

L. 442-6-1,5° Commercial Code

I.- The following acts committed by any producer, trader, manufacturer or person listed in the trade register render the perpetrator liable and entail the obligation to redress the prejudice caused:

(...)

5. Suddenly breaking off an established business relationship, even partially, without prior written notice commensurate with the duration of the business relationship and consistent with the minimum notice period determined by the multi-sector agreements in line with standard commercial practices.

(...)

The foregoing provisions do not affect the right to cancel without notice in the event of the other party failing to discharge its obligations or in the event of force majeure;

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“The following acts committed by any producer, trader, manufacturer...”

- This provision applies to all economic operators
- Even to non-traders in the eye of French law (eg. Civil agents, and in particular commercial agents)

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“Suddenly breaking off (...) even partially”

- This provision applies to a complete termination: termination of a contract, termination of orders.
- It may also apply to a partial termination :
 - ✓ Significant reduction of orders (from 75,000 to 29,000),
 - ✓ Significant and unjustified modification of contractual terms (prices, payments terms,...)

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“Business relationship”

- The notion of “relationship” is distinct from that of “contract” .

This article can apply to a string of one-off contracts (orders), a string of fixed-term contracts or to an open-term contract.

- The business relationship can be established even though the partner has changed, eg. a new supplier continues the contract made with a previous supplier following a merger.

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“Established”

This provision applies only when the relationship is “stable”.

➤ Signs demonstrating stability:

- Duration of the relationship
- Frequency of the relationship and/or regularity in the relationship
- Investments made for the development of the relationship
- Technical collaboration between the parties
- Size and evolution of the turnover

➤ Signs demonstrating the absence of stability:

- One-off contract for a limited time (eg. sub-contracting agreements in respect of different building sites)
- Calls for tender and competitive biddings on a systematic basis
- Precarious nature of the task assigned (eg. making of a TV report)

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“Without prior written notice”

➤ Formalisation : written notice of the termination.

According to French jurisprudence, this means by “certified mail with return receipt requested”

➤ Proof of the written notice of the termination must be provided by the terminating party.

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“Commensurate with the duration of the business relationship”

- The first criterion to assess the notice period is the duration / length of the business relationship.
- French jurisprudence seems to uphold a notice period of one month per year of business relationship with a maximum of 24 months.

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“Consistent with the minimum notice period determined by the multi-sector agreements in line with standard commercial practices”

- The courts must take into account the standard commercial practices or the multi-sector agreements but only as a minimum basis.
- The notice period can therefore be longer depending on other criteria.

The other criteria taken into account by the courts to assess the notice period

- Steady turnover increase
- Economic dependence of the non-terminating party towards the terminating party (no or few acceptable alternatives)
- Time required to sell the stock
- Investments made by the non-terminating party in respect of the business relationship
- Nature of the products or services: technical nature, seasonality, reputation

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“Render the perpetrator liable”

- It is a liability in tort as the termination of the business relationship does not depend on the existence of a contract.
- But this liability in tort can also come in addition to a liability in contract when the termination of the business relationship consists of the termination of a contract. In such case, the liability in contract prevails if article L.442-6-1, 5 of the French Commercial Code is not the cause of action.

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“And entail the obligation to redress the prejudice caused”

- The compensation must be equal to the gross margin the non-terminating party would have made had the appropriate notice period been respected.
- Possibility to compensate the non-terminating party for other losses caused by the sudden termination:
 - ✓ Damage to non-terminating party’s commercial reputation
 - ✓ Lost stocks or investments
 - ✓ Disruption of non-terminating party’s business

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✓ In such case, the sudden termination is justified.

Article L.442-6 FRENCH COMMERCIAL CODE

- III. - The action is brought before the competent civil or commercial court by any person who can prove an interest, by the Public Prosecutor, by the Minister for the Economy, or by the Chairman of the Council for Competition when he detects a practice referred to in the present Article in the normal performance of his duties.
- When that action is heard, the Minister for the Economy and the Public Prosecutor may ask the court to which the matter is referred to order the cessation of the practices referred to in the present Article. They may also have the nullity of the unlawful clauses or contracts declared in respect of all such practices and request reimbursement of the sums improperly paid and the imposition of a civil fine the amount of which shall not exceed 2 million Euros. Compensation for the prejudice suffered may also be requested.
- IV. - The urgent applications judge may order the cessation of the discriminatory or unfair practices or any other interlocutory measure.

➤ **Is the liability for sudden termination of a business relationship a liability in tort or in contract?**

(Rome I or Rome II regulation)

➤ The business relationship is not the contract.

➤ French jurisprudence is divided but it rather tends towards the recognition of a liability in tort (*Cour de Cassation*, commercial chamber, October 21, 2008 and September 15, 2009)

➤ **Is article L.442-6-I, 5 a mandatory rule of law?**

(Rome I regulation- art.9.1 : “*Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests*”).

➤ The Minister’s intervention expresses a protection of the general interest.

➤ Again, French jurisprudence is divided but it rather tends towards the recognition of article L.442-6-I,5 as a mandatory rule of law.