

N° 1-2021

Trade annual negotiations: The signature of the annual commercial agreements with the dead line of the 1st of march does not discharge the parties in terms of legal constraints on both form and substance for the rest of the year (*art. L. 441-3 II et IV C. com.*)

DISTRIBUTION, FRANCE, DISTRIBUTION/RETAIL, DISTRIBUTION AGREEMENT, VERTICAL RESTRICTIONS, REBATES, PRICE FIXING, SANCTIONS / FINES / PENALTIES, PUBLIC ORDER, PRINCIPLE OF TRANSPARENCY

Art. L. 441-3 II and IV C. com. modified by the law of Dec. 7th, 2020

**This article is an automatic translation of the original article, provided here for your convenience. Read the original article [fr].*

This article was first published in the *Lettre de la distribution* # published by the Centre du Droit de l'Entreprise of the University of Montpellier.

Jean-Michel Vertut | Jean-Michel Vertut - Avocat (Montpellier)

Concurrences N° 1-2021 | Alerts | Distribution

It's finally signed, and often in the last days of February, or even on the evening of Monday 1 March 2021! It is such a pity that this 1st March 2021 did not fall on a Friday, as it did two years ago, leading to a well-deserved weekend for key account managers and buyers. Because from the morning of Tuesday, March 2, 2021, without transition, another era began! That of the actual execution of the agreements.

Completing commercial negotiations by 1 March, with the signing of the annual agreement for the coming year, is in fact both a legal constraint and a source of relief for both sales managers on the supplier side and buyers on the distributor side. But there is an aftermath... Indeed, already and without having to wait for the first evolutions of the commercial relationship during the period, some key accounts and their buyers may have experienced the impact of the "ASAP law" of 7 December last, which imposes within the new point 4° of the I of the article L. 441-3 of the French Commercial Code, to disclose in the written agreement " *the subject matter, date, terms and conditions of performance, remuneration and products to which it relates of any service or obligation under an agreement entered into with a legal entity located outside the French territory, with which the distributor is directly or indirectly linked* ". In other words, that the content of the agreements of the "international agreements" be reported there.

Without even touching on the subject of reconciling the sequencing of the "France" trade negotiations with the "Europe" trade negotiations, these agreements, which are not necessarily signed before 1 March, must - and will if not done so - add to the content of the original agreement. More conventionally, after 1 March, the handling of day-to-day business and the monitoring of the implementation of the initial agreement may unfortunately lead to the problems of revising the annual agreement being relegated to the background when the parties, in the course of their day-to-day practice, actually make changes or additions to their initial agreement, without formalising these changes. Examples include the forecasting, during the year, of additional services to be rendered by the distributor, the revision of the content of the initial services or their prices, the content of the benchmark, the granting of a conditional end-of-year rebate when the sales target to be achieved has not been fully met due to the non-delivery of certain products ordered, the general decline in the market, etc. The year 2020, which will remain the year in which COVID will have entered into business relations, confirms that there may be a real gap between the initial projections before 1 March and the actual achievements afterwards. The lack of formalization of changes may be the result of a lack of knowledge of the applicable rules beyond the mere need to "sign" by 1 March, of a certain indolence on the part of the parties after the tense period of the previous months of negotiation, or even of trust in the other party to implement commitments made during the course of the relationship, by telephone or at a follow-up meeting.

First of all, in terms of form and after 1 March, the parties will have to think about providing for amendments to their agreement in the event of a change to the initial agreement. These amendments will have to meet the requirements of II of Article L. 441-3 of the French Commercial Code (i.e. a written amendment that mentions the new element justifying it), at least for agreements covered by this article but also by Article L. 441-4, which is "superimposed" on it, as far as consumer products are concerned (Rappr. CEPC, Opinion No. 09-09 which, on the question of calling into question the negotiations just after the signing of the contract on 1 March, already referred to " *a new element or a new and significant particular condition [which] justifies it* "). In the end, this is merely a translation, *in concreto*, of the principle of " *transparency in the commercial relationship* " proclaimed in the very title of Chapter I of Title IV of Book IV of the Commercial Code, under which Section 2 on " *negotiation and formalisation of the commercial relationship* " falls (Rappr., Précision et transparence : une relation aux multiples enjeux dans le cadre des PRC et des relations commerciales en général, RLC, Juillet-Août 2017, n° 63, p. 43 et seq.) There is an issue on this subject in the law of restrictive competition practices, regarding the formal regularity of the agreement which must continue to faithfully transcribe even after March 1 and throughout its duration, the agreement of the parties, under penalty of administrative sanction, but also in the law of obligations (Rappr. Paris, Jan. 18, 2017, No. 14/08437, Lettre distrib. 02/2017; Le formalisme de l'article L. 441-7 et la preuve de la modification de l'accord des parties, RLC, Avril 2017, No. 60, p. 36 et seq.)

In terms of substance and the evolution of the content of commercial negotiation, the renegotiation, in particular of tariffs, between suppliers and customers of large-scale distribution, is not exempt from a certain framework, while the reopening of negotiations, after the signing of annual commercial agreements, is becoming increasingly frequent (Rappr. Paris, May 16, 2018, No. 17/11187, Lettre distrib. 06/2018; Reopening of tariff negotiations during the financial year: the Paris Court of Appeal balances the practice of requests for price cuts or additional "budgets", RLC, July-August 2018, No. 74, p. 16 et seq., our obs.).

The parties, who wrongly and too often believe themselves to be freed from regulatory constraints after March 1, will therefore be advised not to put off their initial agreement until the end of the contractual period, and to consider updating it in the event of changes to the conditions initially agreed. So, rather than a goodbye to the next negotiations at the end of 2021 for 2022, it is most likely a "see you soon" that should be preferred.