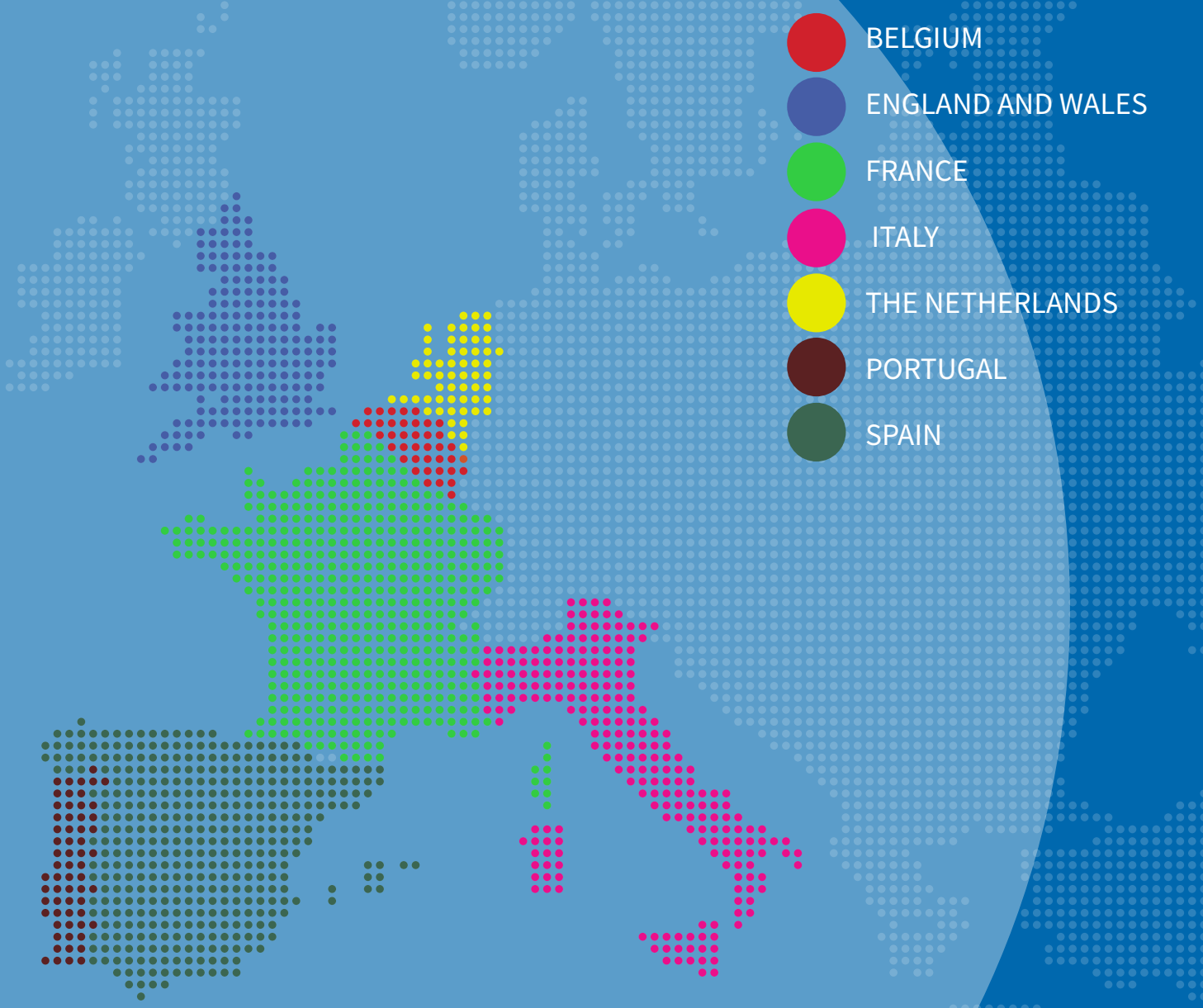
Loi&Stratégies
NICOLAS GENTY AVOCATS

presents a Distribution Law Network Guide

THE CONTROL OF ABUSES IN SUPPLIER DISTRIBUTOR RELATIONSHIP



COMPARATIVE STUDY

JULY 2021

This Distribution Law Network is an informal network of experienced lawyers with a passion for international distribution law and familiar with the specific issues raised by international negotiations.

The strength of our friendly network is the team spirit and pragmatic approach, which enables us to handle transnational issues efficiently.

The experience acquired through this network is also very useful in our daily practice as it allows us to be aware of the inevitable influences of foreign legislation and caselaw to propose relevant and innovative solutions to our clients.

LEXENA
AVOCATS - LAWYERS

RadcliffesLeBrasseur LLP

Loi & Stratégies
NICOLAS GENTY AVOCATS

Parker
ADVOCATEN

curesis

CALLOL | COCA

VENTURELLO E BOTTARINI, AVVOCATI

PLMJ
Transformative Legal Experts

INTRODUCTION

The aim of this comparative study is to compare the state of the law in each of the countries within the scope, before the Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, is transposed in the member states.

We acknowledge that competition law impacts, sometimes decisively, on the shaping of distribution and vertical relationships by virtue of Articles 101 and 102 of the Treaty on Functioning of the European Union (TFEU) and its related regulations, case law and equivalent national provisions. In particular:

(a) Article 101 TFEU (and equivalent national law provisions) prohibits agreements and concerted practices between companies which negatively impact competition. Typical vertical restraints forbidden under Article 101 TFEU and its national equivalents include the fixing of resale prices by a distributor (resale price maintenance); and the partition of the EU internal market along national lines, for instance, by inserting contractual restrictions in distribution agreements making it impossible for distributors to export or import distributed goods across member States. For the purposes of giving legal certainty on which covenants between principal and distributor are prohibited or not under Article 101 TFEU, the European Commission issued Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices (VBER). The VBER includes a "black list" of clauses which are per se forbidden and otherwise allows vertical restraints generically under the conditions of the VBER. The VBER is complemented by the European Commission vertical guidelines, which provide greater detail on the competitive treatment of the various types of distribution systems and typical clauses to be found in the context of vertical agreements.

Both the vertical guidelines and the VBER are currently in the process of being revised with a view to being replaced by new legislation.

(b) Article 102 TFEU (and equivalent national law provisions) prohibits the abuse by a company or group of companies of their dominant position in a given geographic and product market. Article 102 TFEU therefore applies to the (much more) restricted universe of 'dominant' companies. Within that context, conduct in the framework of distribution or supplier/purchaser relationships can be abusive if it aims, for instance, to restrict the entry of new distributors, to deprive a company from a given supply, or otherwise to foreclose a market in detriment of competition. The assessment of when a given conduct can be deemed an abuse contrary to Article 102 TFEU (or national equivalents) may require advanced legal and economic consideration. Some example of administrative guidance in the area is provided by the Commission Guidance on Enforcement Priorities in exclusionary abuse cases.

On top of the pending VBER reform mentioned above, there are intensive ongoing discussions at EU and international level on how to enforce competition law in the Internet and e-commerce sectors. It is worthwhile mentioning in the EU the

prospective legislative initiatives aimed at approving the Digital Markets and Digital Services Acts. Various aspects of these prospective laws will affect the competition law on vertical restraints in the digital markets generally (and food products specifically).

1. Directive 2019/633

The Directive under analysis seems to have emerged from a political reflection on the unresolved tension between EU agriculture policy and competition law.[1] In June 2016, the European Parliament issued a resolution encouraging the Commission to act in a more concrete manner. In 2017, the Commission published an impact assessment identifying different regulatory options. This started the legislative process for what became Directive 2019/633 concerning unfair trading practices with respect to trade in agricultural and food products[2] which aims at ensuring that agri-food companies are protected against unfair practices.

This Directive defines unfair trading practices as business-to-business practices that deviate from good commercial conduct, that are contrary to good faith and fair dealing, and that are unilaterally imposed by one trading partner on another.

It is a minimum harmonisation Directive, which thus allows Member States to introduce further domestic protections within the defined framework. [3]

The abovementioned tension between EU agriculture and competition law persists between the special treatment of agriculture and its increasing market orientation. However, at the same time, the derogations granted from the competition rules leaves many agricultural actors (farmers and their associations) victim of power disparities in the food sector.

The adaptation of agriculture to market mechanisms and its integration into transnational value chains has resulted in growing *individual* and *collective* retailer power. A shift in the balance of power has been taking place between retailers and suppliers and between national and transnational levels. This raises concerns both about farmers' lack of market power.[4]

The structure of the food supply chain has further been influenced by the rise of private labels in food retail.[5] This concentration of power has led to an increase in UTPs in the sector and a shifting of risks and costs to the weaker contractual partners. [6]

[1] European Parliament resolution of June 7, 2016, on unfair trading practices in the food supply chain (2015/2065(INI)).
[2] Fabrizio Cafaggi & Paola Imiceli, Unfair Trading Practices in the Business-to-Business Retail Supply Chain (2018), https://op.europa.eu/en/publication-detail/-/publication/a6faa665-b17e-11e8-99ee-01aa75ed71a1, at 2 and 3.
[3] Member States, for instance, can broaden the scope of application and reduce the fragmentation to bilateral contractual relationships within unitary chains: see preamble of DIRECTIVE 2019/633, paras. 1, 39, 44 and Article 1.
[4] Ioannis Lianos & Claudio Lombardi, Superior Bargaining Power and the Global Food Value Chain: The Wuthering Heights of Holistic Competition Law, CLES RESEARCH PAPER SERIES (Jan. 1, 2016).
[5] By eliminating the intermediate level of large food processors and shortening the chain with retailers directly engaging farmers and first stage transformers. Alessandro Sorrentino et Strengthening Farmers' Bargaining Power in the New CAP, INT. J. FOOD SYSTEM DYNAMICS, Proceedings in System Dynamics and Innovation in Food Networks 2017, 123-127 (2017), at 221.
[6] Fabrizio Cafaggi & Paola Imiceli, at 5. Cafaggi and Iamiceli argue that the inappropriate exercise of market and contractual power may bring about an inefficient allocation of tasks, together with undesirable distributional consequences. Such imbalances may encourage certain behavioural practices on the part of the stronger party in a given commercial relationship or transaction.

The objective is to reduce the occurrence of UTPs in the food supply chain, by introducing a minimum common standard of protection across the EU. [7]

Thus, the Directive 2019/633 does not contain general provision prohibiting unfair trading practices; instead, it has two lists of prohibited practices.

The first list contains practices that are prohibited in all circumstances:

- the buyer setting payment deadlines of more than thirty days for perishable agri-food products and of more than sixty days for other agri-food products;
- the buyer's cancelling on short notice any orders for perishable agri-food products;
- the buyer unilaterally deciding to make contract modifications;
- the buyer demanding payments not related to the sale of agri-food products;
- the buyer transferring the risks of loss and deterioration to the supplier;
- the buyer's refusal to confirm the supply contract in writing to the supplier, despite the latter's requests;
- the buyer unlawfully obtaining, using or disclosing the supplier's trade secrets;
- the buyer threatening commercial retaliation against the supplier if the supplier exercises his/her contractual or legal rights;
- the buyer claiming compensation from the supplier for the cost of examining customer complaints relating to the sale of the supplier's products despite the absence of negligence or fault on the part of the supplier.

The second list contains practices that are prohibited unless they have been previously agreed in clear and unambiguous terms in the agreement between the parties:

- the buyer returning unsold agri-food products to the supplier without paying for these unsold products or without paying for the disposal of these products;
- the buyer charging the supplier for its agri-food products to be stored, displayed or re-branded or made available on the market;
- the buyer requiring the supplier to bear all or part of the costs relating to any discounts on agri-food products sold by the buyer in the context of promotional activities;
- the buyer charging the supplier for the advertising of agri-food products;
- the buyer charging the supplier for the marketing of agri-food products;
- the buyer charging the supplier for the staff responsible for the fitting-out of the premises used for the sale of the supplier's products.

As the Directive is primarily focused on exploitative abuses that arise in the absence of actual dominance, its aim is to complement competition law by covering situations of unequal bargaining power. While the Directive addresses dependence and superior bargaining power, it does not, however, establish clear criteria to operationalise these concepts. As an approximation of relative bargaining power, the Directive uses the annual turnover of the different market operators. In this way, the Directive establishes turnover-based categories of operators according to which protection is afforded. [8]

[7] The rationale for EU intervention was based on the inadequacy and heterogeneity of legislative responses at the Member State level. The main goal of DIRECTIVE 2019/633 is to define a common standard to prevent the undesirable consequences of power imbalance, namely, the occurrence of UTPs.

8 DIRECTIVE 2019/633 takes the position that, although an approximation, this criterion nonetheless

However, it could be argued that relying solely on a quantitative turnover system may not be a reliable indicator of market power, superior bargaining power, or even of economic dependence, insofar as the methodology of competition law assessment relies on a combination of quantitative market share thresholds and qualitative analysis of market power.

At the same time, the Directive includes a *black and a grey list* of practices that are per se prohibited as unfair or prohibited unless agreed in clear and unambiguous terms in the original or a subsequent agreement between the parties. This is a technique often used in EU legislation, however, this approach lacks a more specific methodology of assessment.

It is unclear what served as basis to the enumerated unfair practices selected. While we note the absence of definition of "unfairness", and the imprecision of the legal standard of assessment, a more specific methodology of assessment can be distilled both in competition and in contract law.

At the end the Directive has created a new layer of EU law which falls short of clearly conceptualising *why* and *when* superior bargaining power should trigger intervention and which legal standards should guide the assessment of such power disparities and shape the remedies.

2. Common Agricultural Policy (CAP)

Ever since the inception of the Common Agricultural Policy (CAP) in 1962, the EU legislature has sought to find ways to reinforce farmers' bargaining power, while endeavouring to reconcile such efforts with the EU competition rules.

The perceived "special" nature of the agricultural sector underlies a fear that, if agricultural production and markets are left unregulated, they will fail to deliver a secure and safe supply of food at stable and reasonable prices. This, in turn, will lead to a decline in farm incomes and rural communities as well as natural resources and ecosystems.

Accordingly, within the EU, agriculture has been subject to constant market intervention in the form of direct subsidies, rural development programmes, and specific interventions in times of crisis.[9]

In the United States, in order to allow agricultural cooperatives to raise the capital necessary for their efficient operation, a special exemption for the sector was enacted as early as in 1922.[10]

Similarly, Germany enshrines an exception from its domestic competition laws for cooperation between producers in agricultural cooperatives and producer organisations. [11]

gives operators predictability concerning their rights and obligations under the Directive. An upper limit should prevent protection from being afforded to operators who are not vulnerable or which are significantly less vulnerable than their smaller partners or competitors: preamble of DIRECTIVE 2019/633, para. 14.

[9] A discussion of the main features of the CAP can be found on the Commission's website at http://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en.

[10] Capper-Volstead Act, 7U.S.C. §§ 291-292. (7U.S.C. 291, 292).

[11] The relevant provisions are Article 28 Gesetz gegen Wettbewerbsbeschränkungen (cooperatives) and Article 11 Marktstrukturgesetz (producer organisations).

Hence, the special treatment of agriculture within EU competition law is not unique. What is more remarkable is the broader constitutional framework within which such exceptions lie at EU level.[12]

3. The EU Agricultural Policy's constitutional framework

In the EU's constitutional framework, agricultural policy enjoys a unique status. Although, as basic principles of primary EU law, the Treaty competition rules fully apply to the agriculture sector, the TFEU grants a special status to the agricultural sector. [13]

Under Article 42 TFEU, the competition rules apply to the production of and trade in agricultural products only to the extent determined by the European Parliament and the Council, acting within the framework of Article 43(2) TFEU. Moreover, any application (or non-application) of the competition rules in this context must take into account the objectives of the CAP as set out in Article 39 TFEU, namely, increasing productivity, achieving a fair living standard for the agricultural community, stabilising agricultural markets, ensuring the availability of supplies, and ensuring reasonable consumer prices.

