

Insights

PARIS ANTITRUST & DISTRIBUTION NEWSLETTER - JUNE 2023

Jun 02, 2023

SUMMARY

The following articles present a brief summary of topics of interest specific to French law which apply to French and foreign companies in the food, beverage and agriculture sector, when products are marketed in France

These articles provide a broad overview of some of the key issues that may arise and do not constitute legal advice. The points addressed in these articles may be subject to further analysis by BCLP teams.

ANOTHER NEW FRENCH LAW BRINGS SIGNIFICANT CHANGES TO COMMERCIAL RELATIONS BETWEEN DISTRIBUTORS AND SUPPLIERS

On March 22, 2023, the French National Assembly adopted a law known as “Egalim 3” which aims to strengthen the balance in commercial relations between suppliers and distributors. Given the complex nature of this regulation and the fact that the next set of trade negotiations commence in a few months, French and foreign economic operators in the food, beverage and agricultural sector that market their products in France will quickly need to get to grips with what will be required.

This new law completes three previous regulations (“Egalim 1” law of October 30, 2018, the “ASAP” law of December, 7 2020 and the “Egalim 2” law of October 18, 2021) seeking to restore a balance between suppliers and distributors by:

- i. ensuring that agricultural producers receive an appropriate level of remuneration;
- ii. combating price deflation; and
- iii. simplifying, clarifying and strengthening the legal framework to improve commercial relationships.

These regulations focused on:

- Contractual relations between suppliers and distributors, especially through agreements on food and pet food products, consumer products (i.e. those defined as non-durable products with high frequency and recurrence of consumption such as food, household, hygiene and beauty products sold in grocery stores) and "retailer's brand" products;
- Pricing practices (a rise in the threshold of sales loss to 10% and implementation of a framework for promotions).

The existing legal framework has however required further adaptation to mitigate the impact of Covid-19 and the war in Ukraine "aggravating a general rise in the prices of many raw materials", but also to strengthen and to address some uncertainties of previous laws.

THE "EGALIM 3" LAW CONSEQUENTLY BRINGS SIGNIFICANT CHANGES AND CLARIFICATIONS TO THE ALREADY DENSE LEGAL FRAMEWORK APPLICABLE TO COMMERCIAL RELATIONS, INCLUDING THE FOLLOWING:

1. The provisions of the title 4 of the French Commercial Code governing commercial transparency and prohibited practices between professionals are now public policy rules

The provisions granted public policy status by the "Egalim" 3 law are:

- i. The drafting of the general terms and conditions of sale;
- ii. The negotiation and formalization of commercial relationships;
- iii. The logistic penalties;
- iv. The particular rules on agricultural products and foodstuffs;
- v. The prohibited practices between professionals, including those known as "restrictive practices" and the "other prohibited practices."

Consequently, French and foreign suppliers and distributors will not be able to derogate from the jurisdiction of the French courts and the application of French law once the contractual products are marketed in the French territory.

2. The regime of logistic penalties is reinforced

Logistic penalties are financial penalties imposed in the event of non-compliance with logistic provisions of the contract between the supplier and the buyer (delivery time, etc.).

Following frequent abuses by distributors, the “ASAP” law of 2020 limited the imposition of logistic penalties, followed by the “Egalim 2” law of 2021 under which failure to comply with the requirements of these penalties constitutes a “restrictive practice” likely to engage the responsibility of its author before the French civil or commercial court.

The “Egalim 3” law reinforces this applicable framework by providing that:

- i. The reciprocal logistics obligations to which the parties agree are set out in a separate written agreement;
- ii. Penalties imposed on the supplier by the distributor are capped at 2% of the value of the products of the concerned product category;
- iii. No penalties can be imposed after one year from the occurrence of the breach of contract;
- iv. Distributors and retailers have an obligation to communicate, on an annual basis, the amount of penalties imposed and paid to the Directorate-General for Competition, Consumer Affairs and Prevention of Fraud (DGCCRF). Any breach is subject to an administrative fine of up to €75,000 for an individual and €500,000 for a legal person - which can be doubled in case of repetition.

3. The framework for promotions and the threshold of sales loss is extended and amended

To protect suppliers from value-destroying practices of large retailers and to protect the remuneration of farmers and others who form part of the distribution chain such as wholesalers, the “Egalim 1” law of 2018 introduced a framework which applies to food and pet food products as part of a two-year experiment, extended in 2020 by the “ASAP” law until April 15, 2023. This includes:

- i. The threshold of sales loss that consists to sell the products by applying a 10% increase to the effective purchase price of the products (i.e. this price corresponds to the net price of the product - financial advantages (discounts, rebates) and VAT and other specific taxes and transport price);
- ii. The framework for promotions that prohibits promotions (a) with a value exceeding 34% of the selling price to the consumer or an increase in the equivalent quantity and (b) in exceeding 25% of the volume or turnover determined in advance by the parties to the contract.

The “Egalim 3” law brings two changes:

- i. The threshold of sales loss framework ceases to apply to fruits and vegetables and is extended until April 15, 2025;
- ii. The framework of promotions will apply to all consumer products, including household, hygiene and beauty products (and not only to food products) from March 1, 2024. The framework is

extended until April 15, 2026.

