
# Distribution / Competition / Consumer Law Newsletter

**May 2014**

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## *New act on commercial negotiations: Does increased formalism mean more transparency?*

Although the French Consumer Act of 17 March 2014 (the "Hamon Act") is best known for its "consumer" provisions, it is also going to alter relations between distributors and suppliers.

### Negotiations start always from the GTCs...

The GTCs already formed the basis of commercial negotiations; **they are now officially their "sole" basis**. This slight revision is meant to remind distributors that the GTCs are predominant and that they may not in any case dismiss them out of hand, even though it is of course still possible to negotiate. Furthermore, in order to curtail commercial negotiations, the GTCs' pricing list must now be notified by 01 December of each year.

### ...and come to an end with the annual frame agreement.

From now on, the GTCs' **price list** must be reproduced in the annual frame agreement. By providing that **"price reductions" must be detailed**, the law seems to be going back on the prior practice of overall price reductions, which could once more oblige the parties to provide justification for each item of remuneration. However, in a bout of flexibility, the law provides that obligations that are meant to promote the commercial relationship (what used to be known as "separate services") may be compensated by way of either a remuneration or a discount on the invoice; such compensation must in either case be set out in the annual agreement.

Under the Hamon Act, all "**New Promotional Instruments" (NPI)** covering all promotional techniques through which manufacturers grant consumers price reductions directly must be formalised in writing (in a separate instrument, not the annual agreement) as in such cases the distributor is only an agent in the meaning of article 1484 of the French Civil Code.

However, the true novelty of the law is that it provides for **administrative sanctions** instead of criminal penalties. Therefore, failure to comply with the provisions pertaining to the annual agreement may result in the French authorities (the DIRECCTE) directly ordering the offender to pay a fine (up to 375,000 euros for legal entities). As a consequence, we should be seeing a greater number of higher and quicker sanctions.

### A new restrictive practice

Under article L442-6 of the French Commercial Code, the law prohibits **invoicing or paying a product a different price than the price agreed upon** in the annual agreement or set out in the GTCs (provided they have been accepted as is). Consequently, this article could apply to informal commercial relationships where one of the parties wishes to change the price list set out in the GTCs.

### Regulation of industrial subcontracting

For the first time, industrial subcontracting (or, to be more precise, contracts for the purchase of products manufactured at the purchaser's request for the purpose of integrating them in the latter's own production) **must be formalised in a contract that must include a number of predefined clauses**. The minimum amount which such contracts must be worth for such formalism to become mandatory will be set by decree. Failure to enter into a formal contract in accordance with article L441-9 of the French Commercial Code will be sanctioned in the same way as the failure to sign an annual agreement.

## *International distribution: Two cats among the pigeons*

Two rulings of the Court of Justice of the European Union (CJEU) could have a profound impact on the legal security of the parties to commercial agency contract or distribution contract.

### Can a European commercial agent benefit from national protection?

In Unamar *v*. NMB (C-184/12), the CJEU had to determine whether a national law (here Belgian commercial agency law transposing the EC's 1986 directive) was to be deemed to include overriding mandatory rules and therefore applied independently of the law chosen by the parties (here Bulgarian law). The CJEU had already found in the Ingmar case (C-381/98) that the provisions of the 1986 directive guaranteeing a certain amount of protection to commercial agents had to be deemed to include overriding mandatory provisions where the contract is signed between an agent established within the European Union and a principal established without and governed by the principal's domestic law.

The CJEU ruled that **the application of the national law of a European Union member state, although normally transposing the rules set out in the 1986 directive, may be ruled out by the courts of another state in favour of the *lex fori*** if the court finds specific evidence that the legislator transposing the directive thought it crucial within its own legal system to grant the commercial agent protection beyond the requirements of the directive (which only laid down minimum rules). Although the ruling may raise more questions than it actually solves, there is no doubt that it could lead principals to better do their homework in order to make sure that their contracts comply with the overriding mandatory rules of European member states. Still, the CJEU's solution only applies in favour of the *lex fori* so it is up to the parties to choose the right court…

### Which court has jurisdiction over international distribution contracts?

In Corman Collins *v*. La Maison du Whisky (C-9/12), the CJEU had to rule on the likening of a distribution contract to a service agreement in the meaning of article 5.1.b of Regulation 44/2001 (Brussels I). The CJEU had to determine whether a court to which a case is referred to pursuant to article 5.1 of the Brussels I Regulation is supposed to check whether it does have jurisdiction according to the jurisdiction criterion applicable to service agreements or to the ordinary jurisdiction criterion applicable to contracts in general.

