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COMMERCIAL-DISTRIBUTION LAW NEWS FLASH - 1

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The minister of the economy's action under article l. 442-6, iii of the french commercial code, once again before the judges

In two cases ruled on October 18, 2011, the Commercial Chamber of the Cour de cassation had another opportunity to analyse the Minister of the Economy's action under Article L. 442-6, III of the French Commercial Code.

To recap, the provisions of Article L. 442-6, I and II of the French Commercial Code list a certain number of unfair practices which may be punished inter alia by injunctions to stop the practices concerned, the invalidity of the relevant clauses or contracts, the recovery of undue payments, civil fines, damages. Article L. 442-6, III of the French Commercial Code provides for a specific system allowing, inter alia, the Minister of the Economy to take the initiative of bringing legal action against the perpetrator of such practices, in order to have them ascertained and punished.

In the first case (Commercial Chamber, October 18, 2011, no. 10-28.005), the Cour de cassation examined the nature of the Minister's action. As a reminder, the independent nature of this action, which is reiterated once again in the October 18, 2011 decision, had previously been confirmed (Commercial Chamber, 2 decisions (Le Galec and ITM), July 8, 2008): "(…) the Minister's action (…) is an independent action to protect the functioning of the market and competition, and is not subject to the consent or the presence of the suppliers." Also, following a preliminary question of constitutionality raised by some players in the retail sector (including Le Galec), the Conseil Constitutionnel had ruled that the Minister's action was consistent with the French Constitution provided, however, that the parties to the contracts (and, in particular, the injured supplier) are informed of the filing of such an action by the Minister (Conseil Constitutionnel, May 13, 2011, Decision 2011-126, Preliminary Question of Constitutionality).

This time, the issue of the territorial jurisdiction of the court was raised. In other words, is the Minister free to choose the venue for his action? In this case, the Minister had brought an action against Le Galec before the Rennes Commercial Court in order to sanction this distributor's unfair payment terms applicable to two suppliers falling under the jurisdiction of this court. Le Galec argued that the Rennes Commercial Court did not have jurisdiction and that the Minister should have filed suit in the jurisdiction of the registered office of Le Galec, the defendant. This argument was dismissed by the Rennes Court of Appeal, which upheld the Rennes Commercial Court's jurisdiction (Rennes Court of Appeal, October 15, 2010, 1st Chamber E). Before the Cour de cassation, Le Galec stated that the Minister's action was not of a tortious or quasi-tortious nature, so the provisions of Article 46 of the French Civil Procedure Code authorising the plaintiff to bring legal action in the jurisdiction of the factor causing the damage or in the jurisdiction where the damage was sustained, were not applicable to such an action. Le Galec's argument was dismissed and the Cour de cassation upheld the Court of Appeal's reasoning according to which: "(…) although practices restricting competition are generally ascertained during the course of business relations based on a contract, it is, through the performance of the contract, the behaviour of an economic operator carrying on an unjustified practice in view of the normal play of competition which is punished by the action provided under Article L. 442-6 of the French Commercial Code, the decision finds that the Minister's independent action to stop these practices and cancel the underlying contracts qualifies as a quasi-tortious liability action; the Court of Appeal correctly inferred from this that the Minister may choose whether to file his claim in the jurisdiction of the defendant, in the jurisdiction of the factor causing the damage, or in the jurisdiction where the damage was sustained (…)". The Minister therefore has a choice of venue and it is highly likely that he will prefer to file suit before the courts in the venue where the victim of the unfair practice concerned is located.

In the second case (Commercial Chamber, October 18, 2011, no. 10-15.296), the Cour de cassation examined more specifically the Minister's action for the recovery of undue payments. During a DRCCRF audit, it was discovered that a supplier had provided some distributors – free of charge – with temporary workers to perform the inventory of the goods sold by this supplier. The Minister consequently filed suit against the distributors concerned seeking payment of a civil fine and the recovery of undue payments, on the basis of Article L. 442-6-I, 1° of the French Commercial Code which sets forth: "Anyone who obtains or attempts to obtain from a business partner any advantage whatsoever that does not correspond to any commercial service effectively provided or that is manifestly disproportionate considering the value of the service provided (…) shall incur liability and be required to indemnify the damage caused." Although the Douai Court of Appeal (December 17, 2009, 2nd Chamber, 1st section) recognised that the practice implemented by the distributors constituted for them an advantage without consideration for the supplier, it dismissed the Minister's claim for the recovery of undue payments, on the grounds that the advantage was not materialised by any transfer of funds to the distributors, so the recovery of undue payments could not be recovered. In other words, according to the Douai Court of Appeal, which based its decision on Article 1376 of the French Civil Code ("Anyone who wrongly or knowingly receives something that is not due to him is required to return that thing to the person from whom he unduly received it"): there shall be no recovery of undue payments if there was no prior payment of an undue sum.

This argument was dismissed by the Cour de cassation which quashed the decision of the Douai Court of Appeal to dismiss the Minister's claim for the recovery of undue payments. For the Cour de cassation, the Minister's action for recovery of undue payments, brought on the basis of Articles L. 442-6.I, 1° and L. 442-6, III of the French Commercial

Code “implies only the recognition of an advantage that was unduly received by the supplier’s distributor and that does not correspond to any commercial service effectively provided by the distributor to the supplier or that is manifestly disproportionate considering the service provided.” The fact that no funds were actually transferred is therefore irrelevant and does not preclude an action by the Minister for the recovery of undue payments./.

Mahasti Razavi - Partner
Alexandra Berg-Moussa - Counsel