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The validity of the minister of a economy's action against abusive commercial practices

Under French law, the Public Prosecutor and the Minister of Economy can initiate legal proceedings to request the judge to order the cessation of an abusive commercial practice, the nullity of the relevant unlawful clauses and contracts, the reimbursement of the undue payments and a civil fine on the infringing economic player(s)[1].

By remand decision dated March 8, 2011[2], the Commercial Chamber of the *Cour de Cassation* (French Supreme Court) filed with the French Constitutional Council an application for a priority preliminary ruling on the issue of constitutionality, following a petition of the companies *Système U Centrale Nationale*, *Carrefour France SAS* and *Groupements d'achats des Centres Leclerc* (GALEC) (the "Applicants").

In 2007, proceedings for abusive commercial practices were initiated against Système U Centrale Nationale, at the request of the Minister of Economy, pursuant to Article L. 442-6, III of the French Commercial Code.

During the proceedings before the *Cour de Cassation*, Système U Centrale Nationale raised the issue of constitutionality of certain provisions of the aforementioned Article and was joined by Carrefour France SAS. GALEC then joined proceedings before the French Constitutional Council.

On the other hand, the Federal Consumers Union *UFC Que Choisir* and the Prime Minister joined the proceedings, arguing that the challenged provisions did not infringe any rights and/or freedoms guaranteed by the French Constitution.

The application for priority preliminary ruling on the issue of constitutionality was worded as follows *"Does Article L. 442-6 III §2 of the French Commercial Code, according to which the Minister of Economy can request the nullity of clauses and contracts and request the reimbursement of undue payments in the absence during the proceedings of the relevant supplier(s) or even without the latter(s)' consent, infringe the rights and freedoms guaranteed by the Constitution, and more precisely, the freedom of enterprise, the fair trial principle, the right to bring legal proceedings and the right of ownership of the supplier and distributor?"*.

The Constitutional Council examined whether the provisions set forth in Article L. 442-6 III §2 of the French Commercial Code infringed the freedom of enterprise (**1**), the adversarial principle and the right to remedy (**2**), and, lastly, the right of ownership (**3**), and subsequently held that the challenged provisions were consistent with the Constitution, subject to an interpretation reserve[3].

1. Firstly, regarding the alleged infringement of the freedom of enterprise:

The Applicants asserted that the measures provided for under Article L. 442-6 III §2 of the French Commercial Code were useless and disproportionate with the pursued objective of protecting the interest of economic operators that are at disadvantage compared to their business partners. As such, these provisions allegedly infringed the freedom of enterprise principle.

In its decision of May 13, 2011, the Constitutional Council recalled that the power to take action granted to public authorities under Article L. 442-6, III §2 of the French Commercial Code is aimed at combating abusive commercial practices, re-establishing a balance in the relationships between business partners and preventing the repetition of such practices.

Considering that the legislator had struck a balance between freedom of enterprise and general interest in order to maintain equilibrium in business relationships, the Constitutional Council found that the restriction on the freedom of enterprise was not disproportionate with the pursued objective, i.e. the preservation of the economic public order.

2. Secondly, regarding the alleged infringement of the adversarial principle and right to remedy:

The Applicants also asserted that Article L. 442-6 III §2 of the French Commercial Code infringed the adversarial principle and the right to fair trial because it grants public authorities the possibility to take legal action, without the party harmed by the commercial practice being necessarily called into the dispute.

In addition, the Applicants also claimed that since the harmed party is not put in a position to give its consent to the proceedings and is unable to personally organize and freely conduct the defense of its interests and to terminate the legal action, the challenged provisions also infringed the right to a remedy.

In its decision of May 13, 2011, the Constitutional Council recalled that the challenged provisions preclude neither the party harmed by the abusive practice from initiating legal proceedings or joining the action engaged by the public authorities, nor the prosecuted party that applied the abusive practice from summoning the allegedly harmed party, requesting that the latter be heard or obtaining from the latter delivery of the documentation necessary to its defense.

As such, the Constitutional Council found that the challenged provisions did not contradict the adversarial principle.

