MOTOR VEHICLE DISTRIBUTION LAW

NOVEMBER 2018 UPDATE

CHAPTER 2
EUROPEAN LAW

Section 2 Block exemption

II. After-sales : Regulation No 461/2010

2.42. General conditions for exemption.

Pursuant to Article 4 of Regulation No 461/2010, Article 101 TFEU does not apply to agreements relating to the sale or resale of spare parts or the provision of repair and maintenance services, which fulfill the requirements for an exemption under Regulation No 330/2010 and do not contain any of the hardcore restrictions listed in Article 5. Agreements, either directly or indirectly, in isolation or in combination, must not restrict the sales of spare parts by members of a selective distribution system to independent repairers which use those parts for the repair and maintenance of a motor vehicle[1], restrict the supplier's ability to sell spare parts, repair tools or diagnostic or other equipment to authorized or independent operators (distributors or repairers) or end users[2], or to place its trade mark or logo effectively and in an easily visible manner on the components supplied or on the spare parts (Article 5)[3]. The aim of those provisions is to ensure effective competition on the repair and maintenance markets and to allow repairers to offer end users competing spare parts. They do not exclude the ability for vehicle manufacturers to require the authorized repairers within their network to only use spare parts that match the quality of the components used for the assembly of a certain motor vehicle. According to the guidelines, matching quality parts must be of a sufficiently high quality that their use does not endanger the reputation of the authorized network in question (point 20). Likewise, for repairs made under warranty of the manufacturer, the exemption applies to agreements which require repairers to use only spare parts supplied by the vehicle manufacturer (point 17). Regulation No 461/2010 has been applicable

[1] According to pt 22 of the 2010/C 138/05 Guidelines, this restriction concerns a particular category of parts, referred to as captive parts, which may only been obtained from the motor vehicle manufacturer or from members of its authorized networks.
[2] This provision covers in particular so-called 'tooling arrangement' between component suppliers and motor vehicle manufacturers, which are sub-contracting agreements in principle excluded from the scope of Article 101 TFEU, unless the component supplier must transfer its ownership of such a tool, intellectual property rights, or know-how, bears only an insignificant part of the product development costs, or does not contribute any necessary tools, intellectual property rights, or know-how. Guidelines, at pt 23.
[3] This provision should facilitate the identification of compatible replacement parts which can be obtained from original equipment suppliers (OESs). Guidelines, at pt 24.

since 1 June 2010 to such agreements. As the Commission has specified, it does not affect the possibility for the manufacturers to limit warranties to vehicles sold by authorized dealers[4].

[4] European Commission, letter of 4 December 2017 to the Fédération nationale de l'artisanat automobile.

CHAPTER 3
FRENCH LAW

Section 1 Lawfulness of network

II. Supplier-repairer relations

3.13. Authorization in a qualitative selection system.

In the brochure supplementing Regulation No 1400/2002 of 31 July 2002[5], the Commission had stated that for authorized repair networks with a market share above 30%, the exemption would apply only to qualitative selective distribution. Suppliers wishing their agreements to be block exempted could not adopt a quantitative selection system and were therefore bound to accept all candidates meeting the criteria, including authorized dealers whose contracts had been terminated but who wanted to continue as authorized repairers. As a result, the national courts sanctioned manufacturers who refused candidates fulfilling the authorization criteria[6] and ordered, subject to coercive fines, that those candidates be accepted into their networks[7]. Late disclosure of the authorization criteria also incurs the manufacturer's liability, even where the plaintiff is a former terminated dealer[8]. On the other hand, a refusal is justified where the application is made in bad faith i.e. the candidate has engaged in acts of counterfeiting and unfair competition[9] or has not shown a sufficient stake in the brand and has already been excluded from the network for that reason[10]. Furthermore, insofar as only purely qualitative selection is allowed for the activity in question, an authorized repairer cannot sue the supplier for allowing another network member to set up in his area[11]. This solution was valid under Regulation No 1400/2002 and such is still the case

[5] Explanatory Brochure, question 72.
[6] T. com. Dijon, 30 June 2003, LawLex034308.
[7] CA Dijon, 1 April 2004, LawLex04738; TGI Metz, 19 October 2004, LawLex042840; CA Paris, 11 June 2015, LawLex15758: use of the term "specialist" or the resale of vehicles having over 1,500 kms on their clocks do not constitue fair reasons for a refusal to authorize an applicant to join the network.
[8] TGI Metz, 19 October 2004, LawLex042840; T. com. Versailles, 29 June 2007, LawLex093240. See, however, CA Paris, 2 September 2010, LawLex10988, which asserts that the late disclosure does not cause any harm to the candidate where, even postponed, its authorization remains possible absent any quantitative restriction.
[9] Cass. com., 4 December 2012, LawLex122421.
[10] CA Douai, 25 January 2012, LawLex12300.
[11] CA Paris, 19 October 2011, LawLex111723.

under Regulation No 461/2010, as the Commission, in the new motor vehicle guidelines[12], remains favorable to qualitative selection.

In recent cases, the courts have refused to consider the termination of a qualitative selective distribution agreement as tortious even where the distributor fulfilled the selection criteria[13] and have generally rejected claims to force suppliers to admit distributors to qualitative selective networks especially where the network qualifies for block exemption, insofar as the offenses of refusal to sell and discriminatory practices have been repealed. As the T. com. Paris quite rightly underlined, in addition to the disappearance of the traditional legal basis for forced network auhtorizations, the decision to approve a distributor or not constitutes a unilateral act, which does not fall under the prohibition of restrictive agreements[14]. The Court of Appeal of Paris has taken this further, even considering that a refusal to approve within a repairer network ineligible for automatic exemption having regard to the network's market share which, according to the Court, is necessarily very high, nonetheless does not constitute an anticompetitive practice[15]. In contrast, in the same decision, it considers that, even if subject to exemption, a refusal to approve within a selective distribution network can be sanctioned on the basis of contract law if it reveals a breach by the manufacturer of the general obligation of good faith which is applicable as of the precontractual phase. Such is the case when, having launched a call for applications in the context of the reorganization of its network, the manufacturer does not provide its authorization criteria to all the candidates in the same conditions prior to their response and gives no reasons for its decision showing that the applications have been properly examined and shows discrimination.

