

client alert

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SAPIN II ACT'S IMPACTS ON COMMERCIAL RELATIONSHIPS

The Act No. 2016-1691 of 9 December 2016 on transparency, anti-corruption and economic modernisation (known as "Sapin II Act") was published in the Official Journal on 10 December 2016 and entered into force on 11 December 2016.

The main innovations in economic law are the following.

MULTIANNUAL FRAMEWORK AGREEMENT

From 1 January 2017, the Sapin II Act introduces the opportunity for professionals to conclude a framework agreement for a period longer than one year (for two or three years maximum).

The multiannual framework agreement shall specify the conditions for the review of the agreed price¹ as determined by the parties. Article L.441-7 of the French Commercial Code indicates that "*these conditions can provide for the taking into account of one or more public indices reflecting changes in the production factors price*".

The deadline for concluding the framework agreement (whether annual or multiannual) remains 1 March 2017 (or within two months of the start of the marketing period for products or services subject to a particular marketing cycle).

FRAMEWORK AGREEMENT IN THE AGRICULTURAL SECTOR

The transparency of negotiations on the purchase or sale of unprocessed agricultural products for which a written contract² is required (i.e. sheep, milk, and fresh fruits and vegetables³) has been reinforced as follows:

- suppliers (and agricultural cooperatives) must include in their general terms of sale the average provisional price offered to the producer of the agricultural products. The criteria and methods for determining the provisional price may refer to one or more public indices of cost-of-production in agriculture, and one or more public indices of food product retail prices⁴.
- contracts of less than one year entered into by a supplier (or an agricultural cooperative) and a distributor for the design and production of food products in accordance with the particular needs of the purchaser shall include the price or the criteria and detailed rules for determining the purchase price of the products used in such food products⁵.

¹ Article L.441-7, I, paragraph 5 of the French Commercial Code

² Article L.631-24 of the French Rural and Maritime Fishing Code

³ Articles R.631-8 and R.631-12 of the French Rural and Maritime Fishing Code

⁴ Articles L.441-6, I, paragraph 6 of the French Commercial Code

⁵ Article L.441-10 of the French Commercial Code.

The Sapin II Act also limits the amount of promotional benefits for certain agricultural products to 30% of the value of the unit price scale, including management fees. The products concerned are milk, dairy products, fruit and vegetables (with the exception of ware potatoes) intended to be sold fresh to consumers, fresh meats, frozen poultry or rabbit meat, eggs and honey⁶.

PAYMENT PERIOD

The Sapin II Act introduces a new maximum 90-day payment period from the date of issuance of the invoice for the VAT-free⁷ payment of goods intended for delivery outside the EU, unless they are carried out by large companies⁸. This payment period must be expressly stipulated by contract and must not constitute manifest abuse towards the creditor⁹.

As a reminder, the maximum contractual payment period in principle remains at 60 days from the date of issuance of the invoice. By way of derogation, the parties may also agree to a period of 45 days end-of-month (45 days + end of month, or end of month + 45 days)¹⁰ from the issuance of the invoice, provided that this period is expressly stipulated by contract and does not constitute manifest abuse towards the creditor¹¹.

The Sapin II Act also increases the amount of the administrative fine applicable to legal persons in the event of non-compliance with the payment terms from EUR 375,000 to EUR 2 million¹², and provides for automatic publication¹³. This fine no longer represents an upper limit when several administrative fines are imposed on the same author in the event of simultaneous infringements¹⁴.

LATE PENALTIES IN CASE OF FORCE MAJEURE

The list of restrictive practices is increased in order to oversee, in line with Article L.442-6 of the French Commercial Code, professionals subjecting, or attempting to subject, a trading partner to late penalties in the event of force majeure¹⁵.

As a reminder, *“there is a case of force majeure pertaining to contracts when an event beyond the control of the debtor, which could not be reasonably foreseen upon entering the contract and whose effects cannot be avoided by appropriate measures, prevents the performance of the debtor's obligations”*¹⁶.

⁶ Article L.441-7, I, paragraph 9 of the French Commercial Code and Article D.441-2 of the French Commercial Code.

⁷ Article 275 of the French General Tax Code.

⁸ For the definition of "large company", see Decree No. 2008-1354 dated 18 December 2008 on the criteria used to determine a company's category for purposes of statistical and economic analysis.

⁹ Articles L.441-6, I, paragraph 15 and L.443-1 paragraph 8 of the French Commercial Code.

¹⁰ See background note of the DGGCRF dated 22 October 2014.

¹¹ Article L.441-6, I, paragraph 9 of the French Commercial Code.

¹² Articles L.441-6, VI and L.443-1 of the French Commercial Code.

¹³ Article L.465-2, V of the French Commercial Code.

¹⁴ Article L.465-2, VII of the French Commercial Code.

¹⁵ Article L.442-6, I, 13° of the French Commercial Code.

¹⁶ Article 1218 paragraph 1 of the French Civil Code.

PRICE REVISION OR RENEGOTIATION CLAUSES

The restrictive practices of Article L.442-6 of the French Commercial Code now also cover a professional's decision to enforce a price review or renegotiation clause in reference to one or more public indices that are not directly related to the products or services that are the subject to the agreement.

This prohibition applies to all types of commercial relations¹⁷, including those pertaining to certain agricultural products (perishable or resulting from short production cycles, live animals, carcasses, aquaculture products and staple food products resulting from the first processing of such products)¹⁸.

INTERNATIONAL PURCHASING ORGANISATIONS

The Sapin II Act adds to the list of abuses provided under article L.442-6, I of the French Commercial Code, as regards advantages that may not apply to any commercial service actually provided or that are patently disproportionate to the value of the service provided, the remuneration for services rendered by an international purchasing organisation¹⁹.

INCREASED PENALTIES

The Sapin II Act reinforces the sanction mechanisms applicable to restrictive practices by increasing the civil fine from EUR 2 million to EUR 5 million²⁰ and by providing for the automatic publication of fine decisions²¹.

¹⁷ Article L.442-6, I, 7° of the French Commercial Code.

¹⁸ Article L.441-8 of the French Commercial Code.

¹⁹ Article L.442-6, I, 1° of the French Commercial Code.

²⁰ Article L.442-6, III of the French Commercial Code.

²¹ Article L.442-6, III of the French Commercial Code.

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