CLIFFORD
CHANCE

Newsletter March 2017

Contracts – Distribution – Consumer Law: Legal Watch

CONTENTS

Contracts – Distribution

Consumer Law

CONTRACTS – DISTRIBUTION

Actions for damages on the grounds of anti-competitive practices: publication of the Order and its Enabling Legislation

Order no. 2017-303 of 9 March 2017 relating to actions for damages on the grounds of anti-competitive practices was published in the French Official Journal on 10 March 2017. It transposes into French law Directive no. 2014/104/EU of 26 November 2014 relating to certain rules governing actions for damages under domestic law for breaches of the legal provisions of Member States' and the European Union's competition law.

Among the numerous provisions of this legislation may be noted, in particular:

- Numerous changes to the Code of Commercial Law. Thus the introduction of a new Title VIII comprising new provisions relating to actions for damages on the grounds of anti-competitive practices;
- Article L.481-1 restates that any individual or corporate entity forming a concern or organization mentioned in Article L.464-2 shall be liable for loss or harm occasioned through commission of an anti-competitive practice. Consequently, pursuant to existing civil liability law, victims may obtain from the person so liable remedy in full for the loss or harm that they have suffered provided always that the conditions set for the said person to incur civil liability are met. Under Article L.410-1 of the Code of Commercial Law and in accordance with a long line of European and domestic decided cases, the notion of concern or organization within the meaning of competition law means any entity carrying on an economic activity regardless of the legal form of such entity and of its means of financing. The said economic unit may be formed by one or more individuals or corporate entities. It is these individuals or corporate entities forming the concern or organization who may be sanctioned and order to pay damages to victims on the grounds of their breaching of the provisions laid down by competition law;
- The victims of anti-competitive practices will enjoy the benefit of provisions making it easier to **prove** liability and loss or harm. With regard to the event causing liability to be incurred, Article L.481-2 provides for a lightening of the *onus probandi* when an anti-competitive practice is placed on record in a decision of the Competition Authority or higher appeals court the existence of the anti-competitive practice and its attribution to the person mentioned in Article L.481-1 are presumed to be irrebuttably established. Conversely, and pursuant to existing law, the decision of a competition authority of another Member State or higher appeals court placing on record an anti-competitive practice shall only represent *prima facie* evidence to be assessed by the relevant court along with other items of evidence submitted by the parties;
- With regard to **loss or harm**, Article L.481-3 restates certain remediable categories of loss or harm in order to guide the victim in the identification of his losses and defines for the first time in the Code of Commercial Law the notion of **extra cost**. Proof of this loss will be made easier for the victim via the introduction of presumptions;
- The **damages debt obligation involves joint and several liability and no longer restricted, *in solidum*, joint and several liability** as is currently the case on account of the application of the existing law of civil liability. However, in order to protect small or medium-sized companies, Article L.481-10 provides for an exception to Article L.481-9. Subject to satisfying certain conditions, a small or medium-sized company (PME) will not be held jointly and severally liable for remedy of losses or harm suffered by victims other than its direct or indirect contracting partners. Such victims will only be entitled to claim from such PMEs their share in the shared damages debt;
- In order to encourage negotiated proceedings (conciliation, mediation, participatory procedure), the legislation provides for **provisions softening the effect of negotiated settlements**;
- Introduction of a new procedure for verification by a judge of the content of an exhibit that may be the subject of the prohibition provided for in Article L.483-5.

The date of effect of most of the provisions of this Order has been set at 11 March 2017.

This Order is complemented by a **Decree** setting out the procedural rules applicable to actions for compensation on the grounds of anti-competitive practices that apply to cases initiated from 26 December 2014 onwards.

Thus, a new Title is introduced into the Code of Commercial Law and a new Chapter into the Code of Administrative Justice that contain procedural provisions relating to actions for compensation on the grounds of anti-competitive practices. The judge to whom such actions are referred shall be entitled to seek from the Competition Authority directions on the appraisal of alleged losses. Also specified are the procedure for protecting business secrets in the context of court hearings and the procedure for protecting exhibits contained in the dossier of a competition authority, revelation of which with a view to or during a damages hearing could adversely affect the effectiveness of proceedings initiated before the said authority.

