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Food Supply Chain and value-sharing: The French General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) provides guidance on the use of indicators in the contractual chain

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DGCCRF, July 24th, 2020, Guidelines on the consideration of "indicators" in the contractual chain.

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Facts. Ensure a better distribution of the value created by the agricultural and agri-food sectors between all the actors in the production chain. This is notably the objective of the Equality Law passed almost two years ago. To achieve this objective, this law reversed the process of constructing the price paid to producers, based on actual production costs, and imposed the inclusion of indicators of these costs, or of the prices of agricultural and food products, in the contracts concluded between the different actors in the agri-food chain.

On July 27, the DGCCRF published guidelines on Equalim indicators, drawn up in consultation with the Ministry of Agriculture and Food, in order to enlighten players in the food supply chain on how to apply this system. After a reminder of the regulations (C. rur., art. L. 631-24 et seq. and C. com., art. L. 443-4), this document deals with their implementation, in terms of "taking into account" the indicators. Five topics are addressed.

Translating the logic of "forward pricing" intended by the Egalim law from the upstream stage, i.e. from the relationship between the producer and the first buyer, the points discussed essentially relate to the "cascade" mechanism at the downstream stage of the supplier-distributor relationship, referred to in Article L. 443-4 C. Com. It should be recalled that the "cascade" mechanism is also provided for in the Rural Code. First of all, in Article L. 631-24-1, for taking into account indicators in terms of the criteria and procedures for determining the price within contracts for the resale of agricultural products by the first purchaser or processed products comprising one or more agricultural products. This article is also

concerned with the consideration of indicators in cases where the initial purchase price was determined. Next, Article L. 631-24-3 provides for a mechanism in the same spirit, adapted to the context of relations between producers and their agricultural cooperatives, POs or PDOs with transfer of ownership, or between producers and the enterprises with which they are linked by an integration contract.

Trouble.

1. Can we consider that the term " *exist* " means that the indicators must be taken into account in downstream relations (supplier-distributor) as soon as they have been made public and are therefore accessible to all operators?
2. What do the terms (clarification) " *refer to it and explain the conditions under which it is taken into account in the determination of prices* " mean ?
3. Can the distributor, on the basis of Article L. 443-4 C. com., ask its supplier for full transparency on the purchase cost of its agricultural raw materials (by making a detailed request for its purchase prices)?
4. What are the penalties incurred by a first buyer who purchases agricultural products from a foreign producer and concludes a written contract with the latter that does not comply with the provisions of Articles L. 631-24 of the CPMR and L. 443-4 of the French Commercial Code?
5. Same question for the case of an operator other than the producer who resells to his customer established abroad?

Solutions.

First question: in a logic of legal certainty, the term " *exist* " means that operators can easily have access to the indicators mentioned.

Second question: The answer is in three parts. Firstly, the DGCCRF points out that the term " *price* ", within the meaning of Article L. 443-4 of the Commercial Code, refers to the " *tariff price* " as it results from the " *contractual document* " constituted by the supplier's GTCs (Article L. 441-1 of the Commercial Code), which is the sole basis of the commercial negotiation, as well as the price agreed at the end of the commercial negotiation within the framework of the single agreements (Articles L. 441-3 and L. 441-4 of the Commercial Code) for all sectors and for agreements relating to consumer products. The same applies to the agreements in articles L. 441-7 and L. 443-2 C. com. With this clarification, which is merely a reminder of the text, the DGCCRF is looking into the determination of the indicators to be taken into account in the case of " *food products comprising several agricultural products* " (processed products). On a general level, the DGCCRF reminds that the choice of indicators is primarily up to the operators. The latter are best placed to determine the indicators that best correspond to the products they " *manufacture* ", with the onus on them to be able to " *justify that the choice* " of these indicators is " *effectively relevant* ". The ball is in the manufacturers' court. More specifically for the indicators to be taken into account in the case of processed food products, the DGCCRF opts for a " *pragmatic and operational approach* " "in accordance with the spirit of the *Egalim law*". This spirit of the law, reflected in Article L. 443-4 of the French *Commercial Code*, will thus be recalled by the DGCCRF, in its response to the third question: " *Article L. 443-4 of the Commercial Code requires that the indicators be referenced in the contractual chain, that the sector be made responsible and that, throughout the supply chain, downstream contracts indicate either the indicators provided for in the contract between the producer and its buyer, or the price indicators for the agricultural products concerned. This is the major objective of the Etats Généraux de l'Alimentation and the Egalim law. In particular, it is a question of ensuring that each co-contractor does not exaggeratedly increase its margins to the detriment of the upstream party, which would not see*

the value reflected up to its level". To this end, " *only the main agricultural products must be referenced and taken into account in price determination*". Operators could thus mention the indicators selected "in order of importance" or " *really determining*" in the construction of the price. The choice of the indicators selected will have to be " *explained and justified*" in the contract (thus in the GCS, since these are considered as a contract in the answer to the first question and, in any case, because article L. 443-4 C. com. requires this choice to be made explicit; in the single convention, etc.). Finally, the situation in which it would not be possible to make the indicators explicit or, more concretely, the situation in which the seller " *could not take the indicators into account*" - it is assumed that they are referenced - for " *legitimate reasons*" is admitted.

