, distributors are playing a passive role according to which they have no ability to negotiate contracts but to only adhere to the terms imposed by the supplier. One last final conclusion to be made is the fact that only half of the contracts are conducted on a written paper basis. This is really alarming in a conflictive sector in which the stipulation of clear and complete conditions is absolutely necessary and indispensable in order to avoid and reduce litigation.
2.2. **Imbalance between the parties**

The distribution contract in Spain is not regulated. The lack of regulation can benefit the sector in the sense that parties can adapt their necessities through these contracts. However, a total deregulation has led to a situation in which the parties are not equal when negotiating and executing these agreements. As seen in the previous section, the actual position of suppliers is that they are really powerful and its lack of regulation harms the negotiating position of the distributor, who is forced to accept abusive clauses if he intends to persevere in the distribution business. Indeed, evidence suggests that most of distribution contracts include abusive clauses for distributors and this is their generalized feeling in most of the examined sectors mentioned in the previous section\textsuperscript{27}.

Indeed, the main clauses that can imply an asymmetry between parties and their negotiating power are: exclusivity; transformation of indefinite contracts into determined duration; obligation of the distributor to make specific investments; limitation of the independence of distributors; remuneration systems; imposition of minimum sales; right of the supplier to conduct direct sales in the territory of the distributor; the use by the supplier of the distributor’s clients; unilateral modification by the supplier of the terms of the contract; obligation for the distributor to renounce to any indemnification in the future; large numbers of causes according to which the distributor breaches the contract and the renounce of any compensation or using any other tribunals than the ones of the domicile of the supplier\textsuperscript{28}.

The imbalance of the parties’ situation can try to be justified by different theories. The first one consists in the fact that Spanish suppliers are under some circumstances that condition their selling of products such as the society’s tastes, the economic environment, state of technique or the legal framework\textsuperscript{29}. These conditions have a really powerful effect on the negotiations between the supplier and distributor. Therefore, if the supplier pretends to be successful in the business, he is obliged to take into account the aforementioned circumstances and thus, sometimes he needs to unilaterally impose certain nonnegotiable conditions to distributors\textsuperscript{30}. Nevertheless, the fact that suppliers are under the pressure of markets does not compulsorily imply that they shall have the right to abuse distributors with some conditions that have no effect at all in the final client such as the renounce of the compensation for clientele.

In other occasions these unfair conditions such as the imposition of a minimum number of purchases or sales, the renouncement to the indemnification for clientele or the non-reimbursement of specific investments are imposed by the supplier when seeking to obtain more benefits and fewer costs and not because of the aforementioned market circumstances. The imposition of unfair conditions can also be tried to explain from the principal-agent problem\textsuperscript{31} perspective. The supplier imposes unilaterally his conditions because he has no information or certainty that the distributor will develop his duties efficiently. Therefore, one way to compensate this possible inefficient behavior of the distributor is to impose really severe conditions so that the distributor will be incentivized to outperform. Nevertheless, the existence of the principal-agency problem does not work as a justification. The imposition of abusive conditions instead of incentivizing him to perform really well can have the opposite effect due to the certainty of the distributor that even if he outperforms he will have no other beneficial compensation.

Regarding this issue, the Spanish Supreme Court has stated that it is a normal but not a fair practice to establish terms according to which the distributor has no power to negotiate but to adhere and accept them\textsuperscript{32}. In addition, in another judgment, this Court has wrongfully established that there is no unilateral imposition of terms if the contracting party has the liberty to accept or not the execution of the contract\textsuperscript{33}. This positioning of the Court continues to diminish the negotiating power of distributors who may be forced, without any other choice, into accepting these abusive conditions if they want to continue in the distribution business.

The Preamble of the \textit{121/000138 Bill of Regulation of Distribution Contracts} (2011) has also recognized the difficulties of distributors in the phase of negotiating their contracts. In an attempt to diminish them, this proposal tried to implement a law that would equal the negotiating position between parties, as well as to reduce the conflictivity of the sector\textsuperscript{34}.

Nevertheless, conversely to this generalized thought, in certain sectors such as the distribution of press or the food sector, the weak party tends to be the supplier who is obliged to adhere and accept the conditions imposed by the distributor\textsuperscript{35}. In addition, depending on the size of the distributor, it can have more or less power to negotiate. If the distributor has a considerable size and market power, the distributor can always “threaten” to change its suppliers in case they did not accept its conditions\textsuperscript{36}. Yet, this paper is not going to focus on the analysis of

\begin{footnotesize}

\begin{itemize}
\item \textsuperscript{32} Sentencia Tribunal Supremo (Sala I), num. 360/2000 (April 26, 2000).
\item \textsuperscript{33} Sentencia Tribunal Supremo (Sala I), num.1799/2010 (April 13, 2010).
\item \textsuperscript{34} Preamble 121/000138 Bill of Regulation of Distribution Contracts (2011).
\item \textsuperscript{36} Comisión Nacional de la Competencia. "Informe sobre las Relaciones entre Fabricantes y Distribuidores en el Sector Alimentario.". P. 57.
\end{itemize}

\end{footnotesize}
these exceptional sectors but on the general situation in which the distributor tends to be the weak negotiating party.

In this framework, distributors are not fully incentivized to conclude distribution contracts because they see themselves forced to accept conditions that are not truly beneficial to them. This would make a lot of distributors switch this contractual modality towards the use of the agency contract because of its existing regulation, its more homogeneous jurisprudence and its fewer assumption by the distributor of the risks of the activity through the use of the name of the principal. Nevertheless, even if they accepted to use a distribution contract, all these exploitative conditions would disincentive distributors to develop their duties efficiently. In this regard, one way to solve this problem would be to elevate the compensation or the remuneration margin that distributors perceive in exchange of some of the imposed leonine conditions such as the obligation of investing huge amounts of money in order to distribute a product or service. Another solution would be to adopt some bonuses for good performance at the end of the final results. However, there exists one problem here. What about enforcement? Since this is just a recommendation, it would not be compulsory to adopt it. Hence, what are the incentives for the suppliers to earn less money when at the moment they are imposing these conditions and they are being accepted? The answer to this question would be that by letting distributors earn more money, they would be compensated by the other unfair terms negotiated in the contract. At the same time, they would have more incentives to promote and distribute the products or the services of the supplier in a more efficient way, which in the end, would benefit the name and the reputation of the supplier.

2.3. Non-regulation

Until the date of the elaboration of this Master Thesis, there is no regulation in Spain that is applicable to all kinds of distribution contracts. As a response to this lack of regulation, some authors believe that, alternatively to the provisions of the contract, the general dispositions about normal purchase and sale agreements regulated in arts. 325-345 of the Spanish Commercial Code would be applicable, as well as the Civil Code.

The only regulation in Spain that has been provided for distribution contracts concerns the motor vehicle sector due to its importance in the Spanish economy. In this regard the Spanish

---

39 Art. 1255 CC established the freedom of the parties to negotiate contracts according to their will.
40 This sector has been regulated by the EU through the Commission Regulation (EU) No 461/2010 of 27 May 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 in the motor vehicle sector.
legislator established that the Law for the Agency Contract\(^{41}\) would also be applicable to this kind of contracts until a law for distribution contracts was enacted\(^{42}\). However, the content of these provisions imply that in practice this provision is not applied for various reasons.

The first point of the aforementioned First Additional Disposition of the Law of the Agency Contract establishes that a distributor is a person “who perceives a remuneration”. While this statement may be true, it is also true that in Spain compensation as such is barely used; it usually consists on discounts on the price of the products or services or a margin that the distributor obtains when selling his products\(^{43}\). This characteristic is open to some discussion on whether compensation includes or not these kinds of discounts or margins. However, the second feature is totally undisputable. The same article specifies that a distributor must act “on behalf and in the name of the supplier” and not in his own\(^{44}\). In this vein, it is useful to mention some of the most recent literature that distinguishes the “distribution contract” from the “agency” one. The main feature that differentiated both contracts is the fact that in the distribution contract the distributor carries his activities in his name and under his own risk\(^{45}\). In light of this, it is really difficult, not to say nearly impossible, that this regulation would be finally applied to a distribution agreement. Nevertheless, and despite the fact that in this point it is not the intention of this work to analyze the whole law, it must be said that, even though it can hardly be applied, this regulation is a step forward in protecting the distributor in front of a potential harmful conduct of the supplier\(^{46}\).

If these two arguments were not enough to convince the reader that this law would not be applied, the Final Fourth Disposition of the Law 7/2011, of April 11\(^{47}\) states that until a law for the distribution contract is enacted, the dispositions of the Law about the Agency Contract will not be applied to any of the distribution contracts (except those celebrated before the enactment of the Law 2/2011, March 4\(^{th}\), of Sustainable Economy). Despite the fact that it leaves the subject unregulated (again), it is clear that the will of the Spanish legislator is to regulate these contracts.

---

\(^{41}\) Law 12/1992, May 27\(^{th}\), about the Agency Contract.

\(^{42}\) First Additional Disposition of the Law 12/1992, May 27\(^{th}\), about the Agency Contract. See also Additional Disposition 16\(^{th}\) of the Law 2/2011, March 4\(^{th}\), of Sustainable Economy.

\(^{43}\) Carrasco Perera, Ángel. "Regulación de los Contratos de Distribución de Vehículos Automóviles e Industriales. ¿Pero de verdad se ha derogado el régimen de la ley de contratos de distribución de automóviles de la Ley de Economía Sostenible?" Diario La Ley (La Ley), no. 7615 (abril 2011). P. 3.

\(^{44}\) This is also the definition of “agent” established in art. 1 of Law 12/1992, May 27\(^{th}\), about the Agency Contract.


\(^{46}\) Among other provisions this article prohibits the supplier to change unilaterally the terms of the contract, it grants a clientele indemnification as well as the restitution of the investments made by the distributor plus damages and prejudices. However, regarding the investments that the distributor shall make, it still leaves an open door for abusive conduct of the supplier.

\(^{47}\) Law 7/2011, of April 11\(^{th}\), that modifies the Law 41/1999, November 12th, about payment methods and securities liquidation and the Royal Decree 5/2005, March 11th, of urgent reforms of productivity and public recruitment.
In fact, the Spanish legislator has tried to regulate the matter in several occasions which are discussed below.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 2004:</td>
<td>A proposal for a Regulation of the Distribution Contracts was made but it did not succeed due to the change of Government that year.</td>
</tr>
<tr>
<td>MARCH 2007:</td>
<td>The Commission of Industry and Commerce of the Congress approved a non-law Draft in order to analyze all the issues regarding the distribution contract. In 2008 a Public Initiative promoted by FACONAUTO (Federation of Concessionaries of Vehicles) did not achieve the minimum amount of signatures to enact a law for the distribution contracts.</td>
</tr>
<tr>
<td>FEBRUARY 2009:</td>
<td>The ordered report by the Government and the General Direction of Commercial Politics is received by the Congress. It analyzed the situation of the distribution contract.</td>
</tr>
<tr>
<td></td>
<td>- The 1st Additional Disposition of the Law of the Agency Contract (which was introduced by the Additional Disposition 16th of the Law 2/2011, March 4th, of Sustainable Economy) establishes that the Law of the Agency Contract would be applicable to the distribution of motor vehicles until a specific law for the distribution sector was approved.</td>
</tr>
</tbody>
</table>

- The Final 4\textsuperscript{th} Disposition of the Law 7/2011, of April 11\textsuperscript{th}\textsuperscript{55} states that until a law for the distribution contract is enacted, the dispositions of the Law about the Agency Contract will not be applied to any of the distribution contracts (except those celebrated before the enactment of the Law 2/2011, March 4\textsuperscript{th}, of Sustainable Economy).

