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Abusive commercial negotiations: The French Commission for the Examination of Commercial Practices recalls the broad application of the prohibition for advantages without consideration

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CEPC, 15 Sept. 2023, Notice no. 23-7 concerning a request for an opinion from a professional regarding the compliance of invoicing practices with the provisions of article L. 442-1, I, 1° of the French Commercial Code

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Facts. The CEPC ruled on the compliance with the provisions of the former article L. 442-6, I, 1° and article L. 442-1, I, 1° of the French Commercial Code of the practice whereby an IT company successively issued five flat-rate annual invoices on the basis of a subscription contract to the order of a client company, for services which the latter would not receive, due to the lack of deployment of an IT platform enabling the delivery of these services.

Issues. The question was to determine whether this practice could be apprehended both on the basis of the prohibition of advantages without consideration (old and new version resulting from the ordinance of April 24, 2019) and on that of the law of obligations.

Solutions. The question will not be dealt with from the point of view of the law of obligations, except to point out that the CEPC, in view of the circumstances of the case, is considering the concepts of caducité and exception d'inexécution. As for the approach to the practice described in relation to articles L. 442-6 I 1° and L. 442-1 I 1°, the CEPC considers it to be non-compliant, after verifying the conditions of application of the prohibition. Thus, on the new basis resulting from the Order of April 24, 2019, it considers that " *the IT company carries out an economic service activity. For its part, the customer is indeed "the other party" to whom the benefit of Article L. 442-1, I, 1° of the Commercial Code is reserved. Moreover, this provision is provided with a general letter, mentioning "un avantage", without any precision, or exclusion. (...) the IT company is claiming payment of the subscription price from the customer, as provided for in the contract, even though, in the absence of installation of the platform,*

no service has been performed by it, which appears to constitute "le fait d'obtenir ou tenter d'obtenir un avantage sans contrepartie" in violation of article L. 442-1, I, 1° of the French Commercial Code. This would be different, however, in the case where the absence of any benefit originated in the customer's own behavior ". The assessment does not vary when the practice in question is put to the test of the former article L. 442-6 I 1°, insofar as the IT company does indeed appear as a " *commercial partner* " and the prohibition on obtaining an advantage without consideration applied "whatever *the nature of this advantage* " and could therefore concern the price (Com., Jan. 11, 2023, Lettre distrib. 02/2023, *our obs.*).

Observations. The content of opinion no. 23-7 on the scope of the prohibition on unrequited advantages is not surprising, both in terms of the clarifications given by the Cour de cassation (Com., Jan. 11, 2023, aforementioned) and in terms of the prohibition as defined by the old and new texts. In the past, the CEPC has, on numerous occasions, shown itself to be in favor of an open application of the provision, in contemplation of its letter (see in particular opinion no. 20-4; no. 19-1; no. 18-2; no. 18-3; no. 18-8; no. 15-21). In an opinion issued last February (no. 23-1), it reiterated its position, on the basis of the prohibition newly defined by article L. 442-1 I 1°. Moreover, historically speaking, we all remember the vigorous judicial handling of the prohibition in the case of fictitious contracts for the provision of services, notably commercial cooperation. So, while it deserves to be brought to the Letter, the present opinion applying the prohibition to the consideration, understood here as the price per se of the service, reveals nothing unexpected for this multifaceted prohibition, given the multiform nature of the practices it is intended to combat. But it's always foolhardy to believe that the end is in sight. A glance at the Paris Court of Appeal will convince us of this. In one of its latest decisions (Paris, Pôle 5 ch. 5, May 11 2023, no. 20/04679), a rather surprising one in our view, the said Court has once again raised the question of the scope of application of an unrequited or manifestly disproportionate advantage. Admittedly, its solution is based on article L. 442-6 I 1°, which was applicable to the facts of the case. After pointing out that " *the text punishes the granting, within the framework of a contractual partnership, of an advantage without consideration or with consideration that is manifestly disproportionate to the service rendered* ", the Court of Appeal noted that the parties had entered into a commercial relationship under the terms of which they had agreed on the purpose and price of an assignment to recruit an associate. However, in her opinion, " *the disputed remuneration is the price of the service agreed between the parties and does not relate to a benefit granted within the meaning of the aforementioned provision* ". Curiously, the Court *added* that "in *addition* ", " *it follows from the foregoing that the object of the service is not fictitious (...)* ", which could be seen as a contradiction if the text of L. 442-6 I 1° is not applicable. In the Court's view, the application of L. 442-6 I 1° to the case in point is *out of the* question. *Bis repetita!* Are we back to a new interlude of resistance to the literal application of the aforementioned article (*rappr.* Paris, May 10 2023, n° 21/04967, Lettre distrib. 06/2023, *nos obs*), which is even less understandable than in the past, in view of recent case law (Com., Jan. 11 2023, *prec.*) and changes in the law? For the time being, the solution resulting from this ruling does not seem to be in line with the one issued by the Cour de cassation earlier this year regarding the scope of the aforementioned article.