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Written agreement: The Versailles Court of Appeal recognizes its jurisdiction to rule on an action for damages against a supplier from a retailer fined for delay in signing the agreement and recognizes its standing to bring such an action, but dismisses the action on the grounds of demonstrating the fault of its supplier *(Interdis/ Procter et Gamble France)*

DISTRIBUTION, FRANCE, BURDEN OF PROOF, BUSINESS SECRETS, DISTRIBUTION AGREEMENT, PRICES, ALL BUSINESS SECTORS, ADMISSIBILITY (COMPLAINT), CRIMINAL SANCTIONS, PASSING-ON, JUDICIAL REVIEW, NULLITY / VOIDNESS, ABUSIVE PRICING, BUYER POWER, LIABILITY (PERSONAL), GROUP PURCHASING ORGANIZATION, SIGNIFICANT IMBALANCE

Versailles Court of Appeal, 21 Dec. 2023, RG n° 21/06836, Interdis c/ Procter and Gamble France

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Concurrences N° 1-2024 | Alerts | Distribution

Facts. With a view to the 2019 commercial agreements, the "Envergure" central purchasing unit, created as part of a partnership between the Carrefour and Système U groups to negotiate with the groups' largest suppliers and acting on behalf of SNC Interdis ("the distributor"), itself the Carrefour group's central listing unit, conducted commercial negotiations with SAS Procter & Gamble France ("the supplier"). As the discussions dragged on, written agreements were not concluded until March 13, 2019, in breach of the rule then laid down by article L. 441-7 C. com. At the end of 2019, the DGCCRF imposed a fine of 247,000 euros on the distributor for 8 agreements not concluded on time with the supplier, the latter not being penalized. This sum was included in an overall amount of 2,931,000 euros, for 157 breaches with some 45 suppliers. Considering its supplier to be jointly responsible for the breach, the distributor sued it on the basis of article 1240 C. civ. for payment of 123,500 euros in damages, i.e. half the amount of the fine. Dismissed, the distributor appealed to the Versailles Court of Appeal, which upheld the judgment.

Trouble.

Issue 1: Jurisdiction of the Commercial Court . Was the distributor entitled to bring an action before the Commercial Court without its action being inadmissible, seeking an order that its supplier compensate it for the loss that the former considered it had suffered as a result of the latter's alleged actions, which had contributed to the failure to sign the written agreement within the legal timeframe?

Issue 2: Distributor's standing to sue . Did the distributor have standing to bring an action to establish the supplier's share of responsibility for the failure to sign the written agreements by March 1 at the latest, so that its action was admissible?

Issue 3: Civil liability of the supplier . Has the distributor, criticizing the DGCCRF for failing to make a proper assessment of the facts surrounding the commercial negotiations in order to sanction only the distributor, provided evidence of the supplier's fault, such as to entail its joint civil liability for the delay in these negotiations, which did not result in the signing of written agreements within the legal timeframe?

Echoing recent public outbursts in connection with " *name and shame* " pricing disagreements in private business dealings, possibly in defiance of confidentiality obligations, the supplier's counterclaim for damage to its reputation and loss of image should also be noted. The supplier complained that the summons issued against him had been communicated to journalists. The claim was dismissed, as the supplier was not named in the published extract of the summons. On the other hand, the distributor was more concerned about the confidentiality of information relating to its commercial negotiations, in the event that some of this information should have been mentioned in the judgment to be handed down, to the point of formulating a request for business confidentiality, which the supplier also supported, but which was unsuccessful for lack of necessity. " *Name and shame* followed by business confidentiality: a paradoxical sequence.

Solutions.

On the 1st issue: The Court approved the Tribunal's decision to declare itself competent to rule on the supplier's fault-based liability during the pre-contractual negotiation phase, and on the possible indemnification of its commercial partner, as requested by the distributor. According to the Court, this did not involve encroaching on the exclusive jurisdiction of the DGCCRF (art. L. 470-2 C. com. for the pronouncement of administrative fines), nor did it call into question the decision of this authority.

On the 2nd issue: The Court ruled that the distributor's action was admissible, as it was intended to establish the supplier's share of responsibility in failing to meet the March 1st deadline. The distributor, as the only party sanctioned, had standing to demonstrate the supplier's liability.

On the 3rd issue: The Court found that, contrary to the distributor's contention [] , the administrative authority had indeed carried out an assessment of the facts surrounding the commercial negotiation and, after responding precisely to the distributor's observations, had decided to impose sanctions on it alone, taking into account " *the seriousness and extent of the breach* ". It noted that the supplier had rightly pointed out that the DGCCRF had found no less than 157 breaches by the distributor, in the context of negotiations involving numerous other suppliers. With regard to the supplier's alleged misconduct, the distributor did not provide any evidence that would demonstrate the supplier's co-responsibility in the late signing of the agreements.

