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Developments in Distribution Law - 2020/2021
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Focus on EU, French, Dutch and UK legal regimes

At the end of 2020 and the start of 2021, there were several noteworthy changes across Europe in distribution law, more specifically regarding the rules on conclusion of contracts, formal contractual requirements and unfair business practices, to name a few.

On a European Union (EU) level, there were also legislative developments that provided clarifications on various aspects of distribution law (Section I of this brief). The EU also influenced significant changes in member states' legislative landscape. As a reminder, in 2019, the EU passed a directive on unfair trading practices in the agricultural sector (1) and a regulation on promoting fairness and transparency for business users of online intermediation services (2).

French distribution law (Section II of this brief) was impacted by two laws: the "DDADUE" (*Diverses Dispositions d'Adaptation Au Droit de l'Union Européenne*) Law of 3 December 2020 transposing various European provisions on economic and financial matters (3), and the "ASAP" Law (*Accélération et de Simplification de l'Action Publique*) of 7 December 2020 on public action (4).

The Netherlands also shifted their approach to franchise agreements and distribution law with the adoption of the new Dutch Franchise Act (5) (Section III of this brief).

It is also worth mentioning that Brexit will have an impact on how UK distribution law develops in the coming years (Section IV of this brief).

¹ Directive (EU) 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain

² Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance)

³ *Loi n°2020-1508 du 3 décembre 2020 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économique et financière*

⁴ *Loi n°2020-1525 du 7 décembre 2020, d'accélération et de simplification de l'action publique*

⁵ Dutch Franchise Act, passed on 30 June 2020, entered into force in January 2021

I. Changes in EU Law

In 2020 the Court of Justice of the EU (CJEU) provided important clarifications regarding the criteria used to determine if an intermediary can be qualified as a commercial agent and, as a result, benefit from an otherwise beneficial legal regime afforded to commercial agents (6). The CJEU's decision, more expansive in nature, is in sharp contrast to the more restrictive view forged by French case law in that CJEU makes a compelling case that an intermediary can be qualified as a commercial agent even though the person may not have the power to modify the price of goods or services (which previously would have prevented such a qualification according to French case law).

II. Evolution of French Distribution law

Firstly, it is worth mentioning that some experimental/temporary provisions of the "Egalim" (*États Généraux de l'Alimentation*) Law (7), regarding the food sector (but which could potentially lead to a broader amendment of French Distribution Law) have been extended to April 2023. This law has multiple objectives, including to ensure a fair price is paid for producers; reinforce the health, environmental and nutritional quality of agricultural products; and encourage a healthy and safe food supply.

The "DDADUE" and "ASAP" laws have resulted in an increase of disputes regarding unfair business practices as defined by Article L.442-1 of the French Commercial Code. Practices leading to a disproportionate advantage, a significant imbalance or / and abrupt termination of the commercial relations have now been completed by the following practices:

- Imposing disproportionate penalties for the inexecution of contractual obligations
- Imposing direct and automatic penalties for late or early delivery, or non-conformity of goods
- Breaching the obligations set out in the European regulations on promoting fairness and transparency for business users of online intermediation services

The "ASAP" legislation also strengthened the requirements for contractual formalism. As a reminder, Article L.441-3 of the French Commercial Code sets out the obligation for the supplier and the distributor to conclude a single convention, which formalises the end of precontractual negotiations. The "ASAP" legislation introduced an obligation to mention in the contract the details regarding the object, the date, the implementing rules, the remuneration and the products which are subject to a contract concluded with a legal entity located outside of the French territory.

Last but not least, the Paris Court of Appeals (8), provided clarifications regarding the activity of branch management and the applicability of the French legal regime linked to this activity. The French judges clarified that the statutory regime can be applied to regular employees who are, de facto, branch managers.

⁶ CJUE, 9e ch., 4 June 2020, case C-828/18

⁷ Loi n° 2018-938 du 30 octobre 2018 pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous

⁸ Paris, 15 January. 2020, n° 17/11510

III. Evolution of Dutch Distribution Law

The new Dutch Franchise Act came into effect in 1 January 2021 and aims at achieving a better balance in the relationship between franchiser and franchisee. In order to do so, the Act relies in the core ideas of *reasonableness* and *fairness*.

While the law is relatively recent, there is already case law developing to help better define how these notions play out in practice. On 11 February 2021 the District Court of Noord-Nederland rendered a judgement, in which the court referred to the Act to rule a case involving an agency agreement. This underlines the broad influence the Act may have on Dutch distribution law in the future.

Thus, the core elements of the act should be considered by businesses involved in activities of distribution:

- Prior to the conclusion of the franchise agreement there is a duty to share information
- The act introduces a "cooling off period" of 4 weeks between the moment on which the franchisee receives all required information and the moment of signing the franchise agreement
- The act sets conditions for making amendments to the franchise agreement or formula
- The act furthermore contains a potential right of goodwill for the franchisee on termination of the franchise agreement, and limits non-competition restrictions

IV. Evolution of UK Distribution Law

Since 2016 the product safety regime applied in the UK was still directly derived from EU regulations and directives. However, since Brexit dating from the 1st of January 2021, it now operates as a matter of UK law only.

The UKCA (UK Conformity Assessed) mark is now the new product mark which confirms that goods meet certain standards, which have substantially remained the same when compared prior to Brexit. However, these standards are likely to evolve / diverge in the future since the government announced plans on 11 March 2021 to renew and strengthen these safety laws.