In addition, the Constitutional Council specified that the legislator is free to vest upon public authorities the right to initiate proceedings to seek the cessation of a contractual practice that is contrary to public order.

Consequently, the Constitutional Council held that neither the principle of contractual freedom nor the right to effective judicial remedy prevents public authorities, when exercising their power, from seeking the annulment of the unlawful clauses/agreements, the repayment of sums unduly received and compensation for the damage caused by these practices.

Yet, the Constitutional Council required that all parties to the agreement be duly informed of the initiation of the legal proceedings.

In doing so, the Constitutional Council expressed a so-called "reserve of interpretation" guaranteeing that all parties to the agreement be duly and fully informed since the challenged provisions impose neither on public authorities the obligation to notify the initiation of legal proceedings nor on the judge the obligation to make sure that such notification has been duly made.

The Constitutional Council did not specify on whom this obligation was imposed but we can reasonably believe that the obligation of information falls on the party that initiates the proceedings. The judge is then responsible for ensuring that this obligation has been complied with.

In practice this obligation of information will probably not radically change things with respect to sanctions pronounced in disputes for anti-competitive practices since ministerial departments already usually inform the relevant professional actors of the launch of investigations in respect of alleged anti-competitive practices and of the Minister's right to initiate proceedings that can be joined by the parties to the relevant contracts.

Subject to this reservation of interpretation, the Constitutional Council found that the provisions set forth in Article L. 442-6 III §2 of the French Commercial Code did not infringe the right of remedy.

3. Lastly, regarding the alleged infringement of the right of ownership:

The Applicants asserted that Article L. 442-6 III §2 of the French Commercial Code did not permit business partners to obtain the repayment of the sums unduly paid from the public authorities and infringes the ownership right of both the company ordered to reimburse the sums unduly received and the company that unduly paid these sums.

The Constitutional Council pointed out that the order to repay sums unduly received and, as the case may be, the order to pay damages are issued by judgment as a consequence of the annulment of the unlawful clauses/agreements. As such, it held that the challenged provisions did not infringe the ownership right of the party ordered to reimburse such sums.

Lastly, the Constitutional Council recalled that the sums unduly paid and any potential damages are paid, or made available, to the party harmed by the commercial practice, and that, accordingly, the latter's ownership right is not infringed.

This is not the first time that the Constitutional Council is led to rule on the constitutionality of Article L. 442-6 of the French Commercial Code.

In a recent decision dated January 13, 2011, the Constitutional Council, putting forth an economic public order requirement – just like in the commented decision, held that the provisions of Article L. 442-6 I §2 of the French Commercial Code were in conformity with the constitution. Such provisions stipulate that the fact to impose or trying to impose on a business partner obligations that create a significant inequality in the rights and obligations of the parties is constitutive of an anti-competitive practice[4].

Lastly, the Commercial Chamber of the *Cour de Cassation* has ruled on several occasions that the provisions set forth in Article L. 442-6 III §2 of the French Commercial Code are in compliance with Article 6 § 1 of the European Convention on Human Rights that deals with the right to a faire trial[5].

According to an established case-law, the *Cour de Cassation* considers that the action of the Minister of Economy does not infringe the above-mentioned Article 6 § 1 of the European Convention on Human Rights. On the contrary, it sees this action as an autonomous action that is aimed at protecting the functioning of the market and competition and that is not subject to the supplier's presence or consent.

Yet, in the commented decision, the Constitutional Council specified that suppliers must be informed of the action initiated by the Minister.

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[1] Article L. 442-6, III §2 of the French Commercial Code

[2] Cass. Com., QPC, 08.03.2011, n°10-40070, Sté Système U Centrale Nationale et Autres

[3] Cons. Const., QPC, 13.05.2011, n°2011-126, Sté Système U Centrale Nationale et Autres

[4] Cons. Const., QPC, 13.01.2011, n°2010-85

[5] Cass. Com., 08.07.2008, n°07-16761; Cass. Com., 16.12.2008, n°08-13162