

Checklist – Intercompany Agreements for Transfer Pricing Compliance

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Resale and distribution of goods

1. **Contracting model:** Ensure you have an accurate understanding of the relevant contracting model (including which entities act as principal in sales to third party customers, and which act as principals in purchasing products or materials from third party suppliers), the flow of title to goods, and the physical flow of raw materials and finished products. Consider which parties (if any) are required to hold regulatory approvals or licences.
2. **Parties:** Identify legal entities correctly with company registration numbers and tax ID numbers etc. Identify whether any parties are acting through a branch / P.E. For arrangements between an entity and its own branch / P.E., include a recital explaining the status of the document (not a contract) and appropriate corresponding provisions.
3. **Bilateral / multilateral format:** If there are multiple distributors or multiple suppliers to the same distributor(s), consider the relative merits of using a series of bilateral agreements or a single multilateral agreement.
4. **Commencement date / effective date:** Consider carefully any attempt at retrospective economic effect, especially as regards allocation of risk. Where appropriate, refer to availability of evidence that the parties’ historic conduct is consistent with the terms of the agreement.
5. **Scope of products / goods:** Define appropriately. Allow for flexibility to modify product lines etc without unnecessary revision of the agreement.
6. **Territory and exclusivity** (if applicable): Define appropriately. Allow for flexibility to modify these terms without unnecessary revision of the agreement.
7. **Order procedures:** Avoid unnecessarily prescriptive provisions. Avoid obligations to purchase minimum volumes unless this is required to reflect the nature of the intended commercial relationship.
8. **Associated services provided by supplier** (e.g. strategic support): ensure consistency with intended functional analysis. Consider whether such services should be governed by a separate agreement.
9. **Associated services provided by distributor** (e.g. marketing and PR activities, after sales support): ensure consistency with intended functional analysis.
10. **Associated software:** Consider whether there is any associated software (e.g. embedded in the products or used in association with the products), and if so how the legal relationship between the parties regarding that software should be defined.
11. **Inventory risks:** Reflect intended allocation of inventory risks. If appropriate, include an obligation the supplier to buy back unsold stock. Avoid ‘boilerplate’ obligations to maintain stock levels unless this is required to reflect the nature of the intended commercial relationship
12. **Passing of risk in goods:** Ensure consistency with intended risk allocation and functional analysis, and with any terms regarding obligations to insure.

13. **Passing of title in goods:** Ensure consistency with chain of title to raw materials and finished products. If appropriate, provide for 'flash title' (acquired by distributor immediately prior to on-sale to third party customer).
14. **Credit risk:** Ensure consistency with intended risk allocation. If appropriate, reflect allocation of credit risk in deferred payment terms or an obligation of the supplier to buy the distributor's book debts at par.
15. **Currency risks:** Ensure consistency with intended risk allocation, e.g. through definition of currency of payments. Consider how exchange gains or losses may be treated in any specified net margins to be achieved by the distributor (where applicable).
16. **Product liability and related risks:** Ensure consistency with intended risk allocation. Consider carefully any warranties given by supplier as to quality / fitness for purpose. Where appropriate, include indemnities in favour of the relevant party to be de-risked.
17. **Regulatory risks:** Ensure consistency with the regulatory structure and the intended risk allocation. Consider whether any 'boilerplate' provisions regarding compliance with laws etc are appropriate.
18. **Limitation of liability / caps on claims:** Ensure consistency with intended allocation of risk, and that they do not conflict with the intended effect of any contractual warranties or indemnities.
19. **Pricing of shipments:** Ensure framework for pricing of individual shipments is expressed with 'legal certainty' and is consistent with intended allocation of economic risks (including market risk) and rewards. Incorporate any guaranteed or minimum return for the distributor. Where applicable, include appropriate definitions of margins etc. Provide for post year-end true-up or true-down adjustments as appropriate.
20. **Payment provisions:** Ensure consistency with intended risk allocation. Relevant provisions include due dates for payment, VAT treatment, provisions for default interest. Grossing up provisions are unlikely to be appropriate, unless it is intended to allocate tax risks to the supplier. Consider interaction with documentation of intercompany loans / balances.
21. **Term and termination provisions:** Ensure that they make commercial / economic sense from the perspective of each participating entity. Especially relevant for a distributor which is intended to carry limited risk, if that distributor depends on this agreement to recoup set-up costs or ongoing overheads. Consider any provisions for termination on occurrence of events of defaults or force majeure events, and whether they reflect an arrangement which the directors of each participating entity can properly approve.
22. **Obligations on termination:** Ensure consistency with the intended commercial nature of the transaction. Includes treatment of customer / user data, treatment of stock, and inclusion / exclusion of rights to compensation or indemnity on expiry or termination of the agreement. Post-termination restrictive covenants are unlikely to be appropriate in most cases.
23. **Ownership / control of intangible assets and related risks:** Reflect the legal / beneficial / economic ownership and flow of intangible assets and related IP rights, and the associated functional analysis. Includes brand IP, customer data, user data, obligations to maintain and defend IP rights etc. Consider whether it is appropriate to refer to any separate IP licence (if applicable), and if so what implications may arise as regards customs valuations.

24. **General provisions:** Avoid unnecessary 'boilerplate' provisions which may undermine the clarity of the document and which may inadvertently contradict the intended risk allocation or functional analysis.
25. **Applicable law:** Include a clear and legally binding choice of applicable law and jurisdiction.
26. **Translations:** Consider whether notarised, certified or simple translations may be required. Specify which language version of the agreement prevails if there is any conflict.
27. **Other formalities:** Consider what (if any) additional formalities apply, e.g. execution as a deed, requirements to comply with mandatory local laws etc.
28. **Due execution, dating and archiving:** Ensure that the resulting agreement(s) are duly signed / executed and dated, and that signed copies are archived appropriately and are available when needed to respond to enquiries and tax audits.

Comments welcome

Resources can always be improved. Please send any comments or suggestions to LCN legal at info@lcnlegal.com.

For specialist legal assistance with intercompany agreements and the legal structuring of multinational groups

To arrange a free, no obligation and confidential consultation with one of our senior lawyers regarding the review, updating or creating of intercompany agreements for your group or for a client you represent, call us on one of the numbers shown above, email us at info@lcnlegal.com, or contact us at www.lcnlegal.com.