2011: The Government and the Council of Ministers approved the Draft Bill Proposal of Regulation of Distribution Contracts. Afterwards, the Congress and its Commission of Industry, Tourism and Commerce started to discuss via the urgent procedure the Bill of Distribution Contracts of June 29th. However, the dissolution of the chambers because of the general elections in 2011 implied the suspension of the proceeding\textsuperscript{56}.

March 2012: The Minister of Industry, Energy and Tourism, José Manuel Soria announced that the proposal would not be promoted by the Government\textsuperscript{57}. This means that the regulatory framework in Spain of this modality of contracts is based on the application of the Code of Commerce, the Civil Code as well as the jurisprudence of courts\textsuperscript{58}.

2.3.1. Comments on the last Bill of Regulation of Distribution Contracts of June 29\textsuperscript{th}\textsuperscript{59}

In order to analyze whether a regulation of these contracts is necessary or not, and if so, what should it regulate, it is important to give a critical review of the Bill of Regulation of Distribution Contracts of 2011. Only by its analysis one can assess the necessity and the content of a possible regulation.

This proposal for a regulation was intended to balance the negotiating position of the parties. It regulated certain matters that at first glance may seem that they are accomplishing this function but, when studied more into detail, they do not give a real solution to the problem as

\textsuperscript{55} Law 7/2011, of April 11\textsuperscript{th}, that modifies the Law 41/1999, November 12th, about payment methods and securities liquidation and the Royal Decree 5/2005, March 11th, of urgent reforms of productivity and public recruitment.


\textsuperscript{57} See Lizón, Javier. "Soria no sacará adelante la Ley de Contratos de Distribución." La Vanguardia, March 1\textsuperscript{a}, 2012.


\textsuperscript{59} 121/000138 Bill of Regulation of Distribution Contracts (2011).
they still leave an open door to the commitment of subjectivity and abuses of suppliers. For instance, article 6 stated that regardless of the fact that the supplier has more obligations of giving pre-contractual information to the distributor, the same article specifies that the supplier of a distribution network will inform about all the conditions of the contract. It is not hard to see that the specification of these conditions will be unilaterally imposed by the supplier most of the times and will include other information that is not crucial to the development of the contract. Despite that even though during the contract the supplier has more informative rights, the fact that in none of the conditions there was mentioned that the supplier had access to the clients’ list of the distributor, was a step forward towards their protection. Nevertheless, in art. 20 it can be seen the imbalance between the parties because even though the modification of the contract should be agreed by both parties, it also allows the supplier to incorporate in the contract (abusing its dominant position) a clause according to which he could be able to modify it unilaterally.

In addition, this proposal includes some articles that are totally redundant with other existing laws that would make them not necessary to be included. Regardless, it is true that it tries to tackle one of the major problems of distribution contract: oral tradition. It introduces a clause according to which all contracts shall be concluded in written support and the party who denies it, shall prove that the contract includes other conditions than the ones imposed in the law. Nevertheless, the law is not clear in its application. The law should grant the indemnification of damages and prejudices that it imposes to the party that did not want to conclude it in writing, because otherwise the harmed party has no way of enforcing or obliging the other to do it in such format. The reason of it relies in the fact that it is really difficult to prove that the second party opposed to it (for instance in cases in which the negotiation is dealt orally without any witnesses).

In other articles the law is also trying to balance the interests of both parties but ends up satisfying none of them. For instance, in art. 12 about minimum sales, the proposal stated that there can be a minimum number of compulsory sales but at the same time the distributor has the right not to pay those products or services that he does not need or seek. In this vein, how is it possible that it can be concluded that the distributor has the right not to pay those products/services that he does not need but at the same time is obliged to acquire a minimum (specially bearing in mind the different negotiating positions of the parties)?

See art. 6.2 of 121/000138 Bill of Regulation of Distribution Contracts (2011).
See art. 6.3 of 121/000138 Bill of Regulation of Distribution Contracts (2011).
See art. 20.1 of 121/000138 Bill of Regulation of Distribution Contracts (2011).
In this vein, see for instance art. 4 or art. 15 of 121/000138 Bill of Regulation of Distribution Contracts (2011). See also Gómez, Fernando, and Marian Gil. "Cuestiones de Formación del Contrato en la Propuesta de Anteproyecto de Ley de Contratos de Distribución." InDret, 2010. P. 26.
See art. 8.1 of 121/000138 Bill of Regulation of Distribution Contracts (2011).
See art. 8.2 of 121/000138 Bill of Regulation of Distribution Contracts (2011).
See art. 12 of 121/000138 Bill of Regulation of Distribution Contracts (2011).
Finally, regarding the termination of the contract, the legislator established the same notice periods as the ones of the agency contract for indefinite duration contracts: one month per year of the contract with a maximum of six months. However in certain cases it can be up to one year, which is a really long notice period depending on the duration of the contract. Regarding the indemnification for damages and prejudices, the proposal grants them in case of termination of the contract before its stipulated duration or before all the inversions have been amortized. However, the legislator harms those suppliers that end the contract with a fair cause but before all the investments were amortized. In this vein, this indemnification should be granted only when there is no fair cause and not when the investments induced by the supplier are not amortized because otherwise indefinite duration contracts would have a compulsory minimum term. With the actual provision of the proposal, distributors are incentivized to breach the contract because they know that either way they will get paid for those investments. On the other hand, if this compensation is not paid in order to cover these investments, distributors will not be incentivized to implement them. Therefore, a regulation on this matter should only grant damages and prejudices of those unamortized investments only when the breach of the contract is not imputable to the distributor. In other words, if the distributor breaches the contract by not fulfilling all his obligations, he should not have the right to perceive those investments. In addition, this article should only be applicable to undefined duration contracts because in determined duration contracts the parties should analyze during the negotiations if the investment can be amortized in the period of the contract. In case of an undetermined duration contract, the proposal is not coherent because it obliges the parties to establish a minimum period of time of duration of the contract, which, in case it was breached, it would induce to the compensation of damages and prejudices under a breach of the contract regulated in art. 1101 of the Spanish Civil Code but not compensation for specific investments.

Last but not least, the proposal establishes a general rule according to which distributors have no right of an indemnification for clientele unless they prove that they have contributed to the clientele or that they have signed a non-competition agreement for a maximum of one year. The approach of the proposal in this matter is correct because it balances the interests of both parties in order to compensate their efforts and gains.

67 See art. 23 of 121/000138 Bill of Regulation of Distribution Contracts (2011) and art. 25 of Law 12/1992, May 27th, about the Agency Contract.
68 See art. 23.3 of 121/000138 Bill of Regulation of Distribution Contracts (2011).
69 See art. 25.1 of 121/000138 Bill of Regulation of Distribution Contracts (2011).
70 See art. 25.1 and 25.2 of 121/000138 Bill of Regulation of Distribution Contracts (2011).
73 See art. 25.4. of 121/000138 Bill of Regulation of Distribution Contracts (2011).
2.4. The Spanish Supreme Court’s jurisprudence

One of the major challenges that distribution contracts face in Spain is the lack of a unique line of jurisprudence. In this section, the paper’s intention is not to analyze all Spanish judgments but only to point out in a general way those of the Supreme Court (which is the organ in charge of establishing a unique line of jurisprudence\(^\text{74}\)) that are contradictory and that may lead to a lack of legal certainty.

The Supreme Court through its judgments has adopted two main lines of jurisprudence regarding the compensation for clientele (which is clearly one of the issues that raises more litigation). The first one consists in admitting this compensation on a basis of unfair enrichment defined in art. 1.258 of the Spanish Civil Code that, at the same time, allows to apply by analogy the art. 28 of the Law of the Agency Contract\(^\text{75}\). Within this line of jurisprudence, in some occasions courts admit the application of the minimum period notice requirement (one month per year of contract with a maximum of six months\(^\text{76}\)) and the maximum amount of this compensation (the medium average remuneration perceived during the last five years) established in the Law of the Agency Contract\(^\text{77}\). In this vein, in application of art. 30 of the Law of the Agency Contract, in those cases in which the breach of the contract was made by the distributor, there is a denial to the right to obtain such compensation\(^\text{78}\). However, regarding the prescription of the action for exercising this compensation, the ones who defend this line of jurisprudence do not apply art. 31 of Law of the Agency Contract (one year) but the general one established in art. 1964 the Civil Code of 15 years\(^\text{79}\).

The second line of jurisprudence understands that no unfair enrichment can be made if the reason of it is stipulated in the contract\(^\text{80}\), and therefore no compensation for clientele is granted. In addition, they deny the analogical application of the Law of the Agency Contract due to the different characteristics of both contracts\(^\text{81}\). In this vein, regardless of the fact that they do not


\(^{75}\) See art. 28 of Law 12/1992, May 27\(^\text{th}\), about the Agency Contract and Judgment of the Supreme Court (STS) of January 15\(^\text{th}\), 2008.

\(^{76}\) See art. 25.2 of Law 12/1992, May 27\(^\text{th}\), about the Agency Contract and Judgment of the Supreme Court (STS) of January 15\(^\text{th}\), 2008.


\(^{81}\) See the analyzed judgments in Table 2.
grant a compensation for clientele, they sometimes accept a remuneration for damages and prejudices based on the application of art. 1101 and 1124 of the Spanish Civil Code.

The Supreme Court has established that the parties can resign their compensation for clientele in their clauses of the distribution contract82. However, how can one renounce a right that is still not materialized and may not ever be?

There is also disagreement between the Spanish jurisprudence about compatibility between the compensation for clientele of art. 28 of the Law of Agency Contracts and the general application of art. 1101 of the Civil Code regarding compensation for damages and prejudices83.

Regarding the form of remuneration of the distributors there are no judgments that analyze whether it should be formed by the margin obtained as a result of the price of buying the product/service and its selling or if it is the net profit obtained after diminishing the expenses of the distributor84.

In order to prove the lack of a consistent and coherent jurisprudence, this paper has picked randomly and analyzed thirty judgments of the Spanish Supreme Court that evaluate several aspects regarding the distribution contract in Spain (see Table 2). Through this examination, it is not the intention of this work to give a detailed explanation about all these judgments but to point out the lack of a homogeneous jurisprudence regarding conflictive matters. The methodology used in order to elaborate the table was to pick in a randomly basis recent judgments of the Supreme Court and examine them. The table analyzes the most common and problematic features of the distribution contract. The methodology used is to give 1 point if the statement of the first line was accomplished and a 0 if it is not. If the judgment does not make any reference to all the analyzed conflictive subjects a (-) is inserted. In the end, an average of all the results has been made and then transformed it into a total percentage.

