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Abusive advantage: The Paris Court of Appeal rules that the maintenance of the business stream between a supplier and a distributor may constitute, within the meaning of article L. 442-6, I, 1° of the French Commercial Code, the consideration for a price reduction *(Ministre de l'Economie / Galec)*

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Paris Court of Appeal, 25 Oct. 2023, RG n° 21/11927, Ministre de l'Economie / Galec

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Facts. Following several press articles reporting a Galec practice known as the "Lidl tax", the DGCCRF and, at regional level, the Dirrecte (Drieets) investigated the conditions under which the E. Leclerc imposed an additional 10% discount on suppliers of national-brand products (Heineken, Lactalis, Mars, Unilever, Yoplait, etc.), which were also present on the shelves of competing Lidl stores. The investigators analyzed the annual agreements concluded in 2013, 2014 and 2015 between Galec and a sample of 22 suppliers, and found that products listed by Galec were subject to an additional price reduction when they were also listed by Lidl, and that this reduction was presented as unconditional. Deeming the price reduction practice to be in breach of the provisions of article L.442-6 I 1°, the Minister summoned Galec, in particular for the nullity of these obligations in the agreements concluded between 2013 and 2015, restitution of 83,035,774.91 euros in respect of sums wrongly received and payment of a civil fine of 25,000,000 euros. On appeal by the Minister, whose case had been dismissed at first instance, the Court of Appeal upheld the judgment.

Problem. In addition to the argument, rejected by the Court of First Instance, that the Minister's independent action was inadmissible on the grounds that it was contrary to EU competition law (art. 101 TFEU; Reg. 1/2003) and the primacy of this law in the European legal order, the question of the lawfulness of the disputed discount arose, namely whether the obtaining by a distributor from a supplier of a discount whose sole consideration is the maintenance of the flow of business with this supplier, in a context of competitive tension between this distributor and its competitor, is lawful under article L. 442-6 I 1° C. com.

Solution. " *From all these findings, it is clear that in the process of determining the price agreed between the parties during the annual negotiations, the discount at issue was clearly not intended to remunerate a commercial service or 'any other obligations', but was an integral part of the negotiation linked to the conditions of the sales transaction which could lead to price reductions on the suppliers' price list, and for which the consideration expected by the latter was none other than the maintenance of the flow of business between the parties in a context of competitive tension between the distributors E. [W] and Lidl.* It follows that *the discount at issue does not constitute an unrequited advantage within the meaning of article L. 442-6, I, 1°* ".

Observations

1. On the apparently stabilized perimeter of control of the unrequited benefit. The first judgment (Trib. Com. Paris, May 11 2021, no. 2018014864, cited in Lettre distrib. 02/2023) had found the Minister's claim for restitution to be unsubstantiated, on the grounds that it had been made " *exclusively under Article L. 442-6 I 1°, based solely on the absence of a commercial service actually rendered, even though this was not provided for in any of the disputed framework contracts* ". This astonishing reasoning led us to conclude that a contractualized service, but fictitious or giving rise to a disproportionate advantage, could be exposed to analysis on the basis of this article, unlike an advantage providing no consideration, i.e. the archetypal abusive situation under the angle of the former article L. 442-6, I, 1°. But that was before the decision of the Commercial Chamber of Cassation on January 11 (Lettre distrib. 02/2023), which ruled that Article L. 442-6 I 1° applies to any advantage, and therefore to price reductions. In so doing, the Court overturned a decision by the Paris Court of Appeal on November 4, 2020 (ch. 5-4, no. 19/09129, Lettre distrib. 12/2020, obs. N. Eréséo), ruling that the aforementioned provisions did not apply to a price reduction obtained from a commercial partner. It should be noted, however, that the latter, just one month before the cassation, had reversed its position (*Paris, Dec. 7, 2022, Pôle 5, Ch. 4, n° 20/11472* cited in Lettre distrib. 02/2023), providing an explanation of the text of article L. 442-6, I, 1° and of the understanding of the solution in its ruling of November 4, 2020.

