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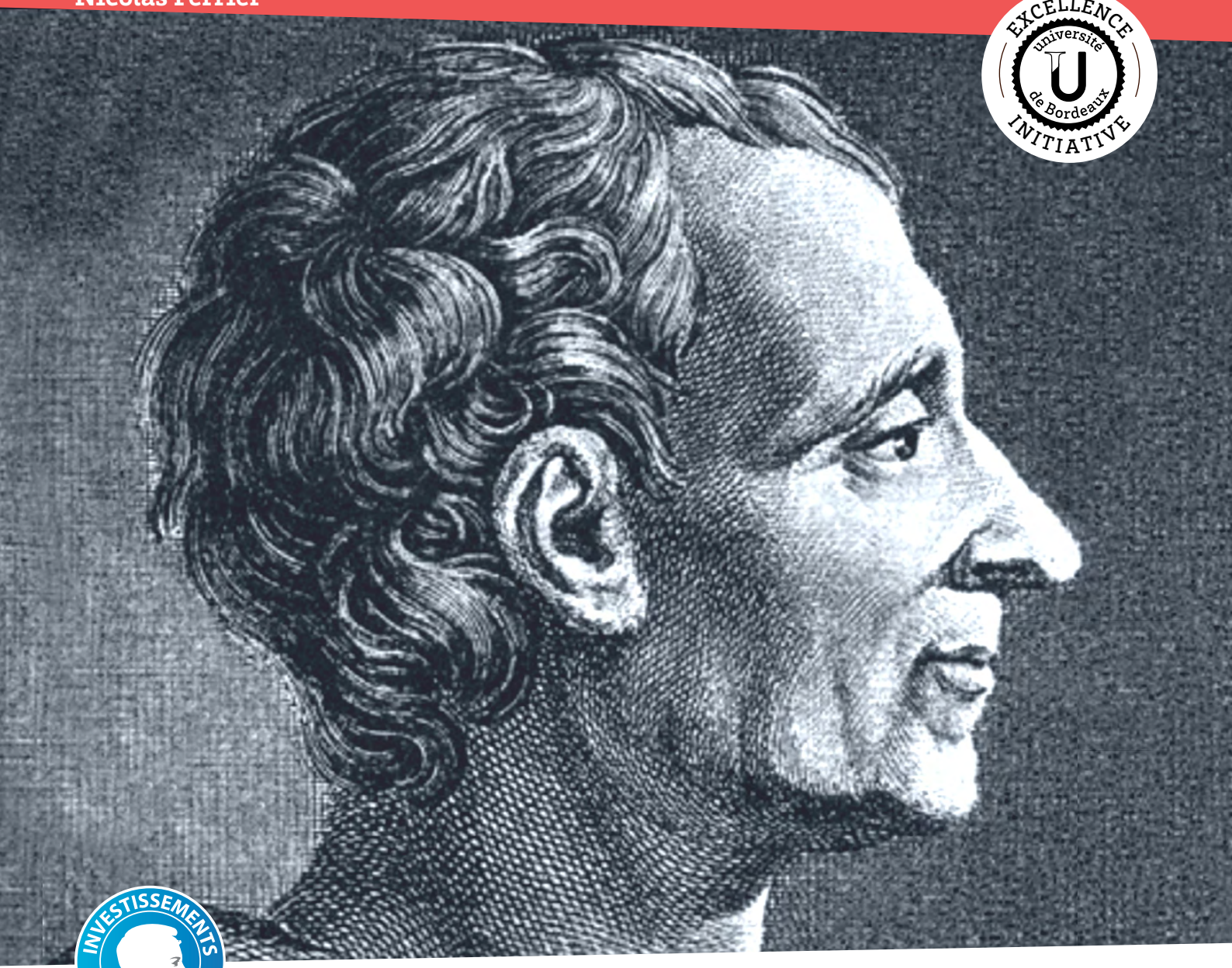

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Business Law:

The contributions made to French distribution law by the *loi Macron*

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In line with the usual practice in French law of the *loi fourre-tout* (literally, “mishmash statute”), the legislature adopted a number of measures, in the form of a statute known as the "*loi Macron*" (1), on highly varied topics of economic law and in particular the law on distribution. While the latter has not been turned thoroughly upside down, the amendments provide insight on the matter at hand. The first relates to the process of developing standards/norms. At least in part, the "Macron" law is directly inspired on the one hand by opinions issued by an independent administrative authority – in this case the *Autorité de la concurrence* (ADLC – the French Competition Authority) – and, on the other hand, active requests made by a professional sector. The second relates to the major current concerns of distribution law, regarding the promotion of competition between networks (I) and the framework for trade negotiation (II), both of which are occasionally linked (2).

