

Q&A DOCUMENT | 4 October 2021

Q&A on Distribution Agreements

Part I: Legislative framework

Q1. Please specify the legislative framework generally applicable to the conclusion and execution of distribution agreements (a)? Please include a link to the official publication of the applicable rules (e.g., relevant link to the Official Gazette) (b) and, if available, to the English translation of the legislative framework (c).

a. Legislative framework:

General terms and conditions of sale: Art. L.441-1 to Art. L.441-2 French Commercial Code

Specific distribution agreements:

- Art. L.441-3 to L.441-7 French Commercial Code
- Art. L. 443-2 French Commercial Code
- Art L.443-8 French Commercial Code

Exclusivity clauses: Art. L.330-1 to L.330-3 and Art. R. 330-1 French Commercial Code

Restrictive competition practices: Art. L.442-1 to L.442-7 French Commercial Code

Anticompetitive practices: Art. L. 420-1 to L. 420-6 French Commercial Code

b. Link(s) to official publication:

General terms and conditions of sale: [Art. L.441-1 to L.441-2](#) French Commercial Code.

Specific distribution agreements: [Art. L.441-3 to L.441-7](#), [Art. L. 443-2](#) and [Art. L.443-8](#) French Commercial Code.

Exclusivity clauses: [Art. L.330-1 to L.330-3](#) and [Art. R. 330-1](#) French Commercial Code

Restrictive competition practices: [Art. L.442-1 to L.442-7](#) French Commercial Code.

Anticompetitive practices: [Art. L. 420-1 to L. 420-6](#) French Commercial Code

c. Link(s) to English translation:

Not available.

Q2. Other than for agency agreements pursuant to Directive 86/653 (EEC) on the coordination of the laws of the Member States relating to self-employed commercial agents, are there specific rules depending on the distribution format (e.g. franchising, exclusive distribution)?

Yes.

If yes, which specific rules apply (a)? Where available, please also include a link to the official publication of the applicable rules (b) and, if available, to the English translation of the legislative framework (c).

a. Specific rules depending on distribution format:

Title III : Exclusivity clauses

- Art. L. 330-1 French Commercial Code;
- Art. L. 330-2 French Commercial Code;
- Art. R. 330-1 French Commercial Code

b. Link(s) to official publication:

Title III : Exclusivity clauses

[Art. L. 330-1](#) French Commercial Code

[Art. L. 330-2](#) French Commercial Code

[Art. R. 330-1](#) French Commercial Code

c. Link(s) to English translation:

Not available.

Q3. Other than general contract law and competition law, are there other rules which may generally restrict the parties when drafting and concluding distribution agreements (e.g., rules in relation to unfair contract terms in B2B contracts, specific requirements in the context of a prohibition of abuse of economic dependence)?

Yes.

If yes, which general rules apply (a)? Where available, please also include a link to the official publication of the applicable rules (b) and to the English translation of the regulatory framework (c).

a. General rules:

French law contains specific provisions regarding B2B relationships which should be taken into account by the parties when they negotiate, conclude and execute distribution agreements.

1. Restrictive competition practices regarding B2B agreements (Art. L. 442-1 and L. 442-3 French Commercial Code)

Any party carrying out production, distribution or service activities shall be held liable, if during the negotiation, conclusion, or performance of an agreement it commits one of the following offences:

- obtaining or seeking to obtain from the other party an advantage which does not correspond to any

counterpart or which is manifestly disproportionate to the value of the counterpart given (Art. L. 442-1 I. 1° French Commercial Code);

- subjecting or seeking to subject the other party to obligations that create a significant imbalance in the rights and obligations of the parties (Art. L. 442-1 I. 2° French Commercial Code);
- imposing disproportionate penalties for the non-fulfilment of contractual obligations, refusing to return goods, automatically deducting from the amount of the invoice produced by the supplier, the penalties or discounts corresponding to the failure to respect a delivery date or the non-conformity of the goods, when the debt is not certain, liquid and due, without the supplier being able to verify the reality of the corresponding grievance (Art. L. 442-1 I. 3° French Commercial Code);
- benefitting retroactively from discounts, rebates or commercial cooperation agreements (Art. L. 442-3 a. French Commercial Code);
- benefitting automatically from more favourable conditions granted to competing undertakings by the contracting party (Art. L. 442-3 b. French Commercial Code);
- prohibiting the other party from transferring its claims on the other party to third parties (Art. L. 442-3 c. French Commercial Code).

Sanctions:

- regarding Art. L. 442-1 French Commercial Code, the violation of its provisions may result in the infringer's liability and compensation for the damage thus caused;
- regarding Art. L. 442-3 French Commercial Code, the clauses shall be deemed null and void.

For the practices mentioned in Art. L. 442-1 and L. 442-3 French Commercial Code, the French minister for Economic Affairs and Finance may:

- ask the court to which the case is referred to order that the practices above mentioned be ceased;
- for all these practices, request a declaration of nullity of the illegal clauses or agreements and the recovery of the mistaken payments;
- request the imposition of a civil fine, the amount of which may not exceed the highest of three following amounts:
 - five million euros;
 - three times the amount of the benefits unduly received or obtained;
 - 5% of the turnover net of tax achieved in France by the perpetrator of the practices achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented.

