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Antitrust Publications & Events

N° 2-2023

Abusive negotiations : Paris Court of Appeal provides details on loyalty in the conduct of investigations under Article L. 450-3 of the French Commercial Code, as well as the definition of attempt to submission to significant imbalance *(Min. Eco / Incaa, ITM et EMC)*

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CA Paris, March 15th, 2023, RG n° 21/13227, Ministre de l'Economie et des Finances c/ Incaa, ITM et EMC
CA Paris, March 15th, 2023, RG 21/13481, Ministre de l'Economie et des Finances c/ Incaa, ITM et EMC
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° 2-2023 | Alertes | Distribution

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Facts. Following an investigation carried out in 2016, the French Minister of the Economy, Finance and Industry served two writs of summons on Intermarché Casino Achat (INCAA) and its principals ITM Alimentaire International (Intermarché) and Casino (EMC Distribution) for abusive commercial practices vis-à-vis certain suppliers in the "perfumery-hygiene" sector (*https://www.economie.gouv.fr/dgccrf/infos-presse-2017*). According to the Minister, the investigation carried out on the basis of article L. 450-3 C. com. with both the distributors and their suppliers, revealed that INCAA, only a few weeks after the signing of the annual framework contract legally scheduled for March 1, 2015, had made additional financial requests to its suppliers, not justified by new circumstances or a new need on the part of the suppliers, and not accompanied by any precise and quantified consideration at the time of the requests. Suppliers who refused were allegedly subjected to retaliatory measures. According to the Minister, these practices constituted an attempt to create a significant imbalance within the meaning of the former article L. 442-6 I 2°. In two rulings (T. com. May 31, 2021, n° 2017025155 and n° 2017025159, Lettre distrib. 10/2021, *nos obs.*) preceded by two other preliminary rulings dated November 18, 2019, the Court condemned INCAA and its principals and imposed a civil fine of twice two million euros. In two rulings dated March 15, 2023, and following an *in concreto* analysis of the situation of the suppliers concerned, the Court of Appeal essentially upheld the initial sentences.

Problems. We will be looking in particular at the subject of the conduct of the "simple" investigation, which is often neglected in favor of substantive issues. On the procedural level, *in limine litis* and as their principal claim, the respondents sought to have the judgments set aside before the Court of First Instance, thereby declaring the summons and subsequent proceedings null and void, and hence the judgments of May 31, 2021. Should this request fail to succeed, the Court was asked to set aside a series of exhibits on the grounds that the Administration had disregarded the principles underlying a fair trial. On the merits, we will report on a few points of the rulings in terms of the evidentiary approach to establishing attempted submission.

Solutions and comments.

I. - Procedure: fairness in the conduct of the investigation

– On the Minister's application for a writ of nullity - Under article 6 of the CESDH and article 9 of the DDH, and given that the Minister's action was a criminal matter, the investigators were accused of having violated the principles of loyalty in the search for evidence, impartiality and neutrality in the conduct of the investigation and, of the presumption of innocence, within the framework of an inquisitorial procedure to their detriment and through questions directed at both the respondents and the suppliers investigated, postulating their guilt, and provoking responses to support the accusations without any factual justification. These actions would have irremediably vitiated the entire procedure, and would have rendered the investigation null and void. In a way, an original flaw corrupting the entire subsequent procedure.

The Court did not see it that way. First of all, it takes care to point out that " *belonging to the 'criminal sphere' is determined without any decisive regard for the categories of domestic law which constitute no more than a relevant criterion of qualification, and applies only to the application* of [CESDH]*: the examination of the dispute under the criminal head of Article 6 of the CESDH, which is always global and carried out in the light of fairness ('key principle' according to ECHR, July 10, 2012, Gregacevic v.* Croatia, no. 58331/09, §49), does not involve the application of domestic rules of criminal law and criminal procedure" (rapp. Trib. com. *Croatia, n°58331/09, §49), does not imply the application of national rules of criminal law and procedure* "*(rappr.* Trib. com. Paris, June 2, 2020, n° 2015024900). We believe that this represents a contextual consideration of the principles of the ECHR, but not a literal consideration of criminal law, which would lead to investigations such as the one under discussion being subject to the rules of criminal law.

The Court dismissed the objection to the nullity of the summons on the grounds that, under domestic law, the Minister's action based on the former article L. 442-6 III C. com. is civil in nature (Com. Oct. 18, 2011, no. 10-28.005, which validates the characterization of an action in tort) and subject to the rules of the Code of Civil Procedure *(comp.* CJEU, Dec. 22, 2022, C-98/22, *Eurelec* : Lettre distrib. 01/2023, *nos obs*, which, from the angle of art. 1 of regulation no. 1215/2012, admittedly not at issue here, nonetheless removes the Minister's action from civil and commercial matters). In accordance with these rules, the writ of summons, a procedural document, can only be annulled on the grounds of formal or substantive defects within the meaning of articles 112 et seq. of the CPC, it being emphasized that the defendants did not put forward any arguments in this regard.

