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COMPETITION AND DISTRIBUTION LAW NEWSFLASH



IT and Data Protection Intellectual Property, Media, and Art Law Competition, Retail and Consumer Law
Commercial and International Contracts | 09/10/12 | Mahasti Razavi Alexandra Berg-Moussa

Breaking news updates about competition and distribution law : 1. fixed compensation for recovery costs, 2. e-commerce: general terms of sale, box to tick, hyperlink and information duty, 3. commercial cooperation and advantage without proportionate consideration

1. Fixed compensation for recovery costs

A decree dated October 2, 2012 fixes at 40 euros the compensation for recovery costs that any professional shall automatically pay to its creditor in case of late payment as from January 1, 2013.

Such compensation, provided for in article L. 441-6 of the commercial code as modified further to the adoption of the Bill n° 2012-387 of Mars 22, 2012, is owed in addition to the late payment penalties which are also owed automatically, i.e. without the necessity of a reminder. If the amount of the recovery costs exceeds that fixed sum of 40 euros and is duly documented, the creditor may ask for an additional compensation.

Noteworthy, as from January 1, 2013, the general terms of sale and invoices shall be modified in order to include a mention concerning this compensation.

2. E-commerce: General terms of sale, box to tick, hyperlink and information duty

Requesting a buyer to tick a box (opt-in) to accept the general terms of sale of a trader accessible via a hyperlink is a common business practice in e-commerce. Although previously validated by French courts (namely the Paris Appeal court, November 25 2010), such business practice is now challenged by a decision of the Court of Justice of the European Union (CJEU, 05/07/52012, Content Services Ltd vs. Bundesarbeitskammer).

Article 5(1) of Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts (the "Directive") provides that in the context of distance selling, "*the consumer must receive written confirmation or confirmation in another durable medium available and accessible to him (...)*" of a certain number of information "*in good time during the performance of the contract, and at the latest at the time of delivery (...), unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him*". Such information includes inter alia the existence of and limitations pertaining to the right of withdrawal.

In the context of a dispute resulting from the online purchase of a software, a question was referred to the CJEU for a preliminary ruling, on the validity of the business practice consisting in only making the information provided in Article 5(1) of the Directive available to the consumer by means of a hyperlink referring to the trader's general terms of sale on the latter's website, general terms of sale that the consumer must mark as read by ticking a box in order to be able to enter into a contractual relationship. According to the CJEU:

Before the conclusion of the distance contract, consumers can only access the relevant information (including the information relating to the right of withdrawal) by clicking on a hyperlink which refers them to the general terms of sale of the trader that are posted on the latter's website;

- After placing their order, consumers receive an email from the trader which does not contain any such information, but in which there is, again, a hyperlink which refers to the general terms of sale of the trader that are posted on the latter's website;
- Insofar as the Directive provides that the relevant information shall be "received" by or "given" to the consumer, the process envisaged is a process of transmission of information by the professional which does not require for the consumer - recipient of the information - to take any particular action. By contrast, where a link is sent to a consumer, he must act (i.e. click on the link) in order to acquaint himself with the information in question, which is as a consequence neither "received" or "given" within the meaning of the Directive;
- The seller's website, on which are posted the general terms of sale accessible via the hyperlink, is not a "durable medium" as it does not allow the consumer to store the information which has been addressed to him personally, in such a way that he can access it and reproduce it unchanged during an adequate period without the seller being able to amend the content unilaterally.

According to the CJEU, the business practice is therefore not compliant with the information duties of a professional seller towards a consumer in the context of distance selling. To be continued...



3. Commercial cooperation and advantage without proportionate consideration

"*Obtaining or attempting to obtain from a commercial partner any advantage which does not relate to a commercial service effectively performed or which is patently disproportionate compared to the service performed*" is sanctioned by the provisions of article L. 442-6 I, 1° of the French commercial code. On the occasion of the termination of its commercial relationships with a central purchasing authority in the mass market retail sector, a supplier launches a claim before the courts, first to have the termination qualified as "abrupt" and second to obtain the reimbursement of certain sums paid for commercial cooperation services. In its ruling (Com, 11/09/2012, Carrefour vs. Compagnie des Salins du Midi et des Salines de l'Est) the Cour de cassation (French supreme court) validates the analysis of the appeal judges according to which:

- The purpose of the various commercial cooperation agreements is very vague ("to define together a global commercial cooperation policy with a common aim of creating value and more specifically in order to have an offer adapted to the market and to the clients' needs");
- The relevant services were not clearly defined (clarification and specific positioning of the product range, assistance with the launch of new products, communication or promotion, cost optimization);
- The evaluation of such services reveals, for almost all of them, a patent lack of proportionality: some services were invoiced between 25 and 26% of the sales revenues depending on the year;
- Invoicing is not carried out in consideration of the consistency of the services performed but rather on the basis of an objective of a global rate of 50% expressed by the distributor, which effectively resulted in an invoicing at an average global rate of 46% of the sales revenues, with no relation to the real value of the services performed.

The judges conclude the lack of connection between the effective value of the services performed and their "*patently excessive and disproportionate*" remuneration. The distributor is ordered to reimburse the supplier the overpayments, which are estimated in this case at half of the invoiced sums.

Mahasti Razavi - Associé

Alexandra Berg-Moussa - Counsel