Article L. 442-4 French Commercial Code gives the same prerogatives to the Public Prosecutor's Office. However, in practice, only the French minister Economic for Affairs and Finance acts on this legal provision.

Any party who can prove an interest may ask the court to order the practices referred to in Articles L. 442-1 and L. 442-3 French Commercial Code as well as to order compensation for the loss suffered.

Only the party who is the victim of the practices provided for in Articles L. 442-1 and L. 442-3 may have the unlawful clauses or contracts declared null and void and apply for the restitution of the undue advantages.

2. Abuse of the state of economic dependence in B2B agreements (Art. L. 420-2 French Commercial Code)

In addition to the previous behaviours, abuse of the state of economic dependence is considered illegal. Three criteria are necessary to constitute this offence, which the French case law rarely considers fulfilled:

- firstly, the existence of a state of economic dependence of one undertaking on another is required. This state is characterised by a situation in which one undertaking is obliged to continue trading with another when it is impossible for the undertaking to obtain supplies or substitutable products under equivalent conditions (Cour de cassation, chambre commerciale, April 8, 2002, case n° 00-13.921);
- secondly, this situation must be abused by the undertaking on which the other party is dependent. Such abuse can be expressed by a brutal increase in prices;
- thirdly, and lastly, such behaviour must have an actual or potential effect on the structure or functioning of competition (Art. L. 420-2 paragraph 2 French Commercial Code).

Sanctions:

- any agreement relating to this prohibited practice is null and void (Art. L. 420-3 French Commercial Code);
- the French Competition Authority can sanction the company involved by a maximum fine of 10 % of the highest worldwide turnover, net of tax, achieved in one of the financial years preceding that in which the practices were implemented (Art. L. 464-2 French Commercial Code);
- any physical person fraudulently taking a personal and decisive part in the design, organisation or implementation of such practices is subject to a prison sentence of four years and a fine of 75,000 Euros (Art. L. 420-6 French Commercial Code).

b. Link(s) to official publication:

Restrictive competition practices: [Art. L.442-1 to L.442-7](#) French Commercial Code.

Anticompetitive practices: [Art. L. 420-1 to L. 420-6](#) French Commercial Code and [Art. L. 464-2](#) French Commercial Code.

c. Link(s) to English translation:

Not available.

Part 2: Pre-contractual phase

Q4. Are there mandatory provisions in relation to the disclosure of pre-contractual information prior to concluding and/or executing distribution agreements?

Yes.

If yes, which mandatory provisions apply (a) and which information must be disclosed (b)? Where available, please also include a link to the official publication of the applicable rules (c) and, if available, to the English translation of the regulatory framework (d).

a. Mandatory provisions:

General provisions: Art. 1112-1 French Civil Code

Exclusivity clauses: Art. L. 330-3 and R. 330-1 French Commercial Code

General terms and conditions of sale: Art. L. 441-1 to L. 441-2 French Commercial Code.

Specific distribution agreements: Art. L. 443-4 French Commercial Code and Art. L.443-8 French Commercial Code

b. Information to be disclosed:

The French Civil Code contains general provisions concerning pre-contractual information (1.). The French Commercial Code adds additional requirements, some of which are specific to certain distribution relationships (2.).

1. General provisions of the French Civil Code

The French Civil Code provides for a general obligation to inform the other contracting party. The parties may neither limit nor exclude this obligation. In addition to the liability of the party required to provide information, the violation of this obligation can result in the annulment of the agreement (Art. 1112-1 French Civil Code).

The party who knows information that is of decisive importance for the consent of the other party must inform him of it when the latter does not legitimately know the information or relies on the contracting party for such information. Information which has a direct and necessary connection with the content of the agreement, or the quality of the parties is deemed decisive (Art. 1112-1 French Civil Code). However, for example, the buyer is not obliged to inform the seller that the stipulated price is lower than the value of the thing, nor is the seller obliged to inform the buyer that the price is higher than the value.

2. Specific provisions of the French Commercial Code

2.1. In general terms and conditions of sale

Any party engaged in production, distribution or service activities establishing general terms and conditions of sale shall be obliged to communicate them to any purchaser who requests them for a professional activity (Art. L. 441-1 and L. 441-2 French Commercial Code).

When the parties are subject to Art. L. 441-3 and L. 441-4 French Commercial Code, general terms and conditions of sale shall be communicated to the distributor within a specific period:

- for mass-marked products: before December 1 of each year (Art. L. 441-4, French Commercial Code);
- for other products: within a reasonable timeframe before March 1 of each year, except where the agreement has a duration of two or three years (Art. L. 441-3 French Commercial Code).

General terms and conditions of sale shall include, in particular, the terms of payment, as well as the elements for determining the price, such as unit prices and price reductions (Art. L.441-1 and L. 441-10 French Commercial Code).

Additional information shall be specified in the general terms and conditions of sale for agricultural and food products (Art. L.441-1-1 and L.443-4 French Commercial Code). For example, where indicators exist for the formation of prices and margins, the general terms and conditions shall refer to them and explain the conditions under which they are used by the supplier (Art. L. 443-4 French Commercial Code).