4. The existing framework is strengthened in the absence of an agreement between suppliers and distributors by March 1

Under French law, the contracts between suppliers and distributors must be concluded no later than March 1 of each year. Failure to comply with this requirement is punishable by a fine of up to €75,000 for an individual and €375,000 for a legal person, doubled in case of repetition.

The “Egalim 3” law provides clarification and reinforcement where the parties have not concluded their contract by March 1:

- i. Firstly, to resolve the issue where parties continue their commercial relationships under unfavourable pricing conditions for the supplier, the law introduced an experimental measure for a period of three years, under which the supplier may;
 - a. Terminate, without notice, any business relationship with the distributor in the absence of a newly formed contract. In this event, the distributor cannot hold the supplier liable on the basis of the prohibition of sudden termination of the business relationship; or
 - b. Request the distributor the application of a notice period.
- ii. Secondly, for consumer products only, the law reinforces the sanction incurred for non-compliance with the March 1 deadline by:
 - a. Increasing the amount of the fine up to €200,000 for an individual and €1,000,000 for a legal person, doubled in case of repetition;
 - b. Creating a new “restrictive practice” allowing to engage the liability of the party who breaches the duty of “good faith” that led to the non-conclusion of the contract on March 1.

5. Prohibition of discriminatory practices is extended to consumer products

Discriminatory practices consist of applying or obtaining, with regards to the other party, discriminatory prices, payment periods, sales conditions or sales or purchase terms which are not justified by real considerations.

The prohibition of discriminatory practices, which was removed from French law in 2008, was restated with the “Egalim 2” law of 2021 for contractual relations concerning food products and pet food. The “Egalim 3” law therefore extends its scope of application.

THE FRENCH COMPETITION AUTHORITY ONCE AGAIN SANCTIONS A SUPPLIER AND ITS WHOLESALER-IMPORTERS FOR IMPLEMENTING

ANTI-COMPETITIVE EXCLUSIVE IMPORT RIGHTS IN FRENCH GUYANA AND GUADELOUPE

On March 8, 2023, a Champagne supplier and its two wholesaler-importers were fined €283,000 by the French Competition Authority (The Authority) for maintaining exclusive import rights in French overseas territories. This is the tenth decision rendered by The Authority on these practices since the “Lurel” law of 2012 created this French-specific anti-competitive practice.

SINCE THE LUREL LAW, EXCLUSIVE IMPORT AGREEMENTS IN OVERSEES COLLECTIVES ARE PROHIBITED UNDER COMPETITION LAW

The Lurel law of December 22, 2012, in force from March 2013, created a new anti-competitive practice specific to France to limit the "high cost of living" situation in the overseas territories.

The law prohibits agreements or concerted practices with the object or effect of granting exclusive import rights in the overseas territories on consumer products, including food products and alcoholic and non-alcoholic beverages. This prohibition applies to the territories of Guadeloupe, Reunion, French Guyana, Martinique, Mayotte, Saint-Barthélemy, Saint-Martin, Saint-Pierre-et-Miquelon and Wallis and Futuna.

This framework was completed by a law of December 3, 2020, that prohibits wholesaler-importers and retailers from applying discriminatory conditions to companies in which they do not hold a share of the capital, concerning products or services for which there is a *de facto* import exclusivity situation.

Companies that do not comply with these requirements are subject to a penalty of up to 10% of worldwide turnover.

THE EXCLUSIVE IMPORT RIGHTS SANCTIONED WERE THE RESULT OF DISTRIBUTION CONTRACTS AND A BODY OF EVIDENCE

In this case, a Champagne producer exclusively relied on an importer-wholesaler in Guyana (the company Sodis Chrismay) and on another importer-wholesaler in Guadeloupe (the company Sodipa) for the distribution of its beverages.

The Authority found that, in both of these territories, the supplier had implemented prohibited exclusivities:

- For the first period of the infringement, the exclusivity was clear since it was stipulated in an exclusive distribution contract.
- For the remaining period of the infringement, The Authority considered, in the absence of explicit contractual provisions, that the exclusivity was the result of a body of serious, precise

and concordant evidence attesting the common will of the parties to continue to apply the exclusivity.

- The evidence consisted of:
 - i. statements and internal documents;
 - ii. pricing documents, exchanges and statements stating that a "Distributor and Exclusive discount" had been granted;
 - iii. refusals to sell by the supplier to potential customers; and
 - iv. a mechanism implemented by the supplier to encourage local buyers to go through the exclusive importer by limiting the financing of promotional offers of distributors in the French metropolitan area, to promote sales via this distribution channel.

DISTRIBUTORS AND SUPPLIERS MUST ENSURE THAT THEIR COMMERCIAL PRACTICES IN THE OVERSEAS TERRITORIES ARE NOT PROHIBITED

This new sanction emphasizes the need for suppliers and distributors active in the distribution sector to be vigilant regarding their activities in the overseas territories. In particular, it requires foreign companies marketing their products in these territories to be particularly careful, as this prohibition is a French specificity.

This insight was produced by Partner Julie Catala Marty based in Paris Office together with Legal Trainee Rebecca Loko.

RELATED CAPABILITIES

- Food & Agribusiness
- Food, Ag & Nutrition
- Food, Ag & Nutrition (Class Actions)

MEET THE TEAM



Julie Catala Marty

Paris

julie.catalamarty@bclplaw.com

+33 (0) 1 44 17 77 95

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.