In the Court's view, even if we follow the appellants' reasoning and find that there has been disloyalty or an infringement of the rights guaranteed by article 6 of the ECHR in its criminal aspect, irreparably violating their right to a fair trial, " *the investigation, which is merely a means of gathering evidence, is not the necessary support for the summons, and the nullity of the former, assuming that the civil judge can pronounce it, does not entail the nullity of the latter* ". It is therefore held that the absence of evidence, either because it is inadmissible or because it does not convince the judge, is not a cause for nullity of the summons, but a defense on the merits leading to the rejection of the claims contained therein. The mere invocation of " *criminal matters* ", as well as an investigation that fails to respect fundamental principles, does not *ipso facto* render the subsequent summons null and void. However, as is clear from the judgments, this does not mean that the conduct of an investigation on the basis of article L. 450-3 C. com. (which does not open the right to the same controls and appeals as those provided for so-called "heavy" investigations under art. L. 450-4) is, however, beyond the reach of any criticism to be made before the court subsequently seized, inviting it to undertake an analysis of the evidence submitted for its appraisal in the light of the aforementioned principles.

In practice, if the questions asked during the investigation seem to the respondent to be a little too "biased", he or she may nevertheless consider requesting that they be reformulated, without going so far as to risk opposition to the function (art. L. 450-8 C. com). If this is not possible, he or she will have to be careful about the content of the response, or even qualify it. However, such an option is unthinkable when the information is obtained from third parties, such as suppliers, as part of the investigation.

– On the request for inadmissibility of the documents produced by the Minister - The judge's task here is to ascertain, from the various documents submitted by the Minister (mainly from the minutes of declarations and copies of documents and exhibits), the reality of a bid or attempted bid: to succeed in having these documents removed from the proceedings is to see the evidence of the alleged practices disappear.

In essence, the respondents criticized the administrative investigation for having been conducted unfairly, with possible bias and bias resulting from the methodology employed by the investigators. On this point too, we will confine ourselves to a brief summary of the reasons for the judgments, to which reference should be made. Taking up once again the ECHR's case law on article 6 of the CESDH, the Court of Appeal considers that, in view of the investigative means employed and the amount of the civil fine requested, the civil nature of which is irrelevant given its nature as a sanction and its severity, the Minister's action falls within the scope of criminal law within the meaning of the aforementioned article 6. However, as already indicated, " *the autonomy of this classification does not imply that the internal rules of criminal law and criminal procedure apply to the dispute and to the examination of the admissibility of evidence. Moreover, judging the case under the criminal head of Article 6 of the ECHR is not satisfied with an isolated examination of the alleged violations , but requires an assessment of the fairness of the proceedings as a whole, in order to appreciate the actual impact of the former on the trial and on the assessment made by the court within the meaning of Article 6 of the ECHR*". The Court then reiterates the methodology specified by the ECHR in various of its judgments, for assessing " *the overall fairness of a trial* " or " *whether the proceedings were fair as a whole* " or " *whether the proceedings, including the manner in which evidence was obtained, were fair as a whole* ". From this perspective, and despite the clarifications provided, the fact remains that the assessment " *in concreto and taking into account the legal framework of the investigation* " raises questions in terms of legal certainty. It also seems to vary according to the situation, since the type of relationship established between supermarkets and suppliers " *considered to be structurally in an unfavorable situation, regardless of whether or not the imbalance is confirmed in the case in point, since it is a question of assessing the contextual and legal framework of the investigation, leads to a more flexible assessment of infringements of the rights guaranteed by Article 6 of the ECHR in its penal aspect than in the context of correctional or criminal proceedings, as investigators may have to overcome or circumvent the reluctance of suppliers anxious not to displease their commercial partners* ". In the end, everything will rest on the sovereign judgment of the specialized courts, under the control of the Paris Court of Appeal, which has already given its assessment of the investigators' modus operandi reported here.

Following its examination of the requests sent by the investigators to the suppliers concerned (initial requests, additional requests, hearings) in order to establish the reality or non-existence of the bid or attempted bid, and after an " *overall assessment of the alleged infringements and the admissibility of the evidence* ", In the case in point, the Court ruled that " *any bias introduced and directions taken by the methodology employed are, by virtue of their total transparency and the absence of any concealed maneuver, subject to free debate before the Commercial Court and then before the Court, with the appellants remaining free to produce any evidence likely to contradict the suppliers' declarations and the documents they have communicated. (...) Consequently, accepting their reality, the alleged infringements are not irremediable and do not affect the fairness of the proceedings as a whole* ". The Court did not uphold the inadmissibility of the documents requested.

