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 4 Termination of contract

I. Extraordinary termination

A. Causes

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[5]. 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[6] or the mere transfer of the premises against the supplier's advice[7] 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"[8]. 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 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[9].

II. Ordinary termination

[5] Cass. com., 16 April 1996, LawLex025563, dismissing the appeal lodged against CA Paris, 7 April 1994, LawLex025389.
[6] CA Paris, 14 November 2002, LawLex03737.
[7] CA Paris, 14 November 1994, LawLex025421.
[8] Regulation No 1400/2002 of 31 July 2002, OJEC L 203 of 1 August 2002, Article 1(1)(b) and recital 27.CA
[9] CA Paris, 7 February 2018, LawLex18254.

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))[10]. 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[11]. 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[12] and JAMA[13] 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[14], 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[15] or at least made it irrelevant whether or not the reasons given were accurate[16]. Compliance with the notice period also exempted the manufacturer from any liability by reason of investments incurred by the dealer shortly before the notification of the termination[17], provided that they were spontaneous investments by the dealer which could be re-used as part of another exploitation[18], 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

[10] 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.
[11] 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.
[12] European Automobile Manufacturers Association.
[13] Japanese Automobile Manufacturers Association.
[14] T. com. Paris, 28 September 1989, LawLex025758; CA Paris, 22 October 1999, LawLex025244.
[15] CA Paris, 11 December 1990, LawLex025815; TGI Paris, 27 November 2002, LawLex03640.
[16] CA Paris, 26 January 2005, LawLex053766.
[17] CA Paris, 19 May 1993, LawLex026004; 4 July 1996, LawLex025590.
[18] 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.

informed of its reorganization projects[19] 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[20]. 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[21]. 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[22]. 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[23]. 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[24].

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.

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

[19] 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.
[20] Cass. com., 6 May 2002, LawLex024624. See also CA Paris, 4 June 2003, LawLex032288.
[21] CA Paris, 5 February 2003, LawLex032863.
[22] CA Chambéry, 8 April 2014, LawLex141871.
[23] CA Grenoble, 22 February 2018, LawLex18358.
[24] CA Paris, 12 September 2018, LawLex181295.

termination decision (Article 3(4))[25]. Even if it imposed a requirement going further than general contract law[26], 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[27], 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[28]. 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[29]. 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[30].

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[31] now once again apply insofar as contracts no longer have to contain an obligation to provide reasons for termination[32]. Like previously, stating reasons, even fallacious ones, will therefore no longer incur the supplier's liability[33] since the court is not required to review the

[25] 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.
[26] 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.
[27] 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.
[28] 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.
[29] CA Paris, 11 May 2016, LawLex16965.
[30] Cass. com., 29 March 2017, LawLex17627.
[31] 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.

[32] 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.
[33] 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,

legitimacy of the grounds for termination given by the manufacturer[34]. 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[35]. In contrast, a grievance which was not mentioned in the termination letter may not subsequently be invoked to justify the measure[36].

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[37]. 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[38]. 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, 5º 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 over national law[39]. 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

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.

[34] Cass. com., 29 March 2017, LawLex17627.

[35] CA Paris, 22 March 2002, LawLex024699.

[36] CA Paris, 18 May 2016, LawLex16955.

[37] T. com. Paris, 28 September 1989, LawLex025758.

[38] See especially CA Versailles, 4 September 2012, LawLex122118.

[39] CA Paris, 11 May 2011, LawLex11935, LawLex11936, LawLex11937, LawLex11946, LawLex11947.

of an established commercial relationship[40]. 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[41]. 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[42]. 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[43].

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[44]. 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[45]. A distributor also cannot complain of having received no notice 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[46]. 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

[40] CA Versailles, 4 September 2012, cited above.
[41] 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.
[42] CA Paris, 15 January 2014, LawLex1433; 2 July 2014, LawLex14777 and 24 June 2015, LawLex15837; 11 May 2016, LawLex16965.
[43] Cass. com., 5 July 2016, LawLex161293, upholding on this issue CA Limoges, 18 February 2015, LawLex15227.
[44] 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.
[45] CA Paris, 2 September 2010, LawLex10988.
[46] Cass. com., 14 May 2013, LawLex13830; and on referral: CA Limoges, 18 February 2015, LawLex15227.

occurs in the context of the dealer's extended failure to meet its financial obligations[47]. 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[48]. 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[49].

