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Unfair advantage : The Paris Commercial Court considers that the provisions of former article L. 442-6 I 3° of the French Commercial code are not limited to the wrongful payment of listing fees *(Phyto Plus / Frans Bonhomme)*

DISTRIBUTION, FRANCE, BURDEN OF PROOF, REBATES, ALL BUSINESS SECTORS, SANCTIONS / FINES / PENALTIES, PUBLIC ORDER, BUYER POWER, SUDDEN BREAK OF ESTABLISHED BUSINESS RELATIONSHIPS, SIGNIFICANT IMBALANCE

Paris comm. Court, Oct. 10th, 2022, n° 2021000304, Phyto Plus / Frans Bonhomme
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Facts. The dispute was between a supplier (Phyto Plus) and one of its distributors (Frans Bonhomme). The two companies had entered into a commercial relationship from 2011 until March 1, 2020. The supplier claimed that its distributor had asked it in early 2016 to design and develop a specific sanitation filter, in accordance with the distributor's precise specifications, to meet the needs of the distributor's customers. According to the supplier, this request would have been accompanied, orally, by an agreement on the volumes of orders for this product, which would have led our supplier to undertake investments and loans to the tune of several hundred thousand euros. As the number of orders placed did not meet expectations and the distributor claimed that it was not responsible for the manufacture of the products, the said distributor, pointing out the brutal behavior of its supplier during telephone exchanges, had to notify it in August 2019 of the termination of the commercial relationship, with a seven-month notice period expiring on March 1, 2020. The supplier sued on the basis of the former article L. 442-6, I, 3° (obtaining an advantage without a written order volume), 4° (disproportionate financial conditions under the threat of a brutal rupture) and 5° (brutal rupture) of the Commercial Code. By judgment of October 10, 2022, the Paris Commercial Court dismissed the supplier's claims.

Our observations will be confined to the solution given by the Court on the basis of point 3 of the aforementioned article. This prohibition is often referred to in the language of practitioners as the prohibition of referral bonuses

Problem and solution. In the context of this business relationship and when the circumstances of the case did not describe a situation of " *referencing* ", in particular because of the eponymous plants, could the text be applied - at least in principle? The answer is affirmative for the Court, which, by a generic formulation, " *notes that the provisions of article L. 442-6 I 3° of the French Commercial Code are not limited to the sole wrongful payment of referencing bonuses* ". However, the Court dismissed the claim that this prohibition had been violated after verifying the reality of the plaintiff's allegations.

Observations. The general solution does not surprise us. As a reminder, there were two opposing readings of the former article L. 442-6, I 3°. The supplier reproached its distributor for having obtained as an advantage the creation of a filter to satisfy its demand and this according to precise specifications respected by the supplier. It added that the distributor would have committed, not in writing but orally, to order a certain number of filters per annum, included a quantitative range and that this commitment had moreover not been respected. The distributor argued that article L. 442-6, I 3° was inapplicable (" *the conditions of application of the former article L. 442-6, I, 3° of the commercial code relating to referencing bonuses are not met* "), the text having " *vocation to fight against the fact of subordinating the referencing of a supplier to the granting of financial advantages, without sufficient counterpart, like the abusive referencing bonuses which can be paid to the referencing centers* ". *In concreto*, according to him, the requirements of this text were missing. By this he meant, in particular, the non-existence of an advantage prior to the placing of an order, since Phyto had already been an active supplier of the distributor for several years, but also the absence of a " *financial* " advantage (" *secondly, the alleged advantage is not a financial advantage* ") not accompanied by a commitment of volume or a service requested by the supplier). The Court favored the first of these two readings.

Of course, the solution will not lead to the condemnation of the distributor, for lack of proof of the practice thus prohibited and in particular of the existence of an advantage within the meaning of the aforementioned article (" *That consequently, the plea according to which PHYTO PLUS would have defined and elaborated the 'STEPURFILTRE' product, on the basis of specifications sent by FRANS BONHOMME, and that the latter would have imposed on PHYTO PLUS the creation, development or production of this filter, will be dismissed by the Court; That in any case, PHYTO PLUS does not demonstrate either that FRANS BONHOMME would have made, beyond the interest in the 'STEPURFILTRE' product to obviously diversify its product catalog, any commitment to place orders, either orally or in writing;* "). The reasons for the judgment, which relate the specific circumstances of the case, are worth referring to, particularly for those who wish to consider other hypotheses in which the elements of the prohibited practice could have been verified.

It should be noted, however, that the practice in question is no longer sanctioned *per se* since the reform of Title IV of Book IV of the Commercial Code by the Order of April 24, 2019. This ordinance refocused the list of abusive practices around three existing general practices and modified their scope, within the new article L. 442-1. As a result, practices previously referred to as such may fall within the scope of the prohibitions maintained, which it will be up to the courts to assess in light of the letter of the new texts. When it comes to applying the new texts, case law on abusive practices based on grounds that have now disappeared, for reasons that have more to do with a desire for simplification than absolution (see the Report to the President of the Republic on the Ordinance, pp. 7 and 8), may then serve as a reference point.

But in our view, the essential point is elsewhere: beyond the practice reported here, the judgment suggests a more "macro-legal" reflection, if we dare use the expression. But let us explain below.

This case demonstrates both the plasticity of the texts in the area of abusive practices and the compatibility of their content to apprehend practices that were not necessarily those for which the texts had been initiated. The law has its reasons, which cannot override the law: it is well known that once established, the rule of law has an abstract, obligatory and coercive character. To this three examples.

It should be remembered, first, that the prohibition of the brutal termination of an established commercial relationship, the broad scope of which the *Lettre* had emphasized (Lettre distrib. July/August 1996), had nevertheless been essentially conceived, on the occasion of the Galland Act of 1996, in order to combat abusive delisting. The same multifunctionality applies, secondly, to the

prohibition, instituted by the NRE, of article L. 442-6, I, 1°, aimed at new forms of abuse " *sometimes committed by large-scale distribution to the detriment of its suppliers* " (Senate Report on the project adopted by the National Assembly relating to the New Economic Regulations, p. 20), which constituted advantages without consideration or with disproportionate consideration. On this basis, the Court of Cassation ruled, ten years later, in a decision that received the honors of publication in the Bulletin, that the free provision by a supplier to its distributor client of temporary staff for the realization of an inventory was an undue advantage because it was without consideration or clearly disproportionate to the service rendered, even though it did not give rise to a movement of funds in favor of the distributor (Com., Oct. 18, 2011, No. 10-15.296). This can be seen as an application of the prohibition to a benefit in kind. On the strength of this evidence, if any, of the adaptability of the text to particular contingencies and unless there is a reversal of case law by the same chamber that we would not have noticed, we question - again - the solution of the Paris Court of Appeal in a decision of November 4, 2020 (n° 19/09129) from which it emerges that the provisions of article L. 442-6 I 1° do not apply to a price reduction obtained from a commercial partner. In this regard, the recent analysis of the Constitutional Council, admittedly on the new article L. 442-1, I, 1°, whether or not it is liked (*see* for a critical analysis, CC n° 2022-1011 QPC, 6 Oct. 2022, Lettre distrib. 10/2022, *obs.* N.E.), could have some impact on the fate of this solution, since to our knowledge, the appeal judgment has been appealed. The future will tell us more. Lastly, in the related area of the formalization of the commercial relationship, how can we fail to mention the application of the texts of the Commercial Code to universes that are very different from that of the relationship between suppliers and large distributors?