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Abusive negotiations: The Paris Court of Appeal issue a reminder of its assessment of unfair advantages in the context of a restitution dispute and enriched it on the economic dependance notion in the light of the competition law *(MPH Distribution / Achats Marchandises Casino e.a.)*

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Paris Court of Appeal, May 10th, 2023, RG n° 21/04967, MPH Distribution / Achats Marchandises Casino et al.
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Facts. SARL MPH Distribution, which wholesales agricultural products to supermarket chains, filed an action via its liquidator for the restitution of sums it considered to have been wrongly received by various Casino Group companies. At issue were the validity of sums corresponding to credit notes issued by the supplier between 2013 and 2017, price cuts, payments for statistical data and penalties imposed on the supplier. Only the supplier's claims relating to the communication of statistical data were upheld by the lower courts (T. com. Paris, Nov. 25, 2020, no. 2019005181). On the supplier's appeal, the judgment was confirmed.

Issues. The supplier invoked various provisions of the former article L. 442-6 I, in points 1° to 4°, as well as 8° and 12°.

Solutions and observations. This ruling stands out for being as clear-cut in its structure as it is pedagogical in its content. Admittedly, many of the practices examined are no longer specifically proscribed in the current article L. 441-2, following the "refocusing" of prohibited practices under the April 2019 ordinance. They could still mobilize the new article L. 442-1, in its points 1° and 2°, insofar as their conditions of application are met, and, where applicable, its 3° for logistical penalties. We could also consider the discriminatory practices referred to in 4° for certain products covered by the agreement of article L. 441-4 of

the French Commercial Code (or the "PGC" regime), which has recently been extended by the latest "Loi Egalim 3" law. This would be an opportunity for litigants and their legal advisors to re-appropriate a tool that has long been used in both pricing and litigation, until it was repealed by the LME, which proclaimed the principle of negotiability, which some players may have originally believed, wrongly, to be limitless. In connection with the case in point, however, let us reserve this last ground. It is clear from the judgment that the supply of the products in question concerned " *eggs and milk under private label and first price* ". These are all situations which, in our view, would lead to the inapplication of 4°, due to the taxonomy of existing contractual regimes with regard to the nature of the products (e.g. eggs, unless I'm mistaken, come under article L. 443-2 C. com.) and/or that of the contracts in question (e.g. private label contracts, which come under article L. 441-7 C. com.).

As regards the casuistic examination of claims based on the various provisions of the former article L. 442-6 I, and mainly points 1° and 2° but not only, we encourage you to read the judgment, the better to focus on the main contributions of the decision which, not surprisingly, deal with the essential subjects of advantages without consideration or disproportionate (I) and significant imbalance (II).

I.- Unrequited or disproportionate benefits

– **A motivated rallying for an enriched analysis** - After a short interlude refusing to consider the former article L. 442-6 I 1° inapplicable to price reductions, the case gives the Court the opportunity to openly rally to the solution recently given by the regulatory Court on the scope of the text (Com., January 11 2023, n° 21-11.163, Lettre distrib. 02/2023, *our obs*). However, while this is the first Paris Court of Appeal ruling to follow the Cour de cassation's solution - at least to our knowledge - it should be remembered that the Court was already inclined to adopt a similar solution, as can be seen from one of its rulings a few weeks before the Cour de cassation's ruling (Paris, Dec. 7, 2022, Pôle 5, Ch. 4, no. 20/11472, Lettre distrib. 02/2023, aforementioned). In keeping with the High Court's general solution, the Cour d'Appel teaches that " *'assets' cannot be excluded a priori from the scope of application of the text* ". It goes on to define the criteria for legal credit notes, specifying that " *the issuance of credit notes or the granting of price reductions unconnected with any commercial service* is not prohibited, provided that *they have an identifiable cause which justifies their existence and, in this case, the amount (return of defective goods, regularization of erroneous invoicing or any other cause for a credit note in the classic sense of the term)* ". We agree. The credit note is, after all, no more than a support for the benefit under discussion, whose reason alone will matter when it comes to assessing the validity of the event giving rise to it *(rappr.* T. com. Paris, June 2 2020, no. 2015024900, dealing with the technique of debit notes analyzed on the basis of significant imbalance). Thus, even if a credit note does not reflect the consideration for a commercial service, it remains lawful provided that the reason for it is identified and that its raison d'être, which is not in itself a service rendered, justifies it (e.g. correction of a previous erroneous invoice). In the absence of such a situation, and ultimately of a "consideration" as expressed more clearly in the new article L. 442-1 I 1°, the beneficiary of the advantage will be exposed to the criticism of the unlawful advantage, and therefore to restitution. The ruling is therefore also intended to be enlightening in the light of the new text.

