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Cessação de acordos de distribuição no direito português: resenha de jurisprudência recente sobre prazos de denúncia e indemnização de clientela

Secção I

Investigação Científica*

* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review*.

Cessação de acordos de distribuição no direito português: resenha de jurisprudência recente sobre prazos de denúncia e indemnização de clientela

Termination of distribution agreements in Portuguese law: survey of recent case-law concerning notice periods and compensation of good-will*

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Resumo: No direito contratual português, os acordos de distribuição constituem uma categoria genérica e heterogénea que integra a agência, a concessão comercial e a franquia. A agência está legalmente prevista e regulada como tipo contratual autónomo, com noção e elementos essenciais, ao passo que a concessão comercial e a franquia são objeto de elaboração doutrinária e jurisprudencial. É opinião comum que a agência está vocacionada para servir de 'regime-modelo' dos contratos de distribuição. Este trabalho trata, em particular, de alguns problemas de cessação dos contratos, tais como a denúncia e a indemnização de clientela, indagando se e em que termos as regras da agência se adequam à concessão comercial e à franquia, tendo em conta a jurisprudência recente dos tribunais portugueses.

Palavras-chave: contrato de agência – concessão comercial – acordos de franquia –denúncia – indemnização de clientela e concorrência

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Abstract: In Portuguese contract law, distribution agreements are a generic and heterogeneous category which includes agency, commercial concession and franchising contracts. The agency is regulated by special legislation as a separate type of contract with its notion and essential elements, while the commercial concession and franchise are object of doctrinal and jurisprudential construction. It is common understanding that the agency serves as the model regulation for distribution contracts. This paper focuses, in particular, some problems of termination of contracts, such as notice terms and compensation for goodwill, asking whether (and on what terms) the rules of the agency contract are suited to commercial concession and to franchise agreements, taking into account recent jurisprudence of the Portuguese courts.

Keywords: agency contract - commercial concession - franchising – notice periods - compensation for goodwill and competition

Summary: 1. Introduction: general features and legal framework of distribution contracts. 2. Agency contract - legal definition and basic elements. 2.1. Market prospection and contract negotiation. 2.2. Eventual powers of representation and apparent agency. 2.3. Acting on behalf (and in the interest) of the principal with autonomy and stability, exclusivity not required. 3. Other distribution contracts: concession and franchising. 3.1. Basic features of commercial concession. 3.2. Franchising elements and features. 4. Termination of distribution agreements upon notice. 5. Compensation of good-will. 5.1. Requirements of the compensation of good-will. 5.2. Compensation of good-will for concessionaires and franchisees? 5.3. The hybrid nature of the good-will compensation. References.

1. Introduction: general features and legal framework of distribution contracts

Under the generic designation 'distribution contracts', Portuguese business law recognizes several species of contracts, notably agency (*agência*), commercial concession (*concessão comercial*) and franchising (*franquia*).[2]

Agency (*agência*) is a legal type of contract, i.e. it has a name and a special regulation provided for by legislation – the Agency Act.[3] On the contrary,

[2] The 'doctrinal type' of distribution contracts has been construed, in Portuguese legal science, by Prof. António Pinto MONTEIRO (*Direito comercial - Contratos de distribuição comercial*, Coimbra, 2002, 69-74), based upon a 'common ground of legal issues' and 'global image', as an autonomous series of contracts, the regulatory matrix of which would be Decree-Law No 178/86. On this statutorily atypical category of commercial contracts see also, for example, from the same Author, 'Do regime jurídico dos contratos de distribuição comercial', *Revista Brasileira de Direito Comparado*, 22 (2002), 33-50. Se also António Menezes CORDEIRO, *Manual de Direito Comercial*, 2ª ed., Coimbra, 2007, 651-692; J. A. Engrácia ANTUNES, *Direito dos Contratos Comerciais*, Coimbra, 2009; Fernando A. Ferreira PINTO, *Contratos de distribuição. Da tutela do distribuidor integrado em face da cessação do vínculo*, Lisboa, 2013. Some Portuguese speaking countries provide specific statutory regulation of distribution contracts which is clearly influenced by the Portuguese Agency Act and its underlying doctrine. See notably Angola Law No 18/03 of 12 August, and the Commercial Code of Macau. For an overview of the Macanese codification of distribution contracts see Alexandre LD PEREIRA, 'Distribution Agreements: The Regulation of Agency, Concession and Franchising Contracts in the Commercial Code of Macau', in Jorge GODINHO (ed.), *Studies on Macau Civil, Commercial and Criminal Law*, Lexis/Nexis, Hong Kong, 2010, 187-205.

[3] Decree-Law No 178/86 of 3 July, as amended by Decree-Law No 118/93 of 13 April, to implement Council Directive No 86/653/EEC of 18 December 1986 on the coordination of the

commercial concession and franchising agreements are deemed *atypical contracts*. Nevertheless, both species are accepted as valid and enforceable agreements under the basic *principle of freedom of contract* as enshrined in Article 405 of the Portuguese Civil Code: within the limits of the law, contracting parties can freely set up the content of the contracts, conclude contracts different from those foreseen in this Code or set up the terms they wish (1); parties also can conclude mixed contract by joining in the same contract rules of two or more typical contracts (2).[4]

As atypical contracts, both concession and franchising contracts are regulated, to begin with, by the terms agreed by the parties; *general principles* such as freedom of form and the rules on the formation of the agreement and on defects of will, also apply to atypical contracts because they qualify as legal transactions (*negócios jurídicos*). The same is valid for general *principles and rules on contracts as source of obligations* (notably the principles of sanctity and privity of contract, transfer of property by consensus, assignment of the contract position, *exceptio non adimpleti contractus*, resolution of the contract) as well as for the general principles and rules on *breach of contract* (performance or fulfilment of contract obligations).

Notwithstanding, before resorting to the general principles and rules provided by the Civil Code, there may be a situation of *analogy*, i.e. gaps of legislation are to be filled by statutory rules the rational of which can assimilate them (*eadem ratio*) as well as by legal principles which the operator ought to create should he legislate within the spirit of the system (Article 10 of the Civil Code). In particular, the regulation of the *mandate* contract is deemed applicable to services contracts for which there is no specific statutory

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laws of the Member States related to self-employed commercial agents. On the Agency Act see, in detail, António Pinto MONTEIRO, *Contrato de agência. Anotação ao Decreto-Lei n.º 178/86,* 7ª ed., Coimbra, 2010. Hereinafter, unless otherwise stated, the articles referred to belong to the Agency Act.