Section 3 Performance of contract

I. Rights and obligations of supplier

A. Supplier's rights

3.33. Unilateral changes in the terms of the contract.

Although suppliers are bound by the provisions of motor vehicle distribution contracts, they retain a certain margin of maneuver in the organization and management of their networks and remain free to

[12] Motor Vehicle Guidelines 2010/C 138/05, pt 70.
[13] CA Paris, 30 September 2015, LawLex15190; CA Paris, 7 October 2015, LawLex151240; CA Paris, 14 October 2015, LawLex151312.
[14] T. com. Paris, 29 June 2016, LawLex161202. See also T. com. Paris, 21 February 2018, LawLex18320, by virtue of which a former authorized repairer may not claim that the manufacturer's refusal to approve infringed Article 101 TFEU when it does not establish that it is not an isolated act which affects the competitive operation of the market and is the result of an agreement between the head of the network and its other authorized repairers.
[15] CA Paris, 24 May 2017, LawLex17919.

review their commercial strategy in the course of the contract in order to adapt it to economic circumstances, without the distributors being able to claim the intangibility of the contractual conditions. Suppliers may at any time make changes to supplier credit arrangements[16] or the bonus system which is not of a contractual nature[17], unless by doing so it drastically undermines all the financial terms of the contract while at the same time protecting the supplier from unfavorable market developments[18] or, in a difficult general environment, they require distributors to make considerable sacrifices while paying handsome dividends to their shareholders[19]. Apart from these cases, a distributor's refusal to accept simple network management measures, such as using of the online network to replace the obsolete communication system[20], is wrongful. Likewise, where it has chosen a quantitative selective distribution network, a supplier is not guilty of wrongdoing in offering a limited territory to a former dealer where the latter remains free to carry out active or passive sales[21]. Lastly, a car manufacturer may legitimately decide to cease an activity, subject to compliance with a notice period and the faithful execution thereof[22].

Sometimes, the conduct of a distributor is in itself at the origin of the unilateral changes adopted by a supplier. Thus, large outstanding payments may lead the supplier to freeze supplies and establish a cash payment system[23]. However, changes imposed on the dealer must not relate to an essential condition of the contract. A change in the brand in particular requires its consent[24]. Likewise, a unilateral change in the contract terms by the supplier may constitute a "manifestly unlawful disturbance" where it comes as a result of a breach for which other measures are provided in the contract[25]. The assessment of the legitimacy of changes made by the supplier sometimes results in excessive interference by the court in

[16] CA Paris, 18 January 2012, LawLex12309, upheld by par Cass. com., 4 June 2013, LawLex131401, specifying that the supplier may lower the dealer's margin on the sale of certain types of vehicles if that measure is offset by the granting of a additional margin which is at least equal where targets have been met; Cass. com., 15 March 2017, LawLex17541, holding that the supplier having made no commitment to grant a supplier credit to distributors is entitled to make such credit subject to the provision of a first demand guarantee.
[17] TGI Paris, 25 November 2004, LawLex054026 and LawLex054045; 20 February 2007, LawLex07343; CA Paris, 12 March 2008, LawLex081118 and LawLex081119; 27 May 2010, LawLex10631: the supplier is free to adapt at any time its financial incentive system to its commercial strategy where it has taken out no commitment in this respect with regard to its dealers and that the new measures adopted do not imbalance the contract economy. Cf. CA Versailles, 10 November 2001, LawLex111852, ruling that a supplier cannot unilaterally amend aspects of the calculation of bonuses by adding further conditions during the course of the contract upon which their obtention is dependent.
[18] TGI Paris, 9 March 2004, LawLex04737.
[19] Cass. com., 15 January 2002, LawLex025004.
[20] CA Versailles, 19 June 2003, LawLex034300.
[21] T. com. Paris, 4 August 2004, LawLex042135.
[22] CA Paris, 15 November 2017, LawLex171871.
[23] Cass. com., 18 June 2002, LawLex024194; CA Bordeaux, 7 September 2004, LawLex042136.
[24] T. com. Paris, 24 September 1999, LawLex024623.
[25] CA Pau, 1 July 1999, LawLex024204.

the management of undertakings: the unilateral withdrawal of an outstanding debt facility has been regarded as a source of a manifestly unlawful disturbance[26].

B. Supplier's obligations

3.36. Obligation to deliver.

As the motor vehicle distribution contract is a master-agreement for the organization of sales contracts, the supplier is subject to the obligations set out in those contracts. Thus, it has an obligation to supply the motor vehicles stipulated in the contract in a regular manner and according to the conditions set therein. The supplier must supply within the planned time-periods[27]. If it fails to do so it must compensate the dealer for the harm resulting from the loss of margin but also from the loss due to the non-satisfaction of customers where this is established[28]. Likewise, the termination is attributable to the manufacturer where it stems from the latter's refusal to meet orders placed by the distributor under normal conditions due to the distributor's failure to participate in an optional promotional action[29]. On the other hand, a decrease in stocks allocated to certain distributors of the same level as the decrease in their orders does not constitute a violation by the supplier of its obligation of cooperation when they do not provide evidence of having to forgo any sales[30].

Section 4 Termination of contract

I. Extraordinary termination

A. Causes

3.50. No provision of surety.

Non-performance by the dealer of its commitment to provide a bank surety justifies the termination of the concession contract[31]. The non-provision of such a guarantee affects the supplier's essential interests: on the one hand, it is a sign of a deterioration of the solvency of the distributor who is unable to obtain a surety from its bank; on the other hand, in most cases it leads to a very significant decrease in sales due to a switch to cash payments and the termination of the supplier-credit which could be guaranteed the bank surety, which results in the substitution of a regular flow of sales as part of a supplier-credit for a

[26] T. com. Versailles, 29 December 2000, LawLex04225.
[27] CA Versailles, 20 September 2001, LawLex04463: a supply period that exceeds three months cannot be regarded as reasonable.
[28] Cass. com., 28 January 2004, LawLex04238.
[29] CA Paris, 6 December 2001, LawLex024637.
[30] Cass. com., 15 March 2017, LawLex17541.
[31] CA Paris, 30 June 1995, LawLex025483; CA Paris, 22 September 2010, LawLex11848.

series of one-off cash agreements. Such a situation is not bearable since it compromises the interests of the supplier whose sales fall and those of customers whose delivery times are extended.

The fact that a supplier waives its claim for non-provision of a surety for a given year does not render abusive the implementation of the termination clause in respect of that infringement for the following year[32]. Likewise, the fact that the supplier is still demanding a bank surety where the dealer has submitted a security from its parent company does not amount to a waiver of the latter[33].

It has been held that the non-provision of a surety provided for in the contract constitutes a breach of an essential obligation of the contract authorizing the termination of the dealer agreement, including in the event of safeguard proceedings, without full payment constituting a guarantee equivalent to the surety, taking into account the offsets that can exist between the delivery and the actual payment[34]. Similarly, the supplier does not act in bad faith by refusing to accept an alternative surety which is more difficult to execute and does not cover the required sums[35].

3.51. Absence or transfer of showroom.

Under Regulation No 1475/95 of 28 June 1995, the lack of specific premises for the sale of the manufacturer's motor vehicles was a legitimate cause for termination of the contract[36]. The use by the dealer of a single showroom for the sale of competing brands, whereas it had undertaken under contract to reserve it to the dealer's brand[37] or the mere transfer of the premises against the supplier's advice[38] thus allowed the manufacturer to put an immediate end to the contract. Absolute multi-branding established by Regulation No 1400/2002 of 31 July 2002 prevented the manufacturer from requiring the dealer to display the brand's motor vehicles in a separate area. At most, the manufacturer could display the motor vehicles "in brand-specific areas of the showroom in order to avoid brand confusion"[39]. Breach of that obligation was a legitimate cause for termination.