The Court of Justice has thus long recognised the *precedence of the CAP over the objectives of the Treaty in the field of competition*,[14] and the Court's interpretation provided the Council with broad discretion as to whether and how competition law should be applied to agricultural products.

This approach has been reiterated most recently in the important Endives judgment,[15] where a Grand Chamber sitting of the Court specified the analytical framework applicable to assess cooperation within and by Producer Organisations ("POs")[16] and Associations of Producer Organisations (APOs) from an antitrust perspective. The case concerned a decision of the French Competition Authority that sanctioned various anticompetitive practices in the endive production and marketing sectors. The practices had been implemented by producer POs, APOs, and various other entities, and they involved concertation regarding both the price of endives and the quantities placed on the market, as well as the exchange of strategic information.

The question before the Court of Justice was thus whether the alleged cartel fell under EU competition rules. In its judgment, the Court held that only practices that are strictly necessary to pursue one or more of the objectives assigned to the PO or APOs concerned may be exempt from the EU competition rules. The reasoning behind this approach is that POs (and APOs) form the "basic elements" of the agricultural sector, equivalent to the "undertakings" that comprise the subjects of the competition rules. Consequently, any agreements, decisions, and concerted practices that take

[12] Cseres, K. J., "Acceptable" Cartels at the Crossroads of EU Competition Law and the Common Agricultural Policy: A Legal Inquiry into the Political, Economic, and Social Dimensions of (Strengthening Farmers') Bargaining Power, at 409.
[13] European Commission, The Application of the Union Competition Rules to the Agricultural Sector, COM(2018)706 final.
[14] See Cases C-139/79, Maizena, EU:C:1980:250, para. 23; C-280/93, Germany v. Council, EU:C:1994:367, para. 61; C-373/11 and C 671/15, APVE and Others, EU:C:2017:860, para. 37.
[15] Case C 671/15, APVE and Others, EU:C:2017:860, para. 37.
[16] In Portugal, the rules for the recognition of "producer organisations" and "producer groups" are set out in Ministerial Order 169/2015 of 4 June. On the other hand, Ministerial Order 254-A/2016 established the possibility for producer organisations and producer groups to access public support, in particular a subsidy of EUR 100,000 (article 9(2)(a)).

place within that basic element are excluded from Article 101(1) TFEU because this Article is unconcerned with the relations between different entities within a "single economic unit," a doctrine established in the Court's case law since the early case of Centrafarm.[17]

4. Unfair Trade Practices

Among the 19 Member-States (MSs) that have Unfair Trading Practices ("UTP") legislation, 11 have adopted legislative instruments specifically applicable to the food supply chain, whereas in 8 MSs the UTP legislation is applicable to all sectors, although it sometimes includes specific provisions on practices in food and groceries trade.

One of the most interesting questions that arises in the direct regulation of UTPs is whether the aim of such provisions is solely to regulate the individual contractual relationship to protect a weaker party or whether wider market competition should be taken into account.[18]

If the consequences of economic dependence are purely distributional, one could argue that such a situation should be handled through civil courts and should not be a concern for competition authorities.

UTPs that transfer risks and costs onto farmers and small enterprises do not only have distributional effects but may also impact the development opportunities of enterprises and thus harm consumers at the end of food supply chains.[19]

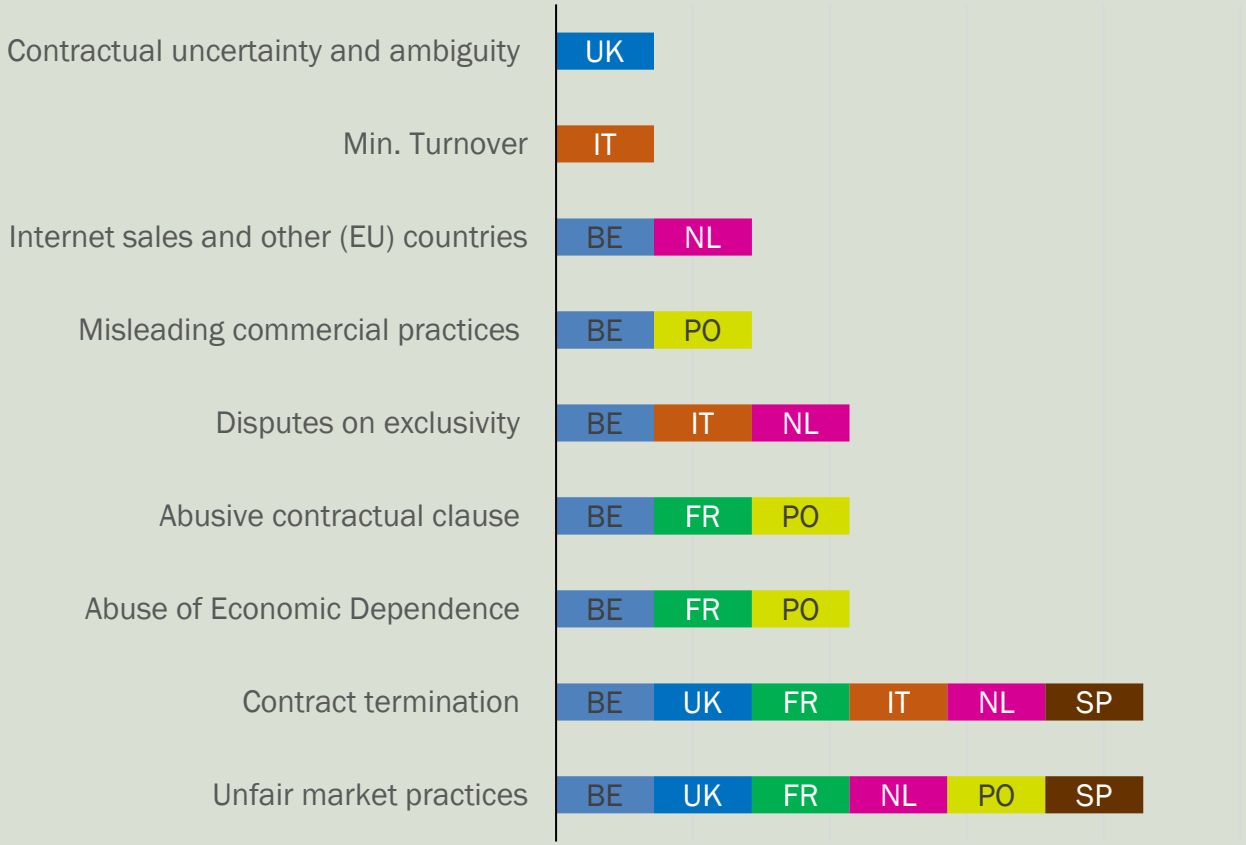
Although many EU Member States have adopted rules regulating UTPs, in some countries, there is no or only ineffective protection against UTPs.[20] On the other hand, these concerns about the rising retail power have steered Member States to intervene with specific or general legal rules in the contractual relationship between business market actors.

Many EU Member States have implemented national rules on UTPs, either in separate legislation, within their competition laws, or in their civil or commercial code. [21]

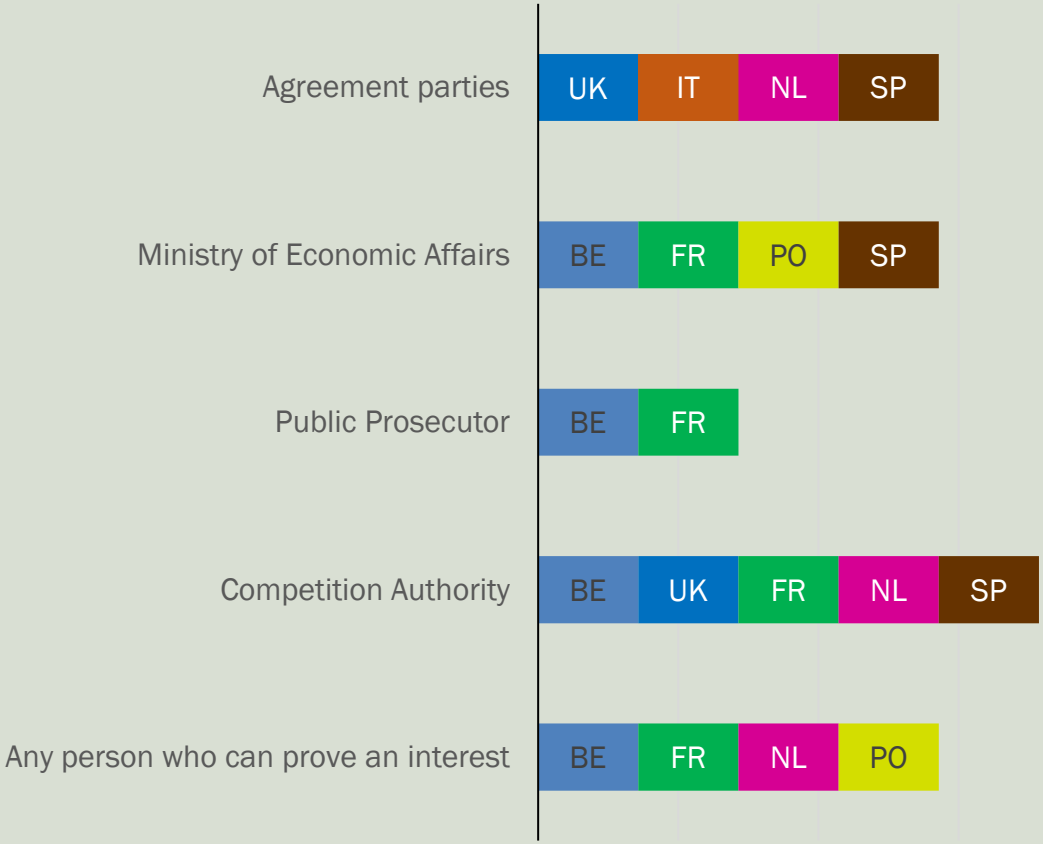
While national regulatory choices differ, their underlying rationale is to prevent the exploitation of weaker trading partners.

[17] Case C-16/74, Centrafarm, EU:C:1974:115.
[18] EDDY DE SMIJTER & LARSK JOEL BYE, The Enforcement System Under Regulation 1/2003, in THE EC LAW OF COMPETITION 87 (Jonathan Faull &Ali Nikpay eds., 2007)
[19] Viktoria Daskalova, Counterproductive Regulation? The EU's (Mis)adventures in Regulating Unfair Trading Practices in The Food Supply Chain, TILEC DISCUSSION PAPER, No. 027 (2018); Fabrizio Cafaggi & Paola Iamiceli.
[20] Some countries, such as Germany, have stretched the application of the competition rules beyond the boundaries of Article 102 TFEU using concepts such as "abuse of superior bargaining power" or "abuse of economic dependence." This type of legislation, although introduced within a competition law framework, does not turn upon the specific UTP's impact on market competition.
[21] As of 2017, five Member States remained without any form of dedicated unfair trade practice (UTP) legislation or voluntary framework in the EU: Denmark, Luxembourg, Malta, Poland, and Sweden. See European Commission, JRC Technical Report: Unfair Trading Practices in the Food Supply Chain. A LITERATURE REVIEW ON METHODOLOGIES, IMPACTS AND REGULATORY ASPECTS 42 (2017). See also overview in Cafaggi & Iamiceli, at 2 and 9.

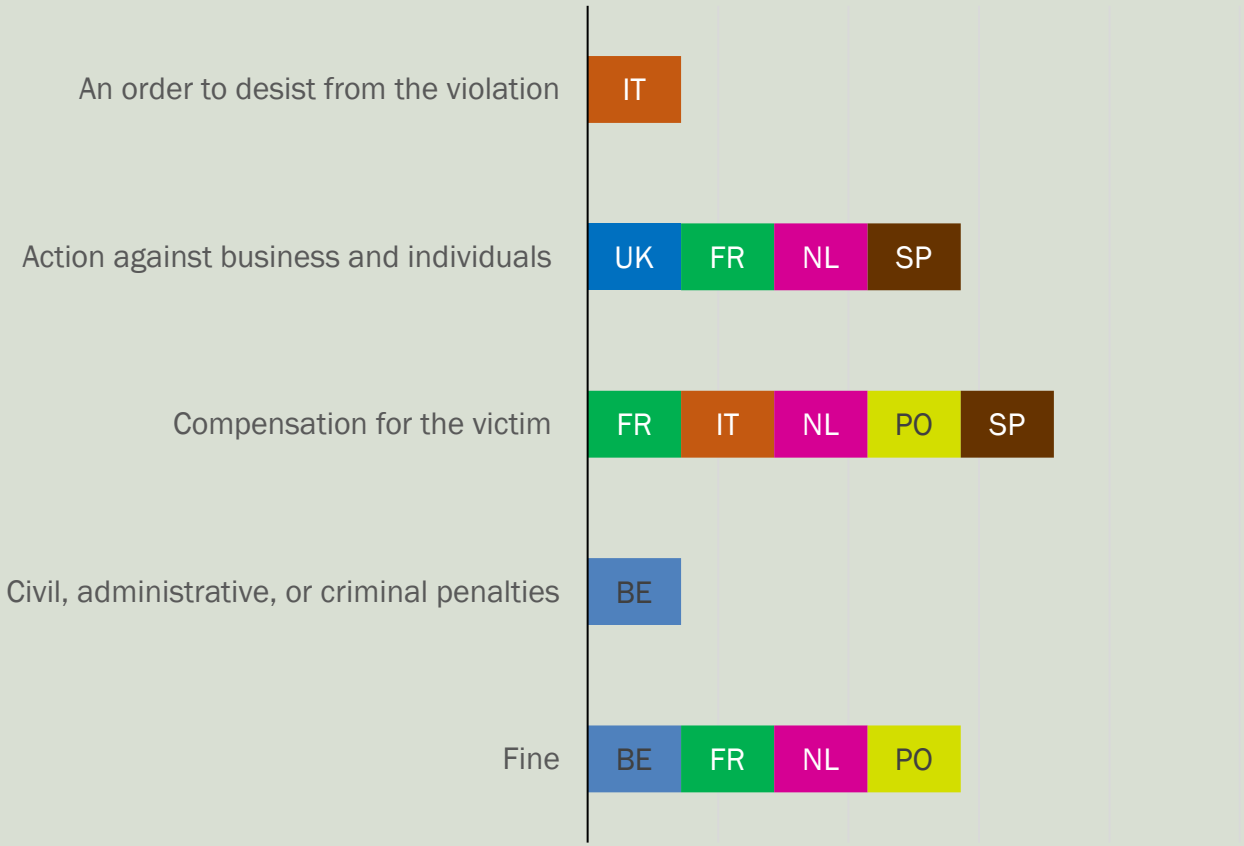
Main sanctioned practices



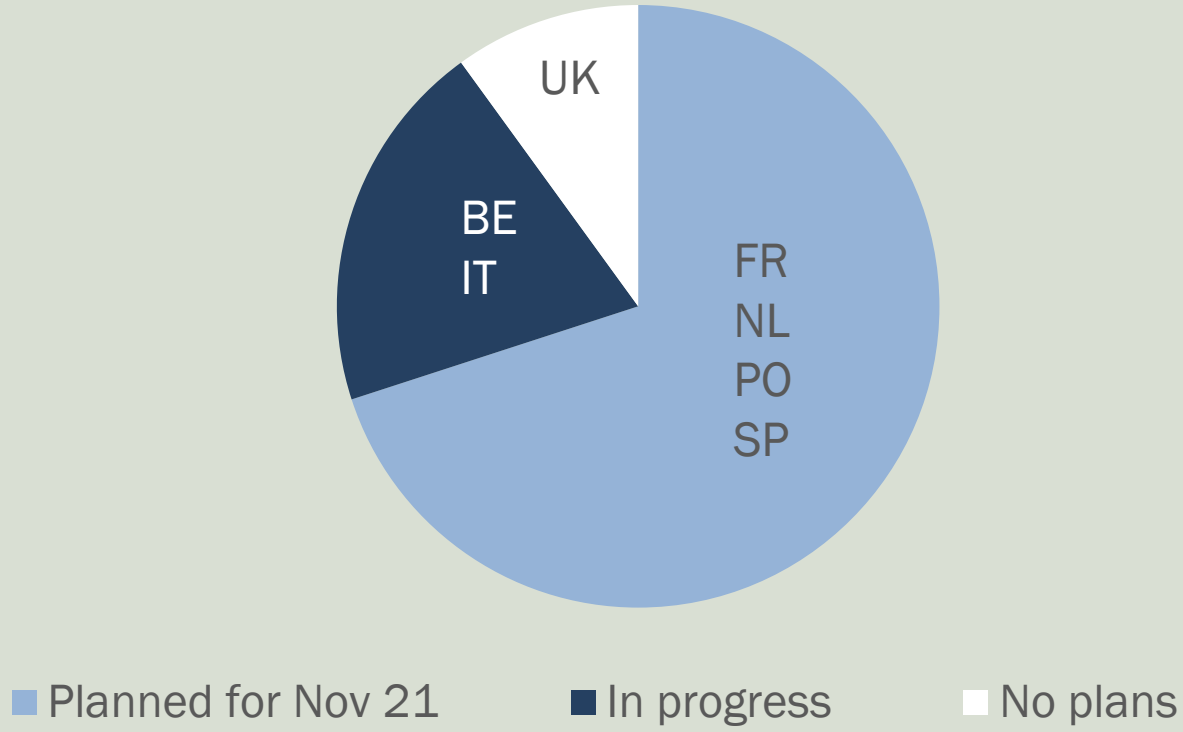
Who can seek for legal action?



