

# ARTICLE

## COMMERCIAL AND DISTRIBUTION LAW

IT et données personnelles Droit de la propriété intellectuelle, média et art ANNULE - Concurrence, régulation européenne et FDI Contrats commerciaux et internationaux | 22/06/12 | Mahasti Razavi Alexandra Berg-Moussa

### Selective distribution: no violation by an online auction site of the prohibition of resale outside a network

In a recent decision (no. 11-10.508 handed down by the Cour de cassation on May 3, 2012 (no. 483 FS-PB), eBay Inc, a company incorporated under the laws of Delaware, vs. Parfums Christian Dior), the Cour de cassation quashed the decision handed down by the Paris Court of Appeal judges, who, in particular on the basis of Article L. 442-6.I.6° of the French Commercial Code, had pronounced eBay guilty.

Considering that many sales of products that are usually marketed within the scope of selective distribution networks had been made via the online auction site, the companies at the head of such networks (i.e. in this case Parfums Christian Dior, Kenzo Parfums, Parfums Givenchy and Guerlain) brought proceedings against eBay on the basis of Article L. 442-6.I.6° of the French Commercial Code which provides:

« Holds liable its author and requires the latter to repair the damage caused, the fact by any producer, trader, manufacturer or person registered with the trades directory to: (...) 6° Directly or indirectly take part in the violation of the prohibition of resale outside a network to the distributor bound by a selective or exclusive distribution agreement, exempted under the applicable competition law rules; (...) »

During the appeal, the judges had considered, in particular, that as this text incriminated the indirect participation in the violation of a selective distribution network, « little importance given to whether this violation was carried out by a trade professional or by a private individual », eBay's liability was therefore fully incurred. By providing means (online sales platform), eBay participated in the violation of the prohibition of resale outside a network, such violation being however due to private individuals.

Such reasoning is banned by the Cour de cassation, which specifies in particular that « (...) to claim that the eBay companies had participated in the violation of the prohibition of resale outside selective distribution networks set up by DKGG (...) the decision upholds that it matters little whether the violation was committed by a trade professional or by a private individual and notes that said companies left performed, without taking any effective measures, the organization outside the network of important sales on which they received commission. Whereas by ruling as it did, while the sales performed by simple individuals are not likely to violate the prohibition of resale outside a selective distribution network, the Court of Appeal violated the aforementioned text; (...) ».

The parties are now sent back before the Paris Court of Appeal.

### SIGNIFICANT IMBALANCE: NEW EXAMPLES

The return of unsold products clause had already been pinpointed by the Commercial Court of last January. Within the framework of a new decision handed down on May 29, 2012 against Darty by the Commercial Court of Bobigny, the judges considered that:

- The price protection clause allowing the distributor to be given a credit note by its supplier in the event of a decrease in the latter's prices regarding products that are still in the distributor's inventory; and
- The « obsolete products/fall in product sales» clause allowing the distributor to be given a credit note by its supplier in the event of obsolescence, manufacturing cessation or a fall in the sale of products that are purchased or stocked at the distributors;

produced a significant imbalance in the parties' rights and obligations, in particular as they (i) advantage Darty, who is insured, whatever the market change, to not lose any money and (ii) decrease the commercial freedom of the suppliers who, before changing their prices, will be required to take into consideration the revaluation expected as a consequence of the price protection clause. The judges also observe that the fact that these clauses offer the distributor the possibility to retroact on the sales conditions, and this, further to the sale itself, constitutes an imbalance in itself.

The Court observes the unlawfulness of the relevant clauses, enjoins Darty to no longer include them in its contracts,



observes in particular the nullity of the relevant clauses in 14 identified contracts and, furthermore, sentences Darty to pay a civil fine of €300,000 and to pay the Public Treasury slightly over €575,000, corresponding to the sums that were unduly paid by 4 identified suppliers, in accordance with the relevant clauses./.

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