Since 1 June 2013, the sale of new motor vehicles has come under the regulation on vertical restraints. Distribution agreements can once again include non-compete obligations prohibiting distributors from reselling competing brands in general. Authorized distributors may therefore be prevented from trading

[32] CA Paris, 7 May 1999, LawLex025022 approved by Cass. com., 18 December 2001, LawLex025024.
[33] CA Paris, 17 November 2005, LawLex0510041.
[34] CA Paris, 27 May 2015, LawLex151702.
[35] CA Paris, 17 May 2017, LawLex17892.
[36] Cass. com., 16 April 1996, LawLex025563, dismissing the appeal lodged against CA Paris, 7 April 1994, LawLex025389.
[37] CA Paris, 14 November 2002, LawLex03737.
[38] CA Paris, 14 November 1994, LawLex025421.
[39] Regulation No 1400/2002 of 31 July 2002, OJEC L 203 of 1 August 2002, Article 1(1)(b) and recital 27.CA

from different premises or from opening a new store in another place. Thus, the modification by the distributor of its place of establishment without prior authorization from the manufacturer, which in addition is now in a temporary space not meeting the standards of the brand, justifies the immediate termination of the contract[40].

II. Ordinary termination

A. Notice period

3.57. Contractual or reasonable notice period.

Where the agreement has an indefinite term, block exemption was subject to the ordinary termination period of at least two years for both parties (Regulation No 1400/2002, Article 3(5)(b))[41]. Since 1 June 2013, ordinary termination has no longer been subject to a fixed notice period to benefit from the block exemption. The obligation to comply with a reasonable notice period will nevertheless still be the rule. In effect, each party may terminate an indefinite-term contract at any time provided that it complies with a reasonable notice period and does not commit an abuse of right[42]. Furthermore, the use of the two-year notice remains commonplace; on the one hand, a number of contracts concluded under Regulation No 1400-2002 are still in force, and on the other, the codes of practice of the ACEA[43] and JAMA[44] associations recommend a notice period of two years.

Compliance with the contractual notice period is in principle sufficient to validate the termination of the contract[45], unless the duration of the contractual notice period is less than the legal notice required by Article L. 442-6 of the Commercial Code, which is not usually the case for motor vehicle distribution contracts due to the two-year notice period stipulated in Regulation No 1400/2002, which remains the norm even after its expiry. Until the entry into force of Regulation No 1400/2002, it was accepted that compliance with the notice period exempted the manufacturer from any obligation to justify the termination[46] or at least made it irrelevant whether or not the reasons given were accurate[47]. Compliance with the notice period also exempted the manufacturer from any liability by reason of investments

[40] CA Paris, 7 February 2018, LawLex18254.
[41] Where the agreement did not fall within the scope of European competition law, the parties could set a notice period of less than two years, see CA Aix-en-Provence, 26 October 2001, LawLex03568; CA Paris, 2 September 2010, LawLex10988.
[42] CA Versailles, 14 December 1995, LawLex025516: the termination without notice period of an indefinite-term distribution contract is abusive by reason of its sudden character; Cass. com., 20 January 1998, LawLex025089; 7 October 1997, LawLex025053.
[43] European Automobile Manufacturers Association.
[44] Japanese Automobile Manufacturers Association.
[45] T. com. Paris, 28 September 1989, LawLex025758; CA Paris, 22 October 1999, LawLex025244.
[46] CA Paris, 11 December 1990, LawLex025815; TGI Paris, 27 November 2002, LawLex03640.
[47] CA Paris, 26 January 2005, LawLex053766.

incurred by the dealer shortly before the notification of the termination[48], provided that they were spontaneous investments by the dealer which could be re-used as part of another exploitation[49], and not investments required by the manufacturer and specific to the brand. If it had complied with the contractual notice period, the manufacturer could neither be blamed for having not kept its dealers informed of its reorganization projects[50] nor of having compromised the terminated dealer's chances of reconversion by placing it in an inferior negotiating position with a purchaser of its business, insofar as the purpose of the notice period is precisely to allow it to begin its reconversion[51]. By contrast, the termination of a distribution contract by reason of the termination of the contract between the manufacturer and the importer does not constitute a force majeure event that justifies shortening the contractual notice period where the importer has obtained the continuation of the supplies under specific conditions[52]. These solutions remain applicable post 1 June 2013 as the vertical restraints regulation does not provide for any obligation of a contractual nature.

What will happen when a distributor terminates the contract without complying with the contract notice period? According to the trial courts, the distributor who fails to comply with the notice period is not liable where the notice was given solely in the distributor's interest and the supplier was able to find a new distributor rapidly[53]. More reasonably, other courts have accepted the existence of harm for the supplier, to which however they award compensation not according to the loss of gross margin but to the expected profit on sales where the measure occurs in the context of a recession[54]. In other circumstances, the harm is compensated on the basis of the manufacturer's loss of margin on variable costs until the appointment of a new distributor or the normal term of the relationship[55].

The systematic non-application of the obligation of compliance with the notice period, which is disadvantageous for the supplier and favors the distributor, seems abnormal. It goes against the principle of the binding force of contracts which applies to both parties and seeks to minimize the disruption of the supplier's sales due to the distributor's failure to comply with the notice period when leaving the network.

[48] CA Paris, 19 May 1993, LawLex026004; 4 July 1996, LawLex025590.
[49] CA Versailles, 15 May 1998, LawLex025128 approved by Cass. com., 6 June 2001, LawLex024370; 2 July 1998, LawLex025137, approved by Cass. com., 22 May 2001, LawLex024906; CA Paris, 4 June 2003, LawLex032288; 19 June 2003, LawLex04778.
[50] T. com. Paris, 25 October 1999, LawLex025245; CA Paris, 4 June 2003, LawLex032288; 15 September 2004, LawLex042112. Contra, See T. com. Paris, 29 November 1999, LawLex025255.
[51] Cass. com., 6 May 2002, LawLex024624. See also CA Paris, 4 June 2003, LawLex032288.
[52] CA Paris, 5 February 2003, LawLex032863.
[53] CA Chambéry, 8 April 2014, LawLex141871.
[54] CA Grenoble, 22 February 2018, LawLex18358.
[55] CA Paris, 12 September 2018, LawLex181295.

D. Obligation to state reasons

3.63. No obligation to state reasons.

Under Regulation No 1400/2002 of 31 July 2002, for suppliers to qualify for block exemption they were required to give notice of termination in writing and to include objective and transparent reasons for the termination decision (Article 3(4))[56]. Even if it imposed a requirement going further than general contract law[57], the regulation did not require reasons for termination for breach of contract or any review by the courts of the appropriateness of the manufacturer's decision[58], but merely an explanation of the decision, which could be due to circumstances which were legitimate and which could even be unrelated to the co-contracting party per se. According to the trial courts, the purpose of the obligation to state reasons was only to ensure that terminations were not carried out to restrict competition. Apart from such considerations, the courts were not required to verify the accuracy of the reasons provided by manufacturers[59]. The need to reorganize the distribution network to comply with the Vertical Restraints Regulation has nevertheless been considered a valid reason to terminate the contract in light of the requirement to give reasons[60]. Similarly, the termination of a motor vehicle distribution contract due to the implementation of a new policy of growth based on the development of the range and new requirements to strengthen customer satisfaction, notified to the whole of the network in France and in Europe, was not considered to be determined by anticompetitive motives[61].

