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MAIN CHANGES BROUGHT ABOUT BY THE ORDINANCE ON TRANSPARENCY, PRACTICES THAT RESTRICT COMPETITION AND OTHER PROHIBITED PRACTICES DATED APRIL 24, 2019

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Article 17 of the Law for the balance of trade relationships in the agricultural and food industry of October 30, 2018 (known as the “EGalim” Law) authorized the French Government to recast by means of an ordinance Title IV of Book IV of the French Commercial Code on transparency, practices that restrict competition and other prohibited practices. This has now been done with the publication of Ordinance No. 2019-359 of April 24, 2019.

The objective pursued by the legislator is to make the rules governing business relationships, practices that restrict competition and prohibited practices easier to understand and more transparent, and to ensure greater legal certainty.

Article authored in collaboration with Cyrine Boudouda, trainee-lawyer

Ordinance No. 2019-359 of April 24, 2019 (the “Ordinance”) clarifies and amends important provisions governing the life of businesses. This article will address these changes from three different angles, in accordance with the new presentation of the French Commercial Code: transparency in negotiations and business relationships (1)[1], invoicing and payment terms (2)[2], reorganization of the law on practices that restrict competition (3)[3].

Only the most significant changes will be mentioned in this Article.

1. Towards more transparency in negotiations and business relationships

A. Creation of an article dedicated to general terms of sale

Previously scattered in various articles of the French Commercial Code, the rules governing general terms of sale (hereinafter “GTS”) are now set forth in a dedicated article, i.e. Article L. 441-1 of the French Commercial Code. These rules are structured around four major themes: (i) the content of the GTS, (ii) the obligation to produce such terms to the commercial partner, (iii) their role as the “basis for commercial negotiations”, and (iv) the penalty in case of non-production.

- **The content of the GTS:** the sale conditions are no longer included among the information that must mandatorily appear in the GTS. Only the elements for

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determining the price, such as unit price lists, payment conditions and applicable rebates, if any, are required under new Article L441-1 I of the French Commercial Code, it being specified that such list is not exhaustive.

- **The obligation to produce the GTS:** this obligation is now imposed on “any person carrying on manufacturing, distribution or service activities” who/that establishes GTS, insofar as a buyer has requested the production thereof for the purpose of a professional activity. The GTS must henceforth be produced by any means which constitute a “durable medium”.
- Once established, the GTS remain, like before, the “*sole basis for commercial negotiations*”.
- **The penalty:** the civil fine is replaced by an **administrative fine** of up to 15,000 euros for natural persons and 75,000 euros for legal entities. This amendment **increases the effectiveness of the penalty** for non-production of the GTS since such penalty may be imposed by a competent administrative authority without the need to refer the matter to the court.

B. The new regime governing “conventions uniques”

The “convention unique” is a single commercial agreement that formalizes the outcome of the negotiations between the supplier and the distributor or service provider.

Former Articles L. 441-7 and L. 441-7-1 of the French Commercial Code used to provide respectively for a general regime applicable to single commercial agreements concluded between a supplier and a distributor, and a lighter regime for single commercial agreements concluded between a supplier and a wholesaler:

New articles L. 441-3 to L. 441-7 of the French Commercial Code introduced by the Ordinance create two regimes for the formalization of business relationships between suppliers and distributors:

a) A general regime for single commercial agreements between a supplier and any distributor or service provider (including wholesalers).

- The mandatory content of the single commercial agreement is similar to that previously required for single commercial agreements concluded between suppliers and wholesalers. As such, it must include:
 - The conditions of the transaction for the sale of the products or services (which include in particular price reductions);
 - Commercial cooperation services (which are provided by the distributor or service provider when reselling products or services);
 - Other obligations (which are performed by the distributor or service

provider in order to facilitate their business relationship with the supplier).

- The Ordinance abolishes the obligation to provide the following information:
 - The price list used as a basis for the negotiations or the terms and conditions in which this list can be consulted;
 - The three-month period that was imposed on the supplier to produce its GTS before the deadline of 1 March. It is replaced by "a reasonable period" before 1 March. Similarly, for products or services subject to a particular marketing cycle, the GTS must be produced "before the starting point of the marketing period"^[4] and no longer two months before it.
- A new definition of "**agreed price**" is introduced^[5] and now includes remuneration for **commercial cooperation services** in addition to the price resulting from the conditions of the transaction for the sale of products or services and remunerations for other obligations designed to promote the business relationship between the supplier and the distributor.
 - b) A specific regime for single commercial agreements relating to day-t-day consumer products**, namely "unsustainable products with a high frequency and recurrence of consumption", the list of which will be set out in a forthcoming Decree. It should be noted that wholesalers are expressly excluded from the scope of application of this scheme.
- In particular, the single commercial agreement must include, in addition to the information provided for in the general regime (see above), the following information:
 - The unit price list provided by the supplier or the terms and conditions in which the version of the list used as a basis for the negotiations can be consulted;
 - The estimated turnover and the terms and conditions for revising it for single commercial agreements concluded for two or three years. These statements, together with all the obligations set out in the single commercial agreement, constitute the **business plan for the commercial relationship**.
- The supplier remains bound to produce its GTS at least three months before March 1, or two months before the start of the marketing period for products or services subject to a particular marketing cycle^[6].
- The Ordinance also specifies that any amendment to the single commercial agreement must be in writing and must set out the new element justifying such amendment^[7]. This obligation is applicable to any single commercial

agreement in force as of April 26, 2019.

