

# Issues and Essence of Distribution Law in Germany: A Contribution in Honour of Professor Charl Hugo

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## Abstract

The focus of this article is on the law of contractual distribution systems which has evolved from the law of sales agents, mainly by way of judicial interpretation and intervention. The article explores the realm of distribution law – mainly – from a German perspective. The law of distribution relates to the contractual, commercial, and competition law aspects concerning the distribution of goods and services. The area comprises forms of indirect distribution through contractual distribution systems by means *inter alia* of commercial sales agents, licensed distributors and franchisees. However, direct distribution (such as e-commerce through internet sales) plays an important role too and thus requires the consideration of consumer protection law issues. Subject matters of distribution law of wider interest, for example vertical integration systems and the regulatory task of distribution competition and distribution contract law, will be explored. Subsequently, the article highlights current challenges in the field of distribution law, among them the digitalisation and internationalisation of distribution activities.

## Keywords

German law; distribution law; distribution contract law; distribution cartel law; distribution competition law; franchise law; sales intermediaries; distribution channels; commercial agent; law of agency; vertical forward integration; vertical group cooperation; digitalisation.

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## 1 Introduction: A surge in publications relating to distribution law

Professor Charl Hugo, whom I had the pleasure to get acquainted with in his pre-professorial existence already, namely some thirty-three years ago at Stellenbosch, has always been interested in comparative aspects of commercial law, particularly regarding the situation and developments in Germany, where he spent a lot of time in pursuit of his research interests in commercial law. In the past decades, numerous discussions and controversies with my friend and colleague (in that order) Charl Hugo have evidenced his trust in the fruitfulness of cross-border oriented legal scholarship. Thus, the author of this contribution to Professor Charl Hugo's sixty-fifth birthday can be confident to attract the jubilarian's attention for a report on the German law of the distribution of goods and services, which has evolved into a stand-alone field of commercial law of remarkable and expanding importance. Although the celebratee masters the German legal language very well, this report will be presented in English to reach a wider professional readership.

The legal community in Germany has observed for some years that a new field of law has become firmly established under the name of "distribution law" and has quickly become significant. This can be seen not least in a veritable surge of literature on distribution law: The *Handbook of Distribution Law*, first published in 1996, is already available in its 4<sup>th</sup> edition of 2016. It contains more than 2,300 pages.<sup>1</sup> The 5<sup>th</sup> edition is in the making; its appearance is announced for the end of 2022. Raimond Emde's commentary on the law on commercial agents, authorised dealers and franchises also contains around 2,000 pages in its 3<sup>rd</sup> edition of 2014.<sup>2</sup> The

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<sup>1</sup> Martinek, Semler, and Flohr *Handbuch des Vertriebsrechts*; also see Westphal *Vertriebsrecht Bd I* and Westphal *Vertriebsrecht Bd II*; the traditional three-volume *Handbuch des gesamten Außendienstrechts*, edited by Küstner and Thume has been operating under the name *Handbuch des Vertriebsrechts* for some years and consists of Küstner and Thume *Handbuch des Vertriebsrechts Bd I*; Küstner and Thume *Handbuch des Vertriebsrechts Bd II*; as well as Küstner and Thume *Handbuch des Vertriebsrechts Bd III*. For an overview, see recently Mann *Vertriebsrecht in Handel und Industrie*; Birk, Löffler and Boos *Marketing- und Vertriebsrecht*; the commentary by Hopt *Handelsvertreterrecht*, an excerpt from the long-established HGB commentary by Baumbach and Hopt has long since become a (small) commentary on distribution contract and distribution cartel law; in what from today's perspective is a curious conflation of terms, Micklitz and Tonner had called their 2002 handbook commentary on doorstep selling, distance selling and electronic commerce "distribution law" (see Micklitz and Tonner *Vertriebsrecht*).

<sup>2</sup> Emde *Vertriebsrecht*.

2<sup>nd</sup> edition of the commentary on distribution law by Flohr and Wauschkuhn was published in 2018.<sup>3</sup> In practitioners' journals on business law, one increasingly finds page-long overviews of case law and literature on distribution law, and more and more decisions, essays, contributions and books can be attributed to distribution law. Twenty years ago, the reform of the law of obligations introduced a subtitle "Special forms of distribution" into the general part of the law of obligations of the *German Civil Code*, the BGB (*Bürgerliches Gesetzbuch*). Our larger law firms have long had departments or divisions for distribution law, and one also comes across this or that specialised "law firm for distribution law". Law firms and companies are looking for "distribution lawyers" in their job advertisements. The German Society for Distribution Law (DGVR, *Deutsche Gesellschaft für Vertriebsrecht*) was founded twelve years ago.<sup>4</sup> Distribution law conferences are held several times a year. It is no exaggeration to speak of a community of distribution lawyers. For ten years now, the CH Beck publishing house has been publishing a journal (in print and in the online medium) under the name *Zeitschrift für Vertriebsrecht* (available also at the University of Johannesburg's law library). This puts Germany in line with the general trend. If one looks at the neighbouring European states, a comparable development in the field of the Law of Distribution, *Lois de Distribution* or *Diritto della Distribuzione* etc., can be observed.

## 2 The subject matter of distribution law

### 2.1 Definition and sub-areas of distribution law

Distribution law is the contractual and commercial law of distribution relationships for the sale of goods and services. This practitioner definition includes the law of intermediary sales relationships, i.e., indirect sales via contractual distribution systems involving sales intermediaries such as commercial agents, authorised dealers, commission agents, franchisees or authorised specialist dealers, but also universal or dispersed sales via quantitatively and/or qualitatively selected sales intermediaries. Furthermore, sales via depot or shelf rental systems and shop-in-the-shop systems belong to distribution law as well. The law of sales intermediaries or the law of contractual distribution systems forms a distinctive focus here; one may therefore speak of distribution law in the narrower sense.<sup>5</sup> However, the definition presented here also includes direct distribution by way of distance selling, in particular using the internet (e-commerce) or teleshopping. Distribution law in the broader sense also deals with distribution groups, voluntary chains, purchasing groups and strategic

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<sup>3</sup> Flohr and Wauschkuhn *Vertriebsrecht*.

<sup>4</sup> See DGVR 2022 <https://www.dgvertriebsrecht.de> for more information.

<sup>5</sup> Thus, Martinek *Aktuelle Rechtsfragen*.

alliances. The broad understanding of distribution law by no means leaves out areas such as product liability law or export control law.

However, the sub-areas of distribution law can not only be divided according to different forms of distribution or sales in economic practice, but the subject matter can also be subdivided into distribution contract law, distribution cartel law and ancillary areas of distribution law. Distribution contract law is primarily commercial contract law, but also extends to consumer protection law. Distribution cartel law is the national and European law of distribution-related restrictions of competition. The economic ancillary areas of distribution law include the distribution-related regulations of unfair competition law and intellectual property law. Distribution law can even spill over into labour and social security law, as we have known for decades from the discussion on quasi-employee commercial agents and as was shown again only a few years ago by a decision of the *Bundessozialgericht* (Federal Social Court) on the statutory pension insurance obligation of "self-employed franchisees who are part of a vertical distribution chain".<sup>6</sup> In all of this, distribution law always has a cross-sectoral orientation and deals with all saleable goods and services, from motor vehicles to fashion articles, from beverages to computers, from petroleum products to leather goods, from insurance policies to student assistance and language courses. The definition naturally also includes the distribution law of foreign legal systems, especially that of our neighbouring countries. Furthermore, there is a pronounced impact stemming from sales-related regulations and directives by the European Union (EU), and decisions by the Court of Justice of the European Union (EU).<sup>7</sup>

The description of distribution law as the contractual and commercial law of the distribution of goods and services is helpful and sufficient as a handy and concise practitioner's definition but, strictly speaking, it is still too narrow and thus incomplete. It does not cover, for example, the marketing and sale of advertising time on television via media agencies, of media exploitation rights for sporting events (the sale of sports rights) or even of condominiums or timeshare objects. A jurisprudential definition that strives for accuracy and completeness must start with the economic concept of distribution, which encompasses all actions, processes and relationships that affect the path of an economic good from the producer to its final productive or consumptive use. In this context, economic goods (products) include both tangible goods and services, i.e., raw materials and manufactured goods as tangible goods as well as services as intangible goods; but real estate and rights of use also represent tangible and intangible real goods whose

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<sup>6</sup> *Bundessozialgericht*, Judgment of 4 November 2009 - B 12 R 3/08 R; also see *Bundesfinanzhof*, Judgment of 9 February 2011 - IV R 37/08.

