Concurrences
Competition Laws Review

Concurrences
Antitrust Publications & Events

N° 4-
2022

Upstream contractualization and food supply chain: The Tribunal Judiciaire of Coutances (France) condemns on the basis of civil law a processor for unilateral practices relating the pricing with its milk producers (*SUNLAIT / SAVENCIA*)

DISTRIBUTION, FRANCE, PROFESSIONAL ASSOCIATION, EXCLUSIVE DISTRIBUTION, ALL BUSINESS SECTORS, ABUSE OF ECONOMIC DEPENDENCE, EXCLUSIVITY CLAUSE, COMPETENCE, NULLITY / VOIDNESS, OBLIGATION TO SUPPLY, EXCLUSIVE PURCHASING AGREEMENT, BUYER POWER, SUDDEN BREAK OF ESTABLISHED BUSINESS RELATIONSHIPS, SIGNIFICANT IMBALANCE

TJ Coutances, August 30th, 2022, SUNLAIT c./ SAVENCIA, RG n° 21/01372

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

Concurrences N° 4-2022 | Alertes | Distribution

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

Facts. The subject of the reported litigation is the alleged non-compliance by an Association of Milk Producer Organizations (Sunlait AOP), with two companies of the processor Savencia ("Savencia"), better known through its cheese product brands (Saint-Moret, Caprice des dieux, Elle et Vire etc), of the contractual framework determining the price of milk. In 2012, the Producer Organizations (POs) belonging to the PDO signed framework contracts negotiated by the PDO for a period of 7 years, providing for the supply of raw cow's milk and automatically renewed for 5 years in 2019. Savencia was the sole purchaser of the milk volumes produced by the PO producers. These framework contracts, which included provisions for setting the price of milk collected from member farmers, gave rise to several amendments and memorandums of understanding. After unsuccessful mediation before the mediator for agricultural trade relations on some of the PDO's claims, in September 2021 the PDO brought the matter before the Court of Justice under the *"accelerated procedure on the merits"* as provided for in Article L. 631-28 CRPM, the purpose of which is, under the conditions set out in this text, to allow for the rapid resolution of contractual disputes relating to contracts or framework agreements (under Article L. 631-24 CRPM) concerning the sale of agricultural and food products. The PDO requested that Savencia be condemned for non-performance of its contractual obligations regarding the price of milk paid to producers and negotiated between the manufacturer and the PDO, due to what it considered to be the unilateral fixing of this price. The parties were asked to re-

establish the contractual provisions, in particular those allowing the determination of this price for 2020 and 2021. The Court of Coutance condemned the two companies of the Savencia processor for almost 26,000,000 euros. The provisional execution has not been ordered. According to our information, the decision is being appealed by the transformer.

Issues. This case concentrates a significant number of issues such as the jurisdictional competence of the Court of First Instance seized under the accelerated procedure on the merits, the admissibility of the action brought against one of the processor's companies, the power of the PDO to act on behalf of producers, the intervention of the mediator of agricultural trade relations, a QPC rejected by the defendant on the operative part of article L. 631-28 CRPM or the request for transmission of a preliminary question raised by the defendant on the compatibility of the aforementioned article with the provisions of the CMO regulation n° 1308/2013.

We will only focus on the issue of determining the price of milk through a " *formula* " for its evolution in the framework agreements and its amending acts, such as amendments and memoranda of understanding, which is addressed from various angles in the decision.

As already indicated, the AOP's pleas for the restoration of the contractual provisions between the parties raise three problems. First, that of the non-performance of the contract binding the parties and the liability of one of them for its fault in the performance of its obligations. Secondly, the formation of the contract and the nullity of a protocol fixing the price of milk between the parties because of the circumstances that governed its conclusion. Thirdly, that of the fixing of the price for a specific period, on an ad hoc basis, without the provision of a formula allowing the price of milk to be determined in advance after this period. The judgment, which is very rich in developments, forces us to take the side of having to target the most salient reasons, with the risk and regret of being incomplete.