Third question: the DGCCRF states that it is up to the operator who determines the price of its products to refer either to the indicators chosen in previous contracts or, in the absence of such indicators, to the indicators it considers most relevant and to justify it in this case. But there should be no excessive transparency in this respect regarding the determination of their prices by manufacturers. The law does not require the price formula or the precise construction of the costs of production, but simply to provide indicators and explain how they are taken into account.

Fourth and fifth questions: in the case of the supply of agricultural products to a first buyer from a foreign supplier, the DGCCRF considers that the provisions of Articles L. 631-24 et seq. of the CPMR and L. 443-4 C. com. can thus be considered, subject to the sovereign assessment of the judges, as police laws applicable to any situation with elements of attachment to French territory (place of establishment of the economic player in France, French market concerned for the disposal of goods, etc.). In the case of reverse flows, i.e. in the event of resale to a customer established abroad by an operator that is not a producer (a processor, for example), Article L. 443-4 applies and the operator's GTCs, when available, must mention the indicators (except in the case of calls for tenders from foreign bodies, as the purchase to be made does not take place on the basis of the GTCs).

Analysis. Our bias is to highlight, in a general way, the points of practical interest in these guidelines, grouped by key ideas, despite the impression that they might sometimes give the impression, perhaps unfairly, of pushing open doors.

Multiplicity of indicator sources. This is what we retain from the answer to the first question, which asks about the condition of the " *public*" nature of the indicators, in order to be - and must be - taken into account. This character does not result, expressly, from the text itself. However, it should be remembered that such a character had been provided for in Article L. 441-6 I para. 6 C. com. resulting from the Sapin II law, concerning the " *public*" index or indices of production costs in agriculture and the selling price to consumers of food products to which reference could be made for the fixing of the criteria and methods of determination of the " *average forecast price proposed by the seller to the producer of these agricultural products*", which must be mentioned in the general conditions of sale. Nevertheless, that provision, whose effects were not remarkable, foreshadowing the current article L. 443-4, was of a more limited scope, since it related only to food products comprising one or more unprocessed agricultural products 'which *must be the subject of a written contract*' (contracts known as 'LMAP', as in the case of cow's milk), and was aimed only at the content of the general terms and conditions of sale and not also, in particular, at the single agreement. Henceforth, the condition of existence of the indicators, probably less subject to debate than that of their advertising, is satisfied when operators can easily access them. The provision of examples by the DGCCRF of the origin of these existing indicators is appreciable (dissemination by an interprofession, by the OFPM or any other body; content of the contract with the producer) and one can conclude that there is a great multiplicity in the sources of indicators. But beware, this advantage of multiplicity has its flipside: that of making operators who have not taken into account indicators that nevertheless "exist" be held responsible. In other words, the failure to take the indicators into account in the GTC and the contract will only be "excusable" by their non-existence. The argument of ignorance of an indicator which, although little known, was nevertheless accessible, is likely to be little audible in the event of a check. In the same way, and because of the penalties incurred, it is to be feared that some operators will use, for the sake of good form, indicators that may exist but are unsuitable and therefore ineffective. In relation to the latter case, it could also be

debated whether an indicator that is disseminated, but is in fact truly unsuitable or has become such (for example, an indicator that is too general or not very up-to-date) in relation to the purpose sought by the law, which is that of price valuation or price revaluation, can be considered as a truly existing indicator in a given relationship. Certain clauses could possibly provide for the substitution of indicators in such cases. In any case, any utilitarian approach should not be banned if it is to make sense. Finally, it remains to be seen whether the latter situation could be dealt with by the case referred to in the last issue of the second question (see below), which, according to the DGCCRF, " *concretely refers to the hypothesis in which a seller could not take the indicators into account for legitimate reasons* ". To be seen.

Multiplicity of "taking into account" situations. This multiplicity can be seen from the structure of the second answer, which is itself multiple.

Multiplicity first in the media used in the negotiations to determine the price, announced in the tariff or agreed upon at the end of the negotiations and mentioned in the negotiated agreement, i.e. GTCs and agreements, which are also multiple (general system agreements for cases where an agricultural or food product is not classified as "GMP", GMP agreements, private-label agreements, specific system agreement for certain agricultural products listed in Article D. 441-2 of the C. com.)

