

Insights

DIFFERENTIATED GENERAL TERMS AND CONDITIONS OF SALE

FRENCH SUPREME COURT SPECIFIES CONDITIONS OF SUPPLIER'S LIABILITY FOR FAILURE TO COMPLY WITH THEIR DUTY TO COMMUNICATE

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SUMMARY

Distribution : In two rulings issued on 28 September 2022, the French Supreme Court clarified the conditions under which suppliers can be held liable for failure to comply with their duty to communicate

Article L.441-1 of the French Commercial Code gives suppliers the possibility to differentiate general terms and conditions of sale ("**GTCs**") "*according to the categories of purchasers of products or services*". The Code also requires that suppliers who draw up GTCs must communicate them "*to any buyer who requests them for a professional activity*." If the supplier doesn't communicate them, they will be liable.

A supplier's ability to differentiate GTCs has many benefits including adjusting prices and giving discounts by categories of purchasers, recalling that the proposed GTCs "*constitute the sole basis for commercial negotiation*".

However, it is likely to generate practical difficulties. For example, when a purchaser receives the GTCs applicable to one of the defined categories of purchasers that they consider less favourable - they may challenge the justification for the differentiation made by the supplier or claim a different purchaser category.

These are the issues that the French Supreme Court ruled on in two cases dated 28 September 2022. While both cases involved a laboratory and the same purchasing grouping company ("**SRA**") within the pharmaceutical sector, there are key takeaways for all suppliers.

BACKGROUND TO THE CASES

In the pharmaceutical distribution sector, laboratories are likely to contract with different categories of purchasers: wholesalers, pharmacies, grouped pharmacies, hospitals, SRAs, etc. The latter are intermediaries between the laboratories and their member pharmacies. They act as buying agents, i.e. in their own name but on behalf of their members. As part of this group purchasing activity, the SRAs are regularly associated with pharmaceutical purchasing centres ("**CAP**"), which store the goods.

One SRA had asked two laboratories for their GTCs.

In the first case, the laboratory had distinguished four categories of purchasers and established as many differentiated GTCs for (i) wholesaler-distributors, (ii) pharmacies, (iii) SRAs and CAPs and finally (iv) hospitals and public hospital establishments. It had communicated to the SRA the "SRA and CAP" GTCs, while the latter requested the communication of the GTCs applicable to pharmacies.

In the second case, the laboratory had established three sets of differentiated GTCs, for (i) independent pharmacies, (ii) grouped pharmacies, and (iii) wholesalers. It had communicated to the SRA the "wholesalers" GTCs when, once again, the latter considered that it should benefit from the GTCs applicable to pharmacies.

THE ISSUE RAISED AND THE IMPACT OF THE FIRST DECISION (CASE NO. 21-20357)

In the first decision, the main issue raised before the French Supreme Court concerned the supplier's justification for the differentiation between its different purchasers: did the supplier have good reasons to differentiate pharmacies from SRAs? If not, should it be considered that the communication of "unjustified" differentiated GTCs was likely to engage the supplier's liability for breach of its duty to communicate?

The differentiation of GTCs must be justified by objective differences between purchasers' situations.

In order to determine whether the communication to the SRA of the "SRA and CAP" GTCs was justified, or whether the latter was justified to request the communication of the ones applying to pharmacies, the French Supreme Court examined whether there were objective differences between these two categories of purchasers.

In this case, the French Supreme Court held that there was an objective difference given that the SRAs contracted on behalf of the pharmacies but in their own name, unlike the pharmacies with which the laboratories "directly deal". The Court specified that it did not matter that the transfer of ownership of the products sold was made directly to the pharmacies, since the contract was concluded by the SRA in its own name, which negotiates the prices and purchases itself.

Consequently, for the High Court, the laboratory's refusal to communicate the GTCs applicable to pharmacies was not wrongful.

Although the difference between pharmacies and SRAs identified in this decision is not necessarily transferrable to all business sectors, the reasoning will be of interest to all suppliers who draw up GTCs: the differentiation of different purchasers must be based on objective criteria. Otherwise, the communication by a supplier of "artificially" differentiated GTCs would constitute a failure of communication – leading to liability.

The communication by a supplier of "artificially" differentiated GTCs would constitute a failure of communication and would lead to liability.

THE ISSUE RAISED AND THE IMPACT OF THE SECOND DECISION (CASE NO. 19-19768)

In the second decision, the French Supreme Court faced a different situation since the laboratory had not drawn up GTCs specific to SRAs. The question was whether the supplier had failed in its duty to communicate and was liable by transmitting GTCs applicable to another category of purchasers.

Where no specific GTCs apply to a purchaser, it is necessary to examine which category it "most closely fits" with regard to the "relationship of the parties as a whole".

In order to determine whether the communication to the SRA of the "wers" GTCs was justified, or whether the latter was justified to request the communication of the ones applying to pharmacies, the French Supreme Court examined which category of purchasers identified by the laboratory the SRA "*most closely fits*", based on the "*relations of the parties as a whole*".

The Court points out that, while "*the supplier is free to define the different categories of purchasers to whom its terms and conditions of sale apply, provided that the criteria defining these categories are objective*", it may refuse to communicate the category-based GTCs "*only if it establishes, on the basis of objective criteria, that the purchaser does not belong to the category in question*".

In this case, the Court agreed with the SRA, considering that (i) the fact that the SRA acts as a buying agent on behalf of pharmacies and (ii) that SRAs, like pharmacies ordering directly, bear storage costs, were decisive similarities with the situation of independent pharmacies.

Accordingly, the Court held that the laboratory was liable by communicating category-based GTCs that were inapplicable to the SRA.

A supplier is liable if it communicates category-based GTCs that are not applicable to the purchaser.

This ruling therefore invites suppliers to be particularly careful; Firstly, when determining the different categories of GTCs they draw up and, secondly, when communicating category-based GTCs to a purchaser who does not clearly fall into one or other of these categories.

RELATED CAPABILITIES

- Antitrust

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