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Advantages without counterpart or disproportionate: The Paris Tribunal of Commerce dismisses a supplier's request for repayment to a Referencing Center due to its interference in a pre-existing commercial relationship (*SAS Guy Guérin / SNC Transgourmet Service*)

DISTRIBUTION, FRANCE, BURDEN OF PROOF, DAMAGES, ALL BUSINESS SECTORS, PUBLIC ORDER, NULLITY / VOIDNESS, BUYER POWER, PRINCIPLE OF PROPORTIONALITY, PRINCIPLE OF TRANSPARENCY, SUDDEN BREAK OF ESTABLISHED BUSINESS RELATIONSHIPS, GROUP PURCHASING ORGANIZATION, BROKERAGE, FORMALISATION OF THE COMMERCIAL RELATIONSHIP

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Concurrences N° 3-2022 | Alertes | Distribution

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Facts. A supplier, Guy Guérin (the Supplier), based in Charente Maritime, is a wholesaler of fresh fruit and vegetables. Transgourmet Operations is a major distributor (the Distributor) in the world of "RHD", within the eponymous distribution group, in particular of food products for commercial or collective catering professionals as well as bakeries and pastry shops.

While the Supplier had been doing business since 2014 with one of the Distributor's establishments located in Saint-Loubès, without the Distributor's referencing Central, Transgourmet Services, having intervened for that purpose, and while the business flow had been developing progressively between the Supplier and this establishment, the Supplier and the Central concluded for the year 2018 a " *Global Supplier Brands Agreement* ", providing for the referencing of the Supplier to 30 Transgourmet affiliates. In return for the listing, a remuneration of 4% was agreed, presumably of the turnover achieved with the affiliates. Although the estimated turnover for the year 2018 with Transgourmet was exceeded, it was nevertheless limited to the pre-existing business relationship with the only Transgourmet establishment with which the Supplier had its historical relationship, before the intermediation of the Central.

A new, identical agreement is concluded for 2019 and the estimated turnover is also exceeded, but still with this single establishment.

In 2020, the same agreement was concluded, but no remuneration was provided for the Central's intervention. At the end of 2020, as the supplies of the Transgourmet establishments are centralized in a new company, Transgourmet Fruits and Vegetables, the Supplier alleges that the listing services for 2018 and 2019 are fictitious and, at the very least, that the remuneration is clearly disproportionate. According to the Supplier, the intervention of the Central and the service paid for the referencing of the 29 affiliates in addition to its historical client, had not allowed any order.

At the beginning of 2021, the Supplier then sued Transgourmet Services and Transgourmet Operations before the Paris Commercial Court, seeking the cancellation of the 2018 and 2019 agreements on the basis of Articles L. 442-6 I 2° and L. 442-1 1° C. com. He sought reimbursement of the sums he had to pay for the referencing (note that he also sued Transgourmet in a separate proceeding for brutal breach of commercial relations). He was dismissed by the judgment reported here. To our knowledge, an appeal has been lodged.

First problem: **On the existence of consideration for the remuneration paid for the listing service** - The remuneration in question was in return for the services set out in an article of the annual agreement, namely: " *Selection of the supplier and listing of its products in a price list, Presentation of the supplier and communication of commercial contacts at each of the Transgourmet affiliates, Provision of a list of affiliates, Commitment to study the listing of new products at the request of the supplier"*. In view of the circumstances of the case, the Court considers that the compensations provided by Transgourmet were real. For the judges, Transgourmet had indeed sent the Supplier the list of Transgourmet affiliates, which it was up to the Supplier to contact in order to develop its sales, which it had not done. According to the Court, " *the fact that only the Saint-Loubès center* " (with which the Supplier was already working before the intervention of the referencing center), placed an order with the Supplier *"does not demonstrate the fictitious nature of the referencing services"*, but rather " *the failure of Guy Guérin to take commercial action"* . The Court is also insensitive to the Supplier's argument that it was unable to work with the other 29 Transgourmet affiliates because of their distance. Finally, for the Court, the very strong development of the turnover during the period when the referencing agreements were in force " *demonstrates the reality of the economic consideration"*.

