Distribution / Competition / Consumer Law Update

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COMPETITION AND CONSUMER LAW LITIGATION

Class actions: Impact for businesses

Introduced by the French Hamon act of 17 March 2014 and clarified by the decree of 24 September 2014 (http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029499594&fastPos=1&fastReqId=1648082819&categorieLien=cid&oldAction=rechTexte) and the circular of 26 September 2014, class actions ("actions de groupe") are now available in France (since 01 October 2014). The purpose of this collective redress is to allow a group of consumers who find themselves to be in a similar or identical situation to seek, within the framework of a single suit, relief for individual injuries all caused by a business's anti-competitive practices or breaching of a legal or contractual duty when selling goods or performing services.

- **Three-step procedure**

- The **first stage** of the class action is **judicial** and aims to secure a judgment on the issue of liability. The TGI court of the place of the defendant's place of business rules on the issue of the business's liability, identifies the group of consumers towards which it is liable, sets the criteria for joining the group, further sets the injury compensation ceiling for each consumer or consumer category belonging to the group, and defines how its decision should be circulated to reach consumers liable to be part of the group.
- The **second stage** is **extrajudicial** and sets the consumers concerned a deadline for opting in while the business reviews and fulfils individual compensation claims (in cash or in kind).
- The **third stage** is again **judicial** and sees the court settle the difficulties relating to any injuries that were not spontaneously compensated for by the business.

Therefore, contrary to the class action system in the United States of America where the number of victims is known before proceedings start, in France the case will only be officially publicised in order to allow potential victims to join the action once the business's liability is *res judicata*.

- **Judicial timeframe *versus* media impact**

First of all, the length of the procedure might well turn out to have a deterrent effect on consumers. The opt-in stage can only take place once all appeals available to the business incurring liability have been exhausted. The procedure will be all the longer where the class action is filed for anti-competitive practices as the violation must first be finally established by the French competition agency (Autorité de la concurrence). Therefore, in very concrete terms, should the business first exhaust all possible appeals, a decade might well elapse before the opt-in stage commences. Moreover, until the court issues a judgment defining a consumer group, mediation (which the Hamon act encourages) remains available to the parties at all times, although any agreement between the parties must be approved by the court. Lastly, the business targeted by the class action may individually check each compensation claim for compliance with the criteria laid down in the liability decision.

Still, beyond the question of the judicial timeframes and uncertainties, businesses should not underestimate the potential media backlash and should organise a response immediately upon being targeted by an approved consumer association by stating their case to the media and to their employees, customers, and shareholders.

- **A limited scope... for the time being**

For the time being, the scope of this new legal mechanism is limited to compensation claims for injuries sustained in the field of competition and consumer law to the exclusion of non-economic losses. However, such a limitation could be short-lived as plans to extend class actions to environmental and life sciences claims are already in the works.

Furthermore, class actions can only be brought by one of the fifteen approved national consumer associations and only for injuries sustained by natural persons, thereby excluding all company actions. However, this limitation, too, could be lifted in future by authorising, e.g., professional associations to sue as a class.

- **Anticipating risks by setting up internal checks**

In short, the terms under which a class action may be brought appear to protect the interests of businesses, at least at the judicial level. However, businesses must remain particularly careful and must already take internal organisational measures in order to anticipate and detect all risks of customer dissatisfaction or dispute that might degenerate into a class action. It is all the more important to anticipate such a judicial risk by setting up, e.g., tools and procedures to review promotional offers and terms and conditions of sale before and after as two major risks are looming: a judicial risk that the class action will be extended to cover new fields of liability and new persons and the risk of damage to the business's brand image or even to its reputation.

COMPETITION LAW

New DGCCRF memorandum relating to the French Hamon act

Following the criticism levelled at its memorandum no. 2014-149 of 06 August 2014 (see our newsletter of October 2014), on 22 October 2014 the French agency for competition, consumer affairs, and the repression of fraud (DGCCRF) published a new superseding memorandum. Although it analyses only one implementing decree, the new memorandum is good news because it softens the agency's previous clarifications. For instance, concerning the new restraint practice prohibited by article L442-6 I 12° of the French Commercial Code that sanctions the fact of placing, invoicing, or settling an order at a different price than the agreed-upon price, the DGCCRF now accepts on certain conditions that so-called “catalogue price” clauses may provide that the basic agreed-upon price follow catalogue pricing adjustments.

Recommended retail price and restraints of trade within a distribution network

France's highest appeals court, the Court of Cassation, recently (on 07 October 2014) recalled that the practice of setting recommended retail prices can be sanctioned pursuant to articles 101 of the TFEU and L420-1 of the French Commercial Code as an unlawful restraint of trade if it amounts to retail price maintenance. In the case at hand, the French competition agency (Autorité de la concurrence) had sanctioned the exclusive distributor in France of a statuette (of the Diddl brand) that had set up understandings and practices with its own resellers for the purpose of setting the retail price to consumers.

