

N° 3-2021

---

### Advantages without counterpart: The Paris Court of Appeal denies a service provider from its action against a company member of a distribution group company for having obtained an advantage consisting in administrative costs for the organization of a call for tenders (*PSI Grand Sud / Monoprix*)

**DISTRIBUTION, FRANCE, DISTRIBUTION/RETAIL, REBATES, CORPORATE GROUP, ABUSE OF ECONOMIC DEPENDENCE, PUBLIC ORDER, NULLITY / VOIDNESS, BUYER POWER, SUDDEN BREAK OF ESTABLISHED BUSINESS RELATIONSHIPS, GROUP PURCHASING ORGANIZATION, SIGNIFICANT IMBALANCE**

Paris Court of Appeal, May 6th, 2021, SAS PSI Grand Sud / SAS Monoprix, RG n° 19/06400

---

**Jean-Michel Vertut** | Jean-Michel Vertut - Avocat (Montpellier)

**Concurrences N° 3-2021 | Alerts | Distribution**

*\*This article is an automatic translation of the original article, provided here for your convenience. Read the original article [\[fr\]](#).*

**Facts and procedure.** A company had been providing surveillance and guarding services for nineteen Monoprix stores since 2002. In 2013, a framework contract of indefinite duration formalised this situation. In 2015, Monoprix launched a call for tenders for the service. The security company was given two months' notice of termination in the event that its application was not selected at the end of the tender. It was selected for 11 outlets and a new, lower price scale was applied for the future relationship for the entire "Monoprix market", i.e. for services provided to both the selected outlets and the eight that were not. A new framework contract of indefinite duration was drawn up for the services provided at the 11 sales outlets, terminable with three months' notice. The ruling states that the service provider must pay a " *retro-commission* " of 1.5% of the first year's turnover to the Groupe Casino company organising the tender, which the service provider does. Two years later, the service provider was given almost five months' notice of termination, thus complying with the contractual terms, while a second call for tenders was launched. The service provider was not selected and the contract was terminated at the end of the notice period. The business relationship ceases.

The service provider sued Monoprix and formulated several claims, including one for the brutal termination of an established commercial relationship by means of a notice period that it considered too short. The claim was dismissed insofar as Article L. 442-6 I 5° was not applicable, as the commercial relationship had become precarious in 2015, due to the regular competitive bidding process since the selection of partners by tender. The partner was also dismissed from its claim on the basis of the significant imbalance of Article L. 442-6 I 2°, as it failed to establish that it was subject to the obligation to apply lower prices, both for the services provided by the selected outlets and for those that were not, and therefore during the notice of termination for the latter. The judges added that the obligation to lower prices on the entire Monoprix market was compensated by a "*particularly long*" notice period in relation to the length of the relationship, while there was no evidence of economic dependence on the service provider, which generated 11% of its turnover with Monoprix. We will not return to these two subjects, which would probably deserve some comments, and will concentrate on the payment of the retro-commission of 1.5% on the first year's turnover following the 2015 call for tenders and for which the service provider tried to argue that it was a grab by Groupe Casino of a sum corresponding to the CICE (Employment Competitiveness Tax Credit) that it had obtained. The claim was dismissed.

**Issue.** Does the payment by a service provider of a sum entitled "*retro commission*" up to a percentage of the turnover achieved during the first year of activity with its client, to a company of the latter's Group having organised the call for tenders at the end of which the service provider was selected, constitute the obtaining of an unjustified advantage within the meaning of Article L. 442-6 I 1°?

**Solution.** Referring to Article L. 442-6 I 1° ("*On obtaining an unjustified advantage: the retro-commission received on 15 September 2015. Under the terms of Article L. 442-6 I 1° of the French Commercial Code in the version applicable to the facts of this case, it is punishable to obtain... (...)*"), the Court held that "*It appears from the email sent by PSI to Monoprix dated June 25, 2015 (...) that PSI was aware that it would owe administrative costs for participating in the tender for 1.5% of its turnover for the first year. The sum paid to the Casino group, which is not disputed and which organised the 2015 call for tenders for the guarding of Monoprix stores, corresponds to the planned administrative costs and not to a disguised retrocession of the CICE as claimed by PSI. (...)*" ».

