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RESTRICTIVE BUSINESS PRACTICES

DGCCRF memorandum of 06 August 2014 relating to the French Hamon act

Although the 34-page memorandum (no. 2014-149) published on 06 August 2014 by the French agency for competition, consumer affairs, and the repression of fraud (DGCCRF) is not binding for the courts, it is interesting to know what the DGCCRF's position is with respect to restrictive business practices and the related penalties. For instance, the DGCCRF's comments on article L442-6 I 12° of the French Commercial Code, under which it is now prohibited to "*place, settle, or invoice an order at a different price than the agreed-upon price*" are puzzling.

According to article L441-7 of same Code, the selling price for a product or service that is the result of negotiations between supplier and distributor is the price specified in the so-called annual "comprehensive agreement" ("convention unique") which must set out all elements that were taken into account when setting the price, such as the seller's price list, any price reductions granted pursuant to special terms and conditions, and compensation for services performed by the distributor, if any.

However, for the DGCCRF, "*if the supplier wishes to change its pricing during the term of the contract, it cannot force the change upon its customer and can therefore only apply the change if the customer agrees thereto*": **The comprehensive agreement would therefore appear to set the price definitively.** The memorandum does mention that the contract might be modified by way of an amendment, but the DGCCRF presumes to regulate such modification: the parties must have provided for the price to be revisable on the basis of "*exogenous, not reasonably foreseeable elements*" and the amendment may not "*alter [the contract's] general economic balance*"...

Sudden termination of a business relationship: More, more, more

We have in the past reported in this newsletter on several decisions that extended the scope of article L442-6 I 5° of the French Commercial Code to include cases or persons that at first glance did not seem to be concerned by the said provision. In a similar vein, on 20 March 2014, the Paris Court of Appeal applied the said article to an **intellectual services contract** in the communications field where moreover the terminating party was a not-for-profit association (although an association that belonged to a group of trading companies – Danone – that had indirectly benefited from the said services).

On 20 May 2014, the Court of Cassation (the French supreme court) confirmed that article L442-6 I 5° could be applied to **service agreements** in a case where a company managing the rights of a professional boxer (Brahim Asloum) accused Canal Plus of the sudden termination of their business relationship. It should be noted that the Court also awarded compensation for the **moral prejudice** sustained by the boxer, whereby it reaffirmed its own precedent according to which **a third party** may invoke the sudden termination of a business relationship if it causes them a prejudice.

Although the breach of a contractual provision may give the other party the right to terminate the relationship without prior notice, this does not apply where the breach was tolerated by the terminating party. This is precisely what the Paris Court of Appeal reproached a company at the head of a ski rental network with in a ruling of 10 April 2014. The said company had excluded one of its distributors from the network with immediate effect on the grounds that it had founded its own trademark and commercial network and that this was incompatible with its continued membership in the terminating company's network. After noting that **the company at the head of the network had tolerated many of its members operating under other trading names**, the Court found that the abovementioned grounds **were insufficient to justify terminating the contract without prior notice**.

PRICING TRANSPARENCY

Fines and deadlines

The so-called Pinel act of 18 June 2014 adds to the regulatory revision initiated by the Hamon act. The 15,000 EUR criminal fine no longer exists. From now on, both natural and legal persons are liable to a fine up to 75,000 EUR and 375,000 EUR respectively, which the DGCCRF will order in the following cases:

- failure to comply with the statutory 30-day payment deadline or statutory ceilings,
- failure to state the conditions and interest rate for late-payment penalties (including the lump-sum penalty) in the terms of payment,
- setting different interest rates or conditions for late-payment penalties than the rates and conditions stated in the terms of payment.

DGCCRF memorandum of 06 August 2014 relating to the French Hamon act

The DGCCRF's memorandum explains the invoicing rules, particularly in regard of the right to postpone invoicing and to invoice periodically, as well as payment deadlines and the related penalties. The memorandum also discusses the role of general terms and conditions (GTCs). According to the Hamon act, **GTCs represent the sole basis for commercial negotiations**. However, the DGCCRF's position is more nuanced as it recalls in particular that GTCs are not mandatory and that they may not be unilaterally forced upon customers by sellers...

The DGCCRF creates another point of uncertainty by claiming that under the Hamon act **price reductions do not have to be detailed** in the so-called "comprehensive agreement" ("convention unique") in order for their reality to be ascertained. However, article L441-7 1° of the French Commercial Code now provides that annual comprehensive agreements must clearly set out "price reductions" (plural). The DGCCRF therefore seems to want to revert to the *status quo ante* where negotiated price reductions could be mentioned as a single global item. This is supposed to be simpler but will probably just be less transparent.

CONSUMER LAW

Sales and markdown advertising: End of season?