2.2. In exclusivity or quasi-exclusivity relationships

There is a specific obligation regarding distribution agreements that applies especially to franchise agreements and exclusive sales concessions. Any party who provides to another party a trade name, trademark or corporate name, requiring from that party exclusivity or quasi-exclusivity for the exercise of his activity, shall be required, prior to the signature of any agreement between both parties, to provide for the other party a document giving accurate information, enabling him to make a commitment in full knowledge of the facts. This information must be provided at least twenty days before the signature of the agreement (Art. L. 330-3 French Commercial Code).

The aforementioned document shall mention, in particular, the seniority and experience of the business, the state and development prospects of the relevant market concerned, the size of the network of operators, the duration, the conditions of renewal, termination and assignment of the agreement, and the scope of exclusivity rights (Art. L. 330-3 para. 2 French Commercial Code).

The document must also include the address of the registered office of the company, the nature of its business, its registration number, bank account(s), the creation date of the company with a reminder of the main stages in its development and its professional experience, the annual accounts for the last two financial years, and a

presentation of the network of operators, as well as the nature and amount of the expenses and investments specific to the sign or trademark that the party to whom the draft agreement is addressed commits to before starting operations (Art. R. 330-1 French Commercial Code).

c. Link(s) to official publication:

General provisions: [Art. 1112-1](#) French Civil Code.

Exclusivity clauses: [Art. L. 330-3](#) and [Art. R. 330-1](#) French Commercial Code.

General terms and conditions of sale: [Art. L. 441-1](#) and [Art. L. 441-2](#) French Commercial Code

Specific distribution agreements: [Art. L. 443-4](#) French Commercial Code

d. Link(s) to English translation:

Not available.

Q5. Is there a standstill obligation linked to the requirements imposed for the pre-contractual phase?

No.

Q6. Does the relevant regulatory framework impose sanctions if the pre-contractual obligations are not (fully) respected?

Yes.

If yes, which sanctions apply (e.g., nullity of contract, penalty payment)?

1. General provisions of the French Civil Code

In addition to the liability of the party required to provide information, the violation of this obligation could be a ground for nullity of the agreement (Art. 1112-1 French Civil Code).

2. Specific provisions of the French Commercial Code

2.1. In general terms and conditions of sale

A fine of 15,000 Euros for physical parties and of 75,000 Euros for legal parties are set when the general terms and conditions of sale are not transmitted (Art. L.441-1 French Commercial Code). If the terms of payment are not indicated to the other party, the sanction is a fine of 75,000 Euros for physical persons and 2 million Euros for legal parties (Art. L. 441-16 French Commercial Code).

2.2. In exclusivity or quasi-exclusivity relationships

The offence is punishable by a fine of 1,500 Euros, and in the event of a repeat offence, a fine of 3,000 Euros for a physical party (Art. R. 330-2 French Commercial Code; Art. 131-13 French Criminal Code). If the infringer is a legal party, the fine is multiplied by five, and is therefore set at 7,500 Euros, or 15,000 Euros for a repeat offence. The supplier may as well obtain, where there is a defect in consent, the nullity of the agreement. Nullity is

pronounced if it is shown that the failure to provide pre-contractual information has vitiated the distributor's consent (Cour de cassation, chambre commerciale, February 12, 2008, case n° 07-10.462).

Q7. Can a party be held liable if it terminates the pre-contractual negotiations?

Yes.

If yes, on what grounds (a); under what conditions (b); and what consequences are generally linked to such liability (c)?

a. Grounds for pre-contractual liability:

Art. 1112 French Civil Code provides that "the opening of negotiations and termination of pre-contractual relations are free." In other words, according to this article, the parties are, in principle, free to open negotiations and to terminate pre-contractual relations.

However, any human action whatsoever that causes harm to another obliges the party to compensate the prejudice (Art. 1240 French Civil Code).

b. Conditions for pre-contractual liability:

Three conditions are required by Art. 1240 French Civil Code: a fault, a damage and a causal link.

Fault is only accepted in the case of a breach of pre-contractual relations if an abuse is established, for example in the case where negotiations are conducted in bad faith: the party knows that the negotiations will not succeed but does not inform the other party or leave the process (Cour de cassation, chambre commerciale, November 26, 2003, case n° 00-10.243).

c. Consequences of pre-contractual liability:

However, even in the case of fault, the damage consists only in expenses incurred during the negotiations, and not in the loss of an opportunity to conclude the agreement, nor the loss of the expected benefits of the agreement not concluded (Art. 1112 French Civil Code). The party who has abusively terminated the pre-contractual relationship can only be required to compensate said expenses (Cour de cassation, chambre commerciale, November 26, 2003, case n° 00-10.243).

Q8. Are there other relevant rules and/or restrictions that apply during pre-contractual negotiations between supplier and distributor?

No.

Part 3: Contractual phase

A. Form of distribution agreements

Q9. Must a distribution agreement be executed in writing to be valid and enforceable?

Only in certain instances.

If only in certain instances, please explain when a written agreement is required.

Distribution agreements are consensual agreements and are therefore formed upon the exchange of consents.

No form is required for their validity (the principle).

However, even if the written form is not required by law, an exclusive distribution agreement cannot be presumed.

To be able to avail of an exclusivity, the party must have agreed in writing on the principle of this exclusivity and its scope with the other contracting party. Otherwise, it will be very difficult for him/her to invoke the existence of this exclusivity.

The existence of an exclusive distribution agreement therefore requires in principle that the object of the concession, the exact delimitation of the territory conceded, its duration, the reciprocal rights and obligations of the parties and the terms of termination be established in a precise and unequivocal manner.