Since 1 June 2013, the distribution of new motor vehicles has come within the scope of application of the Vertical Restraints Regulation. Court decisions rendered before Regulation No 1400/2002, which made the lawfulness of the termination conditional upon the manufacturer complying with a contractual or reasonable notice period[62] now once again apply insofar as contracts no longer have to contain an

[56] T. com. Limoges, 25 June 2003, LawLex032860 approved by CA Limoges, 10 March 2004, LawLex04949; T. com. Nanterre, 1 June 2004, LawLex041651, which indicates that the obligation to state reasons only relates to terminations held after 1 October 2003.
[57] See T. com. Paris, 2 December 2013, LawLex131770, which restates that in contract law a supplier may proceed with an ordinary termination by complying with the contractual notice period without having to give reasons for that decision even if it was necessary to terminate the agreement in order to be in conformity with Regulation No 1400/2002.
[58] T. com. Pontoise, 25 September 2007, LawLex071516: the control by the court on the reasons for the termination must be limited to checking their pro- or anticompetitive character, and cannot relate to the appropriateness of the decision.
[59] T. com. Paris, 13 February 2014, LawLex14297. The court thus considers that the supplier had fulfilled its obligation in respect of the requirement of the regulation by complaining to the dealer about its poor commercial performances, its inadequate bank guarantee and the selling of vehicles to final customers before having paid the supplier for them, CA Paris, 4 February 2015, LawLex15146; see also T. com. Paris of 16 June 2015, LawLex15772; CA Paris, 24 June 2015, LawLex15837.
[60] CA Paris, 11 May 2016, LawLex16965.
[61] Cass. com., 29 March 2017, LawLex17627.
[62] T. com. Paris, 28 September 1989, LawLex025758 approved by CA Paris, 11 December 1990, LawLex025815; 3 March 1995, LawLex024268; Cass. com., 6 June 2001, LawLex024370; 6 May 2002, LawLex024621; T. com. Bobigny, 24 January 2003, LawLex031195; T. com. Versailles, 14 November 2003, LawLex034429; 9 June 2006, LawLex061373; CA Versailles, 31 January 2006, LawLex07273; CA Paris, 10 January 2018, LawLex1864.

obligation to provide reasons for termination[63]. Like previously, stating reasons, even fallacious ones, will therefore no longer incur the supplier's liability[64] since the court is not required to review the legitimacy of the grounds for termination given by the manufacturer[65]. Likewise, the fact that a dealer's conduct has been exemplary i.e. always meeting commercial targets and realizing all investments required to promote the brand image, will not challenge the validity of the termination[66]. In contrast, a grievance which was not mentioned in the termination letter may not subsequently be invoked to justify the measure[67].

IV. Sudden termination of established commercial relationship

3.70. Application of Article L. 442-6, I, 5° of the Commercial Code to motor vehicle distribution.

Until 1 June 2013, in order to qualify for block exemption by virtue of the successive motor vehicle regulations, automobile distribution agreements had to provide for a minimum notice period for both ordinary contract terminations and for the non-renewal of fixed-term contracts. In principle, compliance with the contractual notice period should have been sufficient for the termination for the contract to be lawful[68]. However, relying on Article L. 442-6, I, 5° of the Commercial Code, the courts have assumed the authority to assess the reasonable nature of contractual notice periods[69]. Extending the scope of application of Article L. 442-6, I, 5° in this way raises the question as to its relationship to EU law.

It is difficult to reconcile the fact that a notice period provided for under European competition law can be called into question by a national rule which also pursues the aim of protecting the market. Thus, it has been held that a dealer whose contract has been terminated for network reorganization with one year's notice could not rely on Article L. 442-6, I, 5° of the Commercial Code to challenge the duration of the notice period as the provision must be interpreted in light of European law which takes precedence

[63] CA Paris, 19 October 2011, LawLex111723: a manufacturer giving notice of termination in an ordinary termination is not required to give reasons for that decision; CA Paris, 15 January 2014, LawLex1433, ruling that in the automobile sector, a termination due to the reorganization of the network does not have to be justified as long as does not reflect the implementation of an anticompetitive practice. T. com. Paris, 24 February 2016, LawLex16416, holding that the absence of reasons for the termination of an open-ended contract is not unlawful where the supplier has granted the dealer the two-year contractual notice period.
[64] TGI Paris, 2 February 1995, LawLex025444; CA Versailles, 22 May 1998, LawLex024911; Cass. com., 20 February 2007, LawLex07227; 6 November 2007, LawLex071778. Contra, see prior court decisions controlling the stated reasons: CA Paris, 5 November 1990, LawLex025806 (no cleaning of premises); Cass. com., 5 April 1994, LawLex025387 (dealer's intention to withdraw); 20 January 1998, LawLex025089 (insufficient sales); CA Versailles, 25 November 1999, LawLex025254 (dealer's deficiency); CA Paris, 11 May 2016, LawLex16965.
[65] Cass. com., 29 March 2017, LawLex17627.
[66] CA Paris, 22 March 2002, LawLex024699.
[67] CA Paris, 18 May 2016, LawLex16955.
[68] T. com. Paris, 28 September 1989, LawLex025758.
[69] See especially CA Versailles, 4 September 2012, LawLex122118.

over national law[70]. This should also be the case with regard to the two-year notice period under Regulation No 1400/2002. The Versailles Court of Appeal chose not to adopt that position, considering that the notice periods set out in Regulation No 1400/2002, which is not intended to replace the domestic public policy provisions of Article L. 442-6, I, 5° of the Commercial Code, could not serve as a reference for the assessment of the minimum notice period owed to the victim of a sudden termination of an established commercial relationship[71]. Likewise, the Court of Appeal in Limoges held that Article L. 442-6, I, 5°, which provides for the possibility to grant a longer notice period than the motor vehicle regulation, is not contrary to the provisions of the latter as it only provides, in its preamble, for minimum periods[72]. The Paris Court of Appeal concurred with that opinion, finding that since Article 101 and 102 TFEU pursue objectives which are different from those pursued by Article L. 442-6, there is nothing to prevent the court from assessing the reasonable character of the two-year notice period granted by a car manufacturer under Regulation No 1400/2002 with regard to the length of previous relations[73]. Those decisions defy all logic since the only legal issue that needs to be posed is whether a contract which is fully exempted under EU law can be prohibited by a rule of national law. In principle, as both texts are aimed at protecting the market, the answer must be no, it cannot. This position, although contestable insofar as the courts are challenging the principle of precedence of European law, was nevertheless upheld by the Court of Cassation[74].