What are sanctions incurred?



Transposition of directive 2019/633



Country	Belgium	France	Italy	Netherlands	United kingdom	Portugal	Spain
Do you have a regulation specifically applicable to supplier - distributors relationship ?	Yes. Commercial Belgian law: articles X.35 to X.40 of the Belgian Code of Economic law	Yes. Title IV Book IV of the French commercial code regarding the contracts contents and formalism, general terms and conditions, and restrictive competitive practice	Yes. Law no. 173/2005 on direct sales representatives Law no. 129/2004 on franchising contracts	Yes. The Dutch Civil Code, book 3 and book 6, on the formation of contracts, general terms and conditions etc. The Franchise Act of 1 January, 2021.	Yes. The Groceries Supply Code of Practice 2009 (GSCOP)	Yes. Platform for Monitoring Relations in the Agri-Food Chain 2011 ; Sectors's legistlation (food ans groceries trade); Decree-Law 166/2013 (Rules on Individual Restrictive Practices on Trade) Decree-Law 57/2008 (Legal Rules on Unfair Trade Practices of Companies)	Yes. Law 7/1996, of 15 January, on Retail Commerce (Retail Commerce Law); Law 3/1991, of 10 January, on Unfair Trade (Unfair Trade Law); Law 12/1992, of 27 May, on Agency (Agency Law) Law 12/2013, of 2 August 2013, on Food Supply Chain
Main sanctioned practices	Abuse of Economic Dependence Abusive contractual clause Deceptive and aggressive market practices between companies Unfair market practices Issues on the termination, sales via internet and from or to other countries, disputes on exclusivity	Termination of the contractual relationship Anti-competitive vertical agreements Obtaining or attempting to obtain an advantage for no consideration or, a consideration which is manifestly disproportionate Subjecting or attempting to subject the other party to obligations creating a significant imbalance	Termination of the contractual relationship Not attainment of the minimum turnover Violation of the exclusivity	Termination of the contractual relationship Anti-competitive vertical agreements Sales via internet and sales from or to other EU countries Disputes relating to whether the agreement is exclusive or non-exclusive.	Termination of the contractual relationship Issues of contractual uncertainty and ambiguity Anti-competitive restrictions	Misleading commercial practices Practices restricting Competition Abuse of Economic Dependence Unfair trade practices Abusive contractual standard terms	Termination of distribution agreements, prior notice and the subsequent damages and clientele compensation Unfair trade practices such as inducement to breach a contract or abuse of economic dependence

	Belgium	France	Italy	Netherlands	United kingdom	Portugal	Spain
Any recent reform?	Yes. Prohibition of the abuse of economic dependence and misleading and aggressive unfair practices between companies, entered in force the 1st June 2020	Yes. Law n° 2018-938 of 30th October 2018, n°2018-1128 of 12th of December 2018 Ordinance no. 2019-359 of 24 April 2019 which reformed Title IV of Book IV of the FCC governing supplier-retailer relationship and the law for Accelerating and Simplifying Public Action ("ASAP" law), of 7 December 2020 (now, 4 restrictive practices instead of 13) DDADUE law which impact the relationships between retailers and suppliers Law project Besson-Moreau	No	Yes. The adoption of the Dutch Franchise Act which is effective per 1 January, 2021	No.	Yes. Decree-Law 220/2015 specified some of the solutions, application and the sales at a loss rules ; Decree-Law 128/2019 on transparency in trade relations and the balance of bargaining positions between economic operators	No.
Who can seek for a legal action?	Any person who can prove an interest The Belgian Competition Authority The Public Prosecutor The Ministry in charge of the Economy	Any person who can prove an interest The President of the Competition Authority The Public Prosecutor The Ministry in charge of the Economy	The parties to the agreement	Any person who can prove a legitimate interest The parties to the agreement The Netherlands Authority for Consumers and Markets	The parties to the agreement The UK Competition and Markets Authority	Any person who can prove a legitimate interest Food and Economic Safety Authority	The parties to the agreement The administrative authorities

What are the sanctions incurred?	Fine up to 2% of the company's previous year's Belgian turnover civil, administrative, or criminal penalties	Civil fine not exceeding certain amounts Compensation for the victim An order of cessation of the practices, the voiding of the illegal clauses or contracts and the restitution of the undue advantages obtained	An order to desist from the violation (Interim measure) Compensation for the victim	Civil fine not exceeding certain amounts Compensation for the victim An order of cessation of the practices, voiding of the illegal clauses or contracts and restitution of the undue advantages obtained	Action against business and individuals	Fine Action for damage	Declarative action Compensation for the victim Injunction
Any specific rules regarding the termination of the contract ?	Yes.	Yes.	No.	No.	No.	Yes.	Yes.
Any specific rules regarding the indemnity ?	Yes. A complementary indemnity may be accorded in addition of an indemnity in lieu of notice	Yes. The judge will take into account various criterion such as the duration of the business relationship, the uses in the sector or the nature of the products, etc.	No.	No.	No. Unless included in the contract. The courts have a general power to sanction unreasonable provisions and behavior	Yes. Compensation for the damage caused by failure to comply with the duty to give notice of termination, clientele compensation	Yes. The clientele compensation is limited to average annual remuneration last five years (distributor's net profits)
Any information on the transposition of the directive 2019/633 ?	Waiting for the release of the legislative proposal	The ordinance on unfair business-to-business commercial practices in the agricultural and food supply chain was published on 1 July 2021. It transposes the provisions of the 17 April 2019 directive that were not yet covered by the restrictive practices that we know.	Preliminary approval on 12 December 2019: by the Council of Ministers. Still needs to be transposed	The new act has been adopted and will enter into force on 1 November 2021 at the latest.	None planned, UK is no longer member of EU	No later than 1st November 2021	A bill must still be approved by the Senate (it has already been approved by Congress). Shall be done no later than November 2021

BELGIUM

1. **Could you give us some inputs on the general climate surrounding the supplier – retailer relationships in Belgium?**

As in France, the mass market retailers experienced a strong development during the second half of the 20th century.

Today, the major retailers in Belgium belong to foreign companies or alliances (Carrefour-Ahold Delhaize – Colruyt - Aldi – Lidl) who have a considerable influence on the conduct and the climate of negotiations.

2. **What are the sources of the regulation on supplier – retailer relationships in Belgium? What are the most common grounds for denouncing a practice in the context of supplier-retailer relations? What kind of practices are sanctioned / regulated?**

Contract law consecrates contractual freedom while punishing abuse of rights and defects of consent. Commercial Belgian law also contains specific rules which only apply to certain categories of distribution agreements and only deal with the unilateral termination of such agreements (articles X.35 to X.40 of the Belgian Code of Economic Law). By virtue of this specific legislation, in addition to an indemnity in lieu of notice, or even if the notice period granted has been adequate, the distributor may also be entitled to a complementary indemnity (see more details below in the answer to question 8).

Unfair market practices (see more details below in the answer to question 4)

3. **Are supplier-retailer relationships subject to extensive regulation in Belgium or is the trend rather liberal?**

In Belgium, until 2019, the major regulations having a significant impact on supplier-retailer relations were :

- the mandatory legislation on termination without cause of some specific distribution agreements (see more details below in the answer to question 8);
- the general prohibition on unfair market practices (article VI.104 of the Belgian Code of economic law).

Today, the supplier – retailer relationships have become less liberal (see below answer to question 4).

4. **Have there been any significant reforms, recently or in the late decades, on the regulation of supplier – retailer relationships in Belgium?**

Belgium has recently adopted innovative legislation prohibiting abuse of economic dependence and misleading and aggressive unfair practices between companies as well as unfair terms in B2B contracts. The new framework created by this law will soon be supplemented by a law transposing Directive 2019/633.on unfair trading practices in the food supply chain (see below answer to question 10).

Prohibition on abuse of economic dependence (see article IV.2/1 of the Belgian Code of economic law entered into force on June 1st, 2020).

This prohibition is subject to three cumulative conditions:

(1) the existence of a position of economic dependence;

The new Article I.6, 4° of the Belgian Code of economic law defines economic dependence as "a company's position of submissiveness towards one or more other companies that is characterized by the absence of a reasonably equivalent alternative, available within a reasonable period of time, on reasonable terms and at reasonable costs, allowing this or each of these companies to impose terms that could not be obtained under normal market circumstances.

The legislator does not provide further indications on how such a position of economic dependence should be assessed. For companies and practitioners, it thus remains to be seen which factors will be used in the case law to identify an economic dependence situation. The preparatory works of the new law list the following elements that might be relevant in this regard: the relative market power of a company, the share of the other company in one's own turnover, the technology or know-how held by a company, the strong reputation of a brand or the scarcity of a product, the customer loyalty, and the access to essential resources or infrastructure by the economically-dependent undertaking.

(2) an abuse of that position;

The non-exhaustive list of abusive practices included in the new law contains practices similar to those included in Article 102 TFEU (and its Belgian equivalent of Article IV.2 of the Belgian Code of economic law):

- refusing a sale, a purchase or other transaction terms;
- directly or indirectly imposing unfair purchase or sales prices or other unfair contract terms;
- limiting production, markets or technical development to the detriment of users;
- applying dissimilar conditions to equivalent obligations towards economic partners, thereby putting them at a disadvantage in competition;
- making the conclusion of contracts dependent on the acceptance by the economic partners of additional obligations that, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.

This would allow the Belgian Competition Authority (BCA) and the Belgian courts to rely on existing case law on abuse of dominance to find an abuse. It remains to be seen whether the interpretation of this new provision will indeed follow the existing case law on the abuse of a dominant position.

(3) the possibility of that abuse resulting in competition on the Belgian market or a substantial part of it being affected.

It is important to note that the new Act does not require an actual effect on competition, but provides that a potential effect on competition is sufficient.

Abusive contractual clauses

In accordance with article VI.91/4 of the Code of economic law (entered into force on December 1st, 2020) are abusive, the clauses which have the purpose of :

1° providing for an irrevocable commitment of the other party, whereas the performance of the company's services is subject to a condition whose fulfilment depends on its sole will;

2° giving the company the unilateral right to interpret any clause of the contract;

3° in the event of a conflict, having the other party waive all means of recourse against the company;

4° irrefutably binding the other party with the knowledge or adherence to clauses it did not have the opportunity to become acquainted with before the conclusion of the contract.

In accordance with Article VI.91/5 of the Code of economic law (entered into force on December 1st, 2020):

Are presumed abusive, unless proven otherwise, the clauses which have the purpose of :

1° authorizing the company to unilaterally modify the price, characteristics or conditions of the contract without a valid reason;

2° tacitly extending or renewing a fixed-term contract without specifying a reasonable period of notice;

3° placing, without consideration, the economic risk on one party when this risk is normally incumbent on the other company or on another party to the contract;

4° inappropriately excluding or limiting the legal rights of a party in the event of total or partial non-performance or defective performance by the other company of one of its contractual obligations;

5° without prejudice to article 1184 of the Civil code, binding the parties without specifying a reasonable period of notice;

6° releasing the company from its liability for fraud, serious misconduct or the misconduct of its employees or, except in cases of force majeure, for any non-performance of the essential commitments under the contract;

7° limiting the means of proof that the other party may use;

8° setting the amounts of damages claimed in case of non-performance or delay in the performance of the other party's obligations which clearly exceed the extent of the prejudice likely to be suffered by the company.

Deceptive and aggressive market practices between companies

A deceptive practice is an action, omission, step or commercial communication, including advertising and marketing, that misleads a company about essential elements of the contract determining its economic behaviour.

In accordance with article VI.109 /1 of the Code of economic law (entered into force on September 1st, 2019), a market practice is deemed to be aggressive if, in its factual context, taking into account all its characteristics and circumstances, it materially alters or is likely to materially alter, as a result of harassment, coercion, including the use of physical force, or undue influence, the company's freedom of choice or conduct with respect to the product and, as a result, causes or is likely to cause the company to make a decision with respect to the transaction that it would not otherwise have made.

For the purposes of this section, undue influence means the use by one company of a leading position vis-à-vis another company so as to put pressure on the latter, even without using physical force or threatening to do so, in such a way that its ability to make an informed decision is significantly limited.

5. Who can take legal action to seek sanctions for such practices and what are the sanctions incurred?

The Belgian Competition Authority can use its existing investigation tools under

competition law to investigate, prosecute and punish abuses of economic dependence.

The fines provided for this new type of restrictive practice differ from the fines for the existing antitrust law infringements. While for restrictive agreements and abuses of dominance a fine of up to 10% of the undertaking's previous year's worldwide turnover may be imposed, the maximum fine for an abuse of economic dependence is capped at 2% of the company's previous year's Belgian turnover (Belgian and export from Belgium).

Most of the decisions rendered on the basis of unfair market practices are brought by a company as part of a prohibitory action.

However, the action may also be brought by:
- any other person who can prove an interest ;
- the Public Prosecutor ;
- the Ministry in charge of the Economy ("Direction Générale de l'Inspection Economique")

Penalties may be civil, administrative or criminal.

6. Is there a specific regulation in Belgium regarding the termination of the contract and the right to indemnity for the other party ?

Yes

Articles X.35 to X.40 of the Belgian Code of Economic Law

These specific rules only apply to certain categories of distribution agreements and only deal with the unilateral termination of such agreements. A "distribution agreement", that is exclusive, quasi-exclusive or imposes important obligations on the distributor, and that is, concluded for an indeterminate period of time. If a contract of determined duration has been renewed twice, any subsequent extension will be deemed being of indeterminate duration (article X.28 of the Belgian Code of Economic Law).

By virtue of this specific legislation, either party can terminate a contract concluded for an indefinite period giving a reasonable notice period or a fair indemnity to be agreed upon between the parties on the conclusion of the agreement, unless there has been a serious breach of duty. in addition to an indemnity in lieu of notice, or even if the notice period granted has been adequate, the distributor may also be entitled to a complementary indemnity.

Such complementary indemnity may consist of:
- (i) a client and goodwill compensation,
- (ii) compensation for expenditures, and/or
- (iii) an indemnity for severance pay.

Article VI.91/5 of the Belgian code of economic law

Since December 1st, 2020, abrupt termination of established commercial relations is expressly sanctioned by article VI.91/5 of the Code of economic law, which requires compliance with a "reasonable" notice period.