The French act of 18 June 2014 (the so-called Pinel act) increased the **biannual statutory end-of-season sales period** from 5 to 6 weeks but outlawed all **other, non-statutory sales** as from 01 January 2015. According to article L310-1 I of the French Commercial Code, sales are "*sales that are accompanied or preceded by advertising and advertised as intended to help clear stocks by offering markdowns on the one hand and that take place during specific times of the year on the other hand*".

Moreover, the rules applicable to **markdown advertising**, which in France is currently regulated by a ministerial order of 31 December 2008, will likely be relaxed following the ruling issued by the CJEU on 10 July 2014 (C-421/12, *European Commission v. Belgium*). On the basis of the Directive of 11 May 2005 concerning unfair business practices, the CJEU ruled that markdown advertising is not *per se* a prohibited commercial practice (as per the black list in the Directive's appendix I) but a commercial practice that is *prima facie* valid but needs to be analysed on a case-by-case basis. Therefore, French law will certainly change in order to include a lighter definition of the "reference price". It will then be up to the courts to check whether the markdown advertisement at hand (i) is contrary to the requirements of professional diligence and (ii) might materially distort the economic behaviour of the average consumer. Consequently, economic operators will enjoy greater freedom but they should beware not to implement practices that might be deemed to be misleading or aggressive in the meaning of both the European Directive and the French Consumer Code.

Joyeux anniversaire, Toubon act!

The French act relating to the use of French (the so-called Toubon act), which was passed on 04 August 1994, is now 20 years old. The main purpose of the act is to make the use of French mandatory in all documents presenting a product or service or setting out their terms of use or warranty as well as in all related advertisements. The act does not prohibit the use of foreign languages but requires that they be translated into French so that the French text is as intelligible as the foreign version.

Although the Toubon act **clearly does not apply to company names, trading names, and business names**, it is **not so clear whether it applies to trademarks** as the act only mentions the "*statements and messages registered along with the trademark*", i.e., in the meaning of the act, the terms describing or characterising the trademark. However, the act does not prohibit the registration of a trademark with a slogan or message in a foreign language but simply regulates its use by obliging the holder of the trademark to provide a French translation.

In the end the Toubon act does not have much to show for its 20 years of existence. Companies only rarely get sanctioned for failing to (sufficiently) translate information or advertisements. However, beyond the issue of advertising and of the (rightful) protection of French consumers, companies must be watchful when it comes to **technical documentation** such as software user guides for French employees of international groups or installation guides for foreign medical equipment intended for health professionals, which they must carry on **systematically and intelligibly translating into French**. Such endeavour is necessary as sanctions can vary from a simple warning to a fine or periodic penalty payments until the translation is completed.

Information on the social conditions in which products are manufactured

The French act of 31 July 2014 on a social and solidarity economy (ESS) introduced a **new obligation for manufacturers, producers, and distributors of a product in France** in article L117-1 of the French Consumer Code. They must now provide upon request **any and all information in their possession on the social conditions in which the product was manufactured** (notably the geographical origin of materials and components, quality control, organisation of the production chain, identity and role of the manufacturer, subcontractors, and suppliers) to any consumer expressing serious doubts as regards the manufacture of the product in conditions that comply with international human rights treaties. Although the request may be denied if disclosing the information is liable to hurt the company's material interests, and although the act does not provide for any specific sanctions on that count, it does show a certain political

will. Moreover, as this duty is an **overriding mandatory rule**, non-compliance might be sanctioned under ordinary consumer laws or unfair competition rules. Still, this is a far cry from the streamlining promised by the government...

SELECTIVE DISTRIBUTION AND ONLINE SELLING

Online selling by selected distributors on their web sites

The ruling issued on 13 March 2014 by the Paris Court of Appeal following the appeal filed by Bang and Olufsen against a decision of the French competition agency (AdIC) ordering it to pay a 900,000 EUR fine for having forbidden its selective distributors from selling its products online seems to allow greater flexibility as regards online selling within a selective distribution network.

First of all, the Court of Appeal confirmed the Pierre Fabre precedent (CJEU, 13.10.2011) insofar as the prohibition of online selling in a selective distribution contract characterises a restriction of competition by object in the meaning of article 101 § 1 TFEU. However, it is interesting to note that the reference to article 101 § 3 of the Treaty on the functioning of the European Union and article L420-4 of the French Commercial Code, which provide for an **individual exemption possibility depending on the nature of the product**, might henceforth lead to distinguish between **less technically advanced (and therefore unrestricted) products and technically advanced products requiring on-site demonstration or advice (which may possibly be excluded from online selling)** even where both categories of products are included in the same contract.