Q10. Are there any (other) requirements as to the form of the distribution agreement for it to be valid and enforceable?

No.

B. Content of distribution agreements

Q11. Other than restrictions imposed by EU competition law (including Regulation (EU) 330/2010), do specific rules and/or restrictions apply in distribution agreements with respect to

- the territory in which or the customers to whom the goods/services will be sold;
- an exclusivity granted to the distributor;
- (exclusive) sourcing/purchasing obligations;
- resale prices;
- non-compete clauses?

Yes, specific rules apply with respect to (1) (exclusive) sourcing/purchasing obligations and (2) resale prices.

If yes, what do these specific rules and/or restrictions entail?

1. Exclusivity clause

According to Art. L. 330-1 French Commercial Code, the period of validity of any exclusivity clause by which the

distributor undertakes with regard to the supplier not to buy similar or additional items from another supplier shall be limited to a maximum of ten years.

In that case, the distributor is committed to purchasing the products only through its other contracting party and/or, if it is authorized, from supplier(s) designated by it.

Where the agreement containing the exclusivity clause referred to in Art. L. 330-1 is subsequently complied with between the same parties, by other similar obligations relating to the same type of goods, the exclusivity clauses contained in such new agreements shall terminate on the same date as the initial agreement (Art. L. 330-2 French Commercial Code).

For example, there is a contract between a French footwear producer and a supplier of sport equipment. The parties agree on two separate exclusivity contracts with different durations: the first signed contract is for the sale of shoes (with a duration of five years) and the second for the supply of spare parts (e.g., contract signed two years later with a duration of five years as well). In this case, the contracts relate to the same type of goods (the spare parts being intended for the after-sales service of the shoes) and the exclusivity clauses in the agreements will end on the same date (in this case, the term corresponding to the first contract concluded). Thus, if the first contract ends, the spare parts contract will also end, even if it does not have the same duration.

2. Resale below cost

French law introduces a specific regulation regarding resale below cost.

According to Art. L. 442-5 French Commercial Code, any party who resells or advertises the resale of a product in its unaltered state at a price lower than its actual purchase price is punished by a fine of 75,000 Euros. This fine may be increased to half of the advertising costs if an advertisement, regardless of the medium, mentions a price lower than the actual purchase price.

Resale below price is calculated from the net unit price appearing on the purchase invoice to which must be added and subtracted various amounts:

- this net unit price must be reduced by all other financial advantages granted by the seller (e.g.: price reductions agreed upon but not yet realized; remunerations paid in return for the performance of services; discount for cash payment);
- then this net unit price must be increased by taxes on turnover, specific taxes relating to such resale and the price of transport.

The effective purchase price is multiplied by a coefficient of 0.9 for wholesalers who distribute products or services exclusively to professionals who are independent of the wholesaler and who are active as retailers, processors or final service providers.

It is subject to a coefficient of 1.10 for food products and pet foods resold as is to the consumer (Art. 125 of Law n° 2020-1525, December 7, 2020). This measure is applicable until April 15, 2023. It could be extended by the law.

Art. L. 442-5 French Commercial Code shall not apply:

- to voluntary or forced sales caused by the cessation or change of commercial activity;
- to products which are sold according to a marked seasonal nature, during the final period of the sale season, and in the interval between two sale seasons;
- to products that no longer meet general demand due to fashion trends or the emergence of technical improvements;
- to products with identical characteristics, of which the restocking has occurred at a lower price, with the actual purchase price being replaced by the price resulting from the new purchase invoice;
- to food products marketed in a shop with a sale area of less than 300 square metres and to non-food products marketed in a shop with a sale area of less than 1,000 square metres, of which the resale price is aligned with the price legally applied to the same products by another trader in the same area of activity;
- provided that the reduced price offer is not advertised in any way outside the place of sale, to perishable products from the moment when they are subject to rapid deterioration;
- to the products on sale mentioned in Art. L. 310-3 French Commercial Code.

Moreover, Art. L. 420-5 French Commercial Code prohibits price offers or consumer sales price practices that are excessively low compared with production/processing and marketing costs.

Q12. Do specific rules and/or restrictions apply in distribution agreements with respect to

- obligations of the supplier vis-à-vis the distributor, including in relation to the remuneration of the distributor;
- obligations of the distributor vis-à-vis the supplier or vice versa;
- a non-solicitation clause during and/or after the term of the distribution agreement;
- minimum sales quota imposed on the distributor;
- specific sector rules?

Yes, specific rules apply with respect to (1) obligations of the supplier vis-à-vis the distributor, including in relation to the remuneration of the distributor, (2) obligations of the distributor vis-à-vis the supplier or vice versa, and (3) specific sector rules.

If yes, what do these specific rules and/or restrictions entail?

1. Provisions imposed by Art. L. 441-3 French Commercial Code

Where Art. L. 441-3 French Commercial Code is applicable, the French Commercial Code requires the conclusion of a specific written agreement in relationships between a supplier and a distributor or service provider aimed at contractualising the conditions of sale of a product or service resold as is, when the relationships are not only based on the general terms and conditions of sale.

Under Art. L. 441-3 French Commercial Code this specific written agreement must be formalized between the supplier and the distributor or service provider in cases where the products or services are resold as is to the end customer. These legal provisions have a wide scope.