Apart from those cases, the courts consider that the notice period given to the distributor must, to comply with Article L. 442-6, I, 5°, be of sufficient duration for the dealer to develop new business. Thus, a period of two years is regarded as reasonable even for a commercial relationship of over thirty years in light of the concrete possibilities to transform the business open to the terminated dealer[75]. Likewise, a six-month period for the termination of an automobile distribution agreement of indefinite duration was held to be reasonable within the meaning of Article L. 442-6, I, 5° although it was less than the period provided for in the motor vehicle regulation, as the terminated multi-brand dealer had already found an alternative solution prior to the expiry of the contractual notice period and was able to increase revenues during that period[76]. A distributor also cannot complain of having received no notice

[70] CA Paris, 11 May 2011, LawLex11935, LawLex11936, LawLex11937, LawLex11946, LawLex11947.
[71] CA Versailles, 4 September 2012, cited above.
[72] CA Limoges, 9 February 2012, LawLex12294. The court maintained its position in the judgment rendered following referral from the Court of Cassation (14 May 2013, LawLex13830), CA Limoges, 18 February 2015, LawLex15227.
[73] CA Paris, 15 January 2014, LawLex1433; 2 July 2014, LawLex14777 and 24 June 2015, LawLex15837; 11 May 2016, LawLex16965.
[74] Cass. com., 5 July 2016, LawLex161293, upholding on this issue CA Limoges, 18 February 2015, LawLex15227.
[75] CA Paris, 25 January 2012, LawLex12183. But see CA Limoges, 18 February 2015, LawLex15227, granting a notice period of 36 months for a 44-year relationship.
[76] CA Paris, 2 September 2010, LawLex10988.

of termination at all where such termination was notified in two letters sent by the manufacturer more than a year before which clearly stated that the contract would not be renewed once it arrived at its term, even if it did not rule out the possibility of re-examining the dealer's application for a new contract[77]. Article L. 442-6, I, 5° allows for a sudden termination on the grounds of non-performance of obligations by the other party. The termination of the established commercial relationship is not "sudden" where it occurs in the context of the dealer's extended failure to meet its financial obligations[78]. However, a failure to comply with the standards of the brand that has been tolerated by the manufacturer for several years may not be invoked to justify a sudden termination of the established commercial relationship[79]. To be effective, the notice period granted must be respected; relations must be maintained if not under the exact same, then at least under similar conditions during that period. According to case law, a manufacturer does not comply with the notice period when it makes the signing of a new contract subject to the dealer achieving higher sales in that period than those stipulated in the objectives clause of the contract[80].

The Court of Cassation's recent case law based on Article L. 442-6, I, 5° of the Commercial Code has tended to make contractual relations increasingly rigid. The courts now assess the duration of the required notice period and subsequently the compensation owed in the event of insufficient notice automatically from the date of receipt of the termination letter by the distributor[81] without taking into account the successful transformation of the distributor's business prior to the date on which the contract should have theoretically terminated, which in practice can lead to the awarding of compensation where no loss has been suffered, an outcome which is difficult to justify with regard to a provision intended to repair harm. After handing down several judgments in which it expressed its disagreement, considering that the realities of a reorganization or the absence of harm to the terminated partner were factors that should be taken into account when assessing the amount of notice required[82], the Paris Court of Appeal now appears to wish to go back to the position adopted by the Court of Cassation[83].

[77] Cass. com., 14 May 2013, LawLex13830; and on referral: CA Limoges, 18 February 2015, LawLex15227.
[78] T. com. Ajaccio, 2 October 2017, LawLex171875.
[79] CA Paris, 25 October 2017, LawLex171717.
[80] Cass. com., 29 March 2017, LawLex17627.
[81] Cass. com., 9 July 2013, LawLex131090.
[82] CA Paris, 28 January 2016, LawLex162250, LawLex16227; 29 January 2016, LawLex16284.
[83] CA Paris, 15 November 2017, LawLex171871, holding that the compensation awarded to the dealer cannot be reduced merely by reason of the fact that it found a new brand to represent in the course of the notice period when no return on investment is expected before the end of that period and LawLex171889: the fact that the dealer has found another brand to commercialize in the course of the notice period does not reduce the compensation owed insofar as the manufacturer is unable to demonstrate that this representation offset the dealer's loss of revenue in respect of sales of products of its brand; 15 March 2018, LawLex18515.

V. Termination of agency contract

3.71. No triangular relationship.

In France, as in most larger countries with a low or average population density, motor vehicle distribution networks are generally organized into a primary network of dealerships and a secondary network of motor vehicle agents.

The motor vehicle agent has no direct legal connection with the manufacturer[84]. The affixing of its signature on the agency contract followed by the mention "for approval" is a mere technical approval that certifies that the agent meets the conditions required to represent its brand[85]. The manufacturer cannot therefore be held liable for the termination, such liability being attributable to the dealer[86] or the agent if the latter instigated the termination[87]. The manufacturer's liability can only be sought where it is established that it is at the origin of the contractual relationship from which the agent's loss arose[88] or that the dealer has set up an inter-dependency between the contracts and ensured that the agency contract follows the main contract[89]. Thus, the termination of a dealer agreement can lead to the termination of the independent repairer's agency agreement by reason of their inter-dependency, where the breaches having justified the termination of the dealer agreement undermine the loyalty, confidence and partnership on which the relationship is based[90].

Traditionally case law has held that where the contractual notice period is complied with, the termination of the agency contract is not abusive[91]. Now the courts will find that the contractual notice period must however be in relation to the length of the commercial relationship between the parties. It has also been held that there was no sudden termination of the established commercial relationship where a dealer terminated a contract which had been pursued for fifteen years, in giving its agent, who was not in a situation of dependence with respect to the dealer, a six-month contractual notice period[92]. In practice, dealers often give agents the two year' notice as provided by the former motor vehicle regulations. Similarly, a two-year notice period is considered sufficient with regard to an established

[84] T. com. Bordeaux, 8 August 1995, LawLex2300205487.
[85] T. com. Bordeaux, 8 August 1995, LawLex2300205487; CA Rennes, 10 March 2009, LawLex09994.
[86] CA Toulouse, 22 June 2004, LawLex041670; CA Bordeaux, 22 April 2003, LawLex04499; T. com. Nanterre, 30 March 2005, LawLex055536; T. com. Lille, 15 April 2009, LawLex091731.
[87] CA Toulouse, 22 June 2004, LawLex041670.
[88] CA Paris, 19 September 2013, LawLex131358.
[89] CA Versailles, 16 October 2007, LawLex071583.
[90] CA Pau, 3 October 2013, LawLex131455.
[91] CA Paris, 15 October 1999, LawLex033231.
[92] CA Rennes, 16 January 2007, LawLex07110.

commercial relationship of sixteen years' duration[93]. In addition, where the two-year notice period is respected, the court does not have to assess the merits of the grounds relied upon by the dealer[94]. However, a dealer whose contract is terminated with two years' notice in the expectation of the proposal of a new contract in compliance with the new motor vehicle regulation and who has, for that reason, terminated the contract binding it to its agent, is guilty of a sudden termination of an established business relationship where it only informs the agent at the end of the notice period given that no new contract will be signed with the latter[95]. However, the fact that a service agent was the only member of the network not to have been offered a new contract is not sufficient to establish the existence of discrimination incurring the contractual liability of the dealer[96].

