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Abusive commercial negotiations: The Paris Court of appeal confirms the wide application of the prohibition on abusive advantages as well as the applicable proving mechanism and, through its ruling, contributes to renew the debate on the legitimacy of certain payments to central price and purchasing negotiation body *(Le Roy Muribane / Franprix Leader Price Holding)*

DISTRIBUTION, FRANCE, BURDEN OF PROOF, DISTRIBUTION AGREEMENT, PRICES, REBATES, ALL BUSINESS SECTORS, ABUSE OF ECONOMIC DEPENDENCE, PUBLIC ORDER, NULLITY / VOIDNESS, ABUSIVE PRICING, BUYER POWER, GROUP PURCHASING ORGANIZATION, SIGNIFICANT IMBALANCE

Paris Court of Appeal, 6 Sept. 2023, RG n° 21/19954, SARL Le Roy Muribane / SAS Franprix Leader Price Holding

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Facts. Le Roy Muribane (the "supplier"), a fruit and vegetable wholesaler, had been supplying fresh produce since 1996 to supermarkets operated under the Leader Price franchise by Distribution Bretagne Atlantique (DBA or the "distributor"). Changes in the company's capital structure between 2008 and 2020 brought it under the Casino Group umbrella. During the course of their relationship, the supplier and the distributor have signed several annual agreements, setting out the remuneration payable by the former in exchange for the services provided by the latter. The last agreement was signed for 2017, and no agreement has been signed for 2018 or 2019. As of the end of 2019, the distributor ceased all purchases from the supplier, who brought an action against it before the Paris Commercial Court for brutal breach of established commercial relations. The proceedings were in progress at the date of the reported judgment. The supplier also brought an action before the Rennes Commercial Court, which dismissed the action, claiming the nullity of two articles of the annual agreements signed in 2016 and 2017 entitled " *Referencing and services contract* ", in order to obtain reimbursement of sums wrongly paid to its distributor. The supplier appealed to the Paris Court of Appeal. In support of its claim for nullity, the supplier invoked the fictitious nature of the services, and therefore the absence of consideration for the remuneration provided for in the two aforementioned articles. The disputed services were grouped under four "items", namely: " *1. referencing and centralized administrative management commission; 2. in-store*

advertising and point-of-sale information; 3. exhibitions and events; 4. Technical elements ". In a ruling dated September 6, 2023, the Court of Appeal overturned the first judgment, declared the disputed items null and void and ordered the distributor (Franprix Leader Price Holding at the time of the appeal proceedings) to repay the sums wrongly paid by the supplier.

Problems

1) How is the burden of proof shared in a dispute based on article L. 442-6 I 1° C. com. prohibiting the obtaining of an advantage without consideration?

2) What is the material scope of article L. 442-6 I 1°?

3) Under article L. 442-6 I 1°, how do you define the services that may give rise to remuneration under a commercial agreement concluded in the mass retail sector between a supplier and its distributor for the distribution of the former's products by the latter?

Solutions

1) Apportionment of the burden of proof : " *It is up to the supplier, the company (...), plaintiff in accordance with article 1353 of the French Civil Code, to prove that consideration was paid. It is then up to the company (...), whose role was to enable* the supplier[] to *benefit from its services for the distribution of its products in the various supermarkets managed by (...), to prove that a service was actually rendered (Com, March 3, 2021, no. 19-13533)* ".

2) On the substantive scope of article L. 442-6 I 1° : " *The letter of the text makes it possible, through the great generality of its terms, to extend its application beyond commercial cooperation services alone ("service commercial") and to an advantage of any kind ("un avantage quelconque"). The Court of Cassation holds that "the application of article L 442-6 I 1° of the French Commercial Code requires only that the obtaining of any advantage or the attempt to obtain such an advantage not corresponding to any commercial service actually rendered or manifestly disproportionate with regard to the value of the service rendered be established, whatever the nature of this advantage" (Com., January 11, 2023, n° 21-11.163)* ".

3) On the definition of services that may give rise to remuneration (*a contrario* may not) **with regard to Article L. 442-6 I 1° in the context of a commercial agreement in the world of mass distribution** : " *It* [the Court of Cassation] *has specified that "the service giving rise to remuneration in the context of a commercial agreement must be specific and go beyond the simple obligations resulting from purchase and sale operations by giving the supplier a particular advantage of such a nature as to facilitate the marketing of the products" (Com., September 26, 2018, n° 17-10173)* ".