Order no. 2017-303 of 9 March 2017

Report to the President of the Republic on Order no. 2017-303 of 9 March 2017

Decree no. 2017-305 of 9 March 2017 relating to actions for damages on the grounds of anti-competitive practices

Significant imbalance in supplier-distributor relations: new ruling from the Supreme Civil Court

On 25 January 2017, the Supreme Civil Court handed down a new ruling relating to significant imbalance.

In the case in point, the Minister for the Economy, the initiator of the action, accused a purchasing group of having wrongfully forced certain suppliers:

- to pay a year-end rebate without having contracted towards them any obligation or any real obligation;
- payment of the said rebate in monthly advance instalments prior to payment by the distributor of the cost of the goods and, more generally, before the condition to which granting of the rebate was subject was fulfilled.

The Supreme Civil Court approved the Appeal Court's finding of significant imbalance and dismissed all the arguments in the purchasing group's appeal to the supreme court.

It set forth, first of all:

- on the one hand, that "*in relations formed between a supplier and a distributor, imbalance is assessed with on the basis of the written agreement provided for under Article L.441-7 of the Code of Commercial Law, which specifies the obligations to which the parties have pledged themselves and sets, in particular, the conditions governing the selling operation* [...]*, including such price reductions as result from commercial negotiation* [...]," from which it deduces that the rebate at issue provided for in the conditions governing the selling operation is very likely to fall under Article L.442-6, I, 2 of the Code of Commercial Law; and
- on the other, that Article L.442-6, I, 2 of the Code of Commercial Law "*does not exclude* [...] *that significant imbalance may be the result of mismatch between the price and the item sold*" and that "*the Law of 4 August 2008, in demanding a written agreement setting out the price list as previously communicated by the supplier, along with the latter's general terms and conditions of sale, was intended to allow comparisons to be made between the prices agreed by the parties and the prices initially proposed by the supplier*", from which it deduces that "*Article L.442-6, I, 2 of the Code of Commercial Law allows the courts to monitor prices,* [...]".

It then approves the Appeal Court's having held that "*the principle of free negotiability is not unlimited and that the absence of any consideration or justification for the obligations assumed by the contracting partners, even where such obligations do not fall into the category of commercial co-operation services, may be sanctioned under Article L.442-6, I, 2 of the Code of Commercial Law, if it is founded in subjection or attempted subjection and results in significant imbalance*".

In the case in point, the clauses relating to the end-of-year rebate that were inserted into the outline agreements examined did in fact give rise to significant imbalance between the rights and duties of the parties. The already drafted nature of the clauses at issue and the absence of any real negotiation pointed clearly to subordination of Article L.442-6, I, 2 of the Code of Commercial Law.

Supreme Civil Court, Commercial Division, 25 Jan. 2017, no. 15-23.547, FS-P+B, Galec SAC versus Min. for the Economy

Liability incurred through defective professional-use product quality and latent defects

In a judgment handed down on 7 January 2017, the First Civil Division of the Supreme Civil Court clarified the scope and autonomic nature of defective product liability.

In the case in point, a haulage company had sued for damages both a manufacturer of axles, defects in which had caused three lorries to set on fire, and the seller of the lories along with the parts supplier that had supplied the axles.

The Supreme Civil Court restated that even if the repairing of damage caused to an item intended for use by professional operators and used for this purpose does not fall within the scope of Directive 85/374/EEC relating to defective product liability, the same Directive does apply to the producer of the defective product, regardless of intended use, private or professional, of such product. Thus, if the producer had sought to avoid incurring defective product liability, he should have submitted to the Appeal Court a pleading grounded in the professional nature of the use for which the damaged and goods were intended, which was not the case in the case in point. The lower-court decision was thus upheld insofar as it found the producer alone liable, exonerating the sellers from liability pursuant to the aforementioned Directive. Conversely, the Supreme Civil Court censured the trial and appeal court judges on the grounds that, even if the sellers were not liable pursuant to defective products liability law, such exoneration did not, as the Appeal Court believed, preclude an independent action for damages against the sellers on other grounds such as the seller's latent defects warranty provided for in Article 1641 of the Code of Civil Law.

