

Distribution / Competition / Consumer Law newsletter

January 2017

The Sapin II Act: Relaxing pricing transparency regulations and hardening the rules against restrictive business practices

After the 2014 Hamon Act and the 2015 Macron Act, it is the turn of the Sapin II Act no. 2016-1691 of 09 December 2016 to tackle corruption issues and to attempt to modernize the economy. The Sapin II Act, which came into force on 11 December 2016, brings its share of reforms, relaxing the rules pertaining to pricing transparency, tightening the control over restrictive business practices, and increasing the penalties incurred all round.

➤ Relaxed transparency rules: Two timid steps in the right direction

In addition to changing the rules of transparency for business relations focussed on agricultural products, the Sapin II Act introduces two new rules:

– Increased term for summary agreements

The annual summary agreement recapitulating the outcome of business negotiations can now have a term of... up to three years (articles L441-7 I § 5 and L441-7 1 § 7 of the French Commercial Code), though the same form and substantial requirements still apply. However, summary agreements with a term of more than one year must set out the terms of revision of the agreed-upon price, which the parties are free to choose, such as an index (or several indices combined) reflecting the evolution of production factor costs. Irrespective of their term, summary agreements must still be entered into before 01 March of the year during which they are to become effective.

– New payment term for exports

For purchases that are not liable to VAT (article 275 of the French General Tax Code), the maximum payment term the parties may contractually agree upon in 90 days from invoicing (instead of the normal 60 days). However, this special term provided for in articles L441-6 I § 15 of the French Commercial Code only applies to purchases (i) of goods to be delivered as is (processed goods therefore seem to be excluded) outside the European Union (ii) by microbusinesses, SMBs, or intermediate-sized companies (big businesses are excluded). In order to be valid, such an exceptional term must be "*expressly covenanted by contract*". If in the end the purchased goods are not resold as is outside the European Union, the late-payment penalties of article L441-6 I § 12 of the French Commercial code apply.

➤ Penalization of three new restrictive business practices

In a traditional attempt to close loopholes in the law against restrictive business practices, the Sapin II Act penalizes three new forms of abuse:

- Any person taking part for no proportionate consideration and with no common interest in the financing of a sales promotion action or in the compensation of services rendered by an international organization of distributors incurs a penalty pursuant to article L442-6 I 1° of the French Commercial Code (which prohibits benefits that do not compensate any effective commercial service or that are evidently disproportionate).
- Clauses under which a trading partner incurs late-delivery penalties in case of force majeure are prohibited.
- In summary agreements with a term of more than one year, price revision clauses based on one or several indices bearing no direct relationship to the goods or services that are the object of the agreement are also prohibited.

➤ Hit 'em where it hurts: Threatening wallet and reputation as a deterrent

– Penalties for late payment

The cap on administrative fines for late payment is increased from 375,000 EUR to 2,000,000 EUR (for legal persons) and to 4,000,000 EUR for repeat offenders (within two years of a final decision). The Sapin II Act also lifts the cap introduced by the Hamon act that used to limit the maximum fine for concurrent offences to the highest administrative fine applicable. Furthermore, the decision setting the penalty must from now on systematically be published, judicial discretion being restricted to the duration and conditions of such publication.

– Penalties for restrictive business practices

The cap on administrative fines for restrictive business practices (no or disproportionate consideration, delisting, significant imbalance, sudden termination of a business relationship, etc.) is increased from 2,000,000 EUR to 5,000,000 EUR. The new maximum fine provides an alternative to the amounts defined by the Macron Act: three times the amount of unduly paid sums or 5 % of the turnover grossed in France. Here also, the decision setting the penalty must systematically be published.

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