

**CAA of PARIS, 3rd chamber, 07/07/2020, 18PA03828, Unpublished in the Lebon collection****CAA of PARIS - 3rd room**

Reading for Tuesday, July 7, 2020

No. 18PA03828  
Unpublished in the Lebon collection

President  
Mr. President BOULEAU  
Public Rapporteur  
Mrs. PENA

Rapporteur  
Mr. Christian BERNIER  
Lawyer(s)  
IMHAUS

**Full text****FRENCH REPUBLIC  
IN THE NAME OF THE FRENCH PEOPLE**

In view of the following procedure:

Previous litigation procedure:

By three requests, the company Climespace asked the Paris Administrative Court to annul three decisions of December 13, 2016 by which the Director of Enterprises, Competition, Consumer Affairs, Labor and Employment of Ile-de-France, imposed an administrative fine of 125,000 euros against it for breach of the 9th paragraph of I of Article L. 441-6 of the French Commercial Code, together with three decisions by which the Minister of Economy and Finance dismissed its hierarchical appeals or only partially upheld them.

By judgment No. 1709708-1712637-1713282 of October 9, 2018, the Paris Administrative Court, after joining them, dismissed these three requests.

Proceedings before the Court:

By an application and a brief registered on 7 December 2018 and 10 March 2020, the company Climespace, represented by Mr A... F... and Mr E... D..., asks the Court to overturn the judgment and:

- 1°) to annul the decisions of 13 December 2016 of the Director of Enterprises, Competition, Consumer Affairs, Labour and Employment of Ile-de-France, together with the rejections of its hierarchical appeals;
- 2°) to order the restitution of the sums paid in execution of these decisions;
- 3°) to order the publication on the DGCCRF website of a press release informing third parties of the annulment by the Court of the contested decisions;
- 4°) in the alternative, to reduce the administrative fine to fairer proportions and to order the restitution of the surplus sums paid;
- 5°) in any event, to order the State to pay the sum of 20,000 euros on the basis of Article L. 761-1 of the Code of Administrative Justice.

She argues that:

- the procedure followed before the administration, which combines the powers of investigation, accusation and sanction, disregards the principle of impartiality and undermines the fairness of the trial;
- the choice to impose a fine and the amount chosen are neither justified nor motivated; the DIRRECTE moreover failed to respond to this argument before the first judges;
- the delay in payment can often be explained by the incomplete nature of the invoices;
- the provisions of the Commercial Code, which make the payment period run from the date of issue of the invoices and not from the date of actual receipt, are a source of legal uncertainty;
- the date of issue of an invoice is that of its delivery and not the date appearing on it;
- no duty of care is imposed on it in the event of issuing a defective invoice, and the sanctions provided for in Article L. 441-6-VI could not apply to breaches of Article L. 441-3, only the sanctions provided for in Article L. 441-4 being applicable in this case;
- the decisions of the DIRRECTE disregard Directive 2011/EU of 16 February 2011 which only refers to "receipt of the invoice";
- they also disregard the principle of legal certainty and Article 7 of the European Convention on Human Rights;
- the DIRRECTE shortened the payment deadlines without a legal basis, the deadlines in question being clear deadlines;
- 90% of the invoices were paid on time, the breaches are not serious and the sanctions are out of proportion to the alleged cash flow advantage; The contested judgment is marred in this respect by contradictions and errors.

In a brief filed on February 26, 2020, the Minister of Economy and Finance concludes that the application should be dismissed.

The Minister, who refers to the arguments developed at first instance, maintains that:

- the Constitutional Council and the Council of State ruled that administrative sanction procedures did not contravene the principle of impartiality;
- the quantum of the sanction does not require specific motivation and the method of calculation had been discussed in the adversarial phase of the procedure;
- the date of issue of the invoice is that appearing on the invoice which must be established as soon as the service is performed;
- the company was not sanctioned for non-compliance with invoicing rules but for non-compliance with payment deadlines;
- Directive 2011/7 EU was transposed into domestic law and France could enact measures more favorable to creditors;
- compliance with legal certainty is ensured;
- the breaches were of significant gravity and the penalty could be assessed in light of the company's turnover and financial situation.

Having regard to the other documents in the case.

Having regard to:

- the European Convention for the Protection of Human Rights and Fundamental Freedoms,
- the Commercial Code,
- the Code of Relations between the Public and the Administration,
- Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life,
- the General Tax Code,
- the code of administrative justice.

The parties were duly notified of the date of the hearing.

The following were heard during the public hearing:

- the report of Mr. B...,
- the conclusions of Ms. Pena, public rapporteur,
- the observations of Mr. F... for the company Climespace.

