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COMMERCIAL AND DISTRIBUTION LAW NEWSFLASH

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Clarifications on the concept of a significant imbalance and more questions hanging over the Minister of the Economy's.

Many twists and turns are continuing to pop up in the "saga" of the Novelli lawsuits.

Article L. 442-6, I 2° of the French Commercial Code sets forth that anyone who *"places or attempts to place a business partner under obligations creating a significant imbalance in the parties' rights and obligations"* may incur liability and Article L. 442-6, III of the French Commercial Code includes a specific procedure giving the Minister of the Economy a right of action against the perpetrator of such practices, allowing him to seek an injunction against the practices in question, the invalidation of the relevant clauses and contracts, the recovery of undue payments, a civil fine and damages.

In late 2009, Hervé Novelli (Minister of the Economy at the time) filed a series of lawsuits under Article L.442-6 of the French Commercial Code and, in particular, on the grounds of a "significant imbalance".

Some of the distributors concerned raised Preliminary Questions of Constitutionality (French acronym: "QPC") which slowed down most of the lawsuits. Now the QPC have been settled, the pending lawsuits have resumed. Three out of the five decisions rendered in these cases (four of which have been handed down in the past few months) give us some initial insight into which practices might create a "significant imbalance":

- Accepting the principle of a review of the supplier's prices negotiated contractually, while providing that price reductions will be implemented automatically and immediately whereas price increases are subject to the supplier's objective proof, the distributor's consent and, as the case may be, deferred application periods (2 or 4 months depending on the circumstances) (Lille Commercial Court, 7 Sep 2011, Auchan);
- Imposing standard "minimum service rate" clauses on suppliers, when such clauses are pre-drafted, imprecise and general, do not take into account the specific supplier, product or store concerned and give rise to the application of penalties that are out of proportion to the breach in question and the actual harm sustained (Lille Commercial Court, 7 Sep 2011, Auchan);
- Giving the distributor the possibility of terminating the contract (and of therefore de-referencing the supplier) in the event of *"the product's under-performance", insofar as the "poor performance of a product is directly related to the conditions in which the distributor presents it for sale"* (Meaux Commercial Court, 6 Dec 2011, Provera);
- Providing shorter payment terms for business cooperation services than the payment terms for product purchases, and advance payment systems for business cooperation services, having the effect of creating a cash flow imbalance to the detriment of the supplier (Meaux Commercial Court, 6 Dec 2011, Provera);
- Requiring the supplier to pay monthly advances on rebates which are supposed to be paid to the distributor at the end of the year on the basis of the achievement of certain volume of sales, providing shorter payment terms for these advances than the payment terms for product purchases and the levying of penalties on the late payment of such advances, calculated on the basis of an exorbitant rate considered as *"usurious"* (Lille Commercial Court, 6 Jan 2010, Castorama).

The ideas of reciprocity and symmetry in the parties' rights and obligations do therefore seem to prevail.

However, new developments come from two decisions rendered by the Créteil Commercial Court on December 13, 2011.

One of the QPCs mentioned above had resulted in the Conseil constitutionnel handing down a decision on May 13, 2011 (Decision no. 2011-126) in which the action by the Minister to obtain the invalidation of the unlawful contracts, the recovery of the unduly received amounts and compensation for the harm caused by the unfair practices was held to be compliant with the Constitution on the condition, however, that the parties to the contracts (and particularly the harmed supplier(s)) are informed of the filing of the lawsuit.

In the two December 13, 2011 decisions, the court initially refused to issue a general ruling on the clauses in the standard contracts of Le Galec/Leclerc and Système U: *"(…) The Court cannot generalise for all suppliers, on the basis of the 124 contracts* (72 for Système U), *by issuing a general ruling without reference to specific contracts and therefore to specific suppliers."* The court then later referred expressly to the Conseil constitutionnel's reservation by ruling *"Whereas the Conseil constitutionnel, in its decision of May 13, 2011, held that the Minister's action was compliant with the Constitution, insofar as the parties to the contract were informed about the filing of such lawsuit; Whereas the Minister did not prove that it informed the 58 suppliers concerned* (56 for Système U). *Whereas, consequently, the Court cannot issue a general ruling or rule on the 124 contracts* (72 for Système U) *produced before the court and relating to the 58 suppliers* (56 for Système U)", and held that the Minister's action against Le Galec/Leclerc and Système U was inadmissible.

These two decisions are surprising in several respects: on the one hand, in the abovementioned decision against Auchan, the Lille Commercial Court ordered penalties against Auchan solely on the basis of the standard contracts. On the other hand, in the two decisions against Auchan and Provera, the Lille and Meaux Commercial Courts also examined the issue and had found the Minister's action to be admissible insofar as the prerequisite recognised by the Conseil constitutionnel was not applicable because the Minister's action did not seek the invalidation of the unlawful clauses or the recovery of unduly paid amounts. Finally, following the Conseil Constitutionnel's decision of May 13, 2011, the Minister of the Economy had modified his claims before the Créteil Commercial Court to limit them to an injunction against the ascertained practices in the future and civil fines (and thus no longer the invalidation of the relevant contracts or the recovery of the amounts unduly received by the distributors).

Diverging decisions and more uncertainties; the "saga" is not over yet and promises to be the subject of some exciting debates before the Court of Appeals./.

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