Art. L. 441-3 specifies the mandatory content of this agreement:

- the conditions of the sale of products or services, including price reductions and situations where derogations are possible;
- the commercial cooperation services, suitable for promoting the marketing of the supplier's products or services, that the distributor or service provider provides to the supplier, not covered by the purchase and sale obligations, specifying the purpose, the planned date, the terms of performance, the remuneration of these services as well as the products or services to which they relate and the overall remuneration relating to all these obligations;
- other obligations intended to promote the commercial relationship between the supplier and the distributor or service provider, specifying for each the subject matter, the planned date and the terms of performance, as well as the overall remuneration or price reduction relating to all these obligations;
- the purpose, date, terms of performance, remuneration and products to which it relates of any service or obligation under an agreement with a legal entity located outside French territory with which the distributor is directly or indirectly linked.

Failure to comply with these provisions is punishable by an administrative fine of up to 75,000 Euros for a physical party and 375,000 Euros for a legal party. The maximum fine is increased, respectively, to 150,000 Euros and 750,000 Euros, if the infringement is repeated within two years of the date on which the first penalty decision became final (Art. L. 441-6 French Commercial Code).

In addition to these formal requirements, the parties must ensure that they do not engage in restrictive competition practices within the meaning of Art. L. 442-1 and L. 442-3 French Commercial Code, when formalising and implementing their distribution agreement.

2. Specific provisions for certain products imposed by the French Commercial Code

Certain widely consumed products

In addition to Art. L. 441-3 French Commercial Code, the supplier and distributor of certain widely consumed products must respect the additional requirements imposed by Art. L. 441-4 French Commercial Code as mentioned below:

- the tariff of the supplier defined in its general terms and conditions of sale;
- the forecast turnover between the parties;
- the terms and conditions under which this forecast turnover shall be reviewed when the agreement spans two or three years.

Failure to comply with these provisions is punishable by the same fines as those mentioned above (Art. L. 441-6 French Commercial Code).

The list of products concerned by these legal provisions is specified by Art. D. 441-9 French Commercial Code:

- Food and non-alcoholic beverages;
- Alcoholic beverages;
- Electric batteries for all purposes;
- Cleaning agents and washing products such as soaps, washing powders, liquid detergents, scouring powders, detergents, bleach, fabric softeners, window cleaners, drain cleaners, disinfectants and distilled water, but excluding waxes, polishes, dyes, insecticides and fungicides;
- Articles for cleaning purposes such as brooms, scrubbing brushes, dustpans and handbrushes, feather dusters, rags, dishcloths, mops, household sponges, scouring pads, steel wool and chamois leathers;
- Paper products such as filters, tablecloths and napkins, kitchen paper, Hoover bags and cardboard tableware, including aluminium foil and plastic bin liners;
- Adhesive and non-adhesive bandages;
- Pet food;
- Non-electrical appliances such as razors and razor blades, nail files, toothbrushes, excluding mechanical hair trimmers and their blades, scissors, combs, shaving brushes, hairbrushes, nailbrushes, hairpins, hair curlers, bathroom scales, baby scales;
- Articles for personal hygiene such as toilet soap, medicinal soap, cleansing oil and milk, soap, shaving cream and foam, toothpaste;
- Beauty products, perfumes and deodorants such as lipsticks, nail polish, make-up and make-up removal products (including compacts, brushes and powder puffs), hair sprays and lotions, pre-shave and after-shave products, sun protection products, depilatories, perfumes and toilet waters, body deodorants, bath products;

- Other products such as toilet paper, paper handkerchiefs, paper towels, tampons, cotton wool, cotton buds, disposable baby diapers, toilet sponges.

Art. L. 441-3 *“does not apply to wholesalers, which means “any individual or legal entity who, for business purposes, buys products from one or more suppliers and mainly resells them to other wholesalers or retailers, to processors or any other traders or companies that procure supplies for their business. Central procurement units and collective wholesale purchasing organisations are considered to be wholesalers. Companies or groups of individuals or legal entities that directly or indirectly operate one or more retail outlets or work in the distribution sector as a central procurement unit or collective buying organisation for retail companies are excluded from the concept of wholesaler”* (Art. L. 441-4, II French Commercial Code”).

Furthermore, for agricultural products or food products comprising one or more agricultural products, additional information shall be specified. Where indicators exist for the formation of prices and margins, the distribution agreement shall refer to them and explain the conditions under which they are used (Art. L. 443-4 French Commercial Code). The inclusion of an automatic price revision clause may also be required (Art. L. 443-8 French Commercial Code).

The sanctions are identical to those mentioned in Art. L. 441-6 (Art. L. 443-4 II French Commercial Code; Art. L. 443-8 VII French Commercial Code).

Finally, agreements with a performance period of more than three months relating to the sale of agricultural and food products, of which the production prices are significantly affected by fluctuations in the prices of agricultural raw materials and foodstuffs and agricultural and food products and, where appropriate, energy costs, shall include a clause on the arrangements for renegotiating the price so as to take account of such fluctuations (Art. L. 441-8 first paragraph French Commercial Code).

