



# Appointing a distributor or agent to expand your business

**Jonathan Silverman** weighs up the pros and cons of both options for businesses looking to increase their sales networks

**W**hen advising product-based clients contemplating the expansion of their sales networks, several options are available. The client may wish to grow organically by building their own sales force; alternatively, they may wish to appoint independent distributors or sales agents to carry their products, or even, in the new digital age, to market over the web.

Each of these options has its own advantages and disadvantages, both from a commercial and legal perspective, and careful consideration needs to be given to achieve the right result if the client's business is to prosper long term.

**T**he traditional route to market for many manufacturers was simply to sell to a wholesaler, but in many industries those simply have vanished. The cost of holding stock has inevitably led to a 'just in time' distribution pattern and the ability to bring in merchandise from overseas at very short notice has radically changed distribution structures and attitudes.

The principal attractiveness of utilising a distributor for a manufacturer is that in most cases he is able to take advantage of an existing sales network for his product range; the risk of holding stock passes to a third party and payments should be secure.

Moreover, the opportunity to place specific obligations including sales targets and performance criteria on the distributor to achieve market penetration for one or more product lines without the manufacturer having to take on further commitments can be a key benefit. In such cases it is essential for the manufacturer to submit a carefully honed distribution agreement to any prospective distributor, setting out all the key objectives that the manufacturer wishes to see achieved with means to ensure enforceability. The retention of title is one of those provisions and may require careful drafting, especially where the product range is something bland such as plastic bags or serviettes.

Setting minimum sales criteria will be central to any agreement especially if the

intention is to create an exclusive distribution network. Achieving sales targets may also require the distributor to commit to marketing and one key discussion point will inevitably be to seek to restrict a distributor handling a competitive product.

One question that is regularly raised is to what extent the manufacturer can demand from his distributor details of those retail customers who have been taking the product lines, both during and at the end of the distribution agreement. Distributors in the UK tend to be highly protective of their customer base and are reluctant to provide any information to the manufacturer, so it is a matter that needs to be properly covered in the agreement.

The position may not be as clear as with distributors operating at some European Union countries when it comes to compensation upon termination. Consider the implications of early termination revisions through non-performance to ensure that the manufacturer does not find himself facing a claim for loss of profits arising from the termination. Try to ensure that both jurisdiction and law in any distribution or agency agreements with a foreign-based party are made subject to English law.

In the case of agency agreements the EU directive that was implemented throughout the community places an obligation on the manufacturer to pay compensation based on a predetermined formula on termination. Perhaps reflecting the historic situation that many manufacturers' representatives were either employees or treated as such.

However, from the manufacturer's point of view the decision to appoint an agent rather than a distributor may include a number of material factors; certainly the financial risks are quite different.

## The agent route

In the case of a manufacturer's agent the debts will be more broadly spread throughout the customers, with each having their own accounts with the manufacturer rather than the distributor dealing with collection. Payment terms may be far more protracted

both in theory and practice and, while the risk may be more widely spread, the accounting is far more complex.

The practicalities of dealing with stock returns and disputes are more likely to fall directly on the manufacturer in the case of an agent, unless the contract expressly deals with such matters which of course it should. Whether or not an agent will be as rigorous or disciplined in promoting sales or dealing with customer complaints as a distributor will depend very much on the individual appointment; there are clearly good and bad agents and distributors.

Just as in the case of a distribution agreement, consideration needs to be given as to whether or not the agent will have an exclusive territory and/or be prohibited from carrying competitive product; careful thought needs to be given to the appropriate drafting to ensure enforceability.

Whether appointing a distributor or agent, you need to consider whether to try and restrict that entity from carrying competing goods for a period of time after the distribution or agency agreement has being terminated, so as to protect the market that has been built up to date for the product range.

However, the spectacular growth in consumer purchasing online is likely to result in appreciable changes to the way manufacturers choose to meet the ultimate or end user's demands. The ability to exploit a wider market geographically by means of utilising the web rather than by having salesmen 'on the road' or reliant upon having merchandise held by a distributor or retailer requires thorough consideration.

If the manufacturer can create a commercially attractive website, almost certainly this will result in enhanced margins and profitability, and, with the route to market more closely controlled and the ability to build a loyal customer base, this could in turn mean that the manufacturer is able to enhance the value of his business, which eventually could make their businesses more saleable.

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