<sup>7</sup> See in particular Franck *Europäisches Absatzrecht System*.

production and use or consumption are institutionally distinct and can thus be the subject of a distribution activity. Distribution law, defined in legal terms, is the normative recording and ordering of all actions, processes and relationships between the production and consumption of tangible and intangible economic goods. For legal practitioners, however, it is sufficient to describe distribution law as the contractual and commercial law of the sale of goods and services.

## **2.2 The law of contractual distribution systems**

For more than twenty years distribution law in the narrower sense (especially in the past often referred to as sales intermediation law, in German: *Absatzmittlungsrecht*) has been understood in sales practice and in legal literature as all cooperative relationships based on distribution contracts that are established in the classic three-tier sales structure of manufacturer-wholesaler-retailer by a company at a higher economic level with a company at a lower level in order to give the sales cooperation a long-term contractual basis. This is where the "music" of distribution contract and distribution cartel law has always been played and is still being played today. Despite all the differences between the individual forms of distribution contracts (from simple supply and specialist dealer contracts to authorised dealer, commission agent and commercial agent contracts, franchise contracts and, not to be forgotten, the good old beer supply contracts), they all have one thing in common: they form the elements of a fan- or pyramid-shaped distribution (contract) system: a manufacturer, an importer, a wholesaler or another "system headquarters" maintains similar contractual relationships with a large number of sales intermediaries. In the meantime, more and more service sectors are also using sales organisations based on distribution contracts; here it is a question of the central preparation of standardised service forms (e.g., a certain concept for restaurants, hotels or cleaning businesses), which are then provided to the customers by individual service companies as sales agents of the system headquarters. Sales intermediary relationships analogous to the sales of goods, which are combined in groups to form a contractual sales system under the leadership of the system headquarters, can now even be found in pure service industries such as legal revision services, student assistance, real estate agents or temporary employment agencies.

It is the law on commercial agents that forms the starting point and still often the point of reference for distribution (contract) law because the commercial agency contract of sections 84 *et seq* of the *German Commercial Code* (HGB, *Handelsgesetzbuch*) or the *European Commercial Agents Directive*

of 1986<sup>8</sup> (implemented in all 27 countries of the EU) is the only legally regulated distribution contract in Germany. The commercial agent, who is "permanently entrusted" by his "entrepreneur" with the safeguarding of his interests pursuant of section 84(1) HGB is, according to the legislator's conception, a sales organ with a permanent position in the sales channel and a partner in a systemic sales cooperation based on a distribution contract, as is clear, for example, from the figure of the district representative. Distribution law, however, as a cross-sectional area of primarily contractual, commercial, cartel and unfair competition law matters, is concerned with the sales intermediary relationships not directly regulated by law of commission agents and, above all, of specialised dealers, authorised dealers and franchisees, who do not act on behalf of third parties but on their own behalf and usually in their own name, and usually (with the exception of the less important commission agent) also on their own account. They thus appear to the outside world as "independent" merchants, but in their internal relationship with the head office they are "permanently entrusted" with the representation of interests in accordance with instructions, similar to (or even more than) a commercial agent and are obliged to promote sales as channel administrators under the terms of the agency agreement. The discussion about other types of sales agents (that is, other than commercial sales agents), especially the development of a commission agent, authorised dealer and franchise law, repeatedly revolves around the question of the analogous applicability of the provisions of commercial agency law.

In fact, in accordance with the importance of distribution contracts in economic practice, efforts have intensified more and more in the judiciary and jurisprudence over the past decades to delineate the respective legal framework of individual types of sales intermediaries in economic practice.<sup>9</sup> It was only through the case law and literature after the Second World War that the law of sales intermediaries expanded into the law of types of vertical sales cooperation and quickly experienced an increasing consolidation as a separate sub-area of commercial and competition law. The case law of the *Reichsgericht* and later of the *Bundesgerichtshof* (Federal Supreme Court), most recently of the Eighth Civil Senate and the Cartel Senate, as well as jurisprudential research at the end of the last century<sup>10</sup> initially gave the

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<sup>8</sup> *European Economic Community Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents* OJL 382 of 31 December 1986, 17-21.

<sup>9</sup> The foundations for this had already been laid in the 1920s; see Schmidt-Rimpler "Der Handlungsagent" 1 *et seq*; Schmidt-Rimpler "Das Kommissionsgeschäft" 477 *et seq*; as well as Heymann "Der Handelsmakler" 321 *et seq*.

<sup>10</sup> Rittner *Die Ausschließlichkeitsbindungen in dogmatischer und rechtspolitischer Betrachtung*; Ulmer *Der Vertragshändler*; Ebenroth *Absatzmittlungsverträge im*

activity of the commission agent and the contract or proprietary trader, then also the franchisee, a framework under contract and competition law. Since then, distribution law has produced hundreds of articles, dozens of monographs and a number of handbooks.<sup>11</sup> The various legal fields are brought together by the integrative power of the basic idea of giving distribution law an independent consideration as the law of entrepreneurial cooperation in the distributive sale of material goods and services.

The distribution law in force today, which can only fragmentarily fall back on legal regulations, is first and foremost the result of the judicial application of the law and further development of the law. It is judge-made law. Thanks to legal information systems, several hundred published decisions of the *Bundesgerichtshof* can be identified which, despite all the difficulties of delimitation and overlapping, can be assigned to distribution law as it is understood today – today's understanding, because some decades ago no one even knew the term. Excluding the law on commercial agents, which, however, makes up the lion's share, it is still possible to list some 500 distribution law decisions from the approximately seventy years of *Bundesgerichtshof* case law. The enormous quantity of factual material and the complex legal substance of these decisions form the basis for the judicial legal field of distribution law and, at the same time, for the efforts of legal scholars to work through it dogmatically and systematically, to provide explanatory commentary and constructive criticism.<sup>12</sup>

### **2.3 Vertical forward integration**

If one wants to shift the focus from the quantitative to the qualitative dimension and dare to assess the regulatory and formative forces in distribution law, a "red thread" quickly comes into view that runs through the rich factual material and the initially still fragile and loose, but now tear-resistant fabric of this legal material, insofar as it has detached itself from commercial agency law and developed into the overarching law of contractual distribution systems. We are talking about the so-called vertical forward integration as the dominant movement in the relationship between manufacturers and dealers, which has shaped the sales economy of Germany and its neighbouring countries over the past seventy years, has become the model also for goods-analogue service sales in cooperation between a system headquarters and its franchises or licensed outlets, and at the same time has become the driving force for modern distribution law.

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*Spannungsverhältnis von Kartell- und Zivilrecht*; Martinek *Franchising*; Rohe *Netzverträge*; Lange *Das Recht der Netzwerke*.

<sup>11</sup> Compare the literature reviews on the sub-areas of distribution law in Martinek, Semler, and Flohr *Handbuch des Vertriebsrechts*.

<sup>12</sup> See Martinek "Vertriebsrecht und vertikale Integration in der BGH-Rechtsprechung" 102-152.