Except for amendments, the new single commercial agreement regime will come into force on March 1, 2020 for agreements in force as of April 26, 2019 with a duration of more than one year^[8].

2. New provisions on invoicing and payment terms

A. Regarding invoicing rules

The Ordinance harmonizes the rules set forth in the French Commercial Code with those of the French Tax Code. One of the main developments^[9] is the addition of two mandatory statements on the invoice, i.e.:

- **the invoicing address of the buyer and the seller** (if different from their respective addresses); and
- **the purchase order number**, if issued beforehand.

These rules shall enter into force on October 1, 2019.

Still for the **swiftness and effectiveness of applicable penalties** in case of non-compliance with the invoicing rules, the criminal fine law is replaced by an **administrative fine** (75,000 euros for natural persons and 375,000 euros for legal entities).

B. Regarding payment terms

The Ordinance does not make any substantive changes but provides greater **clarity** by reorganizing the texts. The provisions on payment terms are now included in new Articles L. 441-10 to L. 441-16 of the French Commercial Code.

3. Reorganization of the law on practices that restrict competition

Regarding practices that restrict competition, the Ordinance completely recasts the applicable framework.

A. The deletion of references to some practices that restrict competition

Former Article L. 442-6 I of the French Commercial Code, which listed thirteen practices that restrict competition, has been replaced by Article L. 442-1 that is now structured around three practices:

- Obtaining or attempting to obtain from the other party a benefit without consideration or a benefit that is manifestly disproportionate to the value of the consideration granted;
- Subjecting or attempting to subject the other party to obligations that create a significant imbalance in the rights and obligations of the parties;
- The sudden termination of established business relationships.

The other practices that restrict competition have been **deleted**, with the exception of the provisions concerning the prohibition to resell outside the network which are now addressed in a specific Article, namely Article L. 442-2[10]. However, these practices do not become lawful and may be sanctioned on the basis of the practices that have been maintained in the French Commercial Code.

In addition, the scope of the text is broadened as it now defines the author of the practice as “any person engaged in production, distribution or service activities”, which includes non-traders. In the same way, the victim is now referred to as the “other party” and no longer as the “commercial partner”.

B. The sudden termination of established business relationships

Former Article L. 442-6 I 5° has largely been incorporated into Article L. 442-1 I of the French Commercial Code. Failure to respect “written notice which takes into account in particular the duration of the business relationship, with reference to trade practices or multi-sector agreements” is, therefore, still punishable.

A significant development brought about by the Ordinance deserves to be underlined. Indeed, the liability of the terminating party **may no longer be sought** on the ground of insufficient notice period wherever an **eighteen-month notice period** has been respected[11].

In addition, the doubling of the duration of the notice period in the event of termination of business relationships relating to private label products, or resulting from a tendering procedure by means of remote bidding, is abolished.

C. Contracts or clauses that are automatically null and void

For the sake of simplicity, only two prohibited clauses out of the five that were previously listed are maintained in new Article L. 442-3 of the French Commercial Code.

As a result, are null and void clauses providing for the possibility to benefit:

- retroactively from discounts, rebates or commercial cooperation agreements, and/or
- from the more favorable conditions granted to competing businesses by the contracting partner

D. Penalties

The Ordinance specifies more clearly that the cap on the civil fine corresponds to the highest of the following three amounts[12]:

- Five million euros, or
- Triple the amount of benefits unduly received or obtained, or

- 5% of the pre-tax turnover generated in France by the author of the practices in question during the last financial year ended since the financial year preceding the one during which the practices were implemented.

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Notes

- [1] Book IV, Title IV, Chapter I, Sections 1 and 2 of the French Commercial Code
- [2] Book IV, Title IV, Chapter I, Section 3 of the French Commercial Code
- [3] Book IV, Title IV, Chapter II, Sections 1 and 2 of the French Commercial Code
- [4] New Article L. 441-3 V of the French Commercial Code
- [5] New Article L441-3 III of the French Commercial Code
- [6] New Article L. 441-4 VI of the French Commercial Code
- [7] New Article L. 441-3 II of the French Commercial Code
- [8] Article 5, I and II of Ordinance of April 24, 2019
- [9] New Article L. 441-9 of the French Commercial Code
- [10] "Any person conducting manufacturing, production, distribution or services activities, who/that becomes directly or indirectly involved in contravening the prohibition on reselling outside the network imposed on distributors bound by a selective or exclusive distribution contract covered by an exemption under the rules applicable to competition law shall be held liable therefor and shall compensate the harm caused thereby".
- [11] New Article L. 442-1 II §2 of the French Commercial Code
- [12] New Article L. 442-4 I of the French Commercial Code

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