The economic risk as determining factor for the qualification as distributorship agreement – the end?

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1. It is well known to Belgian distributors that the (in)famous Act of July 27, 1961, provides a (more than?) fair degree of protection in certain cases of termination of their exclusive distributorship agreements. Article 1 of the Act sums up the categories of distributorship agreements to which the Act applies (exclusive distributorship agreements, quasi-exclusive distributorship agreements and distributorship agreements that impose certain onerous obligations upon the distributor). Therefore, one can find in a majority of cases parties battling in front of Court whether the commercial relations at stake fall under one of the aforementioned categories.

2. However, parties often tend to forget that first the question should be raised whether the commercial relations can actually be qualified as a distributorship agreement as such, before discussing if it is also a distributorship agreement falling into a protected category. The Act only protects certain, determined categories of distributorship agreements. Where a manufacturer often only focuses on tackling the qualification under one of these categories of the Act and already produces figures to counter the claim of exclusivity, it might be more useful to look first at the question whether the commercial relations actually qualify as a distributorship agreement.

3. Article 1, § 2 of the Act defines a distributorship agreement as ***'any agreement by which a supplier grants to one or more distributors the right to sell in their own name and for their own account products which the former manufactures or distributes'***. The phrase ***'in their own name and for their own account'*** not only distinguishes the distributors from the commercial agents and commercial representatives, but also used to form a determining factor to qualify the commercial relations as a distributorship agreement.

4. In the past, Courts refused the qualification as distributorship agreement to commercial relations where the 'distributor' did not bare the risk of disappointing sales and price fall, was only invoiced for the goods after the 'distributor' himself invoiced them to his customers or received only a commission on sales. Another element that could indicate the lack of economic risk with respect to the 'distributor' is the non-existence of any investments (f.e. stock).

5. With decision of 21 March 2008[1], the Court of Appeal of Brussels underlined the importance of the fact that parties should first focus on the qualification of their commercial relations before discussing whether the relations fall under one of the three protected categories. Although the manufacturer himself had admitted in the latter case that there was a sort of distribution and there was an exclusivity, the Court rejected the application of the Act 1961 because the 'distributor' received a fixed margin over a theoretical sales price and therefore did not bare the risk of a price fall or customer discounts. The Court reasoned that as a consequence there was no economic risk for the 'distributor' and therefore there was no distributorship agreement.

6. In Belgian literature, this case was called an example of the **'economic approach'**, which is based on the approach in nr. 12-21 of the Guidelines on Vertical Restraints under European Competition Law where 'economic risk' is defined in regard to commercial agents.

[1] Court of Appeal 21 March 2008, DAOR 2008, 141.

7. The decision of the Court of Appeal of Brussels went to the Court of Cassation. With decision of 30 April 2010[2], the Court of Cassation overruled the decision of the Court of Appeal, stating that the fact that the 'distributor' does not bare all economic risks, does not exclude the possibility of the existence of a distributorship agreement between parties. In Belgian literature, this approach was named the **'legal approach'** where one only takes into consideration the legal criteria of the definition of distributorship agreement, without looking into the economic implementation of these criteria. *In casu*, the 'distributor' was granted the right to sell the products from the manufacturer and this was what the 'distributor' did in his own name and for his own account. Adding – as the Court of Appeal of Brussels did – that the 'distributor' should hereby also bare a certain economic risk, would lead to extending the legal criteria and changing the legal definition.

8. If the lower Courts will follow the reasoning of the Court of Cassation, it looks like the factor of 'economic risk' has lost its determining status. But even if so, the 'economic risk' has not lost of its importance. The lack of economic risk is still a strong signal that the commercial relations at stake might not qualify as a distributorship agreement (depending on other facts) and might only be a brokership or a successive sales transaction. Moreover, the lack of economic risk will be taken into account by the Court when determining the damages.

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[2] Court of Cassation 30 April 2010, DAOR 2010, 426.