Even the usual classification of sales agency or distribution contracts with the succession of supply, specialised dealer, authorised dealer, commission agent, commercial agent contracts and finally franchise contracts is based on a distinction according to the intensity of the coordination of behaviour in the contractual cooperation, i.e. according to the degree of vertical integration.<sup>13</sup> The term "vertical (forward) integration", which is common in business practice and marketing theory, describes – in what is probably an excusable abbreviation here – the successful efforts of industrial enterprises to draw originally "free" trading companies into their camp and to turn them into long-term guardians of interests in order to be able to use them to exert a targeted influence on consumers who have become self-confident and choosy.<sup>14</sup> This is a tendency that has prevailed powerfully since the economic recovery phase after the Second World War and still characterises our sales management practice today, which is covered by networks of contractual distribution systems. For this vertical forward integration, the establishment of controllable contractual distribution systems with authorised specialist dealers, commission agents and authorised dealers, and from the end of the 1970s also with franchisees, proved to be the tried and tested means. Through "vertical ties" in the distribution contracts, the system headquarters gained more and more influence on the institutions of trade as well as services and were increasingly able to steer and influence the decision-making behaviour of consumers in their favour. Through the legal implementation of the marketing idea in the structuring of the distribution contracts, which changed from the earlier framework contracts under sales law (supply contracts) to increasingly clear agency contracts, the sales services of the dealers and service providers vis-à-vis the customers became the object of the planning and organisational activities of the manufacturers (manufacturer marketing) and system headquarters in an integrated distribution channel (now: a "marketing channel").<sup>15</sup> The system headquarters naturally played out their market power as far as possible when setting up their distribution systems. The once independent, autonomous and unaffiliated retailers as well as the independent service providers were obliged by the system headquarters to

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<sup>13</sup> Veelken 1990 *ZVglRWiss* 358 *et seq*; Martinek *Franchising* 196 *et seq*; Martinek *Moderne Vertragstypen Band II* 53 *et seq*.

<sup>14</sup> Compare fundamentally Dingeldey *Herstellermarketing im Wettbewerb um den Handel*; Schenck and Wölk *Vertriebssysteme zwischen Industrie und Handel*; Ahlert *Vertragliche Vertriebssysteme zwischen Industrie und Handel*; Ahlert *Distributionspolitik*; Ahlert *Rechtliche Grundlagen des Marketing*; Sölter *Kooperative Absatzwirtschaft*; Meffert *Marketing im Wandel*; Irrgang *Vertikales Marketing im Wandel*; Laurent *Vertikale Kooperationen zwischen Industrie und Handel*.

<sup>15</sup> Compare fundamentally Tietz *Handbuch Franchising* 217 *et seq*; Tietz and Mathieu *Das Franchising als Kooperationsmodell*; Tietz and Mathieu *Das Kontraktmarketing als Kooperationsmodell*; Brauer *Die vertikale Kooperation als Absatzwegestrategie für Herstellerunternehmen*; Laurent *Vertikale Kooperationen zwischen Industrie und Handel*; Irrgang *Strategien im vertikalen Marketing*.

protect their interests and to take care of their business and were included in the development of contractual distribution systems. In this way they were brought into line with commercial agents and commission agents who by virtue of their function and legal status are bound by instructions and obliged to protect their interests. The "born guardians of interests" according to section 86(1) HGB and sections 675(1), 611 and 665 BGB were joined by authorised dealers, specialised dealers, general agents, factory representatives, concessionaires or franchisees who were more and more closely connected to the system headquarters, i.e., "bound" to them, as "appointed guardians of interests". Over the last sixty years Germany's sales economy, like that of all industrialised countries, has been surrounded by an increasingly close-meshed network of contractual distribution systems.

The fact that the case law of the *Bundesgerichtshof*, even if it has never spoken *expressis verbis* of "vertical integration", has always been clear about its problems and regulatory tasks is already expressed in the conceptual designation of the authorised dealer, which the *Bundesgerichtshof* made at the end of the sixties – one used to like to speak of the "proprietary trader" or "contracted dealer"<sup>16</sup> – following Peter Ulmer and has since then constantly been used as a basis in case law.<sup>17</sup> According to this, the authorised dealer is "a merchant whose company is integrated into the sales organisation of a manufacturer of branded goods in such a way that he permanently assumes, through the contract with the manufacturer or an intermediary appointed by the latter, to distribute the contractual goods in his own name and on his own account in the contractual territory and to promote their sale, to orientate the functions and risks of his trading activity to this and to highlight the manufacturer's trademark next to his own company name in business dealings". Ulmer himself puts it more clearly: "The discrepancy between decision-making power and actual risk" is the "characteristic of distribution via authorised dealers"; there is a "typical discrepancy between functions determined by others and bearing one's own risk".<sup>18</sup> The *Bundesgerichtshof* did not attempt to define franchising, the most recent form of contractual cooperation, the "royal class of distribution systems",<sup>19</sup> although the great German pioneer of franchise law, Walther Skaupy, had already done groundbreaking

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<sup>16</sup> For example, *Bundesgerichtshof*, Judgment of 11 December 1958 - II ZR 73/57; *Bundesgerichtshof*, Judgment of 16 February 1961 - VII ZR 239/59.

<sup>17</sup> *Bundesgerichtshof*, Judgment of 21 October 1970 - VIII ZR 255/68; *Bundesgerichtshof*, Judgment of 11 February 1977 - I ZR 185/75; compare fundamentally Ulmer *Der Vertragshändler* 206 (in particular); also Schmidt *Handelsrecht* 758; Wauschkuhn *Vertragshändlervertrag*; Dau *et al Der Vertragshändlervertrag*; Semler *Handelsvertreter- und Vertragshändlerrecht*.

<sup>18</sup> Ulmer *Der Vertragshändler* 150, 227; also Schüller 1968 *ORDO* 233 *et seq.*

<sup>19</sup> Flohr *et al Franchising*.

preliminary work on this.<sup>20</sup> In this case the vertical integration processes between industry and commerce – with larger cooperation fields and longer cooperation duration compared to contract commerce ("total cooperation"<sup>21</sup>) – even often led to rigorous instruction distribution, to an existential economic dependence of the franchisee and to a high degree of quasi-monopolistic relationship consolidation of the participants (the franchise-specific "quasi-branch-position").<sup>22</sup>

#### **2.4 Regulatory tasks of distribution contract law**

Against the backdrop of the paradigm of vertical forward integration, it is understandable that in case law and in economic law literature (much less in legal practice) the regulatory tasks of distribution contract law have so far been primarily seen in this: to protect specialised dealers, commercial agents, authorised dealers or franchisees, who are regularly regarded as weaker negotiators, *per iustitiam commutativam* from overreaching, exploitation, the restriction of entrepreneurial freedom of movement and the economic loss of existence vis-à-vis the system headquarters with greater market power. Vertical forward integration has favoured a decided understanding of distribution contract law as "entrepreneurial social protection law". This concept, which is contained in the commercial agency law of sections 84 *et seq* HGB (and also in the *European Commercial Agents Directive* of 1986) can easily be traced in the case law on the conclusion of a distribution contract. Already in the case law on the pre-contractual obligation of trust between the owner of the system and his sales intermediary in future, the idea of the need for the protection of the sales intermediary has an effect. Increased duties of loyalty flow for the parties as early as in the contract negotiations. The pre-contractual obligation of trust appears to be even more intensive, the more pronounced the agency element of the distribution contract is. As a result, the parties are under a special obligation to disclose all information relevant to the cooperation to the other party during negotiations on the conclusion of a contract and, in the event of a breach of this obligation, are liable for damages due to *culpa in contrahendo*. This duty of disclosure also applies to the future sales intermediary, who must "lay his cards on the table" with regard to his professional skills, personal characteristics and financial possibilities, insofar as these are significant to the sales cooperation. Above all, however,

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<sup>20</sup> On the unforgettable Walther Skaupy, see the contributions in the commemorative volume edited by Flohr *Franchising im Wandel* Gedächtnisschrift für Walther Skaupy, with list of publications at 559.

<sup>21</sup> Tietz and Mathieu *Das Franchising als Kooperationsmodell* passim.

<sup>22</sup> On recent franchising today, see Liesegang *Der Franchisevertrag*; Giesler and Nauschütt *Franchiserecht*; Metzlaß *Praxishandbuch Franchising*; Flohr and Petsche *Franchiserecht*; Flohr *Franchise-Vertrag*; Ahlert *Handbuch Franchising und Cooperation*; Nebel, Schulz and Flohr *Das Franchise-System*.

the supplier as the system headquarters of an authorised dealer or franchise organisation is called upon to disclose information about the prospects of the success of the marketing concept, to provide truthful figures about comparable businesses in his system and to provide information about the necessary labour and capital input of the sales intermediary. This is because it is precisely the supplier who, when making contact and negotiating the contract, solicits that special trust which the sales intermediary, as the agent of the business, must place in the principal due to the impending dependence on instructions. In its leading decision on this,<sup>23</sup> which was promptly taken up and refined by the subsequent case law,<sup>24</sup> the *Bundesgerichtshof* placed particularly stringent requirements on the duty of disclosure arising from the pre-distribution contractual obligation of trust, at least in the case of distribution systems that requisition inexperienced traders or even newcomers as system partners.