Online selling by selected distributors on market place web sites

Concurrence referred several practices of Samsung Electronics France on the brown goods distribution market (in particular for television sets) to the French competition agency (AdIC). In a decision no. 14-D-07 of 23 July 2014, the AdIC ruled on the admissibility of Concurrence's various grievances as well as on an application for protective measures.

Concurrence accused Samsung Electronics France mainly of active and passive restraint of trade by generally prohibiting sales **on unapproved distributor web sites and on all third-party web sites, and in particular on so-called "market place" web sites**, and of setting terms of approval for web sites in general but not for third-party web sites in its selective distribution agreements. Although the AdIC denied the application for protective measures on such grounds, it did decide to investigate the complaint further in order to determine whether Samsung Electronics France was guilty of vertical restraint. However, the decision's wording seems to indicate that the fact of contractually setting qualitative criteria for the sale of products on online market places, does not amount to vertical restraint.

COMMERCIAL AGENCY

Can an agreement be tacitly amended by the parties' behaviour?

The Paris Court of Appeal and the Court of Cassation have answered the question differently, although that is probably due to the circumstances of the respective cases.

NO.

On 03 June 2014, the Court of Cassation quashed a ruling that had found that the sector and the related exclusivity had been tacitly modified by mutual agreement of the agent and the principal after the former had canvassed outside their sector and invoiced their services to the latter which had settled the resulting invoices. The Court of Cassation noted that the agency agreement expressly provided that **changes to the agreement had to be formalised in an amendment** and therefore gave the letter of the contract and its binding force (article 1134 of the French Civil Code) precedence over the spirit of the relationship between the parties.

YES.

On 05 June 2014, the Paris Court of Appeal found that a commercial agent who had acted as representative for competitors of the principal was not guilty of serious offence despite the

inclusion of a non-compete clause in the contract. The court found that **by their behaviour the principal had tacitly agreed to such coexistence** because, firstly, they were aware of their agent's activities, secondly, they had failed to give the latter any formal notice to cease and desist, and thirdly, upon terminating the agreement, they had given the agent notice in accordance with the provisions applicable to termination on grounds other than serious misconduct.

UNFAIR COMPETITION

Parasitism v. unfair competition: Just a whiff of simplification?

Asked to settle a dispute between Ferragamo Parfums and Parfums Christian Dior, the Court of Cassation had outlined on 04 February 2014 an *a priori* simple evidential boundary between unfair competition and parasitism: while a body of presumptions was insufficient to prove unfair competition, **parasitism could be deduced from a body of elements assessed globally**. However, the ruling's wording seemed to indicate that both shared the concept of confusion although reference to confusion within the framework of parasitism seemed superabundant and could perhaps be explained by the fact that the Court of Cassation had to decide on an appeal against a decision in urgent matters seeking to characterise a clearly unlawful disruption.

The ruling issued on 20 May 2014 by the same commercial division of the Court of Cassation in a dispute between two house building companies added to the previous ruling by spelling out the definition of parasitism: Parasitism is where an economic operator **follows in the wake of another by unduly profiting from the former's renown or investments, regardless of any likelihood of confusion**, as determined by a global assessment of a body of elements. In the case at hand, the Court of Cassation criticised the Court of Appeal for not assessing whether the fact that one of the builders had used promotional media (almost) slavishly copied from the other builder's had or not allowed it to profit from the latter's renown and financial and human investments without incurring any expenses themselves.

Parasitism and unfair competition: Two of a kind

An Italian shoe maker, Geox, had brought an action against a competitor that had commercialised two models that were virtually identical to two of Geox's own models. On 28 May 2014 the Paris Court of Appeal first clearly **found that the competitor was indeed guilty of unfair competition** after noting that both models gave an identical overall impression and that the slight differences ascertained did not have any incidence on such impression, which created a likelihood of confusion in consumers' minds. Furthermore, the Court of Appeal **found that the competitor was also guilty of parasitism** by intentionally following in the manufacturer's wake and therefore profiting from its renown, its advertising investments, and its intellectual work without spending a penny themselves. Consequently, the Court ordered Geox's competitor to pay compensation both on the count of unfair competition and on the count of parasitism.

Ambush marketing: No try

On the day following a France-England rugby match during the Six Nations Championship, Fiat France issued an advertisement referring to the match (although France had lost...) and announcing the French team's next match in the Championship. As Fiat France was not an official sponsor, the French Rugby Federation (FFR) believed this amounted to parasitism, *inter alia*.

In this possible ambush marketing case, the Court of Cassation disallowed the FFR's claim on 20 May 2014 and issued a rather benevolent ruling for advertisers by requiring **that the plaintiff prove that the advertiser had indeed followed in their wake in order to profit from their investments – which was not the case here – even though the plaintiff held the exclusive exploitation rights to the sporting event**. Although at first glance the decision appears to restrict the conditions for sanctioning ambush marketing, a claim brought instead by an official sponsor in direct competition with a non-sponsor advertiser might be more successful.