Observations. Despite the failure of the distributor's claim to prevail over the supplier's defence on the merits, this case, which raises a number of new issues, could open up a new chapter in relations between suppliers and distributors, and encourage other disputes of the same type, since their admissibility is recognized, or even discussions on the assumption of responsibility for the amount of fines imposed on just one of the parties.

Concerning the 1st problem: The first and most direct lesson to be learned is the possibility of a recourse action, a sort of " *follow-on* " action in restrictive competition practices, initiated by a party who is both the perpetrator of the infringement, sanctioned as such, and considers himself to be the victim on this occasion, against his partner whom he considers to be the co-perpetrator of the infringement committed. The approach is reminiscent of that of the " *pass-on* " of the direct victim of an anti-competitive practice, although the genesis and logic are different. In the latter case, it is the victim of the practice who wishes to be compensated by the perpetrator of the practice for a loss, in particular additional costs, which he or she did not suffer in full because it was passed on to his or her own customers. In this case, on the other hand, it is the offender who wishes to pass on to his partner a share of the penalty that was not imposed on him. To our knowledge, this type of recourse is unprecedented in the field of CRP. A second lesson arises from the distinction between recourse actions and appeals against administrative penalties. It stems from the different nature of litigation and the independence of the two levels of jurisdiction. Although the claim originates in a practice sanctioned by an administrative fine which, when appealed, falls within the "jurisdiction" of the administrative courts, the civil liability action must be brought before the judicial judge. Should the administrative penalty be annulled, the same would apply to the action for restitution of any sums paid out as a result of the civil litigation, should there be a spontaneous refusal of restitution. A third lesson, derived from the foregoing, lies in the reminder that the judicial judge, when he intends to rule on the indemnity claim of the condemned party, neither assigns to himself a subsidiary power of administrative sanction vested in the Administration alone, nor understands himself as a court of appeal against the sanction initially pronounced against only one of the parties, even though they were all actors in the signing of the same contract concluded out of time. Finally, a fourth lesson concerns the matters that may give rise to a recourse action. Even if the Court does not expressly state so, we understand from the ruling, through the reference made to breaches covered by Title IV relating to transparency, that recourse for compensation is available for other types of infringement that the Administration may sanction on the basis of article L. 470-2 C. com., (e.g. non-compliant written agreement). This augurs well for future settlements of scores in the continuity of controls, which seem to be particularly timely following the latest upheavals in the agricultural world (" *Négociations commerciales : Bruno Le Maire pointe 124 dossiers en infraction* ", M. Picard, LSA, Feb. 6, 2024).

On the 2nd issue: The developments in the judgment on the first issue of jurisdictional power suggested a general solution to the question of the distributor's standing to sue. Although the two issues are not the same, it would have seemed paradoxical for the court to have given reasons for admitting its jurisdictional power in the context of the indemnity action in question, only to declare that the party bringing the action did not have standing to sue *as* a victim. In this case, the supplier contested the distributor's right to bring an action on the grounds that the distributor had been found to be the sole perpetrator of the facts that led to the sanction. The Court ruled against him. The solution was by no means obvious, since it *ultimately* amounts to making the party not sanctioned bear a share of the administrative sanction imposed on the other party. This point was not lost on the supplier (" [the supplier] *cannot be held liable and held jointly and severally liable for payment of the administrative fine, especially as* [the distributor] *has in no way paid the DGGCRF for the debt owed to it by another party, thereby giving it the right to seek repayment* ". *Comp.* art. 1317 et seq. C. civ. ; " [le distributeur] *considère que l'amende infligée à l'appelant, par sa finalité exclusivement punitive, ne peut constituer un dommage réparable* "). While the inadmissibility of a claim on the grounds of *res judicata* under article 122 of the CPC is not open to discussion, we could, if necessary, look to the principle that res judicata in criminal cases has precedence over res judicata in civil cases, in the event of both conviction and acquittal (*see* Civ. 2, Nov. 24, 2022, no. 21-17.167). Beyond this solution, the debates on the legitimacy of this type of recourse action are perhaps not definitively closed. To the best of our knowledge, and as of the date on which we comment on this ruling, it seems that the time limit for appeals has not yet expired.