Given the fact that Article VI.91/5 of the Code of economic law has only been in force for a few months, it has not yet been the subject of case law. The interpretation of the concept of reasonable notice provided for in Article VI.91/5 of the Code of economic law will likely be based on the assessment

criteria used under the special regime applicable to the termination of sales franchises (see Article X.36 of the Code of economic law), where case law considers that the length of reasonable notice is that which is theoretically necessary for the foreclosed distributor to find a franchise or, at least in an equivalent situation, if necessary by reconverting its activities. To assess this theoretical period, the courts generally take into consideration the following elements: Age of the agreement, Extent of the territory covered by the franchise, Brand awareness (the more well-known the brand, the more difficult it will be to replace it), Importance of the franchise in determining the distributor's revenue.

On the basis of these various criteria, case law grants notice periods that may vary from three to forty-eight months.

7. Is there any specific / significant case law in your jurisdiction regarding supplier – retailer relationships ?

On October 28, 2020, the President of the Commercial Court of Ghent issued a judgment in the first "abuse of economic dependence" case in Belgium., i.e. only two months after the entry into force in Belgium of the prohibition of the abuse of economic dependence.

The case concerned a request for a cease-and-desist order against a designer, manufacturer and supplier of, among other things, children's clothing. A retailer claimed that the supplier had abruptly refused to supply the retailer's orders for the new 2020 winter collection. The supplier argued that such a refusal was justified due to the retailer's chronic delay in payments. The President concluded that there had been an infringement of Article IV.2/2 of the Belgian code of economic law (abuse of economic dependence) or at least uncareful conduct that violated the fair market practices (Article VI.104 of the Belgian code of economic law). Unfortunately, the President did not provide any supporting element for this conclusion and ordered to end the refusal to supply the products and imposed a periodic penalty payment if the supplier persisted in refusing to supply the products.

8. Do you have some information about the transposition of Directive 2019/633 in Belgium ?

It will be interesting to see how the Belgian legislator will transpose the Directive into Belgian law and, in particular, how it will ensure that its provisions coexist with those on business-to-business commercial practices, whether in terms of prohibited practices, scope, terminology, monitoring mechanisms, etc.

We look forward to the release of the legislative proposal ...

FRANCE

1. Could you give us some inputs on the general climate surrounding the supplier – retailer relationships in France?

The mass market retailers experienced a strong development during the second half of the 20th century when the concepts of modern distribution, via hypermarkets and supermarkets, attracted all French consumers which lead to several successive reforms to try to regulate this field of the economy.

Today, the market remains fragmented, with around 17 000 food manufacturers against 6 major retailers[22] representing large and medium-sized supermarkets (GMS), with a balance of power that the regulation struggles to control despite many reforms. The market remains indeed dominated by retailers who have a considerable strength. These facts help to understand the different provisions existing under French law which try to control and punish the party abusing of its power.

Nevertheless, every year, supplier-retailer relationships make the headlines, particularly because of the tensions that can exist between the parties in the conduct of negotiations. Indeed, one of the specificities of French regulation is that the negotiations are framed according to a precise timetable.

Briefly, every supplier has to conclude its mandatory written agreement[23] with all its clients (retailers) on March 1st at the latest.

2. What are the sources of the regulation on supplier – retailer relationships in France? What are the most common grounds for denouncing a practice in the context of supplier-retailer relations? What kind of practices are sanctioned / regulated?

In France in addition to the rules on anti-competitive practices (anti-competitive agreements and abuse of dominant position), there is a specific section under the French commercial code ("FCC") entitled "restrictive competitive practice" (articles L. 442-1 FCC and seq.).

Anti-competitive practices, in a macroeconomic perspective, prohibits practices that distort competition and aims at regulating the European market itself whereas restrictive competitive practices are microeconomic rules regulating relationships between private parties[24].

Restrictive competitive practice include :

- obtaining or attempting to obtain an advantage for no consideration or, a consideration which is manifestly disproportionate;
- subjecting or attempting to subject the other party to obligations creating a significant imbalance;

[22] The 6 main retailers in France are Carrefour, Auchan, Leclerc, Casino, Les Mousquetaires and Système U knowing that Auchan and Casino have created a referencing alliance named HORIZON (which includes METRO and SCHIEVER) while Carrefour and Système U have also created a buying alliance named ENVERGURE (which includes CORA).

[23] Under French law, supplier and retailers may conclude a one year, two years or three years contract but annual contracts are the most common form.

[24] We acknowledge that competition law impacts, sometimes decisively, on the shaping of distribution and vertical relationships by virtue of Articles 101 and 102 of the Treaty on Functioning of the European Union and its related regulations, case law and equivalent national provisions. Yet, for reasons of coherence and clarity (i.e., keeping this study focused strictly on the implementation of Directive (EU) 2019/633, cited), the EU and national competition law on vertical restraints is excluded from the scope of the study.

- the abrupt termination of established commercial relations (Article L. 442-1 FCC) (see question 6);
- violation of the prohibition of resale outside the network in the context of selective or exclusive distribution agreements (Article L. 442-2 FCC);
- the retroactive granting of discounts, rebates, or remuneration of commercial cooperation agreements;
- the automatic granting of more advantageous conditions to competing companies (Article L. 442-3 FCC);
- resale at a loss (Article L.442-5 FCC);
- resale price maintenance (Article L.442-6 FCC);
- the fact that a buyer of agricultural products or foodstuffs has his supplier charge an abusively low transfer price (article L.442-7 FCC);
- a contract relating to a price offer at the end of a remote reverse auction contrary to the provisions of article l. 441-8 FCC.

As developed in below questions, the most common grounds used to denounce such a practice are the three first ones, that is to say: the advantage for no consideration as well as the significant imbalance (representing 49 decisions in 2018), and the abrupt termination of established commercial relations (representing 243 decisions in 2018).

3. Are supplier-retailer relationships subject to extensive regulation in France or is the trend rather liberal? What are the main provisions of French law used in supplier-retailers relationships ?

In France, supplier – retailer relationships are subject to extensive regulation. As mentioned above, due to historical and economic reasons, the topic has given rise to many different reforms trying to rebalance the powers.

The most structuring rules applicable to supplier-retailer relationship are what we call the “restrictive competitive practice”.

Until 2019 the French commercial code quoted, in the former article L. 442-6 of the French Commercial Code (herein after “FCC”), thirteen practices considered as “Restrictive competitive practice”. However, in its annual report for 2018, the French administration underlined that most of the lawsuits filed in 2018 had been brought on the basis of 3 of these practices:

- the granting of an advantage without consideration or manifestly disproportionate;
- the submitting, or attempting to submit, to obligations creating a significant imbalance between the parties; and
- the abrupt termination of established commercial relations.

Therefore, it has been decided to simplify the rules. The new article L. 442-1 FCC (formerly article L. 442-6 FCC) now refers to those three practices, and another one regarding disproportionate penalties, instead of the previous 13 practices.

In practice, the two main provisions having a significant impact on supplier-retailer relations are those referring to the advantage without consideration and the obligations creating a significant imbalance as they are particularly useful during negotiations. Suppliers and retailers must

pay attention to the wording of the respective obligations they impose to the other party to make sure they cannot be argued on the ground of these two practices. For instance, in a case law brought before the *Cour de cassation* (French Supreme Court), the Court took into account the fact that the retailer systematically imposed its conditions of purchase with every supplier, which excluded any real negotiation, in order to characterize the submission to a significant imbalance (*Judgement of the Court of cassation, Commercial Chamber, 27/05/2015, n° 14-11.387*).

It has also been considered that a provision granting an asymmetrical price revision option created a significant imbalance between the parties. The said provision made the supplier's proposals to increase its prices subject to the retailer's prior agreement but established an automatic passing on of a decrease in the supplier's costs to the prices, under penalty of termination of the contract (*Judgment of the Court of Cassation, Commercial Chamber, 03/03/2015, no. 13-27.525*).

In addition, the *Cour de Cassation* has confirmed the existence of an advantage without consideration to the detriment of the suppliers, in a commercial cooperation contracts providing for the remuneration of a service actually delivered by the suppliers themselves (*Judgment of the Court of Cassation, Commercial Chamber, 26/09/2018, no. 17-10173*).

Requesting for payment of a service, which is not precisely defined in the contract and the invoice and which execution is not justified by the distributor is considered as granting of an advantage without consideration (*Judgement of the Court of Cassation, Commercial Chamber, 03/03/2021, n°19-16.344*).

It is also important to note that these provisions regarding the advantage without consideration or the significant imbalance, are considered by French courts as overriding mandatory provisions[25] ("loi de police") – see the "Expedia" decision of the *Cour de Cassation* of July 8, 2020. The Court ruled that the specific regime of the practices provided for in article L. 442-1 FCC are "*imperative provisions whose observance is deemed crucial for the preservation of a certain equality of arms and loyalty between economic partners and are therefore indispensable for economic and social organization*". What we don't know yet is whether these provisions have the status of mandatory provisions only when the action is brought by the Minister of the Economy or also when the action is brought by the co-contractor (see question 5).

In addition, in order to help suppliers and retailers to understand the French legal framework the Commission for the Examination of Commercial Practices ("CEPC") was created in 2001. The CEPC is composed of an equal number of representatives of suppliers and retailers, as well as members of parliament, magistrates and qualified personalities.
The commission's mission is to give opinions or make recommendations on issues, commercial or advertising documents, and practices regarding commercial relations between producers, suppliers and retailers that are submitted to it. The courts may also refer matters to the CEPC for an opinion.

[25] As defined under article 9 of Regulation (EC) No 593/2008 of the European parliament and of the council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

Its recommendations are very useful to companies that wish to protect themselves in advance against any sanction on the basis of restrictive competition practices.

As an example, the CEPC provided a best practice guide for logistics penalties n°19-1, which is a central topic of discussion between suppliers and retailers (*Recommendation of the 17th of January 2019*).

Following the Covid-crisis, a Recommendation n°20-1 was elaborated by the CEPC to provide guidance on the effects of the Covid-19 health crisis in the large-scale food retailing sector (*Recommendation of the 6 July 2020*).

4. Have there been any significant reforms, in recent years, on the regulation of supplier – retailer relationships in France?

The evolution of the regulations governing supplier-retailer relationships in France has been ongoing for four decades (11 reforms since 1996) and continues to this day. Since 1973, the legislator has been pursuing the same objective: trying to rebalance the relationship.

One of the last reforms to date is the law n° 2018-938, which has been specified by two government Ordinances:

- the government Ordinance n°2018-1128 providing specific provisions for food products (increase of the threshold for resale at a loss and caps promotions)
- the government Ordinance no. 2019-359 of 24 April 2019, which completely reformed Title IV of Book IV of the FCC governing supplier-retailer relationship. This ordinance aims to rebalance commercial relations but also to better remunerate upstream agricultural activities. It has provided specific rules on negotiation for a list of products: the non-durable products with high frequency and recurrence of consumption (*Decree 2019-1413*).

Thus the regulation of commercial restrictive practices has been simplified since the new article L. 442-1 FCC now covers only four practices, instead of 13 previously:

- The granting of an advantage without consideration or manifestly disproportionate (article L. 442-1, I, 1°);
- The submitting, or attempt to submit, to obligations creating a significant imbalance between the parties (article L. 442-1, I, 2°) ;
- The abrupt termination of established commercial relations (article L. 442-1, II) ; and
- Since December 7th, 2020 the imposition of disproportionate penalties regarding the contractual obligations unperformed and the automatic deduction of the associated amounts (article L. 442-1, I, 3°).

These practices are intended to encompass most of the practices previously listed in the former article L. 442-6, I FCC.

Additionally, the law for Accelerating and Simplifying Public Action ("ASAP" law), of 7 December 2020, has made some changes to the supplier-retailer relationship regime, as follows:

- It confirms the increase of the threshold for resale at a loss and caps promotions with some specificities for seasonal food products;

- It provides that disproportionate penalties may be punished (article L. 442-1, I, 3° above mentioned) which is one of the burning issues in supplier-retailer relationships;
- written agreements concluded between suppliers and retailers will henceforth have to include numerous mentions on contracts concluded with international retail alliances.

Finally, it should be noted that European Directive 2019/633/EU of 17 April 2019 on unfair commercial practices in business-to-business relations within the agricultural and food supply chain should have been transposed into French law before 1 May 2021. The DDADUE law dated 3 december 2020 gave a one-year delay to the French government to proceed with the transposition into French national law.

Some authors feared that this directive is going in the opposite direction to the above-mentioned ordinance of 24 April 2019, however it seems that its transposition in France will not deeply change the existing law (see question 8).

In 2021, a bill is discussed by the Parliament to deepen the law n° 2018-938, by providing further specific provisions on food products.

5. Who can take legal action to seek sanctions for such practices and what are the sanctions incurred?

Regarding restrictive competitive practice, the action may be brought by:

- any person who can prove an interest ;
- the Public Prosecutor's ;
- the Minister in charge of the Economy;
- the President of the Competition Authority when he finds such a practice in the course of matters falling within his jurisdiction.

One important fact is that the action of the Minister or the Public Prosecutor is autonomous. They must only notify the allegedly victims contractor that they initiated a legal action but they do not need to obtain their opinion or approval.

For instance, as part of its regular monitoring mission of retailers and suppliers relationships, the French administration (hereinafter referred to as “DGCCRF”) has conducted over the years 2015 to 2017, an investigation into the legality of requests for discounts contained in the agreements concluded between a retailer and its suppliers. This investigation has shown that the retailer imposed each year, to some suppliers, a discount, generally 10%, on all products that these suppliers also sold in the previous year to a "hard discount" retailer, competitor of the retailer. This additional discount request was required without any commercial consideration, which is contrary to the provisions of the FCC.

Thus, the DGCCRF brought an action against the retailer on behalf of the Minister of the Economy on 28 February 2018. The Minister requested to the Commercial Court of Paris to consider void the 10% discount in the

agreements between the GALEC and its suppliers, the cessation of the practice described above and the conviction of the retailer to a civil fine of up to 25 M€, as well as the restitution to the suppliers of the sums unduly received, up to € 83 million.
Penalties for restrictive competitive practice are set out in article L.442-4 FCC. They may take the form of (1) a compensation for the victim and/or (2) an action brought by the Minister in charge of the Economy and the Public Prosecutor in order to ask the judge to :

- i) order the cessation of the practices, the voiding of the illegal clauses or contracts and the restitution of the undue advantages obtained, as soon as the victims of these practices are informed, by any means, of the introduction of this legal action.
- (ii) To impose a civil fine not exceeding the highest of the following three amounts:
    - five million euros;
    - three times the amount of any undue benefit received or obtained;
    - 5% of the turnover (excluding tax) generated in France by the author of the practices during the last financial year ended since the financial year preceding that in which the practices were implemented.

6. Is there a specific regulation in France regarding the termination of the contract and the right to indemnity for the other party ?

Yes, article L. 442-1 II FCC deals with the abrupt termination of established commercial relations. A termination of an established business relationship is brutal (1) as soon as it is carried out without written notice or (2) with a period of notice which is considered too short in accordance with the length of the business relationship between the parties.

Article L. 442-1, II FCC also may held liable a company for the termination, even partial, of an established commercial relationship.
The notion of partial termination can be inferred from the termination of relations concerning only specific products, a reduction of orders, or a significant decline in revenues that occurred without prior notice and in the absence of a mutual agreement, for example.

The notice period must also allow the business partner to reorganise its activity. The judges take into account varied criteria to assess the reasonable length of notice.
The main criterion is the duration of the business relationship in reference to trade practices or interprofessional agreements. On average, the length granted by the judges is equivalent to one month's notice per year of the business relationship.

For example, French judges gave an average of 6 months' notice for a 4-year relationship, 1 year for an 8-year relationship, 18 months for a 15-year relationship, 2 years for a relationship of more than 30 years. Judicial decisions vary greatly depending on the case but the average is a one-months' notice period for each year of commercial relationship.

