

France

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Direct distribution

1 May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

A foreign supplier can establish its own entity to import and distribute its product under both EU and French law which protect the freedom of establishment.

A subsidiary is considered a separate legal entity from the parent company and would be a viable option for a foreign parent company wanting to keep ultimate control of the entity established in France.

2 May a foreign supplier be a partial owner with a local company of the importer of its products?

This is a viable option as there is nothing prohibiting such a set up, provided that there is no distortion of competition.

3 What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

The best suited will depend on the size and capital of the company but there are three main types of limited liability companies:

- SA: requires a minimum capital of €37,000 for a private SA and €225,000 for a public SA and a minimum of seven shareholders so is best suited for a large business. The management structure does not leave much room for flexibility as it is regulated;
- SARL: requires only one shareholder and a share capital of only €1 and is therefore preferred by smaller businesses. The management consists of one or more managers who can be shareholders but not legal entities; and
- SAS: is the most flexible business form and the most suited for joint ventures. The only requirement for management is the appointment of a president by the shareholder(s).

To set up such entities, the company must register the company with the competent commercial court, which can be done electronically.

The rules governing business entities derives from statutory law and can be found mainly in the Commercial Code.

While it is not common in France, there is also the possibility of the *societas Europaea*, which is a European company that is regulated by EU law and requires a minimum capital of €120,000.

4 Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

With few exceptions, there are no statutory limits on foreign ownership or control of companies. Therefore, foreign business have the right to operate in France, invest and own domestic business entities.

However, the French law does make exceptions in certain sectors such as those concerning France's national interests such as national public order, national defence and public security which are subject to prior notification by the Ministry for the Economy and Finance.

5 May the foreign supplier own an equity interest in the local entity that distributes its products?

It is possible to own an equity interest in a local entity which distributes its products.

6 What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Foreign suppliers will need to pay tax on its earnings in France. The rule of territoriality applies regardless of whether the entity is a subsidiary, branch or a permanent establishment. Therefore, foreign suppliers are privy to the same tax provisions as domestic operators (except for custom duties).

The following is a non-exhaustive list of taxes that will need to be accounted for:

- corporate income tax at the top rate of 33.3 per cent although a surcharge can apply resulting in a maximum rate of 34.43 per cent;
- VAT of 20 per cent paid on all good and services consumed,
- territorial economic contribution (local taxes); and
- dividends paid to non-residents that are subject to a 30 per cent withholding tax and can be increased to 75 per cent if paid to a beneficiary in a 'non-cooperative state or territory'. However, the withholding tax can be reduced or eliminated by applicable double tax treaties or by the EU parent/subsidiary directive.

Local distributors and commercial agents

7 What distribution structures are available to a supplier?

Several distribution structures are available for a supplier:

- franchising: the franchisor puts at the disposal of the franchisee their business know-how and allows the franchisee to become part of a network, allowing them to benefit from a certain degree of brand recognition. This has become very a common distribution method in France;
- commercial agency: the distributor acts in the name of and on behalf of a manufacturer and is therefore acting as an agent or a self-employed intermediary for the supplier;
- exclusive distribution: the distributor is given exclusivity in a territorial area; and
- selective distribution: only certain distributors are selected on the basis of specified criteria.

8 What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

While there is no direct government agency that specifically regulates the relationship between a supplier and its distributor in France, there are other government agencies that could regulate the relationship indirectly. These are:

- The French General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), which is responsible for making sure that competition laws are complied with;

- The French Competition Authority/the European Commission;
- The National Data Protection Commission; and
- sector-relevant agencies.

The relevant laws regulating the relationship between supplier and distributor/agent would be as follows:

- article L134-1 of the Commercial Code that outlines what the agency relationship consists of;
- Books III and IV and article 442-6 of the Commercial Code that outline that a relationship between two commercial partners needs to be governed by fairness and prohibiting any serious imbalance between the parties;
- the European Regulation (EU) No. 330/2010 of 20 April 2010 on the application of article 101(3) of the TFEU that places limits on restrictions that a supplier could place on a distributor or agent; and
- Act No. 78-17 of 6 January 1978 as amended (the Data Protection Act) and Decree No. 2005-1309 implementing it.

