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COMPETITION LAW REVIEW

Advantage without consideration and stand-alone : The Paris Court of Appeal rules that Article L. 442-I 1° of the French Commercial Code is not intended to allow judicial review of price-setting and the strict adequacy between a sale price and the value of the asset concerned, and dismisses the plaintiff's action for sudden breach of commercial relationship and for damages for abuse of a dominant position and economic dependence *(Couvoir de Haute Chalosse / Gourmaud Sélection)*

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Reference: Paris Court of Appeal, 3 July 2024, RG n° 22/14428, Couvoir de Haute Chalosse / Gourmaud Sélection

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Facts. EARL Couvoir de Haute Chalosse (hereinafter referred to as "CHC"), which hatches ducklings for the foie gras industry, and SAS Gourmaud Sélection (hereinafter referred to as "Gourmaud" or "the breeder") maintained a commercial relationship from 2000, with the latter supplying the former with breeding ducks. The relationship was terminated at Gourmaud's initiative, and Gourmaud, citing contractual breaches by its partner, including a drop in orders from Gourmaud, terminated the distribution contract with CHC with 6 months' notice, as stipulated in the contract. Charging Gourmaud with an abuse of dominant position and economic dependence, as well as a brutal breach of their established commercial relationship (the alleged breaches not being sufficiently serious according to CHC), on the basis of articles 1240 of the French Civil Code, L. 420-2, L. 481-1 and L 442-6 I 5° of the French Commercial Code and 102 of the TFEU, CHC brought an action before the Rennes Commercial Court. Its main claim was for the continuation of commercial relations and, in the alternative, for compensation for damages. Rejected in its entirety, CHC appealed. The Paris Court of Appeal handed down a ruling confirming the decision.

Problems and solutions. The judgment deals with procedural issues (intervention of the commissaire à l'exécution du plan in CHC's sauvegarde proceedings, scope of the appeal with abandonment of claims for wrongful termination) and, on the merits, those of brutal termination (art. L. 442-6 I 5°), abuse of a dominant position (only article L. 420-2 being referred to on appeal) and advantage without consideration (art. L. 442-1, I 1°). Without wishing to refrain from making any comments on these various substantive issues, we will focus on the last of them, in the light of the ruling that " *the purpose of this text* (...) *is not in fact to allow judicial review of price-setting and the strict adequacy between a transfer price and the value of the asset in question* ".

Observations.

- On the brutal breach. The appellant was accused of disparaging the breeder by distributing a leaflet to industry players, and of breaching the contract by "moulting" ducks to prolong their reproductive cycle, which had consequences for the reputation of the genetic quality of the ducks initially delivered by the breeder. The breeder also missed out on profits due to a drop in order volumes and the practice of selling ducks at prices unsuited to a prolonged production cycle. Only the practice of "moulting" will be deemed to constitute serious misconduct justifying termination without notice, even if the Court were to find that the contractual notice period of 6 months had been granted, notwithstanding this contractually prohibited practice. In a highly instructive solution, given the numerous reminders given on the conditions of application of article L. 442-6 I 5°, the Court recalls that " *the fault must be incompatible with the continuation, even temporary, of the partnership: its assessment must be objective, with regard to the extent of the non-performance and the nature of the obligation to which it relates, but also subjective, in consideration of its actual impact on the commercial relationship concretely assessed and on the possibility of its continuation despite its commission, as well as the behavior of each party* ", although " *the granting of notice does not per se deprive the person responsible for the breach of the right to subsequently invoke serious misconduct on which it is based (in this sense, Com., October 14, 2020, n° 18-22.119, reversing Com., February 10, 2015, n° 13-26.414)* ".

- Abuse of dominant position and abuse of economic dependence. According to the appellant, the first of these involved a breach of established commercial relations and a refusal to sell following notification of the breach. This was not recognized in the judgment, which refers to the grounds, starting with the justification of the termination on the grounds of serious misconduct or the continuity of deliveries during the notice period. Abuse of economic dependence will not be recognized either, using similar reasoning. For these two forms of abuse, the general reminders in the case law are appreciable and invite us to bear in mind the high standard of technical requirements, particularly in terms of evidence, in litigation for compensation for anti-competitive practices, in this case *stand-alone*.

