Concurrences
Competition Laws Review

Concurrences
Antitrust Publications & Events

N° 1-2023

Significant imbalance : The French Commercial Practices Commission gives an opinion in the industrial subcontracting sector on the conformity of a car manufacturer's contractual documents with regard competition law and instructive in terms of the relations between suppliers and distributors

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French Commercial Practices Commission, Feb. 27th, 2023, Notice n° 23-1 concerning a request for an opinion from a professional organization on the conformity of contractual documents of a car manufacturer with respect to competition law

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

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

Concurrences N° 1-2023 | Alertes | Distribution

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Context. Relations between car manufacturers and their suppliers, subcontractors and other equipment manufacturers are often tainted by asymmetries in the balance of power in negotiations. These asymmetries under the background of cost hunting and ultra flexibility, can lead to behavioral drifts in terms of restrictive practices regulation. This is not a recent issue. It must be placed in the more general context of subcontracting relations between large industrial companies and their suppliers, including SMEs. The care given to the latter is not always exemplary. If, in the words of a 2010 report by the mediator of industrial inter-company relations and subcontracting, "it *is not a question of giving credence to a caricatural vision of reality by blaming all the problems on the principals and exonerating their subcontractors from their obligations* " (Rapp. "Volot" on the legal system concerning inter-company relations and subcontracting, July 30, 2010. *Adde*. rapp. Bourquin on the relations between principals and subcontractors, May 2013), it remains that, according to this same report, there may be abusive practices with which subcontractors are faced. Certainly, as in many sectors where abuses are encountered, behavioral codes have been devised to improve relations between partners (e.g., Code of performance and good practices relating to customer-supplier relations in the automotive industry and construction of February 9, 2009, followed by the eponymous Code of November 6, 2020; Guide for

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the quality of customer-supplier contractual relations established in the wake of the aforementioned " *Volot* " report). It is to this tormented history that the request for an opinion from a professional organization on the conformity of contractual documents of a car manufacturer with respect to competition law, which has just given rise to CEPC opinion n° 23-1, can be linked.

Issues addressed. From the point of view of abusive practices, the CEPC looks at four main categories of clauses contained in the General Purchasing Conditions (GPC) drawn up by the supplier and in the warranty conditions, which relate to logistical organisation, applicable pricing conditions, warranties owed by the supplier and intellectual property rights. Although the CEPC does not present them as falling into a particular category, we should also mention certain stipulations in the GTC that allow the manufacturer to terminate the contract immediately in various cases. We will also briefly consider the subject of logistical penalties, which is discussed in the section on warranty conditions, the reason for which is not known, as well as the question of the unenforceability of the supplier's GTCs and letters of reservation or correction made by the supplier to the said GTCs, which the CEPC discusses in the reminder of the principles for analyzing abusive practices.

Observations

1. General observations on the CGA/CGV confrontation or letters of reservation or correction, on logistical penalties and on drafting imprecision - Exclusively devoted to the analysis of documents from a specific sector, the content of this opinion proves to be instructive on a certain number of clauses or practices that may be encountered in other supply chains, when the balance of power is to the advantage of one of the partners(*recalls.* opinion n° 17-11, Lettre distrib. 12/2017 ; n° 20-11, Lettre distrib. 06/2020, both concerning milk supply contracts).

It should also be noted that most of the cases referred to the CEPC relate to disputes concerning significant imbalances in the relationship between suppliers and retailers in the food retail sector. The CEPC nevertheless examines the documents submitted to it under the angle of both 1° and 2° of article L. 442-1 C. com.

The opinion first provides a reminder of the principles of analysis with regard to the rules on unrequited advantage and significant imbalance. We regret the absence of a reminder of the recent case law on unrequited advantages (Com., Jan. 11, 2023, No. 21-11.163, Lettre distrib. févr. 2023; RLC No. 125, March 2023, No. 4399, *our observations*), which confirmed the relevance of the basis of such a device for controlling abuses in commercial negotiations. We venture to suggest, without certainty, that such silence could be due to the decision-making process within the CEPC, which could lead to a time lag between the drafting of the opinion and its publication. In any event, the CEPC does not fail to point out that the letter of the texts, referring respectively to " *a benefit* " or " *the obligations* " without any precision or exclusion, makes them broadly applicable, provided that the required constituent elements are satisfied. The reference to article L. 442-1 I 1° is all the more remarkable in that this case concerns advantages which in themselves are not financial in nature, but are "legal" advantages or, in other words, situations which are advantageous in terms of obligations for one of the parties. This may be seen as an incursion by 1° into the preferred area of 2° of article L. 442-1 I. This flexibility of 1° may be of interest in the control of advantageous provisions, without having to take account of a possible submission, as is the case when the control is carried out on the basis of 2°.

