

Question A: Abuse of a Dominant Position and Globalization

1. INTRODUCTION

1.1 Provision prohibiting anticompetitive unilateral conduct under the French law

The Article L. 420-2 of the Commercial Code includes two provisions aiming to punish the abuse of dominance. The aforesaid article is located in the Title II named « *Des pratiques anticoncurrentielles* » of the IV book entitled « *De la liberté des prix et de la concurrence* ».

The paragraph 1 of the article forbids the abuse of a dominant position. It is necessary to clarify that, on this matter, the French current practice follows the jurisprudence of the Court. Also, doing a reference to the statistic's data brings further. The big majority of the decisions in which the article L 420-2 of the Commercial Code has been applied, are about the abuse of dominant position and in a large proportion, is made a parallel application of the article 102 TFUE and of the French provision.

As a reminder, the article L. 420-1 of the Commercial Code specifies that the practice that can be punished under competition law are the ones that « *where they have the aim or may have the effect of preventing, restricting or distorting the free competition in a market* ».

The paragraph 2, as for it, forbids the abuse of economic dependence.

This conduct, peculiar of French law, is characterized when a firm, and only a firm facing another firm¹, takes advantage of the situation of dependence in which a commercial partner finds itself, to withdraw undue advantages while the latter doesn't have any alternative solutions².

The existence of a state/ position of economic dependence is appreciated in accordance with of a certain number of criteria as the fame of the trademark, the part of the market that the firm has on the considered market, the importance of the role of a firm into the turnovers of the firm claiming the state of economic dependence from which ensues a situation of inequality³, or the difficulty for the latter firm to find an equivalent solution⁴.

However, the proof of a state of economic dependence is practically difficult to bring in, particularly for two reasons: (i) the importance of the turnover realized by a firm in situation of strength results more often from a choice of commercial strategy of the firm in position of economic dependence and (ii) in the majority of cases, the victim can change quickly his commercial partner without huge costs. This might also be connected to the choice, not literally stated on the text, but done at the moment of the implementation, to retain a very strict interpretation of the text even though the legislator while modifying the aforesaid text intended to allow a less restrictive application of it.

Consequently, most of the requests based on the article L. 420-2, paragraph 2, of the Commercial Code are rejected, without even take into consideration the abusive or not character of the conduct. So, there are only few recent illustrations concerning conducts susceptible to be qualified as abusive.

An analysis of the case law from 2008 to 2014⁵ allows deducting that, from one side, the characterization of a state of economic dependence remains extremely rare, and from the other side,

¹ Cass. Com., 2 décembre 2008, n° 08-10.731.

² Cass. Com., 20 mai 2014, n° 12-26.705 ; CA Paris, 30 juin 2011, n° 09/10289.

³ CA Versailles, 8 avril 2010, n° 07/07662.

⁴ Cass. Com., 10 décembre 1996, n° 94-16.192 ; CA Nancy, 12 mars 2014, n° 646/14.

⁵ Voir point 5.1 (tableaux 5.1).

that the abusive exploitation of such state of dependence, up to now, was never punished by a jurisdiction.

Generally, when a state of economic dependence is characterized, the abusive exploitation is not proven, misdemeanor a breach of the free competition on the market⁶, not being possible to deduct the existence of an abusive behavior only from the existence of a competition clause⁷ or from eventual difficulties of supply⁸.

Also a firm that deliberately positioned itself in a state of economic dependence will no longer be able to claim the application of the article L 420-2 of the Commercial Code⁹.

The aforesaid restrictive interpretation of the article L. 420-2 of the Commercial Code aims to protect the market and not the contracting partner in a position of economic dependence.

However, in the particular sector of the mass-market alimentary retailing, the Competition Authority has just proposed an analysis aiming to a softening of the conditions of characterization of a state of economic dependence, which might eventually lead to concrete developments.¹⁰

Indeed, within the framework of the investigation leading to the aforesaid analysis, the Authority has been questioned by many trader/ economic players regarding the ineffectiveness of the current system, for acknowledge, in a context of strengthening of the purchasing power of the distributors, the abusive conducts implemented by the latter in their relations with their suppliers.