Products mentioned in Art. L. 443-2 French Commercial Code

For perishable agricultural products or products from short production cycles, live animals, carcasses or fishery and aquaculture products, a distributor or service provider may only benefit from discounts, rebates and refunds or provide for the remuneration of services rendered on the occasion of their resale that are suitable for promoting their marketing and that do not fall within the scope of the purchase and sale obligations, or services with a distinct object, if these are provided for in a written agreement relating to the sale of such products by the supplier (Art. L. 443-2 French Commercial Code).

This written agreement shall include, in particular, clauses relating to volume commitments, the manner of determining the price in relation to the volumes and qualities of the products and services concerned, and the setting of a price. It shall mention the tariff advantages granted by the supplier to the distributor with regard to the latter's commitments.

Specific requirements are also set out in Art. L. 443-2 French Commercial Code when the agreement concerns the purchase of fresh fruit and vegetables.

By way of derogation, a purchaser, distributor or service provider may not benefit from discounts, rebates and refunds for the purchase of fresh fruit and vegetables. He may, however, benefit from price reductions resulting from a qualitative or quantitative non-conformity of the product delivered if an agreement concluded by an interprofessional organisation has specified the conditions thereof (Art. L. 443-2 French Commercial Code).

For all these categories, mentioned under Art. L. 443-2 French Commercial Code, any breach of the rules set above by the purchaser, distributor or service provider shall be subject to an administrative fine of up to 15,000 Euros for a physical party and 75,000 Euros for a legal party. The maximum fine is increased to 30,000 Euros for a physical party and 150,000 Euros for a legal party if the infringement is repeated within two years of the date on which the first penalty decision became final.

Private label products

The agreement concluded between a supplier and a distributor for the design and production of food products in a manner that meets the particular needs of the purchaser and sold under a distributor's brand, shall mention the price or the criteria and procedures for determining the purchase price of the agricultural products used in the composition of these food products (Art. L. 441-7 first paragraph French Commercial Code).

This obligation shall apply only if a written agreement is established (Art. L. 441-7 second paragraph French Commercial Code).

The rules mentioned in Art. L. 441-8 et L. 443-4 French Commercial Code, detailed above, may also apply to private label products, depending on the nature of the products.

Specific provisions contained in the French Rural and Maritime Fisheries Code

This code contains specific requirements for the sale of agricultural products delivered on French territory by a producer or agricultural cooperatives. For example, when buying directly from the farmer, the contract shall specify the total quantity of goods, their origin and quality and include an automatic price revision clause (Art. L. 631-24 French Rural and Maritime Fisheries Code).

C. Term and termination

1. Term

Q13. Is an oral or written distribution agreement that does not specify the term always considered to be an agreement of indefinite duration?

Yes.

Q14. Does a distribution agreement of definite duration that is continued after its expiry turn into a distribution agreement of indefinite duration?

Yes.

If yes, what is meant by 'continuation' (a) and what should a party do to avoid this (b)?

a. What is meant by 'continuation'?

Continuation means that the parties continue to perform their obligations as set forth in the fixed-term contract whose term has expired.

According to Art. 1215 French Civil Code, when, at the end of the term of a fixed-term contract, the parties continue to perform their obligations, this contract is renewable by tacit consent. This tacit renewal produces the same effects as the express renewal of the contract by the parties, i.e., the creation of a new contract, with in principle an identical content as the previous one, but whose duration becomes indefinite.

b. What should a party do to avoid this?

To avoid tacit renewal of a fixed-term contract, a party must effectively cease to perform its obligations at the end of the contract. Even if the parties contractually exclude the possibility of tacit renewal, this is not sufficient to exclude tacit renewal if the parties continue to perform their obligations after the fixed term.

In order to secure its position, a party can send a written notice to the other party informing them that the contract will not be renewed at the end of the contract. It is then necessary that the behaviour of the party sending this writing be consistent with the content of this writing.

2. Termination

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution agreements of definite duration

Q15. Can a distribution agreement of definite duration be terminated for convenience?

Yes.

If yes, is an express provision allowing for termination for convenience necessary?

Yes.

Q16. Must a reasonable notice period be observed in order for the termination to be valid even if the distribution agreement provides for the immediate termination for convenience?

Only in certain instances.

If only in certain instances, please explain when a reasonable notice period is in any case required?

In a fixed-term contract, the parties may provide for an immediate termination clause for convenience. However,

the implementation of this clause must respect good faith (Art. 1104 French Civil Code) and not be done in an abusive manner. For example, if the terminating party gives a reason for termination, this reason must not be wrong and must be verifiable. Otherwise, it may be considered by the judges as a breach of the principle of good faith.

If the commercial relationship between the parties is considered to be established within the meaning of Art. L. 442-1, II French Commercial Code (in particular if the parties have signed several successive fixed-term contracts), the terminating party must respect a sufficient period of notice. The length of this notice period will depend on the characteristics of the relationship (seniority, level of dependence, investment in particular).

Q17. What are the consequences for the terminating party if it does not comply with prescribed (statutory, contractual, case law) rules for termination (e.g. in relation to the notice period)? Does the termination continue to have effect (a)? Will damages have to be paid and, if yes, how are those damages calculated (b)?

a. Will the termination continue to have effect?

French Civil Code does not specifically deal with that issue. There is no position of principle established by the case law on this point. However, the majority of court decisions tend to consider that a termination without right is effective.