[4] On freedom of contract as a basic principle of Portuguese contract law see Manuel A. Domingues de ANDRADE, *Teoria geral da relação jurídica*, vol. II, Coimbra, 1966, 27-8; Pires de LIMA & Antunes VARELA, *Código Civil Anotado*, Vol. I, 4.ª ed. col. M. Henrique MESQUITA, Coimbra Editora, 1987, 355-6; João de Matos Antunes VARELA, *Direito das obrigações*, vol. I, 10ª ed., Coimbra, 2000, 230-67; Mário Júlio de Almeida COSTA, *Direito das obrigações*, 9ª ed., Coimbra, 2006, 206-251; Carlos Alberto da Mota PINTO, *Teoria geral do direito civil*, 4ª ed. por António Pinto MONTEIRO e Paulo Mota PINTO, Coimbra, 2005, 107-118; Luís Manuel Teles de Menezes LEITÃO, *Direito das obrigações*, vol. I, 8ª ed., Coimbra, 2009, 21-51. On atypical contracts see also Pedro Pais de VASCONCELOS, *Contratos atípicos*, Coimbra, 1995; Rui Pinto DUARTE, *Tipicidade e atipicidade dos contratos*, Coimbra, 2000.

regulation (Article 1156 of the Civil Code). It means that if concession and franchising contracts qualify as services contracts, the regulation of mandate should apply.

At this point it should be remarked that the agency contract may be understood as an *evolution* of the mandate contract in what concerns business activities.[5] Accordingly, the agency regulation should be applied to commercial services for which no specific rules have been designed, and it should prevail over older rules of mandate provided both in the Civil Code (Articles 1157 to 1184) and in the Commercial Code (Articles 231 to 277), notwithstanding these regulations apply in case there's no special agency rule to the contrary.[6] So, if concession and franchising qualify as services contracts then the Agency Act – along with the mandate regulation – applies to such contracts. Do concession and franchising contracts qualify as services contracts?

In order to answer to this question it is necessary to check whether concession and franchising match with the legal notion of services contract. According to the definition of the Civil Code, in a services contract a party is bound to provide to the other a certain outcome or result of his/her intellectual or hand work, with or without retribution (Article 1154). Concession and franchising contracts are not defined by legislation. However, legal literature and jurisprudence point out their main features, due to which they can be assimilated by the notion of service contracts, in particular the agency service.

In systematic terms it means that the regulation of the mandate contract is applicable to concession and franchising contracts as atypical contracts. The regulation of mandate is to be supplemented with other rules, notably those of the agency contract (as an evolution of mandate adapted to the environment of modern business life), as well as, considering the mixed and complex nature of concession and franchising contracts, the regulation of unfair standard terms, product liability and intellectual property (IP) licensing (including both IP specific rules and those of the lease contract which apply to such licenses).

Notwithstanding this, it is common understanding that the agency regulation, as provided by Decree-Law No 178/86 serves as "model regulation"

[5] António Menezes CORDEIRO, Direito Comercial, cit., 651-692.
[6] For ex., the prohibition that the agent competes during the term of the contract provided under Article 253 of the Commercial Code.

for atypical distribution agreements[7]. The preamble of the Agency Act, drafted after Prof. Pinto MONTEIRO's project[8], expressly states that its provisions are to be applied, by analogy – if and where it takes place – to concession contracts notably those on the termination of contract.

2. Agency contract - legal definition and basic elements

The legal definition of agency enshrines the economic function of commercial agents which consists of helping other enterprises to search for business chances in the market, to penetrate and to remain therein. The Agency Act (Article 1(1)) defines it as the contract by which one of the parties (the *agent*) undertakes, against remuneration, to promote the conclusion of contracts on behalf of the other party (the *principal*) in an autonomously and stable manner, possibly with the designation of a certain zone or circle of clients. This legal notion embeds several elements. [9]

2.1. Market prospection and contract negotiation

To begin with, the agent is committed to *promote* the conclusion of contracts on behalf of the other party. This obligation implies a complex activity of studying the market, in order to find clients for the principal, and to prepare the terms of the contracts.

It does not require the conclusion of contracts and, even if the agent has been granted powers of representation, contracts are concluded in the name of the principal. This element distinguishes the agency from related contracts, such as commission contracts, in which there is no general obligation of promotion and moreover the commission agent acts under his own name. The

[7] See e.g. Supreme Court of Justice, judgments of 27 October de 2011 (proc. 8559-06.2TBBRG.G1.S1), of 15 December 2011 (proc. 1807/08.6TVLSB.L1.S1) and of 20 June 2013 (proc. 178/07.2TVPRT.P1.S1).

[8] 'Contrato de agência (Anteprojecto)', *Boletim do Ministério da Justiça* nº 360 (1986).

[9] Cf. António Pinto MONTEIRO, *Contrato de agência. Anotação*, cit., 49 f; Id. *Contratos de distribuição comercial*, cit., 64 f (with references of case-law and national and comparative literature). The Author argues that 'the provisions on termination of the agency contract seem perfectly adequate to concession and franchising', but its application 'is not automatic' but rather 'byanalogy' (pp. 67, 69)

commercial commission is a mandate by which the commission agent undertakes to practice commercial acts under his own name, but on behalf of the other party, against payment (Article 266 of the Commercial Code).

On the other hand, the obligation of promotion separates the agency from the traditional mandate, the typical activity of which is to carry out one or more legal acts on behalf of the principal (Article 1157 of the Civil Code). Originally regulated under the mandate provisions, agency became an independent statutory contract type.[10] However, the activity of the agent in what concerns seeking clients and negotiating with them produces legal effects, notably pre-contractual liability (Article 227 of the Civil Code) and defects of will such as fraud (Article 253 of the Civil Code).

2.2. Eventual powers of representation and apparent agency

Granting to the agent powers of representation to the conclusion of contracts is an eventual element in agency. It must be done in writing (Article 2(1)) and originates a presumption of authorization to claim and to receive payments on behalf of the principal (Article 3(1) (2)).[11] In case the agent without powers of representation concludes a contract in the name of the principal, the contract does not produce effects towards the principal if he does not ratify it (Article 268(1) of the Civil Code applicable *ex vi* Article 22(1)). However, contrary to the general rule of the Civil Code (Article 268(2)(3)), ratification does not require written form and, in case the principal knows about the conclusion of the contract and its core terms and does not oppose to it within 5 days upon such knowledge, the contract is deemed ratified (Article 22). This is a situation of silence as a valid means of declaration of intent according to Article 218 of the Civil Code, for reasons of *favor negotii* and protection of good-faith of third parties.