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[50] 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[51], the Paris Court of Appeal now appears to wish to go back to the position adopted by the Court of Cassation[52].

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.

[47] T. com. Ajaccio, 2 October 2017, LawLex171875.
[48] CA Paris, 25 October 2017, LawLex171717.
[49] Cass. com., 29 March 2017, LawLex17627.
[50] Cass. com., 9 July 2013, LawLex131090.
[51] CA Paris, 28 January 2016, LawLex162250, LawLex16227; 29 January 2016, LawLex16284.
[52] 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.

The motor vehicle agent has no direct legal connection with the manufacturer[53]. 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[54]. The manufacturer cannot therefore be held liable for the termination, such liability being attributable to the dealer[55] or the agent if the latter instigated the termination[56]. 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[57] or that the dealer has set up an inter-dependency between the contracts and ensured that the agency contract follows the main contract[58]. 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[59].

Traditionally case law has held that where the contractual notice period is complied with, the termination of the agency contract is not abusive[60]. 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[61]. 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 commercial relationship of sixteen years' duration[62]. 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[63]. 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

[53] T. com. Bordeaux, 8 August 1995, LawLex2300205487.
[54] T. com. Bordeaux, 8 August 1995, LawLex2300205487; CA Rennes, 10 March 2009, LawLex09994.
[55] 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.
[56] CA Toulouse, 22 June 2004, LawLex041670.
[57] CA Paris, 19 September 2013, LawLex131358.
[58] CA Versailles, 16 October 2007, LawLex071583.
[59] CA Pau, 3 October 2013, LawLex131455.
[60] CA Paris, 15 October 1999, LawLex033231.
[61] CA Rennes, 16 January 2007, LawLex07110.
[62] CA Paris, 19 September 2013, LawLex131358.
[63] CA Versailles, 11 September 2018, LawLex181264.

contract will be signed with the latter[64]. 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[65].

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[66].

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[67], carries out such sales, even without any advertisement[68], 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[69]. The termination of repairer's agency contract is also justified in the case of a refusal to submit to the required skills assessment for continued authorization[70]. 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[71]. On the other hand, a manufacturer causes a manifestly unlawful disturbance ("trouble manifestement illicite") that the court can remedy by

[64] CA Paris, 27 February 2017, LawLex17422.
[65] CA Paris, 27 June 2018, LawLex181024.
[66] CA Paris, 13 October 2016, LawLex161692.
[67] CA Paris, 22 January 2013, LawLex1387; T. com. Paris, 13 February 2014, LawLex14297; CA Paris, 18 January 2017, LawLex17114.
[68] T. com. Paris, 21 June 2017, LawLex171411.
[69] 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.
[70] T. com. Bordeaux, 8 November 2013, LawLex131633.
[71] 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.

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[72]. 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[73].

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[74]. 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[75]. 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[76].

[72] CA Paris, 10 November 2016, LawLex161878.
[73] CA Paris, 27 March 2017, LawLex17638.
[74] CA Paris, 22 January 2013, cited above.
[75] Cass. com., 22 October 2013, LawLex131543.
[76] Cass. com., 5 July 2016, LawLex161293.

VII. Consequences of termination

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[77] (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[78]. 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[79]. 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[80]. 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[81]. 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[82], 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[83], even if certain chambers of the Court of Appeal continue to refer to gross margin.

Moreover, the dealer's loss cannot be assessed in view of the value of its business where it could rapidly redeploy[84]. By contrast, where the termination of its contract was conducted in such a way that it was

[77] CA Paris, 20 January 2011, LawLex11120.
[78] 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.
[79] CA Paris, 24 January 2008, LawLex081248.
[80] CA Paris, 15 April 2010, LawLex10472.
[81] CA Paris, 27 May 2010, LawLex10631.
[82] Fiche méthodologique (Fact Sheet) No 6, "Which concept of margin ?"
[83] CA Paris, 15 November 2017, LawLex171871.
[84] Cass. com., 3 July 2001, LawLex024957, on this issue quashing CA Paris, 27 May 1998, LawLex024958.

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[85].

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[86]. 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[87].

[85] Cass. com., 17 July 2001, LawLex024948, approving CA Paris, 10 December 1998, LawLex024947.
[86] T. com. Versailles, 8 September 2017, LawLex171460 and 7 March 2018, LawLex18394.
[87] T. com. Paris, 28 May 2018, LawLex18879.