Some professional associations have elaborated, in collaboration with some distributors, Codes of conduct providing special length of notice regarding the duration of the business relationship and the turnover affected by termination, such as:

- The agreement between *Fédération des Entreprises et Entrepeneur de France* (FEEF) and *Féderation du Commerce et de la Distribution* (FCD)
- The agreement between the *Industriels du Nouvel Habitat* (Inoha) and the *Fédération des Magasins de Bricolage* (FMB).

This provision of the FCC has been amended recently and now provides that the party terminating the contract cannot be held liable of abrupt termination if he has given eighteen months' notice period.

The other criteria considered by the judges are the nature of the products or services concerned, the nature and specificities of the commercial relationship, the possible degree of economic dependence, the difficulties in disposing of stocks, the prospects of conversion, the nature of the products, the existence of an exclusivity agreement, etc.

7. Are there any specific / significant case law in your jurisdiction regarding supplier – retailer relationships ?

Minister in charge of the Economy brought actions against most French retailers on the ground of the significant imbalance.

As an example, in a judgment of the *Cour de Cassation*, the Court retained among the elements allowing to characterize the submission to a significant imbalance, the fact that the retailer imposed here its conditions of purchase, systematized them with each supplier, which excluded any effective negotiation (*Judgement of the Court of Cassation, Commercial Chamber, 27/05/2015, No. 14-11.387*).

In another decision regarding the same retailer and related to obligations creating a significant imbalance, due to certain clauses of the master agreement relating to the payment of a year-end rebate to the retailer, the Court agreed on the restitution to the suppliers of the sums unduly received up to €61 millions (*Judgement of the Court of Cassation, Commercial Chamber, 25/01/2017, No. 15-23.547*).

The Court of Cassation also confirmed the existence of an advantage without consideration to the detriment of the suppliers, in a decision implying another retailer, since: "the contractual clause contested by the Minister did not offer the suppliers a real service in return for the sums invoiced". The Court declared the commercial cooperation contracts entered into by the retailer with its suppliers null and void and also ordered the cessation of practices and the reimbursement of more than €76 millions *(Judgement of the Court of cassation, Commercial chamber, September 26, 2018, SYSTEME U c/ Minister)*.

Recently, the Ministry has assigned four entities of the E.Leclerc movement (Eurelec Trading, Scabel, Galec and Acdlec) for the abusive commercial practices committed by the movement's central purchasing office located in Belgium, "Eurelec Trading" and asks the Court to impose a fine of €117 000 000. This significant decision sets the amount of the fine particularly high in order to be as dissuasive as possible.

8. Do you have some information about the transposition of Directive 2019/633 in France ?

The new wording of the Commercial Code resulting from the government Ordinance no. 2019-359 of 24 April 2019 simplified the existing legislation. Whereas the former article covered thirteen prohibited practices,

the new article L. 442-1 FCC now covers only two practices:

- advantage without consideration or manifestly disproportionate (article L. 442-1, I, 1°); and
- significant imbalance (article L. 442-1, I, 2°).
-

However, article 3 of Directive 2019/633 gives a list of many different unfair commercial practices that member states shall prohibit. Some authors feared that the transposition imply a step backwards with a new list of unfair practices.

Actually, the modification will be limited to a few articles in the French commercial code. Indeed the ordinance on unfair business-to-business commercial practices in the agricultural and food supply chain was published on 1 July 2021.
It transposes the provisions of the 17 April 2019 directive that were not yet covered by the restrictive practices that we know. It defines three new prohibited commercial practices
- the cancellation of orders with a too short notice,
- obtaining, using or disclosing business secrets unlawfully,
- refusing to confirm the terms of a contract in writing.
All three commercial practices are subject to administrative sanctions.
The ordinances reduces the maximum payment periods when they are longer than those set out in the Directive. Eventually, it clarifies the contractual formalism required for promotional advantages on agricultural or agri-food products granted to consumers.

ITALY

1. **Could you give us some inputs on the general climate surrounding the supplier – distributor relationships in Italy?**

The commercial distribution, as the set of activities relating to the transfer of goods and services from the manufacturer to the consumer, is a relatively recent phenomenon. Its progressive growth began after the industrial revolution with the starting of the mass production and its excess capacity compared to the absorption potential of the market, which led to the search for new channels for the distribution of the products.

In this contest, there is the supplier – distributor relationship, which can be regulated in different ways (and then with different contractual figures) according to the specific needs of the parties. As you can read below, in Italy there isn't a specific regulation for this kind of commercial relationship and therefore the applicable rules are the general contractual ones and those specific related to singular figures (for example the rules established for franchising agreements).

2. **Have there been some significant reforms, in recent years, on the regulation of supplier – distributor relationships in Italy?**

No, the Italian Legislator did not intervene with reforms in the regulation of the supplier-distribution relationship.

3. **Are supplier-distributor relationships subject to extensive regulation in Italy or is the trend rather liberal?**

There is no specific legislation regarding distribution contracts in Italy; it means that the distribution contract, which is commonly considered as a particular type of supply contract, is qualified as an «atypical» contract, *i.e.* a contract not directly regulated by the law. In this context, the distribution contract could be considered as a «framework contract» whereby the distributor agrees to promote the sale of the supplier's products which he will purchase through separate sale contracts.

4. **What are the sources of the regulation on supplier – distributor relationships in Italy? (specific rules in commercial code for example, or application of general rules from a civil code?)**

Since the distribution contract is an "atypical" contractual figure, without a specific regulation, the applicable rules are those contained in the Italian Civil Code concerning contracts in general and some typical contracts. This possibility of having "atypical" contract figures is expressly provided by the Italian Civile Code, at article 1322 on "contractual autonomy", which establishes that the parties can execute an atypical agreement, provided that the final scope is to realize valuable interests.

Therefore, the general rules on contracts contained in the Italian Civil Code are applicable and reference if usually made also to some typical contracts regulated by the Code such as sale contracts, supply contracts (fulfilment of obligations on a regular basis), deposit contracts and carriage contracts.

Notwithstanding the above, the Italian Legislator decided to specifically regulate some commercial relationships, which are commonly included in the general definition of distribution contracts, that are agency contracts (Italian Civil Code article 1742 and

following); franchising contracts (with the Law no. 129/2004), direct sales representatives (with Law no. 173/2005).

Next to national law, there are the European Union rules concerning competition, in particular the article 101 of the TFEU and EU Regulation no. 330/2010 on vertical restraints.

5. What are the most common grounds for denouncing a practice in the context of supplier-distributor relations in Italy? What kind of practices are sanctioned / regulated in Italy?

Since there is no a specific regulation for this kind of contracts, the practices sanctioned are common to those sanctioned in other commercial relationships.

The main contentious activity is on the following issues:
- termination of the contractual relationship;
- not attainment of the minimum turnover;
- violation of the exclusivity.

6. Who can take legal action, in Italy, to seek sanctions for such practices and what are the sanctions incurred?

With reference to supplier-distributor relations, the action to seek sanctions may by brought by the manufacturer or the distributor, since only the parties to the contract have legal standing to take action.

Italian law does not recognize a general interest regarding this kind of disputes. The practices mentioned in question 5 above constitute a violation of contractual clauses, for which the Italian legal system foresees essentially the recovery of damages. In theory, for the violation of the exclusivity an order to desist from the violation could be issued by the Courts, particularly as an interim measure.

7. Is there a specific regulation in Italy regarding the termination of the contract and right to indemnity for the other party?

The Courts require a reasonable notice applying by analogy article 1569 of the Italian Civil Code on supply agreements or article 1725 on the assignment contract, which both make reference to an appropriate notice («congruo preavviso»).

Thus, if in the agreement between the parties there isn't an indication of the period of notice, it is likely that the Court will fix an appropriate period. However, there is not a clear indication in this respect provided by Italian Courts: in one case one and half year was considered appropriate in a contractual relation which lasted for 25 years (Court of Treviso, 20 November 2015); in another case, six months for a contract lasted for 12 years (Court of Napoli, 14 September 2012).

Furthermore, some Courts apply analogically the period of notice provided for the commercial agents also to the distributors, as indicated in paragraph 3 of article 1750 of Italian Civil Code, which establishes that the period of notice cannot be less than one month for the first year of the agreement, two months for the second started year, three months for the third started year, four months for the fourth started year, five months for the fifth year and six months for the sixth year and for the following years.

If the parties have provided the period of notice in the contract, the Courts try to respect their choice, even if the period is short (Court of Turin, 15 September 1989; Supreme court no. 13394/2011).

What is important to underline is that neither the law nor the jurisprudence recognizes the goodwill compensation for the distributor in case of earlier termination of the contract; the distributor has only the right for a compensation for unjustified earlier termination, calculated according to the general principles on calculation of damages.

8. Is there any specific / significant case law in Italy regarding supplier – distributor relationships?

On November 17, 2020, the Italian Antitrust Authority (AGCM) opened an investigation for abuse of economic dependence against Benetton Group, on the basis of a complaint filed by a former franchisee, who operated two Benetton shops. Among others, the Authority argues that the former franchisee, prior to the signing of the contract in question, already had a past situation of "heavy debt exposure" to Benetton, which, according to the AGCM's assessment, "could discourage, to the point of making impossible, the franchisee's search for a market alternative, thus determining economic dependence on the franchisor".

In its judgment no. 20688 of 13 October 2016, the Italian Supreme Court returned to the issue of the legitimacy of the withdrawal from the dealership agreements entered into with the various distributors forming part of the sales network in Italy by the car manufacturer, holding that withdrawal exercised on the basis of proven business needs and in a non-discriminatory manner is not abusive.

The issue of the abusiveness of the exercise of the withdrawal from the dealership contract by the car manufacturer has been extensively dealt with in the past by the Italian Supreme Court, in its judgment no. 20106 of 18 September 2009. In such decision, the Italian Supreme Court gave detailed reasons for the application of the principles of fairness and good faith to any contractual relationship and at any stage thereof, stating that the withdrawal without justification may be illegitimate where it is exercised in disregard of the aforementioned general principles and without taking into account the protection of the interests of the contracting party who suffers the termination of the contractual relationship.

Therefore, the Supreme Court stated the following: *"The District Court, after recalling the case-law according to which conduct aimed at assuming a leadership role in a given market sector does not in itself constitute an abuse of a dominant position if it does not impinge on the abuse of a dominant position if it does not impair the freedom of action of competing undertakings, it took as its grounds that:*

(a) the decision to reorganise its distribution network is undoubtedly a legitimate choice by the undertaking, even though it may prove detrimental to some components of the distribution chain;

(b) the car manufacturer's termination of the contract was not without reason and was in no way limited to a formal reference to the entry into force of Community Regulation No 1400/2002;

(c) the rationale of the restructuring of the distribution network, consisting in the aim of giving greater visibility and competitiveness to the (OMISSIS) brand compared with the main brand of the car manufacturer, was made widely known to the dealers;

(d) the whole operation was carried out in accordance with objective criteria and with the intention of avoiding unjustified

restrictions on access to the new distribution network."

9. Do you have some information in Italy about the coming transposition of Directive 2019/633?

On 12 December 2019, the Council of Ministers gave preliminary approval to the draft law delegating the Government to transpose European directives and implement other acts of the European Union: this is the "2019 European Delegation Law", which is thus preparing to embark on its parliamentary process.

Among the numerous delegations conferred on the Government, the approved draft law provides for the transposition of Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

This specific delegation is contained in Article 7 of the draft European Delegation Act 2019. The provision indicates the specific guiding principles and criteria to be followed in transposing the European measures: the illustrative report explains that the intention is to regulate supply chain relations between operators in the agricultural and food supply chain, "introducing elements of greater transparency, not only for the benefit of the supply chain itself, but also for the final consumers".

These are the criteria:

(a) adopt the necessary amendments and additions to the existing legislation on the marketing of agricultural and agri-food products, in particular with reference to Article 62 of Decree-Law 24 January 2012 and subsequent implementing rules, coordinating the regulations in force on the terms of payment with the provisions on electronic invoicing;

(b) contracts for the sale of agricultural products and foodstuff, except for those executed with the consumer and for those with simultaneous delivery and payment, must be concluded in writing;

(c) confirming that the requirement for contracts for the supply of agricultural products and foodstuffs to be in writing cannot be satisfied by equivalent forms such as transport or delivery documents or invoices in accordance with the provisions in force;

(d) insert in the list of unfair commercial practices prohibited under Article 9(1) of EU Directive 2019/633 a provision prohibiting the sale of agricultural products and foodstuffs through the use of "double-bottom tenders";

(e) the fines and penalties established in article 6 (1) of the Directive 2019/633 shall be effective, proportionate and dissuasive, and they must be calculated within the maximum limit of 10% of the turnover achieved in the last financial year prior to the assessment.

THE NETHERLANDS

1. **Could you give us some inputs on the general climate surrounding the supplier – distributor relationships in the Netherlands?**

As in France, the mass market retailers in the Netherlands experienced a strong development during the second half of the 20th century.

Today, the major retailers in the Netherlands consist of (amongst others) Ahold Delhaize – Jumbo – Plus – Coop – Dirk - Aldi – Lidl - Ekoplaza. Those large food retailers have a considerable influence on the conduct and the climate of negotiations.

Food retail is one of the big winners from the COVID-19 crisis. Due to the forced closure of the hospitality industry during the first wave in March-May 2020 and the second wave in October-November 2020, food retail has had top sales.

Biggest trends at the moment are: customer demand for convenience (meal kits), increasing online sales (also by new players making use of advanced technology) and a focus on healthy food and a sustainable food chain.

2. **Have there been some significant reforms, in recent years, on the regulation of supplier – distributor relationships in the Netherlands?**

In the Netherlands supplier-distribution relationships are, from a civil law point of view, not specifically regulated. Instead, the general laws of contract apply as well as court decisions. The Dutch Civil Code (**DCC**), book 6, sets out the requirements relating to the formation of contracts. These provisions must be read in conjunction with the more general rules regarding juridical acts; that is, acts intended to invoke legal consequences as provided in book 3 DCC.

There have been no recent reforms to the Netherlands regulation on supplier and distributor relationships.

However the Dutch Franchise Act has just been adopted and is effective per 1 January, 2021 (the **Franchise Act**). The Franchise Act protects franchisees operating in the Netherlands. It has been argued by some, that the Franchise Act should also apply to (selective and exclusive) distribution agreements. As the Franchise Act has been implemented very recently it is unclear what the approach of the courts will be, but it is certainly something to pay attention to when concluding a distribution agreement under Dutch law or with a Dutch distributor, especially when such distribution agreement bears some elements of or resemblance to franchise.

3. **Are supplier-distributor relationships subject to extensive regulation in the Netherlands or is the trend rather liberal?**

Aside from EU and Dutch competition laws, the Netherlands does not have any extensive legislation which deals specifically with supplier-distributor relationships.

As noted above, supplier-distributor relationships are subject to general contract law. Still it does not mean that the parties have complete contractual freedom, as the principle of reasonableness and fairness may supplement and even set aside certain agreed contractual principles. The standard to derogate from an agreed provision, is high.

This said, especially a (very) large company – either supplier or retailer - should be aware that a provision in an existing contract that is very one-sided (e.g. a provision that the contract may be terminated at any given moment, respecting a notice term of only 30 days), especially when dealing with a (very) small counterparty could be set aside by the principle of reasonableness and fairness, if such provision is unacceptable in the given circumstances.

It is not possible to predict what kind of provisions may be set aside, if any, since the court will consider all relevant circumstances, including the economic power of each party, the dependency of the parties from each other, the duration of the contract, the investments made by either party, what each party could reasonably expect from the other party and all other relevant circumstances.

Commercial agency agreements are agreements (or relationships) whereby the principal charges the commercial agent, which the latter undertakes, for a remuneration, to act as an intermediary in the realisation of contracts and possibly to conclude such contracts in the name and on account of the principal without being subordinate to the latter.

The agency protection has a reputation as the agent may be entitled to a goodwill compensation upon termination. In some countries surrounding the Netherlands the commercial agency rules regarding goodwill are implemented in analogy to distribution agreements. So far, this approach has not been adopted by Dutch courts.