[10] António Pinto MONTEIRO, *Direito Contratos de distribuição comercial*, cit., 99.
[11] Holding that, in principle, the existence of representation powers does not imply the attribution of the power to decide whether and how the contract is to be concluded, see António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 87 (quoting BALDI for the same opinion). Perhaps one could distinguish here between acts ofmanagement and acts of disposition.

Moreover, the agent has the obligation to inform third parties about his powers of representation and credit charging, namely by means of notices in his workplace and in every identification document of agency (see also Article 242 of the Commercial Code). In case the principal does nothing despite he is (or should be) aware that the agent is presenting himself as full agent without having powers of representation, there may be 'apparent representation' meaning that contracts agreed by his agent may produce effects towards him although he did not ratify them.

In fact, the protection of good-faith also justifies the so-called *apparent representation* in which a deal concluded by an agent without powers of representation produces effects towards the principal in case there are relevant reasons, which, as objectively evaluated taking into account the circumstances of the case, justify the trust of a good-faith third party in the legitimacy of the agent to conclude the contract, provided that the principal has also contributed to such trust (Article 23). For the rule of 'apparent representation' to apply it is also required that the principal has communicated to the good-faith third party his opposition to the contract concluded by the agent within the mentioned period of 5 days, and it means that the contract will produce effects towards the principal even against his will.

In order to evaluate the good-faith of the third party it is important to take into account whether the agent has complied with the obligation to inform any interested party about his powers, notably by means of posts in his office and in every document in which he identifies himself as agent, in special to specify whether he does or not have powers of representation and credit charging (Article 21). It seems a relevant circumstance e.g. where the principal is aware of misleading documents about the powers of representation of the agent and takes no measure to stop the agent from using them. It may also be the case where the principal gives orally representation powers to the agent, but then does not confirm it in writing and argues invalidity of representation due to lack of required form. In short, the *ratio* behind this solution is to fight the abuse of rights and to protect good-faith of the parties.[12]

[12] See, with more references, António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 88-90.

2.3. Acting on behalf (and in the interest) of the principal with autonomy and stability, exclusivity not required

The acts of the agent produce legal effects towards the principal (Article 500 of the Civil Code). Contrary to the concessionaire (except where acting as commission agent) and the franchisee, the agent acts on behalf of the principal and therefore, in principle, he does not bear the risk of the transactions, unless he assumes e.g. an obligation of *del credere*, i.e. he guarantees payments of the customers.

On the other hand, agency is not a labor contract, where the worker commits himself, against a salary, to provide his intellectual or workforce to another person, under her authority and direction, in terms of legal subordination. In agency agreements, despite the agent has the obligation to respect the instructions of the principal, he carries out his activity with *autonomy* (Article 7(a)), and that's why he pays the expenses of the normal exercise of his activity, unless the parties agree otherwise (Article 20).[13]

Agents act with *stability*, establishing a close, a usually lasting, link of cooperation with the principal.[14] This feature has special meaning concerning the term of the contract. Despite the parties can agree a period of time concerning the duration of the contract, in case they don't the contract is deemed to be concluded without term, i.e. for an indefinite period (Article 27(1)). Moreover, a contract concluded for a fixed period is converted or transformed into a contract for an indefinite period in case the parties continue to perform it after the expiration of the fixed period (Article 27(2)).

[13] See notwithstanding Article 243(§1) Commercial Code concerning the performance of mandate which requires the provision of funding.

[14] In this relation of close cooperation the agent is empowered to request urgent measures to safeguard the interests of the principal and he has the obligation to inform the principal namely about the clients' solvency, the market situation and perspectives of evolution, to render accounts, and to respect confidentiality of the secrets of the principal (Articles 2(3), 7, 8). At the same time, the agent is entitled notably to obtain from the principal all the elements that are necessary to the exercise of his activity as well as to receive immediate notice in case the principal cannot conclude the contracts that have been agreed or expected according to the circumstances (Article 13). The relation of close cooperation does not prevent the agent from competing, after the termination of the contract, with the principal, unless the parties agree otherwise. In case they do, the obligation of non-competition has to be agreed in writing and cannot last more than 2 years nor exceed the area or circle of clients (Article 9).

Exclusivity in favor of the agent, meaning that the principal will not use other agents inside the same area or group of customers for exploring activities competing with those of the exclusive agent, has to be granted in writing (Article 4). Therefore, it is legally neither a necessary nor a natural element of agency.

3. Other distribution contracts: concession and franchising

3.1. Basic features of commercial concession

Legislation does not provide a notion of commercial concession. In literature and jurisprudence, it is considered a "framework contract" by which the principal integrates independent entrepreneurs within his distribution network. It is a «vertical agreement» of integration by which, instead of setting up branches and subsidiaries, the enterprise establishes a network of independent concessionaires, therefore saving investment in offices, staff, and other expenses of direct establishment. By means of the concession contract one of the parties, the concessionaire, undertakes to buy and to resell, in his name and for his own account, goods produced or distributed by the other party, the principal, in a certain zone and in a stable manner, under a certain degree of control and supervision by the other party, including his organization, commercial policy and customer care.[15]

The concessionaire acts on behalf of himself and under his own name, has the right and the obligation to buy goods from the principal and to sell them in a certain zone. Usually the parties agree to an obligation of minimum sale. The concession implies confidentiality concerning each other's business secrets and, in principle, reciprocal exclusivity, meaning that, on one hand, the concessionaire cannot sell nor promote sales of goods that compete with the principal's, who, on the other hand, cannot sell directly or indirectly goods that are the object of the contract in the same area or group of customers. Exclusivity means also that in principle the concessionaire can only buy goods that are object of the contract from the principal or from other authorized

[15] António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 108-10; Id. 'Contratos de agência, de concessão e de franquia («franchising»)', *Estudos em Homenagem ao Prof. Doutor Eduardo Correia*.

dealers. The attainment of the purpose of the contract implies a lasting and stable relationship between the parties, and it is often concluded without a fixed period. [16]

The main obligations of the principal are to sell and to deliver in due time the goods that he produces or distributes (1), to license his distinctive signs (e.g. trademarks) and to provide technical and commercial information required for running the concession (2), and to render technical assistance (3).

