

## WHAT A PLEASANT MONTH IS MAY IN THE COMPETITION AND DISTRIBUTION FIELDS

### An underlying modernization of the economy?

**Will true reforms in the competition and distribution fields sprout out this spring?** Many works published in the last few months have predicted changes: Novelli's report regarding payment terms (December 2007), Attali's report on the release of French growth (January 2008), Hagelsteen's report on the negotiation of price and sales conditions (February 2008). According to the persons operating in the field, the foregoing have provoked hopes and doubts... The bill for the modernization of the economy which will be discussed in May 2008 should deal with all these themes.

■ **Reviving competition.** In addition to the extension of the period for the sales and the creation of an unique high authority for competition ("Haute Autorité Unique de la Concurrence"), the government is planning on changing the regulations of commercial town-planning, in order to support the entry of new role-players in the distribution field. The authorization system for the opening of superstores should focus more on environmental and architectural issues.

In order to encourage price decrease to the benefit of consumers, the bill should also allow freedom in the negotiation of prices between suppliers and distributors. Even though we currently live within a system where prices are free, the supplier has to offer the same sale price to two comparable clients. Any difference must be justified by a genuine consideration from the client to the seller: this goes alongside the rules against discrimination, one of the industrialists' and manufacturers' last defence used to negotiate their prices with store distribution... It is precisely the prohibition of discrimination that the bill should aim at modifying—if not suppressed?—thereby allowing a freedom in the negotiation of prices. To sum up, this will be a true revolution in the distribution field! But violent reactions from industrialists and producers are building up.

■ **Shortening payment terms** is another target of the bill to modernize the economy. The law has already moved forward on several occasions: automatic penalty for late payments, legal term of payment should the seller and buyer fail to agree (30 days), mandatory legal period for food products, alcoholic beverages and transportation of goods (30 days) as well as for local governments (45 days), fines (€ 15,000/€ 75,000) if the terms mentioned above (whether contractual or legal) are not complied with. Attali's report suggests imposing to small businesses a payment term of 30 days at most. The bill would not be as strict (or ambitious?) by imposing a capped period of 60 calendar days and a rise of penalties for late payment. Moreover, professionals would have up to June 30th to reach sectorial agreements of 30 or 45 days.

Is the repression purporting to provide small businesses with a breather, a good solution? If prices can now be negotiated freely without being punished for discrimination, shortening payment terms could well cost industrialists and small businesses a lot. It is likely that the revolution for the balance of power between clients and suppliers will not reach that extent.

Catherine Robin

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ALERION

## WHEN SUSTAINABLE ENERGY AND CONSTRUCTION MEET AND MINGLE...



In the last twenty years, the concerns regarding the environment have moved from ideology to industrial application, opening new perspectives of economic development in all industries through "bio-responsible" innovations.

In the specific field of electric energy, the promotion of electricity produced from sustainable energy sources (e.g., waterpower, windpower, photovoltaics, geothermal science, biogas) is widely encouraged by the EC authorities. Pursuant to EC Directive n°2001/77/EC dated September 27th, 2001, the electricity produced in the Community from sustainable energy sources should, by 2010, and provided that the indicative global target fixed by the directive is honored, represent 22.1% of the energy consumption out of the global electricity consumption of the Community.

To that purpose, there are many systems applied in the Member States to promote the development of these energy sources. In France, for instance, Statute n°2000-108 dated February 10th, 2000, obliges EDF to purchase the electricity produced from facilities using sustainable energies. An administrative order determines the specific purchase conditions in each field, to which bonuses can be added.

For companies who may choose to produce electricity from sustainable energy sources, this national and Community issue is clearly appealing from a financial point of view: as being incorporated in the companies' infrastructures, this means of electricity production can (1) not only cover or provide partial or total energy supply for their own infrastructures, but also (2) become a source of income for those who choose to sell the excess of non-consumed production to EDF.

Many fundamental points will have to be confirmed by those intervening in the building process, on the one hand, and the managers, on the other, in order to optimize their marketing scheme for ones, and their construction project for others: the choice of the construction process incorporating these types of electricity production, the related administrative constraints, the guarantees provided by the developers as regards the durability and the quality of the facilities, the insurance coverage for damage and liability pertaining to these processes, the integration of the electricity production in the leases linked to the facilities.

We group our skills in the fields of construction, insurance, leases and contracts in order to assist our clients in the development and the optimization of their projects.

NATHALIE DUPUY-LOUP

### IN A NUTSHELL

- 1 The EC Directive n°2001/77/EC dated September 27th, 2001, promotes the production of electricity from sustainable energy sources and establishes at 22.1% the share of the energy consumption produced from these sources, out of the global electricity consumption of the Community in 2010.
- 2 Statute n°2000-108 plans to oblige EDF to purchase the produced electricity to which could be added bonuses, in favor of facilities making use of sustainable energy sources.
- 3 The managers as well as those contributing to the building process of these facilities will have to take into account the liability, insurance, lease entailments for the integration of these electricity production means in the construction of their work.

## DURATION OF SHAREHOLDER AGREEMENTS: FOLLOWING THE JUDGMENT OF THE COMMERCIAL CHAMBER OF THE FRENCH SUPREME COURT DATED NOVEMBER 6TH, 2007, UNCERTAINTY REMAINS



The uncertainty around the duration of a shareholder agreement meant to apply “for as long as the parties will be shareholders” has not been entirely clarified by the judgment of the Commercial Chamber of the French Supreme Court which was rendered on November 6th, 2007.

