

COMPETITION / DISTRIBUTION LAW

February 2008

Changes brought in by the Chatel Act as regards distribution

The French Act no. 2008-3 dated 3 January 2008¹ on the development of competition for the benefit of consumers, called the Chatel Act, provides for a certain number of important measures regarding relations between producers and distributors (retailers). These measures consist notably of modifying the method used to calculate below-cost selling thresholds (1), of requiring the execution of a single agreement setting out the terms and conditions which arise out of sales negotiations between suppliers and distributors/retailers (2), and of providing that failure to communicate the general terms and conditions of sales is no longer a criminal law offence (3).

1. Changes to method of calculation of below-cost selling thresholds

Article L. 442-2 of the French Commercial Code, which arises out of the Galland Act of 1 July 1996 on fairness and balance in commercial relations, prohibits below-cost selling by distributors and the advertisement of below-cost selling activities under penalty of criminal law sanctions.

Below-cost selling is defined as resale at a price lower than the effective purchase price.

A move towards lowering the "effective purchase price", and thus the threshold below which a product is deemed to be sold at below its cost, was initiated by the Act in favour of small- and medium-sized enterprises dated 2 August 2005 (the Dutreil Act). This Act lowered the below-cost selling threshold by adopting a method for calculating the threshold amount in which it is gradually set off against the financial benefits arising out of off-invoice and sales cooperation price reductions (called off-invoice rebates and discounts). The setting-off was however limited to financial benefits in excess of a threshold of 20% in 2006, and 15% as regards 2007.

The Chatel Act – the aim of which is to bring down supermarket prices – is in line with the broader trend in favour of lowering below-cost selling thresholds.

Indeed, the effective purchase price is now defined as "*the net unit price listed on the purchase invoice, less the amount of all the other financial benefits granted by the vendor expressed as a percentage of the net unit price for the product, plus turnover taxes, specific taxes pertaining to*

the resale and the cost of transport" (see Article L. 442-2 of the French Commercial Code). The total amount of financial benefits included in calculations of below-cost selling thresholds is therefore no longer limited. The below-cost selling threshold has therefore become a unit price with three net values, which enables all off-invoice discounts and rebates to be taken into account.

2. Obligation to set out the terms and conditions governing commercial relations between suppliers and distributors/retailers in a single agreement

The Chatel Act introduces the requirement of setting out the results of sales negotiations between suppliers and distributors/retailers in a single agreement, which must be entered into in writing before the 1st of March each year or, should commercial relations commence during the year, within two months of the first order being placed. The agreement may take the form of a single document, or may be made up of a framework agreement and implementation agreements, which together constitute a whole (ref. Article L. 441-7 of the French Commercial Code).

Up until now, operators only had the obligation of setting out, in a sales cooperation agreement, the services rendered by distributors/retailers in order to promote sales of products – that is, services not covered by purchasing and sales obligations.

The new "*single agreement*" must now include:

- The terms and conditions governing product sales promotion activities and the provision of services as they arise out of sales negotiations;
- The terms and conditions governing how the distributor/retailer or the service provider undertakes to provide to the supplier, as regards the resale of the latter's products or services to consumers, any and all services to promote the sale thereof which are not covered by purchasing and sales obligations;
- The terms and conditions governing how the distributor/retailer or the service provider undertakes to provide to the supplier services distinct from those referred to above.

Consequently, the single agreement must set forth both the benefits granted to distributors/retailers by the general/specific terms and conditions of sale and the benefits granted in terms of sales cooperation and distinct services.

¹ The French Act no. 2008-3 published in the Official Journal dated 4 January 2008

3. Provision that failure to communicate general terms and conditions of sale is no longer a criminal law offence

The Chatel Act has eliminated criminal prosecution for refusals to provide general terms and conditions of sale to any and all persons that request them. The sanction for breaches of this obligation is now covered by the non-compliant operator's civil liability (ref. Article L. 442-6-1, point 9 of the French Commercial Code).

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