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Distribution / Competition / Consumer Law Update

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Distribution and franchise networks

The Macron Act of 06 August 2015 added two articles to the French Commercial Code (articles L341-1 and L341-2) regulating the termination of contracts between distribution or franchise networks and retailers.

Scope of the new regulations

The new regulations, which will take effect on 06 August 2016, apply to contracts entered into by private legal persons that are a grouping of merchants or that provide the services listed in article L330-3 paragraph 1 of the French Commercial Code (hiring out of business and trading names and marks). This very broad definition covers chiefly distribution and franchise networks, but the regulations only concern contracts entered into with retailers – although the act does not actually define the concept of "*magasin de commerce détail*", which could mean both retailers and providers of services to consumers. However, the Autorité de la Concurrence (France's competition agency) has defined the concept in the past, and under its (perhaps a tad old-fashioned) definition, a "*magasin de commerce détail*" is a shop that essentially sells goods to consumers ("essentially" meaning here at least 50 % of sales), i.e., a retailer. If the courts settle for that definition, service franchises (e.g., restaurants, brokers, or travel agencies) will not be covered by the new regulations.

Furthermore, the regulations only apply to certain types of contracts entered into by the above mentioned parties, i.e., only contracts (i) whose purpose for both parties is to run the shop and (ii) that include clauses liable to restrict the retailer's freedom of trade. Article L341-1 paragraph 3 of the French Commercial Code however provides that the regulations do not apply to leases or the founding contracts of non-profit associations, trading and non-trading companies, and cooperatives.

Concomitant termination of several contracts

According to article L341-1 of the French Commercial Code, the contracts defined above must terminate concomitantly. In spite of the article's clumsy wording, a reasonable consideration is that such concomitant termination is required for both open-ended and fixed-term contracts. Accordingly, the non-renewal or termination of a contract will cause all other contracts to terminate, whether fixed-term or open-ended. The courts will have to refine this, especially where the contracts involve multiple contracting partners or where a contract is terminated for the purpose of defrauding a party of their rights.

The limited validity of clauses restricting the parties' freedom of trade post-contract termination

Article L341-2 of the French Commercial Code lays on the parties, for the contracts defined above, a very strict validity rule for clauses effectively restricting freedom of trade after the contract's termination. The article is obviously meant to cover post-contractual non-compete and non-reaffiliation clauses, though it could also possibly cover other post-contractual undertakings such as pre-emption and restitution clauses. Such clauses will henceforth be deemed null and void unless the creditor under the clause (the head of the network) can prove that the clause meets four cumulative requirements (after the rule set by the European guidelines):

- It is limited to the kinds of goods or services concerned by the contract.
- It is limited to the premises from which the retailer carried on their former business.
- It is absolutely necessary to protect know-how which must furthermore be substantial, specific, secret, and disclosed for the purposes of the terminated contract.
- It must have a maximum term of twelve months following the contract's termination.

The courts will almost certainly have to clarify a number of issues. For instance, an exclusive distribution network might be hard put to successfully argue that a non-compete undertaking is absolutely necessary to protect its know-how as such a concept is obviously foreign to distribution contracts.

Internet and NICT

According to the CJEU, business-to-business "click-wrapping" is lawful

Asked to issue a preliminary ruling on the Brussels I Regulation (article 23 § 1), the CJEU handed down a ruling on 21 May 2015 of particular practical interest for online business-to-business sales (CJEU, 21 May 2015, case no. C-322/14). According to article 23 of the Brussels I Regulation, jurisdiction clauses are valid only if laid down in writing, and any communication by electronic means fulfils that requirement if the buyer can keep a durable record of the agreement on jurisdiction.

In the case referred to the CJEU, even though the purchaser had to click once to agree to the GTCs and then again to display them, the Court ruled that in a business-to-business contract the decisive condition for the jurisdiction clause to be valid was if the buyer was able to keep a durable record of the GTCs prior to concluding the contract by saving and printing them, regardless of whether they had to click twice therefor. Because they only need to permit buyers to save and print their GTCs, the CJEU's solution will certainly prove useful to operators.