The value and significance of this case law can be illustrated by a comparative legal look at the United States of America (the USA) or our neighbouring country France, for example. In the numerous and extensive franchise laws of the USA, a registration obligation or a compulsory prospectus for franchise offers has been known for a long time; in some cases, franchise offerings are subject to a meticulous supervisory control.<sup>25</sup> In France, Law No 89-1008 of 31 December 1989, the so-called *Loi Doubin*, played a similar role<sup>26</sup> before it was replaced in 2016 by the French reform of the law of obligations. However, the *Bundesgerichtshof* proves that the institute of *culpa in contrahendo* makes such legislative intervention in German distribution law unnecessary. In doing so it has not lacked the necessary sensitivity to the fact that a burden with excessive obligations to inform, disclose and advise could paralyse the expansion and innovation propensity of the system operators and that the sales intermediary also enters into an entrepreneurial risk when deciding in favour of a certain distribution system, so that if he has overestimated the goodwill of the system product he may not turn to the system centre by way of recourse if his sales efforts fail.

The tendency to understand distribution contract law as a protective right for sales intermediaries can also be seen in the other regulatory tasks and problem constellations in the lifecycle of a distribution contract from the conclusion of the contract to the post-contractual settlement. This cannot be explained and documented in more detail here, but it should be mentioned

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<sup>23</sup> *Bundesgerichtshof*, Judgment of 12 November 1986 - VIII ZR 280/85.

<sup>24</sup> *Oberlandesgericht Munich*, Judgment of 13 November 1987 - 8 U 2207/87.

<sup>25</sup> Martinek and Rafsendschani "Franchise Agreement (Franchisevertrag USA)" 293 *et seq.*

<sup>26</sup> Martinek and Rafsendschani "Contrat de Franchisage (French Franchise Contract)" 202 *et seq.*

to show where the sensitive problem areas of cooperation in distribution contracts are. These include the control of unconscionability from the point of view of gagging, the maximum permissible contract duration term without the possibility of ordinary termination, or the preconditions for the application of the protective provisions of consumer credit law to sales intermediaries as the founders of businesses. Distribution contract law deals with the review of (regularly system-specific pre-formulated) distribution contracts under the law of general terms and conditions (GTC); to a large extent, distribution contract law is GTC control law. Also worth mentioning here is the dispute over the obligation of the system head office (which can hardly be justified without an explicit agreement) to reimburse or pass on purchasing advantages (differential discounts) to the system partners (so-called kick-back jurisprudence) in so-called group franchising; insiders are inclined to wink knowingly at each other when they hear reference made to decisions such as "Sixt" or "Apollo", which at the same time form prime examples of fruitful discourse on distribution law between case law, cartel jurisprudence and legal science.<sup>27</sup>

One focus of distribution contract law is the prerequisites and consequences of the termination of the contract. These are given particular weight by the fact that sales intermediaries are often dependent on the continuation of the cooperation relationship in order to be able to survive economically.<sup>28</sup> In the event of termination, they threaten to become "victims" of vertical integration. At the very least, in many cases it would take a longer transitional period and a considerable influx of capital to free the sales intermediary company from the system linkage, to find a connection to another head office in another distribution system or even to be able to operate independently of the system and regain a foothold in the market. Frequently the sales intermediary, who is bound by instructions and who protects his interests, has made considerable investments in the operation tailored to the marketing concept of "his" distribution system, most of which would be worthless if he left the system, especially since he is often subject to a post-contractual non-competition clause. Not only when joining the

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<sup>27</sup> Compare in this respect *Oberlandesgericht Munich*, Judgment of 27 February 2000 - U (K) 3297/96; *Bundesgerichtshof*, Judgment of 2 February 1990 - KZR 11/97; *Oberlandesgericht Bremen*, Judgment of 6 December 2001 – Kart 2/2001; *Oberlandesgericht Düsseldorf*, Judgment of 14 November 2001 - Kart 11/01; *Bundesgerichtshof*, Judgment of 20 May 2003 - KZR 19/02; *Bundesgerichtshof*, Judgment of 20 May 2003 - KZR 27/02; *Oberlandesgerichtshof Düsseldorf*, Judgment of 13 December 2006 - VI-U(Kart) 36/05; also see Haager 1999 *DStR* 1153 *et seq*; Haager 2002 *NJW* 1463 *et seq*; Prasse 2004 *MDR* 256 *et seq*; Böhner 1998 *NJW* 109 *et seq*; Giesler 2004 *ZIP* 745; Flohr 2004 *DStR* 94; Rottbauer 2004 *EWiR* 337 *et seq*; Pohlmann 2004 *EWiR* 289-290; Teubner 2004 *ZHR* 78 *et seq*.

<sup>28</sup> See Pollmüller "Rechtliche Aspekte vertraglicher Vertriebssysteme" 196 *et seq*; Martinek *Franchising* 321 *et seq*; as well as Martinek *Moderne Vertragstypen Band II* 117 *et seq*.

system but also during the cooperation relationship he may have invested considerable capital in buildings, equipment and staff – not infrequently out of necessity or even on the instructions of the system headquarters – so that a termination of the contractual relationship before they have been amortised can mean his economic ruin, at least if he has no transitional period and no money available for a reorientation.

There are numerous legal problems surrounding the termination of distribution contracts. They concern the deadlines for ordinary termination as well as the preconditions (the "important reasons") for extraordinary termination. The "vexed question" of an analogous applicability of the compensation claim according to section 89b HGB to sales agents other than commercial agents who safeguard interests should also be mentioned here. It has been one of the basic problems of distribution<sup>29</sup> contract law from the beginning and is now generally affirmed in literature and case law for the authorised dealer, especially in motor vehicle distribution, while for franchising the literature is unanimously in favour. In Germany (unlike in Austria) there is still no clear supreme court decision on this. In the context of contract termination problems, it is also worth mentioning the discussion on whether, in the case of distribution contracts with a dominant agency element (i.e. in the case of commercial agency, commission agency, contract trade and often in the case of franchising), the sales intermediary should be granted special "start-up protection" or "investment protection", for example in the form of a claim for investment compensation, in view of an impending termination of the contract. The question here is whether the supplier's increased duty of loyalty towards his sales intermediary by virtue of the continuing obligation and in particular by virtue of the safeguarding of the interests of these distribution contracts has a limiting effect on his right to terminate the contract with notice or without notice or whether a termination in a case of a breach of the duty of loyalty can even result in obligations to pay damages.<sup>30</sup> The concern behind such a start-up or investment protection under distribution law is obvious: the sales intermediary, who has made costly investments to equip his business in conformity with the distribution system in fulfilment of his obligation to promote sales and in reliance on the continuation of the cooperation relationship, often even on the express instruction of the sales master, is to be protected against the sales centre's unilaterally terminating the sales intermediary relationship by ordinary termination before those investments have been amortised. Such protection appears worth considering not only

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<sup>29</sup> Sandrock "Der Ausgleichsanspruch des Vertragshändlers" 657 *et seq.*

<sup>30</sup> See Canaris *Die Vertrauenshaftung im deutschen Privatrecht* 266 *et seq.* for preparatory work; then fundamentally Ulmer *Der Vertragshändler* 459 *et seq.*; Ulmer "Kündigungsschranken im Handels- und Gesellschaftsrecht" 295 *et seq.*; and Ebenroth *Absatzmittlungsverträge im Spannungsverhältnis von Kartell- und Zivilrecht* 172 *et seq.*

for the years of the start-up phase of the cooperation relationship regarding the initial system integration investments of the intermediary, but also during the long-term intermediary relationship, in which the intermediary may be forced to make new investments on an ongoing basis at the "instigation" of the system headquarters. The question of start-up and investment protection is even more important because a claim for reimbursement of expenses by the intermediary under the law on business supplies (sections 675(1)1 and 670 BGB) cannot be considered for such investments. It is independent of the granting of a claim for compensation according to section 89b HGB. This is because this compensation claim is directed towards compensation for the loss of the clientele acquired by the sales intermediary and towards compensation for the goodwill created by him and benefiting the system headquarters upon the termination of the contract; section 89b HGB has nothing to do with the investments made by the sales intermediary. Currently in Germany – unlike in some neighbouring countries, e.g., Austria (section 454 of the Austrian HGB) – a claim for investment compensation for sales agents is not (yet) recognised by case law.<sup>31</sup>