Considering the following:

1. By a decision of December 13, 2016, the Director of Enterprises, Competition, Consumer Affairs, Labor and Employment of Ile-de-France imposed an administrative fine of 125,000 euros on the company Climespace, concessionaire of the urban cooling network of the city of Paris, on the basis of the 9th paragraph of I of Article L. 441-6 of the French Commercial Code, which penalizes failure to meet deadlines for the payment of invoices between companies, and ordered the publication of this measure. The hierarchical appeal filed by the company Climespace on February 13, 2017 was rejected by the Minister of Economy and Finance by an implicit decision which was replaced by an express decision of July 16, 2017. The company Climespace is appealing the judgment of October 9, 2018 by which the Paris Administrative Court rejected its requests for the annulment of these decisions.

On the ground of violation of Article 6-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the principle of impartiality:

2. Under the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)"

3. If the proceedings brought by the Director of Enterprises, Competition, Consumer Affairs, Labour and Employment of Ile-de-France with a view to imposing financial penalties on the basis of Article L. 441-6 of the Commercial Code are criminal charges, within the meaning of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it does not follow that the sanction procedure must comply with the provisions of this article, since, on the one hand, the Director, who is competent to take the sanction measures, cannot be regarded as a court within the meaning of the provisions of this article, and, on the other hand, the sanction decision may be the subject of a full appeal before the administrative court, before which the procedure complies in all respects with the requirements of Article 6.

4. Furthermore, the principle of impartiality, which is a general principle of law that applies to all administrative bodies, does not require that the regional directorate for business, competition, consumption, labour and employment, which is not an independent administrative or public authority but a decentralised service of the State, and which does not issue decisions following a judicial procedure, separate the functions of prosecution and sanction.

5. The argument based on the incompatibility of the administrative sanction procedure with Article 6-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the principle of impartiality and the infringement of the principle of impartiality must therefore be dismissed.

On the ground based on the insufficient motivation of the decision:

6. On the one hand, pursuant to VI of Article L. 441-6 of the Commercial Code, the failure of a legal entity to comply with the payment deadlines mentioned in the ninth of I of this article is liable to an administrative fine which may not exceed two million euros. On the other hand, it follows from Article L. 211-5 of the Code of Relations between the Public and the Administration that the motivation of decisions imposing a sanction must include a statement of the legal and factual considerations which form the basis thereof.

7. The decision of 13 December 2016 refers to the minutes of 1 July 2016 which detailed the breaches alleged against the applicant, to the letter of 11 August 2016 by which the administration informed the company of its intention to impose a fine of 150,000 euros, and to the numerous exchanges which gave rise in particular to the calculation of the fine. It recalls that 651 invoices out of a total of 2,614 (i.e. 24.90%) were paid late in 2015, that the amounts paid late represented 25.11% of the invoiced amount, that the average delay was 9.77 days, that this resulted in a cash flow advantage of 146,584 euros, and that as of December 31, 2015, the average payment ratio for trade receivables was 92 days and the average payment ratio for supplier expenses was 178 days, a difference of 86 days in favor of Climespace. In doing so, the administration, which was not required to explain why it imposed a fine rather than a warning or another penalty, nor to specifically justify the amount of the fine, provided sufficient evidence regarding the nature, repetition, and seriousness of the facts it had found to enable the proportionality of the penalty to be usefully assessed. The decision is therefore sufficiently reasoned. Whether the administration was mistaken about the amount of the cash flow advantage it refers to in its decision does not concern the external legality of the decision. The fact that the administration did not respond to the argument based on the insufficiency of the reasoning for the contested decision in its submissions at first instance has no impact on the legality of the decision and the regularity of the judgment.

On the merits of the penalty and the argument based on error of law:

8. Under Article L. 441-6 of the French Commercial Code, in its version resulting from the law of 17 March 2014 relating to consumption: "I. - (...) The period agreed between the parties to settle the amounts due may not exceed forty-five days from the end of the month or sixty days from the date of issue of the invoice. In the case of a periodic invoice, within the meaning of 3 of I of Article 289 of the French General Tax Code, this period may not exceed forty-five days from the date of issue of the invoice. (...) / VI. \_ Failure to comply with the payment deadlines mentioned in the ninth paragraph of I of this article shall be liable to an administrative fine of an amount not exceeding 75,000 euros for a natural person and 375,000 euros for a legal entity. (...) ". Finally, V of Article L. 465-2 of the Commercial Code provides that: "The decision issued by the administrative authority may be published at the expense of the person sanctioned. The decision is always published when it is issued pursuant to VI of Article L. 441-6 or the last paragraph of Article L. 443-1. However, the administration must have previously informed the person sanctioned, during the adversarial procedure set out in IV, of the nature and terms of the planned publicity."

