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THE EGALIM BILL: RESALE AT LOSS THRESHOLD, PROMOTIONS AND COMMERCIAL RELATIONSHIPS, MORE TO COME

IT and Data Protection Competition, Retail and Consumer Law Commercial and International Contracts | 15/10/18 | Alexandra Berg-Moussa



The final text of the draft bill for the balance of commercial relationships in the agricultural and food sector and for a healthy and sustainable nutrition (known as the "EGALIM Bill") was adopted by the *Assemblée Nationale* (i.e. the French House of Representatives) on October 2, 2018. The EGALIM Bill is currently being reviewed by the *Conseil Constitutionnel* (i.e. the French Supreme Court which reviews the constitutionality of the laws – judicial review), which will render its decision at the beginning of November. After such decision, the EGALIM Bill shall be adopted and become a law.

Eagerly awaited after several months of parliamentary debates and of consultations following the debates, requests and commitments between the various players within the food industry during the 2017 *Etats Généraux de l'Alimentation* (i.e. 2017 General Food Summit), the EGALIM Bill aims at rebalancing commercial relationships between the farmers, food processors and distributors.

The adoption of the EGALIM Bill takes place in a very tense context since the spirit of the 2017 Food Summit did not have the impact on the 2018 commercial negotiations which was expected by some of the players involved. In particular this year, the price war aiming at always offering lower prices downstream the supply chain (i.e. at the level of sales to consumers), which culminated in the famous "Nutella riots" of last January, seems to appear as one of the causes of the imbalances suffered upstream of the same supply chain.

The EGALIM Bill includes provisions aimed at formalizing, securing and bringing transparency into the upstream process of negotiation, contractualization and price fixing between farmers, producers, first buyers and distributors, with the idea that the construction of prices must be reversed and should be based on the costs borne by farmers and producers. But the EGALIM Bill also includes provisions aiming at regulating prices and practices at the downstream level, *inter alia* through the increase of the resale at loss threshold and through limitations applicable to food products and pet food promotions.

These two topics (resale at loss threshold and promotions) will be subject to a separate *Ordonnance* (i.e. a text adopted by the Government under Parliamentary empowerment) which should be adopted in the coming weeks and which should hopefully clarify the practical questions that remain at this stage with the relevant players.

Regarding the resale at loss threshold, it will be increased for a two-year test period (as announced by the Prime Minister's at the closure of the 2017 Food Summit). The effective purchase price (as defined in Article L. 442-2 of the French Commercial Code) will be **increased by a multiplying factor of 1.1** for the resale of food products and pet food. Noteworthy, this measure will not apply in the overseas departments and will only concern products bought for the purpose of reselling them "as is" to the consumers (thus resale by retailers only, and not wholesalers).

Regarding promotions, based on the last draft *Ordonnance* circulated a few weeks ago, the limitation – also for a two-years' trial period and for the same product categories – would be of two types: in value and in volume, and would give rise to administrative fines.

- **In value**: prohibition to grant consumers advantages which would exceed a (cumulative) total of 34% of the relevant product's consumer sale price (or the equivalent of the quantity sold). Such prohibition would cover any type of advantage (i.e. in cash or in kind), whether granted immediately or at a later stage, and whether granted by the supplier (such as the *NIP – Nouveaux Instruments Promotionels*, for example) or by the retailer.

- **In volume**: these promotional advantages shall not apply to products representing, before deducting said advantages, more than 25% of the estimated turnover (under the *Convention Unique* pursuant to Article L. 441-7 of the French Commercial Code) or estimated volumes/volume commitments (under private label agreements and agreements pursuant to Articles L. 441-2-1 and L. 441-10 of the French Commercial Code) agreed between the supplier and the retailer.

- Perishable products threatened with rapid deterioration are, in principle, outside of the scope of this framework and therefore could be subject to promotions beyond the above value and volume limits, provided that such promotions are not advertised or announced outside the point of sale.

At this stage, a number of questions arise as how, in practice, the above will be approached and implemented:

- What would be the reference price used, including in particular in the context of fresh or perishable food products, which are subject to quick and successive promotions by the distributor given the nature of these products and applicable time constraints?



- Notwithstanding the fresh or perishable nature of the products, how will promotions on food products with a marked seasonal character (Christmas *foie gras*, Easter chocolates, etc.) be dealt with, when the distributor wishes again to significantly promote them after the relevant sales period?

- Taken into account advantages granted at a later stage will cause difficulties when calculating *a posteriori*, especially in a context of cumulative advantages/operations. In addition, how are taken into account the so-called "cash back programs" or other benefits not allocated to a specific product?

- Doesn't the taking into account the advantages granted by suppliers to consumers (known as *NIP - Nouveaux Instruments Promotionnels*) trigger risks of systematic exchanges between suppliers and retailers on their prices and promotional policies, in particular to ensure that the above "value" limit regarding promotions is complied with, involving greater risk in the field of competition law?

- How will the estimated turnover and/or volumes be determined in the context of the above "volume" limit? By product (SKU), by product category, by brand or globally with the same supplier, in order to benefit, as the case may be, from a turnover/volume which covers all purchases with that supplier, including on products that will not be subject (or rarely) to promotions during the year?

- How will the parties manage the monitoring and adjustment of this dual limitation framework? How will the authorities monitor and sanction the compliance (*a posteriori* controls as regards the "volume" framework)? How will the discrepancies between the estimated and the actual figures be assessed? In particular, what will be the consequences for promotions already carried out on the basis of the estimation, and which would *in fine* exceed 25% of the actual figures?

On these two topics (resale at loss threshold and promotions), the question of the date of entry into force of the abovementioned new rules will also be important. The last draft *Ordonnance* circulated a few weeks ago provided, in particular, that the new resale at loss threshold and the "value" limit on promotions should be applicable as of December 1, 2018, which prompted many reactions due to the fact that already planned end of the year promotional campaigns could be compromised whereas their supporting promotional materials (catalogues and other media) are most likely already ready. Some rumors suggest that the applicability of these two new rules would be postponed until January 1, 2019. The "volume" limit on promotion is, on its part, intended to apply to the 2019 contracts that will be concluded at the latest on March 1, 2019.

Finally, two provisions of the EGALIM Bill should also be highlighted.

The prohibition to use the term "free" when promoting food products. This prohibition should apply as soon as the law is published (probably requiring re-labelling or affixing stickers on the existing media and packaging). The use of synonyms is not mentioned in the EGALIM Bill, which already led the players in the relevant field to imagine possible alternatives...

The announcement of a second Ordonnance (which could, according to some recent rumors, actually give rise to two different *Ordonnances*) which aims at amending a certain number of the provisions of Title IV of Book IV of the French Commercial Code, in particular relating to:

- The contractualization scheme of the commercial relationships (role of the General Terms of Sale, *Conventions Uniques* (i.e. framework agreements) with retailers and wholesalers, definition of the *plan d'affaire* - i.e. commercial terms - and estimated turnover, etc.),

- The rules on invoicing terms,

- The restrictive commercial practices set forth in Article L. 442-6 of the French Commercial Code, in particular the sudden termination of commercial relationships,

- The rules on predatory pricing set forth in Article L. 442-9 of the French Commercial Code.

Considering also the reduction of the sales periods contemplated in the PACTE Bill (from 6 to 4 weeks in the course of 2019) and the upcoming discussions in Brussels on the draft directive on unfair practices between professionals of the food supply chain, the coming weeks and months should be full of new proposals and hopefully clarifications on all these important topics, whereas the 2019 commercial negotiations' period is about to begin.
