Concurrences
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Antitrust Publications & Events

N° 1-2023

Abusive advantage: The French Supreme Court rules that the former Article L. 442-6 I 1° of the French Code of commerce applies whatever the nature of the advantage (*OC Résidences*)

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Fr. Supr. Court, Jan. 11th, 2023, n° 21-11.163, Ministre de l'Economie vs. OC résidences

This article was first published in Lettre de la distribution published by the Centre du Droit de l'Entreprise of the University of Montpellier.

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Concurrences N° 1-2023 | Alertes

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Facts. In 2013, the company OC Residences, a builder of individual houses, undertook to deduct from the amount of the receivable of its subcontractor 3J Charpentes SARL, an exceptional discount of 2% under the tax credit for competitiveness and employment (CICE) granted by the State to companies, including 3J. As a reminder, the purpose of the CICE was to finance the improvement of the competitiveness of companies. Its ambition was not to encourage the customers of the beneficiary companies to demand, under this pretext, downward revisions of the negotiated rate. However, it seems that the practice was not so exceptional, to the point of having led the DGCCRF to specifically warn the actors against the abuse that it constituted. Believing itself to be a victim of this practice on the part of its client OC, 3J referred the matter, in November 2013, to the Direccte. In April 2017, the Minister of the Economy brought an action against OC, seeking a ruling that the practice of deducting from subcontractors' invoices a systematic 2% discount for the CICE violated the provisions of Article L. 442-6, I, 1° C. com. in that it constituted obtaining or attempting to obtain an advantage without consideration. In addition to the practice in question, OC was accused of granting itself a 3% discount, admittedly provided for in the contract with 3J, but in the event of early payment and not for invoices paid late, as was the case in this instance. Before ruling, the Commercial Court referred the matter to the CEPC, which considered that " *a discount linked to the benefit of the CICE, as well as a discount justified by a missed payment deadline, constitute advantages without consideration effectively rendered in violation of Article L. 442-6-I-1° of the Commercial Code* " (Opinion No. 18-6). On January 18, 2019 (case no. 201700532), the Court ordered OC to cease its unlawful commercial practices, in addition to ordering the restitution of the sums it had received. The Court of Appeal (Paris, Nov. 4, 2020, ch. 5-4, n° 19/09129, Lettre distrib. 12/2020, obs N. Eréséo) confirmed the decision of the first judges insofar as the provisions of the French Commercial Code applied to subcontracting relationships. However, it reversed the rest of the decision, considering that

the elements of the investigation did not establish that the disputed discount was practiced, and that article L. 442-6, I, 1° did not apply to price reductions, with respect to the 2% CICE discount. On appeal by the Minister, the Court of Cassation, in a published decision, agrees with the assessment of the Court of Appeal as to the application of the aforementioned article to the relationship between a main contractor and its subcontractors. However, it is the cassation both on the question of the insufficient analysis of the judges of appeal in terms of the material characterization of the facts concerning the discount, as well as on the solution of law given by the Court of Appeal as to the field of application of article L. 442-6, I, 1°, which the Court considers applicable in this case. The case is referred back to the Court of Paris, otherwise composed. Only the last point will be commented on below.

Problem and solution. The issue was the scope of application of article L. 442-6, I, 1° of the French Commercial Code as it stood prior to the reform of Title IV of Book IV by the Order of April 24, 2019. The issue at stake was the relevance *rationae materiae* of legal actions, at the initiative of the Minister or the parties, on the basis of the aforementioned article, when the practices in question, *rationae temporis*, do not fall under the new article L. 422-1, I, 1°. This includes actions for restitution following practices committed before the application of the new article L. 442-2, I, 1°, insofar as the rules on prescription allow it, but also ongoing litigation in which a plea is based on the text in question. For the High Court, " *the application of article L. 442-6, I, 1° of the Commercial Code only requires that it be established that an advantage of any kind has been obtained or that an attempt has been made to obtain such an advantage which does not correspond to any commercial service actually rendered or which is manifestly disproportionate with regard to the value of the service rendered, whatever the nature of this advantage (...)*".