Supreme Civil Court, 1st Civil Division, 11 Jan. 2017, FS-P+B+I, no. 16-11.726

CEPC's opinion relating to distributors' brands

An economic-interest grouping ("**EIG**") made up of winegrowers supplying distributors' brand products ' ("**DBP**") for a distributor questioned the Commercial Practices Investigation Commission ("**CPIC**") on the legality of various factors with regard to commercial relations law.

It was established by the opinion given on 14 December 2016 by the CPIC that, in particular:

- the term of the relations between the EIG and the distributor as well as the regularity of sales are factors that allow the legal relationship as "established commercial relations". Thus, for a fall in the volume of sales to be described as the sudden breaking-off of an established commercial relationship, the fall must not be the consequence of the application of a contractual condition organising variations in sales volumes or to have been the subject of earlier information that allowed the supplier to anticipate the fall in sales volumes or to be able to be justified by objective criteria such as customers' lack of interest in the product at issue or a fall in product quality, provided always that such criteria are not contrary to the content of the conditions of the agreement binding the parties. The CPIC specified that such a fall could also, as the case may be, contribute to establishing misuse of economic dependency if, for instance, a request for price alignment on pain of substantial changes in sales volumes had been put forward;
- the fact of putting aside a certain volume of DBP bottles through associating such a contractual obligation with that of permanent availability without any calendar or term for collection by the buyer and without any obligation to collect all the bottles put aside could be seen as significant imbalance, which is prohibited by Article L.442-6-I, 2 of the Code of Commercial Law;
- the fact of threatening to block collection of the set aside and labelled DBP sales volumes in order to obtain price alignment may be seen as a threat to suddenly partially break off relations, conduct prohibited by Article L.442-6-I, 4 of the Code of Commercial Law.

CPIC Opinion no.16-19, 14 Dec. 2016

EUCJ: compliance warranty for sales arranged by a profession operator in the role of go-between between two private individuals

A Belgian consumer had purchased a used car from a garage. The engine broke down very shortly afterwards and was repaired by the same garage. The new owner of the

vehicle refused to pay the bill for the repair, claiming cover under the non-compliance warranty extended to all consumers that is provided for under Directive 1999/44/EC. Only then did the garage inform her that, at the time of sale, the owner of the vehicle was in fact an individual, that it was a simple intermediary and could not be regarded as a professional operator bound by the compliance warranty.

The garage summoned the purchaser for payment of the bill.

Following a question on a preliminary point of law submitted by the Appeal Court, the European Union Court of Justice replied in a judgment handed down on 9 November 2016 that the notion of "seller" within the meaning of Article 1, §2, sub c) of Directive 1999/44/EC must be construed in such a way as to refer also to a professional operator acting as intermediary on behalf of an individual who has not duly informed the purchasing consumer of the fact that the owner of the goods sold is an individual.

EUCJ, 9 Nov. 2016, Matter. C-149/15, S. Wathelet

Safety standards and duty to deliver

In a judgment handed down on 22 November 2016, the Commercial Division of the Supreme Civil Court specified that a seller who does not meet the duty provided for in the agreement relating to the compliance of installations with safety regulations shall incur liability for failure to deliver.

In the case in point, the transferor of a bakery business undertaking stated in the transfer agreement that "*all the installations in the business transferred were in working condition and met current health, hygiene and safety standards*". However, the installation was seen not to comply with the regulations and with safety standards for the oven because of the excessive length of the combustion gas evacuation pipe.

The Supreme Civil Court censured the trial and appeal court judges who, in exonerating the seller of any liability, held that this fault consisted in a latent defect and applied the warranty exclusion clause provided in this connection. The seller had not satisfied the duty to deliver on account of the failure to meet safety standards contrary to what had been claimed in the agreement.

