contrast



Pre-contractual information

Picture this.

You started working with a new distributor a year ago. However, the sales have not really lived up to expectations. The distributor has already been heard grumbling to the effect that he never would have entered into the distribution agreement if he had been aware of the market forecasts at the time of the negotiations. What´s more, he is threatening to have the whole distribution agreement declared invalid by asserting that you violated your “statutorily-defined pre-contractual information obligations”. Can he *do* that?

A brief clarification.

Title II of Book X of the Economic Law Code (the **“Pre-contractual Information Act”**) imposes specific information obligations on a supplier in the phase preceding the conclusion of certain commercial agreements.

Broad scope of application.

The Pre-contractual Information Act applies to “commercial cooperation agreements”. These are agreements where one party grants to another party the right to use a certain commercial formula in the sale of products (or the provision of services). This involves one or more of the following formulas: a common “sign board”; a common trade name; a transfer of know-how; or a commercial or technical assistance.

Thus, the scope of application of the Pre-contractual Information Act is not limited to franchise agreements. It is very broad and can also apply to "ordinary" distribution agreements if the distributor

may use a commercial formula in the sale of the products. Only bank and insurance agency agreements are expressly excluded.

What obligations?

Essentially, there are two obligations that rest upon the provider of the commercial formula.

The first is that of compiling and turning over a **pre-contractual information file**. This file must contain at least the following documents:

1. The draft agreement - and this has to be the *final* one. Any later change triggers the need for a *new* pre-contractual information file and a *new* period of reflection. The only exception concerns changes that are requested in writing by the buyer.
2. A separate document that must describe the legally-prescribed contractual provisions (the buyer's obligations, the scope of any non-compete clause, etc.) as well as the data for properly assessing the commercial cooperation agreement (market forecasts, details about the distribution network, etc.).

The second obligation is the observance of a **period of reflection**. From the moment the pre-contractual information file is turned over, at least *one month* must go by before the parties can actually conclude the commercial cooperation agreement. During this period they are prohibited from entering into any obligation vis-à-vis one another (with the exception of the conclusion of a confidentiality agreement) or from demanding or paying any compensation (the so-called "standstill obligation").

What sanctions?

Violations of the Pre-contractual Information Act are severely punished. In certain well-defined cases, the buyer can demand **annulment of the entire agreement** up to two years after the agreement was concluded. That is the case, for example, when the pre-contractual information file was not turned over, or when obligations were entered into during the reflection period in violation of the standstill obligation.

If the separate document does not contain one of the statutorily-prescribed contractual provisions, the buyer can demand **annulment of this provision** of the agreement up to *ten years* after conclusion of the agreement.

Concretely.

Before you sign a commercial cooperation agreement:

- Always check whether this agreement falls within the scope of application of the Pre-contractual Information Act;
- If yes, make sure that you carefully fulfil all of the information obligations listed in the Pre-contractual Information Act;
- Take adequate account of the period of reflection imposed by the Pre-contractual Information Act and the related standstill obligation, so that you can avoid any timing problems (for example, in light of the planned opening date).

Want to know more?

The Pre-contractual Information Act is included in Title II of Book X of the Economic Law Code and can be consulted here.