Concerning the concessionaire, regardless of his legal independence, he acts under a certain degree of *control* by the principal. In special he has to respect the *commercial policy and instructions* of the principal, namely those related to sales methods and advertising, including recommended *resale prices,* to provide *post-sales assistance* under the terms and methods fixed by the principal, and to provide all the information that he requests (e.g. on the market situation and perspectives of evolution). Eventually, the concessionaire may have an obligation of minimum sale, undertaking to sell periodically a minimum amount of goods or to reach a certain volume of business or market share. The concessionaire may also agree to an obligation of non-competition after the termination of the contract.

The control of the principal is also reflected on the issue of assignment of the contractual position, as the principal will normally control whether the assignee does meet his standards for concessionaires and offer enough guarantees of performance.

In short, concession is a framework contract between independent parties. The concessionaire acts on his name and by his own account, assumes the risk of business, provides post-sale assistance and accepts control by the other party. Despite it is more than a simple services contract, the commercial concession creates between the parties a close and usually lasting relation of

[16] See e.g. Supreme Court of Justice, judgment of 20 June 2013 (proc. 178/07.2TVPRT.P1.S1), holding as main features of concession contracts: the stability of the link; the obligation of principal to sell the goods to the concessionaire; the obligation of the concessionaire to purchase and to resell the products of the principal; the activity of the concessionaire on his account and under his name; autonomy; exclusivity; an area for conducting the concession. See also Maria Helena BRITO, *O Contrato de Concessão Comercial*, Coimbra, 1990; António Menezes CORDEIRO, 'Do contrato de concessão comercial', *Revista da Ordem dos Advogados*, Ano 6 (2000), II, 597-613; José Alberto VIEIRA, *O contrato de concessão comercial*, Coimbra, 2006.

cooperation, with several elements of services and which goes beyond repeated operations of purchase-and-sale.

3.2. Franchising elements and features

In franchising agreements, franchisees are integrated in the entrepreneurial networks of franchisers. It is a contract of vertical integration, as the parties are not in the same level of production or distribution. Franchisees are licensed by franchisers to run a *business system* during a period of time and within a market territory or area defined by the contract. The franchisee acts under his own name and by his own account, taking the risk of business, but carrying out business under the control of the other party and under his mark and know-how, including trade-dress.[17]

There are *advantages* and *disadvantages* for both parties in franchising. Franchisers can enter into new markets by means of setting up independent branches without the costs and risks of establishment. Based upon intellectual property rights and know-how, franchisers control the activity of franchisees, fixing contract terms that give them almost full control over franchisees. On the other hand, franchisees have the chance to run a usually successful business system with almost direct access to the market and customers. In order to enter into the franchising network franchisees usually pay an initial (or entrance) fee and periodic royalties for the use of the licensed business system, including know-how, trademarks and other goods protected by intellectual property rights.

There are several types of franchising. In particular a distinction is made between *master* franchising (by which franchisers grant a license to franchisees in order to set up a network of franchises in a certain territory) and *servant* franchising (the franchiser or the master franchisee grant licenses to end franchisees to run the franchise business in shops open to the public), the former strongly resembling like an agency contract. A franchise is licensed,

[17] António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 120-1; Id. 'Contratos de agência, de concessão e de franquia («franchising»)'. On franchising contracts see also, notably, António Menezes CORDEIRO, 'Do contrato de franquia («franchising»): autonomia privada versus tipicidade negocial', *Revista da Ordem dos Advogados*, Ano 48 (1988), 63; Alexandre L. Dias PEREIRA, 'Da franquia de empresa', *Boletim da Faculdade de Direito da Universidade de Coimbra*, vol. 73 (1997), 251-78; Maria de Fátima RIBEIRO, *O contrato de franquia (franchising). Noção, natureza jurídica e aspectos fundamentais de regime*, Coimbra, 2001; L. Miguel Pestana de VASCONCELOS, *Contrato de franquia*, 2ª ed., Coimbra, 2010.

against indirect payment (initial fee + periodical royalties), in a certain zone, to produce and/or to sell goods and/or to provide services under the entrepreneurial image and control of the franchiser and according to his know-how and technical assistance.

The object of the contract is a license to run a business system, either the production or the sale of goods or the provision of services, in a certain zone specified in the contract, within which the parties cannot in principle compete with each other (e.g. manufacturing or selling competing goods or licensing new franchises). In order to protect his industrial and intellectual property rights or to preserve the identity and reputation of the franchise network, franchisers control the suppliers' network concerning location, machinery and other goods or services used in the assembly or running of the franchise.

4. Termination of distribution agreements upon notice

Distribution agreements have in common several legal issues concerning the termination of contract. For example, in agency there are issues concerning the right to commission for contracts concluded after the termination of the agency, compensation for the obligation of non-competition, and compensation of good-will. This paper focuses periods of notice and compensation of good-will.

Unilateral termination upon notice is one of the regulated modes of termination of the agency contract, together with termination by mutual agreement, expiration and justified rescission (Article 24). Either party may freely terminate contracts without term (Article 28(1)), i.e. contracts concluded for an indefinite period or those which the parties have continued to perform despite the term has expired (Article 27).[18]

This right of termination of the contract does not require justification nor does its exercise entitle the other party to any compensation. The rational of this

[18] However, according to Pinto MONTEIRO (*Contratos de distribuição comercial*, cit., 94-5), it is possible that contracts with fixed term contain a clause allowing for the renewal of the contract for another fixed period, unless any of the parties gives notice of its intent not to postpone the contract.

right is the prohibition of perpetual legal bounds as a principle of public order, and it is also to be found, with different patterns, in other contracts, such as leasing, services, labor, partnership, etc.[19]

However, in order to safeguard the interests of the other party, it is necessary to give a notice of termination which, in agency, has to be written and with specific terms depending upon the duration of the contract (Article 28): if the contract lasts for less than one year, the period of notice is one month; if the contract has already entered into its second year, the period of notice is two months; in the other situations, the period of notice is three months.[20] The Agency Act provides minimum periods of notice, but the parties are free to agree on longer periods, insofar as the periods in favor of the principal are not shorter than those in favor of the agent (Article 28(3)). In the calculation of the period of notice it shall be considered the period already occurred concerning contracts for a fixed period which continue to be performed by both parties after that period has expired and therefore are deemed to be converted in contracts for an indefinite period (Article 28(4)).

Noncompliance with the period of notice gives rise to liability for damages caused by the lack of notice, the agent being entitled to ask, in alternative, an amount calculated upon the average monthly remuneration received during the preceding year multiplied by the lacking period of notice, or where the contract lasts for less than one year the average monthly remuneration received while the contract was performed (Article 29(1) (2)).