First of all, the Court confirmed that an understanding subjecting the listing of resellers on the distributor's web site to compliance with recommended retail prices is anti-competitive by its very object.

Furthermore, the Court, upon dismissing the appeal against the Court of Appeal's ruling that had confirmed the French competition agency's decision, recalled the rules of proof for price-related restraints: There is no need to identify precisely all distributors taking part in the restraint so long as the unlawful practice does not involve all network members. Moreover, the court repeatedly criticised the distributor's behaviour: The distributor monitored resellers and put pressure on them as soon as they strayed from recommended prices, it threatened retailers that had not signed the charter not to list them on its web site, it mentioned the recommended retail prices on all commercial documentation, and it encouraged its retailers to treat pre-labelled prices as floor prices. The fact that nine out of ten resellers, irrespective of status, applied the recommended retail prices clearly shows that the distributor had in effect set up a retail price maintenance policy.

POST-CONTRACTUAL NON-COMPETE CLAUSE

Franchising: Any restrictions must be proportional to the franchisor's interests

On 23 September 2014 France's highest appeals court, the Court of Cassation, recalled that a post-contractual non-compete clause included in a franchising contract must not only be limited in time and space but must also be proportional to the franchisor's legitimate interests and that it is up to the judges ruling on the merits to verify such proportionality in the case under review (http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029514787&fastReqId=578866106&fastPos=1).

In the case at hand, the ex-franchisee of a fast-food network had signed a non-compete undertaking for a year after the termination of its contract for a 50-km radius from any other network franchisee. The Court of Cassation quashed the Court of Appeal's ruling that had allowed the franchisor's claim for compensation after the ex-franchisee had set up a new establishment in breach of the non-compete clause on the grounds that the judges ruling on the merits had not ascertained whether the 50-km-radius prohibition was proportional to the franchisor's legitimate interests. There is such a thing as too much greed...

Commercial agency: The special and general terms of validity combine

On 23 September 2014 France's highest appeals court, the Court of Cassation, clarified two important aspects of the conditions of validity of a commercial agent's post-contractual non-compete undertaking (http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029515600&fastReqId=430528997&fastPos=1).

Although the non-compete clause at issue did have a limited two-year term, it did not include any details as to its scope.

First of all, judges must apply article L134-14 of the French Commercial Code strictly and void any clause that does not specify the geographical sector concerned or the group of people entrusted to the agent (if any) or the type of good or service that is the contract's subject-matter. The clause must therefore fulfil all three special conditions on penalty of avoidance.

Secondly, the Court of Cassation very clearly established that the proportionality principle applies to commercial agents. Until now, the special regime provided for in article L134-14 of the French Commercial Code applied independently of the general principles applicable to non-compete clauses (protection of legitimate interests and proportionality). The Court even went so far as to define the clause's general conditions of validity: *"A non-compete clause that is not proportional, i.e., not justified by the legitimate interests that would be protected, given the contract's purpose, or that is not sufficiently limited in time and space and thereby excessively infringes on the debtor's freedom to carry on an occupation is null and void."*

Principals must therefore carefully word the clause and must both justify the legitimate interests that need protecting and identify a just limitation of the geographical sector, group of people, and products or services concerned.

SUDDEN TERMINATION OF AN ESTABLISHED BUSINESS RELATIONSHIP

Precarious relationships and reasonable advance notice

According to current case law, an established relationship, the termination of which requires giving written notice sufficiently in advance pursuant to article L442-6 I 5° of the French Commercial Code, is a sustained, steady, and habitual relationship. As a consequence, precarious relationships are customarily excluded from the article's scope. The ruling issued on 14 September 2014 by the Paris Court of Appeal appears to be an attempt to soften the law whereby precariousness does not preclude article L442-6 I 5° of the French Commercial Code from applying but entails a reduced period of notice.

In the case at hand, a former franchisee of French opticians network Afflelou accused its former franchisor of giving him only six months' notice for the termination of a twelve-year relationship. In view of the particulars of the case, the Court concluded from each party's behaviour that the relationship had been precarious for the past three years (the franchisor had let it be known that he wished to terminate the contract and the franchisee wished to sell its shares) and the parties both knew that the contract was going to terminate in the short term. The Court then found that the six-month period of notice granted by the franchisor was sufficient.

It will be interesting to see if this precedent is limited to similar cases in future (i.e., to established relationships that have decayed into objectively more precarious ones) or if the Paris Court of Appeal applies this criteria to all types of relationships. For its part, France's highest appeals court, the Court of Cassation, recalled on 04 November 2014 that the systematic recourse to calls for tenders impacts the durability of a relationship which therefore cannot be established. In any case, the termination of master agreements and business relationships should be anticipated and managed in a timely manner in order for operators to avoid the "sudden termination" trap ("*rupture brutale*").