- On the benefit without consideration. The ruling addresses the possible application of article L. 442-I 1° of the French Commercial Code to what, for the Court of Appeal, constituted " *a global transfer including, in addition to the staff buyout, the shares valued at the symbolic euro, but also the hatchery at a price of 400.000 euros, the 'vile' character of which, in reality derisory or manifestly disproportionate, is not established* ", the appellant having stigmatized the proposal to buy back his hatchery at 1 euro as formulated not by Gourmaud, but by a company belonging to his group. We have three brief comments to make.

Firstly, and this seems to be a first, the solution is *ratione temporis*, based on the new Article L. 442-I I 1° resulting from the Order of April 24, 2029, the negotiations having taken place in June 2019.

Secondly, *ratione personae*, the aforementioned article did not apply to SAS Gourmaud Sélection, which was not involved in the negotiations conducted by other companies in the group to which it belonged (" *it is common ground that SAS Gourmaud Sélection, whose legal personality is distinct from those of the companies that make up the group to which it belongs, was not involved in the negotiations conducted in June 2019, as acknowledged by SAS CHC in its written submissions (page 6: 'These talks with ORVIA COUVOIR DE LA MESANGERE failed* ')"). Exit the consideration of the notion of group or company*(to be comp*. in terms of anti-competitive practices).

Lastly, *ratione materiae*, the Court ruled that the rule was " *not intended to allow judicial review of price-setting and the strict adequacy between a transfer price and the value of the property in question* ". This solution is a reminder that only a few months had elapsed since the Cour de cassation had clearly ruled in favor of a broad interpretation of the material scope of the aforementioned rule (Com., Jan. 11, 2023, no. 21-11163, Lettre distrib. 02/2023 and RLC 4399, no. 125, March 2023, p. 31 et seq, *our comments*; Paris, Sept. 6, 2023, no. 21/19954, Lettre distrib. 11/2023), that of a previous decision by the same Court of Appeal concerning the former article L. 442-6 I 1° (Paris, May 11, 2023, no. 20/04679, Lettre distrib. 10/2023). The decision commented on here recalls that " *the application of this text requires only that it be established that any advantage has been obtained (or attempted) which does not correspond to any commercial service actually rendered or which is manifestly disproportionate to the value of the service rendered, whatever the nature of this advantage, which may be tariff-based (in this sense, Com., January 11, 2023, no. 21-11.163). Assessing whether there is no consideration or whether it is manifestly disproportionate requires an essentially objective and quantitative analysis, and is generally carried out on a term-by-term basis* [rappr. Paris, May 10 2023, no. 21/04967, Lettre distrib. 06/2023] *regardless of the existence of a tender*. But the Court sets the limit: no price control as such. However, doesn't the provision lead indirectly, through the will of the law, to a control induced by the simple application of the rule? Some will welcome this solution. Others will baulk at the idea of the debate reigniting, considering that everything depends on the meaning one wishes to give to the notion of " *advantage* " (which, moreover, is " *any* " under the terms of the former article L. 442-6 I 2°), in determining the scope of the system. After all, if one party finds itself at a disadvantage in a transaction, doesn't that mean that the other party has an advantage*(comp*. Paris, Oct. 25, 2023, no. 21/11927, Lettre distrib. 12/2023 or RLC 4575, no. 134, January 2024, p. 18 et seq .*)* It will be remembered that in its previous version, this special text made it possible to check the reality or value of a service, such as a commercial cooperation service*(rappr.* CEPC Opinion 23-07, Lettre distrib. 10/2023, concerning a subscription service for the supply of IT solutions, pointing out that the definition of the prohibited practice has not been modified, so that the conclusion is exactly the same as under the new article L. 442-1, I, 1°). The debates on the material

scope of abuse control based on the prohibition of advantages without consideration may not yet be over. So, are we heading for a new round? It's up to the litigants to decide.

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