Observations

1) Apportionment of the burden of proof. In this case, the supplier provided proof of payment of invoices for services under the standard heading " *Coopération commerciale 2016 - Référencements et prestations de services* " (idem for 2017), but the distributor did not provide proof of services actually rendered in return for the sums paid. In the absence of proof that the services rendered in respect of 2016 and 2017 were actually performed, the Court considers them to be fictitious on this count alone, with no need to consider further the nature of the services claimed, or *a fortiori*, the proportionality of the benefits granted. Moreover, the Court does not enter into either of these two areas, occasionally avoiding an unnecessary analysis. The general solution adopted on this point is in line with the most established case law of the Paris Court on the mechanics of evidence (*rappr.* Paris, May 10 2023, no. 21/04967, Lettre distrib. 06/2023 and RLC 4461, no. 129, *July-August* 2023, p. 15 et seq.) It will then be broken down for each of the four categories of services in question, with the Court pointing out that " *it is irrelevant that* [the distributor] *is no longer in possession of the supporting documents allegedly held by its parent company,*

since it was up to it to keep the documents or obtain their production ". Admittedly, the plea was somewhat naïve, in that it sought to relieve its author of his share of the burden of proof, on the pretext that he could not materially provide proof to the contrary, whereas such a plea reflected recognition of the impossibility of proving, and therefore of being wrong.

As for the "chestnut" of the case, it is unsurprisingly swept aside. For those who haven't yet recognized its tune, it's the distributor's defense that the supplier, for several years, " *did not justify having contested the payment of the sums in dispute* " until its legal claim for the periods not barred by the statute of limitations (2016 and 2017), which demonstrated that the services had indeed been rendered and that the distributor had fulfilled its contractual obligations.

Also rejected was the argument that it was the supplier who " *wished to agree listing and service contracts with the distributor, under the terms of which it* [the supplier] *derived real and specific advantages* ", such as " *the centralized listing and administrative management commission* ", containing a general statement, presumably pre-written, to the effect that the supplier " *wishes to benefit from the central* [*services* of the distributor] *in order to help it deploy its products within the supermarket network managed by* [the distributor] ".

Furthermore, with regard to " *point-of-sale advertising and information in stores* ", the fact alleged by the distributor that fruit and vegetable departments are the showcase of Leader Price stores, which regularly communicate with their customers about the quality, freshness and short distribution channels used by these products (posters, promotional magazines, etc.), does not justify, in the eyes of the Court, the carrying out of point-of-sale advertising and information by the distributor in 2016 and 2017. With regard to the latter service, it was noted that the " *alleged operations at the point of sale, described in very general terms in the contract and not carried out* " had not given rise to " *any application contract* ", even though the supplier had indicated that it had no knowledge of the said operations. The absence of application contracts for " *exhibitions and event-based operations* " was also used by the Court to conclude that the latter were fictitious, even though the supplier once again claimed to have been unaware of them, without being denied.

Finally, with regard to the " *technical elements for the implementation by* [the distributor] *of any action for the sole purpose of promoting the referenced products, in particular the provision by the subsidiaries of lost pallets* ", the Court ruled that there was no justification for their implementation by the distributor.

2) On the material scope of the prohibition on unrequited advantage. There is very little to observe here, other than to note the Court of Appeal's adoption of the recent solution (Com., Jan. 11, 2023, no. 21-11163, Lettre distrib. 02/2023 and RLC 4399, no. 125, March 2023, p. 31 et seq., *our comments*). By this we mean that the text of the prohibition refers to an advantage, whatever it may be (*contra*, Paris, Pôle 5 ch. 5, May 11 2023, no. 20/04679, Lettre distrib. 10/2023, *our comments*). Moreover, it does not appear from the judgment that the distributor considered it appropriate, in its defense, to attempt to debate this issue.

