Exclusivity in Distribution and Agency Arrangements in Kuwait

Client briefing | Antitrust & Merger Control
Kuwait | Exclusivity in distribution agreements under Kuwaiti law
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Two bodies of law govern exclusivity in Kuwaiti distribution and agency arrangements. The Commercial Agency Law liberalized the distribution regime by abolishing statutory exclusivity and allowing parties greater contractual freedom in structuring their commercial relationships. The Competition Law, however, places limits on how that freedom may be exercised by prohibiting contractual arrangements that prevent, restrict or distort competition. Understanding how these two regimes interact—and how the Competition Law qualifies the contractual freedom afforded under the Commercial Agency Law—is essential for any principal seeking to structure a distribution arrangement in Kuwait.

Kuwait's Commercial Agency Law, Law 13/2016 (Agency Law), among other changes abolished mandatory exclusivity in distribution and agency arrangements. Under the prior law, agents and distributors benefited from statutory exclusivity—goods and services could only be distributed through the appointed agent or distributor. The Agency Law reversed this position. It now expressly provides that the importation or supply of any goods or products in Kuwait may not be confined to any single agent or distributor, even where the parties have agreed on an exclusive arrangement in their contract. Any exclusivity provisions are deemed null and void.

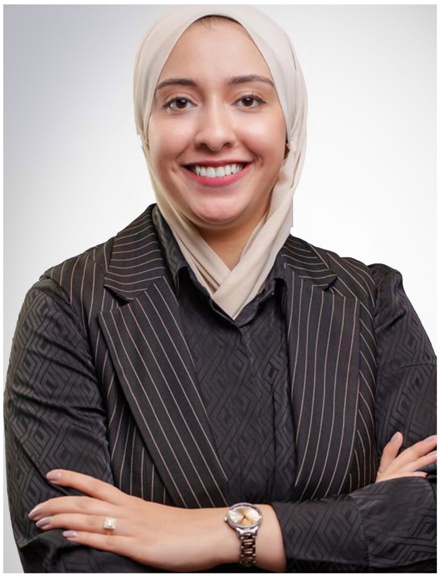
This means that parallel imports are legally permissible in Kuwait. Third parties may import and distribute goods or products regardless of whether these goods are subject of an agreement with an appointed agent or distributor. The principal may appoint more than one agent or distributor in Kuwait without restriction. This marks a deliberate departure from the prior protected monopoly model and was aimed at promoting competition and market access.

Although the Agency Law abolished mandatory exclusivity, it retained and strengthened protections on termination. A principal may not terminate an agency or distribution agreement without a breach or valid cause on the part of the agent. If the principal violates this requirement, they are obliged to compensate the agent for all losses and damages sustained as a result of termination. Compensation is also owed where the principal elects not to renew the agreement without cause. The Commercial Law contains a formula for calculating compensation in such circumstances, though its application in practice can depend heavily on the drafting of the underlying contract and on whether clearly defined performance milestones and termination for cause provisions are included.

In November 2020, Kuwait enacted its current Competition Law. The Competition Law prohibits any agreement that results in preventing, restricting or harming competition. This includes vertical restraints such as market allocation, resale price maintenance (RPM), and territorial or customer-based restrictions. The Competition Law also prohibits abuse of dominance.

Although the Agency Law now permits parallel imports and several distributors being appointed, parties may still seek to achieve de facto market protection through contractual means—for example, by imposing exclusivity obligations, RPM, or market allocation clauses. Such practices are subject to scrutiny under the Competition Law. Vertical agreements that partition markets territorially or by customer, or that restrict a distributor's ability to set its own resale prices, risk being characterized as anti-competitive under the Competition Law. The Kuwaiti competition authority has shown increasing willingness to investigate and sanction such conduct.

However, the authority has to date not weighed in on possible anticompetitive effects of the expansive protections against termination or non-renewal of agency and distributor arrangements established by the Agency law. While the law abandoned exclusivity, it maintain provisions making it difficult for principals to terminate agency or distributor agreements or ending them by letting them run out. This restrictive approach effectively concentrates market power with existing distributors and agents by incentivizing principals to maintain existing structures in favor of engaging new agents and distributors. Thereby, the Agency Law itself creates a situation that disadvantages newcomers and solidifies existing arrangements in favor of a dynamic market. This effect stands in conflict with the Competition Law that seeks to promote and safeguard market dynamics to establish fair and productive competition. How this conflict between the Agency Law and the Competition Law should be resolved is currently not discussed or contemplated by the legislator. The Kuwaiti competition authority has also not made proposals for resolving it. It remains to be seen whether this issue will be attended to in future amendments of the Agency Law or the Competition Law. At present the restrictions and the anti-competitive effects imposed by the Agency Law remain unchanged.



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