Transferring personal data to the USA: The fine line between criminal liability and contractual uncertainty

As an almost involuntary epilogue to the Snowden revelations, on 06 October 2015 the CJEU annulled the European Commission's decision setting up a "safe harbour" between the European Union and the United States of America and authorising the transfer of personal data to the USA (CJEU, 06 October 2015, case no. C-362/14, Schrems *v*. Facebook). In fact, although personal data collected within the European Union had been lawfully transferred since 2000 onto servers in the USA under the safe harbour scheme, it is now illegal to transfer personal data to the USA on that basis.

Even though European data protection agencies, including the CNIL in France, and the European Commission (the G29) are currently working to devise an alternative system, any French companies directly or indirectly concerned (because they are subsidiaries of US groups or use the services of businesses – servers, clouds, etc. – that transfer all or part of the data to the USA or because they transfer data to partner companies which in turn transfer them to the USA) must take immediate steps to avoid breaching French and Community regulations pertaining to the protection of personal data and their transfer outside the European Union, including data on prospects, customers, employees, partners, etc.

Today there exist other legal bases to lawfully export personal data abroad. In short, unless the data are transferred to a foreign (non-EU) country *"offering a sufficient level of data protection"* (basically Canada, Argentina, and the EFTA – not the USA), French companies can only transfer such data abroad if they (i) sign an agreement with their partner which strictly complies with the model contractual clauses approved by the European Commission or (ii) adopt binding corporate rules on data protection. Since the CJEU's decision has an immediate and significant impact on all companies that used the safe harbour scheme to approve their data transfers to the USA, they need to find a different approach until the European Commission signs off on a revised system. For reference, the failure to comply with the French rules governing data transfers abroad carries a 300,000 EUR fine and five years' imprisonment.

Restrictive business practices

The material imbalance sanction applied to price reduction

On 01 July 2015, the Paris Court of Appeal applied article L442-6 I 2° of the French Commercial Code to a price reduction in a remarkable way by sanctioning a material imbalance between the parties' rights and obligations (Paris Court of Appeal, 01 July 2015, case no. 13/19251, GALEC (E. Leclerc) *v*. the French Ministry of Economic Affairs). In the case at hand, the French agency for competition, consumer affairs, and the repression of fraud, the DGCCRF, had noted, in 118 agreements with suppliers, an end-of-year-rebate clause whose quid pro quo was either non-existent or too vague. The Court's decision is remarkable in that the judges took care to recall that although the courts may not control prices because of the freedom to negotiate commercial terms, they may sanction behaviours or clauses that result in a material imbalance. The Court noted that the distributor had not undertaken anything towards the suppliers who on the contrary were firmly committed to paying the rebate. The Court was also careful to note that the distributor had not proven that the suppliers' obligation was balanced by any other clauses. It is worth noting that the Court conversely confirmed the validity of the payment by anticipation of rebates on account on a monthly basis, provided such payments are based on realistic sales estimates.

Sudden termination and the sale of a business: The previous relationship is irrelevant

The Cour de Cassation (France's highest civil court) carries on refining the rules applicable to the sudden termination of an established business relationship as embodied in article L442-6 I 5° of the French Commercial Code. Although the concept of an established business relationship is often defined from an economic point of view, irrespective of its contract law or company law aspects, the Court recently added a contribution, or perhaps a restriction, concerning the termination by the buyer of a business of a relationship previously established by the seller (Cour de Cassation, 15 September 2015, case no. 14-17.964). In fact, the Court ruled that the notice period which the contracting partner is entitled to does not need to take the duration of the relationship conducted with the seller of the business into account; the sale of the business does not automatically entail the transfer of any previous business relationships to the buyer. Only where the buyer clearly intended to take over the previous business relationship might a longer notice period be required. However, the Court's solution shifts the problem onto the seller of the business, as they might be held liable by their contracting partner for the sudden termination of their relationship.