However, Art. L442-4 French Commercial Code provides that the judge ruling by way of summary proceedings may order, in the event of imminent damage or a manifestly unlawful disturbance, the continuation of commercial relations (and therefore of the agreement) when the seller ceases to deliver without giving sufficient notice.

b. Will damages have to be paid, and, if yes, how are those damages calculated?

The terminating party must compensate the other party by way of damages. The nature of those damages depends on the circumstances.

If the terminated party claims compensation on the basis of French Civil Code, it may obtain compensation from the judge for the loss suffered as a result of the abuse of the right of termination. Judges may award damages up to the amount of the profit lost that the terminated party could reasonably expect until the end of the contract.

Sometimes, judges may also compensate for the cost of dismissals caused by the abusive breach of the contract, the victim's moral prejudice, the loss of opportunity to retrain or the time needed to find a new client.

When the terminated party acts on the basis of Art. L. 442-1, II French Commercial Code (in case of brutal termination of the relationship due to insufficient notice), the amount of damages corresponds to the gross margin during the period of notice that should have been respected (For more information, See Q20.b).

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution

agreements of indefinite duration

Q18. Can a distribution agreement of indefinite duration be terminated for convenience even if the agreement does not provide for termination for convenience?

Yes.

If yes, must a reasonable notice period be observed?

Yes.

If a reasonable notice period must be observed, how is this reasonable notice period calculated (e.g. 1 month per year) (a)? Should a minimum notice period be observed (b), is there a maximum notice period (c)?

a. How is this reasonable notice period calculated (e.g. 1 month per year)?

Suppliers and distributors bound by an indefinite-term agreement are free to terminate their relationship. However, they must give reasonable written notice as imposed by Art. L. 442-1 French Commercial Code, when their relationship is stable and established.

The notice period must be determined according to several criteria such as: the duration of the commercial relationship, the economic dependence existing between the parties, the existence of a non-competition clause, financial investments made by the terminated party for the performance of the contract and not depreciated at the time of the termination, etc.

Even if the parties have contractually agreed on a prior notice, it does not bind the judge who remains free to decide what a "reasonable prior notice" is in his opinion. Judges evaluate case by case the "reasonable prior notice" considering the specificities of the relationship (its duration, the economic dependence between the parties, the existence of a non-competition clause, the financial investments made by the terminated party, etc.).

Where the party observes a notice period of eighteen months, he cannot be held liable on the basis of Art. L. 442-1, II French Commercial Code.

Should the party fail to give sufficient notice, the victim is entitled (except in cases of force majeure or serious misconduct) to claim compensation for the damage suffered (loss of profit margin during the period of notice that should have been observed and, where appropriate, compensation for additional damage).

b. Should a minimum notice period be observed? If yes, how long is this minimum notice period and are the parties allowed to contractually deviate from this minimum notice period

There is no minimum notice period required by law.

c. Is there a maximum notice period? If yes, how long is this maximum notice period and are the parties allowed to contractually deviate from this maximum notice period?

There is no statutory maximum notice period.

However, Art. L. 442-1, II French Commercial Code provides that *"in the event of a dispute between the parties on the length of the notice period, the terminating party may not be held liable for giving insufficient notice if it has given eighteen months' notice"*. If the terminating party respects a notice period of at least eighteen months, this notice period will be considered as lawful and the liability of this operator will not be engaged on the basis of Art. L. 442-1, II French Commercial Code.

If, for example, a company terminates a relationship with one of its partners with a twelve-month notice period, the judge might consider, given the specificities of this relationship, that the notice period should have been twenty-four or thirty-six months. In this case, the terminating party could be required to give twelve (if the notice period should have been twenty-four months) or twenty-four months additional notice (if the notice period should have been thirty-six months) and compensate the terminated party accordingly.

Q19. Is a contractual notice period always legally valid and enforceable?

No.

If not, which rules of mandatory law can have an impact on this?

The parties must comply with Art. L. 442-1, II French Commercial Code (see commentary above in Q18.a.) even if the contract mentions a contractual notice period.

Q20. What are the consequences for the terminating party if it does not comply with prescribed (statutory, contractual, case law) rules for termination (e.g. in relation to the notice period)? Does the termination continue to have effect (a)? Will damages have to be paid and, if yes, how are those damages calculated (b)?

a. Will the termination continue to have effect?

In principle, the termination will continue to be effective. However, the injured party may request the resumption of the relationship (e.g.: under daily penalty payment) by means of a summary procedure before the judge, if the conditions for the action are met.

b. Will damages have to be paid, and, if yes, how are those damages calculated?

If the notice period is deemed insufficient by the judge, the party responsible for the termination of the relationship is liable to pay compensation.

The amount of this indemnity generally corresponds to the victim's gross margin, calculated:

- from the average gross margin achieved with the party responsible for the termination during the last three years preceding the termination;
- taking into account the reasonable notice period that should have been given by the party responsible for the breach.

For example: a company terminates the relationship without notice and the judge considers that this company should have given 6 months' notice. During the last three years preceding the termination, the parties had an average annual turnover of 1,000,000 Euros. The average gross margin over the last three years was 70%, i.e., 700,000 Euros per year (1,000,000 x 70%), i.e., approximately 58,333 Euros per month. Considering the 6 months' notice period that should have been respected, the compensation would amount to approximately 350,000 Euros.

Marginally, the terminated party may obtain compensation for a prejudice distinct from that resulting from the abusive nature of the termination (for example: nonpecuniary damage).