84 This question was raised in the STS of May 20th 2009 but the Court did not give an answer. See Marín Castán, Francisco. “La Jurisprudencia del Tribunal Supremo de los Contratos de Distribución.” In Los Contratos de Distribución Comercial. Tirant Lo Blanch, 2010l. P. 24.
Table 2: Analysis of the Spanish Supreme Court’s Jurisprudence

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>STS 6/2000, 20th January</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>STS 60/2004, 10th February</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>STS 70/2004, 5th February</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>STS 130/2011, 15th March</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>STS 264/2009, 13th February</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>STS 829/2008, 15th January</td>
<td>0</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>STS 1189/2002, 16th December</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>STS 1376/2008, 28th April</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>STS 1536/2008, 30th April</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>STS 2578/2008, 8th May</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>STS 3128/2008, 26th June</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>STS 3266/2008, 3rd March</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>STS 3292/2008, 26th June</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>-</td>
<td>0</td>
</tr>
<tr>
<td>STS 3317/2008, 2nd July</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>-</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>STS 3460/2004, 20th May</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>-</td>
<td>0</td>
</tr>
<tr>
<td>STS 3526/2010, 22nd June</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>STS 3812/2008, 9th July</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>STS 4392/2008, 26th March</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>STS 5111/1995, 17th October</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>STS 5549/2008, 15th October</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>-</td>
<td>0</td>
</tr>
<tr>
<td>STS 5552/2008, 24th October</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>STS 5686/2008, 3rd November</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>0</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>STS 6265/2008, 11th November</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>STS 6623/2007, 18th October</td>
<td>0</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>STS 6661/2008, 3rd December</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>STS 6662/2012, 2nd October</td>
<td>-</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>0</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>STS 7291/1999, 17th November</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>STS 8136/2007, 5th December</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>0</td>
<td>-</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>STS 8203/2007, 4th December</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>STS 8423/2012, 20th December</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total % Average of Yes</strong></td>
<td>52,9</td>
<td>100</td>
<td>95,8</td>
<td>100</td>
<td>93,9</td>
<td>78,1</td>
<td>70,9</td>
<td>29</td>
<td>58,3</td>
<td>16</td>
</tr>
<tr>
<td><strong>Total % Average of No</strong></td>
<td>47</td>
<td>0</td>
<td>4,1</td>
<td>0</td>
<td>6</td>
<td>21,8</td>
<td>29</td>
<td>70,9</td>
<td>41,6</td>
<td>84</td>
</tr>
</tbody>
</table>

Source: compiled with hand-collected data.
The table above prompts out to the following conclusions.

First of all, from the analyzed judgments that explicitly gave information about the format of the contract, it is really concerning the fact that only 52% of them were conducted in a written format. This means that almost half of the contracts concluded in Spain are made orally, which, as stated in other parts of this thesis, is one of the sources of major litigation due to the lack of clear provisions and the difficulty to prove them.

Secondly, it comes as no surprise that fourteen out of thirty judgments require good faith of the parties. In the rest, this matter is not explicitly dealt with.

Thirdly, 95% of the studied judgments were dealing with problems arising from undetermined duration contracts. Those in which the issue was the minimum notice requirement, all sentenced its necessity but, its length would vary depending on the case.

In 93% of the studied judgments there was a unilateral termination of the contract that implied that in 78% of the cases this breach of the contract was made by the supplier without any fair cause. This means that it is usual that suppliers terminate the contract without any breach of the contract made by the distributor. However, the fact that in 20% of the cases the distributor is the responsible for such termination is also something that the legislator should bear in mind when regulating this issue.

Regarding the compensation for clientele, while in 70% of the judgments the Court accepted the analogic application of art. 28 of the Law of Agency contracts, only in 29% of them it was granted. For the compensation of damages and prejudices, 58% of the judgments accepted the application of art. 1101 and 1124 of the Civil Code while in the end only 16% of the cases ended up with such compensation granted. The acceptance of both compensations at the same time has been done in only nine of the thirty studied cases.

With all these results one thing is clear: the Spanish Supreme Court’s jurisprudence is not following one unique line of interpretation. As a consequence, and in addition with the lack of regulation, Spanish distributors and suppliers do not have a legal framework that gives certainty about the effects that their contracts (or the lack of them conducted in a written support) will have in case of a legal dispute.
3. EUROPEAN REGULATIONS

3.1. European regulation on vertical restraints, applicable law and competent court

The purpose of this section is to analyze what is the situation of distribution agreements on an international scale in order to assess the necessity or not of a regulation. International distribution contracts (without referring to a specific sector) have only been regulated by European law from the perspective of competition law on vertical restraints. Indeed, art. 101.1 TFEU prohibits, among others, “all concerted practices… that can prevent, restrict or distort competition”. In this vein, distribution agreements could be included within the scope of this article because they usually imply, among others, an indirect price fixing, a limitation and control of investments, they share sources of supply and they conclude other kinds of obligations such as the obligation to inform, to keep confidentiality, etc. However, the European legislator has considered that not all vertical agreements are harmful to competition. Indeed, they can carry positive effects. Therefore, the European Commission enacted in April 20th 2010 the Regulation No. 330/2010, according to which a block exemption is applied to all vertical agreements that are conducted by a supplier who owns shares of less than 30% of the relevant market. Nevertheless this block exemption is not applied if the agreement falls within the scope of the hardcore restrictions defined in article 4 (such as restriction by object) as well as excessive non-competes of article 5. If the supplier surpasses the 30% threshold, there will be an evaluation on the effects of the agreement in intra and inter-brand competition. Finally, if the supplier surpasses the 50% threshold, it is considered as an abuse of a dominant position and art. 102 TFEU will be applied indeed.

It is important to mention that the European Commission has enacted Regulation (EU) No 461/2010, May 27th 2010 that regulates and exempts from the application of art. 101.1. TFEU distribution contracts of vehicles. However, this paper is not going to focus on a determined

---

85 Treaty of the Functioning of the European Union.
86 In relationship with art. 101.1 of TFEU.
87 See art. 101.3 of TFEU.
89 See arts. 2.1 and 3.1 Regulation (EU) No. 330/2010. If the market threshold is below 15%, European Guidelines on Vertical Restraints (2010/C 130/01) establish in section II. 1.(9) that they generally cannot fall within the scope of art. 101.1 TFEU.
90 However, in the Pierre Fabre Case, the ECJ estates that even though there can be a restriction by object when restricting sales through the internet and they cannot benefit from the block exemption, it still can be applied the individual exemption from article 101.3 TFEU. See C-439/09 Pierre Fabre Dermo-Cosmétique SAS, judgment of 13 October 2011.
91 See European Guidelines on Vertical Restraints (2010/C 130/01) section III.1.(23).
sector and, from this point on, there will be only a reference to general regulations applicable to distribution contracts as an overall form.

Other European regulations that may affect the distribution contract are Regulation 593/2008, Rome I that determines the law applicable to distribution agreements: the law of the place in which “the distributor has his habitual residence”\textsuperscript{93}. Also the Brussels Regulation 44/2001 affects distribution contracts but, in a general manner, establishing that the competent court would be the one were the goods should be delivered or services be provided\textsuperscript{94}. These regulations tend to benefit the distributor as their local courts can be more prone to rule for him. These regulations let the parts decide the applicable law and competent court and, in case they did not determine anything, the law of the distributor would apply and/or the court of the place where the distributor is would be competent. This is one of the reasons why in most of distribution contracts the determination of the competent court and applicable law is concreted.

3.2. European regulation at a national level in different countries

In order to evaluate if it is essential to establish a regulatory framework for this kind of contracts, it is necessary to analyze the situation of the distribution contract in other countries. This paper will focus on the legal framework of Spain, France, Belgium, United Kingdom, Germany and Italy. These countries have been chosen due to its membership in the European Union, its proximity as well as their great influence in the Spanish legal framework. The purpose of this analysis is to see if former colleagues of the European Union have regulated the matter or not and what is their current situation. In case that the examination showed that several member states had not regulated this kind of contract and if they presented the same level of conflicts of Spain, one of the possible options would be to regulate the contract at a European level. However, this conclusion will be made below, in other parts of this thesis.

In order to analyze which is the situation there have been studied eleven characteristics of the contract that ought to carry more confrontation between the parties, making a special emphasis on compensation upon termination of the contract. The methodology of the analysis is to be made as it follows: first, an explanation of what is the situation in each country will be given (except for Spain, whose situation has already been stated in other parts of this work) and afterwards, as a complementary support, a comparative table (see Table 3) will be included in order to facilitate visualize the reader this comparison.


\textsuperscript{94} Art. 5.1.b) of COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
3.2.1. France

France is a country that leaves distribution agreements unregulated\textsuperscript{95} and therefore there is no specific rule that includes any formal requirement such as a written form\textsuperscript{96}. In this country exclusivity clauses are permitted for a maximum period of ten years\textsuperscript{97}.

Regardless of the fact that there are no specific laws for distribution contracts, some general provisions of the French Commercial Code can be applied to distribution contracts. For instance, art. L-330-3 of the Commercial Code establishes the right of the exclusive or quasi-exclusive party (distributor) to obtain pre-contractual information of the characteristics concerning the other party (supplier) 20 days in advance to the signature of the contract. Nevertheless, the lack of access to this information gives no right to the distributor to claim for damages and prejudices when termination of the contract according to the French jurisprudence\textsuperscript{98}. In addition, art. L-442-6-I-5 of the Commercial Code establishes for contracts in general that, in case of abrupt termination of the contract without any (or reasonable) notice, there shall be right for indemnification for damages and prejudices\textsuperscript{99}. Regarding the specific minimum notice requirement, it is not established in any law. Jurisprudence requires a “reasonable” forewarning. In this vein, courts must examine the period established by the parties and they accept as “reasonable” a notice of six months in advance\textsuperscript{100} but, in long-term agreements, they have also accepted a minimum of one or two years\textsuperscript{101}.

French courts do not usually grant compensation for loss of clientele or for damages and prejudices (under general laws) unless it is proven that they have been harmed\textsuperscript{102}. The damages granted vary upon which Court is the one who is having notice of the case. In this vein, the French Supreme Court grants the “effective loss”, that is, the loss of gross margin; while Commercial Courts and Court of Appeal do not always follow this criteria and grant, in addition, the costs of specific investments that are not profitable to conduct other businesses as well as the cost of products (stocks), always taking into account the economic dependence of the distributor

\textsuperscript{97} Art. 330-I French Commercial Code.
\textsuperscript{98} Briganty Arencibia, Alfredo. La Necesidad de una Ley de Distribución para el Sector de la Distribución. Qvadrigas Abogados. P. 17-18.
towards the supplier\textsuperscript{103}. The term of prescription of the action to claim these damages is of five years\textsuperscript{104}.