– Before examining each of these categories of clauses and after indicating that these several clauses of the GTC and the warranty conditions appear to constitute an imbalance, and if necessary also likely to be apprehended on the basis of the advantage without consideration, the CEPC notes that one of the stipulations of the GTC is intended to subject the supplier to the manufacturer's GTC, by introducing the principle of the non-invocability of the supplier's GTC, as well as all its reservations or corrections, in clear contradiction with article L. 441-1, which states that the GTCs are the basis for commercial negotiation. The CEPC notes that it has already been considered in such a case, that such a stipulation was at the origin of a significant imbalance (Com., May 27, 2015, No. 11387) and points out that " *the other clauses of the contract are applied in the context of acceptance resulting from this first clause* ", which seems to accentuate the characterization of such imbalances (*rappr.* Trib. com. Paris, Feb. 22, 2021, n° 2016071676, Lettre distrib. 04/2021, obs. S.C.). We could add to this, in view of the broad application of the prohibition of advantage without consideration, the possibility of such an advantage for the author of the GTC, who *ipso facto* deprives his

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supplier of the possibility of exercising his legal prerogative of being able to negotiate on the basis of his GTC, rendered unenforceable by the GTC. The disadvantage of one of the parties translates into an advantage for the other who dictates *ab initio* his own conditions. Furthermore, and resituated in the context of annual commercial negotiations between supplier and distributor, the criticism formulated here of the declaration of non-enforceability of the supplier's GTCs " *as well as all its reservations or corrections* ", can be understood as a recognition of the practice of reservation letters frequently encountered and by which the supplier declares that it does not accept as is the content of the agreement that it has been asked to sign by its customer, which is more and more by means of a "click" acceptance by way of electronic signature. In practice, this appears to be one of the points to be highlighted in this opinion, whereas the practice of reservation letters may make it possible to clarify the consent given by the supplier on clauses which, as they stand, are not acceptable to him, in the sometimes rushed context of the signature of annual agreements.

– Furthermore, although the subject is addressed under the study of the clauses examined in relation to guarantees, it should also be noted, as a cross-cutting issue, that for sums qualified as " *logistical penalties* ", the CEPC considers that the provisions of article L. 442-1, I, 3° apprehending the fact of " *imposing logistical penalties which do not comply with article L. 441-17* " do not appear to be able to be invoked. This is because article L. 441-17 of the C. com concerns the relationship between a supplier and a distributor, i.e. a professional who buys a product to resell it. However, this situation does not correspond to the relationship between a manufacturer of components or parts and a car manufacturer, which is more like a business or industrial subcontracting contract, since the parts will be incorporated into a complex unit, the vehicle, which will be distributed by the manufacturer's network of dealerships. As this relationship is not subject to Article L. 441-17, it should not be subject to Article L. 442-1, I, 3°. The CEPC recalls that this is also the interpretation retained by the DGCCRF in its " *Frequently Asked Questions on Guidelines on Logistics Penalties* " of July 2022. We add that although excluded from the scope of application of the aforementioned text, logistics penalty clauses are nonetheless, under the terms of case law, controllable on other grounds such as significant imbalance (Paris, Sept. 11, 2013, No. 11/17941, Lettre distrib. 10/2013; Paris, Dec. 18, 2013, No. 12/00150, Lettre distrib. 01/2014, *our comments*).

– Moreover, even if certain provisions of the GTCs are examined, allowing the manufacturer to terminate the contract immediately in various cases, such as any delay in delivery or when the manufacturer has " *reasonable grounds* " for doubting the supplier's ability to meet its commitments and the supplier does not provide adequate assurances of good performance, the CEPC notes that the " *imprecise and general* " nature of this formula could contravene the provisions of Article L. 442-1, I, 2°, which gives the manufacturer "discretionary or even arbitrary power" to terminate the commercial relationship without legitimate grounds. 442-1, I, 2° conferring a " *discretionary or even arbitrary power* " on the manufacturer to break off, without legitimate reason, the commercial relationship. While it is not forbidden to rely on the illusion thus provided in terms of control in the implementation of such clauses, the vagueness of the wording is not the desirable option in the eyes of the CEPC (*rappr.* on the transparency-precision binomial, RLC n° 63, July-August 2017, n° 3226).

2. Observations on the examination of the categories of clauses - It seems to us that the lessons of this opinion can be used to reflect on comparable practices sometimes encountered in the distribution sector.

– *Clauses relating to logistical organization* - A significant imbalance is constituted by the provision in the GTC of the possibility of modifying, at the purchaser's discretion, the requirements relating to the frequency and quantity of deliveries, the methods of transport, shipment and packaging, the drawings and specifications of the goods supplied, without any time limit for the entry into force of these modifications in order to allow the supplier to adapt, while leaving him to bear the expenses and costs associated with these new requirements, without any possible renegotiation, in particular of the price, while moreover the distribution of these costs is carried out unilaterally by the customer. The same applies to clauses relating to quality (including the need for the seller to strive for continuous improvement of the quality of the goods, manufacturing processes and logistics) and to the buyer's requirements and procedures in this area, as modified or updated regularly by the buyer. The unbalanced

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nature of these obligations is amplified by the provision of a recourse and indemnity clause. This provision states that if Seller fails to fully and timely perform any of its obligations, Buyer shall be entitled to recover from Seller all direct, indirect, incidental, special and consequential damages, lost profits and lost revenues, and all legal fees and costs incurred by Buyer.