Most motor vehicle agent contracts include a stipulation which withdraws the status of commercial agent for the activity of representative for the sale of new vehicles carried out as a secondary activity to that of independent trader for the sale of spare parts and auto repairs. In addition, a vehicle service agent may demand the notice period provided for by Article L. 442-6, I, 5° of the Commercial Code and not the period provided for in Article L. 134-11 for commercial agents, insofar as the contract describes him as an independent trader who acts in his own name and for his own account, and he acts only in an ancillary capacity as an agent for the sale of vehicles[97].

VI. Termination of authorized repairer contract

3.72. Termination for fault.

In accordance with Article 1224 (formerly 1184) of the Civil Code, breaches by authorized repairers in the execution of the contract may justify its termination by the manufacturer. This is the case where the authorized repairer is listed in the yellow pages and on the internet as a dealer for the sale of new vehicles[98], carries out such sales, even without any advertisement[99], or contacts a third party to the network claiming to be an authorized distributor, and proposing training courses for the reparation of branded vehicles and the supply of diagnosis tools reserved for members of the network, and has allowed that party to win a call for tenders to the detriment of network members[100]. The termination of repairer's

[93] CA Paris, 19 September 2013, LawLex131358.
[94] CA Versailles, 11 September 2018, LawLex181264.
[95] CA Paris, 27 February 2017, LawLex17422.
[96] CA Paris, 27 June 2018, LawLex181024.
[97] CA Paris, 13 October 2016, LawLex161692.
[98] CA Paris, 22 January 2013, LawLex1387; T. com. Paris, 13 February 2014, LawLex14297; CA Paris, 18 January 2017, LawLex17114.
[99] T. com. Paris, 21 June 2017, LawLex171411.
[100] CA Versailles, 20 October 2015, LawLex151321, specifying that the contract may be terminated without notice, even if this is contractually required when it is not materially possible for the repairer to remedy the breach in question.

agency contract is also justified in the case of a refusal to submit to the required skills assessment for continued authorization[101]. When the repairer is also authorized to sell new vehicles under a second contract, the termination of a dealer agreement also terminates the authorized repairer contract if it is stipulated that a breach of one of them will extend to the other in the case of a fault undermining fair trading, the trust and the partnership between the parties[102]. On the other hand, a manufacturer causes a manifestly unlawful disturbance ("trouble manifestement illicite") that the court can remedy by ordering the continued performance of the contract, when it terminates the relationship on the basis of its interpretation of a clause relating to the obligations of the members of the network in terms of signage, which is particularly unfavorable to the repairer having regard to the location of his establishment in relation to the street, even though the stipulation invoked does not necessarily permit it[103]. Likewise, an auto manufacturer cannot terminate the contract of an authorized repairer for breaches by the latter during the performance of the previous contract and which are sanctioned by contractual penalties[104].

As is the case in a number of areas, it is tempting to invoke Article L. 442-6, I, 5° of the Commercial Code to contest the termination. Nevertheless, the provision can only be relied on if the relationship at issue is an "established" one. This is obviously not the case for a contract of only five months' duration[105]. In addition, the discretion of the court means that, where the claim is brought on the basis of Article L. 442-6, I, 5° of the Commercial Code, it may not only increase but also reduce the duration of the contractual notice period in an authorized repairer contract where it does not take account of the brevity of the commercial relationship in question[106]. Lastly, insofar as only losses resulting from the sudden nature of the termination can be repaired on the basis of Article L. 442-6, I, 5° of the Commercial Code, the decline of a repairer's after-sales activity cannot be indemnified on that basis[107].

[101] T. com. Bordeaux, 8 November 2013, LawLex131633.
[102] Cass. com., 10 February 2015, LawLex15371, upholding CA Pau, 3 October 2013, LawLex131455. Cf. in the absence of an interdependence clause between the contracts, CA Paris, 10 November 2016, LawLex161878.
[103] CA Paris, 10 November 2016, LawLex161878.
[104] CA Paris, 27 March 2017, LawLex17638.
[105] CA Paris, 22 January 2013, cited above.
[106] Cass. com., 22 October 2013, LawLex131543.
[107] Cass. com., 5 July 2016, LawLex161293.

VII. Consequences of termination

A. Relationship between the parties

2° Supplier

3.75. Approval of a successor.

Article 3(3) of Regulation No 1400/2002 made the benefit of block exemption conditional on the obligation for the supplier to agree on the transfer of the rights and obligations resulting from the vertical agreement to another distributor chosen by the former dealer within the distribution system[108]. The obligation for assignments within the network disappeared within the integration, on 1 June 2013, of the activity of sale of new motor vehicles within the general regulation on vertical restraints No 330/2010 of 20 April 2010, which does not include any provision of that nature. Litigation on approvals will then have a purely contractual nature just as it did prior to the coming into force of Regulation No 1400/2002.

Pursuant to the general law, the exercise of the approval right by the supplier must not be sudden and hasty or may be held abusive[109]. Likewise, the supplier's refusal to approve a takeover bid by a third party is abusive where, in violation of its contractual obligations requiring a fair and careful review of applications, it does not give grounds for that decision[110]. The supplier is under an obligation to strictly comply with the procedure it has itself specified[111]. The refusal to examine the offer to take over a dealership by a third party to the network without establishing that the transferee selected was approved on the basis of criteria whose precise content could be verified, is discriminatory within the meaning of Articles 1240 of the Civil Code and L. 420-1 of the Commercial Code[112]. By contrast, a supplier who has not taken on any commitment to objectively review all bids for the takeover of its dealerships is not breaching the contractual obligation of good faith if it postpones its answer to such a bid, where it is put forward in the context of the restructuring of its own undertaking[113]. The refusal to approve notified at the end of a careful review of the submitted candidacy cannot be challenged[114]. However, a refusal is not justified where the evicted candidate meets all the criteria laid down by the supplier[115].

[108] For application to a contract concluded under Regulation No 1400/2002, see CA Paris, 17 May 2017, LawLex17892, holding that, although the supplier may oppose the transfer of the distribution agreement, even within the network, when its market share is below the de minimis thresholds, such is not the case for an authorized repairer contract, due to its necessarily large market share on the market in question.
[109] Cass. com., 2 July 1991, LawLex025853.
[110] Cass. com., 2 July 2002, LawLex024211.
[111] T. com. Lyon, 14 December 1999, LawLex025264.
[112] CA Versailles, 25 April 2017, LawLex17744.
[113] CA Paris, 28 January 2004, LawLex041513.
[114] CA Versailles, 19 June 2008, LawLex081005.
[115] CA Paris, 23 October 1998, LawLex025145.

By contrast, a refusal to approve cannot be held unlawful merely because the supplier offered another territory to the ousted candidate, where that refusal may validly be based on other grounds than those relating to the candidate itself[116]. A supplier does not commit any abuse where it refuses to approve a candidate who does not give the required guarantees but instead offers it an agency contract, insofar as the financial commitments required under the latter contract are not comparable[117]. Furthermore, a refusal to approve a candidate introduced by the terminated dealer is based on lawful grounds where it relies on the requirements of network restructuring[118] or on the non-compliance with the financial and legal standards of the brand applicable to all the candidates[119]. Lastly, the mere fact that assignment negotiations have been less beneficial to the assignor that it had expected is not sufficient to establish misuse of the manufacturer's right of approval where that manufacturer has not refused any candidacy introduced by the dealer[120].