\subsection*{3.2.2. Belgium}

Belgium is the only country analyzed in this paper that has regulated distribution agreements as such via the Act of July 27\textsuperscript{th} 1961\textsuperscript{105} (which was amended by the Act of April 13\textsuperscript{th} 1971). However, this regulation is restricted only to distribution agreements whose object is the selling of products (and not services), which can be on an exclusive or quasi-exclusive basis (when the distributor owns the majority of sales in a certain territory\textsuperscript{106}), and focuses its attention in the unilateral termination of the undetermined duration contracts\textsuperscript{107}. The rest of aspects of the contract are unregulated in a specific law. Indeed, there is no formal obligation to conduct these kinds of agreements in a written support and, if oral, they are presumed to be for an undetermined duration of time\textsuperscript{108}. However, it is important to give the other party pre-contractual information in order to avoid any kind of liability\textsuperscript{109}.

The minimum period of notice is not regulated by the law for indefinite duration contracts\textsuperscript{110}. Regardless of the fact that this law is intended to be applied for undetermined duration contracts, it also contains some provisions affecting determined duration agreements. For instance, before the term ends, parties should give a minimum notice requirement of three to six months before the end of term of the contract, in order to terminate the contract, or otherwise it will be transformed into an indefinite one\textsuperscript{111}. In addition, if these contracts have been extended twice, any other extension will imply its transformation into an indefinite duration contract\textsuperscript{112}.

In case of doubt, Courts are the ones responsible to determine whether this period is enough or not. They have accepted, depending on specific facts, for determined duration contracts,

\begin{flushleft}
\textsuperscript{105} Loi du 27 juillet 1961 relative à la résiliation des concessions de vente exclusive à durée indéterminée.
\textsuperscript{106} The jurisprudence has determined that owning less than 30\% of the sales is not enough to consider a distributor as exclusive. See Briganty Arencibia, Alfredo. La Necesidad de una Ley de Distribución para el Sector de la Distribución. Qvadrigas Abogados. P. 15.
\textsuperscript{107} Loyens&Loeff. Legal aspects of doing business in Belgium. Edited by Geert Bogaert. 2013. P. 120.
\textsuperscript{110} Loyens&Loeff. Legal aspects of doing business in Belgium. Edited by Geert Bogaert. 2013. P.123.
\textsuperscript{111} Art. 3 bis Loi du 27 juillet 1961 relative à la résiliation des concessions de vente exclusive à durée indéterminée.
\textsuperscript{112} Art. 3 bis Loi du 27 juillet 1961 relative à la résiliation des concessions de vente exclusive à durée indéterminée.
\end{flushleft}
minimum notice periods of three months to six months\textsuperscript{113} and for undefined distribution agreements or long-term, they have accepted up to three years\textsuperscript{114}.

In case that the minimum period of notice was not observed, Courts have established a compensation for damages and prejudices equal to (1) the net profits before taxes that the distributor would have obtained if the minimum notice was not breached, as well as (2) other costs faced by the distributor during this period of time and also in average with the previous two years\textsuperscript{115}.

As a complementary indemnity, the law admits the possibility to claim a compensation for clientele\textsuperscript{116} if the party proves: the increase of the turnover, products and costumers thanks to his efforts and that the customers will continue to be clients of the supplier\textsuperscript{117}. In addition, the distributor can claim all those expenses that at the end of the contract will benefit the supplier as well as a compensation for the dismissal of its employees\textsuperscript{118}. Finally, the jurisprudence has granted that suppliers shall re-purchase all the stock of the distributor\textsuperscript{119}.

Last but not least, the term to claim these compensations is a maximum of 10 years from the end of the agreement\textsuperscript{120}.

\subsection*{3.2.3. United Kingdom}

In the United Kingdom there is also a lack of regulation for the distribution contract. In this sense, contracts are not subject to any specific formality such as the obligation of conducting them in writing\textsuperscript{121}. Because of the lack of specific regulation, exclusivity clauses are accepted as long as they fit within the limits of competition laws\textsuperscript{122}.

After the termination of the contract, the distributor has no right to claim a compensation for clientele nor damages and prejudices \textit{per se}\textsuperscript{123}. In the second case, it must be proven that harm was caused and that it was not established in the contract. In the event that the court considered

\begin{thebibliography}{99}
\bibitem{113} Loyens&Loeff. Legal aspects of doing business in Belgium. Edited by Geert Bogaert. 2013. P. 120.
\bibitem{116} Art. 3 bis Loi du 27 juillet 1961 relative à la résiliation des concessions de vente exclusive à durée indéterminée.
\bibitem{118} Art. 3 bis Loi du 27 juillet 1961 relative à la résiliation des concessions de vente exclusive à durée indéterminée.
\bibitem{119} Briganty Arençibia, Alfredo. La Necesidad de una Ley de Distribución para el Sector de la Distribución. Qvadrigas Abogados. P. 17.
\bibitem{120} Loyens&Loeff. Legal aspects of doing business in Belgium. Edited by Geert Bogaert. 2013. P. 128.
\end{thebibliography}
to approve this claim, the exact damages will be determined by the court as well as if the minimum notice requirement was “reasonable” or not\textsuperscript{124}.

In order to claim for these damages, the distributor has a maximum period of 6 years since the breach of the contract\textsuperscript{125}.

3.2.4. Germany

There is no specific law that regulates distribution contracts in Germany but in some cases the regulation intended for agency contracts is applied to distribution contracts\textsuperscript{126}. Because of the lack of regulation, there is no obligation to conclude these contracts in writing and parties can stipulate exclusivity clauses (contracts should determine the rights of the distributor)\textsuperscript{127}.

For the minimum notice requirement, the Federal Supreme Court has accepted to apply the provision stated for the agency contract\textsuperscript{128}: “one month for the first year of the contract; two months after the second year of contract and three months if the contract has been executed during three to five years, and six months if the contract is more than six five years old”\textsuperscript{129}.

By the analogical application of art. 89 of the German Commercial Code referring to agency contracts, a compensation for clientele is admitted by courts as well as damages and prejudices. Courts accept the compensation for clientele if after the termination of the contract the supplier benefits from the clientele created and disclosed by the distributor on an involuntary basis\textsuperscript{130} and if the compensation is fair, taken into account the losses already suffered by the distributor\textsuperscript{131}. In appliance of the agency contract regulation, the maximum compensation to be received by the distributor is the average of remuneration received during the last five years\textsuperscript{132}. The action for claiming these damages prescribes after one year since the end of the contract\textsuperscript{133}.

3.2.5. Italy

Distribution contracts are not regulated in Italy and therefore there is not a compulsory legal requirement regarding formalities and exclusivity clauses, which are accepted (always limited by competition law restrictions)\(^\text{134}\). In this vein, the Italian jurisprudence has stated that the exclusivity clause cannot be inferred because of the conclusion of the contract, indeed it has to be specified\(^\text{135}\). Nevertheless, it is considered that even though it is not specified, if the parties can demonstrate that their intention was to create an exclusivity clause, this presumption prevails\(^\text{136}\).

Compensation for clientele is not granted but damages and prejudices under general contracting laws are\(^\text{137}\). The damages that courts usually accept are the income that the distributor should have earned as if the contract was not breached multiplied by the reasonable period of notice (which courts have accepted from three to six months\(^\text{138}\)) plus the investments made by the distributor\(^\text{139}\).

To claim general damages, the action prescribes after 10 years and to claim other specific remuneration to be perceived in a more frequent basis, 5 years\(^\text{140}\).

---


Table 3: Comparison of the regulation and situation of distribution contracts in European countries

<table>
<thead>
<tr>
<th></th>
<th>SPAIN</th>
<th>FRANCE</th>
<th>BELGIUM</th>
<th>UNITED KINGDOM</th>
<th>GERMANY</th>
<th>ITALY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Specific regulation</strong></td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>Regulation of all aspects of the contract</strong></td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>Compulsory written agreement</strong></td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>Exclusivity clauses accepted</strong></td>
<td>Yes</td>
<td>Yes, for a maximum period of 10 years.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Clientele compensation admitted</strong></td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td><strong>Damages and prejudices under general contracting laws</strong></td>
<td>Sometimes.</td>
<td>No except if distributor has been harmed.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Included damages</strong></td>
<td>Sometimes courts grant a compensation for the loss of clientele as well as damages and prejudices.</td>
<td>-French Supreme Court: Effective loss. -Commercial Courts and Court of Appeal: loss of gross margin + costs of specific investments + costs of stock + economic dependence.</td>
<td>Average of net profits before taxes + other costs during the last two years. Reimbursement of costs. Reimbursement for dismissal of employees.</td>
<td>Determined by the court.</td>
<td>Average remuneration perceived by the distributor during the last five years.</td>
<td>Income that the distributor should have earned as if the contract was not breached multiplied by the reasonable period of notice. Also, courts take into account the investments made by the distributor.</td>
</tr>
<tr>
<td><strong>Prescription of the legal action</strong></td>
<td>1 year if Courts apply the Law of Agency Contracts (LAC) or 15 if Civil Code applied.</td>
<td>5 years.</td>
<td>10 years.</td>
<td>6 years since the breach of the contract.</td>
<td>1 year.</td>
<td>10 years in general and 5 for specific compensation.</td>
</tr>
<tr>
<td><strong>Reasonable period of notice</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Usual minimum period of notice</strong></td>
<td>Determined by parties and accepted by courts. Usually, application of art. 28 LAC: one month per year of contract with a maximum of 6 months.</td>
<td>Determined by parties and accepted by courts. 3-6 months.</td>
<td>Determined by the parties and accepted by courts.</td>
<td>Determined by the parties and accepted by courts.</td>
<td>One month per year one, two months per year two, three months per years 4-5 and six months for six years.</td>
<td>Determined by the parties and accepted by courts. Three to six months.</td>
</tr>
<tr>
<td><strong>Period of notice established by the law</strong></td>
<td>None</td>
<td>None</td>
<td>3-6 months</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

Source: compiled with hand-collected data based on the sources mentioned in the section of the regulation within countries.
3.3. **Conclusion of the studied countries**

As analyzed in the previous sections, almost none of the countries have regulated the distribution contract. The only country that tried to regulate a specific kind of distribution contract is Belgium but, however, it does not try to include all aspects of the contract; only the consequences of its termination.

All jurisdictions permit (without banning them expressly) exclusivity clauses with observance of competition law restrictions. This evidence shows that exclusivity clauses, even though they may be abusive in some cases, they are in general positive to competition and prone to collaboration between industries in order to sell their products.

