

DRAFT BILL « SAPIN II»: IMPACTS ON B2B COMMERCIAL RELATIONSHIPS IN FRANCE

After the adoption of the draft bill by the National Assembly, the Senate adopted on July 8, a modified version of the draft bill "Sapin II" related to transparency, anti-corruption and economic modernization.

If the text is not further modified *inter alia* after being examined by the joint consultative committee appointed to find a version that suits both chambers, certain of the modifications set forth to Title IV of Book 4 of the French commercial code at this stage, deserve attention.

Single Agreement of the articles L. 441-7 and L. 441-7-1 of the commercial code

The draft bill provides for more room for manoeuvre regarding the single agreement which incorporates the terms of the commercial negotiations between suppliers and distributors (L. 441-7 of the commercial code) and between suppliers and wholesalers (L. 441-7-1 of the commercial code).

Indeed, professionals should have the possibility in the future to enter into single agreements **for a term of 1, 2 or 3 years**. For agreements of 2 or 3 years, the parties will have to indicate the conditions under which the agreed price shall be revised. The draft bill provides that the revision may be based on one or several public index which reflect the evolution of the production factor prices.

Noteworthy the above-mentioned changes shall be applicable only as from agreements concluded as from **January 1, 2018**, and would thus not be implemented during the 2017 cycle of commercial negotiations.

Finally, if the draft bill adopted by the National Assembly provided that the single agreement had to be concluded as of February 1 of its effective year, the Senate chose to keep the current date of March 1 (or the 2 months delay from the start of commercialization of the products or services submitted to a specific commercialization cycle), as already set forth under articles L. 441-7 and L. 441-7-1 of the commercial code.

Payment terms

The administrative fine of articles L. 441-6 and L. 443-1 of the commercial code, which applies *inter alia* to noncompliance with the payment terms set forth in the above-mentioned articles, should be increased for legal entities from € 375,000 **to 2 million euros**.

In addition, the draft bill provides for the **systematic publication** of the decisions of sanction taken on this basis (whereas it is currently being a possibility left to the relevant authorities' opportunity).

Payment terms' compliance matters remains a front-page issue for the lawmakers who, once again, aim to strengthen the powers entrusted to the authorities and to increase the financial and reputational risks over the non-compliant business players.

Restrictive practices of the article L. 442-6 of the commercial code

The draft bill extends the scope of the prohibited practice consisting in obtaining from a commercial partner an advantage that does not correspond to a real service or of a patently disproportionate nature compared to the value of the service rendered, as provided for under article L. 442-6, I, 1^o of the commercial code, to the **commercial promotional activities** as well as to the potential "**remuneration of services rendered by an international central contracting body which gathers distributors**".

In addition, the draft bill introduces a new prohibition in article L. 442-6 of the commercial code: the prohibition to impose a revision of price (for single agreements of articles L. 441-7 and L. 441-7-1 of the commercial code) or a price renegotiation (for agreements of article L. 441-8 of the commercial code) that refers to one or more public index which have no direct link with the contractual products or services.

Lastly, the draft bill creates a new prohibited practice under article L. 442- 6 of the commercial code, consisting in ***imposing or attempting to impose penalties for late delivery to a commercial partner, when the late delivery is due to force majeure.***

Private label agreements in the agri-food sector

The draft bill provides that the costs related to the creation of new private label food products, to specifications, to analysis and audits (other than those performed by agri-food companies) shall remain with the distributor and may not be imposed to the agri-food companies. This aims at bringing back a certain balance in the private label agreements of the agri-food sector, which often trigger important investments from the suppliers.

The draft bill also creates a new article L. 441-10 in the commercial code, under which the agreements concluded for less than one year for the elaboration and the production of food products corresponding to specific needs of the buyer, shall expressly mention the criteria and conditions under which the purchase price of the non-transformed agricultural products (those which are subject to a written contract according to the decree set forth under article L. 631-24 of the rural and maritime fishing code or according to an extended interprofessional agreement according to the same article L.631-24) which enter into the composition of such food products. Such criteria and conditions refer to one or more public index related to agricultural production costs and to one or more public index related to the price of agricultural and food products which may be set forth under interprofessional agreements or, in their absence, by the Observatory of the prices and margins formation.

Other specific provisions in the agri-food sector

The draft bill provides that the general conditions of sale applicable to food products incorporating one or more non-transformed agricultural products (again, those which are subject to a written contract according to the decree set forth under article L. 631-24 of the rural and maritime fishing code or according to an extended interprofessional agreement according to the same article L.631-24) shall indicate the forecasted average price proposed by the seller to the producer of such agricultural products, during their applicable term. The criteria and conditions under which such price shall be determined are referring to the same elements as those applicable to the contracts under the new article L. 441-10 of the commercial code (see above).

Lastly, for the agricultural products of article L. 441-2-1 of the commercial code and for milk and dairy products, the draft bill is capping the promotional advantages which may be granted by the supplier to the consumers (through the agency mechanism set forth under article L. 441-7 of the commercial code) to 30% of the value of the base unit prices, including management fees.

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