Unfair competition on grounds of administrative regulations violations

It is now well established case law that the violation of a statutory or administrative obligation applicable to a business activity amounts to unfair competition. All economic sectors and regulations are potentially concerned, from pizzas to crushers! For instance, Speed Rabbit

successfully sued competitor Domino's Pizza **for failing to publish its accounts** in accordance with the law. Although the Versailles Court of Appeal's ruling of 18 March 2014 was issued in the specific context of the prior information duty to franchise candidates, the solution appears to be transposable to any other economic sector.

On 21 January 2014, the Court of Cassation applied the same reasoning to an unfair competition action brought by a company specialising in the recycling and crushing of broken-down vehicles against a competitor **that had not complied with regulations applicable to facilities subject to special environmental protection regulations (ICPE)**. The Court found that the balance between competitors had been upset as the company disregarding the regulations had gained an unjustified advantage compared to other complying operators.

POINT OF SALE

French Pinel act: The new law of commercial leases

The so-called Pinel act of 18 June 2014 includes an important section on commercial leases that came into effect on 20 June 2014, with the exception of the provisions relating to one-year-or-less leases, charges, and upper rent limits which will apply to agreements entered into or renewed as from 01 September 2014 (while the lessee's right of pre-emption will apply to any transfer of premises as from 18 December 2014). Herebelow is a list of the main changes.

Temporary occupancy agreements: Article L145-5-1 of the French Commercial Code officially recognises temporary occupancy agreements. Evolved from practice, they had already been recognised by the French courts.

Mandatory schedules of condition when entering and leaving the premises: The French Commercial Code now provides that the parties to a commercial, business, or short lease must draw up a schedule of conditions both when the tenant takes possession of the premises and when they return them. It is an overriding mandatory rule which also applies where the lease or the business is transferred. The schedule can be drawn up by the parties on an amicable basis or by a bailiff (in which case costs shall be equally borne by the lessor and the lessee).

Term: The Pinel act prohibits any exceptions to the lessee's right to terminate the lease upon the expiration of the initial three-year term save in a few specific cases such as where the lease's term is over 9 years, the lease is for single purpose premises (hotels, theatres, cinemas etc.), or the lease is for office space only. The maximum term for short leases is now 36 months instead of 24 months as previously.

Stricter rules for the charges passed on to tenants: From now on, commercial leases must include a detailed inventory of the categories of charges, taxes, and fees and must specify how they are to be distributed between lessor and lessee. A decree will set out what cannot be passed on to tenants. Furthermore, the lessor must append to the lease a budget for any works planned until the end of the initial three-year term as well as a summary statement of any works carried out in the course of the previous three financial years. The lessor must then provide the lessee with a new budget every at the end of every three-year term.

Indexation: It is no longer possible to index the rent (end-of-term revision) and upper rent limit (revision upon renewal) to the building cost index (ICC). Instead, the parties may index them to the commercial rent index (ILC) or to the tertiary activity rent index (ILAT).

A new upper limit for rent variation: The rent variation in a given year (due to annual indexation, end-of-term or renewal revision) may not exceed 10 % of the rent paid for the previous year. This upper limit also applies before term end where the rent varies by more than 25 % due to an escalator clause or where material changes to local commerciality factors result in a variation of more than 10 % of the property's rental value.

Lighter form requirements when giving notice: Until the Pinel act, terminating a lease required serving notice through a bailiff. From now on, it will be possible to give notice by recorded delivery letter, return receipt requested.

Store layout: Now an intangible asset

In a ruling of 10 July 2014 (C-421/13), the CJEU had to decide on whether a representation of the internal layout of a retail store could be registered as a servicemark. In the case at hand, Apple, which had already registered such a mark in the United States for the representation of **the internal layout of its flagship stores**, wished to do the same in Germany, following which the German Patent Office referred a request for a preliminary ruling to the CJEU.

After recalling that in order to be liable to protection a mark must satisfy three conditions: to be a sign, to be capable of graphic representation, and to have a sufficiently distinctive character, the Court answered in the affirmative subject to conditions. For the Court, **the representation, albeit by a design alone, without indicating the size or the proportions, of the layout of a retail store may constitute a mark** provided that the sign is capable of distinguishing the undertaking's services and that the layout in question significantly departs from the customs of the economic sector concerned (here, the services concerned are training or demonstration services rather than just the sale of already trademarked products). It is now up to the German Patent Office to determine whether the mark is truly distinctive in this case.

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