Regarding the compensation for clientele, there are some disagreements in their application. Half of the studied countries’ jurisprudence accept it in a limited number of cases while the other half do not. It is important to see that in the cases where it is granted, they usually base their appliance in the provisions stipulated for the agency contract through analogy. It comes as no surprise that under general contracting rules, parties can claim in most of jurisdictions a compensation for damages and prejudices. As for the damages that are included, each country has developed their own jurisprudence but, however, most of the countries have determined that it should cover the effective loss and, in some cases such as Germany, there is a maximum compensation established. Prescription of the legal actions determined in order to obtain these compensations vary from country to country but a common feature is clear: all of them establish minimum a year since the end of the contract and none of them surpass the 15 years (they usually require 5, 6 or 10 years).

All of the studied countries via jurisprudence establish a compulsory “reasonable” period of notice that varies across jurisdictions and depending on the determined circumstances of the cases but, in general, the most common period is between three and six months in advance of the termination of the contract.

This evidence prompts an underlying question: if none of the countries have regulated this issue, why should Spain be different? The answer to this question relies in, on the one hand, the fact that the lack of regulation in these countries has not affected the liberty of the parties in any way. Indeed, all these countries have a unique line of jurisprudence that gives legal certainty to the parties. On the other hand, the characteristics of these contracts in Spain and the lack of a homogenous jurisprudence from the Spanish courts are troublesome. If contracts are to be left without any regulation, it is important that courts apply the same criteria when judging these contracts. Otherwise, parties have no legal certainty about the consequences of their contracts and are not incentivized to conclude them for fear of an unexpected judgment and change of criteria.
4. ALTERNATIVES FOR THE IMPROVEMENT OF THE SITUATION OF THE DISTRIBUTION CONTRACT IN SPAIN

Other parts of this paper have analyzed the problematic situation of distribution contracts in Spain. The lack of regulation and the absence of a uniform jurisprudence within the highest judicial organism, the Supreme Court, among other courts, conceive a framework according to which distributors and suppliers are uncertain about how to negotiate and execute their contracts. Indeed, evidence has shown that Spanish courts accept sometimes the analogical application of the Law of the Agency Contract while in others it is denied.

In this vein, it is clear that something needs to be changed in order to improve the situation of Spanish distributors and suppliers. This is what this section will analyze: different alternatives that can eventually be applied in order to diminish the existing problematic in this sector. First, it will be discussed whether there is a need or not of a regulation at a national level by analyzing the pros and cons. Afterwards, we will shift from the national point of view and analyze the same issue but from a European perspective. Finally, other alternative proposals shall be given through the consideration of their effectiveness and usefulness. All presented options, its pros and cons are summarized in Table 4.

4.1. OPTION ONE: regulation through a specific law at a national level

The lack of regulation, the high litigation as well as the inability of courts to establish a common standard, the importance of the distribution sector in Spain, the large number of contracts concluded on an oral basis and the weak position of distributors, among others, are smoking signs that something in this sector is not evolving completely well in Spain.

Indeed, the several attempts to regulate this contractual modality (see section 2.3. Un-regulation) are a clear proof that the Spanish legislator is concerned about their situation. Yet, the following question arises: if there have been so many efforts in concluding a specific regulation, why is it still not approved? The answer to this question relies in two factors. First of all, and as mentioned in other parts of this work, most of the times that a draft of regulation was being discussed, this process terminated due to the end of the period of the legislature and the convocation of general elections. Secondly, despite the fact that there are many people claiming a regulation, there are other voices who are not prone to it.

At this point, it is deemed necessary to analyze the arguments from those individuals who believe that by regulating these contracts the situation of the parties would improve. Later arguments of those who are against of a regulation because it may be detrimental to the actual situation will be also exposed and analyzed.

4.1.1. Arguments for a regulation

There are several reasons why a regulation at a national level is necessary.

The first reason relies in the fact that parties are not in equal positions when negotiating. In general, parties involved in distribution contracts can be divided into distributors, who believe that a regulation is completely necessary because of their weak position; and suppliers, who believe that the present situation without a regulation is already good as it is\(^\text{142}\). However, this is not always the case. For instance, in the sector of press distribution, distributors are the ones who do not claim the necessity of a regulation while suppliers are the ones who demand it\(^\text{143}\). Conversely to what it is generally thought of distribution agreements, and as stated in other parts of this paper, in the sector of press distribution, distributors are the strong party that imposes unilaterally their conditions\(^\text{144}\). Nevertheless, on a general basis in which the distributor tends to be the weak party, a regulation would balance these positions by allowing them to purchase products in much better conditions and perceive the economical compensations that are deemed necessary.

The second reason why they should be regulated is the importance that these kinds of contracts have in the Spanish economy. Indeed, they play a pivotal role for SMEs and for society in general, who benefit from the distribution of products.

Thirdly, these contracts should be regulated in order to prevent the high litigation that exists around them. A regulation will give legal certainty to the parties and, if clauses are incomplete, it shall act as a supplementary legal framework. In this vein, there are some theories about contracts being incomplete without the chance of ever being capable to foresee all possible situations\(^\text{145}\).


\(^{144}\) *Problemas Jurídicos de la Distribución Digital*. Anele. n.d. http://www.anele.org/jornadas/2012/03-Problemas-juridicos-Distribucion-Digital.pdf. This document analyses the situation between distributors and suppliers of electronic press in which suppliers (authors of books) are in a weaker position to negotiate than distributors (Google, Amazon, Apple, Sony, etc.) but at the same time claim that distributors rely on them and therefore, in case a negotiation went wrong they can always distribute online their own products.

A regulation will serve as a guide for courts to establish a homogeneous jurisprudence on the matter. At the moment, Spanish courts have not applied the same criteria for all cases and the duality of jurisprudence is creating high levels of legal uncertainty. In this regard, those courts that accept the analogical application of law for the agency contract are mistaken. While some understand that the inspiration of the creation of this law can be also applicable for the distribution contract, others believe that because of the different and unconceivable characteristics of both contracts, it should not be possible to analogically apply a law that is intended to regulate agency contracts taking into account its own nature. This main difference consists in the fact that agents act in the name of the principal and do not bear any risk while distributors act on behalf on their own name and accept the risk of their business. In light of this and in an attempt to give a solution for this legal gap, if a regulation was to be made, it would avoid courts from applying a legal precept from a law that regulates a completely different contract.

Lastly, due to the numerous contracts that are concluded orally, a regulation would also serve as a means to oblige parties to conclude those contracts in writing. Through writing down the stipulations that parties agree on, this measure would also reduce conflicts arising between them. However, the obligation of conducting these agreements in a written support is not a total guarantee of a decrease in litigation because even though parties can negotiate and stipulate all they deem necessary (always bearing in mind the theory of incompleteness of contracts), some clauses can be dark or ambiguous and bring conflictivity.

4.1.2. Arguments against a regulation

The proposal of a regulation has been a very controversial issue. There are so many individuals who believe that a regulation is not necessary. The most common argument is the fact that distribution contracts are an atypical form of contract that is created upon the will of parties.

In this regard, the Spanish Competition authority (CNC) has expressed its opinion on the matter in various occasions. The latest one, in their report about the last Draft Bill of regulation of the distribution contract, the CNC stated that there should be a minimum regulation on the matter but, this regulation should be supplementary because otherwise the

---

146 Most of Spanish courts that apply by analogy the Law for the Agency Contract base their argumentation in the inspiring criteria of the law to compensate agents for their work.
148 Comisión Nacional de la Competencia (CNC).
business liberty of the parties could be restricted\textsuperscript{149}. According to their point of view, the fact that a distributor is weak in the negotiation does not necessarily mean that there is a market failure or abuse. In addition, too much regulation can diminish flexibility and reduce the organizational options, with a consequence of efficiency losses that can affect the final client (in terms of quality, price\textsuperscript{150} or innovation) and reduces competition between players in the market\textsuperscript{151}. In this regard, the CNC believes that with a regulation suppliers have less liberty to organize their distribution networks and, at the same time, there is a limitation on the intra and inter-brand competition between distributors\textsuperscript{152}. Furthermore, in an attempt to put in equal positions both parties, the risk that now is borne by the distributor can be translated to the supplier and, in this regard, the distributor would not have any incentive to try to implement the most efficient organizational and technological solutions\textsuperscript{153}. Not only this but, implementing a new regulation equally to all distribution agreements without taking into account the specific characteristics of each sector could not have the expected results of equilibrating the power of parties\textsuperscript{154}. Nevertheless, the report ends up admitting that the pros outweigh all these cons and that a minimum regulation would be necessary\textsuperscript{155}.

In addition to all these arguments, others state that the distribution sector is really variable in the time and in each sector and therefore it is impossible that the law reflects at each moment its truly necessities\textsuperscript{156}. Furthermore, evidence has shown that when franchise contracts were regulated, they were used less and it affected employment rates\textsuperscript{157} and, therefore, the same logic could be applied to distribution contracts\textsuperscript{158}. However, the same studies that demonstrated it also conclude that without a regulation franchisees (suppliers)


\textsuperscript{150} There are several studies that support this argument and reveal that when these contracts are regulated the prices raise and when not, they drop. See for instance Lafontaine, Francine, and Margaret Slade. "Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy." Journal of Economic Literature, 2005.


\textsuperscript{157} Klick, Jonathan, Bruce Kobayashi, and Larry Ribstein. "Incomplete Contracts and Opportunism in Franchising Agreements: The Role of Termination Clauses." Working Paper (George Mason University School of Law), 2006.

could benefit and exploit franchisors (distributors) and this would lead to a lack of cooperation between parties\textsuperscript{159}.

4.2. **OPTION TWO: general regulation in the Code of Commerce**

This option is much more general than the first one and it consists in regulating all kinds of commercial contracts, without differentiating within classes of agreements, in the Spanish Commercial Code\textsuperscript{160}. This option would be viable because the Spanish Code of Commerce was enacted in 1885 and loads of its regulations are outdated. Therefore, when re-writing it, all contracts would have a general regulation. This option would simplify the process of negotiating contracts *ex ante* and would be much easier to solve controversial issues *ex post*. However, on the other hand, this reform of the Commercial Code would not be enough in order to tackle the problematic situation of distribution contracts in Spain because all contractual arrangements have specific characteristics that should be regulated in special laws and that a general regulation could not cover under its scope. Nevertheless, if the Code of Commerce was to regulate all contracts in different sections, this option would be as viable and face the same challenges as option one.

4.3. **OPTION THREE: regulation at European level**

This third option would entail more or less the same consequences stated in option one in an *ex ante* and *ex post* basis. In addition, a regulation at the European level would facilitate trade between member states by unifying all criteria and characteristics that the distribution contract should have. For instance, from the analyzed situation of distribution contracts in other countries, it is clear that jurisprudence is homogeneous in some matters such as the acceptance of exclusivity clauses. However it tends not be completely homogeneous regarding the aspects of the termination of the contract such as the minimum notice requirement and the total compensation (whether if it includes compensation for clientele and/or damages and prejudices). If the European legislation regulated these matters, it would provide a more compact set of judgments.

