



French justice rules out Carrefour for restrictive competition practices during its commercial negotiations

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Summary: On February 22nd this year, Carrefour was fined €1.75 million by the Paris Commercial Court for restrictive competition practices after 5 years of proceedings. We will come back to a case which is the first legal illustration of the new will of the French General Directorate for Competition, Consumption and Fraud Control to control commercial negotiations more strictly.

I. Presentation of the case.

1 - The law on restrictive competition practices in France.

The law on restrictive competition practices arose from a particular economic context. In its drafting, the legislator has taken into account the features of the - mass distribution sector in France and specifically mass food distribution. This sector is now mainly shared by six historical brands in France. They deal with numerous professional contractors, suppliers, vendors, who turn to them in order to reach consumers. This is an indispensable cooperation for many French economic operators. This cooperation occurs in a closed market, which creates an imbalance of economic power, from which legal imbalances arise.

Initially, after the Second World War, French law wanted to allow flexibility for this large-scale distribution in order to stimulate the economy. But it quickly appeared that this could pose a real problem for small businesses. Certain laws emerged with the aim of protecting these threatened local shops. This was without counting on a rapid adaptation on the part of these six players in the retail sector. The law on restrictive competition practices therefore provides protection for the weakest party in their relationship with large-scale distribution.

In European law, restrictive competition practices are often synonymous with anti-competitive practices, but French law makes a distinction. The origin of this regulation of restrictive competition practices is the imbalance between the parties. But in parallel

with this regulation, there is a dimension of action that allows for regulation of the market, which is a major substance of competition law. In fact, to make a distinction, this law of restrictive practices is called the "small" competition law in France, while the law of anti-competitive practices is called the "big" competition law.

2 - The factual context and the beginning of the investigation against Carrefour.

Economic tensions have reflected in commercial relations for some time., especially with the various economic crises that the world has faced. The General Directorate for Competition, Consumption and Fraud Control (DGCCRF) has sought to strengthen its control action. This institution wants to exercise extreme vigilance over the annual commercial negotiations. This is why the DGCCRF announced in a press release dated 12 February 2016 that "*The investigation services also carried out a search on the premises of a large retailer on Tuesday 9 February 2016. Several suppliers accused this retailer of imposing a significant non-negotiable discount as a prerequisite for negotiation in 2016. If proven, this practice, which is contrary to the law, could be the subject of legal action by the Minister for the Economy. Indeed, the fact that a retailer imposes an unavoidable obligation on its*

suppliers at the start of commercial negotiations constitutes an abusive practice"¹.

In 2015, Carrefour, one of the largest French food retail companies, found itself impacted in terms of market share by the integration of the "Dia" group into its market share². This acquisition allowed the company to obtain points of sale known as neighbourhood outlets. This was part of the company's desire to change its sales model in order to reposition itself on the local distribution market. To this end, Carrefour demanded the payment of an additional distribution discount, intended to finance the additional logistical services linked to local distribution³.

3 - The summons by the Ministry of the Economy.

On 9 November 2016, less than 10 months after the start of the investigation, the Minister for the Economy, Michel SAPIN, Martine PINVILLE, Secretary of State for Trade and Crafts, and Christophe SIRUGUE, Secretary of State for Industry, announced in a press release that Carrefour would be summoned to appear before the Commercial Court on 8 November 2016. The summons were based on abusive commercial practices infringing the French Commercial Code. In the summons, the

¹ DGCCRF, Press release, "*The DGCCRF reinforces its control action in a context of tension in commercial relations*", Paris, 12 February 2016.

² Jérôme PARIGI, press article, "*Shares de marché de la distribution alimentaire: les gagnants et les perdants de 2015*", LSA conso, 12 December 2015.

³ Yves PUGET, press article, "*Décryptage de la condamnation de Carrefour à cesser ses pratiques restrictives de concurrence envers ses fournisseurs*", LSA conso, 30 March 2021.

Ministry asked the Commercial Court to impose a civil fine and to order Carrefour to put an end to its illegal practices. In this press release and following the DGCCRF investigation, the Ministry blames "*Carrefour for having demanded from its suppliers, without any compensation, an additional distribution discount of a significant amount, the payment of this discount being a prerequisite to the opening of annual commercial negotiations. These practices, which are contrary to the law, are likely to destabilise the economic equilibrium of the sector, to weaken industrial companies and agricultural producers, with possible consequences on employment or, in the long term, the diversity of the offer*". The summons are based on two articles: (i) L.442-6, I, 1° (former) of the Commercial Code, which prohibits advantages granted without consideration in contractual relations within commercial relations and (ii) L.442-6, I, 2° of the Commercial Code, which prohibits significant imbalance in contractual relations.

4 - In its decision, the Paris Commercial Court fully endorses the arguments put forward by the Ministry of the Economy⁵.

In its decision of 22 February 2021, No. RG 2016071676, the Paris Commercial Court, fined Carrefour 1.75 million euros for

restrictive practices of competition towards its suppliers⁶.

The Commercial Court observes the reasoning established by the Ministry of the Economy. It indeed held "*that the practice of obtaining from suppliers a non-negotiable discount, presented as a prerequisite for commercial negotiation, without allowing suppliers to verify the basis and justification for it in terms of logistical costs, and by refusing to grant compensation for the RCD, even though the retailer was imposing on some of its suppliers a significant cost that was higher than the logistical costs already covered by the distribution discounts (RDD), constitutes a submission or an attempt to submit to a significant imbalance in the rights and obligations of the parties to the benefit of the CARREFOUR chain and to the detriment of its suppliers, and contravenes the provisions of the former Article L 442- 6, I, 2° of the French Commercial Code.*" In this case, the court noted two things: firstly, that there was no consideration, but also that it was a submission to a significant imbalance. In other words Carrefour was trying to use its dominant position within the negotiations to gain a major economic advantage despite potential economic risks for their supplier. The Court of First Instance noted that Carrefour had forced its suppliers to accept

⁴ Ministry of the Economy, Press release, "*Michel SAPIN, Christophe SIRUGUE and Martine PINVILLE announce the summons of the CARREFOUR chain before the commercial court*", Paris, 9 November 2016, N°222.