Observations. This solution does not surprise us. It is not even, in our opinion, an extensive interpretation of the mechanism introduced by the NRE Law of 2001, but a pure and simple reading of the text. In terms of the regulatory history, the scope of application of this provision was not reduced by the LME Act, with the introduction of the prohibition of significant imbalance within the meaning of Article L. 442-6, I, 2°, which presupposes specific conditions. In terms of solutions arising from case law, the Court of Cassation ruled, ten years after the NRE Act, in a decision published in the bulletin, that the provision of temporary staff by a supplier to its distributor customer free of charge for the purpose of carrying out 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 could be seen as an application of the prohibition to a benefit in kind, which, *a fortiori* it seems to us, should make the solution rendered by the Paris Court of Appeal years later all the more logical, in terms of the letter of the text, with regard to financial benefits resulting from commercial negotiations (Paris, Sept. 13, 2017, No. 15/24117, " *Gelco judgment* ", Lettre distrib. 11/2017, obs. N. Eréséo). This judgment had said Article L. 442-6, I, 2° applicable to price reductions, in this case a rebate. We do not recall that its solution was generally surprising, even though this assessment was shared by the CEPC in a number of opinions prior to or subsequent to this last case. However, the decision of the Paris Court of Appeal (Paris, Nov. 4, 2020, no. 19/09129), which was censured by the decision commented on here, was like a bolt of lightning in the previously clear sky of the control of abusive advantages resulting from commercial negotiations on the basis of article L. 442-6, I, 1°. The Court of Appeal considered that the provisions of article L. 442-6, I, 1°, did not apply to the price reduction obtained from a commercial partner. It came to this conclusion on the grounds that " *Because of the principle of free negotiation of the price, judicial control of the price remains exceptional in matters of restrictive competition practices. This review does not take place outside of a significant imbalance, when the price has not been freely negotiated, as recalled by the Constitutional Council in its decision no. 2018-749 QPC (see recital no. 7) following the decision of the Court of Cassation of January 25, 2017 (Cass. com. Jan. 25, 2017, no. 15-23547)* ." The Court of Appeal reiterated its assessment in another decision that went unnoticed (Paris, Nov. 18, 2020, n° 19/12813, Lettre distrib. 12/2020, *obs.* M.-P. B-D). As a counterpoint, however, we note a later decision of the same Court which examined a retro-commission of 1.5% of the turnover and considered it not to be abusive on the basis of article L. 442-6, I, 1°, which concerned administrative costs for participation in a call for tenders, although it does not appear from the debates in this case that the parties to the dispute intended to cross swords on the material scope of application of the aforementioned article (Paris, May 6, 2021, n° 19/06400, Lettre distrib. 06/2021, *our observations*). In any event, we might have thought we had reached the end of our surprises in terms of the narrow reading of article L. 442-6, I, 1°, but this would have led to misunderstanding, in view of a judgment of the Commercial Court of Paris (May 11, 2021, n° 2018014864). In this case, the framework contracts examined by the Court showed that the discounts referred to by the Minister, all of which were called " *unconditional invoice discounts* ", did not refer to

" *any commercial service* " on which the parties had agreed. The Court then ruled that the Minister's claim for restitution was unfounded, on the grounds that it had been made " *solely on the basis of Article L. 442-6 I 1°, based solely on the absence of a commercial service actually rendered, even though such a service was not provided for in any of the disputed framework contracts* ". Subject to an incorrect understanding on our part and in the vein of this solution, a contractualized service, but fictitious or giving rise to a disproportionate advantage, would then be exposed to an analysis on the basis of the aforementioned article, as opposed to an advantage that does not provide for any consideration, i.e. the archetypal abusive situation under article L. 442-6 I 1° to date.