9 Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

This depends on whether the distribution agreement was a fixed-term agreement or not.

- fixed term: the parties cannot terminate the contract before it has reached its term unless there is a specific clause that provides otherwise or there has been serious misconduct by one of the parties; and
- non-fixed term: the parties are free to terminate the contract without cause provided that adequate notice has been given.

One of the main restrictions is that a party must provide adequate notice to the other party before terminating a business relationship as set out in article L442-6-1-5° of the Commercial Code unless there has been serious misconduct in which case notice would not be necessary but the courts have set the threshold high for the interpretation of serious misconduct.

It is within a supplier's rights not to renew a distribution relationship provided that it exercises its rights not to renew in accordance with the renewal provision. The courts have upheld that non-renewal can be abusive if a supplier induces an operator into thinking that there will be renewal or if there is inducement to make investments shortly before the contract expires.

10 Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

This depends on the qualification of the contract:

- non-fixed term: parties can terminate such a contract freely without having to pay any compensation or indemnity unless the termination was abusive, in which case compensatory damages could be awarded but not punitive ones;
- non-fixed term without notice: the victim can ask for compensation correlating to the loss of profit but not the loss of turnover which would normally have been perceived during the notice period which was not complied with; and
- fixed-term before the expiry date: the victim can ask for compensation correlating to the loss of profit but not the loss of turnover which would have been perceived if the contract had been left to run its course and provided there was no serious breach or misconduct on the victim's part.

Furthermore, a commercial agent is entitled to a termination payment at the end of the agreement as set out in article L134-12 of the Commercial Code.

11 Will your jurisdiction enforce a distribution contract provision prohibiting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Such a contractual provision would be likely to be enforced in France since parties are generally free to decide on contractual terms. However, there are alternatives to an outright prohibition such as allowing a transfer, subject to the supplier's consent.

While the parties could agree to a provision that prohibited change in ownership or the transfer of its business to a third party, it would be much more common to see a provision which gave the supplier the right to terminate an agreement in such cases.

Regulation of the distribution relationship

12 Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

While confidentiality agreements are common, there are limitations to the extent to which the courts will enforce them.

For example, the information would need to be confidential and not have been previously revealed to the public or known by the co-contractor before entering into the contract.

Furthermore, the provision would need to be limitative and not too broad in order for it to be enforced.

13 Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Non-compete provisions restrict competition and therefore need to be limited in their scope in order to be enforceable. This is especially the case for post-contractual non-compete provisions.

Non-compete provisions are admitted during the term of the contract provided that they are not longer than five years or indefinite, which would be the case if an obligation was automatically renewable.

More stringent criteria have to be met for post-contractual non-compete provisions outlined by EU Regulation 330/2010 on vertical restraints. These include having to be limited to:

- competing goods and services;
- to the premises and land from where the former distributor operated;
- to a period of one year after termination of the agreement; and
- the necessity in protecting know-how that has been transferred to the distributor by the supplier.

The French law mirrors the French law as updated by the Macron Law which entered into force on 6 August 2016.

In a commercial agency, the agent's obligation to act dutifully toward the supplier, pursuant to article L134-3 of the Commercial Code, would limit their actions vis-à-vis a competitor, even in absence of a specific non-compete clause. However, if there was such a clause, it could not exceed two years and would have to be limited to the territory and the kinds of goods that they had been designated to buy or sell.

14 May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

While maximum resale prices can be fixed, the same is not possible for minimum resale prices as these cannot be controlled by the supplier. These restrictions are enforced by the DGCCRF, which can impose fines.

In addition, the French Competition Authority and the European Commission can impose penalties for price-fixing agreements.

However, in a commercial agency, as the agent is working as an intermediary for the supplier, the supplier can fix the prices.

15 May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

While suggesting resale prices is acceptable, a supplier cannot control minimum resale prices, even if it is done in an indirect way. Placing too much pressure on distributors such as establishing minimum advertised price policy or announcing it will not deal with customers who do not follow its pricing policy would be illicit.

16 May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Pursuant to article L442-6 II d of the Commercial Code, a distribution contract specifying that the supplier's price to the distributor will be no higher than its lowest price to other customers are unenforceable.