II. - Background: on the characterization of attempted submission - The two first-instance judgments had given us the opportunity to address the issue of suppliers' habituation to the practices at issue, which is not a cause exonerating their perpetrator from liability (cf. Lettre distrib. 10/2021, *our obs.*).

On appeal, the Court focused not on the submission but on the attempt resulting from the additional demands. For the Court, the repression of a mere attempt, " *which is understood as the action by which one vainly strives to obtain a result, thus implies an analysis that pays particular attention to the alleged entry into negotiation* "*(rappr.* Trib. com. Paris, February 22, 2021, n° 2016071676, *obs. S.C*). This notion echoes article 1112 of the French Civil Code, which the Court ruled did not apply to the dispute, and which states that while the initiative, conduct and termination of pre-contractual negotiations are free, " *they must imperatively satisfy the requirements of good faith* ". Such a reminder is useful, even in the light of the most recent law of March 30, 2023 (art. 9), which expressly refers to this notion. The Court then sheds light on the characterization of attempted submission by means of " *relevant criteria* " or " *relevant indications* ". Here are two of them.

Firstly, the Court ruled that while the law does not exclude the possibility of " *interim renegotiation* " in accordance with ordinary contract law and the principle of contractual freedom, such renegotiation must be " *based on a concrete, verifiable and lawful reason* ". In other words, the need for a new element which, while not a formal condition for renegotiation, " *is a material condition and in any event constitutes a relevant criterion for assessing the bid or attempted bid* ". Renegotiation must be objectively motivated, and the revision of the initial conditions must not be arbitrary to the detriment of one of the parties.

Secondly, the Court inferred from the absence of consideration the existence of an indication of attempted submission: " *while the analysis of the consideration is primarily part of the assessment of the significant imbalance, the analysis of its existence, rather than its sufficiency, remains useful in characterizing a possible submission or attempted submission*, in *that the absence of an advantage expected by the co-contractor or of reciprocity of obligations is likely to shed subjective light, due to the purely unilateral dimension of the approach, on a desire to subjugate .(...)* ". The Court went on to point out that " *In fact, the very idea of negotiation presupposes from the outset that the needs of the other party are taken into account, and that identifiable and quantifiable counterparties, however provisional and summary, are determined from* the outset. *In this sense ,the absence of the latter is a relevant indicator of submission, or the attempt to do so* ". This reasoning, which invokes the mechanics of proof by presumption of fact, takes into account the objective of the attempt or its expected result (an obligation without consideration) to infer, alongside other clues, the existence of the attempt. Under the terms of this recital, the solution also applies to the tender itself. This approach is reminiscent of a previous case (Trib. Com. Paris, July 6, 2021, n° 2016064825, Lettre distrib. 09/2021, *nos obs* ; rappr. Trib. com. Paris, 1st ch., Oct. 13, 2020, n° 2017005123, *obs.* K. Biancone). In our opinion, this is not in opposition to the solution whereby it cannot be inferred from the content of the offending clauses alone (Paris, March 29, 2019, no. 16/25962; Paris, Apr. 1, 2019, no. 19/21083). 2021, no. 19/21083), the characterization of submission or its attempt, at the risk of confusing the condition of submission with that of imbalance referred to in the text, the Court's reasoning further refines the probative index approach to submission or its attempt (see already Paris, May 16, 2018, no. 17/11187, Lettre distrib. 06/2018 and RLC July/August 2018, no. 3425, *our obs*).

In conclusion, still on the subject of evidence, the Court considers that internal communications from suppliers, which were contemporaneous with the disputed negotiations and which the latter are required to provide to investigators on request (art. L. 450-8 C. com.), have evidential value, in the same way as a real-time account of the situation described therein. According to the Court, " *an internal e-mail report is not deprived of probative value by the mere fact that it emanates from a supplier, who is not a party to the dispute and could not foresee, when drafting it confidentially, before the start of the investigation, and for purely internal purposes, that it could be used against the appellants* [i.e. their customer]. *An account* is,*by definition, an objective account of a past event: its purpose being purely informative, its faithfulness to reality is its essence. These documents are therefore fully probative, an analysis which applies to all internal documents of the same kind (...)* " (see judgment no. 13481, concerning the supplier Henkel, in respect of which, incidentally, the attempted submission was unsuccessful). If these documents are not attributable to the respondent, they can at least be used against him. Proof of a bid or attempted bid may thus emerge from bilateral exchanges between the parties, as well as from the account, for one's own internal and *a priori* confidential use, of these exchanges or their scope: not expressly externalizing a bid or attempted bid - or endeavoring to do so - does not imply that such a bid does not exist.