3.79. Transfer of employment contracts to the new dealer.

In the case of a change in the legal position of the employer such as sale, inheritance, merger or conversion of the business, Article L. 1224-1 of the Labor Code[121] requires the new employer to take over all employment contracts. Distributors relying on that provision have, after the end of the contract, sued the supplier or the new distributor to force them to take over their staff or assume the dismissal costs. As a principle, this is subject to a strict condition: the transfer of an economic entity that retains its identity and whose business is carried on or taken over[122].

The applicability of that provision of labor law regarding motor vehicle distribution has resulted in a lot of litigation the outcome of which has been variable. Faced with these changes in the case law, some petitioners, in view of the Directive of 12 June 1998[123], asked the national courts to refer the matter for

[116] Cass. com., 5 October 2004, LawLex024211. Compare with T. com. Paris, 21 January 2002, LawLex024689: the refusal to approve an acquirer is unfair where, that acquirer being approved for another concession, that decision shows the supplier's will to impose a third party under conditions much less favorable for the dealer.
[117] CA Paris, 28 January 2004, LawLex041581.
[118] CA Paris, 30 June 2006, LawLex061544.
[119] TGI Paris, 9 January 2007, LawLex07108.
[120] CA Douai, 28 January 2010, LawLex10109. - Cf. CA Paris, 18 February 2000, LawLex024741.
[121] Former Article L. 122-12.
[122] Cass. ass. plén., 16 March 1990, Bull. civ. nº 4.
[123] Council Directive No 77/187/EEC of 10 February 1977, relating to the safeguarding of employees' rights in the event of transfer of undertakings, as amended by Council Directive No 98/50/EC of 29 June 1998, replaced by Council Directive No 2001/23/EC of 12 March 2001, on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJEC L 82 of 22 March 2001, 16.

a preliminary ruling to the EU court. This attempt failed and the French courts have unanimously rejected this type of claim[124].

According to case law, where the exclusive rights on the territory and the activity of the dealership are transferred to a new distributor, Article L. 1224-1 requires the latter to also take on the former dealer's employment contracts[125]. This legal obligation means that the employment contracts must be still in progress at the date of the designation of the new dealer. The terminated dealer who did not wait until the notice period has expired or a new reseller is appointed to lay off its staff, cannot subsequently claim that his successor has fraudulenty avoided the application of Article L. 1224-1 by delaying the signing of the contract[126]. This solution is concretely assessed in light of the transaction as a whole: even where the transfer is carried out in two phases, the taking-over of the employment contracts by the new exclusive distributor is final[127]. The latter's take-over obligation exists even if the ousted distributor remains active[128]. This solution is open to criticism: it creates a veritable social liability attached to the former dealer's territory such as to dissuade possible candidates from having an interest in the continuation of the activity, in particular where the former dealer employed a large or under-skilled staff. In such a case, far from protecting employees' jobs, Article L. 1224-1, as applied by the courts, is likely to prevent the setting-up of a new dealer and the creation of jobs which would have been generated by the activity of the candidate taking-over the territory.

Thus, the courts always try to ascertain whether the transfer of the business has taken place in concreto. Therefore, where the business of an undertaking in which an employee claims the application of Article L. 1224-1 is limited to the repair and sale of second-hand vehicles without including the business of distribution of new vehicles[129], or where there is no transfer of tangible assets between the former and the new distributor[130] whereas the former distributor continues to carry out a significant portion of its business, it has been held that there was no transfer of activity. Given the risk of loss of jobs, it is preferable that the application of Article L. 1224-1 to successive dealers be as restrictive as possible.

[124] Labor Court of Alès, 21 October 2004, LawLex042597: it is not required to refer the Court of Justice for a preliminary ruling relating to the interpretation of Article [L. 1224-1] of the Labor Code where the manufacturer has not appointed new representatives on the territory in question; CA Rouen, 18 January 2005, LawLex053765: it is not necessary to refer the Court of Justice for a preliminary ruling relating to the interpretation of Directive No 2001/23 of 12 March 2001 relating to the safeguarding of employees' rights in case of transfer of undertakings.
[125] Cass. soc., 11 June 2002, LawLex031203.
[126] CA Lyon, 15 March 2018, LawLex18484.
[127] CA Bordeaux, 2 February 2004, LawLex04316.
[128] Cass. soc., 11 June 2002, LawLex031203.
[129] CA Rouen, 18 January 2005, LawLex053764.
[130] CA Amiens, 3 April 2001, LawLex031193.

It has been held that in the case of the pursuit of the activity after the deadline for the notification of the term of a distribution agreement and up to the date of the termination of employment contracts more than three months later, the trial courts alone - not the interim relief judge - may rule on the criteria of Article L. 1224-1 of the Labor Code and their consequences[131].

3.81. No obligation to assist reconversion.

The end of the 1990's was marked by a wide trend of decisions influenced by the theory of contractual solidarity[132], which challenged many lawful terminations held in compliance with the contractual notice period solely on the grounds that the dealer had met with problems selling its business. Thus, the trial courts considered that a manufacturer breached its duty of loyalty when terminating a concession contract without having informed the dealer of its intention to restructure the area concerned, therefore depriving it of the possibility of negotiating its redeployment under satisfactory conditions[133], or when it weakened its negotiation capacity with the purchaser[134] by removing any chance of redeployment[135]. In certain circumstances, the courts even required the manufacturer to allow the dealer to distribute competing motor vehicles during the notice period[136], or even to extend the term of the notice period in order to facilitate the acquisition of the concession under acceptable financial conditions[137].

The Court of Cassation has ended that case law trend which amounted to instituting a termination indemnity for the distributor, even in case of lawful terminations, by laying down the principle that the manufacturer has no duty of assistance of the dealer for its redeployment[138]. Consequently, the manufacturer is not required to postpone the termination pending the possible sale of the business[139]: notice of termination during the sale negotiations does not incur the liability of the manufacturer where it is not established that it is the cause of the negotiation failure[140], which may be explained by the lack of cooperation by the dealer[141]. The manufacturer cannot be required to get involved in the negotiations conducted for the purpose of a possible repurchase of the terminated distributor's company by a new

[131] Cons. prud'h. (labor tribunal), Ajaccio, 16 October 2013, Diesel (9 orders granted on same day), unpublished.
[132] This principle originates in Article 1104 (former Article 1134(3)) of the Civil Code pursuant to which agreements "must be performed in good faith".
[133] CA Paris, 30 January 1998, LawLex025097, upheld by Cass. com., 9 January 2001, LawLex024787.
[134] CA Paris, 11 February 1999, LawLex025177; 24 March 2002, LawLex024598; T. com. Paris, 24 January 2002, LawLex024638.
[135] CA Paris, 4 March 1999, LawLex025187.
[136] CA Paris, 26 March 1999, LawLex025199; 15 October 2003, LawLex04854. Compare: where that option is spontaneously offered to the dealer, T. com. Paris, 23 October 2000, LawLex024788.
[137] CA Paris, 11 December 1998, LawLex025159, upheld by Cass. com., 19 June 2001, LawLex024369.
[138] Cass. com., 6 May 2002, LawLex024624; 7 April 2004, LawLex04959; see also CA Paris, 4 June 2003, LawLex032288; 15 September 2004, LawLex042112.
[139] CA Paris, 10 November 2004, LawLex055641; 6 April 2005, LawLex09521; TGI Paris, 25 November 2004, LawLex054045. Contra, see CA Paris, 2 October 2008, LawLex09511.
[140] CA Paris, 14 February 2003, LawLex03835.
[141] CA Paris, 27 March 2008, LawLex08344; Cass. com., 16 December 2008, LawLex09137.