If this option was to be applied, it should be developed through the enactment of a Directive because, as already seen in section 3.2, not all countries have the same characteristics. It should regulate the minimum common features within countries and then all countries should be able to regulate the rest as they deem necessary. However, how to determine these common features if there is no regulation at all? A European Regulation

---


\textsuperscript{160} This solution was proposed as an alternative to specific regulation in the Dirección General de Política Comercial. *Informe sobre la Problemática de los Contratos de Distribución*. Ministerio de Industria, Turismo y Comercio, 2009.
would restrict the liberty of the parties and would not be possible to be enacted because there is no consensus on the conditions to be met by distribution agreements within European countries, especially on a delicate matter that has not been regulated in most of them. In February 2003 the European Commission created an Action Plan on European Contract Law in which a Common Frame of Reference was created. Indeed, maybe the enactment of a European Civil Code or Code of Commerce would facilitate this harmonization and improve the situation of these contracts in European countries. This solution is still subject to discussion being held by scholars. However, as stated in option two, this last solution would not be efficient for distribution contracts due to its specialties; unless they were regulated on a separate basis from other contracts. Another option would be the creation of a model of contract or a model of law. This alternative, on the one hand, would help countries to adapt their criteria to these standards. If it was enacted through a soft law instrument, this would grant the parties the option to decide whether to apply them or not. However, as most of soft law instruments, it would entail a problem: if its application was not compulsory, parties would have no incentives at all to follow these recommendations unless it was a common use within the distribution sector and the lack of application of these standards could harm the reputation of suppliers. On the other hand, if they were hard law, it would reduce the liberty of the parties to negotiate whichever terms suit best their legal situation. Hence, the creation of a standard model of contract or regulation is not an efficient solution to the current problem.

Still, this option presents various problems. The first one is the difficulty in unifying inexistent regulations within member states. Why regulate at a European level the minimum aspects that the distribution contract should have if there is no regulation at all or consensus within all countries’ jurisprudence? This situation is completely different than the one of agency contracts according to which, the European Directive was enacted to


165 See for instance that there have been created the Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC) and they are not being implemented in practice because they are not a law instrument. In this regard, it does not regulate into detail the most conflictive matters for the distribution contract, but only defines general rights and obligations that are intrinsic to the nature of the contract. Nevertheless, it must also be mentioned that it includes some guidelines regarding the termination of the contract that, even though are applicable to the three contractual modalities (see for instance, articles 1:301 to 1:306), can be a useful guideline for the parties if they chose to apply them.
harmonize the regulations between member states. In the distribution contract, the only country that has regulated some of its aspects is Belgium and the rest of the countries lack regulations that Europe ought to homogenize.

The second and most important problem relies in the fact that all countries have a heterogeneous jurisprudence regarding the issues of distribution contracts. How to build a common regulation of completely different criteria in different countries? Why have not these countries regulated the matter if it was really necessary? Should the liberty of the parties be restricted because of the difficult situation of distribution contracts in Spain? Definitely not. If the situation in these countries was no longer sustainable they would always have the choice, like the Spanish case, to regulate these contracts at a national level.

4.4. OPTION FOUR: mediation and arbitration ex post

Promoting mediation and arbitration at a national or international level are two solutions for resolution of controversies on an ex post basis that can help restore the positions of the parties as well as protect the weak one (which usually tends to be the distributor). Even though mediation can be seen as a form of bringing together the positions of the parties within the negotiations of the contract, this section will analyze these alternatives from the perspective in which the controversy has already been material and thus, when the harm is already occurred.

These two solutions can be used by parties when there are some conflicts regarding their contract as an alternative to traditional court litigation. Mediation is a technique to solve conflicts that consists in approaching the different positions of the parties and determining a solution. Mediation is a rapid, confidential and cheap way to solve conflicts arising between parties. However, the problems with this kind of system are that (1) it is necessary that both parties accept mediation as a conflict solution; (2) despite being cheaper than judicial litigation, parties have to face its cost; and (3) the final agreement is not compulsory for the parties and if one of them wants to enforce it, they will have to litigate in court.

On the other hand, arbitration is a resolution of conflicts’ procedure according to which one arbitrator elected by the parties or an institutional one gives a solution to the controversy. The benefits of choosing this resolution of conflicts are (1) that they are solved much faster than in traditional courts, (2) the process is much more flexible, (3) it is confidential and (4) the parties can elect arbitrators who are experts in the field of the

---

168 See for instance in Spain the Corte Española de Arbitraje (http://www.corteespanolaarbitraje.es/).
On the other hand, as conflicts are solved in a faster way, (1) it is necessary the consent of both parties, (2) it is more expensive than court litigation, (3) it is really difficult to appeal on a different stage and (4), in the same way as mediation, it lacks enforcement.

4.5. OPTION FIVE: special forum for commercial contracts (at a national and/or European level)

The fifth option would consist in creating a specialized organism that would solve conflicts on an *ex post* basis within the existing Spanish jurisdictional framework. Whenever a dispute between parties would arise, they would have the right to attend to this special public entity formed by specialized judges that would analyze the controversial issues of the contract.

The current situation in Spain is that there is no equal jurisprudence and that the Supreme Court has not a specialized organism in the resolution of commercial contracts disputes. Therefore, if the Supreme Court was to create a special forum or a special organism for these contracts, it would allow the parties to be sentenced by a specialized court formed by specialist members in this area. In addition, it would be more likely that the enacted jurisprudence would follow more homogenous criteria and it would give legal certainty to the parties in case of lack of regulation. The resolution of disputes would be faster because of the specialization of the judges. For these kinds of procedures even less strict norms could be enacted for the proving facts. This option could also be implemented at European level by establishing a specialized jurisdiction of the European Court of Justice or another dispute resolution organ for commercial contracts.

Nevertheless, this option would be difficult to implement because in a decade in which Spain is suffering one of the worst financial crisis and due to the numerous cutbacks in essential policies, the Spanish legislator, the Government and the population could oppose to such measure. The European regulator would also not be very prone to accept this solution because of the costs that it would carry.

---

171 Following the lead of countries such as United Kingdom or United States. See Enforcing Contracts, http://www.doingbusiness.org/reports/global-reports/-/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB12-Chapters/Enforcing-Contracts.pdf.
172 For instance in Spain there are oral processes that are shorter in time and with a more flexible structure. See art. 250 of *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*. 
4.6. **OPTION SIX: codes of conduct**

Codes of conduct (at national or international level) are a *soft law* alternative to traditional regulation\(^{173}\). They are a set of optional regulations of good practices that parties can decide to adhere to them and make them compulsory in order to regulate their relationships\(^{174}\). In the sector of distribution these kinds of instruments have already been used. In Spain, there have been some judgments in which the tribunal considered that if the parties were adhered to codes of conduct they were compulsory and its non-observance could be a breach of the contract\(^{175}\).

These codes of conducts can be enacted by public organisms or private parties and they would contain specific provisions that regulate the relationship of the parties. The difference with option one, enactment of a regulation, relies in the fact that this code of conduct permits parties to decide if they apply these provisions. This gives a chance to the community to be critical about the lack of adhesion to these codes. In Spain the last Bill of Proposal for a regulation established a complementary measure to the regulation consisting on the adoption of codes of conduct for specific sectors (see art. 5). Indeed, there have been enacted codes of conducts in sectors such as the distribution of vehicles but, however, they have not been as successful as expected\(^{176}\).

The benefits that this option involves are a regulation framework for the distribution relationship that parties are free to choose. It would be a minimum regulatory framework and the parties would have the liberty to choose if they want to be adhered to it or not. However, as in most cases of *soft law*, this liberty presents one problem: if it is not compulsory, probably parties would be reticent to apply it. Finally, if this option was to be successful and most of distribution agreements were adhered to it, those supplying companies who did not, would have a bad reputation within their clients as well as within distributors and that would include the possibility to be driven out of the business if they did not apply them.

\(^{173}\) See for instance the Codes of Corporate Governance enacted in the UK or Germany. See Seidl, David, Paul Sanderson, and John Roberts. "Applying "Comply-or-Explain": Conformance with Codes of Corporate Governance in the UK and Germany." *Centre for Business Research, University of Cambridge*, no. Working Paper No. 389 (2009).


\(^{175}\) However, jurisprudence has not entered into detail if the breach of the contract is produced because the parties agreed in the contract to adhere to codes of conduct or if it was because the parties had included a clause that contained all provisions of these codes. See for instance Judgment of First Instance number 10 of Bilbao number 12/2004, January 12\(^{th}\) (AC 2004/171).

4.7. **OPTION SEVEN: do nothing**

The seventh and last option consists in doing nothing and leaving markets regulate themselves. This option entails giving more freedom and flexibility to the contracting parties in order to adapt the contract to their specific situation. However, the practice in the distribution sector has proven this solution not to be efficient because there tends to be a lot of abusive behavior of suppliers towards distributors. It is true that markets can have the power to determine and regulate its own conditions and let only the best distributors and the best suppliers remain in the business. In this vein, even if suppliers could be thought to be abusive towards distributors, if only one distributor were to accept those “abusive” conditions he would prove that they are not as harsh as one could think because otherwise he would not accept them. Nevertheless, this acceptance does not always mean that the supplier’s conditions are fair; it only means that if a distributor wants to continue in the business he has no other choice than to accept them. If not a single distributor were to accept the conditions of the supplier, then the principal would be obliged to change the terms of the agreement because of the need to appoint a distributor in order to avoid making further investments for the distribution of the product/service. This situation would be really difficult to happen in real situations. It is clear that the position of distributors is unsustainable and something needs to change. In this regard, the fact that the weak and abused party is most of the times the distributor and that it has no capacity of negotiating contractual terms; the fact that there is a lot of litigation in this sector (which means as well more economic costs) or the fact that there is no legal certainty about a possible court decision, as well as the rest of arguments stated in option one and two, justify the necessity of a regulation or the rest of complementary measures stated in options four, five and six. Indeed, a regulation would help the parties to have legal certainty *ex ante* and give a basis to courts to create a more predictable and coherent jurisprudence on those matters that are not regulated in the law or those concepts that can present different interpretations.
**Table 4: Alternatives to improve the situation of the distribution contract in Spain**