Is this regulation of termination upon notice applicable to other distribution agreements? This mode of termination is to be admitted also in concession and franchising, but the periods of notice may prove insufficient, as concessionaries and franchisees have to undertake significant investments in offices, machinery, and staff. In fact, the periods of notice may not enable them to amortize the costs and expenses that they had to incur for running the concession or the franchising. In general, the agency periods of notice do not seem enough to

[19] Cf. António Pinto MONTEIRO, *Contrato de agência. Anotação,* cit., 127-133; Id., *Contratos de distribuição comercial*, cit., 134-5.

[20] The wording of the provision is not perfect as it suggests that the free termination of a contract lasting already for two years and one day would require a period of notice of three months. Moreover, the Portuguese legislation did not take advantage of longer periods of notice admitted by the Council Directive 86/653/EEC on self-employed commercial agents (Article 15) and, on the contrary, reduced those which existed before the implementation of the Directive.

safeguard the interests of concessionaires and franchisees concerning the recovery of the start-up investment and the achievement of a minimum reasonable profit.[21]

The distributor bears the risk of termination of the contract upon notice and therefore he is expected to have had that in mind when deciding to make the investments. However, the distributor is sometimes the weaker party in the contract, accepting the conditions which are proposed by the other party to enter into the distribution network. It is a principle of contract justice that no party should be vulnerable to the free will of the other in lasting contracts which required substantial investments. It is submitted as a general principle of contract law derived from good-faith and the prohibition of abuse of right that a contract can only be freely terminated once a *reasonable period* has passed, not immediately or soon after it starts to produce effects.[22]

Article 19(f) of the Act on Unfair Standard Terms[23] provides the prohibition in B2B contracts, according to the business standards framework, general contract terms which entitle one of the parties to terminate the contract immediately or with insufficient period of notice, without adequate compensation, in case the contract has required from the other party substantial investments or other expenses.

This provision applies also to concession and franchising contracts. However, the broad terms of this provision may not be enough to give distributors enough protection against free termination upon notice. And in fact it doesn't add much to the protection afforded by the Agency Act.

Article 12(2)(b) of the Competition Act[24] provides as a possible situation of abuse of economic dependence the unjustified termination, total or partial, of an established commercial relation, having in consideration previous commercial

[21] *Contratos de distribuição comercial*, cit., 138.
[22] António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 137 (upholding the insufficiency of these notice periods for these distributors to recover their investments, but also arguing that an express proposal to modify the contract implies a tacit notice of termination unless the changes are accepted – p. 139-42).
[23] Decree-Law No 446/85, as amended by Decree-Law No 220/95 and Decree-Law No 249/99. Outlining the importance of this Act for concession and franchising contracts, see António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 131. On the Standard Terms Act see notably Inocêncio Galvão TELLES, *Manual dos contratos em geral*, 4ª ed., Coimbra Editora, 2002, 311-335.
[24] Law No 19/2012 of 8 May. See for ex., with more references, Alexandre L. Dias PEREIRA, 'Direito da concorrência e liberdade de empresa', *Boletim da Faculdade de Direito da Universidade de Coimbra*, vol. 89/2 (2013), 97-131.

relations, usages recognized in the field of economic activity or the stipulated contract terms. This situation exemplifies the general prohibition, provided that it is capable of affecting the functioning of the market or the structure of competition, of abusive exploitation by one or more undertakings of the situation of economic dependence in relation to which any other undertaking is placed due to lack of equivalent alternative (Article 12(1) of the Competition Act). It is understood that there is no equivalent alternative where the provision of the good or service in question, notably the service of distribution, is rendered by a restrict number of undertaking and the dependent undertaking cannot find identical conditions by other commercial partners within a reasonable period.[25]

In concession and franchising agreements, it is a basic element the use of distinctive signs (notably trademarks) and other immaterial goods of the other party, including know-how and trade-dress. As such use is temporary, even if for an indefinite period of time, and against payment, the closest contract legal type may be lease (*locatio*).[26]

Taking into account the specificities of commercial concession in relation to agency, the courts do not blindly apply the period of notice of the Agency Act to other distribution agreements. The Supreme Court of Justice, in judgment of 15 November 2007 (proc. 07B3933), held that it is not unlawful by reasons of bad-faith or abuse of right the free termination of a contract of commercial concession with a notice period of one year with a view to restructuring its network of concessionaires, notwithstanding the concessionaire in accordance with the contract still continued to invest in the concession during that and the preceding years. The court seems to have reasoned *a simile* with competition

[25] Article 12(3) of the Competition Act. A concise definition of abuse of economic dependence is given by the Supreme Court of Justice in judgment of 20 June 2013 (www.dgsi.pt).

[26] Pinto MONTEIRO (*Contratos de distribuição comercial*, cit., 133) points to the lease contract to find regulatory criteria for the term of distribution contracts. Besides, this regulation should naturally apply where paid intellectual property licenses are involved, not to mention that we think that franchising contract are in essence a form of business lease. The regulation of lease provides that either party may oppose to the renovation of contracts upon notice to the other with a minimum period of 120 days if the contract lasts for six years or more (Article 1055(1) (a) of the Civil Code). By means of integration or combination we would add this period of notice to the agency regulation. Besides, it is close to the original period of notice concerning agency contracts for periods longer than one year. In fact, the original period of notice provided by the Agency Act for contracts lasting for more than one year was between three and twelve months, according to its importance, the expectations of the parties and other circumstances of the case.

rules, as Regulation (EC) 1475/95 of the Commission[27] allowed the principal to terminate the contract upon notice with, at least, one year period in case of restructuring the network of distribution.

5. Compensation of good-will

5.1. Requirements of the compensation of good-will

The Agency Act entitles the agent to a compensation of good-will, after termination of the contract, if the following requirements are met (Article 33(1)).[28]

1º - The agent has brought new customers to the principal or has significantly increased the volume of business with clients already existing when the agency started. It is understood that this requirement may be fulfilled where the agent keeps the customers in a situation of market recession.

2º - The principal continues to extract substantial benefits from the business with such customers. It is enough that the principal can reasonably take advantage from the activity undertaken by the agent. But in case he discontinues his business with such customers, the compensation for good-will will be excluded.

3º - The agent does not receive any further retribution for contracts that he has negotiated or concluded, after the termination of the contract, with customers that he arranged for the principal. This requirement does not refer to commissions due to the agent for contracts concluded after the termination of the contract that he proves to have negotiated or, having prepared them, its conclusion is due mainly to the activity undertaken by him, insofar as such contracts are concluded within a reasonable period after the termination of the

[27] It has been replaced by Regulation (EC) No 1400/2002 and this, in turn, has been replaced by Regulation (EU) No 461/2010 of the Commission of 17 May 2010.