17 Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

Such restrictions do not exist provided that the seller's actions do not:

- distort competition;
- create significant imbalances between professionals; and
- impose manifestly unfair and excessive terms.

18 May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? May a supplier reserve certain customers to itself? If not, how are the limitations on such conduct enforced? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

While the general principle is that the distribution partners can sell freely without restraint, there are certain exceptions.

A distinction needs to be made between active sales and passive sales:

- passive sales: these are sales in response to an unsolicited demand that a supplier cannot restrict; and
- active sales: these are sales that involve actively approaching customers. A supplier can exclude a distributor from selling in a territory or to customer groups which have been reserved exclusively for another distributor or for the supplier itself.

Selective distribution allows for a supplier to restrict sales pursuant to objective criteria, a distribution option suitable for high-end items.

The supplier must not prevent a distributor from selling products online, although they could impose the existence of a physical sales outlet (prohibition of 'pure players').

19 May a supplier restrict or prohibit e-commerce sales by its distribution partners?

Internet sales are considered passive sales (see question 18). Therefore, a supplier cannot prohibit internet sales, even in a selective distribution system. However, a supplier can nonetheless restrict the distribution partners online presence to their assigned territory and can also impose certain conditions. Suppliers can regulate e-commerce by requiring some quality standards as would be the case in a physical sales outlet.

The restriction of e-commerce is a relatively new phenomenon resulting in uncertainty surrounding the enforcement of restrictive provisions.

20 Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

A supplier can refuse to deal with particular customers provided that doing so would not distort any competition.

Furthermore, a supplier can dictate to a distributor to not sell to a particular customer group if it has been exclusively allocated to a different distributor or reserved for the supplier themselves. However, this is only the case for active sales as passive sales made by a distributor cannot be restricted.

A supplier is free to ban a distributor from selling to unauthorised sellers in a selective distribution network in order to protect it.

In other circumstances, a supplier cannot restrict the distributor's autonomy to deal with customers but 'soft measures,' are tolerated such as outlining the benefits of dealing with a particular customer group.

21 Under which circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

A transaction would either need to be cleared by either the French Competition Authority or the European Commission depending on the circumstances of the transaction.

The French Competition Authority would be competent if the operation was qualified as a concentration, the total worldwide sales figure of all involved companies exceeded €150 million and the total sales figure generated in France by at least two of the companies was greater than €50 million.

However, the European Commission would be competent if the thresholds outlined in Council Regulation No. 139/2004 were reached, such as a worldwide turnover exceeding €5 billion and an aggregate turnover of at least two of the companies exceeding €250 million

The authorities adopt an economic approach to analysing whether a transaction can be cleared, focusing on the effects that concentrations would have on the market's structure and the impact that this could have on competition.

22 Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Both French and EU competition laws prohibit anti-competitive practices such as abuse of a dominant position and illegal cartels. The relevant EU legislation would be article 101 and 102 of the TFEU and European Regulation No. 330/210.

Under French law, article L420-1, 420-2 and 442-6 of the Commercial Code outline further anti-competitive practices.

The DGCCRF can intervene to enforce these laws in a supplier and distributor relationship and can impose fines in case of anti-competitive practice.

Furthermore, a private party can sue for compensatory damages if they have been victim to anti-competitive practices.

Order No. 2017-303 of 9 March 2017 and its supplemental decree increased the efficiency in which a victim can enforce competition rules and obtain full compensation.

23 Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

There are ways to prevent parallel or 'grey market' imports in relation to active sales in selective distribution. Therefore, a distributor can ask that a supplier find out who is responsible for the imports. Often times it will be a distributor who is part of the network who has resold to a non-member, in which case both the supplier and the distributor could claim compensatory damages.

In exclusive distribution, a distributor can be sued if they make active sales in another's territory. The victim can be awarded compensatory damages.

However, it can difficult to prove with certainty that the sales have indeed been active, since they could have been passive sales which are permitted.

24 What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or share in its cost of advertising?

Contractual freedom governs how the supplier and distributor organise advertising and its costs. Therefore, the supplier can allow the

distributor to advertise directly while imposing marketing standards so as to protect the network common identity.

However, deceptive or misleading advertising towards consumers is not permitted under L121- 1 of the Consumer Code.