I. Commercial distribution networks

The *loi Macron* added a new Chapter IV to Book III of the *Code de commerce* (Commercial Code), devoted to "commercial distribution networks", the wording of which – like so much recent legislation – being particularly defective and therefore a source of ambiguity.

Articles L. 340-1 and L. 341-2 are the culmination of a process, instigated in 2010, which unfolded in four stages: a review of the ADLC branding competition in the food retail sector in the Paris region as “insufficient”, specifically owing to various obstacles faced by their members to their withdrawal from networks (3), taken up in 2001 in an initial bill devoted to that sector, the content of which was particularly restrictive (4); the bill was ultimately abandoned owing to the change of parliamentary term, when the *loi Hamon* became the priority (5). The bill then re-emerged in 2015 in the form of the *loi Macron* which came into force on 7 August 2016 and applicable, according to the Constitutional Council, to existing contracts. The Law is likely not the last stage, since extensions are to be expected (6).

Beyond the reference to "networks", which joins other provisions (cf. Commercial Code, Articles L. 330-3 (7) and L. 442-6) and contributes to its legal recognition, the measures are intended to facilitate rebranding, thus promoting competition between networks. The measures are both broader in terms of the area (A) and more limited in content (B) than the 2011 bill.

A) Area

In fairly complicated terms, the measures apply only to certain networks, involving the identification of their members, i.e., the promoter and distributors.

1) The network promoter

The party known as the “promoter” is a natural or legal person governed by private law, which brings together groups of traders or provides the services mentioned in the first paragraph of Article L. 330-3 of the Code (8).

• As regards the first category, while the concept of legal person in which brings together traders is clear and specifically covers central contracting or SEO agencies, the concept of a natural person bringing together individual traders is more difficult to understand.

However, collective shops of independent traders (Commercial Code, Article L125-1 et seq) and mutual guarantee schemes (Commercial Code, Article L126-1 et seq) are expressly excluded but not co-operative associations of retailers (Commercial Code, Article L. 124-1 et seq) whose submission to the provisions, however, raises issues of interpretation (see below).

• As regards the second category, the reference to Article L. 330-3 of the Commercial Code involves the provision by the promoter of distinctive signs, curiously described as a "service". One difficulty is that Article L. 330-3 requires, in consideration of this “service”, an obligation of exclusivity or quasi-exclusivity. Does such an obligation on the part of the distributor constitute a condition for the application of Article L. 341-1 of the same Code? Some believe so, on the basis of a restrictive interpretation of Article L. 341-1 justifying the restriction the scope of its application as far as possible (9). However, it is unclear whether this interpretation corresponds to the will of the legislature, which moreover did not include all the requirements under Article L330-3, only “provision” as envisioned by the legislation.

Franchise or concession contracts generally fall under the second category; this is more rarely the case for selective distribution agreements because these do not always prevail over the provision of distinctive signs.

In any event, reviewing the compliance of those measures with the Constitution, the Constitutional Council considered that they "apply only to contracts between distribution networks and retail operators" (10), thus excluding contracts between suppliers and distributors but outside any network.

2) The distributor

The party known as the “distributor” is any person who operates a retail store. Wholesalers are implicitly excluded, in accordance with a distinction between wholesale and retail trade for which the criterion is not specified but could be based on the primary character or otherwise of sales made to distributors distributor provided that they act on behalf of retailers.

The activity may be operated by the distributor on its own behalf or for the account of others, which serves to include representatives such as branch or business capital managers, as well as agents/commissionaires.

However, the requirement contained in the 2010 bill was not included, thus resulting in the provisions applying to food retail only.

B. The scheme

1) Synchronising the termination of multiple contracts

The legislation provides for a legal form of indivisibility of certain contracts between the promoter and the distributor in the event of a breach of such a contract. As if in response to Opinion 10-A-26 of the ADLC (pt. 136 et seq.), the aim is to prevent the relationship enduring owing to discrepancies in the duration of each contract.

a) The contracts concerned

Principle

Legal indivisibility applies to all contracts with the common purpose of store operations, thus excluding contracts pursuing another aim. The requirement does not seem difficult insofar as it is based on an objective criterion that is relatively easy to implement.