The duty of loyalty and consideration of the system head office towards the sales agent also retains its outstanding importance in the other numerous settlement and consequential problems of the termination of authorised dealer, commission agent and franchise contracts.<sup>32</sup> Only in rare cases do intermediary contracts contain explicit provisions on a right of return for unsold contract goods, unused equipment, or surplus spare parts after the termination of the contractual relationship. In such exceptional cases, for example, the authorised dealer or franchisee is granted a right of resale at a reasonable price in the distribution agreement to be exercised by means of a unilateral declaration. In the absence of such an agreement (or if it is insufficient), the post-contractual duty of good faith forms the dogmatic starting point for the derivation of a right of return of the sales agent (and the corresponding obligation of the sales master to take back) for such contractual goods, spare parts, operating resources and equipment which have become largely worthless and useless for the sales agent after the termination of the contract. The principle of good faith determines the standard for the scope and limits of a right of return and controls the distribution of the realisation risk of such objects which can no longer be used for their original purpose due to the termination of the contract. As early as 1970 in a landmark decision on distribution law the *Bundesgerichtshof* pronounced that the post-contractual duty of loyalty of a manufacturer/supplier towards an authorised dealer exceeds in its intensity the due-diligence and ancillary duties usually owed after the termination of

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<sup>31</sup> Wauschkuhn and Teichmann 2009 *RIW* 614 *et seq.*

<sup>32</sup> Regarding authorised dealer, see Ulmer *Der Vertragshändler* 468 *et seq.*

a contract.<sup>33</sup> This is justified by the special functional orientation of the sales intermediary's business towards the interests of the sales centre and by the dependence of the sales intermediary on the plans of the system head. The increased post-contractual duty of loyalty was concretised by the *Bundesgerichtshof* to the effect that it can also result in a duty for the principal to cooperate to a reasonable extent in the execution of the contract and to contribute to the avoidance of damage during the dissolution of the close cooperation relationship. This basic idea also applies to such franchise relationships as those in which the sales intermediary is obliged to a certain extent to keep stock and to provide customer and spare parts service, but after the end of the contract can no longer do anything with the goods, with the individual parts, special tools, equipment etc. tailored to the system product. The sales intermediary must not be "left sitting" on such items of the contract goods and business equipment, in extreme cases even on a full and unsaleable stock or spare parts inventory.

Admittedly, the sales intermediary can invoke the principle of good faith (section 242 BGB) only in the case of a termination of the contract not initiated by him; otherwise, he would have to accept the reproach of contradictory conduct on his part<sup>34</sup>; it goes without saying that culpable conduct on the part of the sales intermediary must not be rewarded with a discharge of the disposition risk he has contractually assumed. Conversely, however, culpable conduct on the part of the principal and supplier must lead to a tightening of his obligations to cooperate and take back the goods. Accordingly, the risk of the aggravated realisation of a stock of goods or spare parts created at the instigation of the supplier must in principle be borne by the contracting party who is responsible for the termination of the contract. In the case of a termination caused by both parties, a mutual distribution of the risk is also appropriate. For the structuring of the supplier's obligation to take back the goods and the corresponding right of the sales agent to return the goods, what the parties can reasonably be expected to accept after weighing the interests of both parties is decisive in the concrete individual case, both in terms of content and time. The principal's duty to cooperate in the removal of the burdens remaining to the intermediary from the cooperation relationship can also concern only such stocks of goods, raw materials or spare parts or equipment whose accumulation and storage was necessary in the interest of the proper fulfilment of the contract. The supplier's obligation to show due consideration for the interests of the intermediary and to take back objects accordingly is limited to the point where the intermediary can exploit the possibilities of utilisation by making a reasonable effort on his own. In this area of vertical de-integration, too,

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<sup>33</sup> *Bundesgerichtshof*, Judgment of 21 October 1970 - VIII ZR 255/68; also *Bundesgerichtshof*, Judgment of 25 May 1988 - VIII ZR 360/86.

<sup>34</sup> *Bundesgerichtshof*, Judgment of 21 October 1970 - VIII ZR 255/68.

the case law of the *Bundesgerichtshof* has in the meantime been supplemented and deepened, refined and confirmed in many cases.

## **2.5 Regulatory tasks of the distribution cartel law**

The above only exemplary but perhaps illustrative panopticon of problem areas in distribution contract law can be supplemented by a brief overview of the regulatory tasks of distribution antitrust law or cartel law. The use of distribution contracts as instruments of selective distribution in the hands of system-controlling manufacturers or suppliers is connected with vertical forward integration and the marketing idea in the sales economy.<sup>35</sup> For the conclusion of distribution contracts, the supplier selects from the group of all possible market partners at the downstream economic level those who enable the optimal distribution of the products according to his objectives and excludes other applicants from the business relationship who do not meet certain qualitative or quantitative requirements of the conception of his distribution system. In the case of qualitative selection, the acceptance of business relations is made dependent on the fulfilment of certain technical and operational qualifications such as the size of the company, the catchment area, the equipment, the location, the reputation, the turnover, or the financial resources of the future sales intermediary. In terms of quantitative criteria, the selection is made if the manufacturer generally wants to contract with only certain number of wholesalers or retailers, i.e., wants to limit the number of sales outlets in a market area with a view to his own efficiency, optimal market cultivation and internal system competition at the operational level.

There is no contractual distribution system without some kind of distribution ties at the expense of the sales intermediaries, which restrict their economic freedom of action and movement and which, at least formally, have a restrictive character on competition. These vertical ties, which act as the "transmission belts" of selective distribution and vertical forward integration in the classic manufacturer-dominated specialised trade, authorised dealer and franchise systems, vary greatly in their type, composition and quantity from one distribution system to another and are difficult to systematise, since they are tailored to the respective marketing concept of the system and depend on the respective constellation of power and interests.<sup>36</sup> Special

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<sup>35</sup> Meier *Der selektive Vertrieb im EWG-Kartellrecht*, Mathé 1984 *RabelsZ* 721 *et seq*; Pawlikowski *Selektive Vertriebssysteme* 32 *et seq*; Ebenroth *Absatzmittlungsverträge im Spannungsverhältnis von Kartell- und Zivilrecht* 130 *et seq*.

<sup>36</sup> Biedenkopf *Vertragliche Wettbewerbsbeschränkungen und Wirtschaftsverfassung* 30 *et seq*; Kapp *Wettbewerbsbeschränkungen durch vertikale Vertriebsbindungen?* 27 *et seq*; Ahlert "Absatzkanalstrategien des Konsumgüterherstellers" 68 *et seq*; Tietz and Mathieu *Das Kontraktmarketing als Kooperationsmodell* 37; Meier *Der selektive Vertrieb im EWG-Kartellrecht* 149 *et seq*; Pawlikowski *Selektive Vertriebssysteme*

practical and legal importance is attached to the exclusive purchasing agreements. As a rule, the sales master as manufacturer or supplier imposes on the sales intermediary the obligation to purchase certain goods or parts of the assortment, sometimes even all goods or raw materials intended for resale, from himself or from prescribed other suppliers (approved suppliers). In the case of service franchising, mainly the operating resources required for the provision of the service are covered by purchase obligations (e.g., machines and chemical concentrates for car washes or cleaning companies). The form of such purchase commitments can range from simple minimum purchase quotas (performance standards) for individual products to exclusive purchase commitments for the entire product range (demand coverage agreements, full line forcing). In the case of the so-called distribution ties of the sales intermediary, a distinction must be made between customer and territory ties. In the case of customer restrictions, which are rather rare, certain customer groups are prescribed (e.g., the supplier may supply only end consumers) or excluded (e.g., the supplier may not supply public authorities or large customers because the supplier usually reserves the right to supply such customers himself). Cross-delivery bans (no delivery to other intermediaries) also belong here. The much more important territorial restrictions also occur in various forms. Absolute territorial restrictions allow sales only in the exclusive territory and may threaten border crossings with contractual penalties or compensation payments to the neighbouring dealer who is actually responsible (cross-border commissions). Relative territorial ties allow the dealer to make "passive sales" to customers from outside his own area of primary responsibility, but do not allow him to actively acquire customers beyond the territorial boundaries. In addition, there are also ties between the supplier and the intermediary, such as the granting of exclusive dealing rights and thus the granting of territorial protection for the respective dealer of a certain exclusive territory. Such "self-ties" are imposed by the sales centre on its own initiative, if only in the interest of its concept of territory allocation.