As mentioned under #2, the new Dutch Franchise Act has just been implemented, which may impact distribution agreements.

4. **What are the sources of the regulation on supplier – distributor relationships in the Netherlands? (specific rules in commercial code for example, or application of general rules from a civil code?) What are the most common grounds for denouncing a practice in the context of supplier-distributor relations in the Netherlands? What kind of practices are sanctioned / regulated in the Netherlands?**

Dutch contract law

As noted above, there are no Dutch laws that specifically regulate supplier–distributor relationships and these agreements are governed by the civil law principles of general contract law. Under Dutch law, onerous conditions do not need to be accepted specifically. However, in the event that seriously onerous conditions are contained in a distribution contract, the principle of reasonableness and fairness may cause these conditions to be invalid, depending on the circumstances of the matter.
Articles 236 and 237 of Book 6 of the Dutch Civil Code contain a list of conditions that are either voidable or considered to be void.

Even though these ('black-listed') conditions mainly apply to a business-to-consumer relationship, they may also apply to a business-to-business relationship in the event that the 'affected' party is considered to be a small business. Then the small business may be protected under those rules.

Common disputes in a supplier-distributor relationship include:

- the issue of termination, particularly when the agreement is silent or not clear on this matter,

- sales via internet and sales from or to other EU countries,
- disputes relating to whether the agreement is exclusive or non-exclusive.

5. Who can take legal action, in the Netherlands, to seek sanctions for such practices and what are the sanctions incurred?

As supply and distribution agreements are governed by general contract law, it is only the parties to the agreement who can seek to enforce their contractual rights to the agreement. However, when the parties infringe competition laws while executing the agreement, the below applies.

The Netherlands Authority for Consumers and Markets (ACM) is charged with competition oversight, sector-specific regulation of several sectors, and enforcement of consumer protection laws. The ultimate goal of the ACM is to create a level playing field, where all businesses play by the rules, and where consumers exercise their rights.

For the ACM, fines are an important way to sanction violators. Fines can be as high as €450,000 or 10 per cent of the relevant turnover.

6. Is there a specific regulation in the Netherlands regarding the termination of the contract and right to indemnity for the other party?

Unlike commercial agency agreements and franchise agreements, which regulate termination and the possible payment of goodwill compensation, there are no specific Dutch regulations applicable specifically to the termination of distribution agreements. However in court decisions a certain approach has been developed.

When a distribution agreement has been concluded for a fixed period, in principle it is not possible to terminate the agreement early, unless there are termination possibilities in the agreement or when there is a material breach situation (preferably the agreement gives the option to terminate for (material) breach).

Dutch laws do not restrict or limit the right to terminate a distribution agreement. However, this does not mean that a party can always terminate the agreement and even if it can, it may be obliged to respect a certain notice period or pay compensation or indemnity, or both. A contract with an indefinite term may in principle be terminated for convenience. This is the prevailing opinion, affirmed by the Dutch Supreme Court. However, under certain circumstances a party may have to show cause to terminate the agreement.

It has been determined in case law and in literature that on termination of a distribution agreement by the supplier and in the absence of a contractually agreed notice period, the supplier must respect a reasonable termination period. What is a reasonable notice period is very much dependent of all circumstances. The duration of the relationship is however seen as a key factor of importance.

To give a very rough indication: for an agreement with a duration between 0-1 years: 1 month termination period should be respected, for an agreement with a duration between 1-2 years: 2 months and for an agreement of more than 2 years: 1 month per year. Another way of calculating the termination period is a period of 1,2 months per year that parties have a distribution relationship for the first 10 years and a

period of 0,8 month per year that parties have a distribution relationship thereafter.

There has been a discussion pending between scholars whether the notice period should be longer than 12 months as this could have a negative impact on the business, especially with a reluctant distributor still representing the products/brand. However there are several court decisions – also from higher Dutch courts – in which longer notice periods than 12 months have been granted. The maximum notice period so far granted by a Dutch court is three years (this happened in several instances, in particular with very long lasting relationships).

A Dutch court is not bound by those general guidelines (derived from existing case law) with respect to a reasonable termination period; on the ground of reasonableness and fairness a court can decide what it deems to be an appropriate termination period under the given circumstances. In rather exceptional circumstances, for instance a distribution relationship that exists between parties for an exceptionally long period, a court can decide that it is not possible at all for a supplier to unilaterally terminate such distribution relationship with its distributor without having sufficient reason to do so.

Such has been ruled by the Dutch supreme court in the Latour/De Bruijn landmark decision and has been confirmed by the Supreme Court in 2016 (Ronde Venen decision). Initially the High Court has granted a notice term of three years, the Dutch Supreme Court overturned this and has decided that it is not always possible to terminate a distribution agreement without having sufficient reason/cause. In this particular instance, it was ruled termination was not possible in the absence of having sufficient reason/cause and in the light of the circumstances, in particular the very long-lasting relationship between Latour and De Bruijn, of approximately a 100 years.

Specific circumstances a court seems to take into account when deciding upon the notice period which should be respected are (amongst others):

- the length of the relationship (this seems to be the most important factor in most instances);
- the dependency of the distributor of the supplier (high, low etc.);
- the reasons for termination;
- exclusivity of the relationship;
- the size of the company of the supplier and the distributor, where Dutch court often protect the "weaker" party;
- whether there are any statements from the supplier about the continuance of the relationship, future plans together etc.; and
- the performance of the distributor, was the distributor meeting its targets (if any) and other obligations.

In the event of an unlawful termination, for instance, a termination respecting a too short notice period, the supplier will be liable to compensate the distributor's damages as a result hereof. The distributor may instead also try to claim continued performance. The latter is often enforced by an interim injunction procedure. Dutch courts tend to be available for such procedures on short notice – often within a timeframe of a couple of weeks.

In the event of termination of a distribution relationship, the supplier may be required to pay an indemnity for investments or costs made by the distributor, in case these investments cannot be earned back due to

the termination of the contract and the supplier was aware – or should have been aware – of the investments made. So far, a higher court in the Netherlands has not granted a goodwill compensation to a distributor upon the termination of a distribution agreement.

7. Is there any specific / significant case law in the Netherlands regarding supplier – distributor relationships?

Yes, the most important case law is developed on the termination of supplier-distributor relationships, see question 6.

As specified above, in the Dutch legal system, the obligation to act in accordance with the principle of good faith is very important. Dutch civil laws are governed by the principle of reasonableness and fairness (in Dutch: 'redelijkheid en billijkheid').

This principle also applies to supplier-distribution relationships and may for example supplement the existing relationship or derogate from the contract that the parties agreed upon at an earlier stage. It is therefore possible that the principle of reasonableness and fairness sets aside a provision in an existing contract.

8. Do you have some information in the Netherlands about the coming transposition of Directive 2019/633?

On 20 November, 2020 a draft proposal of the new act based on Directive 2019/633 ("*Wet oneerlijke handelspraktijken landbouw- en voedselvoorzieningsketen*") was sent by the Ministry of Agriculture to the Dutch Parliament and in the meantime has been adopted by the Dutch Parliament and Senate. This new Act is now only awaiting a Royal Decree, signed by the King, announcing per what date the new Act enters into effect.

The Dutch competition authorities (ACM) will be in charge of the sanctioning of infringement of the new Act.

THE UNITED KINGDOM

1. Could you give us some inputs on the general climate surrounding the supplier – distributor relationships in the United Kingdom?

In the UK, unlike agency, there is little legislation applicable to distribution arrangements other than domestic competition law and the relationship between the distributor and supplier is largely governed by the agreement between them. The UK recognises freedom of contract as paramount, save in certain defined instances and even then, for the most part, in relation to business to consumer (B2C) contracts. Courts are generally reticent to "interfere" with business to business (B2B) contracts and, save where the parties in a supplier-distributor relationship are attempting to distort market competition, fix prices or otherwise manipulate the operation of the market, courts tend to steer clear of intervention in these types of relationships.

Suppliers generally have less control over a distributor than a principal has over their agent, primarily because an agent sells on behalf of its principal, whereas a distributor buys and resells on its own account.

Whereas in a principal-agent relationship the principal will usually make decisions with regard to pricing, marketing, publicity and terms of supply to end-users, the supplier has little influence in such matters with its distributor. This inability on the part of the supplier to influence pricing arises under both UK and EU competition law, and often stands in the way of a supplier's efforts to build market share.

2. Have there been some significant reforms, in recent years, on the regulation of supplier – distributor relationships in the United Kingdom?

There have been no recent reforms to the UK regulation on supplier and distributor relationships.

The Groceries Supply Code of Practice 2009 (GSCOP) provides regulation specifically with regards to supply and distribution contracts between supermarkets and their suppliers. This code had the intention of preventing large supermarkets from abusing their dominant position in the UK marketplace; however, it has arguably had little significant effect.

The UK's departure from the EU will, in all likelihood, have an effect on UK domestic competition law which, at the time of writing, is still based on Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and has incorporated EU competition laws on vertical agreements.

Now that the UK has left the EU, the UK will be free to amend its domestic competition law in a way that diverges from the TFEU. Whilst there are no current plans to do so, a divergence in this area in the future could well have implications on the regulation of vertical agreements which may, in turn, impact the UK regulation of supplier-distributor relationships.

3. Are supplier-distributor relationships subject to extensive regulation in the United Kingdom or is the trend rather liberal?

Aside from domestic competition law, the UK does not have any extensive legislation which deals specifically with supplier-

distributor relationships. As noted above, supplier-distributor relationships are subject to UK contract law and suppliers and distributors are accordingly bound by the contractual arrangement they agree.

4. **What are the sources of the regulation on supplier – distributor relationships in the United Kingdom? (specific rules in commercial code for example, or application of general rules from a civil code?) What are the most common grounds for denouncing a practice in the context of supplier-distributor relations in the United Kingdom? What kind of practices are sanctioned / regulated in the United Kingdom?**

UK Contract Law

As noted above, there are no UK laws that specifically regulate supplier–distributor relationships and these agreements are governed by the common law principles of contract law. Accordingly, it is fair to say that the most common disputes which arise in supplier–distributor agreements thus relate to issues of contractual uncertainty and ambiguity.

Common disputes include the issue of termination, particularly when the agreement is silent on this matter, and disputes relating to whether the agreement is exclusive or non-exclusive.

UK Competition Law

Domestic UK competition law impacts vertical agreements between a supplier and distributor by preventing suppliers and distributors from imposing anti-competitive restrictions on one other in their contractual arrangements.

Chapter 1 of the UK Competition Act 1998 incorporates the EU rules on vertical agreements into domestic UK law. This chapter prohibits agreements that prevent, restrict or distort competition in the UK.

Supply-distribution agreements could potentially come within the scope of this restriction; for example, in the case of an exclusive distribution agreement.

However, in European competition law there exists an automatic block exemption that applies to vertical agreements (VABE) which has the effect of ensuring that most vertical agreements fall outside the scope of Chapter 1. The VABE has also been incorporated into domestic UK law.

The VABE applies when the market share of each of the parties to the agreement does not exceed 30% of their relevant market and there are no specified "hard core" restrictions in the agreements.

- Hard core restrictions include:
- Price fixing/ resale price maintenance
- Territorial/customer sales restrictions
- Territorial/customer sales restrictions in a selective distribution system
- Restrictions on cross supplies within a selective distribution system
- Restriction on access to component parts

The VABE also lists a number of "obligations" which, if included in a vertical agreement, will ensure that the agreement falls outside the scope of the VABE. These are:

- any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years

- any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services

- any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

The existing European VABE is due to expire in May 2022, at which point we may start to see the commencement of a divergence between the UK and the EU approaches to the VABE if the EU amends or replaces it, and the UK does not follow suit.

The Groceries Supply Code of Practice (GSCOP)

As mentioned above, the GSCOP specifically regulates supply and distribution contracts between the largest UK supermarkets and their suppliers. It imposes a number of key obligations on the supermarkets with regard to their contractual dealings with their suppliers in an attempt to redress the balance of power and prevent the supermarkets abusing their dominant market position.

The GSCOP only regulates the conduct of a "designated retailer". To be classed as a designated retailer, a company's UK grocery sales turnover must be greater than £1billion. Because of this, the list can change. Currently, there are 13 designated retailers in the UK.

The GSCOP is overseen by an Adjudicator, who is an official appointed by the government to oversee the implementation, running and effectiveness of GSCOP and works under the supervision of the UK Competition and Markets Authority (CMA). The Groceries Code Adjudicator is a part-time government salaried position whose role is to "arbitrate, investigate and fine". As of 2015, the Adjudicator gained the power to fine retailers in breach of GSCOP 1% of their UK turnover.

The Groceries Code Adjudicator comprises an office of 6 full-time equivalent staff. Funding for its running costs comes from an annual levy on the designated retailers.

Further Statutory Provisions

Increasingly businesses are facing greater obligations to monitor their compliance with statutory obligations, not just internally but throughout their supply chains. Certain statutory instruments therefore place a further burden of compliance on parties to distribution contracts of ensuring that the party they are contracting with is also complying with the regulations.

Statutory instruments that include these obligations include but are not limited to:

- The Bribery Act 2010
- The Modern Slavery Act 2015
- The Data Protection Act of 2018

5. Who can take legal action, in the United Kingdom, to seek sanctions for such practices and what are the sanctions incurred?

As supply and distribution agreements are governed by UK contract law, it is only parties to the agreement who can seek to enforce their contractual rights to the agreement. This is in line with the doctrine of privity of contract.

The UK Competition and Markets Authority (CMA) is the competition regulator in the UK.

The CMA deals with and conducts investigation into competition issues within the UK, such as breaches of the Competition Act 1998. It has the power to take action against businesses and individuals that it believes are taking part in anti-competitive behaviour.

6. Is there a specific regulation in the United Kingdom regarding the termination of the contract and right to indemnity for the other party?

No, unlike agency agreements, which regulate termination via the Commercial Agents Regulations, there are no specific UK regulations applicable specifically to the termination of distribution agreements.

Termination of a UK distribution agreement will therefore be based on the terms of the contractual arrangement that has been entered into between the parties. If the terms of termination contained within the contract are unambiguous then they will be upheld by the UK courts. There will be no indemnity payable unless this has been specified by the contract.

In the absence of a specified end date or termination clause, UK contract law holds that there is an assumption that the contract cannot be intended to run indefinitely and therefore an implied term of "reasonable notice" exists when terminating a contract.

What is "reasonable" is to be decided on a case by case basis, and factors that are considered by the UK courts when deciding what is reasonable include but are not limited to the following:

- How long the relationship between the supplier and distributor has existed
- The intention of the parties when they entered the relationship
- Whether the relationship was formal or informal
- If the notice was unexpected or if prior warning had been provided
- The financial implications of the termination on the terminated party
- Notice periods the parties had previously discussed.

7. Is there any specific / significant case law in United Kingdom regarding supplier – distributor relationships?

Most of the significant case law in this area relates to the relationship between supplier and intermediary, and whether this relationship is one of agency or distribution. The case of *AMB Imballaggi Plastici Srl v Pacflex Ltd* [1999] 2 All ER (Comm) 249 provided clarity on this matter.

In this case, AMB (supplier) was trading with Pacflex (intermediary). AMB would provide Pacflex with goods, which Pacflex would then sell on to end users. Pacflex had been given the option by AMB to deal on an agency basis and receive a commission; however, it chose to deal on a sale and resale basis and decided its own mark up.

Upon termination of the contract by AMB, Pacflex claimed the relationship between the two parties was one of commercial agency and they were therefore entitled to compensation under the Commercial Agents Regulations.

The court found that the relationship was one of distribution rather than agency. It was held that as Pacflex had acquired the goods on a sale and resale basis, charged its own mark up and was acting in its own interests, it could not be acting as an agent for AMB, despite having been given the option to act as such. It was held that for

there to be an agency contract an agent must have a continuing authority to negotiate on behalf of the principal and or conclude a sale in the name of the principal. On the facts of this case, Pacflex had neither behaved in such way nor had they acquired such an authority.

