



International Distribution Institute

Customers' Data as Goodwill

IDI CONFERENCE 2024

Drafting and Managing International Sale Contracts Within
Distribution Networks

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Introduction

“Confidentiality / Data Protection”:

- Personal Data Protection
- Trade secrets: Goodwill

Personal Data Protection

- Protects the **use of individual's data** in relation to its **collection, storage and processing by entities**.
- **Nature:** mandatory rules.
- **EU regulation: *Regulation (EU) 2016/679*** of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
- **Includes:**
 - Email addresses (also corporate emails)
 - IP's (computer's I.D.)
 - Phone numbers

Trade Secrets

- **Protects** the **confidential information** created or legally acquired by a company.
- **Nature:** voluntary rules.
- **EU Directive:** ***Directive (EU) 2016/943** of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.*
- **Includes:**
 - *Data bases, for example, lists of clients, costumers, potential clients, recipients of newsletters, SSNN followers etc.*
 - *Client's Data Bases could also include: all kind of information on commercial transactions.*

Confidentiality on Trade Secrets vs Non Compete

- **Advantages:** no expiry term / non remunerated
- **Employees:** maximum 2 years / remunerated

Customers' Data are

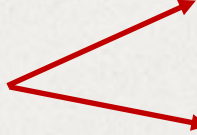
- Collected
- Stored
- Used
- Shared



By different parties in
the commercialization
chain

Franchisor – Franchisee
Principal – Distributor
Principal – Agent

How are PD collected and where are they stored?

- Use of mandatory software
- Online platforms/software for  Orders
- CRM
- Company's websites
- Social networks: Facebook, Instagram, etc.

Data Protection

- Consent to share personal data with other parties in the commercialization channel.
- Bidirectional ?
- Both parties are responsible of data treatment?
- Ownership on the Goodwill?

EU Regulation

Commission Regulation (EU) 2022/720 of 10 May 2022 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 (VBER):

Distributors and franchisees cannot be prohibited from making some types of publicity, therefore they could create their own personal data bases.

Agency Agreements

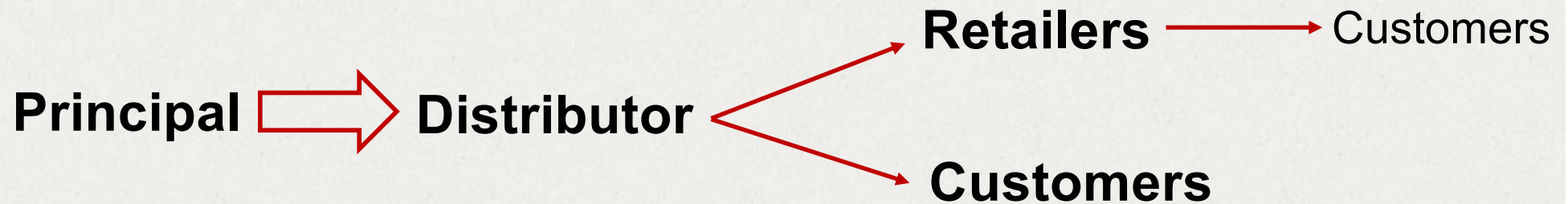
Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.



