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Introduction of a labour relations dialogue body into franchising networks

Article 64 of Law no. 016-1088 of 8 August 2016, known as "Loi Travail" (Work Law) provides for franchise networks exceeding three hundred members to have to set up a labour relations dialogue body at the request of any representative union organization within the branch or any of the branches within which the concerns in the network fall or which have set up a union section within a concern in the network.

The networks targeted are those in which there exists an exclusivity or quasi-exclusivity agreement as mentioned in Article L. 330-3 of the Code of Commercial law whose contract contains clauses affecting the organization of work and working conditions in the concerns in the network. The body presided over by the franchisor which will include salaried employees' representatives and franchisees will be set up following negotiations undertaken by the franchisor within a maximum period of time determined by Council-of-State decree.

Article 64 of Law no. 2016-1088 of 8 August 2016 relating to work, the modernization of labour relations dialogue and professional career securitization

EUCJ: selling a computer with pre-installed software is not in itself an unfair commercial practice

The Supreme Civil Court has asked the EUCJ, firstly, whether a commercial practice consisting in the sale of a computer with pre-installed software under circumstances where the consumer is unable to procure the same model of computer without the pre-installed software constitutes an unfair commercial practice and, secondly, whether, in the context of a joint offer consisting in the sale of a computer featuring pre-installed software, the fact that the price of each software programme is not stated is tantamount to a misleading commercial practice.

In its decision handed down on 7 September 2016, the Court held, in reply to the first question, that such sales did not constitute in themselves an unfair commercial practice within the meaning of Directive 2005/29/EC relating to commercial practices unfair to consumers, provided always that such an offer was not contrary to the requirements of professional diligence and did not adversely consumers' economic behavior. It is for the national courts to assess this factor in taking into account the specific circumstances surrounding the matter.

With regard to the second question, the Court issued a reminder that a commercial practice is deemed misleading if it omits substantial information which the average consumer needs in order to make a commercial decision in full knowledge of the consequences and, as a result, which leads or is likely to lead him to make a commercial decision that he would not otherwise have taken. As part of a joint offer consisting in the sale of a computer with pre-installed software, the Court holds that the fact that the price of none of these software programmes is shown is neither such as to prevent the consumer from making a commercial decision in full knowledge of the consequences nor likely to lead him to make a commercial decision which he would not have otherwise taken. As the price of each software programme does not represent substantial information, the fact that the prices of the software programmes are not shown cannot be held to be a misleading practice.

EUCJ, 7 September 2016, no. C-310/15, Vincent Deroo-Blanquart v. Sony Europe Ltd

Action by Minister for the Economy to halt restrictive practices: exclusion of the arbitration clause provided for in the distributor's agreement at issue

In a decision dated 6 July 2016, the Supreme Civil Court pointed out that the arbitration clause included in a distributor's agreement was not binding on the Minister for the Economy, who acts in connection with an assignment as guardian of public economic order. It stated that his action was autonomous and restricted to the State courts.

Summoned by the Minister for the Economy with a view to seeing certain clauses in a distributor's agreement pronounced null and void, two companies had claimed that the State court lacked jurisdiction on the basis of the arbitration clause stipulated in the agreement.

The Supreme Civil Court approved the Appeal Court's holding the arbitration clause as clearly inapplicable to the dispute. It reminded parties that Article L. 442-6, III of the Code of Commercial Law reserves for the Minister with

responsibility for the Economy the option of going to law to put an end to illicit practices or to levy civil fines. The action so attributed in connection with an assignment as guardian of public economic order in order to protect the functioning of the market and of competition is autonomous action, jurisdiction for which is the preserve of the State courts in view of its nature and object. Te Minister was not acting either as party to the agreement or pursuant to it but the arbitration agreement applied only to the parties and was consequently inapplicable to the Minister.

Cass. 1st Civil Division, 6 July 2016, no. 15-21 811, no. 805 FS-P+B

The concept of economic worth with regard to "free-riding"

In a decision dated 5 July 2016, the Commercial Division of the Supreme Civil Court pointed out that the "free-riding" represented by unduly profiting from the expertise and human and financial efforts lent by an economic agent, and that these cannot be deduced merely from the longevity and success of the marketing of a similar product sold by the party which considers itself to be the victim of "free-riding".

Two companies in the Prada Group were ordered *in solidum* by the Paris Appeal Court to pay damages and made subject to a prohibiting order on pain of coercive fines for having marketed like the company *Appartement à Louer* a teddy bear suggesting the universe of children at play and possessing the same functions of decorative accessory and of bag materialized by the addition of a hooking system or of a feminine key ring enjoying the additional competitive advantage procured by the prestige of the Prada brand.

The Commercial Division of the Supreme Civil Court censured the lower-court decision for lack of any legal basis in their decision as they had limited themselves to taking account merely of the longevity of the marketing of the teddy bear and the turnover realized by this as the constitutive factor in the creation of economic worth, arising from the expertise and the human and financial efforts deployed by the plaintiff, a condition essential to being awarded damages for "free-riding".

