

LICENSING YOUR PRODUCT –2

WHEN TO USE A COMMERCIAL AGENT OR DISTRIBUTOR

BY
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Over the previous month I have addressed the issues surrounding the appointment of commercial agents in marketing your products, the legal issues surrounding the appointment of commercial agents and the key areas that should comprise an agency agreement. However, an agency arrangement is simply one means of getting your product on the market. Another alternative is to enter into a distributorship arrangement, writes **Dr Rosanna Cooper**.

Should you appoint an agent or a distributor?

In my experience, there tends to be some confusion between the role of an agent and that of a distributor. As an overview, a principal appoints an agent to act on his behalf and as such an agent cannot act on his own accord and will not usually conclude any contracts. An agent will therefore have no rights or obligations under such contracts. However, a supplier appoints a distributor to resell his products and the distributor will then purchase products from the supplier and sell them on to his customers. The parties should always enter into a written agreement before an agent or distributor is appointed.

There are several differences between an agency and a distributorship arrangement, and in many cases an agency arrangement may be preferable to a distributorship. I have considered below some of the main differences between an agency and distributorship:

- **Greater Control** - In an agency arrangement the principal can exert control over the actions of his agents. For instance, the principal can fix prices for the sale of products whereas a supplier is restricted under competition laws if he were to impose retail price maintenance on a distributor. Therefore, if you wish to retain control over the licensing of your products, an agency arrangement would be preferable.
- **Position under contract** – An agent generally has no contractual relationship with a customer because such contracts are usually concluded between the customer and the principal. On the other hand, a distributor enters into a direct contractual relationship with a customer when he resells his products.
- **Choice of customers** – An important factor in determining whether to appoint an agent or distributor might be your customer base. You should note that as a supplier you may face mandatory laws in certain jurisdictions if you were to restrict a distributor's choice of customers. However, in an agency arrangement as principal you can determine your choice of customers.
- **Risks** – In any arrangement you must weigh up the risks. Under contract law an agent's risk in respect of his liability to a customer is minimal. However, a distributor's risk is significantly higher because he resells his products and has to accept liability for them, except if they are defective. Whether you appoint an

agent or distributor would depend on the degree of risks you wish to take in licensing your products.

- **Payment** - An agent earns commission on the sale of products which is usually a percentage of the revenue he generates. A distributor buys his products and has the option to add a mark-up when he sells his products on. He can therefore determine his profit margins.
- **Legal instruments affecting the arrangement** – In the last two issues I looked at the impact of the Commercial Agents Regulations on the relationship between agents and principals. The Regulations do not apply to a distributorship arrangement, as they solely govern an agent-principal arrangement. However, competition laws are highly relevant to a supplier-distributor relationship. The competition laws do not apply to a genuine agency relationship. Therefore, if you are considering appointing a distributor, you are strongly advised to define the scope of your agreement to fall in line with competition laws, as there are financial penalties if you were to fall foul of them. RT Coopers can assist you in this regard.

Disadvantage of an agency arrangement

The main disadvantages of an agency arrangement are:-

- **Payment of compensation on termination** – In the European Union and in most other countries, an agent is entitled to compensation on the termination of an agency agreement by a principal (except in certain circumstances). As a principal, you may find yourself having to pay large sums by way of compensation if you terminated an agency agreement improperly. There is no compensation payable to a distributor on the termination of a distribution arrangement in a number of countries, including the UK.
- **Tax issues** – You should always seek tax advice if you have appointed agents in different countries as there is a risk that you might be treated as trading in a country, if you have appointed an agent to act in that country.

Termination of an agency agreement

Next month I will be looking in more detail at the issues surrounding the termination of an agency arrangement.

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