Principal accesses Clients' Data →

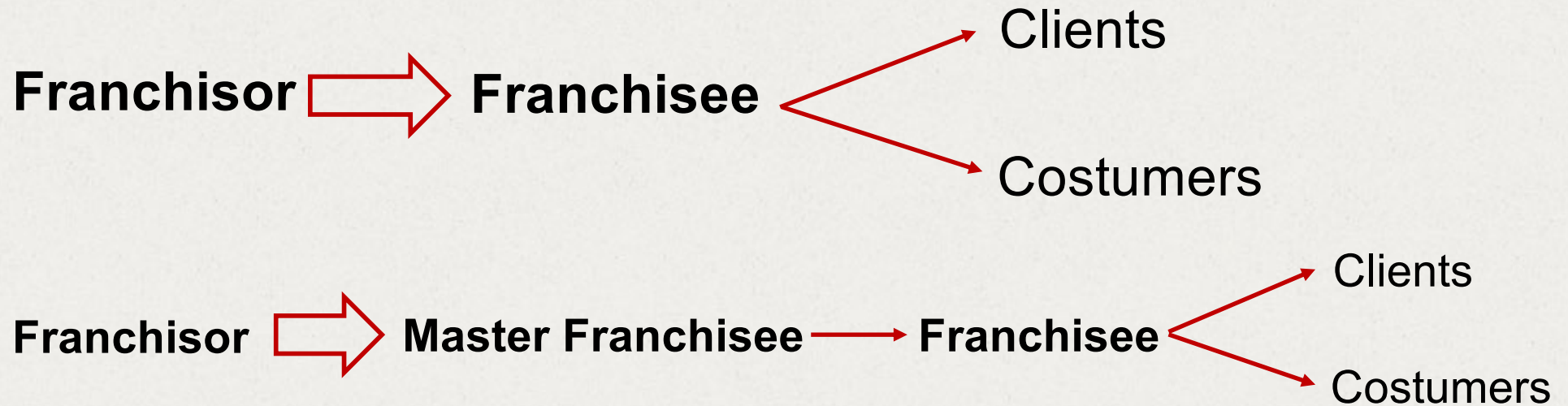
**Goodwill
compensation
is mandatory**

Distribution Agreements



Goodwill compensation ?

Franchise Agreements



Goodwill compensation? “Know How”
“ I.P.”



Conclusion

Personal Data is an asset
Access and right to use PD is goodwill



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Examples of contractual clauses

1. On-line platform agreement: “*neutral*”

- **PERSONAL DATA**:
- Personal Data relating to the Parties: typical clause.
- Personal data relating to Customers: The Parties agree that there is no transfer of personal data relating to Customers between them, given that the Software they use does not communicate this type of data.
- **CONFIDENTIALITY**: typical clause.

2. Retail store + online sales: “*principal favourable + 2nd part favourable*”

- **PERSONAL DATA:**
- The Franchisee undertakes to enter into the Franchisor's software, in accordance with the procedures described in the Know-How Manual, all the personal data of the customers of his Store. (***transfer of PD***)
- This data is integrated into a single database designed for the Franchisor and managed by the Franchisor and owned by the Franchisor. The Franchisee shall refrain from using, transferring, assigning or making this data available to third parties. (***PD-Database as Asset***)
- The Franchisor's customers' personal database is the exclusive property of the Franchisor. The Franchisor is the producer, as the Franchisor has taken the initiative and the risk of significant financial, material and/or human investment in its creation, development and evolution (***Data Base as an investment***)

2. Retail store + online sales: “*principal favourable + 2nd part favourable*”

- During the term of the present Contract or at the end of the Contract, except in the event of termination for non-performance by the Franchisee, the Franchisee may request the extraction of the personal data (surname, first name, e-mail address and contact telephone number only) that it has collected. This request must be made within thirty (30) days from the date of termination of the Contract. Requests may not be made to the Franchisor more than 2 times per contract year. The data shall be sent in electronic.xls format. (***Re-balancing in favor of franchisee***)
- The Franchisee may also create its own independent database of customer contacts.

3. Services license: “*principal favourable*”

- The Licensor collects PD from customers and prospects of the Licensee, who enters such data into the Licensor Software.
- The Licensee may, in its capacity as an independent professional, itself carry out the treatment of personal data within or from its Store as part of the exercise of its activity, and outside the use of the Software or the tools or the Licensor's Website.

3. Services license: “*principal favourable*”

Effects of termination of the contract:

If the Licensee has not transferred its business to a Licensee or a future Licensee, the Licensor may use the Licensee's customer file, a copy of which the Licensee undertakes to provide to the Licensor, for the purpose of informing customers of the end of the Licensee agency's membership of the brand and, if applicable, of the installation of a new Licensee of the brand in the geographical area and of the transfer of this customer file to the new Licensee; The Licensee, when obtaining consent for the personal data of its own customers, shall inform them that their personal data will be transferred to the Licensor and the companies belonging to its group, without any compensation from the Licensee.

