

## Opinion of the CEPC on the payment of year-end rebates

**In an opinion dated September 21, 2017 and released in early November, the *Commission d'examen des pratiques commerciales* (Commercial Practices Review Committee, hereinafter the "CEPC")<sup>[1]</sup> ruled on the lawfulness of the payment of year-end rebates provided for in an annual agreement between a supplier and a distributor whereas the requirements applicable for such payment were not met.**

The questions submitted to the CEPC concerned the payment of a year-end rebate ("YER") provided for in an annual agreement between a supplier and a distributor and conditional upon the achievement of a sales target.

Although the sales target agreed upon for the payment of the YER had not been achieved – by a narrow margin – at the end of the year, the supplier paid this EYR to its distributor.

The CEPC was asked to examine whether this YER would be considered as a prohibited remuneration within the meaning of Article L. 442-6-II a) of the French Commercial Code, and whether there existed a legal provision providing for a "tolerance threshold" permitting the payment of a YER even though the requirements applicable for its payment were not met<sup>[2]</sup>.

It should be recalled that Article L. 442-6-II a) of the French Commercial Code prohibits agreements under which a producer, merchant, industrial or craftsman may "*retroactively benefit from rebates, discounts or commercial cooperation agreements*".

Pursuant to Articles L. 441-7 of the French Commercial Code, end-year rebates or discounts must be specified in a written agreement between the supplier and the distributor or the service provider that details the obligations assumed by the parties "*for the purpose of determining the price at the conclusion of the commercial negotiation*".

In its opinion, the CEPC firstly recalled that end-year rebates or discounts based on the achievement of a volume purchase target constitute price reductions to which a purchaser may be entitled, the achievement of

the defined target being the consideration for the price reduction applied by the seller. This type of conditional price reduction does not fall within the scope of application of Article L. 442-6-II a) of the French Commercial Code that addresses retroactive rebates or discounts.

The CEPC confirmed in its opinion that the parties may freely agree on price reductions based on the achievement of a sales target *“which must be clearly and previously defined in the agreement”* and that the achievement of such target is a so-called *“obligation de résultat”*<sup>[3]</sup> under French law.

It specified that if the above is not complied with, the conditional price reduction is not due.

However, the CEPC considered that, as per the principle of contractual freedom, *“the supplier may legitimately consider that, given the efforts made by the distributor, or given the adverse market conditions that constitute exogenous elements, it is free to grant all or part of the rebate”*, even if the defined sales targets have not been achieved.

In its opinion, the CEPC accordingly held that the supplier may grant such rebate, subject to conditions.

Indeed, it considered that the sums agreed upon between the parties may be paid if:

- The supplier operates freely, without any constraint, pressure or threat from the distributor; and
- The agreed rebate neither constitutes a benefit without consideration or a disproportionate benefit, which is prohibited by Article L. 442-6-I, §1 of the French Commercial Code, nor creates a significant imbalance in the rights and obligations of the parties, which is prohibited by Article L. 442-6-I, 2° of the same Code.

In addition, the CEPC recommends specifying in an amendment to the agreement that the terms of payment of the rebate have been reviewed and including therein the reasons that have led the supplier to consider that all or part of such rebate could be paid.

<sup>[1]</sup> The CEPC issues opinions and formulates recommendations on questions, commercial or advertising materials, including invoices and contracts covered by industrial and commercial secrecy, and practices that concern commercial relationships between producers, suppliers and resellers and that are submitted to it for review.

<sup>[2]</sup> CEPC, opinion n° 17-10, September 21, 2017

<sup>[3]</sup> French law makes a distinction between two types of contractual obligation: *“obligation de résultat”* (literally “obligation of result”) and *“obligations de moyens”* (literally “obligations of means”). With an *obligation de résultat*, a party must fulfill a specific obligation or arrive at a specific result. With an *obligation de moyens*, the party must simply implement or use, to his/her best efforts, all necessary means in order to fulfill a specific obligation or achieve a specific result.



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