<table>
<thead>
<tr>
<th>OPTION</th>
<th>DESCRIPTION</th>
<th>PROS</th>
<th>CONS</th>
</tr>
</thead>
</table>
| ONE          | Enactment of a specific regulation of the main controversial issues of the contract. | ✓ More balance between parties.  
✓ Importance of distribution contracts in Spain.  
✓ Less litigation.  
✓ Homogeneous jurisprudence.  
✓ Legal certainty.  
✓ Law adapted to specific characteristics of the distribution contracts.  
✓ More certainty by obliging parties to conduct contracts in a written support. | • Restriction of the liberty of the parties.  
• To be in a weak position does not mean necessarily to be abused.  
• Less flexibility and less capacity for parties to organize their business: efficiency losses, less competition and harm to the final client.  
• Distributors less incentivized to find efficient solutions.  
• Not all distribution sectors have the same features.  
• Variable sector and difficulty that a law reflects the actual necessities of parties.  
• Less use of distribution contracts and lower employment rates.  
• Invisible hand that impedes the enactment of a regulation? |
| TWO          | ❖ General regulation for contracts in the Commercial Code.  
❖ Specific regulation of distribution agreements in the Commercial Code. | ✓ Viable because most of the regulations included in the Commercial Code are outdated.  
✓ Legal framework *ex ante* (negotiation) and *ex post* (conflict situation).  
✓ If specific regulation, same positive effects as option one. | • A general regulation would not tackle the problems of distribution contracts.  
• A specific regulation would face the same cons as stated in option one. |
| THREE        | Regulation through a European Directive.                                  | ✓ Easier trade between member states.  
✓ Homogeneous criteria. | • How to homogenize unregulated issues?  
• How to force countries to regulate something that is not regulated and they deem not necessary? |
<table>
<thead>
<tr>
<th>OPTION</th>
<th>DESCRIPTION</th>
<th>PROS</th>
<th>CONS</th>
</tr>
</thead>
</table>
| FOUR   | **Mediation**: approach of positions in the solution of a controversy.  
**Arbitration**: solution made by an arbitrator to a dispute. | **Mediation**:  
✓ Rapid, confidential and cheap.  
**Arbitration**:  
✓ Fast, flexible, confidential, and the arbitrator can be a specialist on the matter. | **Mediation**:  
- Necessary acceptance of both parties, cheap but still carries costs and not enforcement of the final agreement.  
**Arbitration**:  
- Necessary acceptance of both parties, more expensive than court litigation, difficulties in appealing and lack of enforcement. |
| FIVE   | Creation of a special forum for commercial contracts in existing Courts (in Spanish or European level).  
Creation of a special organism for resolution of disputes (in Spanish or European level). | ✓ Specialized judges.  
✓ Homogeneous jurisprudence.  
✓ Legal certainty.  
✓ Faster resolutions.  
✓ More flexible procedure. | ❌ Costly for Spanish or European Governments to maintain. |
| SIX    | Enactment of a code of conduct with provisions for specific sectors to which parties can be adhered on a voluntary basis. | ✓ Minimum legal framework.  
✓ Freedom of choice whether to apply its provisions or not and explain.  
✓ If successful, pressure mechanism for those who are not adhered. | ❌ The freedom to be adhered to it can turn out into no application to parties. |
| SEVEN  | Do nothing and let the distribution sector regulate itself. | ✓ Freedom and flexibility for contracting parties.  
✓ Contract fully adapted to the necessities of the parties. | ❌ Abusive situations.  
- No legal certainty.  
- No homogeneous jurisprudence.  
- More litigation costs. |

Source: compiled with hand-collected data from the sources in Section 4.
4.8. Conclusion of the alternatives

According to all the information provided in the previous sections, and despite the fact that a regulation could in some way restrict the liberty of the parties, it is necessary because its benefits clearly outweigh the cons. As it has been already pointed out, a regulation would equal the negotiating position of the parties and would reduce controversial issues without the need to litigate (it would reduce costs in terms of money and time). It would also help courts to establish a homogeneous jurisprudence and give legal certainty to the parties. However, the need of an existing law is not enough to justify that it would need to cover all issues on the matter since the will of parties and their ability to negotiate should not be restricted in an unnecessary way. Indeed, the regulation should only cover the minimum aspects of the contract in order to guarantee the freedom of the parties but at the same time give a minimum legal framework to equal the negotiating positions of the parties. Because this regulation should be compulsory to comply, it should only cover general aspects of the contract that usually carry more controversies (but not all of them) and all sectors of distribution, permitting parties to adjust their necessities to the type of distribution market segment that is affected\textsuperscript{177}.

The liberty of the parties to negotiate and good faith are two essential requirements. However, it is clear that at least a law at a national level that only regulated minimum aspects should be enacted. But what exactly should it regulate? This next section is going to analyze the minimum content that a law should include.

- First of all, a regulation should define the scope of its application. However, this definition should not mention any kind of subtypes of distribution contracts such as exclusive, selective, etc.\textsuperscript{178} In this regard, by not distinguishing any subclasses, it is easier that all contracts fulfill the characteristics included in the definition and hence, it would lead to less litigation of issues regarding the scope of the regulation and its subclasses. At the same time, it would be necessary to include a section in which it was specified to which contracts the regulation would not apply\textsuperscript{179}.

- The analysis of jurisprudence has shown that there is a lot of litigation regarding the exclusivity of the parties and its territory. In this regard, the regulation should oblige the parties to determine the degree of exclusivity in the contract, and if necessary, the territory where it shall apply.

\textsuperscript{177} Dirección General de Política Comercial. \textit{Informe sobre la Problematización de los Contratos de Distribución. Ministerio de Industria, Turismo y Comercio, 2009.}
\textsuperscript{179} Following the lead of art. 3 of the \textit{121/000138 Bill of Regulation of Distribution Contracts.} (2011).
The duration of the contract, the applicable law and designated court should also be determined by the parties within the contract in order to reduce litigation. However, the last two clauses should be of voluntary compliance as there are specific laws that deal with these issues.

Due to the elevated number of oral contracts, there should be an article according to which all parties can demand the contract to be in a written support and, in case that the other party denies it, (1) he should have the burden of proof that the contract stipulated otherwise than established in the law when the clauses are of voluntary compliance, and (2) face the damages and prejudices that would arise from the lack of a written contract. Even when the contract is written but through practice other obligations or rights are born, it should be obligatory to reflect them in a written contract. In case the parties did not, the same consequences mentioned above for unwritten contracts should apply. Through this provision, even though parties are not fully obliged by the law to conclude a written contract, they are fully incentivized to do so. Nevertheless, this option faces a challenge when proving that the other party did not want to conduct the agreement in a written support. In order to solve this problem, and without including such a recommendation on the regulation (it can infringe the right of privacy of the parties), it would be easier to prove this attitude if the parties recorded the negotiations.

Regarding the language of the contract, the parties should be free to stipulate whichever they deem necessary. However, in order to attract international suppliers or distributors, the law should include an obligation to conduct the contract in another language such as English when one of the parties demands so.

After the proposal of the CNC and despite being quite redundant, the regulation should also establish a clause in which it reminded the parties that the European Competition regulations should be respected.

The regulation should include some pre-contractual rights and obligations such as confidentiality of the parties or information rights. For instance, the right of both parties to have access to all necessary information that can affect the

---

contract and its conditions. However, the concept of “necessary information” is vague and it would still carry some litigation. Conversely, regulating it more into detail such as in the 121/000138 Bill of Regulation of Distribution Contracts (2011) can suppose an infringement to the right of privacy and freedom of the parties in cases where the law stipulated that the information was necessary and in practice it was not.

In order to equate the positions of the parties, this regulation should create an organism that *ex ante* would help in the negotiations when one party believes that is in a weak position by obliging the other party to go to mediation. This mediating organism should be public and all parties that deemed necessary its intervention should have the right to access it. The function of this organism should not be to create the contract itself but to guarantee that the minimum legal provisions of this law were applied as well as to approach positions of both parties. Nevertheless, the fact that this organism should be public would entail more costs for the Government and, in an era of crisis, it may not be viable at all. If this organism was private, then the parties should face its costs and this means that the organism would be rarely used because a party cannot be obliged to go to mediation and pay its costs unless he specifically accepts it. This option presents other risks such as the lack of obligation between parties to obtain a certain result. It would be an obligation of means. Therefore, if the supplier was obliged to go to these negotiations, unless there was a real and deep interest in contracting with that specific distributor, the supplier would act in bad faith and try to impede the negotiations because he would know that there are a lot of other suppliers in the market who would accept his unilaterally imposed terms. In addition, at the same time of the mediation, if the parties did not sign an exclusive negotiation agreement, the supplier would have the opportunity to conduct negotiations with other parties that could agree on his unilaterally imposed terms. To impede this from happening, a clause should be added according to which suppliers could not negotiate with third parties while the mediation was taking place. Yet, this would mean a loss of time and money, especially for the supplier who may need to distribute his products as soon as possible. Because not all initial negotiations lead to a conclusion of a contract and therefore it is impossible to impede several negotiations at the same time unless the parties specifically agree so.

---

184 In Spain there exists, among others, the Instituto Español para la Mediación (Spanish Institute for Mediation) which is private and parties have to face its costs.
Due to the importance of internet sales nowadays, the regulation should prohibit suppliers to deny the right of distributors to conduct online sales or to impose a certain design for the webpage\textsuperscript{185}. The regulation should also include the obligation of the parties to determine a minimum notice requirement for unilateral termination in indefinite contracts\textsuperscript{186}. It should not specify and oblige the parties to stipulate an exact period because it should be up to the parties. However, according to the analyzed jurisprudence at a national and international level, the regulation could establish that if the parties have not agreed otherwise, “minimum notice requirement” is between 1 and 6 months (one month per year of contract duration with a maximum of 6\textsuperscript{187}). The legal minimum period of notice would also be applied in case the courts would determine that it is abusive because it is much more inferior than the one established in the law. With this regulation one assure that (1) the parties have liberty to choose a minimum period of notice but (2) at the same time that it is not abusive. By establishing it, the courts would have a (3) clear pattern to follow and (4) the parties would have more predictability upon the court judgments and (5) would be more incentivized to establish the same period regulated in the law.

The regulation should include the obligation for the supplier to repurchase all goods from the distributor in case that there was a breach of the contract made by the supplier or a unilateral termination of the supplier without a fair cause.

The regulation should include a clause according to which the distributor should have right to compensation in case the specific non-amortized specific investments were induced (or obliged) by the supplier\textsuperscript{188} and only in those cases where the supplier wanted to terminate the indefinite contract\textsuperscript{189} unilaterally. The burden of proof that the supplier did not induce or oblige to make these investments would be on the supplier.


\textsuperscript{187} Regarding the minimum notice requirement, I believe that the one stipulated in the art. 25.2 of the Law 12/1992, May 27th, about the Agency Contract is enough in order to avoid collateral damages.

\textsuperscript{188} Spanish jurisprudence, in general, only accepts the compensation in those cases in which the distributor has made these investments in order to execute the contract and not when he expects certain benefits. See Alonso Soto, Ricardo. "Bases Para una Futura Regulación de los Contratos de Distribución." In \textit{La Reforma de los Contratos de Distribución Comercial}. Madrid: La Ley, 2013. P. 59. See also Martí Miravalls, Jaume. "Gastos de Confianza o Inversiones Específicas ¿Qué Debería Ser Objeto de Indemnización en la Ley de Contratos de Distribución?" In \textit{La Reforma de los Contratos de Distribución Comercial}. Madrid: La Ley, 2013. P. 501-512.