Q21. Must the terminating party comply with certain formalities?

Yes.

If yes or only in certain instances, when is a written notice required (a), must the notice contain a motivation in order for the termination to valid (b) and what are the consequences if any of the formalities are not observed (c)?

a. Is a written notice required? If yes, is a registered letter (or similar) required?

For distribution agreements, Art. L. 442-1, II French Commercial Code provides that written notice is required for the validity of the notice. If sending of this notice by registered letter is not expressly required by the above-mentioned legal provision, compliance with this formalism allows the terminating party to ensure that the terminated party well received this notice.

b. Must the notice contain a motivation in order for the termination to valid?

Termination of distribution agreements of indefinite duration does not have to be justified.

c. What are the consequences if any of the formalities are not observed?

According to Art. L. 442-1, II French Commercial Code, the terminating party can be required to pay compensation.

Q22. Can the parties stipulate the formalities in the distribution agreement?

Yes.

If yes, what are the consequences if those formalities are not observed?

If the parties provide for the respect of a special formality in the contract to terminate it, and this is not observed, this renders the notice ineffective and the terminating party is liable.

Q23. Is the terminated party entitled to damages or another type of compensation even if the correct notice period has been observed?

Only in certain instances.

If yes, does this concern goodwill compensation or another type of compensation? Do the legal consequences vary depending on the type of agreement (definite/indefinite duration; exclusive/non-exclusive; franchise etc.)?

In principle, the terminating party who has given sufficient notice under Art L 442-1, II French Commercial Code is not liable and does not commit any abuse in the termination. However, despite having given sufficient notice, it could be accused of an abuse of rights when the other circumstances of the termination are such that they constitute a fault in the exercise of the right to terminate.

For example, this may occur if the termination was accompanied by acts of disparagement, discrimination or unfair competition causing the internal disorganization of the other party.

Immediate extrajudicial termination on account of serious breach or exceptional circumstances

Q24. Is immediate extrajudicial termination possible even if the distribution agreement does not provide for early termination?

Yes.

If yes, on what grounds (a)? Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement (b)?

a. On what grounds?

Immediate extrajudicial termination of a distribution agreement is possible when the other party is in breach of its obligations (serious misconduct is required) or in the event of force majeure.

b. Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement?

No.

Q25. Will an (extrajudicial) termination continue to have effect if the court rules that the agreement was wrongfully terminated on account of serious breach and/or exceptional circumstances?

Only in certain instances.

If not or only in certain instances, what are the consequences of the termination not being upheld?

The majority of court decisions tend to consider that a termination without right is effective.

However, Art. L442-4 French Commercial Code provides that the judge ruling by way of summary proceedings may order, in the event of imminent damage or a manifestly unlawful disturbance, the continuation of commercial relations (and therefore of the contract) when the seller ceases to deliver without giving sufficient notice.

The terminating party might be liable in damages.

Q26. Does the terminated party have a right to compensation if it appears that the agreement was wrongfully terminated or dissolved on account of serious breach and/or exceptional circumstances?

Yes.

If yes, is this right based on statute or case law (a) and how is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill) (b)?

a. Is this right based on statute or case law and what this right entail?

This right arises from the general principles of French Civil Code and from Art. L. 442-1, II French Commercial Code. These legal provisions provide the right to compensation of damages.

b. How is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill)?

As the termination becomes unlawful, the compensation may be calculated in the same manner as mentioned above under Q20.b. if the terminated party claims compensation on the basis of Art. L. 442-1, II French Commercial Code.

Q27. If a party believes that the distribution agreement has been wrongfully terminated or dissolved, can it apply to the judge in interim relief proceedings to have the effects of the termination suspended?

???????Yes.

Part. 4: Post-contractual phase

Q28. Is the supplier required to repurchase the stock that is still at the distributor's disposal when the distribution agreement ends?

No.

Q29. Are there other post-contractual obligations that generally apply to either of the parties in the context of the termination of the distribution agreement?

No.

Part 5: Dispute resolution

Q30. Do specific rules and/or restrictions apply as regards the choice of forum and/or jurisdiction?

Yes.

If yes, what do these specific rules and/or restrictions entail?

Regarding disputes bases on Art. L. 442-1, L. 442-2, L. 442-3, L. 442-7 and L. 442-8 French Commercial Code, competent jurisdictions are those indicated in the Annex 4-2-1 of this Code.

Q31. Can the parties opt for arbitration?

Yes.

If yes, are there any rules and/or restrictions as regards the enforceability of arbitration clauses in distribution agreements?

Yes.

If yes, what do these specific rules and/or restrictions entail?

The arbitration clause or agreement must be in writing, and may result from an exchange of writings or from a document in which the agreement is mentioned (Art. 1442 and 1443 French Code of Civil Procedure). To be effective, the agreement must precisely describe the subject matter of the disputes to be settled by arbitration in order to avoid any unnecessary litigation regarding its scope.

Furthermore, only when the agreement is clearly void or unenforceable the court will be deemed competent.

Both parties can always ask the judge for provisional or conservatory measures.

Q32. What is the statute of limitations applicable to claims regarding the performance of a distribution agreement?

Claims are limited to 5 years (Art. 2224 French Civil Code; L. 110-4 French Commercial Code).