4. Online platform services for reservations (*platform favourable*):

“The Platform is the owner of the database generated with the **personal data supplied by users in the process of purchasing products** through the website. The Platform undertakes to comply with its obligation of secrecy of personal data and its duty to treat them with confidentiality, and to this end The Platform will adopt the necessary measures to prevent its alteration, loss, unauthorized processing or access, taking into account at all times the state of technology in accordance with the provisions of current legislation on the protection of personal data”.

4. Online platform services for reservations (*platform favourable*):

“The user accepts that the personal data provided in the purchase process of our products are incorporated into an automated file, whose ownership corresponds to The Platform, in order to adequately provide the requested service, as well as to send commercial communications by email about other products that are marketed through The Platform website and that The Platform considers that could be of interest to the user, because they are similar to those contracted.

4. Online platform services for reservations (*platform favourable*):

Likewise, for the necessary provision of the contracted service, **the user accepts that The Platform communicates his or her personal data to the provider of the services that the user reserves.** The user will have access to these conditions during the purchase process. Likewise, in cases where it is not the user who is to benefit from the reservation made, he expressly undertakes to obtain the consent of those third parties who are to benefit from it, before communicating their data to The Platform.”

5. Healthcare services: *“clause intentionally unclear”*

- **CONFIDENTIALITY:** typical bilateral clause.
- **DATA PROTECTION.** The CLINIC (lessor of premises and provider of back-office services) shall be responsible, for the purposes of the GDPR, for the file generated as a result of the treatment of the data provided by the patient.
- The (Doctor) assumes the commitment to maintain professional secrecy with regard to the data which, as a result of its professional activity, is processed by them. This obligation will subsist even after the end of their professional relationship with the CLINIC.

6. Clause allowing principal to contact distributor's employees and clients:

The Distributor hereby authorises the Principal to contact directly via email, telephone or another online system those of its employees who are in charge, at any moment during the Term, of the Products' commercialization, regarding the purposes included in this Agreement, and guarantees it has obtained their consent to do so.

7. Confusing model: personal data and confidentiality mixed

- “The Distributor undertakes, throughout the duration of the distribution Contract and without time limit after its expiration, for any reason whatsoever, to maintain total confidentiality, refraining from disclosing, directly or indirectly, any financial or commercial information relating to the Principal and its exploitation procedures to which he may have had access within the framework of the execution of the Contract. (**Confidentiality**)
- The Distributor will inform prospective clients that their personal data will be communicated to the Principal so that a commercial proposal can be established, and that they have the right of access, rectification, portability and deletion of their personal data, as well as the right of opposition and the right to limit the processing of their personal data. (**Transfer of PD**)
- Within the framework of the contractual relationship between the Distributor and its clients, the Distributor is solely responsible for the processing of the latter's personal data for contractual purposes and will have to provide its own information and obtain consent if necessary”. (**Wrong**)

8. Model favourable to principal

a) Short:

“At the end of the distribution contract, for whatsoever reason, the personal data collected during the course of the business relationship shall become the property of the Principal.” (***May be unfair***)

8. Model favourable to principal

b) Strong:

“At the end of the Distribution Agreement for whatsoever cause, the Principal will be allowed to use the personal data collected during the business relationship, a copy of which the Distributor undertakes to provide to the Principal, in order to inform customers of the end of the distribution relationship and, if applicable, of the appointment of a new Distributor in the Territory and of the transfer of this customer file to the new Distributor; the Distributor, when collecting consent for the personal data of its own customers, will inform them that their personal data will be transferred to the Principal. ***(Usual / convenient in complex distribution chains)***”

9. Model favourable to distributor / franchisee (*unrealistic*)

“In the event of termination of the distribution / franchise contract, the goodwill that the Distributor / Franchisee has created during the course of the commercial relationship shall remain the exclusive property of the Distributor/Franchisee, and under no circumstances may this goodwill be transferred to the Principal”.



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