Supreme Civil Court, Commercial Division, 22 November 2016, 14-23658

Sudden breaking-off of established commercial relations: scope of jurisdiction clause

In a decision handed down on 18 January 2017, the Supreme Civil Court ruled on the application of a jurisdiction clause to the sudden breaking-off of commercial relations.

In the case in point, a French company summoned an English company, its partner, to appear before a French court on the grounds of the sudden breaking-off of commercial relations. The English company objected to jurisdiction, basing itself on the jurisdiction clause contained in the agreement designating the English courts.

The French company disputed application of the clause, asserting that, in particular, this clause nullified the imperative provisions of Article L.442-6, I, 5 of the Code of Commercial Law and that as the clause limited itself to contractual disputes, it was not applicable to an action for liability in tort based on the sudden breaking-off of established commercial relations between the parties.

The Supreme Civil Court dismissed these arguments. The "legal relationship" at issue was not limited to contractual obligations but was to include disputes arising from the contractual relationship. Consequently, the jurisdiction clause did apply to the sudden breaking-off of the agreement regardless of the fact that the imperative provisions representing the overriding mandatory provisions were applicable to the substance of the dispute.

Supreme Civil Court, 1st Civil Division, 18 January 2017, no. 15-26.105

Conversion to commercial use – new procedure for obtaining planning permission constituting authorisation to operate a commercial venture

In an opinion issued on 23 December 2016, the Council of State specified the new procedure for obtaining planning permission constituting authorisation to operate a commercial venture applying to projects to set up or extend retail commerce shop sales areas mentioned in Article L.752-1 of the Code of Commercial Law.

The opinion establishes in particular, that:

- in the event of an appeal brought before the National Commercial Development Commission against the opinion of the relevant departmental commission or in the event of referral to the national commission at its own initiative, the authority competent for delivering planning permission constituting authorisation to operate a commercial venture, which enjoys the advantage of an examination time prolonged by five months pursuant to the provisions of Article R.423-36-1 of the Code of Town Planning Law, must wait for the appearance of the opinion, whether express or tacit, of the national commission in order to deliver permission;
- the Council of State recommends that the Administration should avoid delivering permission before the time allowed for appeals against the departmental commission's opinion has expired; and that
- as planning permission can only legally be delivered in the event of commercial town planning authorisation, cancellation of it inasmuch as it replaces commercial town planning authorisation blocks realisation of the project. In such an event, however, if the changes required in order to render the project compliant with the matter considered by the decision to cancel have no effect on the compliance of the projected works, new planning permission constituting authorisation to operate a commercial venture may, at the petitioner's request, be delivered merely in light of a new, favourable opinion on the part of the departmental commission or National Commercial Development Commission.

CS, 4th- 5th Divisions sitting jointly,, 23 Dec. 2016, req. no. 398077

CONSUMER LAW

The Order covering the legislative section of the Code of Consumer Law is ratified

The Ratification Law of 21 February 2017 corrects a number of errors, more or less important, and changes certain provisions in Orders nos. 2016-301 of 14 March 2016 relating to the legislative section of the Code of Consumer Law and 2016-351 of 25 March 2016 on consumer credit agreements covering residential use properties and simplifying the arrangements for implementing obligations regarding product and service (non-food) compliance and safety.

The notion of "non professional"

In the article that is a preliminary to the Code of Consumer Law the notion of non-professional which made its entry into the Code following its re-codification by the Order of 14 March 2016 has been changed. Up to now, a non-professional was defined as "*any corporate entity that acts for purposes that do not enter into the framework of his commercial, industrial, craftwork-based, liberal profession-based or agricultural activity*". The Ratification Law completes this definition by adding that a professional is any corporate entity "*that does not act for professional purposes*".

Details of and changes to certain retraction times

With regard to remotely-concluded agreements, the consumer has 14 "full calendar" days to exercise his right to withdraw (Code of Consumer Law, Article L.222-7). All the days of the week must be taken into account (Saturday, Sunday, Bank Holidays and Public Holidays included).

In the case of agreements to purchase precious metals, the time allowed to the consumer to exercise his right to retract has been doubled, going from 24 to 48 hours (Code of Consumer Law, Article L.224-99).