[28] On the compensation of good-will see António Pinto MONTEIRO, *Contrato de agência. Anotação*, cit., 142-156; Id., *Contratos de distribuição comercial*, cit., 149-168 (with more references, notably Luís Manuel Teles de Menezes LEITÃO, *A indemnização de clientela no contrato de agência*, Coimbra 2006, and Carolina CUNHA, *indemnização de clientela do agente comercial*, Coimbra 2003).

agency (Article 16(3)). This remuneration is part of the right to commission as such and it is different from the compensation of good-will.[29]

Besides, the compensation of good-will is independent from any other compensation which may be due (Article 33(1)). It means that the compensation of good-will adds to the compensation due for breach of contract, notably for refusal to pay the remuneration guaranteed by the right to commission. But it can still add to other compensations.

First, in case the principal terminates the contract without complying with the period of notice he has to compensate the agent for damages caused by the lack of notice (Article 29). Second, in case the principal terminates the contract due to circumstances which make impossible or seriously harm the achievement of the purpose of the contract, so that no party can be required to keep on with the contract until the expiration of the agreed period or resulting from the period of notice (Article 30(b)), the agent is entitled to an equitable compensation (Article 31) for immediate termination upon this 'objective justification'[30]. Third, in case the principal does not comply with any of his contract obligations, the agent is entitled to compensation for damages caused for breach of contract (Article 32(1)). In this regard, it should be remarked that the agent has the right to a compensation for the obligation of non-competition after the termination of the agency contract (Article 13(g)). Is this compensation relevant for purposes of the compensation of good-will?

According to the Directive on commercial agents, it could be, as Member States adopting this model of compensation of good-will (indemnity in the English version) based upon German law (in alternative to the French model of compensation for damage which the agent suffers as a result of the termination of his relations with the principal – Article 17(3)) might provide as a circumstance to evaluate whether it is equitable that the agent has an obligation of non-competition following the termination of the contract as a restraint of trade clause (Article 17(2)(a) and Article 20 of Directive on commercial agents).

[29] António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 158 ("tal comissão reporta-se directamente à sua intervenção nesse contrato, ainda quando era agente.").
[30] António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 146 (pointing out the connection of this right of termination regardless of fault with the institute of abnormal modification of circumstances – *grosso modo*, *rebus sic standibus* – which render performance *undemandable*, as provided under Article 437 of the Civil Code).

The Portuguese Agency Act does not provide that the compensation of good-will must be equitable, despite one of the circumstances mentioned in the Directive is apparently established has a requirement, *per se*, of the compensation, i.e. the commission lost by the commercial agent on the business transacted with such customers. It is not clear, however, whether the Directive separated the compensation of good-will from the right to commission, as the Portuguese Agency Act has established concerning remunerations for contracts concluded within a reasonable period after the termination of the agency.

In Portugal, compensation of good-will is independent from any other compensation, notably that for damages caused due to breach of contract, such as refusal to pay due commission to the agent. Concerning the obligation of non-competition, it must be agreed in written and means that the agent cannot conduct, after the termination of the contract, business activities which compete with those of the principal (Article 9(1)). Competition is not defined, but taking into account Article 20(2) (b) of the EC Directive on commercial agents, it relates to the kind of goods covered by his agency under the contract.[31] Moreover, the Agency Act provides that the obligation of non-competition cannot last for more than two years and must be limited to the geographical area or group of customers entrusted to the agent (Article 9(2)).

The obligation of non-competition does not depend upon exclusivity of the agent, i.e. the obligation of the principal not to use within the same area or group of customers, other agents for activities competing with those of the exclusive agent (Article 4). However, in case of exclusive agent, the compensation for non-competition seems a kind of retribution for contracts negotiated or concluded by the agent, after the termination of the contract, with clients brought by him. But the exclusivity of the agent is not a requirement of the compensation of good-will.[32]

[31] The Supreme Court of Justice, in judgment of 26 September of 2013 (proc. 6742/1999.L1.S2), adopts, for purposes of unfair competition, a wider notion of competition, including not only identical, interchangeable or complementary economic activities, but also those which target the same kind of customers.

[32] For a critical comment to judgment of 12 March 2015, in which the Supreme Court of Justice ruled that the compensation of good-will requires the infringement of a clause of exclusivity, and making clear that the compensation of goodwill is independent from such clause, which may be relevant only to ascertain whether the contract has terminated by reasons due to the

Besides, while the contract is in force, the right to commission of the exclusive agent includes not only the contracts that he has prepared and those concluded with customers that he brought, but also contracts concluded by the principal or any other of his agents with customers belonging to that area or group of customers (Article 16(1) (2)).

The compensation of non-competition does not necessarily exclude the compensation of good-will. The former refers to activities which compete with those of the principal, while the later seems to require any business relations with customers to be discontinued, even if for non-competing activities, between the agent and the customers brought by him. With the compensation of good-will legislation recognizes an economic value in the agent-customer relation of trust and out of which it is possible to take economic advantages not only in the sector of activity of the principal but also in any other sector of economic activities. These are what Prof. Ferrer CORREIA used to call "situations of fact with economic value"[33], which are of greatest importance in assessing and evaluating undertakings. In case the agent is compensated for an obligation of non-competition, he will be nevertheless entitled to the compensation of good-will if, after the termination of the agency, he cannot keep any commercial relations with the clients brought by him to the principal (e.g. in case of retirement). At stake it is the 'continuity of the clientele' only in the hands of the principal.[34]

The compensation of good-will is not due if the contract is terminated by reasons imputable to the agent, including where he assigns his position to another person with the agreement of the principal (Article 33(5)).[35] The interpretation of the 'reasons imputable to the agent' must take into consideration the principle of protection of the agent. Compensation of good-will is excluded where the contract has terminated due to fault of the agent, notably

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agent, therefore excluding the compensation, see António Pinto MONTEIRO, 'S.T.J., Acórdãos de 12 de Março de 2015 e de 17 de Maio de 2012. (Sobre os requisitos legais da indemnização de clientela do distribuidor comercial)', *Revista de Legislação e de Jurisprudência*, Ano 144º (2015), nº 3992, 380 ("*a indemnização de clientela não está dependente de uma cláusula de exclusividade*").