In this case, the Court recalls the general solution of the French Supreme Court of January 11, 2023 on the scope of Article L. 442-6 I 1°. It goes on to note, on analysis of the 2013-2015 annual framework contracts and their appendices concluded between each of the suppliers and Galec, that the " *specific product discount was provided for as part of the conditions of the product sales transaction (...) and not as remuneration for a commercial service or any other obligation within the meaning of 2° and 3° of article L.441-7* ". The Court of Appeal therefore did not conclude that the disputed practice fell outside the scope of Article L. 442-6 I 1°, thus giving full force to the provision. However, even if the debate on the controllable price reduction has been exhausted, this does not prevent the Court from considering that it complies with Article L. 442-6 I 1°, based on the factual circumstances in which it was obtained. The reasoning of the ruling leads to a solution which, from our point of view, was by no means unavoidable.

Of course, there is some discussion of the quid pro quo, even though this term does not appear expressly in the prohibition (" *1° d'obtenir... du service rendu* "), although it is mentioned in one of the examples given to illustrate one of the prohibited practices (" *Un tel avantage peut notamment consister (...) et sans contrepartie* "). Despite the fact that this term is not used as an express legal condition in the definition of the prohibition, unlike the correlative term " *advantage* ", the search for the existence of "consideration", an implicit and central condition in disputes concerning the application of article L. 442-6 I 1°, is carried out by the Court of Appeal. It should be remembered that since the Order of April 24, 2019, the definition of prohibition in Article L. 442- I 1° refers expressly, on two occasions, to " *consideration* ". However, at the time of the events - and still today - there is no clear dividing line, legal or praetorian, between consideration that is in itself lawful and that which is not (apart from the question of valuing the said consideration). At most, we knew that the corresponding benefit could, according to the law, be *"any"* benefit (henceforth " *an* " benefit - whatever that may be - in the most recent version of the ban). Implicitly and in general terms, we also know that this advantage should not, and still must not, be abusive, such a character being able to derive from the causal counterpart, expressed under different designations (fictivity, false services, etc.). In the version of the text applicable to this case, we still knew that the consideration was its "function" in a very broad sense - the terms "task" or "service" being perhaps

more appropriate - i.e. a commercial service actually rendered. But despite these more or less successful approaches, the "nature" or essence of the consideration within the meaning of article L. 442-6 I 1° (or L. 442-1 I 1°) remains opaque. Hence the importance of establishing the criterion of the counterparty, even if it is difficult to formulate.

2. On the counterparty variable and the usefulness of a criterion.

This is a subject for further reflection. Such a criterion, which would make it possible to distinguish between "reason" (as a motive) and "consideration", without ruling out the possibility that the former may be reflected in the latter, would then be used *ab initio* in a non-exclusively casuistic assessment. Its use would make it possible to determine as usual, but perhaps less subjectively at times, firstly whether the consideration exists for the advantage observed, and secondly whether the corresponding advantage is proportionate.

As a reminder, the respondent had intelligently not contested the scope of application of article L. 442-6 I 1° to price reductions (*rappr.* Paris, Sept. 6, 2023, n° 21/19954, Lettre distrib. 11/2023). He preferred to argue that the disputed practice did not constitute an advantage without consideration, and that if there was reason to consider an " *advantage of any kind* " within the meaning of the aforementioned provisions, the same should apply to the consideration, which could then be " *of any kind* ". It seems to us that the centralizing Court of Appeal, which until recently was reluctant to apply Article L. 442-6 I 1° to price reductions, and in this respect disapproved of by the Cour de cassation, now appears, in this ruling and despite the circumstances, to be quite flexible, not to say less watchful, when it comes to assessing the legitimacy of the consideration at issue. Its assessment of the quid pro quo in this case may appear dissonant, as observed in another ruling of the same date, in view of the quid pro quo of maintaining the relationship or the flow of business in the future, on the occasion of a dispute between the Minister and a rival distribution group, but on the basis of the significant imbalance of article L. 442-6 I 2°, again in a context of price war (Paris, Oct. 25, 2023, no. 20/15542, see *below* "brèves").