– **A reminder of the evidentiary mechanics involved in obtaining an unlawful advantage** - Perhaps taking care not to enter head-on into the debate on the burden of proof (or the criticism of its reversal), when the text in force stipulated that " *in all cases, it is up to the service provider, producer, trader, industrialist or person registered in the trade register who claims to be discharged from his obligation to provide evidence of the event which extinguished it* ", the Court merely reiterated, with equivalent effect, that " *In this context, it is incumbent on SARL MPH Distribution, in accordance with article 1353 of the Civil Code to prove that its commercial partner obtained (or attempted to obtain) any advantage whatsoever, and for Groupe Casino companies to prove the reality and effectiveness of the consideration provided.* " *(rappr.* Paris, Feb. 27, 2020, no. 17/14071, Lettre distrib. 07-08/2020; RLC 3881, no. 97, Sept. 2020, p. 26 et seq., *our comments*). Once again, this solution will serve as a guideline when it comes to applying the new article L. 442-1 I 1°.

II - Significant imbalance

– **Reiteration of the admission of the absence of consideration as an indication of submission** - Renewing the wording of the solution handed down in a recent case (Paris, March 15 2023, no. 21/13227 and 21/1348, Lettre distrib. 04/2023, *nos obs*), the Court once again ruled that " *While the analysis of the consideration is primarily involved in the assessment of the significant imbalance, the analysis of its existence, rather than its sufficiency, remains useful in characterizing a possible submission or attempt at 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* ". As we wrote recently, this reasoning, which calls on the mechanics of proof by presumption of fact, takes into account the expected result (an obligation without consideration) to infer, alongside other indicators, submission. It would therefore seem that this criterion is well and truly established in the evidentiary index of submission.

– **A reminder of the mechanics of proving the existence of an imbalance** - Although the solution appears classic, namely that " *in the absence of any legal presumption, the burden of proof of the significant imbalance lies with SARL MPH Distribution, while that of any rebalancing of the contract by another clause rests with the companies in the Casino group* ", It is useful to be reminded of this, to underline the more demanding nature of the claimant's demonstration of the imbalance complained of, in addition to that of submission, in comparison with the evidentiary requirements required in the event of a claim based on the prohibition of an advantage without consideration under the old text, as well as the new one (cf. above). This reminder will be of interest when it comes to the alleged victim's choice of means, bearing in mind that the invocation of the two grounds, while they call for different conditions of application, are not mutually exclusive, as the Court of Appeal emphasized in the reported case when analyzing the "assets" (judgment, point II 2° and *obs. infra*) (*rappr.* Paris, July 31, 2019, n° 16/11545, Lettre distrib. 09/2019, nos *obs*).

– **A reminder of the similar but distinct fields of application of the prohibition on unrequited or disproportionate benefits and the prohibition on significant imbalance** - Interpreting the letter of the two prohibitions, the Court states that " *Although the 1° and 2° of article L 442-6 I mobilize concepts that partially overlap, notably in that the manifest disproportion or non-existence of consideration is a factor in assessing the significant nature of the imbalance, their regimes are nevertheless distinct. The latter, an instrument for preserving the overall contractual balance implying an absence of effective negotiation, authorizes a more extensive, subjective and qualitative weighing-up than the former, which requires an essentially objective and quantitative analysis, and operates on a term-by-term basis without regard to the existence of a tender. They can therefore be invoked cumulatively, without multiplying restitutions or prejudices* ". While the two provisions of article L. 442-6 I are permeable in terms of their approach to manifest disproportion or the non-existence of consideration, the precision given here to the provisions of 1° of article L. 442-6 I means that they are easier - more mechanical - to handle than those of 2°, which may augur well for an increase in the flow of restitution litigation under the terms of 1°, after a decade of decline, marked by a significant flow to the benefit of litigation concerning significant imbalance. This lesson, which we believe applies to both 1° and 2° of the new Article L. 442-1, sets the framework for future actions on these two revised grounds under the April 2019 Order. As we have already emphasized, this solution will prove useful when it comes to the claimant's choice of means.

- Market structure and economic dependence as indicators of the application of the prohibition on significant imbalance

Two different, yet articulable concepts . Although linked to the debates on significant imbalance, the subject is not directly dealt with in the grounds of the judgment specifically devoted to article L. 442-6 I 1° C. Com, but rather in the general section at the beginning of the grounds for the decision devoted to " *applicable provisions and their scope* ". However, all of this is covered in section 1°) of the judgment, which is devoted to the " *normative and factual framework of the dispute* ", since economic dependence is part of the factual dimension of the dispute. Is this an attempt by the Court to isolate the question of economic dependence from that of submission, in both form and substance, perhaps in order to prevent criticism of the assessment of the conditions of application of the text on which the action is based? We don't know. In any case, these two concepts are neither identical nor mutually exclusive, even if the former may constitute a serious clue for the review of the latter, through the contextual constraint, even if not prohibited as such, that economic dependence may create for the dependent operator when negotiating his rights and obligations. Indeed, the Court makes no secret of the link between these concepts, at the outset of its

reasoning on the subject of economic dependence (" *Although the mechanism for combating significant imbalance was specifically designed to take account of a structural imbalance in favour of large retailers and to the detriment of suppliers …*") *(rappr.* Paris, March 15 2023, no. 21/13227 and 21/1348, Lettre distrib. 04/2023, *our obs.*, using the same wording) . Incidentally, the reasoning of the judgment leads us to note in retrospect that economic dependence as an indicator of submission in the litigation of significant imbalance often appears to be more recognized, certainly with regard to the circumstances and in particular the share of sales made by the victim with the perpetrator of the submission (Paris, Jan. 26, 2022, no. 20/04761) or the difference in size between that of the perpetrator and that of his victim (T. com. Paris, March 28, 2022, n° 2018017655, Lettre distrib. 04/2022, obs. N.E; T. com. Paris, Dec. 19, 2022, 2017040626; *rappr.* Paris, May 17, 2023, n° 21/05790, V. supra obs. N.E), than it is explained methodologically. However, the Court does endeavor to do so here, as observed below.