8. **Do you have some information in the United Kingdom about the coming transposition of Directive 2019/633?**

As the UK is no longer a member of the EU it has no plans to transpose Directive 2019/633 into UK domestic law.

PORTUGAL

1. **Could you give us some inputs on the general climate surrounding the supplier – distributor relationships in Portugal?**

Firstly, the legal relationship between a supplier and a distributor is a commercial legal relationship. The Constitution of the Portuguese Republic contains some provisions directly relating to Commercial Law[26] .

In the Portuguese legal system, one significant initiative of the legislature on this issue is the **Platform for Monitoring Relations in the Agri-Food Chain** ("PMRAC") (legal source here and website here) which reflected the need to "ensure transparency in production, processing and distribution relationships within the agri-food chain and to promote the creation and dynamization of local markets."

There was a recent modification in 2015 where (here), acknowledging that it was fundamental to include a representative of the consumers since the topics at issue had an impact on the offer of agri-food products to consumers. Thus, a representative of the Directorate General of the Consumer was included in the composition of the Platform. Although PMRAC is not a legislative instrument per se, it is a platform with potential impact on drafting and projecting the legislative instruments that coincide with its scope.

In Portugal Unfair Trade Practices (UTPs) legislation is applicable to all sectors with specific provisions on practices in food and groceries trade (alongside France and Latvia). Hence, in Portugal there are specific lists of prohibited Unfair Trade Practices (UTPs) that can be found in different legislative instruments. Although not included in legislation exclusively covering food supply chain, some of those provisions are applicable to that special relationship.

In Portugal, there is cross-sector legislation on UTPs (as there is another 7 MSs) instead of agri-food-specific legislation on UTPs (as another 11 MSs).

2. **Have there been some significant reforms, in recent years, on the regulation of supplier – distributor relationships in Portugal?**

Portugal has chosen a hybrid approach that combines legislation and self-regulation.

The Portuguese Decree-Law 166/2013 on Restrictive Individual Practices in Trade ("RIPT") used to be applicable only to companies established within Portugal.

A recent reform by Decree-Law 220/2015 (here) has repealed a former provision excluding from the scope of application of Decree-Law 166/2013 the purchase and sale of goods and the provision of services originating or terminating in a country outside the EU or the European Economic Area. Now, the Portuguese law would apply, for example, to UTPs that occurred within the relationship between a Portuguese retailer and a Brazilian supplier.

Decree-Law 220/2015 gave new wording to Articles 2, 4, 5 and 7 of Decree-Law 166/2013, because it specified some of the solutions provided for in the latter,

[26] Jorge Manuel Coutinho de Abreu, Curso de Direito Comercial, page 55, volume I, 10th edition, Almedina.

particularly with regard to its scope of application and the sales at a loss rules.

Decree-Law 128/2019 (here) of 29 August made the second amendment to Decree-Law 166/2013, in order to strengthen transparency in trade relations and the balance of bargaining positions between economic operators, ensure greater systemic cohesion between the competition and RIPT rules, and strengthen the operational, supervisory and investigative capacity of ASAE (the Portuguese Food and Economic Safety Authority).

Decree-Law 128/2019 entered into force in 1 January 2020 and it also ensured greater systemic cohesion between the competition and individual trade restrictive practices rules such as UTPs.

The "renewed" rules apply to commercial practices that take place in Portugal and not only to those that occur between companies established in the country, as mentioned.

Additionally:

- The principle of reciprocity was introduced in contracts and agreements between companies;
- It became mandatory to have a written for all negotiation documents, such as price lists, sales conditions, supply contracts, and to keep them for a minimum period of 3 years, in a physical or digital archive;
- Clarification of the data that may be considered in determining the real purchase price in order to determine the existence of a sale at a loss;
- The negotiation practice consisting in providing contractual penalties that are exorbitant in relation to the general contractual clauses is prohibited, as is compensation that is not effective and proportional, namely the issuing of credit and debit notes within a period exceeding three months from the date of the invoice to which they refer;
- The deduction, by one company in relation to another, of values from the amounts of the invoices due for the supply of goods or provision of services is prohibited, when the reasons to which they refer are not properly detailed and the other party gives an unfavourable and reasoned opinion within 25 days;
- The prohibition of some practices directed at micro or small enterprises that were only applicable to the agri-food sector is extended to all sectors of activity, giving the same degree of protection to all small enterprises.

It clarifies that service providers and producers, manufacturers, importers, distributors, packagers and wholesalers of goods must have price lists with the applicable sales conditions and they must provide them whenever requested by any retailer or user, or by the ASAE.

The ASAE will now have the power to take urgent action to prevent abusive business practices that may affect the normal functioning of the market and harm the public interest.

Besides, the confidentiality of those who report prohibited restrictive practices is now guaranteed, whether they are companies or business associations.

3. Are supplier-distributor relationships subject to extensive regulation in Portugal or is the trend rather liberal?

It could be argued that the supplier-distributor relationships in Portugal are quite liberal.

Additionally, it is rare to observe Portuguese legislation where general clauses don't get complemented by lists of prohibited conducts.

4. **What are the sources of the regulation on supplier – distributor relationships in Portugal? (specific rules in commercial code for example, or application of general rules from a civil code?) What are the most common grounds for denouncing a practice in the context of supplier-distributor relations? What kind of practices are sanctioned / regulated?**

The main sources of commercial law are the ordinary laws (the Laws of the Assembly of the Republic and the Decree-Laws of the Government), the most significant being the Commercial Code approved by Letter of Law of 28/6/1888.

Under article 3 of the Commercial Code, civil law is applicable to commercial matters ("If questions on commercial rights and obligations cannot be resolved either by the text of the commercial law, or by its spirit, or by the analogous cases provided for therein, they will be decided by civil law."). It could thus seem *prima facie* that civil law rules are never directly applicable to commercial matters and only intervene to fill gaps in commercial law. However, this is not the case. Commercial law is a special system, open to direct recourse to civil law to regulate commercial relations. Not all omissions of legal-market regulation mean true gaps. Some of these omissions are in accordance with the commercial law plan (for example, with respect to the basic characterisation of contract types - the notion and effects of the purchase and sale contract in Articles 874 and 878 of the Civil Code which also apply to commercial purchases and sales).

Very intuitively, there is the general principle of *lex specialis derogate legi generali* ("Special law repeals general laws"). Hence, there are a few disperse laws that also apply to this relationship between supplier and distributor.

There is an hybrid approach in Portugal regarding UTPs since there is a double-track system which includes both legislation and codes, with the latter playing a complementary role that is explicitly acknowledged in legislation.

In Portugal, some of those ordinary laws deserve to be mentioned here, because they are the most common grounds for denouncing a practice in the context of supplier-distributor relations.

A special reference should be made to **Decree-Law ("DL") 166/2013** (Rules on Individual Restrictive Practices on Trade, here, consolidated version here). Its scope of application is general, but specific provisions have been included to protect small and micro-enterprises.

In this DL:

- Article 10 establishes fines adapted to the size of the infringers.
- Article 12 establishes the treatment to be given to subsidiary legislation.
- Article 16 sets out a system of self-regulation. Under it, the representative structures of all or

some of the economic activity sectors may adopt self-regulation instruments to regulate their commercial transactions. The rules will be subject to ratification by the members of the Government responsible for the area of the economy and for the sectors of activity represented in the said instruments. The members of the Government responsible for the areas of economy and agriculture may create a mechanism to monitor self-regulation by a ministerial order which will also define its powers and working methods.

Additionally, **Decree-Law 57/2008** (Legal Rules on Unfair Trade Practices of Companies, here, consolidated version here) establishes the legal framework applicable to unfair business-to-consumer trade practices occurring before, during or after a commercial transaction in relation to goods or services.

However, Article 1 of Decree-Law 205/2015 (here) enshrined an extension of its scope by applying its provisions to business-to-business relationships between companies regarding misleading commercial practices resulting from false, deceiving or potentially deceiving (even if factually correct) information on the items listed on Article 7(1), meaning, the existence or nature of the goods or services and their principal characteristics better as listed there in detail. Hence, by virtue of Article 7(3), Articles 7(1)(a) to (d) and (f) are applicable to business-to-business and the former provision reads as follows: "A commercial practice is misleading if it contains false information or if, although factually correct, for any reason, including overall presentation, it deceives or is likely to deceive the consumer in relation to one or more of the following items and, in either case, it causes or is likely to cause the consumer to take a transactional decision that he or she would not have taken otherwise:".

Article 8 lists "Actions considered misleading under any circumstance". Among them (e), (f), (g), (h) and (r) should be particularly stressed since they were modified by the abovementioned Decree-Law 205/2015:

e) Proposing the acquisition of goods or services at a given price without disclosing the existence of any reasonable grounds the trader may have for believing that he cannot himself supply or refer another trader to supply the goods or services in question or equivalent, at that price for a reasonable period and in reasonable quantities, taking into account the goods or services, the volume of advertising made of it and the prices indicated;

f) Proposing the acquisition of goods or services at a certain price and, with the intention of promoting a different good or service, subsequently refusing to present the advertised goods or services to consumers;

g) Proposing the purchase of goods or services at a certain price and, with the intention of promoting a different good or service, refusing orders for the goods or services in question or its delivery or supply within a reasonable period of time;

h) Proposing the acquisition of goods or services at a certain price and, with the intention of promoting different goods or services, presenting a defective sample of the product;

(r) setting up, operating or promoting a pyramid promotional scheme where a consumer gives his own contribution in return for the opportunity to receive compensation which is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products;

Article 21 headed "Sanctions" was amended by Decree-Law 205/2015 which establish:[27]

1 - Violation of the provisions of articles 4 to 12 constitutes an administrative offence punishable with a fine ranging from €250 to €3740.98, if the offender is an individual, and from €3000 to €44,891.81 euros, if the offender is a legal person.
[…] The provision also contains other ancillary sanctions better detailed there.

4 - Negligence is always punishable, with the maximum and minimum limits of the fines being reduced by one half.
[…]

8 - The amount of the fines imposed will be distributed in accordance with the terms set out in the regulatory rules for each sector or, if there is none, as follows:
a) 60% to the State;
b) 30% for the entity that carries out the instruction;
c) 10% for the entity imposing the fine.

Another piece of legislation worth considering is **Decree-Law 446/85** (Legal Rules on Standard Contract Terms, here, consolidated version here). Currently, as when this DL was drafted, large companies standardise their contracts to speed up the operations required to place their products, to plan the various aspects of the advantages and disadvantages of their products. Therefore, special protection should be provided.

This piece of legislation was not exclusively concerned with the protection of consumers in standard form contracts. Although the aim of the legislation in question is to protect consumers parties to standard form contracts are, it also applies to relations between businesses. The legislature has however distinguished the relations with consumers from relations between businesses.

Finally, **Law 19/2012** (New Legal Framework for Competition, here, consolidated version here) which has already incorporated Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the provisions of competition law of the Member States and of the European Union. Hence, Law 23/2018 (here) established the Competition Law Infringement Compensation Scheme providing for rules on claims for damages for infringements of competition law.

Another way to react to UTPs could be found in the competition rules, namely those on the restriction of competition either through the abuse of a dominant position (unlikely to succeed) or through the abuse of economic dependence (more likely to succeed).

In the chapter on practices restricting competition (Chap. II), the Portuguese Competition Law (PCL) prohibits the abusive

[27] We must note that this provision is going to have a different wording on 8 July 2021 with the entry into force of the Decree-Law 9/202,1 as can be read in the link for the consolidated version we made here available on page 15, in Article 21. Thus, this alteration will refer to a new set of rules to be published in 29 January 2021, the Legal Framework of Economic Sanctions (here).

exploitation of a dominant position and of the state of economic dependence.

Contrary to the TFEU, the PCL expressly provides that refusal of access to a network or other essential infrastructures controlled by the undertaking may be considered abusive, if the conditions of Article 11(2)(e) are met.

Another ground besides the dominant position,, once a situation of economic dependence is confirmed, its abusive exploitation will be prohibited, and the PCL refers to some situations that may be considered abusive and indicates the circumstances in which an undertaking is deemed not to have an equivalent alternative.

In fact, the commercial practice under analysis may result from :

- the refusal to impose unfair transaction conditions; or
- the non-acceptance by the supplier of supplementary services which are not related to the subject matter of these contracts.
- the application of dissimilar conditions to different commercial partners in the case of equivalent services. This will be the case when one supplier is unjustifiably disadvantaged in relation to another.

With a greater connection to our topic, it is worth underlining the section on the sanctioning process for restrictive practices the former relating to offences and sanctions and the latter relating to waiver or reduction of fines in administrative offence proceedings for breach of competition rules.

The PCL provides that the general rules on unlawful offences of mere social order approved by Decree-Law 433/82 of 27th October apply on a subsidiary level to the proceedings for the infringement of articles 11 and 12. It then classifies a violation of that article as an administrative offence (Article 67).[28]

It is settled that the violation of the provisions of Article 12 constitutes an administrative offence punishable by a fine. As a result of the above, this can be considered a sanctioning and repressive legal framework.

The fine should take into account the gravity and duration of the infringement, the nature and size of the market affected, the degree of participation by the offender, the advantages enjoyed by the offender, their economic situation, their record of administrative offences and their cooperation with the PCA.

Together with the fine, the PCA can determine the application of ancillary sanctions if the seriousness of the offence and the offender's guilt justify it. The PCA may also decide to apply a periodic penalty payment.

Additionally, it is important to draw attention to the fact that the Portuguese legal system has a peculiar trait. There are three typical forms of distribution contracts often used in this type of relationship. These are :

- the **Agency Agreement** (“Contrato de Agência” here, as will be seen in point 4.7., there is very recent and relevant decisionary practice relying

[28] Therefore, an “illicit and censurable fact that fulfils a legal type in which a fine is imposed”. (Article 1 DL 433/82 of 27 October).

on this "matured" piece of legislation),
- the **Commercial Concession Contract** ("Contrato de Concessão Comercial") and;
- the **Franchise Agreement** ("Contrato de Franquia").

There is no unitary and exhaustive regulatory framework for distribution contracts. Instead, the rules are constructed on distribution contracts that are legally atypical.

5. Who can act to seek sanctions for such practices and what are the sanctions incurred?

The main enforcing authority as regards UTP legislation is the ASAE (Autoridade de Segurança Alimentar e Económica) which can impose fines provided by the Article 21 of DL 57/2008 (as amended by DL 205/2015):

Article 21 headed "Sanctions" was amended by Decree-Law 205/2015 in its subsections (6), (7), (8), which establish:[29]
1 - Violation of the provisions of articles 4 to 12 constitutes an administrative offence punishable with a fine ranging from €250 to €3740.98, if the offender is an individual, and from €3000 to €44,891.81 euros, if the offender is a legal person.
[…] The provision also contains other ancillary sanctions better detailed there.
4 - Negligence is always punishable, with the maximum and minimum limits of the fines being reduced by one half.
[…]
8 - The amount of the fines imposed will be distributed in accordance with the terms set out in the regulatory rules for each sector or, if there is none, as follows:
a) 60% to the State;
b) 30% for the entity that carries out the instruction;
c) 10% for the entity imposing the fine.

Regarding the confidentiality of complaints lodged with administrative authorities and *ex officio* investigative powers in UTP legislation, in Portugal there are *ex officio* investigative powers.

Usually, the enforcement of UTPs is decentralised and Portugal is no exception given the different paths of legal action that can be followed under the Laws and Decree-Laws described above, which go hand-in-hand with the provisions of the Commercial Code and Civil Code where applicable. It is based on a triangle including administrative, judicial and private dispute resolution.

Whether entities have legal standing to bring an action will depend on the grounds for the claim being made and on which one of the above Decree-Laws the claim is based.