A territorial protection system accompanying the contractual distribution system – the territories are defined, for example, on the basis of population figures – should prevent other intermediaries from benefiting indirectly from the sales efforts, especially the advertising campaigns, the pre-sale and after-sale service of the neighbouring trader, by offering the goods or services more cheaply – thanks to their own saved costs – than the particularly eager neighbouring trader and ultimately drawing customers away from the latter. They should not be allowed to enjoy a "free ride" at the

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208 *et seq*; pioneering above all Sundhoff "Über vertikale Absatzbindungen" 479 *et seq*; Krasser *Der Schutz von Preis- und Vertriebsbindungen gegenüber Aussenseitern* 9; Lehmpfuhl *Vertriebsbindungen* 35; Sandrock *Grundbegriffe des Gesetzes gegen Wettbewerbsbeschränkungen* 395 *et seq*.

expense of that active sales agent.<sup>37</sup> The reciprocal territorial protection agreements in the intermediary contracts aggregate to form a territorial plan and a market-sharing concept for the supplier. A more or less secured territorial protection is practically part of the functional conditions of the contractual distribution system in most industries. This is the reason for the special importance of the law of vertical restraints of competition for distribution law, which is integrated into the antitrust problem spectrum of "selective distribution" and of "vertical content- and conclusion-obligations" and which deals with the management of vertical partner selection and partner integration under the law on restraints of competition.

The resulting regulatory tasks make use of competition restriction law, i.e., the German cartel law and European antitrust law (Articles 101 *et seq* of the *Treaty on the Functioning of the European Union* (TFEU)) with the distribution-related block exemption regulations of the European Commission. The focus here is on the so-called umbrella regulation or *Vertical Block Exemption Regulation* (VBER) of the EU No 330/2010, which has been in force since 1 June 2010<sup>38</sup> and the so-called *Motor Vehicle Block Exemption Regulation* (MBER) of the EU No 461/2010<sup>39</sup>, which also came into force on 1 June 2010, as well as – for "old cases" – its predecessors.<sup>40</sup> In distribution antitrust law, the *Bundesgerichtshof* and Court of Justice of the EU saw the main danger of vertical integration, which actually increases efficiency and welfare, in an excess of vertical ties and thus in a competition-reducing "pillarisation" and "encrustation" of the sales economy. Contractual distribution systems required the solution of sometimes highly ambivalent market structural and market behaviour-related competition problems: the restriction of sourcing competition at the retail level by cutting off sources of supply for system outsiders; the restriction of distribution competition at the manufacturer level by clogging up distribution channels for system headquarters competitors; the reduction of intra-brand competition with a tendency to intensify inter-brand competition at the dealer level; the transfer of manufacturer oligopolies to the dealer level; the change in the competitive structure from atomistic individual competition to competition between distribution systems. The relevant spectrum of problems can only be

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<sup>37</sup> Note also the account of the free rider problem at Kapp *Wettbewerbsbeschränkungen durch vertikale Vertriebsbindungen?* 49 *et seq*.

<sup>38</sup> *Commission Regulation (EU) 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 Practice* OJEU of 23 April 2010, No L 102 1 *et seq*.

<sup>39</sup> *Commission Regulation (EU) 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* OJEU of 28 October 2010, No L 129, 52-57.

<sup>40</sup> See Liebscher, Flohr and Petsche *Handbuch der EU-Gruppenfreistellungsverordnungen*.

outlined here with a few key words and a general reference to the distribution law manuals; dozens of further references could be made to each of the key words: exclusive supply obligations, exclusive purchasing obligations, exclusive supply claims, the prohibition of discrimination, territorial protection agreements, a refusal to deal, immanence theory, indirect price maintenance, maximum price maintenance, "black", "white", "red" and "grey" clauses, a prohibition of conditionalities, contracting claims, customer restrictions, supplier price differentiation, brand exclusivity, multi-brand distribution, minimum purchase obligations, passive sales, price maintenance prohibition, a prohibition of commission payments, quantitative and qualitative selection criteria, cross-delivery prohibitions, return delivery prohibitions, structural termination clauses, jump delivery prohibitions, "spurious" agency agreements, non-binding price recommendations, use restrictions, and non-competition clauses.

### **3 Current challenges of distribution law**

#### ***3.1 From vertical forward integration to vertical group cooperation***

Up to now, jurisprudence and legal science, the legal practice of lawyers and entrepreneurs on distribution contract law and distribution cartel law have been able to cope with the challenges that vertical forward integration has brought to the distribution industry in the past seventy years and at the same time have created a distribution law that could be dogmatised and systematised to the point of "handbook maturity". However, it should not be concealed that there are also some deficits and omissions in today's distribution law, which is characterised by judicial law, and which – viewed positively – will probably constitute the distribution law challenges of the coming decades. These deficits and omissions, which the jurisprudence of the highest courts must face together with jurisprudence and sales practice, have a common root: vertical forward integration, which has dominated the development of distribution law so far, is by no means the sole determining force and movement in the relationship between industry and commerce. For more than three decades it has been observed that the rather limited canon of types of sales intermediaries and distribution systems that existed until the beginning of the nineties is diversifying strongly and that a previously unimaginable diversification is taking place. This is by no means only about the increased appearance of depot systems, shelf rental systems, or shop-in-the-shop systems. Nor is it just about the blossoming of direct sales, especially in the consumer goods sector, through the internet, i.e., the strengthening of distance selling and especially e-commerce. What seems to be more important than the "total digitalisation" of distribution is that contractual distribution systems are taking shape with very different constellations of power and interests that are by no means characterised solely by vertical forward integration. For some time now it

has been questionable whether the number and significance of the classic distribution systems dominated by industry still predominate.<sup>41</sup> Modern distribution contract systems of franchising, partly also of contract trade, commercial agency and commission agency have often been characterised with the term vertical group cooperation for some years.<sup>42</sup> Indeed, since the turn of the millennium already, a tendency can be discerned in the modern sales economy according to which vertical group cooperation at least complements if not replaces classic vertical forward integration. This also provokes a paradigm shift in distribution law coping patterns towards normative diversification. To put it succinctly: Distribution law must break away from its traditional fixation on the regulatory programmes of commercial agency law and from analogies for other distribution cooperations. In detail, the buzzword of vertical group cooperation conceals various sales economic trends, which at the same time reveal the previous weaknesses of distribution law and reveal the future tasks for jurisdiction, jurisprudence and distribution law design practice.<sup>43</sup>

### **3.2 Relativisation of the doctrine of agency**

The adoption of the one-sided commercial agency and business supply orientation is a truly urgent task. Distribution law must no longer be unilaterally oriented towards relationships of superiority/subordination and the preservation of interests by seeking to understand distribution contracts in terms of legal dogma consistently according to the model of the commercial agency contract as cases of the application of commercial business provision (sales mediation).<sup>44</sup> The doctrine of commercial agency, which dominates the law on distribution contracts, is completely under the spell of vertical forward integration and is based on the assumption, which is by no means unrestrictedly valid any more, that the industrial enterprise is completely at the centre of today's economy and, due to its preponderance of capital and overall economic significance, also dominates economic life at the commercial levels. This concept no longer does justice to the current importance of "strengthened trade" in considerable parts of

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<sup>41</sup> Compare fundamental and forward-looking Batzer, Lachner and Meyerhöfer *Die handels- und wettbewerbspolitische Bedeutung der Kooperationen des Konsumgüterhandels*; Irrgang *Vertikales Marketing im Wandel*; Ahlert and Olbrich *Integrierte Warenwirtschaftssysteme und Handelscontrolling*; Zentes *Strategische Partnerschaften im Handel*; Kirsch *Handelsorientiertes Herstellermarketing*.