DISTRIBUTION AGREEMENTS

International litigation: First application of the Corman-Collins precedent in France

On 19 November 2014, the 1st division of France's highest appeals court, the Court of Cassation, clearly incorporated the solution reached on 19 December 2013 by the CJEU in its famous case of

Corman-Collins *v*. La Maison du Whisky (see our newsletter of May 2014) into the French legal system. For the record, the CJEU had ruled that a distribution agreement was to be likened to a service agreement in the meaning of article 5-1 b 2° of the Brussels I regulation: jurisdiction lies with the court of the state in which the service (i.e., distribution) is performed. This is a landmark decision, the scope of which is strengthened by an express reference to the CJEU's ruling. It is only regrettable that the Court of Cassation did not also point out the specific provisions of the distribution agreement that defined the service performed by the distributor. It however remains that the uncertainty relating to the identification of the competent court can be lifted by including a jurisdiction clause in the contract.

Distribution: Complying with prior approval clauses in good faith

Although it is legitimate for the grantor to have a say if its distributor changes heads and to reserve the right to approve or not the new head, it is also fully logical that such a right should be exercised in good faith. For instance, France's highest appeals court, the Court of Cassation, sanctioned on 23 September 2014 a grantor that had dissuaded candidates put forward by the distributor from pursuing their takeover bids (http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029515106&fastReqId=548722172&fastPos=1). Indeed, although the grantor is free to withhold its approval, it must do so as much as possible based on objective elements which usually echo the grounds for recognising the *intuitu personae* nature of the contract in the first place (meaning that the contract was entered into in consideration of the contracting party's identity). Here, the grantor probably attempted to dissuade the candidates put forward by its distributor because it did not wish to approve them although it lacked objective grounds for withholding its approval. This show of bad faith on the grantor's part during the procedure prior to approval is what the Court sanctioned.

PROMOTION AND CONSUMER LAW

Markdown advertising: The curtain is about to drop

On 09 September 2014 France's highest appeals court, the Court of Cassation, sought a preliminary ruling from the CJEU as to the validity of the French regulations pertaining to markdown advertising. This question was put as a result of the CJEU's ruling of 10 July 2014 on the corresponding Belgian regulations (see our newsletter of October 2014). The French ministerial order of 31 December 2008, which set up a restrictive legal framework for markdown advertising to consumers and especially contained several definitions of what a “reference price” is, should logically be found to violate the EC directive of 11 May 2005 and should consequently be repealed. However, there will certainly still be a “reference price” which in future will have to be carefully determined so as not to be sanctioned as an unfair commercial practice in the meaning of article 120-1 of the French Consumer Code.

Premium sales: New deal

The (slow) deconstruction of French premium sale regulations continues and seems to be nearing an end. The French act of 17 May 2011, which incorporates the principles of the EC directive of 11 May 2005 on unfair commercial practices and the findings of several CJEU decisions, had already widely deregulated this promotion technique. The French Hamon act of 17 March 2014 further tidied up the regime and abolished the exception for low-value goods and services. Even more recently, the decree of 17 September 2014 repealed articles R121-8 to R121-10 of the French Consumer Code pertaining to premium value (max. 7 % of the main product) and premium labelling.

As in the case of the reference price for markdown advertising (see above), the end of the 7-% threshold is almost certain to allow greater commercial freedom at the cost of more legal uncertainty. Although one can reasonably expect free premiums whose value lies below the 7-% threshold will remain valid, premium of a greater value will clearly have to comply with professional diligence requirements and not be liable to materially distort the economic behaviour of consumers if they are not to be deemed unfair in the meaning of article L120-1 of the French Consumer Code.

Other premium sales technique should carry on being valid: B2B premiums, self-liquidating premiums, premiums identical to the main product.

POINTS OF SALE

Commercial leases: New rules for charges, taxes, and the cost of works

The French implementing decree of 03 November 2014 issued following the Pinel act of 18 June 2014 (see our newsletter of October 2014) clarified the rules for apportioning charges, taxes, and the cost of works between lessors and lessees of leases entered into or renewed as from 05 November 2014 (http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029701696&fastPos=1&fastReqId=661686517&categorieLien=cid&oldAction=rechTexte.

Article L145-40-2 of the French Commercial Code provides that all leases must include a detailed and exhaustive inventory by category of the charges and taxes for which the lessee is liable. The decree of 03 November 2014 therefore listed the charges and taxes that cannot be charged to the lessee notwithstanding any clause to the contrary in the lease. In substance, these are (1) the cost of major repair works in the meaning of article 606 of the French Civil Code, (2) the cost of compliance works or works due to the property's dilapidation, (3) taxes for which the lessor is legally liable (with the exception of property tax, waste collection tax, office tax, etc.), (4) the lessor's rent management fees, (5) charges and taxes or the cost of works for vacant premises in real estate complexes. Moreover, the lessor must send the lessee by 30 September of the year following the reference year a statement of account including all yearly charges.

The Pinel act also obliges lessors to deliver to lessees, upon the signature of the lease and then every three years, a statement of planned works for the next three years along with a budget and a statement of all works carried out during the previous three years. The decree of 03 November 2014 provides that the lessor must present the lessee upon request with all documentation evidencing the cost of works.

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