9. It follows from the very terms of the 9th paragraph of I of the aforementioned Article L. 441-6 that the time limit runs "from the date of issue of the invoice". This corresponds to the date affixed to the invoice pursuant to 6° of I of Article 242 nonies A of the Tax Code, and not from the date of receipt of the invoice by the debtor who is the recipient thereof. The administration has therefore applied the texts accurately by assessing late payments from the date of issue of the invoices.

10. If the applicant company argues that the date of issue of the invoices does not necessarily correspond to that of its receipt, that the invoices may be backdated or that, on the contrary, the supplier may delay in sending the debtor the invoice that it has issued, these circumstances have been taken into account by the texts. Thus, Article 289-I-3 of the General Tax Code provides that the invoice is, in principle, issued upon completion of the delivery or provision of services and Article L. 441-3 of the Commercial Code provides that the seller is required to issue the invoice upon completion of the sale or provision of the service and that the buyer must request it.

11. It follows that the "date of issue of the invoice" refers to a well-established, clear, legally defined and intelligible concept for the professionals to whom it is addressed and cannot be confused with the date of receipt. Climespace is not justified in arguing that the administration has instituted hidden payment deadlines. Nor is it justified in arguing that the provisions on which the sanction it criticizes are based infringe the principle of legal certainty, nor that Article 7 of the European Convention for the Protection of Human Rights has been violated.

12. While Climespace maintains that taking into account the invoice issue date as the starting point for the payment period is contrary to the objectives of Directive 2011/7/EU of 16 February 2011, the latter, transposed into domestic law by Article 121 of Law No. 2012-387 of 22 March 2012 on the simplification of the law and the reduction of administrative procedures, merely sets objectives for the Member States of the European Union in the fight against late payment in commercial transactions while specifying that Member States may maintain or adopt provisions more favourable to creditors. Therefore, the argument based on the failure to comply with this directive must be dismissed.

13. Finally, Climespace was not sanctioned for failing to claim invoices from its suppliers on the basis of Article L. 441-3 of the French Commercial Code, but for delaying payment on the basis of L. 441-6 I, paragraph 9 of the same code. It cannot usefully claim violation of the scope of Article L. 441-3 of the French Commercial Code and failure to understand the purpose of the investigation.

14. It follows from the above that the argument based on error of law must be dismissed.

On the proportionality of the penalty:

15. As stated in paragraph 7 of this judgment, the Director of Business, Competition, Consumer Affairs, Labour and Employment for the Ile-de-France region noted that 651 invoices out of a total of 2,614 (i.e. 24.90%) had been paid late in 2015, and that the corresponding sums of €5.4 million represented 25.11% of the invoiced amount. Climespace has not provided any evidence that would show that these delays were attributable to a significant proportion of its suppliers. Climespace's payment delays, by their magnitude and continuous nature, are detrimental to the financial situation of its creditors and to economic public order. The company also provides no evidence that, due to its fragile financial situation, the excessive fine would be likely to jeopardize the sustainability of its business. Therefore, by setting the fine at €125,000, three times lower than the maximum amount that could be imposed, the administrative authority did not impose a penalty that was disproportionate to the breaches noted and the company's financial situation. Consequently, there is no reason to moderate the amount.

16. In view of the facts in question, the interest of third parties in being informed of the company's practices and the educational value of such a measure, the publication on the website of the Directorate for Enterprises, Competition, Consumer Affairs, Labour and Employment of the sanction imposed on Climespace, the duration of which, according to the investigation, was limited to six months by decision of the Minister of the Economy and Finance dated 16 June 2017, cannot be considered disproportionate.

17. It follows from all of the above that Climespace is not justified in arguing that the Paris Administrative Court wrongly dismissed its application by the contested judgment.

On legal costs:

18. Since the State is not the losing party in these proceedings, the conclusions presented by Climespace on the basis of Article L. 761-1 of the Code of Administrative Justice can only be rejected.

DECIDES:

Article 1: Climespace's application is dismissed.

Article 2: This judgment will be notified to Climespace and to the Minister of the Economy and Finance.

Deliberated after the hearing of June 23, 2020, at which sat:

- MC., first vice-president,
  - MB., presiding assessor,
  - Ms. Mornet, first advisor,
- Read in public hearing, July 7, 2020.

The rapporteur,  
Ch. B...The president,  
MC..  
The clerk,  
N. DAHMANI

The Republic orders and commands the Minister of Economy and Finance as far as he is concerned or any bailiffs so required with regard to common law remedies against private parties, to provide for the execution of this decision.

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