

Reform of restrictive practices: new provisions anticipated by the Regulation of 24th April 2019

The Regulation of 24th April 2019 results in a profound reform of the applicable regime regarding restrictive rules and practices. The principal modifications and amendments are as follows.

The Regulation introduces two new articles L.442-1-I and L.441-II to the French Commercial Code ("*Code de commerce*") replacing Article L.442-6 in order to realign the list of restrictive practices around three practices.

- The obtention of a benefit without compensation or obtention of a manifestly disproportionate compensation (Commercial Code, Article L.442-1-1 °);
- significant imbalance in the party's rights and obligations (Commercial Code, article L.442-2-1-2 °);
- the sudden termination of established business relationships (Commercial Code, Article L.442-2-II)

The new Articles L.442-1-I-1 ° and 2 ° replace the notion of "commercial partner" ("*partenaire commercial*") by that of "the other party" ("*autre partie*"), which is certainly amenable to an application that is all the more extensive since the new wording is referring to intervening practices "in the context of commercial negotiation, conclusion or performance of a contract".

Regarding the practice of abrupt termination of established business relationships, the changes made to the abrupt termination rule aim, in the first place, to reduce the number of litigations around this provision being deemed too high. The Regulation provides that "in the event of a legal dispute between the parties about the period of notice, the liability of the terminating party cannot be based on the observance of an insufficient period if the party gave notice at least eighteen months in advance" (Commercial Code, Article L.442-1-II paragraph 2).

Furthermore, two substantively new articles are created:

- one the one hand to face cases violating the prohibition of off-network resale by distributors bound by a selective or exclusive distribution agreement (Commercial Code, Article L.442-2);
- and on the other hand, to refocus the five prohibited clauses or agreements around two types of clauses those providing for the possibility of benefiting retroactively from rebates, discounts or commercial cooperation agreements and those providing for the possibility of automatically benefiting from more favorable conditions than those granted to competing companies by the other contracting party (Commercial Code, Article L.442-3).

Implementing the Regulation

The new Article L.442-4-I amends the legal proceedings by providing victims of restrictive practices with the same standing in the same way as the Minister of Economic Affairs and the Public Prosecutor's Office ("*Ministère Public*"), that is to say to declare the nullity of unlawful

clauses or contracts and to demand the restitution of benefits unduly received, with the maintained exception of the request for a civil fine which remains with the Minister of Economic Affairs and the *Ministère Public*.

The new Article L. 442-4 of the Commercial Code incorporates the reservation on the interpretation made by the Constitutional Council in its decision of May 13, 2011 (*Cons. const., 13 mai 2011, n ° 2011-126 QPC, Système U et a.: JCP G 2011, 717, A.-M.Luciani*) stating that in case of an action to declare null and void the act and to get refund, the victims of the practices are informed, by all means, of the introduction of this action.

As regards the determination of the amount of the fine, it should be noted that, on the one hand, there is no longer any indication of proportionality and, on the other hand, that the fixing of the amount is not regulated. The new Article L. 442-4-I of the Commercial Code merely states that the upper limit of the fine is the highest of the following three amounts: 5 million euros, 5% of the pre-tax turnover realized by the author of the practices in France or three times the sums unduly received or obtained.

Entering into force

The Regulation enters into force on April 26, 2019. It is to be applied immediately to all subsequently concluded contracts or amendments and also applies if the additional amendments refer to an agreement concluded before the applicability of the Regulation (*Ord. n°2019-359, 24 avr. 2019, art. 5.*)

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Sources

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