Solutions

– On the disregard by one of the parties of the negotiated agreements, in this case a protocol of June 2018 modifying the milk price formula in relation to the one in force until then - The Court, at the very basis of its reasoning and in the double visa of articles 1103 and 1194 C. civ., states in its major that " *Article 1103 of the Civil Code provides that 'contracts legally formed take the place of law to those who have made them'. Article 1194 of the same code does not contradict this principle by recalling that the contract obliges the parties to what they have expressed as well as to all the consequences which equity, usage or the law gives them*". Noting that, in addition to the agreement on the formula for the evolution of the price, the protocol evoked certain points still " *in question*", "the fact *remains that the parties have fixed and agreed on the formula for the evolution of the price of milk*". And on the contractual responsibility incurred by Savencia, it is held that: " *It follows that the breach of the agreement concluded by way of the protocol of June 2018 is unilateral, the efforts of SUNLAIT to maintain the resulting contractual formula being jeopardized by the competitive positioning of the company SAVENCIA. This unilateral breach, contrary to the law of the parties, is all the more reproachable to the company SAVENCIA as it is in contradiction with the mechanism of the cascade price instituted by the law EGALIM1 applicable to the parties.*" Let us also point out the attention brought by the Court to the contractual options which were however offered by the contract to the purchaser, with a view to adapting the formula which had become undesirable in his eyes and which he did not favour, preferring to disregard his obligations in terms of the price to be paid: " *Then, as was specified above, the parties clearly intended to adopt a formula for determining the price of the milk on the basis of precise reference criteria and indicators. If the formula thus adopted could not be continued* in*view of the variation in the price of raw materials or unforeseeable changes of an economic or regulatory nature that upset the economy of the contract, it was up to the SAVENCIA Group, wishing to maintain its competitiveness and its market shares vis-à-vis its competitors, to initiate a renegotiation via the provisions set out in the framework contract, through the effect of meeting or renegotiation clauses.*

By refraining from using these levers, and by preferring to refuse to execute the formula adopted without being able to justify it, the SAVENCIA Group has failed in its obligations and cannot rely on its own turpitude to pass on the responsibility for its non-performance to the SUNLAIT Association" .

– **On the formation of the contract and the nullity of a protocol dated December 29, 2020 fixing the price of milk** - If the Court considers that the agreement materialized by this protocol is equivalent to an amendment to the framework contract having the force of law between the parties who committed themselves, it questions the *"conditions of negotiation"* and invalidates the said protocol because of a consent obtained in the violence of the circumstances having surrounded this agreement *:* " *Article 1143 of the same code provides that "there is also violence when a party, abusing the state of dependence in which his co-contractor finds himself, obtains from him a commitment which he would not have made in the absence of such constraint, and derives from it a manifestly excessive advantage.* More specifically, the Court, having noted the unilateral and wrongful termination of the June 2018 protocol (see above) as of October 17, 2019, notes that " *In the present case, one cannot disregard the constant pressure exerted by SAVENCIA since the unilateral termination of the contractual ties in October 2019 refusing to apply the price formula resulting from the June 2018 protocol, the economic dependence of the dairy farmers, and the extremely difficult conditions leading to the negotiation of the protocol of December 29, 2020 between Mr. MARCHAIS and SAVENCIA. The negotiation of the December 29 protocol took place in a climate of extreme tension, (...). The pressure was undoubtedly put on the SUNLAIT Association to force it to negotiate the price of milk downwards as quickly as possible"* and to conclude, in view of the manner in which this negotiation took place, that *"Such procedures must be qualified as violence, within the meaning of article 1143 of the Civil Code"* .

– **On the fixing by a protocol of 29 April 2021 of the price over a specific period, on an ad hoc basis, without provision for a formula enabling the price of milk after this period to be determined in advance** - The Court again sanctioned the unilateralism observed. It ruled that " *since SAVENCIA cannot justify the formula adopted, nor a new agreement on the determination of the price of milk on the basis of a formula for determining the price of milk, it is appropriate to return to the basis of calculation fixed by the protocol of June 2018, the only contractual act of determination of the price likely to constitute an amendment to the framework contract, which SAVENCIA wrongfully refused to continue to implement. The price formula set by this June 2018 protocol must therefore be applied unless there is a better agreement. The protocol of December 2020 being considered as null and void, and the protocol of April 2021 being able to be worth fixing a price only on the period which it determines, does not call into question the application of the protocol of June 2018, which in the absence of later agreement, must be used as a basis for the fixing of the price of the milk.*