<sup>42</sup> Compare fundamental and forward-looking Tietz *Der Gruppenwettbewerb als Element der Wettbewerbspolitik*; Tietz and Mathieu *Das Kontraktmarketing als Kooperationsmodell*; Tietz and Mathieu *Das Franchising als Kooperationsmodell*; also Sölter *Kooperative Absatzwirtschaft*; Sölter *Bezugsbindungen in vertikalen Kooperationsystemen*.

<sup>43</sup> Martinek 1997 *ZHR* 67-101.

<sup>44</sup> Compare the subtitle of the book by Ulmer *Der Vertragshändler*; also Veelken 1990 *ZVglRWiss* 358 *et seq*; Martinek *Franchising* 196 *et seq*; Martinek *Aktuelle Fragen des Vertriebsrechts* para 24 *et seq*.

the sales economy.<sup>45</sup> Up to now the legal practitioner in distribution law has not infrequently and almost automatically felt compelled to regard the sales intermediary as worthy of protection (up to and including the application of consumer loan law to sales intermediaries) and to apply a balancing justice to compensate for the presumed position of dependence and inferiority of the sales intermediary. The law on commercial agents, like the previous "model" of the law on sales intermediaries, gives distribution law a social protection slant, so to speak.<sup>46</sup> However, there have long been forms of "vertical" sales cooperation without the dealer being integrated into the manufacturer's sales system, without the dealer's main duty being to promote sales in a way that protects his interests and, in particular, without the dealer's being dependent on instructions, where, for example, an analogous application of section 89b HGB must be ruled out completely for lack of similarity with a commercial agency relationship. At present distribution law constantly runs the risk of assuming a relationship of superiority/subordination between the manufacturer and the sales intermediary even there, of reading an obligation to give instructions into the contract even there and of assuming that the sales intermediary is worthy of protection even there, where no question of any of this does in fact arise. In this way, distribution law threatens to create dependency on the part of the sales intermediary in the first place and to create the problems that it then sets out to solve.

### **3.3 Dealer co-operations – association groups – horizontalisation tendencies**

Another task and challenge of future distribution law is to give greater consideration to contractual distribution systems that are set up by retailers alone, i.e., without manufacturer participation, and which follow their own rules. In classical distribution law, the wholesaler is usually wrongly regarded as the "legal" contractual partner of the retailer, behind whom the manufacturer actually stands as the "economic" contractual partner (keyword: continuous distribution ties).<sup>47</sup> This concept is also still entirely influenced by vertical forward integration, which in reality no longer dominates the distribution landscape without restrictions. Modern distribution law must also cope with the contractual distribution systems of the trade alone, which are managed by a wholesaler or a software centre

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<sup>45</sup> Fundamental and prescient Sölter *Kooperative Absatzwirtschaft*; Sölter *Bezugsbindungen in vertikalen Kooperationssystemen*; Gahrens *Die Ökonomisierung der Warendistribution durch zwischenbetriebliche Kooperation*; compare also Martinek *Franchising* 121 et seq, 138 et seq; Meffert *Marketing im Wandel* 3 et seq.

<sup>46</sup> Martinek *Franchising* 80 et seq; Martinek *Moderne Vertragstypen Band II* 25 et seq, 57 et seq; Martinek 1997 *ZHR* 95.

<sup>47</sup> Ulmer *Der Vertragshändler* 92, 294; Kapp *Wettbewerbsbeschränkungen durch vertikale Vertriebsbindungen?* 30 et seq.

as a system head office and which, under their own trademark and with their own product range, compete with manufacturer-managed and manufacturer-participating distribution systems as well as with the horizontal trade association groups. It was a mistake of the previous distribution law not to have dealt sufficiently with affiliated groups, purchasing cooperatives, central regulation systems, etc. Such distribution systems have become a conspicuous factor in the sales landscape and are by no means always structured according to the pattern of industry-dominated sales intermediary relationships. On the contrary, they can be organised – whether as a "voluntary chain" in the form of a distribution agreement or, like the classical purchasing cooperatives, in the form of a company – without the authority to issue instructions and autocratic marketing leadership of the head office, but instead with the participation of the sales organs in the system control and in the development of the marketing concept.<sup>48</sup>

A related task and challenge of future distribution law is the inclusion of the increasingly pronounced horizontal forms of cooperation in the sales economy. At present the focus is all too one-sidedly on contractual distribution systems as a fan-shaped bundle of individual contractual relationships between the system headquarters and the individual companies on the sales front. In reality, many distribution systems have at least certain horizontal elements, for example in the form of an exchange of experience between the sales organs or a jointly exercised advisory function for the head office. The decisive question is the degree to which these elements are present, which can be very different, but in any case, can also be very high, even if such horizontal elements cannot always be found in the bilateral vertical agreements, because they are constituted only during the implementation of the system cooperation. Certainly, advisory boards of authorised dealers in motor vehicle distribution (dealer advisory boards) can be limited to merely consultative functions or can even have a mere alibi function to disguise what is in reality strictly autocratic central control. In some sectors, however, dealer advisory councils may have grown to become steering bodies towards which the system headquarters may even have the position of an executive body for the implementation of the jointly developed marketing concept. Distribution systems with more or less strongly developed horizontal elements and with participative decision-making structures have already established themselves, in which the

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<sup>48</sup> Beuthien and Schwarz *Kooperationsgruppen des Handels und Franchisesysteme*; Baumgarten *Das Franchising als Gesellschaftsverhältnis*; Kutscher-Puis *Die Verbundgruppen des Handels und ihre Anschlussverträge*; Bahr *Verbundgruppenfranchising und Kartellverbot*; Markmann *Franchising in Verbundgruppen*; Markmann and Olesch "Franchisesysteme und Verbundgruppen" 107 et seq; Olesch *Die Einkaufsverbände des Einzelhandels*; Olesch and Ewig *Das Management von Verbundgruppen*; Zentes and Morschett 2003 *ZfgGW* 143 et seq.

system head office possibly only represents itself as an executive organ of the system partners. Thus, in some sectors, distribution systems between "weakened" industry and "strengthened" trade have emerged that replace the model of autocratically controlled, fan- or pyramid-shaped, strictly vertically organised distribution systems in favour of models of partnership-based participatory powers and horizontal co-decision-making powers of the "system partners". This manifests a turning away from the unilaterally dominated central marketing of a manufacturing company and a turning towards vertical-cooperative, cross-economic level joint marketing. The problem potential hidden here is not sufficiently addressed by classical distribution law. A contractual distribution system can be not only a contractual association but also an association contract. Distribution systems can also be – and have been since the eighties of the last century<sup>49</sup> – internal associations and legal or legalisable "cartels" without further ado.

### **3.4 Industrialisation of services**

Another future task of distribution law is to turn more towards contractual distribution systems in the service sector. The traditional distribution law still tends to limit its scope to the sale of goods. Systems of pure service distribution (gastronomy, hotels, partnership agencies, cleaning companies, temporary employment agencies, language or music schools, student assistance, legal repetitories, etc.) have only recently and so far not been sufficiently recognised as vertical cooperation between independent service providers, but have traditionally and all too often been relegated to the area of licensing relationships and thus reduced to the aspect of the transfer of the use of trademarks and signs, names and business symbols. It is an omission that distribution law has so far not had an intermediary type for services provided in one's own name and for one's own account. In large parts of the service sector, the distribution forms of the sale of goods are imitated<sup>50</sup> with a time lag and lead to a vertical gradation of the structure of service enterprises, which enables or even requires the involvement of sales intermediaries by system headquarters analogous to the sale of goods. The development and provision of standardised services as pre-programmed mass goods embedded in a sophisticated marketing concept, and the incorporation of the principle of the large series into the service offers (keyword: industrialisation of services) have taken place in parallel to the idea of the branded article and poses problems analogous to goods in terms of sales technology. However, the currently prevailing distribution law

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<sup>49</sup> Compare *Bundeskartellamt*, Notice No 41/86 of 22 April 1986; *Bundeskartellamt*, Notice No B6-796000-J-151/85 of 31 March 1987; *Bundeskartellamt*, Notice No 61/86 of 2 July 1986; *Bundeskartellamt*, Notice No 23/87 of 10 March 1987; *Bundeskartellamt*, Notice No B5-791000-lb-220/88 of 1 June 1989.