Supreme Civil Court, Commercial Division, 5 July 2016, 14-10108, Prada v. Société Appartements à Louer

An advertizing campaign that criticizes pharmacists' monopoly status is not denigratory

As part of an advertizing campaign about non-refundable medicine costs, a hypermarket had employed the following text: *"In France, the price of the same drug product can be double or treble the normal price: change the way you are treated!"* illustrated with a glass of water with a one Euro coin dissolving in it like an effervescent tablet. Considering that that a campaign of this kind would result in denigrating and discrediting the whole of the pharmacy sector, the pharmacists referred the matter to the Civil Court with a view to putting an end to it and seeking compensation for their loss.

The Supreme Civil Court held that the campaign did not constitute denigration of pharmacists and pharmacies provided always that it did not seek to tarnish their reputation but only to call into question their monopoly. This was because, even though the campaign represented a claim in favour of the commercial interests of the hypermarket and called for true competition, it was consistent with the current debate on the issue of continuing pharmacists' monopoly on the sale of non-refundable drug products and was intended, just like the current trend, to send consumers the message that the hypermarket was able to offer the lowest possible prices. In addition, moderation had presided in giving the information, which was not misleading.

Cass. Commercial Division, 21-6-2016 no. 14-22.710 F-D

Two new decisions on the prohibition of spurious commercial co-operative ventures

In two judgments given on 29 June 2016, the Paris Appeal Court had to decide the question of sanctioning the spurious commercial co-operation services prohibited under Article L. 442-6 I 1 of the Code of Commercial Law. The Appeal Court stated in both matters that services giving rise to remuneration must be specific in that they confer upon the supplier a special advantage by boosting sales, facilitating resale by the latter of his products and that such services must consequently go beyond mere obligations resulting from purchases and sales.

In the first decision, four suppliers, Danone, Nestlé, Yoplait and Lavazza were to benefit from commercial co-operation

in 2002 and 2003 an event which, in the Appeal Court's view did not actually correspond to any specific commercial services performed for these suppliers. The contracts at issue were thus pronounced null and void, the overpayment amounting to seventy-seven million Euros was ordered to be repaid and the distributor *Système U Centrale Nationale* was ordered to pay a civil fine of one hundred thousand Euros.

In the second matter, the Paris Appeal Court held that a service for centralized payment or for distributing product mixes to brand names does not facilitate enhancing products with consumers and cannot be described as commercial co-operation services. Furthermore, the Appeal Court noted that, in the case in point, no date for performing commercial co-operation services was mentioned on the invoices rendered even though it is a essential factor facilitating demonstration of actual performance of such services.

Paris Appeal Court, Hub 5, Div. 4, 29 June 2016, RG 14/09786

Paris Appeal Court, Hub 5, Div. 4, 29 June 2016, RG 14/02306

Competition Authority applies new compromise settlement provisions

In a decision dated 6 July 2016, the Competition Authority levied an overall sanction of about 615 000 Euros against Henkel and a number of the importers of its products in La Réunion, the French West Indies, French Guyana and the territory of Wallis and Futuna for having implemented exclusive importers' agreements between March 2013 and February 2016 in breach of Article L. 420-2-1 of the Code of Commercial Law deriving from the Law of 20 November 2012 relating to overseas economic regulation, known as the "Lurel Law". This decision is the first application by the Competition Authority of the new compromise settlement provisions allowing, provided that the company waives challenging the claims against it, agreement to be reached between the investigating services and the concern on a sanction scale and so fix the maximum amount of the financial penalty levied with the details of the negotiations allowing agreement to be reached remaining secret.

Competition Authority, Decision no. 16-D-15, 6 July 2016

CONSUMER LAW

Class action: a judgment in the field of residence tenancy law

In a judgment dated 27 January 2016, the Paris Civil Court had to decide the dispute between an approved consumer protection association and a social-housing lessor. Via a class action, the association, plaintiff, sought to see held as unfair the following clause forming part of the general terms and conditions of the lease: *"Late payment of all or part of the rent, of the solidarity rent surcharge and of recoverable costs shall result in payment by the lessee of a sum equal to 2% of the unpaid amount."* It also sought to see made good the loss of every lessee that had had to pay penalties under this clause. The class action was held admissible even though the provisions protecting lessees do not appear in the Code of Consumer Law, even though the consumer association submitted only three individual cases in support of its action and even though the purpose of the action was to have declared null and void a claimedly unfair clause and not the contractual liability of the professional operator. Conversely, the claims of the consumer association were disallowed as the court held that the aforementioned clause could not be deemed as seeking to create or resulting in creating a significant lack of balance between the rights and obligations of the parties, to the non-professional's detriment.

Paris Civil Court, 27 January 2016, *Confédération Nationale* v. *Société Immobilière 3F*, RG 15/00835

Declaring sources of milk and meat used as foodstuff ingredients

As from 1st January 2017 and for a trial period of two years, pre-packed foodstuffs containing a certain percentage of milk or meat must obligatorily show the country of origin of such milk or meat. Notwithstanding this requirement, the words "Origin: EU" and "Origin: non-EU" may be used. Foodstuffs legally produced or marketed before the provision comes into force whose labelling does not comply with its terms may be put on sale, sold or distributed free of charge for as long as stocks last, and until 31 March 2017 at the latest.