Observations. The practical scope of a decision does not necessarily depend on the rank of the court that produces it or its territorial jurisdiction, and it is likely that this judgment, having been reported in the specialized press (La France Agricole), will be scrutinized by the operators in the sectors concerned and beyond, in order to identify its practical scope. The current events are evidence of the persistent tensions on this issue (Sodiaal members in the Grand Ouest region are going on the offensive. C. Pruilh, Réussir Lait, 27 Sept. 2022; Sodiaal accused of not respecting the law. V. Guyot, La France Agricole, 5 Oct. 2022). The subjects inspired by this affair are so numerous that it is difficult to select them for the purposes of a treatment that will remain only too succinct. One obviously thinks of upstream contractual negotiation in the dairy sector (*cf.* CEPC Opinion No. 17-11, Lettre distrib. 12/2017 and No. 20-1, Lettre distrib. 06/2020, *our comments*), which has long been exposed to tensions between producers and processors, but also to numerous other sectors where the issue of value distribution in the supply chain is encountered. This case also demonstrates the sometimes perilous nature of the choice of indicators taken into account in the formula for determining the price over time, when this formula is no longer acceptable to one of the parties. This is the epicenter of the dispute. However, despite the recurrence of tensions between the actors on the distribution of value (from the producer to the distributor), at the origin of the multiplication of corrective laws, one can only note the rarity of upstream litigation. Hence the unprecedented character of this case, including the level of the sentences pronounced. It is true that the upstream players in agricultural production or their representative organizations had already had a run-in with the downstream players, on the basis of the CRP regulations (Caen, March 18,

2008, No. 06/03554, Lettre distrib. 07-08/2009, *our observations*), during litigation under the jurisdiction of specialized courts. This could still be the case when it appears that the case involves situations of imbalance, dependence or pressure. For example, pressure exerted on the partner to force him to adhere to the contract, as also noted by the judges in this case, is also taken into consideration in order to establish submission in matters of significant imbalance (D. and N. Ferrier, Droit de la Distribution, 9th ed. Lexis Nexis 2020, n° 338. *Rappr.* Trib. Com. Paris, July 6, 2021, n° 2016064825, Lettre distrib. 09/2021, *nos obs.*). The same is true for the relationship of dependence as an indication of a possible submission (D. and N. Ferrier, supra). And yet, there is no mention of restrictive practices in the present decision, even though one can note in the Recommendation of the mediator of March 19, 2021, made public in application of article L. 631-27 al. 9 CRPM and having preceded the summons that " *Without prejudice to the interpretation of the courts that may be seized, it is not excluded that the unilateral fixing of the price in such a situation of dependence may characterize a significant imbalance between the rights and obligations of the parties within the meaning of the jurisprudence relating to article L. 442-1 of the Commercial Code*". The case therefore - simply - invokes the principles of the law of obligations: defect of consent (hard bargaining yes, hard bargaining no), non-performance (one should not be released from one's obligations), joint determination of the price or of the elements leading to it (the price or its determination must be agreed). After all, civil law can deal with such situations where it has not traditionally been fully implemented. It even constitutes a traditional and relevant legal basis for, for example, sanctioning the party who would disregard the contractual obligations entered into at his own convenience! Gone then are the specialized courts, the sometimes technical debates on texts which, with the laws that follow one another, can evolve in their content, the sometimes fluctuating and, if necessary, surprising interpretations, not to mention the frequent assaults on CRP texts in the context of QPCs, the outcome of which is more or less fortunate, but which *in the end* slows down the processing of cases. On this last point, it should be noted that the reported litigation, although in the context of an accelerated procedure on the merits, was not spared by such an unsuccessful approach. But if one looks closely, is the approach, even incidentally, to abuses in commercial negotiations by civil law as novel as it seems? For a long time now, there have been decisions which, directly or by way of an undertone, point to a negative answer (e.g. Com., Oct. 18, 2001, No. 10-15.296: Lettre distrib. 11/2006, *our comments*). The case is therefore most captivating in that it invites, by the grounds evoked by the plaintiff and retained by the Court, to think more frequently of the law of obligations, on a principal or subsidiary, or even complementary basis. Commercial negotiation would thus be more frequently placed under the supervision of the law of restrictive practices (of competition), completed by that of restrictive practices (of civil rights). Perhaps it is even a question, depending on the case, of a rediscovery of consensualism, contractual freedom and the binding force of contracts, even if this is not a new alternative because it already exists, as shown by the reported decision. Even if it remains necessary to pay attention to the articulation between special rules and rules of general law (Com, Jan. 26, 2022, no. 20-16.872, *obs.* S.C.), in the event of a concurrence of applicable rules, the resources offered by civil law (defect of consent, good faith of public order, loyalty, illusory or derisory consideration, exception of non-performance, etc.) must be re-examined, in particular in the light of the fact that the rules of common law are not applicable.The resources offered by civil law (vice of consent, good faith, public policy, loyalty, illusory or derisory consideration, exception of non-performance, etc.) must be re-examined, in particular when it comes to the unilateralist or even authoritarian drifts of certain actors in commercial negotiation, as well as in the interpretation or execution of the resulting agreements. Beyond the annual negotiations, the recent news of renegotiations can provide material for this purpose.