Multiplicity then in the choice of indicators offered to operators - and therefore their freedom - with the onus on them to be able to justify "*in the contract*" (including in the General Terms and Conditions of Sale which the DGCCRF refers to as the "*contractual document*" - see also the text of Article L. 443-4 C. com.), the relevance of the choice made. Operators will have to be realistic on this issue. They are moreover invited to a "*pragmatic and operational*" approach which must be "*in accordance with the spirit of the Egalim law*".

Finally, there is a multiplicity of choices in the treatment of complex situations, where the objective of the law controls the means used. This is illustrated, for example, in the choice of indicators to be taken as a reference, made explicit and taken into account in the case of processed agricultural products. In such cases, the obligation will relate only to indicators relating to the main agricultural products used in the food product. But there is a more complex case, which corresponds to the hypothesis where it would not be possible to make the indicators explicit or where the seller "*could not take the indicators into account*" for "*legitimate reasons*". Here we can see a logic of exception. It must then be considered that the seller "*could in its GTC*" - which seems to mean that silence is permitted on this point - "*specify the legitimate reasons justifying that the indicators have not been taken into account in the determination of its price*". In any event, the seller's failure to take the indicators into account in the determination of "*his price*" must be "*expressly explained and justified in the contract (the GTC, the single agreements, etc.)*". We do not deny that we are troubled by this last reference to the GCS, in view of our previous remark. In any event, we note, since this is indicated in Article L. 443-4 of the C. com and repeated in the guidelines, that as soon as the indicators are used in the contract - which nevertheless meets the requirement of principle - their use must be made explicit in the contract. The contract subsequently drawn up must therefore explain and justify such a departure from the rule, giving legitimate reasons. There is an urgent need to examine the reasons for a situation that the legislator no longer wishes to see, namely a price that is disconnected from costs. The situation is at risk and a few additional clarifications and examples would have enabled a better understanding of it: What could be understood by legitimate reasons? *What about indicators that exist in principle but are unsuitable for the particular case, because they are too generic or do not reflect the current state of economic data*(*Rappr. L. Pouchard, Stopper la " crise du prix payé aux éleveurs "*, La France Agricole, Sept. 2, 2020, referring to the demands of the Massif Central breeders to the Minister of Agriculture for the implementation of an "*official tool for observing the cattle market, including all the economic indicators useful for the negotiations, updated weekly*", or the publication on Twitter by the Fédération Nationale Bovine, of weekly market indicators)? What about the countless fruits and vegetables not produced in France and resold at the state or used in the manufacture of processed products, etc.?

Confidentiality preserved from price construction. The answer to the third question does not call for further comment here. Indicators are indications, not inquisitions. The law must not be used as an alibi for the satisfaction of objectives foreign to its own, as recalled by the DGCCRF in its response (*Rappr. nos obs. RLDC, No. 79, January 2019, pp. 13 et seq.*).

Extensive applicability. In its answer to the fourth and fifth questions, the DGCCRF opts for a broad application of the regulations in the context of international commercial contracts. Admittedly, point I of Article L. 631-24 of the CPMR refers to contracts for the sale of agricultural products "delivered" on French territory and specifies that they are governed by the provisions of this article. However, it is true that Article L. 443-4 does not expressly refer to this criterion of delivery on French territory, even though it refers to Article L. 631-24 of the CPMR, but only in point III, which does not deal with this subject. This raises the question of the combination of the two articles and/or the autonomy of point III of Article L. 631-24 of the CPMR in relation to point I of the same article, when it comes to applying Article L. 443-4 of the CPMR's Common Position. However, we note that the DGCCRF points out that the aim of the Egalim law is to make "all players in the French agri-food chain responsible for the price paid to producers", since it seems to us that the latter have generally been perceived as French producers, in addition to the fact that they too are part of "all players". Furthermore, and at least for imported products, especially "plant" products, does the reference in point III of Article L. 631-24 of the CPMR's draft article to inter-professional organisations, the OFPM or France Agrimer, in the context of the development of indicators, not militate in favour of indicators applicable only to products from the French sectors in mainland France and overseas territories? Wasn't the aim of the Egalim law to correct abuses in the distribution of value between upstream players in the French agricultural world and downstream operators, and not to protect farmers in other countries, however noble the cause. Unless, perhaps, the preservation of our agriculture also involves the revaluation of foreign agriculture, and for that matter the increase in the cost of purchases made abroad? But we are speculating.

In any case, and despite the clarifications provided by the DGCCRF, the Achilles heel of this system remains for the moment its relative complexity. The running-in period is proving to be long. Although virtuous, it is still difficult to implement, both in terms of the indicators to be developed and then chosen, and in terms of their ability to satisfy the various stakeholders in the supply chain, particularly the most powerful when it comes to discussing the sharing of the cake. Let us also not forget the importance of the transaction costs that the actors will have to bear on these complex issues. Increasing technical competence - and even more so the goodwill and communication between the actors - will also be a prerequisite for the success of the new price construction.