Decree no. 2016-1137, 19 August 2016, OJ 21 August 2016

NEW TECHNOLOGIES

Publication of Digital Republic Law

Law no. 2016-1321 of 7 October 2016 ("Digital Republic Law") was published in the 8 October 2016 number of the Official Journal. This tripartite law aims (i) to encourage the opening up and circulation of data and knowledge, (ii) to guarantee an open digital environment that respects Internauts' private lives and (iii) to facilitate citizens' access to the digital world.

Amongst other subjects, the law changes certain provisions of Law no. 78-17 of 6 January 1978 relating to data processing, data files and freedoms. The new law strengthens the rights of people affected by data processing. Accordingly, they will have to be informed of the term for which the company stores their data or, should this be impossible, of the criteria employed to allow calculation of such a term. Furthermore, "the right to be forgotten" for minors and a "right to digital death" with the storage, wipe out or communication of his or her data for everyone after death are to be brought in.

Anticipating European Regulation 2016/679 relating to personal data protection, the law includes data portability provisions. Consumers henceforth have a right to take with them and recover their data that is binding on on-line service suppliers. The scope of portability is, furthermore, widened as compared with European Regulation 2016/679 in including data files put on line by consumers, all other data facilitating changing service supplier or allowing access to other services or, again, data resulting from use of the user account with the exception, in this latter case, of data significantly enriched or enhanced by the supplier in question.

In this context, the CNIL's power of sanction is greatly strengthened. The upper limit for financial penalties thus rises by 150,000 Euros to 3 million Euros, approaching the anticipated much higher thresholds set by European Regulation 2016/679 applicable as from 25 May 2018.

A certain amount of enabling legislation is expected in the coming six months to ensure the full and effective implementation of the law but the impact of the law on companies can be measured even at this early stage, not only from the organizational point of view but also from the technical point of view.

Law no. 2016-1321 of 7 October 2016 ("Digital Republic Law")

European Commission publishes preliminary conclusions on e-commerce sector inquiry

On 15 September 2016 the European Commission published a preliminary report, the fruit of its e-commerce sector inquiry launched in May 2015 in the 28 Member States of the European Union (EU).

The inquiry, conducted amongst 1800 concerns and involving the analysis of some 8000 distributor's agreements aims to list possible competition problems on European on-line consumer goods and digital content sales markets. Even though the inquiry confirms rapid growth of the e-commerce sector within the EU, it also reveals commercial practices likely to restrain competition on these markets.

With regard to the sale of consumer goods on line, the report identifies a whole panoply of contractual restrictions on distributors:

- more than two retailers out of five are faced with a certain form of price recommendation and price limitation imposed by manufacturers;
- nearly one retailer out of five is contractually prevented from selling on on-line markets;
- nearly one retailer out of ten is contractually prevented from submitting offers to price comparing websites;
- more than one retailer out of ten states that his suppliers impose contractual restrictions on cross-border sales.

The challenge as regards digital content e-commerce resides in the availability of licences from content copyright owners. A number of important factors determine the availability of rights for on-line content distribution such as the scope (technological, territorial and temporal) of the rights as defined in the licensing agreements between the copyright holders and the digital content suppliers, the duration of the licensing agreements and frequent recourse to exclusivity. The Commission comes to the conclusion that these licensing agreements prove complex and frequently exclusive, with the result that access to digital content services on line is restricted, especially for users in other Member States, through geographical blockage.

Finally, the European Commission warns that it could open inquiries into the specific cases observed in order to guarantee compliance with EU rules relating to commercial practices and misuse of dominant position.

This preliminary report is the subject of a public inquiry open to interested parties until 16 November 2016. It will be followed by a final report giving a picture of the state of the market at the beginning of 2017.

Press Release IP/16/3017

EUCJ: law applicable to personal data processing

Even though the matter EU Sarl versus an Austrian consumer protection association has been the subject of numerous commentaries on account of the light that it casts on the scope of a jurisdictional clause contained in the general terms and conditions of use – held to be unfair by the European Union Court of Justice – the ruling also merits attention in that it specifies the law applicable to the processing of personal data with regard to Article 4, Paragraph 1 of Directive 95/46 on the personal data processing.

In a last question, the Court was asked whether, when personal data processing is introduced by an e-commerce concern, the law applicable to the processing of such data is that of the Member State to which the concern directs its business. The Court held that "personal data processing undertaken by an e-commerce concern is governed by the law of the Member State to which the concern directs its business if it proves to be the case that the said concern undertakes processing of the data in question as part of the business of an establishment located in this Member State". The Court held that it is for the national courts to determine if such is the case, in the case in point.

EUCJ of 28 July 2016 in matter C-191/15, Verein für Konsumenteninformation v. Amazon EU Sarl

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