Provided that doing so does not create a significant imbalance pursuant to article L442-6 1 2° of the Commercial Code, the supplier can pass all its cost of advertising to the distributor or do so partially.

25 How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology-transfer agreements common?

There is a distinction between the treatment of protection of patents and trademarks and the protection of business know-how and trade secrets. These are:

- patents and trademarks: if a patent or trademark has been registered with the National Industrial Property Institute by the supplier, the distributor will need to have a licence to benefit from use of one or the other. Furthermore, compensation for misconduct can be obtained from the courts should there be any infringement of a proprietary right and a supplier can seize any counterfeit items; and
- trade secrets and know-how: while these are not protected as a proprietary right in France, protection can be afforded by other legal mechanisms such as under criminal and civil law. Furthermore, confidentiality provisions can ensure that trade secrets and know-how are kept secret.

Technology-transfer agreements are more common in important financial operations and less so in simple distribution relationships in France.

26 What consumer protection laws are relevant to a supplier or distributor?

The Consumer Code sets out the consumer protection laws in France which were reinforced by the Hamon Law of 17 March 2014 and the LME Act of 2008.

The laws include:

- article 411-1, which provides for legal warranty in case of defect in the conformity of the product;
- article L111-1, which requires the professional to proffer accurate information to the consumer before and during the contractual relationship;
- article L33-3, which obliges the professional to draft terms informing customers of their rights in general terms;
- article L132-1, which prohibits an imbalance in the parties' rights and obligations; and
- article L121-20-12, which gives the consumer a withdrawal right of 14 days.

Furthermore, the Hamon Law introduced class actions which can be brought by a recognised consumer association on behalf of consumers, allowing them to be awarded compensatory damages if they have fallen victim to a professional's misconduct.

27 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and absorbing the cost of a recall?

The DGCCRF can recall or withdraw products that it deems to be defective or presenting a risk to consumers.

Suppliers have an obligation to warn consumers as soon as they become aware of a product's malfunction for security reasons.

Contractual freedom allows the distribution agreement to delineate which party is responsible for the cost of a recall, provided that there is no significant imbalance created between the parties as a result.

28 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

A supplier can either extend or limit the warranties it provides to its distribution partners, but it cannot rule out a warranty.

For example, a supplier cannot limit the warranty it provides to a distributor (unless they are the same specialised operator) in relation to hidden defects (1641 of the Civil Code), which renders the goods unfit for their intended use or which impairs its use in such a way that if the purchaser had known they would not have bought it or bought it at a lower price. This is regardless of whether there was any wrong-doing on the supplier's behalf.

Warranties that are provided to consumers cannot be restricted or ruled out.

29 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end-users of their products? Who owns such information and what data protection or privacy regulations are applicable?

The key legislation relating to personal data is Act No. 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties as amended, also known as the Data Protection Act (DPA) and Decree No. 2005-1309 of 20 October 2005 in France.

The French Data Protection Authority is responsible for enforcing the DPA. The DPA provides rights and guarantees to individuals who have their data processed and outlines that consumers should be informed of how information relating to them will be processed at the time the data is collected.

Parties cannot transfer personal data to a country that is not an EU member if it does not provide a sufficient level of privacy. The new US Privacy Shield seems to provide an extra level of data protection, such as stronger surveillance and enforcement by the US Department of Commerce and Federal Trade Commission, facilitating the transfer of data between the continents.

Being independent from the supplier, each distributor owns the data they have gathered about final consumers or customers as the data controller. However, the supplier could contractually oblige the distributor to share the information with them provided that the DPA was complied with.

Since 1978, files or automated processing systems containing personal information must be declared to the National Commission of Informatics and Liberties (CNIL). The CNIL also has to be informed about any exchange concerning this data, otherwise the contract is void.

30 May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

This depends on whether the distributor is completely independent from the supplier. If the supplier has an equity interest in the distribution partner's business, they would be entitled to make decisions regarding management but if the distributor is completely independent, the supplier could not terminate the relationship based on management decisions.

However, a 'key person' clause could be included in the contract to allow for the terminating of a contract in case of departure of a certain manager or shareholder.

