

Reimbursement of the sums paid by a consumer following the exercise of the right of withdrawal and clarification of the concept of “customized” goods

Pursuant to Article L. 221-18 of the French Consumer Code (“FCC”) introduced by Law of March 17, 2014^[1], a consumer who makes a purchase online benefits from a right of withdrawal, with no additional fee. Specifically, this right of withdrawal applies to distance and off-premises contracts as well as to contracts entered into following a cold calling.

In a decision dated January 17, 2018^[2], the First Civil Chamber of the *Cour de Cassation* (French Supreme Court) recalled the sanction that may be imposed on a trader that does not reimburse the sums already paid by a consumer who exercises his/her right of withdrawal. It also further specified the concept of “clearly customized goods” set forth in Article L. 221-28 of the FCC that excludes the application of the right of withdrawal.

The factual background

A consumer ordered a car online with two options: The first one concerning the color of the car body and the second one concerning the installation of a distance warning system. He made a down payment of 10%. A few days later, the consumer cancelled the order and requested the reimbursement of his down-payment... in vain.

He summoned the trader and sought the reimbursement of the down-payment plus interests calculated at the legal interest rate increased as per the percentage tiers provided for in Article L. 242-4 of the FCC.

Reminder of applicable legislation

Article L. 221-18 of the FCC sets out the general principle that a consumer who makes a purchase online has 14 days to change his/her mind. The right is discretionary.

When informed of the consumer's decision to exercise his/her right of withdrawal, the trader must reimburse to the consumer of all the sums he/she has paid, including delivery costs, without undue delay and no later than 14 days from the date on which it is notified of the consumer's decision (Article L. 221-24 of the FCC).

In order to make this right of withdrawal fully effective, Article L. 242-4 of the FCC provides for a specific sanction for non-compliance: *"Wherever the trader does not reimburse the sums paid by the consumer, the amounts to be repaid shall be automatically increased by*

- *the legal interest rate if the reimbursement takes place maximum 10 days after the expiry of the reimbursement period provided for by law [i.e. 14-days],*
- *a 5% interest rate if the reimbursement is 10 to 20 days late*
- *a 10% interest rate if the reimbursement is 20 to 30 days late,*
- *a 20% interest rate if reimbursement is 30 to 60 days late,*
- *a 50% interest rate if the reimbursement is 60 to 90 days late, and*
- *5 additional percentage points per additional month of delay up to the amount corresponding to the price of the good, and then by the legal interest rate."*

Just like for any general principle, there exist exceptions to the right of withdrawal. Specifically, this right does not apply to some categories of contracts, as listed in Article L. 221-28 of the FCC, among which *"contracts for the supply of goods made to the consumer's specifications or clearly customized"*.

In the case commented herein, the *Cour de Cassation* ruled on the scope of application of Article L. 242-4 and Article L. 221-28 mentioned above.

The sanction imposed by Article L. 242-4 of the FCC

In support of its argumentation aimed at challenging the reimbursement of the sums due under Article L. 242-4 of the FCC, the trader filed three applications for a preliminary ruling on the issue of constitutionality before *the Cour de Cassation*.

It first claimed that the provisions of said Article contradicted the following constitutional principles: Right to an effective remedy before a court of law, respect of the rights of the defense, right to a fair trial and, lastly,

right of ownership (Articles 2, 16 and 17 of the Declaration of the Rights of Man and of the Citizen of August 26, 1789).

In a decision dated July 5, 2017, the *Cour de Cassation* refused to refer these three applications to the Constitutional Council, the highest constitutional authority in France^[3].

The trader then repeated its line of defense, claiming this time that Article L. 242-4 of the FCC contravened Article 6§1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In its decision dated January 17, 2018, the *Cour de Cassation* reiterated in similar terms its ruling of July 2017. It considered firstly that the sanction provided for by Article L. 242-4 of the FCC *“does not deprive the trader of the right to a fair trial insofar as the latter can initiate proceedings before a court of law to seek the refund of the sums that it may have unduly reimbursed to the consumer or challenge, as respondent, the reimbursement sought by the consumer”*. In addition, it considered that *“this sanction is a measure that is instrumental to ensuring consumer protection and guaranteeing the effectiveness of this protection as it serves as a deterrent. [It also considered that] the increase of the sums due is progressive and only applies at the expiry of the 14-day period from the date on which the trader is informed of the consumer’s decision to exercise his/her right of withdrawal.”* It concluded that *“[this sanction] does not impair the right of ownership and is proportionate to the aim pursued”*.

By ruling so, the *Cour de Cassation*, having already upheld the constitutionality of the reimbursement mechanism implemented to the benefit of consumers, confirmed that such mechanism did not infringe the Convention for the Protection of Human Rights and Fundamental Freedoms.

The concept of “clearly customized goods” set forth in Article L. 221-28 of the FCC

The trader’s second argument was based on Article L. 221-28 of the FCC. Specifically, it argued that because of the two options chosen by the consumer, the contract had become a contract for the supply of a *“clearly personalized good”*, thereby barring the buyer’s right of withdrawal.

The *Cour de Cassation* had already had the opportunity to clarify the notion of *“clearly customized goods”*^[4] set out in Article L. 221-28 of the FCC. It had ruled that the application for the registration of a car alters neither the nature nor the intended use of the relevant car, thereby implying that this good was not clearly customized.

This was not an obvious outcome since the registration of a car precisely enables to identify a person through the registration certificate and, as such, contributes to the customization of the relevant good.

In the case commented herein, the *Cour de Cassation* confirmed its strict interpretation of Article L. 221-28 of the FCC.

Indeed, it found that “*the options concerning the color of the car body and the installation of a distance warning system did not entail a specific work by the seller and was not sufficient to consider that the car had become a clearly customized good within the meaning of Article L. 221-28 of the [French] Consumer Code.*”

According to these rulings, the “customization” set out in Article L. 221-28 of the FCC seems to imply the existence of a significant effort by the trader. In order to assess whether the option chosen by the consumer “*clearly customizes*” the good, the criteria to be applied could be the standard character of the relevant option.

As such, in case of standard options – such as the color of a body car or the installation of a distance warning system – if the consumer changes his/her mind, the trader will nevertheless certainly be able to resell the good without any difficulty. The consumer must thus be able to exercise his/her right of withdrawal. Conversely, in case of a specific option that requires specific works by the trader, the withdrawal of the initial consumer could make it difficult for the trader to resell the good. As such the relevant contract should be considered as pertaining to a “*customized*” good within the meaning of Article L. 221-28 of the FCC, thereby preventing the consumer from exercising his/her right of withdrawal.

With this reasoning, the *Cour de Cassation* ensures consumer protection and at the same time preserves the economic interests of traders. It remains, however, to be seen if the to-be-applied differentiating criteria will always be easy to implement in practice.

[1] Law n° 2014-344 of March 17, 2014 transposing Directive 2011/83/EU of October 25, 2011

[2] First Civil Chamber of the *Cour de Cassation*, January 17, 2018, n° 17-10.255

[3] First Civil Chamber of the *Cour de Cassation*, July 5, 2017, n° 17-10.255

[4] First Civil Chamber of the *Cour de Cassation*, March 20, 2013, n° 12-15.052

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