The contracts taken as a whole – as opposed to each individual contract making up that whole – must include clauses that could restrict the free exercise of the distributor's commercial activities. While the concept clearly covers certain clauses such as the exclusivity clause and the non-compete clause, others pose difficulties, e.g. the priority supply clause, the quantity forcing clause, the sales target clause, the clause imposing standards or that prohibiting cross-selling within the network...etc. Several conceptions are in fact possible in relation to any clause that affects the free exercise of the distributor's activities; or only the clause that prohibits a distributor from exercising an activity competing with that exercised within the network activity; or, based on the end purpose of the measures, the clause which deters distributors from leaving the network or, similarly, makes it harder for the distributor to develop activities outside the network.

Exceptions

Indivisibility does not include leases, contracts of association or *contrats de société civile, commerciale or cooperative* (civil, commercial or co-operative partnership agreements – Commercial Code, Article L341-2, final paragraph).

The exclusion of co-operative partnership agreements might appear to be in contradiction with the first paragraph of Article L. 134-1, which implicitly makes the co-operative sector subject to the rules on indivisibility. It is possible to reconcile the two provisions by considering that, pursuant to the first paragraph, the co-operative sector is not immune to the provisions but that under the last paragraph, the co-operative partnership agreement constitutes an exception to the rule of indivisibility. In other words, the various contracts between a co-operative of retail merchants and its members (the retailers) fall within the remit of the provisions, with the exception of the *contrat de société* (partnership agreement).

This interpretation raises questions as to the true scope of the provisions. They could, in fact, be circumvented by the stipulations of clauses restricting the freedom to operate, not in the distribution contract, but in the partnership agreement (the articles of association, for example) (12). Such circumvention, however, could be avoided by making a distinction – which admittedly is difficult to implement and does not follow the provisions to the letter – between, on one hand, what is strictly an associate link (which confers the rights or obligations of a associate in their own right) which would not be subject to indivisibility; and, secondly, the "affiliate" link (which confers the rights and obligations of a seller), which would be subject to indivisibility even though it would result from articles of association (such as an obligation of exclusivity or non-competition).

b) Breach of contract: the causes concerned

Indivisibility is characterised by the fact that all the component contracts provide for a common contract expiry (para. 1) and the termination of one contract is the termination of all contracts (para. 2).

The concept of expiry should not be understood to imply that all contracts are fixed-term (13). Three situations are in fact conceivable (14): either contracts are fixed-term (*contrat à durée déterminée* – CDD), the expiry of one contract bringing about the expiry or lapse of the others according to whether or not the respective terms thereof are identical; or the contracts are open-ended (*contrat à durée indéterminée* – CDI), and the termination of one applies to all the others; or some are fixed-term (CDD) while others are open-ended (CDI), and the non-renewal (for CDDs) or termination (for CDIs) of one bringing about the lapse (for CDDs) or termination (for CDIs) of the others.

Although purportedly covering termination only, the purpose of the Law intended to facilitate rebranding and its wording (the initial – and general – assertion that the contract expiry must be common) together result in the outcome being extended to instances of termination, cancellation or lapse of one of the contracts concerned. This raises the question as to whether the retroactive nullity of one contract brings about the (non-retroactive) nullity or simple lapse of the others. Insofar as the legislation establishes a legal indivisibility which is only intended to guarantee the possibility of withdrawing from the network and not to enshrine a “link of consistency" between the various contracts at all stages of the contractual relationship, it does not necessarily require the extension of the retroactive effects of the nullity affecting one contract to the others. Such an effect could, however, result from a situation of a concretely assessed indivisibility, aside from the legal indivisibility discussed here.

The relationship is thus undermined, with the aim of protecting the distributor by facilitating its withdrawal from the network, which can have undesirable effects (15).

2) The confinement of post-contractual clauses restricting the free exercise of an activity

Article L. 341-2, I of the Commercial Code prohibits certain post-contractual clauses, subject to exceptions under Article L. 341-2, II of the same Code.

a) Prohibited clauses

The ban applies to "any clause which, after the expiry or termination of the contracts referred to at Article L. 341-1 of the Commercial Code, aims to restrict the freedom of exercise of commercial activity" on the part of the distributor. The clauses concerned are deemed to be unwritten, which precludes any judicial interpretation and any limitation period.