31 Are there circumstances under which a distributor or agent would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

As a matter of principle, the distributor or agent is considered an independent trader. However, if the distributor or agent lacks the independence necessary to qualify as such and instead is placed in a subordinate relationship by the supplier, the French courts will treat them as an employee.

Therefore, it will be necessary for the supplier to make sure that the distributor or agent remains independent in order to be protected against responsibility for violations of employment laws. The French courts have considered that there is subordination if the supplier strictly defines retail prices (except in commercial agency) or if the supplier is the owner of the distributor's client list under the contract.

32 Is the payment of commission to a commercial agent regulated?

Article L134-5 stipulates the meaning of the payment of a commission to a commercial agent. However, the payment is a matter left to contractual freedom.

33 What good faith and fair dealing requirements apply to distribution relationships?

Article 1104 of the Civil Code outlines that contracts must be negotiated, concluded and performed in good faith and failure to comply with such obligations can result in the contract being void.

Furthermore, Book III of the Commercial Code outlines certain obligations such as:

- the publication of an annual document regarding the general conditions of prices;
- a pre-contractual document;
- the prohibition of a significant imbalance between parties' rights; and
- prior notice in case of contract termination.

34 Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

There are no laws requiring a registration or approval by a government agency of a distribution agreement or an intellectual property licence agreement unless they need to be approved by the French Competition Authority or the European Commission (see question 20). Furthermore, pursuant to the Macron Act of 2015, certain distribution agreements will need to be communicated to the Competition Authority under certain conditions (worldwide turnover of more than €10 billion and domestic turnover exceeding €3 billion).

35 To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

The Sapin II law introduced in the French criminal code requires companies which reach a certain threshold (more than 500 employees and a turnover of at least €100 million, where the holding company has its registered office in France), to adopt an anti-bribery compliance programme that will satisfy certain provisions set out in the law such as:

- setting up a whistleblowing system;
- creating a risk map;
- run due diligence on the company's major clients;
- train employees that are more at risk;
- set up a disciplinary process in case of breach of conduct; and
- set up an internal process to control the measures implemented.

Furthermore, bribery and corruption can be punished criminally.

36 Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

A distinction needs to be made between the relationship governing a business-to-business relationship and the business-to-consumer relationship. In the latter, mandatory provisions are deemed included in the contract, even if they are absent. Furthermore, unfair provisions, limitation of liability and guarantee clauses are deemed unwritten.

There are clauses that the courts will not enforce in business-to-business relationships such as a limited liability clause relating to an essential obligation, a clause limiting prior notice rights and a clause forbidding a partner to assign debt obligations.

Governing law and choice of forum**37 Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?**

The parties have contractual freedom to choose which country's law will govern a distribution contract. The European Regulation No. 593/2008, dated 17 June 2008, outlines that a 'contract shall be governed by the law chosen'.

There are restrictions on the enforceability of such clauses as they can be limited by mandatory rules of French international public order.

38 Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Since there are no restrictions on the contractual choice of courts, forum-selection provisions and arbitration clauses are valid provided they are between two professionals and they are mentioned in the contract with exception made for legal action made in emergency.

39 What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

In commercial proceedings, it is the commercial court that has exclusive jurisdiction to hear cases, of which there are eight in the country. The Paris Court of Appeal has jurisdiction of appeals. The Supreme Court in France, responsible for overlooking commercial disputes, is the Cour de Cassation.

Foreign businesses are not restricted in their ability to make use of these courts and procedures and they cannot be discriminated against for being a foreign operator.

A judge can order the disclosure of documents from an adverse party. Furthermore, the judge can authorise the entering of premises



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for the purposes of collecting evidence. However, the party seeking the order would need to prove that the evidence being sought would have a direct impact on the case and parties cannot compel the adverse party to disclose any evidence.

Oral testimony is not very common and judges prefer to rely on attestations set out in writing.

The advantages of resolving disputes in the country's courts is the relative cost-effectiveness while the disadvantage would be the length of time a trial could take.

40 Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Such an agreement will be enforced in France as French courts must enforce arbitration agreements and decline jurisdiction. For the conduct of arbitration proceedings, France has adopted a flexible approach and there are no mandatory rules and no formal requirements for arbitration agreements.

The advantages of resolving disputes by arbitration would be the possibility to keep the dispute confidential. However, the disadvantage would be the high cost.