<sup>50</sup> But compare the forward-looking considerations of Knigge *Franchise-Systeme im Dienstleistungssektor*, and Kaub *Franchise-Systeme in der Gastronomie 3 et seq.*

tends to take note of this only marginally (mostly as an atypical manifestation of franchising or "licensed distribution").

### **3.5 Digitalisation, internationalisation and globalisation of distribution**

Another task of future distribution law will be to cope with the digitalisation and internationalisation of distribution and with the processing of the requirements and implementation of European law, the comparative consideration of the legal situation in neighbouring countries and the solution of distribution-specific conflict-of-law issues. Regarding digitalisation, the traditional approach of e-commerce law does not suffice in the light of the growing importance and influence of smart contracts, of smart retail, of the multi- and omnichannel-strategies of social media marketing, and of shopless commerce in the B2B-relationships. Artificial intelligence- and virtual reality-methods will soon flood the modern marketing world. Hyperpersonalised offerings by means of customer data platforms and of personal clouds will soon dominate the scene. In short, the law of distribution will be compelled to acquaint itself with all the facets of the law of digitalisation to keep pace with the requirements of legal technology in a world of digital marketing.

The imperatives of internationalisation and globalisation seem so self-evident and ubiquitous that they need no further elaboration or proof. They affect not only the practice of sales and distribution law, but also the basic discussion of distribution law. This could provide ground-breaking impulses. In the international dialogue of the modern law of distribution. One could learn that distribution contracts must sometimes be understood as hybrid entities (intermediate organisations) between a contract-driven market and an association-like organisation and that the concept of the vertical "association" of intermediary contracts of a distribution contract system must therefore be supplemented by the concept of a horizontal "association" of all system-member intermediaries with "their" headquarters.<sup>51</sup>

## **4 Summary and conclusion**

Distribution law has consolidated itself in Germany as well as in neighbouring countries as an independent field of law with immense practical significance and has given rise to a community of distribution lawyers. Distribution law is the contractual and commercial law of the distribution (synonym: sales) of goods and services. It includes indirect distribution through contractual distribution systems involving sales

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<sup>51</sup> On the development of the international theory debate regarding distribution law, compare the contributions in Joerges *Franchising and the Law*; Teubner *Netzwerk als Vertragsverbund*; Teubner 1990 *ZHR* 295 *et seq*; Teubner 2001 *ZHR* 550 *et seq*; also see §§1-4 in Martinek, Semler, and Flohr *Handbuch des Vertriebsrechts*.

intermediaries such as commercial agents, authorised dealers, commission agents, franchisees or authorised specialist dealers, but also other forms of indirect selective distribution and universal or dispersed distribution. It also includes distribution alliance groups, voluntary chains, buying syndicates and atypical forms of cooperation. It also includes direct distribution up to e-commerce (internet distribution) with its consumer protection law dimensions. The focus is on the law of contractual distribution systems, which has developed primarily as judge-made law from commercial agency law and has contoured the new types of sales intermediaries, such as contract trade or franchising, in the light of vertical forward integration. Distribution contract law must cope with several regulatory tasks, ranging from the duty to clarify during contract negotiations and the control of general terms and conditions law to the compensation claim and post-contractual contract settlement. Until now it has seen its main task all too one-sidedly in the protection of sales intermediaries against overreaching, exploitation and the restriction of entrepreneurial freedom of movement.

Distribution antitrust law is primarily understood as the law of vertical restraints, in particular purchasing and territorial restraints, tying, customer and use restrictions, as well as selective distribution. The prohibition of discrimination also plays a prominent role. In the resulting regulatory tasks for a functioning internal and, above all, external product competition, competition restriction law comes into play, i.e., the German cartel law and the European antitrust law with its distribution-related block exemption regulations of the European Commission.

The future tasks of distribution law will have to be seen first and foremost in overcoming the one-sided orientation towards commercial agency law and vertical forward integration (business supply doctrine). More attention must be paid to partnership-based forms of vertical group cooperation between supplier and service centres on the one hand and dealers and service companies on the other. In addition, greater attention must be paid to horizontal dealer cooperations and sales groups as well as cooperative forms of organisation in the distribution of industrialised services. Of course, the digitalisation, internationalisation and globalisation of distribution must also be given greater attention.

There is therefore no lack of tasks for the further development of modern distribution law. Distribution law as the law of entrepreneurial cooperation in the sale of material goods and services will have to advance quantitatively and qualitatively into new dimensions. It will have to develop as an area of law at the intersection of contract, trade, cartel and fair-trading law and advance its development into an independent, systematically closed and dogmatically constructed area of law.

## 5 Overall summary

This contribution in honour of Professor Charl Hugo deals with the issues and the essence of distribution law in Germany. Law of distribution denotes the contractual, commercial, and competition law concerning the distribution of goods and services. It comprises forms of indirect distribution through contractual distribution systems by means of commercial sales agents, licensed distributors (concessionaires), commission agents, franchisees or authorised dealers, but also other types of indirect selective and universal distribution. It also includes distributive cooperative groups, voluntary chains, purchasing cooperatives and atypical systems of cooperation. Also, direct distribution like e-commerce (internet sales) with its dimensions of consumer protection law belongs to the field of distribution law.

The focus is on the law of contractual distribution systems which has evolved, mainly as judge-made case law, from the law of commercial sales agents and which has given shape to the new forms of distribution organs like licensed distributive dealers and franchisees. The contractual distribution law must cope with a variety of regulatory objectives which range from disclosure requirements in the context of contractual negotiations and the scrutiny of standard form clauses up to goodwill-compensation claims and post-contractual winding-up issues. Up to now its themes have almost exclusively been circling around the protection of distributive organs from overreach, from exploitation and from restraints of their entrepreneurial freedom.

Another focus is on competition law for distribution systems and marketing channels. First, this refers to the law of vertical restraints of trade, particularly exclusive dealing agreements, territorial restrictions, customer restrictions, tie-in agreements, utilisation confinements and selective distribution. In addition, the antitrust and competitive anti-discrimination law matters here. The ensuing normative problems for a workable intrabrand and, more importantly, interbrand competition must be resolved mainly by the German law on cartels and restraints of competition and by the EU antitrust (competition) law including the block exemption regulations issued by the commission and related to distribution.

As future tasks of distribution law one must mention an overcoming of the one-sided orientation towards the law of commercial sales agents and towards the forward vertical integration paradigm (the principal-agent-doctrine) regarding the control of retailers and distribution centres. The future distribution law will have to better accommodate vertical group co-operation based on partnerships between suppliers or service centres on the one hand and dealers or service outlets on the other. In addition, horizontal cooperatives of retailers and voluntary groups as well as

cooperative organisations for the distribution of prefabricated ("industrialised") services deserve decidedly greater attention. In addition, the modern law of distribution must meet the needs of the digitalisation, internationalisation and globalisation of distribution of goods and services.

May Professor Charl Hugo enjoy his future personal and professional life in health and happiness! *Vivat, crescat, floreat!*

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### **List of Abbreviations**

BGB	Bürgerliches Gesetzbuch
DGVR	Deutsche Gesellschaft für Vertriebsrecht
DStR	Deutsches Steuerrecht
EU	European Union
EwIR	Entscheidungen zum Wirtschaftsrecht
GTC	general terms and conditions
HGB	Handelsgesetzbuch
MDR	Monatsschrift für Deutsches Recht
NJW	Neue Juristische Wochenschrift
ORDO	Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RIW	Recht der internationalen Wirtschaft
TFEU	Treaty on the Functioning of the European Union
USA	United States of America
ZfgGW	Zeitschrift für das gesamte Genossenschaftswesen
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZvgIRWiss	Zeitschrift für Vergleichende Rechtswissenschaft