Until now, the applicable case law considered that shareholder agreements providing such duration were deemed concluded for the duration of the company’s existence, since at the expiration of the corporate term, the shareholder status automatically disappeared.

This position had first been questioned by a judgment of the Court of appeal of Paris dated December 15th, 2006. The Court of appeal had ruled that an agreement drawn up with that duration did not really have a term, for two reasons: (1) the loss of one’s shareholder status is not certain even though the shareholders can transfer their shares; (2) the expiration of the corporate term provided in the by-laws can be avoided as the shareholders can extend it.

The Court of appeal reached the conclusion that without a term, the agreement was concluded for an indefinite length of time; therefore it could be terminated unilaterally, subject, however, to a prior notice.

The Commercial Chamber of the French Supreme Court to which the decision had been submitted dismissed the appeal and upheld the decision of the Court of appeal. The Supreme Court took advantage of the fact that the parties’ reasoning was unclear, and therefore, and contrary to the Court of appeal of Paris, did not take a stand on whether or not the corporation would expire at the end of the corporate term, and thus, on whether or not the obligations arising out of the shareholder’s agreement would expire as well.

It is however on this very point that the decision of the Court of appeal of Paris invites criticism. Indeed, the fact that French law obliges companies to set a definite period of time should lead to fix a term, even though the shareholders would be able to extend this term. The parties can indeed always chose to extend a fixed term contract without the latter becoming an indefinite term contract, as Pr. Le Cannu rightly stresses.

A decision in principle from the French Supreme Court would without a doubt be useful to clarify matters.

In the meantime, those drafting the agreements should draft the term clause very precisely and preferably choose a fixed term.

JÉRÔME WERNER

### IN A NUTSHELL

- 1 The French Supreme Court considers that an agreement the duration of which is dependant on the shareholder’s status must be regarded as having an indefinite term and can therefore be terminated at any time.
- 2 However it does not give its view as to whether or not the company should come to an end, and therefore as to whether or not the commitments arising out of shareholder agreements are also subject to that very same term.
- 3 Fixed term clauses should thus be favored.

## WHAT'S NEW AT THE FIRM



**Our teams are growing:** Jérôme Werner has just joined the M&A and Banking departments, Nadine Ghorayeb joined the Insurance and Industrial Risk department, and finally Hélène Aziza reinforced the Litigation department.



**Alérion's breakfast meetings:** Alerion is constantly seeking to improve its clients' company spirit and has thus decided to share and discuss legal news during intimate breakfast meetings. Two hours early morning are easy to fit in tight schedules, in order to keep oneself informed of new legal measures and ask precise questions to the lawyers specialized in the concerned practice areas.

The lawyers of the tax department had therefore devoted February 14th to the main provisions of the 2008 finance law at the *Cercle de l'Union Interalliée*; on April 3rd, it was our Labor team's turn to present the URSSAF-related issues and risks regarding pension and retirement schemes.

The next breakfast sessions will address the reforms in distribution and competition law reforms, as well as the termination of commercial relations.



**A growing firm:** in July 2008, Alerion will move to settle in offices more adapted to its size and development. Alerion will be happy to greet and welcome its clients at its new offices located 137, rue de l'Université, in the 7th arrondissement of Paris.



**On the top of the rocks:** the associates have enjoyed the snowy mountains of the Arcs ski resort on the week-end of March 29th and 30th.



## SPEECHES AND CONFERENCES



Jacques Bouyssou has introduced the biotechnology business to the students in Master 2 of Biotechnology Law at the University of Evry: Alain Huriez (president of TcLand Expression and vice-president of the health Biotechnologies's committee of the Group of Pharmaceuticals Companies) and Pascale Altier (manager of Pasteur Biotop and board member of France Biotech) participated in this programme.



Valérie Mayer teaches litigation to the students in Master 2 of Tax and Corporate Law at the INSEEC.



On February 11th, Catherine Robin also gave courses on distribution law at the Paris Bar School ("EFB").

## PUBLICATIONS



Dominique Doise : "*Crédits documentaires et financement de certaines opérations d'achat et revente de marchandises*", (Documentary credit and financing of purchasing operations and sale of goods), *Revue de Droit Bancaire et Financier*, January/February 2008



Delphine Ricard et Jacques Perotto : "*Loi de Finances de la Sécurité Sociale pour 2008 : vers la fin des régimes de pré-retraite ?*", (Finance law for social security in 2008: a move towards the end of early retirement?), *La Semaine Juridique*, Edition sociale n°4, January 22nd, 2008

## OUR CAUSES



Alerion has donated law treatises and handbooks to the students in Master 1 and 2 of Law at the University of Tananarive (Madagascar).

## OUR ACTIVITIES OVERSEAS



In connection with the meeting of our Asian correspondents, James Joong-Ho Kim and Karine Khau have traveled to Singapore to prepare the opening of our liaison office, which will provide services to our clients in the City Nation.



Jacques Bouyssou and Pierre-Olivier Brouard took part in the 9th *Annual Private Investment Funds Conference* of the IBA (International Bar Association) on March 10th and 11th in London.