Drafters of logistics specifications and other supply conditions, including in the food and non-food supply chain, may wish to draw on this analytical framework when assessing the legality or otherwise of the content of their documents.

– *Clauses on the applicable pricing conditions* - Here again, it seems to us that the opinion invites reflection beyond the automotive industry.

Thus, the obligation to maintain for a long period of time a price set in the context of the " *first sale* ", in other words in consideration of quantities greater than those likely to be ordered in the context of the after-sales service, may create a significant imbalance at the same time as an advantage that is clearly disproportionate to the consideration. The opinion of the CEPC, correlating price and quantity, appears from our point of view to be coherent. Buyers, in the context of annual negotiations, especially when fixed "budgets" are agreed upon with the underlying provisional turnover, as well as during requests for quotations in the context of calls for tenders (for example in the field of private labels), should learn from this, in order to ensure that the volumes announced and in consideration of which the prices were established by the supplier are verified *in fine*, at least in the same order of magnitude.

But beyond the correlation between price and quantity, it is the subject of the maintenance of prices over time that raises questions, particularly with regard to the parameters of their determination. As a reminder, this case involved a clause stipulating that during the first five years after the production of the vehicles had stopped, the supplier had to maintain the agreed price, except for variations in shipping and packaging costs. There was no provision for changes in other costs. In terms of the period of validity of the prices, this is certainly far beyond the requirement, often encountered, of maintaining the price agreed upon in the context of annual negotiations for a whole year. Moreover, very often, the agreements concluded contain a clause dealing with the modification of tariffs and thus of the agreed price, during the year, according to the conditions and modalities of renegotiation established in the initial agreement. It should be remembered that sometimes an obligation to renegotiate can still result from a legal constraint, in particular in the case of contracts relating to agricultural and food products with a performance period of more than three months, including contracts relating to design and production, in accordance with terms and conditions that meet the particular needs of the buyer (L. 441-8 C. com). However, in these cases, there is no guarantee that the price will actually be modified, unless the agreements also contain automatic revision clauses (e.g., L. 441-7 and L. 443-8 C. com) and insofar as the content of these clauses can produce a useful effect. But there is nothing more than these legal mechanisms designed to protect the upstream actors of the food supply chain. These mechanisms designed to encourage, or even oblige, the parties to change the prices of agricultural and food products during the course of a contractual period, bear witness to the fact that the economic parameters presiding over the determination of a price, such as the frequency or intensity of the variation of these parameters, must be able to be assessed over periods that are much shorter than five years (see the situation examined in the opinion), such as one year (the period generally covered by the terms of the annual negotiation) or even less (three months as mentioned above). The pressing requests for renegotiations made by suppliers during 2022 illustrated this reality in the context of the generalized increase in production costs that these suppliers had faced since their previous tariffs. The question of price intangibility over long periods and/or periods marked by significant variations in production costs has probably not finished animating the debate. In fact, and to return to the sector concerned by the opinion, it does not seem that the price of vehicle models sold to users has remained unchanged over a period of five years.

– *Clauses concerning the guarantees owed by the supplier* - The guarantee conditions refer to an article of the GTC which makes the supplier solely responsible for the conformity and quality of the products manufactured for the buyer. After a reminder of the manufacturer’s obligations under the various warranty regimes and the cases of exclusion or limitation of its obligations in this respect where applicable (e.g. fault of the victim), the CEPC observes that neither the article of the GTC nor the warranty conditions provide for the possibility of exoneration of liability for the supplier, even in the event of fault on the

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part of the purchaser (e.g. in the event that the non-conformity results from errors in the " *specifications, drawings, samples, description and quality standards provided or otherwise specified by the Purchaser* "). In so doing, by placing the entire responsibility for the quality of the products on the supplier, without reserving the case where the manufacturing defect is attributable to the buyer, this article of the GTC creates an imbalance in the rights and obligations of the parties which does not appear to be compensated for by any other clause in the GTC or the general warranty conditions. We refer to the opinion on the other subjects discussed, such as (i) certain deadlines for the warranty owed by the supplier, which depend solely on the will of the buyer, since the GTCs and the warranty conditions are non-negotiable, (ii) costs incurred or reimbursed by the buyer to car dealerships, which depend solely on the will and assessment of the buyer, without having to justify them, and (iii) curative actions and recall campaigns with financial compensation to be paid by the supplier, (iv) the unilateral nature of the compensation clause for the benefit of the buyer alone, thus without reciprocity, compensation or justification.

– With respect to *the clauses concerning intellectual property rights* , we refer to the Notice.

This is an opinion that deserves to be taken into account, beyond the world of automotive suppliers. While, according to the common saying, the ink is not yet dry on the commercial agreements signed for 2023, this recent opinion can serve as an analysis grid for certain clauses present in the recently negotiated agreements, and will help to clarify the drafting of those for the next annual negotiations. It is important to remember the warning at the end of the notice, i.e. that the victim of the practices as well as the Minister can have the court declare the various illegal clauses null and void and request the restitution of undue advantages, in addition to the imposition of a civil fine.

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