The grounds of UTPs are set out in DL 57/2008. Article 16 establishes who can bring an injunction action based on this Decree-Law:

"Any person, including competitors who have a legitimate interest in opposing unfair trade practices prohibited under this Decree-law, cam make an application for an

[29] We must note that this provision is going to have a different wording on 8 July 2021 with the entry into force of the Decree-Law 9/202,1 as can be read in the link for the consolidated version we made here available on page 15, in Article 21. Thus, this alteration will refer to a new set of rules to be published in 29 January 2021, the Legal Framework of Economic Sanctions.

injunction as provided for in Law 24/96 of 31 July, with a view to preventing, correcting or stopping such practices."

6. Is there a specific regulation in Portugal regarding the termination of the contract and right to indemnity for the other party?

As indicated above, the Civil Code will be also applicable to commercial relations. Therefore, the General Compensation Rules could be used alongside all the other mentioned specific measures to compensate for UTPs in this study.

More specifically concerning the distribution contracts, the figure of Denunciation ("Denúncia" as in Article 28 of DL 178/86 on Agency Agreements) in the context of causes of termination in these relationships is very often found in practice. Additionally, another common cause of termination in these types of relationships is the Opposition to Extension (Oposição à Prorrogação). Finally, another form of termination worth mentioning is the Resolution ("Resolução") by analogic application of the rules on terminating agency agreements ("Contrato de Agência" as in Article 30 of DL 178/86 on Agency Agreements) to the remaining distribution contracts (franchise, concession and others).

Another effect that can be seen upon the termination of a distribution contract is the possible assumption of a post-contractual non-compete obligation and the protection of the distributor's freedom. Additionally, there could be compensation for damage caused by failure to comply with the duty to give notice of termination ("dever de pré-aviso da denúncia"). Another significant figure of the Portuguese legal system in the case of termination of a distribution contract is clientele compensation ("Indemnização de clientela", as will be described in the next point).

7. Is there any specific / significant case law in your jurisdiction regarding supplier – distributor relationships?

A potentially relevant case, not directly related to UTPs, was the one that clarified the standing of non-profit associations to bring an action. However as stated in this study, UTPs could also be prevented by using the Competition Law (in a more restricted manner in comparison to the use of DL 166/2013).

Another illustrative case, and in connection with the section 4.6. regarding the "Denúncia" form of termination of the distribution contract, is the Decision of the Portuguese Supreme Court of 7 December 2018[30] in which it held that:

I - The agreement whereby the claimant bought pharmaceutical products from the defendant, for subsequent resale to pharmacies and wholesalers, on an exclusive basis, in Portugal, constitutes a commercial concession contract.[31]

II- The defendant's subsequent communication to the claimant that it would sell the pharmaceutical products directly to pharmacies and wholesalers constitutes termination (*Denúncia*) of the contract.

III- The exclusive distribution during five and a half years by the claimant and the unilateral termination without prior notice of the contract, justifies the application, by

[30] Decision here.

[31] This study mentions this form of distribution contract in Point 4.4.

analogy, of Articles 28 and 29 of Decree-Law 178/86 of 3 July, and the defendant being ordered to compensate the claimant for the termination without prior notice.

IV - The integration of the claimant in the distribution network of the defendant and the benefit of the latter due to the growing and constant number of customers and sales volume, justifies the application, by analogy, of articles 33 and 34 of Decree-Law 176/86 of 3 July and the defendant being ordered to pay clientele compensation to the claimant.

V - The fact that the defendant's conduct generated suspicions of incompetence and incorrectness on the part of the claimant in the market of pharmacies and stockists of pharmaceutical products does not prove the existence of damage to image justifying the award of compensation.

Another case concerning the figure of "Indemnização de Clientela" as noted in point 4.6. is the Decision of 9 January 2018 of the Portuguese Supreme Court:[32]

I - The dealer contracts entered into between the parties, which lack the consideration for the use of the trademark, are commercial concession contracts and not franchising contracts, governed (i) by what was agreed between the contracting parties, (ii) by the general rules of contracts and, with the necessary adaptation, (iii) by the rules on the agency contract, namely those relative to client indemnity.

II - Clauses 21.2 - providing for termination - and 21.8 - providing for the concessionaire not to be indemnified in the event of termination of the contract - included in the text of the contract, pre-formulated by the defendant and accepted by the claimant without any possibility of discussing its terms, the rules on general contractual clauses approved by DL 446/85 of 25 October, applies.

III - The termination provided for in article 28 of DL 178/86 of 3 July, applicable to commercial concession contracts, must be understood as termination *ad nutum*, that is, as the exercise of a discretionary power by any of the parties.

IV - The provision, in clause 21.2 of the contract, of a minimum notice period of one year for termination, exceeds the scope of the provision of that Article 28, as it is a contractually justified termination, close to the termination of the contract.

V - The invocation and proof of reorganisation of the network of concessionaires as a cause for termination of the contract, unaccompanied by other facts, does not make it possible to conclude that there has been a manifestly abusive use of the grantor's contractual power, violating the trust, rights and legitimate expectations of the concessionaire, for which reason the termination of the contract is considered valid.

VI - The right to clientele compensation provided for in Article 33 of DL 178/86 is of an imperative nature and must be applied within the scope of dealership contract X.

VII - In light of the proven facts, meeting the applicable requirements (set out in the abovementioned rule) entitle the claimant concessionaire to clientele compensation.

VIII - The calculation of the clientele compensation must comply with the provisions of article 34 of DL 178/86.

[32] Decision here.

IX - In consideration of the proven sales volumes and marketing margins and, based on a judicial presumption that cannot be challenged in a review, the measure of the brand's image and visibility contribution for the purposes of attracting customers, the arbitrated compensation of €168,980.30 euros is considered fair.

X - Interest is added to this amount from the date of service on the defendant of the judgment at first instance that fixed the value of the compensation - Article 805(3)(1) of the Civil Code, at the rate applicable to commercial obligations, because the claimant is a merchant and the interest comes from a commercial act - Article 11 of DL no. 62/2013 of 10 May.

8. **Do you have some information in Portugal about the coming transposition of Directive 2019/633?**

No further information is available at the moment. Article 13 of the Directive 2019/633 states that Member States must adopt and publish, by **1 May 2021**, the laws, regulations and administrative provisions necessary to comply with this Directive.

They must also immediately communicate the text of those measures to the Commission and they must apply those measures **no later than 1 November 2021**.

SPAIN

1. Could you give us some inputs on the general climate surrounding supplier-distributor relationships in Spain?

Distribution agreements are not regulated in Spain by any *ad hoc* piece of legislation, though they are shaped by general commercial and civil law principles, other sets of rules applying by analogy, specific laws and regulations applicable to particular sectors or aspects, and the case law.

Supplier-distributor relationships are generally based on the free will of the parties, where high bargaining power of one of the parties can unbalance negotiations, though there are various correctives curtailing the strict free will of the parties.

Other than the courts, at the administrative enforcement level, supplier-distribution relationships are under some circumstances subject to administrative oversight and have been assessed by the national Competition Authority occasionally (for instance the supply of milk to dairy products manufacturers or the supply of products to large retailers, e.g., supermarkets with high bargaining power, or in the context of vertical restraints).

2. Have there been some significant reforms, in recent years, on the regulation of supplier – distributor relationships in Spain?

There has been some attempted (but so far unachieved) in-depth reform and some reform dealing with particular sectors or areas dealt with below.

There is no Distribution Act in place, perhaps the most relevant piece of legislation within the area of distribution is Law 12/1992, of 27 May, on Agency (Agency Law), last reformed in 2011, which implements EU Directive 86/653 on Agency.

There was an attempt to regulate distribution contracts in 2011 by means of a Distribution bill. The reform of the Agency Law in 2011 included a provision extending its application to commercial distribution for the automotive sector, until the Distribution bill could be introduced in Parliament with a view to having a specific Distribution Law.

Thereafter, two draft bills for distribution contracts were submitted to Parliament but did not prosper. Subsequently, a draft for a new Code of Commerce was drawn up, but it did not mention or include any specific regulation of distribution contracts.

Thus, there is not a concrete regulation of distribution contracts and the subject of supplier-distributor relationship remains pretty much unregulated with the qualifications below.

3. Are supplier-distributor relationships subject to extensive regulation in Spain or is the trend rather liberal?

As indicated above, the vast majority of supplier-distributor relationships are based on the free will of the parties, which has been subject to a degree of correction by the case law. The courts have often relied on the Agency Law by analogy to adjudicate on various aspects of distribution relationships. Areas such as the principal's and distributor's rights and obligations, form requirements, contract termination and damages, or clientele compensation are areas where courts have drawn inspiration from the Agency Law when dealing for instance with selective distribution, exclusive distribution or dealership contracts.

Another important piece of legislation is Law 7/1996, of 15 January, on Retail Commerce (Retail Commerce Law). This is in principle an administrative law regulation which attempts to create a level playing field in retail distribution. To that end, it regulates important matters such as the due dates for payments to suppliers, multilevel selling requirements, prohibition of pyramid schemes or a minimum regulation on franchising contracts.

Third, there is specific legislation applicable to supplier-distributor relationships in the food supply chain; and then there are the laws on unfair trade, which can impact distribution in specific contexts. These are dealt with below.

Consequently, distribution contracts are open to negotiation between the parties, provided that they comply with the mandatory aspects of the applicable laws and regulations.

4. **What are the sources of the regulation on supplier – distributor relationships in Spain? (specific rules in commercial code for example, or application of general rules from a civil code?) What are the most common grounds for denouncing a practice in the context of supplier-distributor relations? What kind of practices are sanctioned / regulated?**

The general sources of regulation of commercial contracts are the 1885 Commerce Code and the 1889 Civil Code, the Agency Law (by analogy, see above) and the Retail Commerce Law.

Distribution contracts are atypical or non-regulated under civil law, so the main duties and responsibilities of each party lie with the agreement the parties have reached and the general contract law rules.

As for the sector regulation, we refer again to Law 12/2013, of 2 August 2013, on Food Supply Chain (Food Supply Chain Law), which aims to establish a fair supplier-distributor relationship by regulating its main aspects: the parties, their obligations, a guide of good practices and a catalogue of prohibited practices and sanctions.

On the other hand, there are other legal instruments which, even though they do not envisage specifically distribution agreements, may impact those relationships. This is the case of Law 3/1991, of 10 January, on Unfair Trade (Unfair Trade Law). There are plenty of situations that the Unfair Trade Law recognizes as unfair which apply to supplier/distributor relations.

The Unfair Trade Law enables companies harmed by unfair acts to seize the jurisdiction of the courts to exercise several actions, such as a declarative action, compensation for damages or an injunction, amongst others.

Prohibited practices under the Unfair Trade Law include the inducement by a third party to breach a contract; sales at a loss; gaining of a competitive advantage by means of breaching other legal rules or the abuse of a situation of economic dependence.

Nevertheless, perhaps the most common grounds for denouncing a practice are those contained in the Agency Law related to the termination of distribution agreements, prior notice and the subsequent damages and clientele compensations.

Moreover, any distributor or supplier may claim compensation for breach of contract, as specified in the Civil Code.

Finally, there are also other legal instruments having an impact on distribution law without addressing it thoroughly, amongst which it is worthwhile noting the competition law on vertical restraints (both European, Articles 101 and 102 TFEU, and Spanish, Law 15/2007, of 3 July, on Competition, and their implementing provisions, regulations and notices), and Royal Decree 201/2010, of 26 February, regulating commercial activity under franchising regime (Franchising Decree), which implements the regulation of franchising contracts foreseen in the Retail Commerce Law.

5. Who can act to seek sanctions for such practices?

Parties to a distribution relationship can seek declarations from a judge that the above laws have been breached and can request compensation for damages.

Laws having an administrative nature, such as the Retail Commerce Law and competition law generally, are monitored by the competent administrative authorities who can issue administrative fines.

6. Is there a specific regulation in Spain regarding the termination of the contract and right to indemnity for the other party?

Yes. As stated above, the Agency Law is used to construe distribution contracts generally (unless expressly excluded), particularly the termination and the compensation for clientele.

The regulation of termination stipulates that any agency contract -and distribution agreements by analogy- is presumed to be indefinite, unless otherwise agreed.

To terminate the agreement, prior written notice is mandatory in case of an indefinite agreement or before early termination of an agreement with a specific duration. Notice must be handed at least a month before termination and up to a maximum of six months (notice is increased for one month for each year the contract has been in force, with a maximum of six months). There is no need for prior notice when the opposing party has either been declared bankrupt or has breached any contract obligation.

Regarding the right to compensation for clientele, the Agency Law foresees the right of the agent to seek compensation provided that the supplier has seen its clientele grow -and continues to benefit from that growth after the agreement is terminated- because of the agent's commercial efforts. This compensation is considered "equitable" based on the existence of contractual obligations limiting competition, commissions that the distributor may fail to receive because of the termination or any other concurring circumstances. This indemnity is, however, limited in the Agency Law to the average annual remuneration from the last five years. Taking into account that the distributor does not obtain remunerations from the supplier (but a profit margin after the sale of the products), Spanish courts have considered the distributor's "net profit" (including structure costs and payable taxes by the distributor) as an adequate parameter for the calculation of such compensation.

7. Is there any specific / significant case law in your jurisdiction regarding supplier – distributor relationships?

The most significant case law in Spain regarding supplier-distributor relationships relates to the application by analogy of the Agency Law.

The Supreme Court has repeatedly established that: (i) unless otherwise agreed by the parties, the legal framework of agency agreements in relation to compensations for clientele, prior notice and duration, is applicable by analogy to distribution agreements; (ii) unless otherwise agreed by the parties, distributor shall be entitled to a compensation for clientele, limited to the average annual remuneration of the last five years foreseen in Article 28 of the Agency Law.

However, the parties can agree different compensation levels and even include a waiver to such compensation; (iii) moreover, as previously stated, since the distributor does not receive remuneration from the principal, the Supreme Court has established in its latest case law in relation to the calculation of the compensation for clientele by application by analogy of Article 28 of the Agency Law, that the most adequate criterion to calculate such compensation is the distributor's net margin, including the distributor's structure costs and payable taxes, which can significantly reduce the amount of the compensation.

8. Do you have some information in Spain about the coming transposition of Directive 2019/633?

Directive (EU) 2019/633 of the European Parliament and of the Council, 17 April 2019, on unfair commercial practices in business-to-business relations within the agricultural and food supply chain is in the process of being transposed.

A bill must still be approved by the Senate (it has already been approved by Congress). The Government's aim is for the Directive to be transposed by November 2021.

The Distribution Law Network contact details

BELGIUM

Sandrine Kinart
Lexena Avocats-Lawyers
Tel +32.2.486.09.02 / +32.476.83.43.56
s.kinart@lexena.eu
www.lexena.eu

ENGLAND AND WALES

Alan Meneghetti
RadcliffesLeBrasseur LLP
Tel: +44 (0)207 227 6704
alan.meneghetti@rlb-law.com
www.rlb-law.com

FRANCE

Nicolas Genty & Jessica Ramond
Loi & Stratégies
Tel +33 (0) 623 350 805 / +33 (0) 766 666 109
Nicolas.genty@loietstrategies.com
Jessica.Ramond@loietstrategies.com
www.loietstrategies.com

ITALY

Marco Venturello
Venturello e Bottarini. Avvocati
Tel + 39 011 5185831
marco.venturello@sleuresis.it
www.sleuresis.it

THE NETHERLANDS

Tessa de Mönnink
Parker Advocaten
Tel +31 (0)20 820 3350 / +31 (0)6 46086934
monnink@parkeradvocaten.nl
www.parkeradvocaten.nl

PORTUGAL

Ricardo Oliveira & João Tiago Morais Antunes
PLMJ
Tel: +351 21 319 73 00
ricardo.oliveira@plmj.pt
joaotiago.moraisantunes@plmj.pt
www.plmj.com

SPAIN

Pedro Callol
Callol, Coca & Asociados
Tel +34 649 421 304
Pedro.Callol@CallolCoca.com
www.callolcoca.com

The control of abuses in supplier-distributor relationships