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Outsourcing of production activities: A new legal requirement imposes the conclusion of a written agreement in certain cases

After two years of waiting, the implementing Decree setting forth the threshold above which the conclusion of a written agreement in the context of outsourcing of production activities is mandatory under Article L. 441-9 of the French Commercial code has finally been published.

The conclusion of a written agreement is henceforth mandatory for any purchase of manufactured goods, produced at the buyer's request in order to be included in his own production, wherever the amount of such purchase exceeds 500,000 euros.

It should be preliminarily recalled that Article 126 of Law n°2014-344 of March 2014 on consumer protection (commonly referred to as the "Hamon Law") inserted a new Article L.441-9 in the French Commercial Code that requires the conclusion of a written agreement for certain types of outsourcing purchases.

As specified by the *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* (General Directorate for Competition, Consumer Protection and Frauds, hereinafter "DGCCRF") in its October 2014 information note on the implementation of the provisions of the Hamon Law, this new requirement is aimed at "*increasing transparency*" in outsourcing relationships and "*imposing a minimum content in agreements, the mandatory required information corresponding to issues that customarily lead to the imposition of potentially abusive practices by principals on their subcontractors*".

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For this purpose, for any purchase of manufactured products customized for the buyer for integration into his own production, Article L. 441-9 of the French Commercial Code imposes the conclusion of a written agreement and requires that specific information be provided therein. This Article also specifies that this new formalistic requirement only applies to purchases that exceed an amount to be set by Decree.

In the absence of any implementing Decree setting the applicable threshold, this text has remained unimplemented.

It is now fully effective. Decree n°2016-237 of March 1, 2016 – that was published on March 3, 2016 and that came into effect on the day following its publication – set the applicable threshold at 500,000 euros (cf. new Article D. 441-8 of the French Commercial Code).

As such, from now on, the conclusion of a written agreement is mandatory for any purchase of manufactured goods, produced at the buyer's request in order to be included in his own production, wherever the amount of such purchase exceeds 500,000 euros.

Pursuant to Article L. 441-9 of the French Commercial Code, this written agreement must set forth the terms and conditions agreed upon by the parties, including:

1. the purpose of the agreement and the respective obligations of the parties;
2. the price or the terms of its determination;
3. invoicing and payment terms in accordance with applicable law;
4. liabilities and warranties of each party such as, if applicable, detailed rules for the application of retention of title;
5. rules governing intellectual property between the parties in accordance with applicable law, when justified by the nature of the agreement;
6. the duration of the agreement and the conditions for termination;
7. the procedures for the settlement of disputes arising in connection with the performance of the agreement and, if the parties decide so, the conditions for mediation.

However, some questions remain as to the scope of application of Article L. 441-9 of the French Commercial Code. In particular, the implementing Decree does not specify whether the threshold of 500,000 euros is to be understood as an aggregate amount for a whole contract or as an amount for each purchase order only.

It should be recalled that the DGCCRF has provided its interpretation of the scope of application of this Article in its October 2014 information note.

According to this information note, Article L. 441-9 of the French Commercial Code does not apply to services agreements, *"agreements pertaining to the outsourcing of tasks that do not constitute the core business of the principal (cleaning, site security, IT, etc.) and to the outsourcing of works"*, *"the purchase of standardized products sold on catalogue"* and *"the purchase of production tools, or other products that are not used in the buyer's production process"*.

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The DGCCRF also provided clarification on the provisions to be included in the written agreement. It specified that most of the information (those specified in 1°, 2°, 3° and 4° with respect to the parties' respective liabilities, and in 6° above) must in any event be included in the agreement. According to the DGCCRF, the law requires the inclusion of the other information wherever this is justified by the intention of the parties (in particular concerning 4° with respect to the warranties, such as the retention of title, and 7° with respect to the implementation of a mediation procedure) or by the nature of the agreement (concerning 5° with respect to intellectual property).

Needless to say that companies must comply with this new obligation, failing which they may be imposed significant penalties.

The absence of such written agreement or non-compliance of such written agreement with the provisions of Article L. 441-9 of the French Commercial Code (i.e. if it does not contain all of the mandatory information that must be included in any event, or if it does not contain the intellectual property rules whereas the nature of the agreement so justifies) is punishable by an administrative fine of up to 75,000 euros for natural persons and 375,000 euros for legal entities. This fine can be doubled in case of repeated offenses (cf. Article L. 441-9 of the French Commercial Code by reference to Article L. 441-7 II of the French Commercial Code).

Lastly, it is worth noting that Article L.441-9 of the French Commercial Code stipulates, quite logically, that the written agreement must *"be prepared in compliance with Articles L. 441-6 and L. 442-6 [of the French Commercial Code]"*.

As such, companies must ensure that the written agreement prepared under Article L.441-9 of the French Commercial Code complies with the rules imposed by the aforementioned Articles, including, but not limited to, with respect to general terms of sale, significant imbalance between the parties and payment terms.

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