However, in the search for a counterparty criterion, we can legitimately question the financing by a supplier of competition on its own products, or even of a price war between two of its customers. However, we understood that competitive rivalry between distributors was a normal situation, particularly when it came to defending market share, and that it was their responsibility to bear the consequences. Now that this competition has turned into a price "war" that they themselves seem to have instigated, or in which they have willingly participated, is it such a situation that the reason for " *maintaining the flow of business between the parties* " should be recognized as a criterion for justifying a financial advantage, and thus given the nature of a consideration within the meaning of article L. 442-6 I 1°? If everything has its reason or explanation, whether legitimate or not, should we not consider that the mere existence of a reason or motive, even one that makes economic sense for the person requesting the advantage, cannot be the relevant criterion for consideration, at least if we claim to have tools to combat certain practices? Without going back over the case law stigmatizing abusive quid pro quos, let's bear in mind that, prior to the refocusing of some of them in the new article L. 442-1, article L. 442-6 I 1°, gave examples of advantages for unlawful consideration, such as the request for alignment or additional demand, during the performance of the contract, aimed at maintaining or abusively increasing margins or profitability (*adde* the automatic benefit of more favorable conditions granted to competing companies, still sanctioned in the new article L. 442-3). These are all situations which we understood, more by their wording than by the identification of a precise criterion, were not compensations subject to advantages, even if they had their own reason. And if we were still to consider this criterion of consideration in the light, among other things, of a " *common interest* ", evoked until recently by an example cited in the former L. 442-6 I 1°, should we be satisfied with a community of interest in the approach to such a criterion, as soon as it is established that the supplier wishes to trade with its customer or to continue to do so, this reason alone attaining the rank of "counterparty" within the meaning of the aforementioned article, thus justifying any means dedicated to this end? We don't think so. In our view, the counterparty cannot be lodged in the fact of maintaining a relationship with a commercial partner, unless article L. 442-6 I 1° (and L. 442-1 I 1°, which now refers only to " *the other party* ") is neutralized, since its implementation is intimately linked to the commercial relationship which is the crucible of the litigious practices, but which cannot as such constitute the controllable counterparty. While in the case in point, the relationship between the parties who responded to the request for an additional discount was maintained, it does not appear that such an interest is shared by all.

In fact, the Court of Appeal, on the fringes of an analysis of the bid, unnecessary here but shedding light on the reason for the price reduction, notes on the basis of suppliers' declarations that the discount requested and obtained by the distributor had no counterpart other than that of being able to maintain the listing of their product with the said distributor and to secure the marketing of their product ranges, or notes that two of the suppliers had been obliged to arbitrate their distribution policy for their national brand and to choose between one or other of the banners, or, for one or other, to limit the number of double listings or their share of business with Lidl, or even to offer the competitor different product formats. The Court also noted that, for the majority of suppliers questioned, this discount practice on their products listed with Lidl had no significant impact on the continuation of their commercial relationship with either chain, or on their overall sales.

In the final analysis, the refocusing introduced by the Cour de cassation last January on the control of benefits without consideration may not suffice, if the latter is to remain a notion with imprecise and sometimes volatile contours, depending on the judge's preferences. What is at stake here is the legal certainty of the content of negotiations between the parties, since case law is full of twists and turns, to the extent that a consideration accepted today may no longer be accepted tomorrow. Even though the causality of the benefit may appear virtuous for its beneficiary, to the question " *To benefit "quelconque" consideration "quelconque "?* " the answer may be yes if we are in the presence of a consideration, but no if this is not the case.