Product and service compliance and safety

The Law compiles in one and the same Article, in the interests of "simplification", the implementation of product and service compliance and safety obligations.

Up to now referred to in Articles L.412-1 and L.422-2 of the Code of Consumer Law, all the information is now detailed in the first of these two references.

Council of State Decrees are to define the rules which goods must satisfy, in particular:

- the conditions under which exporting, offering for sale, selling, giving away, possession, labelling, packing or the method of using goods are prohibited or regulated;
- the conditions under which the manufacture and importing of goods other than products of animal origin and foodstuffs containing the same, foods for animals that are of animal origin and foods for animals containing products of animal origin are prohibited or regulated, etc.

Failure to ensure product and service compliance will be sanctioned by one year's imprisonment and an 150,000 Euro fine (Code of Consumer Law, Article L.451-1).

Law no. 2017-203, 21 Feb. 2017, OJ 22 Feb. 2017

Price comparisons and misleading advertising

In a judgment handed down on 8 February 2017, the European Union Court of Justice ruled on the lawfulness of advertising comparing prices between shops of different formats and sizes.

Questioned on a preliminary point of law, the Court restated firstly that, pursuant to Directive 2006/14/EC, all comparative advertising must objectively compare prices and not be misleading. However, when the advertiser and the competitors are chain concerns each of which possesses a range of shops of different sizes and formats and when comparison does not refer to the same sizes and formats, the objectivity of the comparison may be rendered false by this if the advertising does not mention these differences.

The Court reminds us, furthermore, that comparative advertising that omits or hides an important piece of information which the average consumer needs, given the context, in order to make a commercial decision in full knowledge of the facts or which supplies such information in a manner that is unclear, unintelligible, ambiguous or willy nilly and which consequently may lead the average consumer to make a commercial decision which he would not otherwise have made.

Such, however, is the case of information relating to the size and format of the shops whose prices are compared. In this respect, the Court points out that this information must not only be supplied clearly but also figure in the advertising message itself. It will be for the Paris Appeal Court to check whether this condition has been met in the case in point.

CJEU, 8 February 2017, Carrefour Hypermarkets SAS versus ITM Alimentaire International SASU, Matter C. 562/15

CJEU, 8 February 2017, Release no. 12/17

A new ruling regarding misleading trade practices

According to Article L.121-1 of the Code of Consumer Law, a commercial practice is misleading in particular when it rests on allegations, information or presentations that are false or likely to lead people into error and relating, for instance, to the extent of the advertiser's undertakings, the nature, the selling process or the provision of services.

In a judgment dated 22 November 2016, the Criminal Division of the Supreme Court upheld a judgment of Rennes Appeal Court sentencing an entrepreneur to one year's imprisonment including a six months' suspended sentence for having undertaken between April 2009 and November 2010, for thirty-one professional operators, to publish and deliver cards and guides, announcing by word of mouth the dates for their appearance ranging from one to several months as well as wide distribution of these advertising materials, without having respected any of his undertakings and proving no proof of have made the smallest delivery or undertaken the slightest step to successfully perform these agreements. The client was then blamed for having developed for ninety-seven plaintiffs a misleading commercial sales talk seeking to get them to sign order forms of an equivocal nature misleading clients as to the date and actual nature of the delivery of advertising media, as performance of the service could be indefinitely postponed, without the client being able to issue any complaint or obtain a refund of monies paid. In addition, the entrepreneur had his clients believe that the internet site on which their visuals were to appear was an effective tool for seeking professionals whereas it was only very rudimentary and, finally, the high-profile advertising campaign that he had announced to promote the site was never held. The accused asserted in vain that an order form of an equivocal nature could not constitute a misleading commercial practice between professionals, the Supreme Criminal Court pointing out that "*written information shown in the agreement has no effect on the existence of deliberately misleading allegations which determined execution thereof*".

Supreme Criminal Court, 22 November 2016, no. 15-83.559 F-PB

Editorial team:
Sophie Varisli - Alexis Ridray

Clifford Chance, 1 rue d'Astorg, CS 60058, 75377 Paris Cedex 08, France