dealer[142] and support it in those negotiations[143], or, prior to termination of the contract, to put the former distributor in contact with a potential future dealer[144]. The manufacturer is not required to assist the dealer in finding a solution for its reconversion where that dealer has placed itself on its own initiative in a situation of economic dependence[145]. By contrast, it has been held that a manufacturer was in breach of the contractual good faith obligation in the context of the implementation of a termination for reorganization, even if it has no duty of assistance of the dealer for its redeployment, where it informs that dealer only very late of its decision not to authorize it within its new network, therefore depriving it of the profit of a useful notice period[146]. It is somewhat worrying that the Court of Cassation seems to have recently reversed its former position by finding that a manufacturer beached its duty of good faith, even though it was careful to comply with the contractual notice period when it terminated the contract whilst being aware of sales negotiations initiated by the dealer with a possible purchaser[147]. However, the scope of that unpublished decision remains limited and the trial courts did not follow[148]. In effect the Court of Cassation has reaffirmed the legitimacy of terminations where two years' notice is given: there is no bad faith when the termination takes place in the midst of takeover negotiations that have been ongoing for over a year, and where those negotiations have failed due to the non-approval of the new candidate and not due to the decision to terminate the negotiations[149]. The trial courts have therefore ruled that a manufacturer which respects the time-limit of the contractual notice period is not required to assist the dealer in respect of the takeover of the business and may appoint a new dealer without any obligation on the new dealer to purchase the former dealer's concession[150]. In contrast, while recalling that there is no obligation for the supplier to assist with the dealer's reconversion, the Court found that the termination is in bad faith when the former is aware that negotiations with a third party for the sale of the business are underway and of the impact of its decision on the value of its intangible assets[151]. This case law is likely to discourage suppliers from offering distributors an amicable deal for the transfer of their businesses insofar as such an initiative may result in incurring the supplier's

[142] TGI Paris, 6 November 2002, LawLex03678; 7 September 2004, LawLex042212; T. com. Versailles, 9 June 2006, LawLex061373; CA Paris, 17 December 2008, LawLex09470.
[143] CA Versailles, 16 September 2004, LawLex042138, upholding T. com. Versailles, 4 June 2003, LawLex032302.
[144] Cass. com., 3 December 2002, LawLex031194; TGI Paris, 6 February 2003, LawLex03830; 9 March 2004, LawLex04737; 5 April 2005, LawLex055371.
[145] CA Paris, 27 November 2003, LawLex034517.
[146] CA Paris, 28 April 2004, LawLex04960.
[147] Cass. com., 15 September 2009, LawLex093095.
[148] CA Paris, 21 January 2010, LawLex1076: the supplier, who is not required to assist the dealer for its redeployment, does not wrongfully terminate the contract due to the mere fact that the measure takes place during taking-over negotiations where such negotiations have been initiated for more than a year and that a two-year notice period has been granted, which allows the parties to progress calmly.
[149] Cass. com., 27 April 2011, LawLex11801.
[150] T. com. Paris, 28 May 2018, LawLex18879.
[151] Cass. com., 8 October 2013, LawLex131381.

liability where negotiations are slow in the case of ordinary terminations after the start of the negotiations.

B. Compensation for loss

2° Assessment of the loss

3.86. Dealer's loss.

The compensation for the distributor's loss in respect of a sudden termination of its contract must be limited only to the harm resulting from the sudden nature of the termination[152] (and should not extend to harm related to the termination itself) which is generally assessed as the amount of the margin that would have been made during the notice period. The courts for a long time, and not without criticism, indemnified the loss of gross margin. It has thus been held that only the gross operating surplus, which reflects the economic result achieved by the dealer, may be used as a basis for calculation of the loss resulting from an abusive termination[153]. However, where the dealer had announced its intention to transfer its business, its loss could only correspond to the loss of gross margin it could have achieved during the two years of notice period that it could have claimed[154]. Likewise, the dealer's loss cannot be calculated in view of the average gross margin it achieved in the last three years of operation where its results constantly decreased during that period[155]. Some courts even considered that the compensation should not concern the loss of margin over the two years of notice period but only the loss of the opportunity to pursue business relations in those two years, by taking account, if necessary, of the deterioration of the dealer's financial situation during that period[156]. More reasonably, the Court of Appeal of Paris has returned to this position and advocated, in its "*fiches méthodologiques*" (Fact Sheets) on the compensation of economic loss[157], that account be taken not of the loss of gross margin, but the loss of margin on variable costs, i.e. the turnover after deduction of costs which have not been borne as a result of the decline in activity. This principle is now applied in many cases[158], even if certain chambers of the Court of Appeal continue to refer to gross margin.

[152] CA Paris, 20 January 2011, LawLex11120.
[153] TGI Paris, 19 September 2006, LawLex062073; but see CA Grenoble, 4 October 2007, LawLex071517: the loss of a dealer that has been abusively terminated must be assessed not from the gross margin but from the net profit, less expenses and charges linked to the activity.
[154] CA Paris, 24 January 2008, LawLex081248.
[155] CA Paris, 15 April 2010, LawLex10472.
[156] CA Paris, 27 May 2010, LawLex10631.
[157] Fiche méthodologique (Fact Sheet) No 6, "Which concept of margin ?"
[158] CA Paris, 15 November 2017, LawLex171871.

Moreover, the dealer's loss cannot be assessed in view of the value of its business where it could rapidly redeploy[159]. By contrast, where the termination of its contract was conducted in such a way that it was impossible for it to transfer its business or to find another brand to represent, the dealer must be compensated for the loss of its business[160].

Finally, under Article 2224 of the Civil Code, a compensation claim cannot be brought more than five years after the event giving rise to the harm or the knowledge of it by the dealer[161]. In this regard, the courts have stated that the fact that the manufacturer was willing to provide the distributor with assistance in connection with the closure of a site does not constitute an acknowledgment of liability for the operating losses that the latter has suffered capable of interrupting the statute of limitations[162].

[159] Cass. com., 3 July 2001, LawLex024957, on this issue quashing CA Paris, 27 May 1998, LawLex024958.
[160] Cass. com., 17 July 2001, LawLex024948, approving CA Paris, 10 December 1998, LawLex024947.
[161] T. com. Versailles, 8 September 2017, LawLex171460 and 7 March 2018, LawLex18394.
[162] T. com. Paris, 28 May 2018, LawLex18879.