Thresholds as indices for assessing the economic dependence of one and the economic power of the other in the light of anti-competitive practices and merger law. The Court refers in particular to Article L. 420-2 " *which is certainly not under debate* ", the Court points out, however, or to ADLC merger opinion no. 19-DCC-180 of September 27, 2019 concerning a supplier/manufacturer relationship in an ultra-marine department, evoking the risk of economic dependence (ADLC decision, pt. 37). The Opinion stated that " *there was a 'threat threshold' beyond which the survival of the second party could be called into question, the disappearance of an outlet placing it, in the more or less short term, in a difficult financial situation, which could sometimes lead to bankruptcy, and that the level of this threshold was however not fixed and depended on a large number of specific parameters depending on the sectors concerned, the structure and financial situation of the companies, and the existence and cost of possible alternative solutions* ". In the case in point, " *the threshold used for the supply market in the predominantly food retailing sector in French Guiana, which included five main buyers, was 22%, identical to that used by the European Commission in its decision of January 25, 2000, no. COM/M. 1684, Carrefour/Promodes (…)* " (NB: it would appear that, in view of point 38 of the ADLC's decision, this is more in line with the European Commission's decision of February 3, 1999 in case M.1221).

The subject of thresholds taken into consideration from the angle of market structure and the balance of power between suppliers and distributors, and in this case outside the debate on economic dependence, of a " *safety threshold of 15%* " when assessing a distributor's market power. In another Opinion 15-A-06, this threshold had led the ADLC to invite operators - in this case, distributors - to be *"particularly vigilant* " once this threshold had been exceeded, "for certain product categories, *large-scale, predominantly food retailers represent*[] *the main outlet* " (Opinion 15-A-06, pt. n° 127). This previous ruling also referred to the aforementioned *"22% threat threshold"*, which was also mentioned in Avis n° 15-A-06 (Avis 15-A-06, points 247 et seq.). For the Court, the characterization of such a threshold " *(…) identified by the Commission in its decision of February 3, 1999 1999/674/EC (…) was not, moreover, necessary to that of an imbalance in the balance of power constituting an insufficient indication of an attempt at submission* ". As with so many other factual elements, the threshold remains no more than an indication, whether of submission or economic dependence.

In this case, these quantitative parameters, which are supported by "major" competition law, were used as benchmarks to assess the supplier's situation of economic dependence. The ruling states that the supplier in question reported sales with Casino group companies between 2013 and 2017, representing between 20.17% and 62.29% of its total sales. The Court also noted that the Casino group's market share in the downstream food retailing market was 11.6% at the time of the facts, making it the fourth-largest operator, which led the judges to emphasize " *the importance of the Casino group's economic power in a market with only a few players, and the fact that it is only in fourth place, as well as the business volumes that can be generated by commercial relations with a major retailer* ". Thus " *the market can be considered structurally unbalanced to the disadvantage of SARL MPH Distribution, which enjoys no countervailing power* ".*(rappr.* Trib. com. Paris, July 6, 2021, no. 2016064825, Lettre distrib. 09/2021, *our obs.* This judgment refers to the distributor's " *commercial strength (…) clearly superior to that of a large number of suppliers* ", for a market share of 10% in the DIY equipment retail sector and an " *outlet that is difficult for suppliers to circumvent* "). In this particular case, it concluded that " *in view of the figures communicated by SARL MPH Distribution and not contested by the Casino group companies (…), the nature of their commercial relations, the structure of the market already mentioned and the obvious difficulty for it to find an equivalent replacement solution, even though a diversification possibility*

exists, the situation of economic dependence of the former has been proven since 2013 ". In view of the foregoing, our understanding is that the criterion of the supplier's sales to a major distributor, in relation to the supplier's total sales, transcends that of the major distributor's market share on its market. While it generates substantial sales for the supplier, this perception is all the more prevalent when it comes to assessing indications of bidding or its attempt to do so, as well as those of possible economic dependence, since the distributor, even if far from the leader, is already in a very respectable position in a market where the number of operators is limited and whose respective market shares, even if of one or other of the current leaders, do not exceed 24%, which is already high (Source: *https://www.lsa-conso.fr/e-leclerc-continue-en-tete-u-lidl-et-aldi-suivent-casino-et-auchan-perdent-du-terrain,438716* ↗).