On the 3rd issue: The epicenter of the claim lay in the fact that the DGCCRF had not carried out an *in concreto* analysis of the course of the negotiations, to determine the cause of the missed deadline, and had contented itself with a general assessment based on the dispatch of documents (in particular CGVs) and compliance with legal dates. A debate ensued *ex post* on the imputability of the delay, which the distributor felt had not been conducted *ex ante* by the Administration. To reject the distributor's failure to establish the supplier's fault, the Court took into consideration two types of circumstances identified during the DGCCRF inspection. The first was the finding that the deadline had not been met in 157 cases of non-compliance of the same type involving 45 suppliers, 8 of which involved the supplier in question. While this fact alone was insufficient to establish

the breach of which the distributor was accused, in the Court's view it nevertheless demonstrated a genuine appreciation of the facts and the adversarial nature of the investigation. With regard to the alleged lack of diligence on the part of the supplier, it should also be noted from the grounds of the judgment, in line with those of the administrative fine decision, that the fact that the 45 suppliers concerned had not accepted the distributor's proposals during the negotiations (and thus explained the failure to sign the agreements on time), is not sufficient to exonerate the distributor from liability for signing the agreements after the deadline, whereas "in any event, *the investigation revealed that, as a distributor, Interdis had not been able to justify the conclusion of the agreements by March 1, 2019 at the latest, whereas the suppliers had sent their general terms and conditions of sale at least three months before the deadline, as stipulated in article L.441-7 (...)* ". While it was understood that the timely dispatch of GSCs, often prescribed before a fixed date *(a priori* December 1 for the products concerned), legally gave negotiators sufficient time to reach an agreement by March 1, the clarification that suppliers would not respond positively to the distributor's commercial proposals - we understand their requests - does not exonerate the latter in respect of the breach in question, seems to us novel and welcome. However, the Court did not confine itself to these observations in rejecting the distributor's claim. The second set of circumstances relates to the absence of evidence, which it was up to the distributor to provide, showing that the supplier was co-responsible for the late signing of the disputed agreements. In this respect, the " *few* " e-mails exchanged between Centrale Envergure and the supplier were insufficient to establish the disloyal and dilatory behavior of which the supplier was accused during the negotiations. Among the latter, the Court refers to a letter from the Centrale addressed to the supplier on February 19, 2019, in which the latter recalls the March 1, 2019 deadline and the fact that " *the absence of signature by this date of a written agreement (...) is likely to engage the joint responsibility of the distributor (...)*" and indicates that the supplier's proposals are " *still too far removed from our requests to be able to envisage the conclusion of an agreement for 2019* " while asking him to make new proposals, so that the negotiations can be finalized. The supplier replied the following day, specifying the proposals it had been asked to make since November 2018, that its teams were doing everything possible to meet the legal deadlines, and that it declined all responsibility if an agreement was not reached by March 1, 2019. While such exchanges, in the home stretch of their negotiations, established that the parties had not always agreed on the terms of their collaboration, they did not support the view that the conclusion of the agreements had been delayed through the supplier's fault. To accept or to be civilly liable: the choice of the negotiating parties should not come down to this. Nevertheless, it will be important for each of the parties to the negotiation to be able to prove their behavior on this occasion, both *a priori* during the Administration's controls and *a posteriori* if this type of "redistributive" civil liability litigation were to multiply. The latter situation should not be ruled out in the light of the solution reached here, since the plaintiff, although losing on a strictly evidential level in view of the circumstances of the case, is in our view strengthened by the solutions handed down in terms of "competence" and standing to sue.

In the final analysis, and leaving aside the circumstances of the case which led the Administration to decide to impose a fine on the distributor alone - which the Court does not intend to discuss, as it does not fall within its jurisdictional powers - and whether, in the end, the distributor succeeded in its claims, the judgment must be viewed more favorably on the distributor side than on the supplier side, if the latter were to have a share of responsibility in the sanctioned breach. Moreover, it would appear from a few passages in the ruling that other summonses have been issued against various suppliers who, according to the distributor, were responsible for the failure to sign a written agreement. This is a time of increasing administrative sanctions. That said, in the event of a sanction being imposed on the supplier alone, the latter should be entitled to take the same action. A small consolation, given that, in practice, will it be well advised to initiate proceedings against a customer during the course of a relationship? It should be noted that the summons issued here by the distributor was issued on February 24, 2020, the last week of commercial negotiations for 2020. Whether the negotiations had been concluded by then, or whether the supplier and distributor were no longer in a business relationship, the formulation of such a demand and its subsequent maintenance by the supplier does not seem to be the best way of maintaining or regaining a presence on the distributor's shelves. So, unless the parties stop negotiating as they should the day after March 1st, in the absence of an agreement, the risk - especially if the sales impacted are significant, and unless the administrative sanctions are truly dissuasive - is that the parties will prefer to expose themselves to the possibility of a sanction individually or together, even if it means sharing the burden later, rather than having to agree to commercial conditions they consider too unfavourable, or to cease all negotiation and relations on the evening of March 1st. It remains to be seen how this ruling, with its far-reaching practical implications, will shape the future.