Again, these measures respond directly to the concerns of the ADLC for which these clauses constitute an impediment to any withdrawal from the network (16).

An initial issue is the identification of the relevant clauses, beyond those for which the answer is obvious, such as the non-compete clause or the non-re-affiliation clause. What about, for example, the stipulation (preference agreement, unilateral promise of sale) allowing the promoter, at the end of the contract and by preference over any other, to acquire the business from the distributor who may be driven to transfer the same? On the one hand, we may consider that this

clause does not strictly speaking affect the free operation of the distributor who, by contrast, wishes to cease trading; on the other hand, this clause could indirectly deter that distributor from transferring its business or exercising another activity. It should be noted also that the ADLC itself identified these clauses as an obstacle to rebranding (17).

A second issue is the format of the clause in question. Insofar as the legislation covers "[a]*ny clause which, after the expiry or termination of the contracts referred to in Article L. 341-1 ...*", it seems that it may appear either in one of the contracts falling within the scope of legal indivisibility, or in contracts which are excluded. According to this analysis, the post-contractual non-compete clause included in the company's articles of association, for example, would be deemed unwritten even if its format is not amongst those covered by Article L. 341-1 of the Commercial Code. Indeed, although they are not stipulated in a contract covered by legal indivisibility, such a clause has the effect, on expiry or termination of one of the contracts making up the indivisible whole, of restricting the freedom of the distributor.

b) The clauses regulated

Notwithstanding the above, there is no prohibition on clauses cumulatively shown to concern goods and services in competition with those who are the subject of the contract mentioned at Article L. 341-2, para. I; to be limited to land and premises from which the distributor operates during the term of the contract mentioned in the same paragraph I; to be essential for the protection of substantial, specific and secret expertise shared in the context of the contract mentioned at the same paragraph I; and the duration of which does not exceed one year following the expiry or termination of the contracts referred to in Article L. 341-1.

The rule is based directly and openly (18) on European competition law and specifically Article 5 of Block Exemption Regulation 330-2010 (19). It remains controversial. First, the Regulation does not prohibit a clause that does not meet these requirements, but only defines the conditions under which such a clause may benefit from the block exemption. Moreover, in the absence of such a block exemption, it is still possible for the contractor to demonstrate that the clause offers such efficiency savings that it should benefit from an individual exemption, thus requiring further examination and leading to the second criticism.

The validity of the post-contractual clause is subject to conditions that prohibit a detailed assessment. Hence the preclusion of a specific assessment, usually conducted by the courts, in terms of the proportionality of the restriction of freedom with regard to the legitimate aim of the clause. This also precludes any argument other than the protection of expertise. This excessively rigid rule is a form of questionable distrust with regard to the courts, whose decisions in the field, resulting in a practical assessment of the effects of the clause, however, gave satisfaction nonetheless.

II. Trade relations

A. The easing of rules governing supplier-wholesaler relations

Commercial negotiation is subject to ponderous formalism, originally intended to fight against the abusive practices of supermarkets and to facilitate the identification thereof. Sticking to the basics here, particular note should be made of the requirement to disclose the terms and conditions or "T&Cs" (Commercial Code, Article L. 441-6) and the drafting of an annual summary agreement (the "*convention annuelle*" (annual agreement) or "*convention récapitulative*" (summary

agreement)) to be signed before 1 March of the financial year or "year N" and which summarises the outcome of the negotiations (Commercial Code, Article L. 441-7).

The *loi Hamon* of 17 March 2014 added to this formalism, imposing the disclosure of the T&Cs before 1 December of year N-1, stating the tariff structures in the consolidated convention, the concomitance of the date of entry into force of the different components of the price resulting from the negotiations, and a "duty of courtesy" requiring a detailed response from the distributor within two months of a written application from the supplier with regard to the implementation of the agreement.

These new measures were strongly criticised by some sectors, and particularly the wholesale sector which stressed that the unsuitable, even excessive nature thereof owing to the two-fold specificity of this sector (20): firstly, the balance of relations limits the risk of abuse and, secondly, price volatility is disregarded by the principle of inviolability of the terms and conditions of sale. These criticisms were heard by lawmakers, who took advantage of the *loi Macron* to create a exception specific to the supplier-wholesaler relationship (21).