\textsuperscript{189} When signing definite contracts the distributor should take into account if the duration of the contract is enough to amortize the specific investments. See Martí Miravalls, Jaume. "Gastos de Confianza o Inversiones Específicas ¿Qué Debería Ser Objeto de Indemnización en la Ley de Contratos de Distribución?" In \textit{La Reforma de los Contratos de Distribución Comercial}. Madrid: La Ley, 2013. P. 512-513.
investments should be borne by the supplier because it is really difficult that the distributor can prove it unless there is written evidence. This compensation is necessary in order to incentivize distributors to conduct specific investments because, otherwise, they would not make them. On the other hand, in order to equilibrate the position of the parties, this compensation should be limited to certain cases. If the distributor had right to this compensation even when the breach of the contract was his fault, the distributor would not try to optimize his resources and would make unnecessary specific investments.

As a general rule, the regulation should not allow a compensation for clientele because it is the main object of the contract: to distribute the products of the supplier within their clients. However, under exceptional cumulative circumstances it could be granted if (1) the distributor created a completely new client portfolio and (2) the contract stipulates a non-competition agreement during a certain time after the termination of the contract. This compensation should be capped to the effective benefits obtained by the distributor in an average of the last five years or the duration of the contract. Regarding the renounce of this compensation, the regulation should determine that in the contract parties cannot stipulate such a clause because parties cannot renounce to a right that is not born at the moment of creation of the contract, on the contrary, it is created at its termination.

Last but not least, the regulation should also include an article in which it was stated the prescription of the legal actions regarding distribution contracts. In this vein, after the comparison of prescription in other European countries, and after the lack of consensus, the average within countries is five years, a reasonable period for the parties to be able to litigate.

This regulation would have effects in an *ex ante* and *ex post basis*. Only by regulating the issues mentioned above, distributors, which in general tend to be weak, acquire more rights and therefore the negotiating power of parties is more equal. Even when the conflict has already risen, the law could give legal certainty about the consequences of the infringement of a contract and it would diminish courts litigation. If more clauses were to be added the parties would have less flexibility and less chances to adapt the contract to their real necessities. The liberty of the parties is a pivotal characteristic of this contract and therefore a regulation should only regulate the issues that tend to be problematic and that give no legal certainty to the parties at all. It would not make any difference if that

---

190 This is the regulation provided in art. 25 of the 121/000138 Bill of Regulation of Distribution Contracts. (2011).
192 Regarding the maximum compensation for clientele, the one stipulated in the art. 28.3 of the Law 12/1992, May 27th, about the Agency Contract is enough in order to avoid collateral damages.
regulation was to be made in an independent regulation or within the restructuring of the Commercial Code as long as it contained specific provisions for this kind of contracts.

Nevertheless it is true that this option faces one big challenge: the opposition of suppliers to the regulation. Spain is a country in which the market can impose the legislator its own conditions. In this vein, why else is not the law for a distribution contract approved yet? It is true that there have been several attempts to regulate the matter. All these attempts have been carried out during the eight years of mandate of the President of the Government José Luís Rodríguez Zapatero. Despite the fact that the Courts had been dissolved (this fact impeded its final approval), he could have approved this law at any moment during his mandating term. But it was not, and even though the last attempt was the one that came the longest way, the change of government has made them state that this subject is not going to be proposed to be regulated at all. Therefore, is there really an invisible hand that is pulling strings in order to impede this law from being enacted? It is more than possible that there is and hence, the difficulties of the Spanish legislator to approve it are huge. Nonetheless, the pressure of a certain lobby should not retain legislators from effectively doing their tasks, that is, to regulate what they deem necessary.

On the other hand, regulation at a European level (option three) is not viable at the moment. There is a majority of countries that permit the existence of these contracts without regulating them. From the studied jurisdictions, only Belgium has regulated some aspects of the termination of the contract. In this regard, European Directives or Regulations are intended to create a homogeneous legal framework within the regulations of its member states. In the case of the distribution contract, the lack of regulation in most of the countries, conversely to what happened to the agency contract, makes it completely difficult and unnecessary to enact some European legislation. Countries and its distributors seem to be managing just fine through their case law and a regulation would only diminish the liberty of the parties to establish clauses that they believe adapt better to their own circumstances. Indeed, a European Regulation or Directive would only regulate the common features within countries which would make no difference with the present situation. It would only have a positive effect if it would homogenize the jurisprudence of all countries. In this case, oppositely to options one and two, the third option’s cons would outweigh the pros.

Regarding option four, mediation and arbitration are a good alternative for resolution of disputes on an ex post basis. However, this protection of distributors is easier and more effective if it is done ex ante through regulation or mediation during the negotiations. However, because it is not always possible to have ex ante protection, alternative measures on an ex post basis should be enacted. Mediation and arbitration are rapid and confidential solutions and they would be a good option to protect distributors against abusive behavior of suppliers. This alternative can be simultaneously applied as a complementary measure to option one, two, five and six.
Option five, creating a special forum for commercial contracts disputes, is also a really good and viable alternative. This option could be implemented in two scenarios: (1) when a law for a distribution contract (option one or two) was enacted, and (2), when there was no regulation for these kinds of contracts. Both scenarios would entail more or less the same consequences: it would be a rapid resolution of conflicts that would give legal certainty to the parties by enabling experts on the field to be the ones who evaluate each special case and, at the same time, this would create a homogeneous jurisprudence. Therefore, in both scenarios, and despite the economic costs that it would entail, this measure should be implemented as it has proven that it only involves beneficial effects to the parties.

The creation of codes of conduct (option six) has proven not to be successful. This option could also be implemented in three scenarios:

(1) The first one would be the case in which there was only enacted a law for distribution contracts (option one and two) and due to this law jurisprudence was standardized. In this scenario the creation of codes of conduct would be unserviceable because the regulation would already protect the weak party and it would be compulsory for parties to follow the legal provisions. Nevertheless, they could be applied if their provisions were wider than the ones contained in the law.

(2) The second scenario would entail the creation of a homogeneous jurisprudence via the unification of doctrine of the Spanish Supreme Court or via the creation of a special forum for commercial contracts (option five) without any existing regulation. In this scenario, the enactment of codes of conduct could be used by courts as a starting point for solving their controversies and for parties to adapt their contracts to its provisions.

(3) The third scenario would be the case in which there was no regulation or no homogeneous jurisprudence. In this case, parties would use these codes of conduct as “guidance” in order to prove their points in a potential litigation process.

Nevertheless, the three scenarios present one problem: soft law measures may be hardly used because of the liberty of choice of the parties to use them or not. This solution would give parties more liberty than a compulsory regulation. However, the enactment of a regulation is more necessary because, as evidence suggests, these codes have not been used in practice.

The last option, do nothing (option seven), is not plausible. Throughout this thesis, the necessity of protection of Spanish distributors has been pointed out. The actual situation is no longer sustainable. Therefore, the options stated above should be adopted.
Preferably, codes of conduct (option six) should be enacted because they give more freedom of choice to the parties. However, they have proven to be inefficient and, therefore, there is a necessity of enacting a law (option one and two) and, at the same time, other procedures such as mediation and arbitration (option four) and a special forum for commercial contracts (option five) should be applied.
5. CONCLUSION

The main purpose of this paper was to analyze the situation of distribution contracts in Spain and assess which measures should be implemented in order to improve it.

In order to do so, the reader has been introduced to the subject through a definition of what is a distribution contract, what are the types of distribution contracts that this paper referred to, as well as the most conflictive clauses of these contracts have been pointed out.

Afterwards, this study work has provided some data relating to the importance of the distribution sector in the Spanish economy. It has pointed out the existing imbalance between the parties during the negotiations and execution of the contract. In this vein, it has been determined that, in general, the weak party tends to be the distributor while the supplier usually is the party who imposes unilaterally their conditions. Nevertheless, this is not always the case and that the characteristics of the distribution contract vary from sector to sector. Subsequently this paper has noted the lack of regulation for this contract and explained the several attempts to enact a law for general distribution. Finally, this thesis has analyzed thirty random judgments of the Spanish Supreme Court and pointed out the disparity of jurisprudence principles. If put together, all these characteristics are indicators that the situation of the distribution contract in Spain is not outperforming and that there is a necessity of introducing new measures in order to restore the equal positions of the parties.

After having analyzed the situation of the distribution contract in Spain this thesis has also examined whether at the European level there were some regulations that could affect distribution agreements. In this vein, it has been concluded that the only regulations that could apply to them are those regarding competition law and those determining the applicable law and competent court. Nonetheless, this work aimed to take a further step and analyze what is the framework of distribution contracts in other European countries that could have any influence in Spain. From the analysis of France, Belgium, United Kingdom, Germany and Italy’s legal frameworks, only one of them regulates the termination aspects of the distribution contract. The others leave the matter unregulated and courts’ jurisprudence (that varies depending on the country) are the ones who are establishing criteria applicable to those agreements. And the unanswered question remains: why Spain is different if all of these countries have not they regulated this matter? Probably because of the aforementioned characteristics such as the importance of distribution sector, the existing balance between the parties and the lack of a homogeneous jurisprudence.

The final part of this thesis has examined different alternatives that could improve the situation of distribution agreements in Spain. It is concluded that, because codes of conduct have turned out to be in disuse within certain sectors, it is necessary to enact a law that regulates the minimum and most problematic aspects of the distribution contract. This law would balance the power of the parties on an ex ante basis and, in case it was necessary, the
law would also provide the parties and courts with a minimum legal framework that would regulate their relationships. The enactment of this law would help courts to establish homogeneous criteria on those aspects regulated intrinsically within the law and give legal certainty to the parties. The support of the creation of this law is not important as long as it was compulsory and as long as it contained minimum provisions that would let the parties negotiate their agreements in accordance with their real necessities. On the other hand, it has been pointed out that this regulation should not be at a European level due to the lack of regulations existing in European countries. Other alternative measures to be taken into account are to implement the use of mediation and arbitration \textit{ex post} as well as the creation of a special forum for commercial contracts.

In conclusion, and after having deeply analyzed the problematic of these agreements within the Spanish territory, it should be necessary to regulate them at a minimum level in order to balance the parties ability to negotiate and to perform during the execution of the contract as well as to give legal certainty to the parties by creating a more consistent and coherent jurisprudence within Spanish courts.
BIBLIOGRAPHY


—. "Distribución Comercial y Derecho de la Competencia" ("Commercial Distribution and Competition Law"). n.d.


Comisión Nacional de la Competencia (National Competition Authority). "Informe sobre las Relaciones entre Fabricantes y Distribuidores en el Sector Alimentario" ("Report about the Relationship between Suppliers and Distributors in the Feeding Sector"). n.d.


Garrigues. Garrigues. n.d.


Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (Civil Procedure Law). (n.d.).


Loi du 27 juillet 1961 relative à la résiliation des concessions de vente exclusive à durée indéterminée. (n.d.).


*Sentencia Tribunal Supremo (Spanish Supreme Court Judgment) (Sala 1), num. 360/2000.* (April 26, 2000).

*Sentencia Tribunal Supremo (Spanish Supreme Court Judgment) (Sala 1), num.1799/2010* (April 13, 2010). (n.d.).


*Treaty of the Functioning of the European Union.* (n.d.).