Second problem: **On the manifestly disproportionate nature of the remuneration** (4%) - The Court, recalling that " *the demonstration required by the legislator of the manifestly disproportionate nature of the remuneration reflects the fact that only benefits that appear obviously disproportionate to the services rendered are prohibited",* noted that *"this was not the case in this instance"*, considering the near tripling of the turnover in 2018 and the additional increase of 43% in 2019. Moreover, in the eyes of the Court, the fact that the referencing services did not give rise to invoicing in 2020 did not demonstrate that invoicing was manifestly excessive in 2018 and 2019, but simply that the parties had chosen to organize their relationship differently compared to previous years.

Observations. The practice in question is that of which a supplier has claimed to be the victim, for having been obliged to pay a referencing Centre that had come to interfere in the pre-existing relationship between this supplier and one of the affiliates of the aforementioned Centre, in order to implement a referencing service that did not exist until then. Except for the last part of the description of the service in question, the components of the service did not go beyond a basic referencing task.

It will not be a question here of rehashing the age-old questions about the remuneration of a referencing task (or function) as such, based on a situation *ex nihilo*, or of dwelling on the legal nature of the referencing operation. On this last subject, a point of literature, well supplied on the question and to which we refer, could prove useful for a more thorough treatment of the subject. In the reported case, let us say immediately that the Court does not seem to have gone down this path either, preferring simply to dismiss the plaintiff on the grounds of insufficient demonstration of the conditions of application of

article L. 442-1 1°. In this respect, the evidentiary requirements at work in this case seem to diverge from the usual evidentiary standard (Paris, Feb. 27, 2020, n° 17/14071, Lettre distrib. 07/2020 and not. RLC N° 97, Sept. 2020, *our obs.*).

On the other hand, this instance gives the opportunity to consider an incidental problem. To understand by this the obligation contracted by a supplier, in the continuity of a pre-existing commercial relationship between him and his customer, to have to remunerate for the future the intervention of a Central of referencing, in proportion to a turnover realized by the aforementioned supplier in particular near a customer whom he already invoiced in the past. The subject is all the more prone to intrigue since this turnover constitutes the one and only one that the Supplier will realize with the affiliates of the Central. It is true that referencing is often replayed from one year to the next between suppliers and referencing organizations and there is no right to be selected *ad vitam aeternam*. However, if the intervention of the Central has allowed the supplier to be referenced by new affiliates and the payment of remuneration for this should be considered lawful, because of the real nature of the service agreed upon, assuming that it has been performed, the debate can still and further focus on the terms of the remuneration and its possible disproportionate rate or its basis. This is all the more true since this basis is, *de facto*, only made up of the turnover achieved with the customer with whom the Supplier worked well before the Central intervened to select him. Had it not been, in fact, with its historical client. In the presence of such circumstances, should not the judge's office be deployed according to a double or even triple trigger dynamic, as the litigants may invite him to do, for a more complete and, ultimately, more relevant assessment of the manifest disproportion? The specialized courts dealing with these matters are in fact able to approach these questions in a more specialized way than courts that have not become specialized and, in so doing, do not have the jurisdictional power to rule on this type of dispute.

In this case, the Supplier, although referenced with 30 affiliates, including the one with which it was already doing business, had not benefited from any business flow with the 29 affiliates, which we will call "new", in the referencing perimeter. In this context and even if, for reasons specific to the case, the flow of business with the original customer had increased significantly, it was far from inappropriate for the Supplier to question the regularity of the basis of the advantage granted. While each case has its own circumstances, we should point out, in relation to this same issue, a decision of the Paris Court of Appeal which, like the first judges at the time, had ruled in the opposite direction (Paris, 27 Feb. 2020, no. 17/14071, aforementioned). This is an illustration of the fact that the debates in this area are far from being definitively exhausted. More broadly, the question addressed here is frequently encountered, in particular when a referral or service center interferes (or intends to interfere) in return for payment, in the relationship between a supplier and its existing customers, both domestically and internationally. At the international level, this is the case, for example, in the case of requests for remuneration for the performance of certain services on a supra-national, European, perimeter, for example, when practically all of the turnover made by the supplier in the various countries of the perimeter concerned is made - and will sometimes continue to be made - in only one of these countries, France for example (*see* the transparency obligation of article L. 441-3 I 4° following the ASAP law). We will leave it at that, in terms of our observations on this case which, because of the subject it deals with, would call for many other remarks.