[33] *Lições de Direito Comercial*, vol. I, col. Manuel Henrique MESQUITA e António A. CAEIRO, Universidade de Coimbra, 1973, 203.

[34] António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 166 ('*continuidade de clientela*').

[35] The assignment of the contract position requires the agreement of the other party according to general rule of the Civil Code (Article 424).

in case of serious or repeated breach of contract (Article 30).[36] Let's suppose that the agent infringes the obligation of confidentiality – which remains after the termination of the contract -, using or revealing to third parties secrets which he has been entrusted with by the principal or of which he had knowledge of in the course of his activities (Article 8).[37] Those secrets may be protected as confidential and undisclosed business information according to Article 318 of the Industrial Property Code. The infringement of the obligation of confidentiality may justify the immediate termination of the contract for faulty lack of performance and therefore excludes the compensation of good-will.

However, the termination upon notice by the agent to the principal, although it is due to the agent it should not necessarily be a reason imputable to the agent for purposes of excluding the compensation of good-will. According to Article 18(b) of the EC Directive on commercial agents, the compensation of good-will is not excluded where the agent terminates the contract by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities. In other situations where the agent has terminated the contract, despite it may be an obstacle to his economic freedom - as the loss of the compensation of good-will may serve as penalty -, it seems that the agent will not be entitled to it. In view of the actual regulation[38], the compensation of good-will serves then as a prize of performance and fidelity of the agent towards the principal. Besides, for the compensation of good-will to be due it is necessary that the agent has transferred his customers to the principal, meaning that he will not, after the termination of the contract, keep business relations with such clients even in sectors of activity which do not compete with the principal.

In any case, were the reasons imputable to the agent to be determined in a pure factual basis, then the death of the agent would exclude the compensation of good-will, which however can be claimed by the heirs of the agent within one year following the termination of the contract (Article 33(2) (4)

[36] Supreme Court of Justice, judgment of 15 December 2011 (proc. 2/06.3RBCTB.C1.S1).
[37] The right to information is a basic right of the agent, according to good-faith and in order to the full achievement of the contract purpose (Articles 12 and 13(b)(c)(d)).
[38] A. Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 155-7; Id. *Contrato de agência. Anotação*, cit., 146-7.

Agency Act and Article 17(4) Directive 86/653), without further consideration as to the cause of his death, notably suicide.

The compensation of good-will is calculated in equitable terms, with a plafond of an annual compensation calculated upon the agent's average annual remuneration over the preceding five years or, where it lasted for a shorter period, the average for the period during which the contract has been in force (Article 34 Agency Act and Article 17(2) (b) Directive 86/653).[39]

5.2. Compensation of good-will for concessionaires and franchisees?

Are concessionaires and franchisees entitled to the compensation of good-will after the termination of the contract?

In case the distributor acts like an agent, he is entitled to compensation of good-will as agent. Otherwise, only by means of analogy can the compensation of good-will be granted to distributors. The Supreme Court of Justice has repeatedly and consistently applied the compensation of good-will to the concessionaire[40], but expressed reservations concerning franchisees.[41]

In principle, concessionaires and franchisees can attract new customers to the network of the principal/franchisor or substantially increase the volume of business with existing customers. Market analysis and economic studies may provide evidence of the role of the distributor. It's a matter of fact that in concession and franchising, the power of the attraction of the mark of the principal/franchisor is usually strong or very strong. But the same may apply for agents.

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[39] The Report of the European Commission on the application of Article 17 of EEC Directive on commercial agents, COM (96) 364 final, illustrates the criteria of calculation of the compensation.

[40] Supreme Court of Justice, judgments of 5 June 1997 (proc. 96B817), 18 November 1999 (proc. 99B852), 10 May 2001 (proc. 01B324), 21 April 2005 (proc. 04B3868), 22 September 2005 (proc. nº 05B1894), 23 November 2006 (proc. 06B2085), 13 September 2007 (proc. nº 07B1958), 20 January 2010 (proc. 312/2002.C1.S1), 13 April and 4 and 11 November 2010 (proc. 2916/05.9TBVCD.P1.S1 and proc. 4749/03.8TVPRT.P1.S1), 12 May 2011 (proc. 2334/04.6TVLSB.L1.S1), 6 October 2011 (proc. 454/09.0TVLSB.L1.S1), 17 May 2012 (proc. 99/05.3TVLSB.L1.S1), and 29 May 2012. Considering that the compensation of good-will does not apply in the relations between concessionaires and subconcessionaires, Judgment of the Supreme Court of Justice of 31 January 2012 (proc. 2394/06.5TBVCT.P1.S1) – www.dgsi.pt

[41] Supreme Court of Justice, judgment of 9 January 2007 (proc. 06A4416: "No contrato de franquia o dano de clientela só é indemnizável se alegada e provada a contribuição determinante e notória do franquiado para aumento e fidelização de clientela do franquiador.").

The performance of the local distributor may clearly exceed what was expected from him, adding value to the network or increasing the commercial value of the brand, as the principal or franchisor may impose better conditions, concerning notably remuneration, to new distributors. It is not written in the sky that the principal or the franchisor may not derive substantial benefits, after the termination of the contract, from the activity carried out by the distributor, unless he chooses to discontinue his presence in that area or group of clients.

On the other hand, concerning the requirement of ceasing to receive retribution for contracts negotiated or concluded, after the termination of the contract, with customers brought to the network by the concessionaire or the franchisee, both the principal or the franchisor (or a new distributor) may conclude contracts with customers attracted by the distributor, who ceases to receive retribution, i.e. profiting from the customers.

This requirement cannot be directly applied, as the distributor does not directly receive commissions from the other party. However, its reason d'être is also valid concerning concessionaires and franchisees, meaning that the distributor will be entitled to compensation of good-will in case he has significantly increased the value of the brand and is prevented from having commercial relations with the customers that he brought to the network.[42] In case the distributor receives compensation for non-competition after the termination of the contract, it is a relevant factor to take into account. Where they are entitled to keep commercial relations with such customers, either in competing activities or in different sectors of activity, there is no place for compensation of good-will, as the Supreme Court of Justice held in several judgments[43], yet with some volatility. For instance, in its judgment of 17 may 2012, the Supreme Court decided that the fact that the former concessionaire continued to exercise his activity in the sector of motor-vehicles, repairing and

[42] Arguing the application of indent c) of Article 33 also to concessionaires and distributors, due to *eadem ratio*, see António Pinto MONTEIRO, 'S.T.J., Acórdãos de 12 de Março de 2015 e de 17 de Maio de 2012 (Sobre os requisitos legais da indemnização de clientela do distribuidor comercial)', *Revista de Legislação e de Jurisprudência*, Ano 144º (2015), nº 3992, 376-7. A similar result could also be achieved applying the regulation of lease, taking into account the relevant element of trademark licensing in distribution agreements (Articles 1046 and 1273 Civil Code).

