

Insights

COMPETITION AND DISTRIBUTION LAW NEWSLETTER – BCLP PARIS – DECEMBER 2021

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SUMMARY

This newsletter focuses on two recent legal updates in the agri-food sector:

- The Egalim 2 Law, adopted on 19 October 2021, is aimed at granting guaranties to the French food sector. More specifically, this law intends to work for a "*fair remuneration of farmers*" and, to this end, to rebalance trade relations between the various links in the food and agri-food chain.
- In Europe, the European Commission is working on the review of the Vertical Block Exemption Regulation which will greatly impact the agri-food industry in the EU.

I. IN FRANCE, THE EGALIM 2 LAW INTRODUCES SIGNIFICANT CHANGES IN THE AGRIFOOD SECTOR

On October 19 2021, the French legislator passed a new law intended to protect the remuneration of French farmers ("*Egalim 2*").

This very technical law introduces new regulation and transparency measures, which affect the entire agri-food chain in France, from (i) its upstream part – i.e. relations between agricultural producers and their direct buyers, to (ii) its downstream part – i.e. relations between food suppliers and distributors, and (iii) consumer information.

This newsletter aims at giving a brief overview of this new law and its impact on the agri-food sector.

i. The impact of Egalim 2 on commercial negotiations within the upstream part of the agri-food chain

Several provisions of Egalim 2 cover relationships between agricultural producers and their direct buyers.

Introduction of the obligation to conclude written and multi-year framework contracts

Egalim 2 sets a new obligation upon all agricultural producers who deliver goods on the French territory to **conclude written and multi-year framework contracts** with their direct buyers that will provide a frame of reference for further negotiations between the parties.

The producers must initiate these framework contracts comprising clauses that relate to:

- the duration of the contract (at least three years);
- the price, the criteria and terms of its determination (relevant production costs in agriculture) and the terms for its automatic review.

Trialing of a price variation's control mechanism, also called "price tunnel"

Egalim 2 provides for the trial (during a maximum period of five years) of a price tunnel where the parties (producers and their direct buyers) set up minimum and maximum price limits to control price variations over years.

Creation of the Agricultural Trade Dispute Resolution Committee

Egalim 2 implements an "Agricultural Trade Dispute Resolution Committee" ("**The Committee**") to settle disputes relating to the conclusion or the performance of such contracts, where mediation before the mediator for agricultural trade relations has previously failed. In this respect, the Committee will be able to issue **precautionary measures**.

The Committee will rule on the basis of the non-binding recommendations of the Mediator for Agricultural Trade relations.

It will be composed of five members who are (i) former members of administrative or judicial jurisdictions, (ii) persons with former experience in commercial relations, (iii) in the sector of agricultural products' manufacture or (iv) in the sector of agricultural products' processing.

ii. The impact of Egalim 2 on commercial negotiations within the downstream part of the agri-food chain

Egalim 2 also has a major impact on commercial relationships between food suppliers and distributors, including intermediaries.

Increasing transparency of the general terms and conditions of sale

Egalim 2 introduces a new Article of the French Commercial Code (Article L.441-1-1) that sets a general principle of transparency that shall govern the drafting of the general terms and conditions of sale – the goal is to bring transparency over tariffs related to raw materials.

To this end, the supplier must indicate, in the general terms and conditions of sale, the proportion of agricultural raw materials contained in its product, in both volume and price.

In the event of breach of those rules, Egalim 2 provides for the possibility of a penalty, with a fixed ceiling of **€375,000**.

Introduction of mandatory provisions to be included in contracts

Egalim 2 states that contracts concluded between the concerned food suppliers and their distributors shall comprise:

- the methods used to determine the price deriving from the cost of the raw material;
- the terms for the **automatic review of this price**, related to changes in agricultural price;
- the duration of the contract.

Egalim 2 also prohibits price discrimination without compensation.

Amendment of the price negotiation clause

Performance contracts concluded for a period of more than three months for the sale of agricultural and food products, and those production prices that are significantly affected by fluctuations in the prices of (i) agricultural and food raw materials and products, (ii) energy, (iii) transportation, and (iv) materials used in the composition of the packaging, must now include a price renegotiation clause.

This clause includes conditions and thresholds that, where met, trigger renegotiation automatically in the course of the performance of the contract.

Implementation of a new framework contract

Egalim 2 implements a new framework for contracts concluded between food suppliers and distributors related to their branded goods.

To this end, and as exposed upon, Egalim 2 provides for an **automatic price revision clause** according to the variation of the cost of the agricultural raw material used in the composition of food products.