Commercial agency

Neglect and serious misconduct

Serious misconduct on the commercial agent's part, which precludes the payment of any compensation upon the termination of their contract, is defined as misconduct that makes the continuation of the contractual relationship impossible. On 09 June 2015, France's highest civil court, the Cour de Cassation, recalled two principles that apply in such cases (Cour de Cassation, 09 June 2015, case no. 14-14396). For an agent to show a lack of interest and neglect their activity consistently amounts to serious misconduct (precluding the payment of compensation for termination). However, the principal must express their grievances and warn the agent in a timely manner during the performance of the contract, otherwise the agent may claim that the principal tolerated the situation. In practice, reconciling those two rules is a delicate balancing act as the principal must give their agent warnings but not so many as to moot the instance of serious misconduct.

Serious misconduct and notice period: It does not pay to be nice

It is difficult to reconcile the termination of a commercial agency contract on grounds of serious misconduct with a notice period, however brief. The Metz Court of Appeal recalled on 26 May 2015 that serious misconduct and notice period are hardly compatible since case law defines serious misconduct as misconduct that makes it impossible to maintain the contractual relationship (Metz Court of Appeal, 26 May 2015, case no. 15/00181). In fact, the courts have reinterpreted article L134-11 of the French Commercial Code in such a way that it is no longer a question of the principal being entitled to disregard the notice period rules in case of serious misconduct on the agent's part, rather than of the principal being barred from giving the agent any notice if they do not want the instance of serious misconduct to be deemed to be a case of "simple" misconduct, which does not preclude the payment of compensation for termination. By asserting their agent's serious misconduct as grounds for terminating the contract, the principal must be logical to the last and terminate the contract without prior notice.

Confirmed: Trial periods are lawful

Whereas article L134-12 of the French Commercial Code, which provides for compensation for termination, remains public policy, the Cour de Cassation (France's highest civil court) had to rule on the validity and legal regime of a trial period provided for in an agency contract (Cour de Cassation, 23 June 2015, case no. 14-17.894).

The Court confirmed its earlier position and dismissed the public policy argument by noting that, for the protection enjoyed by commercial agents to attach, the agreement must be definitively concluded. The Court therefore confirmed the validity of the eight-month trial period. In principle, this is an unambiguous solution: If a clause provides that the contract is not definitively concluded until the expiration of the trial period, the protection enjoyed by commercial agents does not attach; accordingly, the agent is not entitled to any compensation upon the termination of the trial period. Still, for all that the principle might be unambiguous, an excessively long trial period might yet be sanctioned as abusive, just like the abusive renewal of a trial period.

Promotion

The fine line between warning and disparagement

The case decided by France's highest civil court, the Cour de Cassation, is a new illustration of how fine a line there is between warning and disparagement (Cour de Cassation, 27 May 2015, case no. 14-10.800). In the case at hand, the Court ruled that a warning sent to the customers of a company suspected of patent infringement amounted to disparagement because it set out a number of legal issues in threatening terms without any further justification. This solution is all the more interesting as the disputed letter had been sent by the patentee who, pursuant to article L613-1 paragraph 3 of the French Intellectual Property Code, must advise indirect infringers (resellers or users) of any infringement in order to be able to subsequently prove their bad faith and hold them liable. However, here the Court did not sanction the principle of the letter rather than its form and contents which were both too broad and threatening, whereby the fact that the letter included copies of the patents was irrelevant.

Consumer law

Planned obsolescence is now an offence

The French act of 17 August 2015 on the energy transition for green growth made built-in obsolescence an offence. Article L213-4-1 of the French Consumer Code aims to sanction the various practices by which commercial operators attempt to deliberately reduce the life of the goods they launch in order to increase their replacement rates.

Such practices now carry two years' imprisonment and a 300,000 EUR fine that may be increased to 5 % of mean yearly turnover. Although such an initiative is commendable in principle, the fact that the legislator adopted a broad definition risks hindering its actual implementation as it will be difficult to prove actus reus and mens rea. Furthermore, according to the law, a reference life will have to be determined for each product. Companies releasing new goods on the market must in any case take practical and documented steps in order to anticipate not only their criminal liability but also their civil liability based on either French consumer law (which may under certain circumstances lead to a class action) or French unfair competition rules.

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Contact:
Christophe Héry
E-mail: chery@lmtavocats.com

Tel.: +33 1 53 81 53 00
Fax: +33 1 53 81 53 30

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