[43] Supreme Court of Justice, judgments of 22 September 2005 (proc. 05B1894), 23 November 2006 (proc. 06B2085), 20 October 2009 (proc. 91/2000.S1), 12 May 2011 (2334/04.6TVLSB.L1.S1), 24 January 2012 (proc. 39/2000.L1.S1), and 29 March 2012 (proc. 913/07.9TVLSB.L1.S1).

selling parts purchased to other concessionaires of the network, does not exclude the right to a compensation for good-will, with the argument that no link exists between such activity and the contracts that he concluded while he was a concessionaire of the mark, and also because the distributor has transferred the clientele to the principal by providing him with the database files of the clients.[44]

Later on, in judgment of 29 May 2012 (proc. 913/07.09TVLSB.L1.S1), the Supreme Court hold that the concessionaire is entitled to compensation of good-will if all its requirements are met and the concessionaire ceases to receive remuneration from its former activity as concessionaire, concluding that the compensation is excluded where a former concessionaire continues to sell the products of the principal, namely to the customers that he brought while acting as concessionaire.

Later on, in judgment of 12 March 2015, the Supreme Court ruled that indent c) of Article 33 is not required.[45] But then in judgment of 29 September 2015, the same High Court ruled that three requirements of the compensation of good-will have to be met, *mutatis mutandis*; however in the concrete case it has denied this compensation to the concessionaire because it found that the clientele was due to the 'attractive power' of the trademark and fidelity programs of the principal.[46]

5.3. The hybrid nature of the good-will compensation

[44] For a comment on this judgment, and stressing the value of providing the clients' files to the principal, see António Pinto MONTEIRO, 'S.T.J., Acórdãos de 12 de Março de 2015 e de 17 de Maio de 2012. (Sobre os requisitos legais da indemnização de clientela do distribuidor comercial)', *Revista de Legislação e de Jurisprudência*, Ano 144º (2015), nº 3992, 379.

[45] Supreme Court of Justice, judgment of 12 March2015, proc. 2199/11.1TVLSB.L1.S1, rel. Paulo Sá ("Quanto aos requisitos de indemnização da clientela, previstos no art. 33.º do DL n.º 178/86, de 03-07, não se aplica ao contrato de concessão o da alínea c), por ser específico do contrato de agência.").

[46] Supreme Court of Justice, judgment of 29 September 2015, proc. 1552/07.0TBPTM.E2.S1, rel. Gregório Silva Jesus ("III - No termo do contrato de concessão comercial, o concessionário pode beneficiar da atribuição da indemnização de clientela se provar os requisitos previstos nas als. a), b) e c) do n.º 1 do art. 33.º do DL n.º 178/86. IV - Emergindo dos factos provados que a clientela do posto de abastecimento de combustível não é fruto de especial trabalho de angariação levado a cabo por parte dos recorrentes, mas antes da "força atractiva" da marca A, publicitada nacional e internacionalmente, bem como dos programas de fidelização por ela lançados, não têm os mesmos direito a receber a "indemnização de clientela" prevista na lei.).

The nature of the compensation of good-will is not clearly defined. The Supreme Court of Justice usually follows almost *verbatim* the doctrine of Prof. Pinto Monteiro, in the sense that it is a compensation in favor of the agent, after the termination of the contract, for benefits which the principal continues to derive from the customers brought by the agent, and that what really matters are the benefits brought by the agent to the principal, which were shared during the contract and revert only in favor of the principal after the termination of the contract. In short, such customers were previously a joint asset and, after the termination of the contract, they remain solely with the principal.[47]

This figure is close to the workers' compensation for the termination of labor contracts. Unjust enrichment is also close, but the truth is that the function of the agent is to bring clients to the principal and/or to preserve those already existing, and it is not unjust that the principal collects the fruits of the performance of the agent for which he receives commissions. It's certainly for reasons of contract and business fairness that the compensation of good-will exists. Despite it is not exactly a matter of equilibrium of the contract, because the compensation of good-will does not exclude any other compensation.[48]

It's also about liability for lawful act, i.e. the termination of the contract for a reason non imputable to the agent gives rise to a right in favor of him to be compensated for a damage originated by the termination of the contract: the impossibility to take advantage, in commercial relations, of the situations of fact with economic vale that his relations with customers are. Nevertheless, compensation of good-will and compensation for non-competition may merge and, besides that, it requires that the agent or distributor does not continue commercial relations with his former customers, even in activities which do not compete with those of the principal. In these conditions will he cease to receive any retribution for contracts negotiated or concluded, after the termination of the contract, with former clients. The termination of the contract shall mean for the agent/distributor an obligation of *non facere*, i.e. not to keep or establish

[47] António Pinto MONTEIRO, *Contrato de agência. Anotação*, cit., 143-4.
[48] Underlining the *sui generis* or mixed nature of this compensation, as the enrichment of the principal as a cause – the contract itself – and its attribution is also justified for reasons of social protection and equitable factos, António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 159-60.

commercial relations with such customers, so that it is the principal only who can take advantage of them in business life.[49]

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[49] António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 154-6; Id., *Contrato de agência. Anotação*, cit., 144-6. However, it may not be compatible with European competition rules - Regulation (EU) 330/2010 of the Commission of 20 April 2010 concerning the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of vertical agreements and concerted practices (in special, Article 5). On distribution contracts and competition law, see António Pinto MONTEIRO, *Contratos de distribuição comercial*, cit., 46-59; João Calvão da SILVA, 'Concessão comercial e direito da concorrência', *Estudos Jurídicos (Pareceres)*, Coimbra, 2001, 185; Miguel Gorjão-HENRIQUES, *Da restrição da concorrência na Comunidade Europeia à franquia de distribuição*, Coimbra, 1998; Sónia Alexandra Mota de CARVALHO, *Os contratos de distribuição comercial e o direito da concorrência na União Europeia*, Tese de Doutoramento, Coimbra, 2012. For a hystorical and comparative analysis of the validity of non competition clauses, between freedom of contract and economic liberty, notably in German law, Manuel Nogueira SERENS, *A Monopolização da Concorrência e a (Re-)Emergência da Tutela da Marca*, Coimbra, 2007, p. 254-282, nota 496.

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