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Abusive negotiations: The Paris Court of Appeal rules that the referencing of a supplier's products by a retail group's central listing office does not constitute a separable service from the purchase and sale transaction and condemn the retailer to refund to the supplier the financial considerations received in this respect *(FG Diffusion / Achat Marchandises Casino ; Distribution Casino France)*

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Paris Court of Appeal, 29 Nov. 2023, RG n° 22/03166, FG Diffusion / Achats Marchandises Casino and Distribution Casino France

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The facts. For a description of the facts, please refer to C. Mouly-Guillemaud's comments (see Focus *above*).

Problem. The ruling touches on a number of subjects that should not be overlooked by observers of commercial negotiations, as the lessons it contains appear to be of practical use in assisting their counterparts, both in commercial negotiations and in current or future litigation. A veritable festival of information. For our part, we shall concentrate *(adde. supra*, C. Mouly) on the answer to one of the main questions, which is frequently asked in practice, and which can sometimes give rise to hesitant or hesitant responses. This is the question of whether or not the task of referencing a supplier in a commercial relationship with a mass retailer can be redeemed for money, under the terms of article L. 442-6 I 1°.

Solution. After comparing the parties' arguments on a " *permanent assortment referencing* " service for 2016 and 2017, the Court found that the explanations and documents produced by Groupe Casino's central referencing agency (AMC) did not make it possible to grasp either the exact scope of this service, " *or how it differs from the simple referencing of FG Diffusion products*

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", or its scope in terms of the variety of ranges justifying specific remuneration. Under these conditions, AMC " *does not justify having performed a service detachable from the purchase-sale transaction" in return for the sum paid by FG Diffusion under the heading "référencement assortiment permanent" (...)* ". The solution was again found incidentally during the debates on the " *marketing* " service for 2018, which led the Court to consider, in view of the documents produced by AMC, that the latter did not justify " *the performance of a service other than the referencing of two FG Diffusion products, which is part of the purchase-sale operation* ", and that AMC " *does not demonstrate that it has performed a service specific to the "mise en marché" in respect of 2018 in return for the sum paid in this respect by the company FG Diffusion* ". The same was true when the Court of Appeal examined the merits of the " *"gamme" rebate* " for 2018. Here again and in the eyes of the Court, " *the so-called "gamme" rebate denominated ZRB3 was not the subject of either a detailed invoice or an application contract making it possible to assess its content, the terms of application and in particular the scope of the FG Diffusion product ranges concerned. While AMC explains that the aim of the rebate was to enable the widest possible reference range of FG Diffusion products", it has to be said that it confines itself to producing the 2018 cadenciers "without any analysis highlighting the optimization of FG Diffusion products and a service distinct from the mere referencing of products". Under these conditions, AMC does not justify having performed a service detachable from the purchase-sale transaction in return for the rebate obtained from FG Diffusion in 2018* ."

Observations. Among other things, this ruling allows us to return to a question that has been asked so many times: can referencing, as such and in all circumstances, starting with that in which it is carried out by an entity often dedicated to this task within a distribution group in which other entities buy and resell the supplier's products, be monetized? We recently examined the question of the monetizable nature of certain payments to supermarket distribution centers, intrigued as we were by a recent ruling by the Paris Court of Appeal (Paris, Sept. 6, 2023, no. 21/19954, Lettre distrib. 11/2023, *our comments*). Rich, practical and clear: in our view, these are the characteristics of the judgment under review, irrespective of the solutions applied in this case. However, this is not necessarily always our feeling, as we are more reserved about other judgments dealing with related issues and calling for a few meetings on more fundamental questions (e.g. Paris, Oct. 25, 2023, no. 21/11927, Lettre distrib. 12/2023 and RLC 2024/134, no. 4575, *our comments*). But nothing of the sort here. After reading the Court of Appeal's analysis of certain plant services and their monetizable nature, is there any need to go into further detail? In what way are such services, whatever their name and for which a " *benefit* " has been granted, (so) distinct from " *simple referencing* "? Without going so far as to say that it has been debased, the task of referencing is therefore trivialized, because in reality it is inherent to the purchase-sale relationship observed, and from which it is not a " *detachable service* ". The fact that it is designated as a " *service* ", or the chatter that sometimes accompanies it in the agreements that provide for it, is irrelevant. From all this, and following an analysis *in concreto*, it is clear from this ruling that requalification also threatens " *services* " or " *compensations* " with distinctive titles such as " *marketing* " or " *range rebate* ". As a result, and on the basis of the former article L. 442-6 I 1° of the French Commercial Code (and *mutadis mutandis* on the basis of article L. 442-1 I 1°), vigilance is required with regard to the negotiability for consideration of certain listing services and their variations, even if disguised as something else. In our opinion, the same observation applies when it comes to examining compensatory measures for significant imbalance on the basis of the former article L. 442-6 I 2° (now article L. 442-1 I 2°). L. 442-1 I 2°; *à rappr.* Com., Jan. 25, 2017, no. 15-23547: Lettre distrib. 02/2017, N. Eréséo; Paris, July 1, 2015, no. 13/19251: Lettre distrib. 07-08/2015, *our obs.*; T. Com. Paris, Sept. 24, 2013: Lettre distrib. 11/2013; Paris, June 12, 2019, n°18/20323, Lettre distrib. 07-08/2019, S. Chaudouet. ; Paris, May 16, 2018, n° 17/11187, RLC 3425, July-August 2018, n° 74, p. 16 et se, *nos obs*), even if convergence in the analysis carried out under the visa of 1° and 2° of article L. 442-6 I sometimes proves uncertain (cf. Paris, Oct. 25, 2023, n° 21/11927, *préc.*). In the middle of a commercial negotiation period, even if some of them are already coming to an end in the middle of January 2024, or will come to an end at the end of this month due to the exceptional provisions for 2024 set out in law no. 2023-1041 of November 17, 2023 (Lettre distrib. 02/2017, N. Eréséo), this is - without more - the light we wish to shed on one of the main contributions of the ruling on this recurring issue, without of course diminishing the interest of the other subjects it addresses.

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