Going back on its definition of service agreements, which implied the existence of a specific activity and the payment of compensation, **the CJEU likened the distribution contract to a service agreement** on grounds that, firstly, the distributor offers "benefits" that a simple reseller does not offer, and secondly, compensation may be a consideration granted by the supplier to the distributor, for instance exclusivity or assistance, e.g., for advertising purposes.

According to the CJEU, likening distribution contracts to service agreements in the meaning of article 5.1.b implies a written agreement providing for a number of sufficiently real and substantial benefits granted by the supplier to the distributor. As a consequence, a distribution contract likened to a service agreement could be referred to the courts for the place of performance of the service whereas a distribution contract not likened to a service agreement would have to be referred, according to article 5.1.a, to the courts for the place of performance of the obligation in question. Given such uncertainty, it is fundamental that the parties include a jurisdiction clause in their contract...

## *Does article L442-6 I 5° of the French Commercial Code have a chance abroad?*

Almost 20 years after it came into force, the legal regime of article L442-6 I 5° of the French Commercial Code, which sanctions the sudden termination of an established commercial relationship (i.e., its termination without giving written notice sufficiently in advance in view especially of the length of the relationship), is still treading water, particularly in international matters.

### Is article L442-6 I 5° of the French Commercial Code an overriding mandatory rule?

An overriding mandatory rule is an imperative provision that the French courts must apply instead of the law normally applicable to an international contract. Often debated, the issue is often peremptorily decided by the courts in favour of French law. For instance, on 05 September 2013, the Grenoble Court of Appeal ruled out Luxembourgeois law as chosen by the parties and applied article L442-6 I 5° of the French Commercial Code on grounds that **it is an overriding mandatory provision** which the parties must submit to (case no. 10/02122). However, the court did not check whether the article complies with the overriding mandatory rules regime set out in the Rome I and Rome II Regulations.

### Which conflict-of-laws criterion for "sudden termination"?

Another way of applying article L442-6 I 5° of the French Commercial Code in international matters is for the courts to apply the conflict-of-jurisdiction rules applicable to quasi-delicts. For instance, on 25 March 2014 the Court of Cassation (the French supreme court) applied French law after finding that **the dispute had closer ties with France** than with Chile (case no. 12-29534). Certainly the Rome II Regulation did not apply here but the Court could have ruled specifically on the issue of whether the harmful event was located in France or not (though, it noted that the case was a complex tortious matter whose cause and resulting damage were located in different places).

## *The scope of "sudden termination": Still a work-in-progress*

Decision after decision, the French courts are still trying to define the scope of "sudden termination".

### "Sudden termination" and the sale of a business

In two rulings dated 22 January 2014 and 13 February 2014 respectively, the Paris Court of Appeal limited the cases in which a commercial relationship is deemed to have been continued by the purchaser of a business. The Court refused to consider that the purchaser had carried on the seller's commercial relationship with a partner in so far as **the relationship had originally been established in consideration of the identity of the contracting parties** (*intuitu personae*).

The Court went even further in the second ruling when it found that the sole fact that the purchaser starts a relationship with the seller's partner **does not entail as of right the**

**substitution of the purchaser for the seller** in the latter's prior relationship with the partner – unless the purchaser lets it be known that he intends to carry on the relationship already established by the seller and to assume the resulting duty with respect to the period of notice. These decisions seem to signal a case law shift compared to previous precedents.

### "Sudden termination" and subcontracting

On the other hand, on 27 February 2014 the same Paris Court of Appeal ordered a principal that had suddenly terminated its relationship with a general contractor to compensate the subcontractor for its prejudice resulting from such sudden termination... even though it would appear that the client was not aware that there was a subcontractor! The Court does not hesitate to consider that the sudden termination of the relationship with the general contractor may constitute a wrong vis-à-vis the subcontractor and to award the latter compensation for the loss of the margin he could have achieved during the length of the period of notice of which he was deprived.

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