The measures apply to relations between a supplier and a wholesaler, the latter being defined as "*any natural or legal person who, for professional purposes, buys products from one or more suppliers and sells, primarily, to other traders, wholesalers or retailers, processors or other professionals who cater to the needs of its business*" to which are assimilated "*central purchasing or wholesaler SEO*". However, it excludes operators running one or more retail outlets, be it directly or indirectly.

While a summary agreement must still be established before 1 March of the financial year, the scheme provides several special measures:

• No deadline imposed for the disclosure of "T&Cs" before the natural limit of 1 March, the deadline for signing the summary agreement and entry into force of the terms and conditions of the relationship.

• It is not necessary to determine all terms and conditions of sale at the conclusion of the summary agreement. It is thus possible to make provision in this agreement for "*types of situation and the ways in which exceptional terms of the sale transaction are likely to be applied*". In summary, from the general provisions of article L. 441-7 of the Code, it is easier to amend the terms and conditions, both formally and substantively; it even seems possible to admit a unilateral amendment clause.

• The summary agreement does not have to mention the price list as this has already been communicated by the supplier. This reduction in the existing formalism is explained by less suspicion of abuse of negotiating positions, because of the reputedly balanced nature of the relationships involved. Indeed, where there is less risk of abuse, there is less justification for regulating such negotiations.

• The absence of an obligation simultaneously to apply the negotiated terms and conditions. Such a requirement under Article L. 441-7, para. 7 of the Commercial Code is intended to fight against the securing of unjustified conditions. The reasoning is as follows: for the parties, the agreed price

is the fair consideration of the terms of the transaction; it is the value thereof according to the parties. Shall therefore be suspect, in the context of an unequal relationship, either the application of the price in conditions other than those for which it was agreed; or mutually applying the same conditions to a price other than the one originally agreed. Indeed, such a change suggests abuse by the imposition of conditions or prices devoid of consideration. However, wholesale-supplier relations being balanced, an obligation such as that referred to in Article L. 441-7, para. 7 is no longer justified; this can explain precisely why it is discarded in this type of relationship. Nevertheless, if a gradual implementation of the conditions/price is possible here, there remain the traditional grievances as to the retroactive application of new terms and conditions (Commercial Code, Article L. 442-6, II a) and Article L. 442-6, II, 12) or obtaining an unfair advantage (Commercial Code, Article L. 442-6, I, 1° or 2°).

• The absence of "duty of courtesy", which is justified again by the fact that the reason for such a requirement (linked to preventing abuse by the incorrect application of the agreed terms and conditions) is not to be found here; the relationship is more equal.

B. Extending the scope of compulsory renegotiation clause

Article L. 441-7 establishes a principle of the inviolability of conditions designed in particular to prevent untimely renegotiations during the course of the commercial relationship, which can be harmful to the economically weaker partner.

However, the law imposed a renegotiation clause to protect the weaker partner when the products concerned are subject to strong fluctuations, by identifying products covered by this provision (Article L. 441-8). In a recent briefing note, the DGCCRF considered that the measures did not apply to "*contracts for services, such as outsourcing contracts for the supply of a product manufactured on the basis of specifications imposed by the distributor*" and in particular to products sold under the retailer's own brand (*produits "MDD"*) (22). This analysis was challenged, which probably explains why it has been expressly contradicted by the *loi Macron*, which added an obligation to provide a renegotiation clause "*in contracts of a duration greater than three months with regard to design and manufacture, on terms corresponding to the particular needs of the buyer*".

C. The tightening of rules in matters of payment periods

The fight against late payments or abusive payment delays has long been a common target of domestic and European law. The *loi Macron* is the last piece in bringing French domestic law into line with Directive 2011/7/EU of 16 February 2011.

By amending Article L. 441-6 of the Commercial, the *loi Macron* brings an end to the choice offered to partners between a maximum of 60 days for payment from the date of issue of the invoice or 45 days after the end of the month in which the invoice was issued. The former now applies in principle.

The scope of the legislative amendment is however reduced since it is still possible to prefer the second option, on condition of an express provision and a lack of "clear abuse" to the detriment of the creditor.

Moreover, the law maintains the possibility of providing for exceptional agreements in "*sectors with particularly strong seasonality*", the list of which is established by decree (Commercial Code, Article D. 441-5-1), and again on condition of an express stipulation and the absence of manifest abuse.