But the law also introduces several contractual requirements, including:

- Providing for **commitments on forecasted volumes**;
- Taking into account **innovation efforts** requested by the distributor for the determination of the price;

- Defining **the minimum duration of the contractual notice period** and the modalities for the disposal of packaging and finished products in case of termination of the contract,
- Writing a **clause for the allocation of additional costs** arising during the execution of the contract,
- Establishing, for the distributor and the manufacturer, **a warning system and periodic exchanges of information** in order to optimize the supply conditions and limit the risks of disruptions.

Introduction of new thresholds for sales loss

The mechanism for supervising the sales issued by the first version of Egalim law has been, once again, adapted as the inflationary side effects observed could not be corrected.

In this regard, Egalim 2 increases the thresholds within the practice of sales loss for spirits and specifies that an order may be issued by the Minister of Agriculture and Food to waive **the 10% increase in the thresholds** of sales loss for certain fruits and vegetables.

iii. The impact of Egalim 2 on consumer information

Last but not least, Egalim 2 provides for various provisions related to consumer information, particularly on the origin of food products.

Trialing of a display on products

It introduces a five-year-trial period of a display (by means of marking or labelling or by any other appropriate process) on the products that provide consumers with **information on the remuneration of the producers** of the agricultural products concerned.

This trial applies to meat, milk and dairy, and some other agricultural products further determined.

Introduction of obligations related to foodstuffs' origin

On the indication of the origin of foodstuffs, Egalim 2:

- Introduces a new category of deceptive marketing practices that punishes the act of displaying a French flag, a map of France or any symbol representative of France on food packaging where the primary ingredients are not of French origin.
- Recalls the European regulations applicable in this sector: Where the country of origin or place of provenance of the food is indicated and it is not the country of origin or place of provenance of its primary ingredient, the country of origin or place of provenance of the primary ingredient is also indicated – or is only indicated as being other than that of the food.

- Applies the obligation to display the origin of the meat to “dark kitchens” – establishments offering meals to take away only.

In conclusion, one can say that the purpose of Egalim 2 is clearly shared by all. In practice however, it will be difficult for economic operators to apply its very technical and complex provisions – subject to various interpretations – within such a short term.

Finally, the provisions of the Egalim 2 Law will have to be integrated soon. However, it is important to be vigilant in that the timetable for the entry into force of these provisions is as follows:

January 1 2022

Provisions relating to price controls and advertising controls for food clearance operations must be incorporated

July 1 2022

Provisions relating to the indication of geographical origin of products used in the composition of foodstuffs

November 1 2022

Provisions relating to obligations to ensure the transparency of the general terms and conditions, except for the obligations relating to price controls which must be integrated upstream

January 1 2023

Provisions relating to contracts for the manufacture of private label products

II. IN THE EUROPEAN UNION, THE VERTICAL BLOCK EXEMPTION REGULATION WILL BE GREATLY AMENDED BY THE COMMISSION

Recently, the European Commission has decided to review its Regulation n° 330/2010 about vertical agreements and concerted practices.

On July 9 2021, the Commission published a draft of the revised Vertical Block Exemption Regulation, also called "revised VBER".

This draft regulation does not provide for any provision specific to the agri-food sector. However, some amendments to the general provisions can have **significant consequences on this industry in Europe**.

In this regard, two major aspects are particularly relevant:

Amendment of the hard-core restrictions' rules

With respect to exclusive distribution, the revised VBER introduces the possibility to provide for a **"shared exclusivity"** according to which a supplier can reserve a territory or customers to several distributors, instead of one of them.

Where suppliers and distributors conclude a distribution agreement comprising territory/customers restrictions, the revised VBER provides that suppliers can constrain their distributors to pass on these restrictions on their co-contracting parties.

Finally, the revised VBER allows a supplier operating multiple distribution systems, in several territories, to prevent a buyer in a territory not covered by these systems from actively or passively selling to unauthorized distributors in a territory covered by the systems. To this end, the revised VBER provides an enhanced protection for selective distribution systems.

With respect to selective distribution, the revised VBER allows the restriction of active sales by selective distributors or their customers into an exclusive territory or a group of customers.

Moreover, a supplier has now the possibility to restrict a selective distributor's customers from making active or passive sales to unauthorised distributors located within the selective distribution territory.

Amendment of the dual distribution exemption

Similarly to the current applicable version of the Regulation, the revised VBER provides that its exemption does not apply to vertical agreements entered into between competing undertakings, except in case of dual distribution agreements.

As the number of dual distribution agreements has significantly increased, the revised VBER intends to limit its exemption to vertical agreements concluded between competitors in dual distribution situation where the parties' combined market shares on the retail marker does not exceed 10%.

RELATED PRACTICE AREAS

- Antitrust
- Food & Agribusiness

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