But let us forget for the moment this last decision, which we find very curious, and return to the decision of November 4, 2020 and its solution, according to which the control of advantages without consideration or manifestly disproportionate could no longer be carried out on the basis of the former article L. 442-6, I, 1°, but on that of significant imbalance, which presupposes a " *submission* ". We were astonished (Lettre distrib. 12/2022) by this exclusive solution and mentioned the recent analysis of the Constitutional Council, admittedly on the basis of the new article L. 442-1, I, 1°, and its possible impact on the destiny of this assessment, pending the outcome of the appeal. Having changed its mind, perhaps premonitatively, the Paris Court of Appeal recently wished to give an explanation of the text of article L. 442-6, I, 1° and of the understanding of the solution of its judgment of November 4, 2020, to judge in this case that " *The Court in its judgment of November 4, 2020 ruled in these terms (...). Now, in the present case, as Edma rightly argues, the dispute does not concern the mere control of the price but a tariff advantage in exchange for commercial considerations through the "specific reduction in the business plan" which does not constitute a simple price-fixing modality. Consequently, Article L 442-6, I, 1° of the Commercial Code is applicable to the dispute* ." (Paris, Dec. 7, 2022, Pôle 5, Ch. 4, No. 20/11472). Thus, after a short period in which it was banned as a tool to combat certain types of abusive advantages, the Paris Court of Appeal rehabilitated Article L. 442-6, I, 1°.

But is this new interpretation of the solution of the judgment of November 4, 2020 not a little late and is it now useful for a judgment which, in the end, no longer exists, as it was overturned by the judgment of January 11, 2023? Indeed, barely one month after the appeal decision of December 7, the Court of Cassation has delivered its solution and published it in the Bulletin. According to the Court, the application of article L. 442-6, I, 1° " *only requires* " that the obtaining of " *any advantage* " or the attempt to obtain such an advantage not corresponding to any commercial service actually rendered or clearly disproportionate to the value of the service rendered, "whatever the *nature of this advantage* ", is established. The former article L. 442-6, I, 1° applies "whatever the *nature of this advantage* ". This is precisely what the text provides when it refers to " *any advantage* " and, in our view, there is nothing to add.

Although the control of the absence of consideration or of the manifest disproportion (except in the case of a significant imbalance) is now carried out on the basis of the new article L. 442-1, I, 1°, the solution of this recent judgment redistributes the cards in terms of the proceedings initiated on the former basis. This solution also eliminates or at least dissuades a similar debate on the new basis of article L. 442-1, I, 1°. In terms of the prohibition of the practice at issue in the terms applicable since the Order of April 24, 2019, what has just been ruled by the Court of Cassation on the letter of *former* article 442-6, I, 1° should be even more well-founded in light of the letter of new article L. 442-I, 1°, even if this provision, which correlates two factors " *an advantage* ", whatever it may be, and " *a consideration* ", whatever it may be, in any event left little room for equivalent polemics on its scope of application and, beyond that, on a prevalence with exclusive effect of article L. 442-1, I, 2° over article L. 442-1, I, 1°, with regard to abusive advantages obtained from the other party as a result of commercial negotiation (*rappr.* Paris, 31 July 2019, n° 16/11545, Lettre distrib. 09/2019, *our obs.*). The breach opened a little over two years ago by the November 4, 2020 decision, whether one is pleased or not depending on whether one is a creditor or debtor of an unfair advantage within the meaning of article L. 442-6, I, 1° and *a fortiori* L. 442-1, I, 1°, has just been closed.

The renewed and reinforced perspectives of this mechanism, which was, since its introduction by the "NRE" law, the essential mechanism for fighting against abusive practices in negotiation, before being joined by the prohibition of significant imbalance by the "LME" (without forgetting, Obviously, because it is even older, since it goes back to the "Galland" law, the prohibition of the brutal rupture of an established commercial relationship, which can be initiated following the disagreement of a partner to consent

to an abusive advantage), invite reflection - numerous - for those who wish to take the subject head on. Leaving aside subsequent changes in the texts, we are witnessing the restoration of the triptych in force following the "LME" law, in terms of the safeguards against the abuses of free negotiability resulting from this same law, following the abrogation of the prohibition as such of discriminatory practices.