D. The increasing penalties for abuse

Abusive practices referred to in Article L. 442-6 C. com. were previously sanctioned by a fine set in principle at €2 million; said fine could, however, be as much as three times the amounts that the victim of the practice had unduly paid to the perpetrator.

In order to give the scheme greater deterrent effect, the *loi Macron* increases the penalty, raising the fine to 5% of the turnover achieved in France by the perpetrator over the course of the most recent year ended since the financial year preceding that in which the practice was first implemented.

Notes:

(1) Cons.Constit., 5 August, 2015, No. 2015-715.

(2) In the current context of "price wars", the major retail chains are brought closer through their central contracting or SEO agencies, to increase their bargaining power with suppliers. The *loi Macron* now includes the obligation to inform the French Competition Authority of any agreement between retailers or agencies, to negotiate in bulk either the purchase or reference "consumer" products with a view to the retail thereof, or the sale of services to suppliers. The obligation rests on these companies or "groups" when they exceed a turnover threshold set by decree (Commercial Code, Article L 462-10). The provision echoes Opinion 15-A-06 of 31 March 2015 issued by the same Authority on the alignment of central agencies in the retail sector, highlighting the concerns raised by such alignment in terms of competition.

(3) *Avis 10-A-26 du 7 décembre 2010, relatif aux contrats d'affiliation de magasins indépendants dans le secteur de la distribution alimentaire.*

(4) *Projet de loi n°3508 du 1er juin 2011 renforçant les droits, la protection et l'information des consommateurs,* Article 1.

(5) *Loi n° 2014-344 du 17 mars 2014 relative à la consommation*

(6) Article 31 para. 3, *Mesures concrètes pour renforcer la concurrence en favorisant le changement d'enseigne*

(7) C. com., Article L 146-1: "*Natural or legal persons managing a commercial or artisan business, on payment of a commission proportional to revenues, are called "manager-agents" when the contract is concluded with the principal, on behalf of whom, as appropriate in the context of a network, they manage said business...*". Article L. 442-6, I: "*Shall incur the liability of the perpetrator and compel him to repair the damage caused any act committed by any producer, trader, manufacturer or person registered in the* répertoire des métiers *(...) 6. Of participating directly or indirectly in any breach of the prohibition on resale outside network against a distributor bound by a selective or exclusive distribution agreement ...*". Article R 330-1: "*The document provided at the first paragraph of Article L. 330-3 shall contain the following information (...) 4. The date of establishment of the company with a reminder of the main stages of its development, including that of the network of operators ...*".

(8) "*Any person who provides another person's trade name, trademark or brand, whilst requiring exclusive or quasi-exclusive obligations for the exercise of its activity shall be bound, prior to the signing of any contract in the common interest of both parties, to provide to the other*

party a document giving truthful information, which allows them to enter into the contract in full knowledge of the facts...".

(9) L. et J. Vogel, Loi Macron : un nouveau régime des contrats de distribution inutile, coûteux et inadapté, AJCA 2015, p. 513.

(10) Cons. constit., cited above, paragraph 25.

(11) In this sense, ADLC, Lignes directrices relatives au contrôle des concentrations, 16 déc. 2009, § 75; Circ n° 892, 20 mars 1993, BOCC 1993-1.

(12) V. Moreover ADLC, cited above, No. 178, which extended the ban to partnership agreements.

(13) See *Rép. min.* n° 8964: *Journal Officiel* of 8 March 2016.

(14) D. Ferrier, La loi du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques... en matière de distribution (?), Dalloz 2015, p. 1904.

(15) See D Ferrier, cited above, who notes that this provision offers promoters, on the one hand, an argument for excluding a distributor who wishes to remain in the network; and, on the other, preclude the engagement of onerous investments that are nonetheless necessary in the face of the risk of early termination.

(16) Comp. ADLC, avis 10-A-26, cited above, pt. 136 et seq.

(17) *Ibid*., pt. 225 et seq.

(18) See Rep. min., cited above.

(19) Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

(20) J. Vogel, Loi Hamon: guide de la négociation commerciale dans le commerce de gros, éd. CGI, 2014.

(21) For a detailed examination, see N. Ferrier, L'allègement des règles de la négociation commerciale dans le commerce de gros, prémices d'un droit commun de la négociation pour les relations égalitaires ? JCP E 2015, 1508.

(22) *Note d'information*, October 2014, p. 25