**Analysis.** Probably because of the amount of the sum paid in respect of this "retro commission" (13,735.98 euros), which is out of all proportion to the other amounts sought in the proceedings, including 1,720,000 euros in respect of the gross breach of contract, it should be pointed out that no subsidiary request seems to have been made in respect of the disproportionate nature of this remuneration, which could have been envisaged for those who wished to discuss the amount of these "*administrative costs*" from the point of view of manifest disproportion. It may not have been worth the effort. In absolute terms, however, their determination by linking them to the turnover achieved with the service provider is not self-evident, whereas in our opinion they are costs of organising a tender procedure, the necessarily variable nature of which cannot be perceived as they stand (see the report on the approach to the value of the benefit in relation to costs, Paris, 30 March 2021, No. 19/15655, our obs. Lettre distrib. 05/2021). Beyond this case and the amount in question, which is quite limited, it cannot be excluded that a proportional remuneration exceeds by far the costs actually incurred to organize a tender (see, in the matter of significant imbalance, Trib. com. Paris, Feb. 22, 2021, Lettre distrib. 04/2021, S. Chaudouet). It is true that in this case, while a complaint was made that Groupe Casino was recovering the amount of the CICE obtained by the service provider, a fixed commission for administrative expenses in an amount corresponding to that of the CICE would not have been of the best effect for Monoprix, if the commission thus received had corresponded to such a practice, which was wrongly argued in the judgment. Moreover, the judgment does not shed any light on what is meant by turnover achieved "*in the first year*", which can be assumed to be only the turnover of the stores retained for the service, as it might be odd to also base this commission on the share of turnover achieved during the notice period for the guarding service for the stores not retained. The Court therefore conducted its analysis under the terms of Article L. 442-6 I 1°, solely in terms of the justified nature of the "*any*" advantage as referred to in the aforementioned article, in order to decide that it is justified and that it therefore has a counterpart, the retro-commission "*giving the right to participate in the tender procedure*".

Apart from these considerations, the solution also calls for some comments on the consideration itself. In the context of the case, it appears that the exchanges on the occasion of the invitation to tender took place with the director of purchasing and overheads of the Casino group to which Monoprix belongs. The advantage granted for the organization of a call for tenders entrusted by a buyer in the framework of his own purchasing procedure, to an entity of his group, allows him to select the best bidder and to exclude the others. This is at the heart of the buyer's internal functional process set up for him and above all for him. On this occasion, the selected supplier thus comes to finance an organization under the terms of which this same supplier will have been chosen. The " *winner takes all* " - the winner takes all and pays for those who are not selected, just as those who are not selected today and will be selected tomorrow will pay for those who are not selected. The financial burden of a component of the purchasing function is thus transferred, in whole or in part, by the buyer to the vendors or service providers. The financial burden of a component of the purchasing function is thus transferred, in whole or in part, by the buyer to the vendors or service providers for a task that is within the scope of the organization he has decided to set up. From a rational point of view, it is questionable whether it is in the interest of a bidder to pay to be put out to tender and to have to lower its prices if it wants to be chosen, even if it *ultimately* wins the tender. The path leading one economic partner to remunerate the other for the sole fact of having been chosen, or the path consisting in having to remunerate a partner in return for the performance of any function inherent to its own activity or reflecting only the fulfilment of its legal obligations (cf. Com. 18 Oct. 2001, No. 10-15.296, concerning benefits in kind by making temporary staff available to carry out the physical inventory) or contractual obligations, calls for vigilance. The regrettable banality of certain practices does not make them lawful. The usefulness of the payment of a benefit cannot *ipso facto* derive from any decision or task carried out within the framework of a relationship. Thus, in supplier-distributor purchase-sale relationships, benefits for actions performed in the exclusive or quasi-exclusive interest of the person receiving the corresponding benefit or of the persons for whom he is acting have long been stigmatized in terms of their usefulness (rappr. Paris, Feb. 2, 2012, Lettre distrib. 03/2012, our obs.; Caen. 18 March 2008, No. 06/03554). As a general rule and beyond this case, be careful not to consider that any benefit borne by a partner is for the latter a profitable expense due to the very existence of the relationship.