⁵ Jean-Christophe GRALL, "*Négociations commerciales : condamnation de l'enseigne carrefour par le tribunal de commerce de Paris à cesser ses pratiques restrictives de concurrence envers*

ses fournisseurs et au paiement d'une amende de 1.75 millions d'euros", Grall-legal.fr, March 2021.

⁶ Ministry of the Economy, DGCCRF Press release "*Négociations commerciales: une enquête de la DGCCRF conduit à la condamnation de l'enseigne Carrefour à une amende de 1,75 millions d'euros*", Paris, 12 March 2021.

this discount by means of retaliatory measures along with graduated scale of sanctions including, in particular, the prohibition of access to the supplier's shops by the sales force, the stopping of the launch of innovations, or even delisting – all constituting threats hanging over suppliers who dared to refuse this type of discount. Regarding the significant imbalance, the court considered a double basis for the imbalance which concerns both the discount itself and the conditions of its application to the company's suppliers. Carrefour claimed that the imbalance was of a global tariff nature, which was refuted by the Court.

The Court also noted that although the burden of proof rests with the party claiming a violation of a rule of law it was up to the defendant to demonstrate that the compensatory measures granted allowed for a rebalancing and prevented the significant imbalance. The Court determined that the information provided by Carrefour did not allow the suppliers to verify the basis of the additional distribution discount and its justification with regard to logistics costs. At the same time, Carrefour imposed a significant cost on its suppliers that was higher than the logistical costs already covered by the distribution discounts.

The Paris Commercial Court ruled that within the meaning of the former Article L.442-6,I,2° of the Commercial Code⁷, the discounts imposed by Carrefour on its suppliers constituted an imbalance in the rights and obligations of the parties in favour of Carrefour.

5 - A lucky fine.

Two elements allow the company to get off lightly. Firstly, the operations carried out by the DGCCRF, involving visits and seizures, prevented Carrefour from recovering the entire amount expected from this discount. As a consequence, the practice was not totally successful and did not allow Carrefour to recover the sums hoped for. But secondly, what saves Carrefour is the temporal context of this case. Interestingly, it takes place in the same year as a major advance in the law of restrictive competition practices. Indeed, the law n°2016-1691 of 9 December 2016, known as the "Sapin 2" law, came into force on 1 June 2017. As the facts occurred before the promulgation of this law, the company avoided this new regulation which increased the ceiling of fines incurred in this context⁹.

6 - Carrefour is not a unique case.

As we have seen above, the DGCCRF is increasingly attentive to the commercial

⁷ Yves PUGET, press article, "*Décryptage de la condamnation de Carrefour à cesser ses pratiques restrictives de concurrence envers ses fournisseurs*", LSA conso, 30 March 2021.

⁹ Jérémy BERLEMONT, Press article, "*Pratiques restrictives de concurrence Carrefour condamné*", Actualité du droit, 14 April 2021.

negotiations that determine the prices of products sold in supermarkets each year. Faced with this intensification of controls, we are observing more and more practices in the context of these commercial negotiations being sanctioned. In February 2020, Carrefour, Système U and Intermarché were fined a total of €4 million for "non-compliance with the rules" during the 2019 trade negotiations¹⁰. But the most striking case is that of Intermarché, which is still in progress. In a press release dated 19 February 2021, the Ministry of the Economy announced that Intermarché had been summoned for abusive commercial practices¹¹. These abusive practices, identified by the DGCCRF, are said to be carried out through central purchasing agencies. In particular, the company is accused of having forced 93 industrialists to pay high prices for services of little value. In its press release, ministry of. Economy asked "*the Commercial Court to impose a penalty of 150.75 million euros, commensurate with the seriousness of the practices denounced and corresponding to 1% of the turnover achieved by Intermarché in France*". If the decision is in line with the Ministry's demands, many consider that this case law could have a

¹⁰ Le Figaro with AFP, 'Carrefour fined 1.75 million euros for restrictive competition practices', Le Figaro, 12 March 2021.

¹¹ Ministry of the Economy, Press Release, "Assignation de l'enseigne Intermarché pour des

snowball effect in the field of abusive commercial practices¹².

II. Commentary.

7 - Topical case.

This judgement comes in the context of tense trade negotiations. These tensions have been exacerbated by the economic crisis and cannot be improved given the health crisis. The law on restrictive competition practices is a mean of defending local shops, producers and suppliers against the power of giant food retailers. But another element must be added to the balance, namely the hyper expansion of digital technology, which tends to compete virulently with the large retailers. The major retailers are therefore trying to struggle as best they can against the American giants, who generally do not worry about the fate of the law, as Amazon will do in 2020. This logical resistance from the large-scale distribution sector can indeed impact all the players around them in a negative way. It is therefore difficult to strike a balance in the defence of one side or the other.

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pratiques commerciales abusives", Paris, 19 February 2021, n°689.

¹² Amaury BEAUTRU, Press article, "Bercy claims 151 million euros in fines against Intermarché", Linéaires, 19 February 2021