3) On the definition of services that may (*or* may not) **give rise to remuneration** under **article L. 442-6 I 1°, in the context of a commercial agreement in the world of mass retailing.** It is from this angle that we find the ruling most interesting in terms of the avenues of reflection it opens up, while at the same time endeavoring to attribute to the Court points of view that it did not express literally in its reasons. Similarly, we will not comment here on an assessment of the nature of the services, as the Court has not actually carried it out. Subject to these reservations, and on this sometimes divisive subject, it must first be emphasized that the judgment comes during a period in which the mechanism for combating the obtaining of an advantage without consideration has been reinvigorated both by the legislator in the Ordinance of April 24, 2019 (cf. art. L. 441-2 I 1° new) and by the High Court (Com., Jan. 11, 2023, *aforementioned*). Secondly, we cannot fail to note that the Court, which could have confined itself simply to noting the lack of proof of performance of the services criticized in order to consider them fictitious, recalls *ab initio* a solution of the Court of Cassation, issued in the epilogue to a long-running case opposing the Minister of the Economy to Système U (Com., Sept. 26, 2018, no. 17-10.173, Lettre distrib. 10/2018, *our obs.*) around the remuneration of central services. The Court of Appeal thus reminds us of the dual criterion of the " *specific* " nature of the service, which must " *go beyond the simple obligations resulting from the purchase and sale obligations* ". We will not go into the third criterion laid

down by the Court of Cassation, namely that the service must " *give the supplier a particular advantage likely to facilitate the marketing of the products* ". As already stated in the judgment under review, which follows on from that of the Cour de cassation (Com., Jan. 11, 2023, no. 21-11163, *aforementioned*), the very generality of the wording of the text means that it can be applied to more than just commercial cooperation services ("service commercial"), and to an advantage of any kind ("un avantage quelconque"). In the case in point, the central services provided by the " *Commission de référencement et de gestion administrative centralisée* " covered four areas: (1) centralizing the negotiation of product information and store orders during promotional operations, (2) setting up strategic sector development, through the presence of sector managers, to relay the overall policy agreed by [the distributor] with [the supplier], (3) the provision of a single point of contact (or points of contact) to determine the strategy, products and quantity of products to be placed in the various supermarkets concerned, and (4) the coordination by [the distributor] of orders from its various subsidiaries (fruit and vegetables, flowers and plants, etc.) into a single delivery to enable the Group to offer a complete range of products.) into a single delivery, to enable the supplier to simplify his daily logistics and facilitate his passage through the receiving area. Leaving aside this last "logistical" issue, weren't the first three services invoked by the distributor (the head office), acting " *in the name of and on behalf of its subsidiaries* ", basically the foundation, not to say the prerequisite, of the entire purchase-sale relationship with said subsidiaries, from which they apparently could not be decoupled? In the presence of certain head office services, should we then see a quid pro quo justifying an advantage for such and such a service which, whether remunerated or not, is obligatorily performed because it is inseparable from the purchasing-sales organization set up by the distributor? Even if there is no "advantage", the service would still be provided when it could not be otherwise, if the relationship is to be established and maintained. Paradoxically, if it is tempting for the author of the service, in order to counter criticism of its non-performance and to maintain that the service deserves remuneration, to invoke the fact that it is performed because it is indispensable, isn't such a defence part of the recognition, for these services, that they cannot be detached from the purchase and sale? The choice of defense can therefore be a difficult one.

If we attempt to draw a dividing line between what is redeemable and what might not be, the question for the judge would be to determine whether the supplier is really in a position to refuse to implement the proposed consideration, without this affecting the entire process of listing and selling his products, and therefore, mechanically, his direct access to sales purchases. If this is the case, we are dealing with a simple option which, if chosen in the manner of an " *opt-in* " and then implemented, could give rise to a cash payment. But if not, the service in question is systemic, with no *opt-out* . As a result, and like a consumer who is refused the sale of a particular product or service if he or she does not at the same time purchase another "proposed" product or service (linked sale or service), the subordination of the commercial relationship between the supplier and the distributor to the performance of the central service means that the said supplier has to bear a charge for this "proposed" coinage.

Finally, and beyond this first debate, already encountered in the past, a second could be revived thanks to this ruling, as the supplier had stressed that the alleged referencing and centralized administrative management services had not really been provided " *in its interest* ", even though they had been invoiced. The Court also upheld the supplier's argument that the " *point-of-sale advertising and information* " service was not actually provided " *in its interest* ", and was therefore fictitious. This is yet another reason to criticize the monetizable nature of the service in question, even if it had been provided.

Could this ruling be seen as the cornerstone of a renewed debate on central services in the field of industry-trade relations? To be continued.