Acknowledging the cumulative application of the current very strict conditions for the characterization of the state of economic dependence, the Authority proposed a redefinition of the state of economic dependence that implies a new formulation of the article L. 420-2 of the Commercial Code, focusing particularly on a criteria that sticks to the capacity of the trader/ economic player to implement a replacing solution within a reasonable delay.

Furthermore, besides the ban of the abuse of dominant position and economic dependence, French competition law forbids the conduct of excessive low prices.

The article L. 420-5 of the Commercial Code bans the conduct based on selling price to the consumers excessively low compared with production, transformation and commercialization costs, once the conducts have or may have as effect to eliminate a market or to prevent the access to a market for a firm or for one of his products.

The application of the provisions concerning the excessively low prices is not limited to the conduct of a firm in a dominant position, contrarily to the provisions of the article L. 420-2¹¹. However, the aforesaid article has a very limited scope since it only aims to the selling of a good produced or transformed by the seller bound for the consumer.

⁶ Voir par exemple : CA Montpellier, 25 octobre 2011, n° 10/0848.

⁷ CA Paris, 23 février 2012, n° 08/15137.

⁸ CA Nancy, 12 mars 2014, n° 646/14.

⁹ CA Paris, 4 décembre 2008, n° 05/23983

¹⁰ ADLC, Avis n°15-A-06 du 31 mars 2015 relatif au rapprochement des centrales d'achat et de référencement dans le secteur de la grande distribution.

¹¹ Voir notamment, CDLC, décision n° 04-D-10 du 1er avril 2004 relative à des pratiques de la société UGC Ciné-Cité mises en œuvre dans le secteur de l'exploitation des salles de cinéma

The evaluation of the abusive character is made in relation with the same calculation method used to track down predatory pricing.

1.2 List of prohibited practices in the provision

The article L. 420-2 of the Commercial Code provides an indicative list of the practices likely to constitute an abuse of dominant position or/ and of economic dependence.

At this regard, are quoted the refusal to sell, a tie-in of sales (tying agreement) or discriminatory terms of sale as well as the termination of established commercial relationships, for the sole reason that the partner is refusing to accept unjustified commercial terms, or product range agreements.

The aforesaid list is not limitative, the Competition Authority and the jurisdiction can appreciate the constituent elements of the abuse.

In practice, the Competition Authority exercises broadly her faculty of judgment concerning the qualification of conducts likely to constitute an abuse of economic dependence or/ and of dominant position.

1.3 History concerning the adoption of the rule.

Under French law, the abuse of a dominant position has been forbidden for 50 years.

Indeed, the article L. 420-2 of the Commercial Code finds its origins into the law n°63-628 of 2th of July 1963 that incorporated into the French law a regulation of the dominant position inspired by the article 86 of the CEE Treaty, nowadays codified at the article 102 of the Treaty on the functioning of the European Union.

The term « abuse » of dominant position, created by the practice, results itself from the merger operated with the aforesaid European treaty.

The introduction has been done by the addition of an additional paragraph to the provisions inserted to the ordinance n°45-1483 of the 30 June 1945 regarding the illegal agreements.

The ordinance n°86-1243 of the 1th December 1986 about freedom of pricing and of competition, amends completely French competition law system, decriminalizing the abuse of dominant position and adding the offense of the abuse of economic dependence.

The article L. 420-2 of the Commercial Code has not been modified since the law n°2005-882 of the 2th of August 2005.

1.4 Other legal rules found in other areas

1.4.1 The practices restrictive of competition of the article L. 442-6 of the Commercial Code: the French cultural exception.

A number of practices likely to constitute an abuse of dominant position and/or economic dependence are equally forbidden *per se* by French regulation against practices restrictive of competition. So, the article L. 442-6 of the Commercial Code draws up a list of abusive practices that involves the civil

liability of their author without being necessary to research the anti-competitive objet or effect of those practices on the market.

The notion of restrictive practices, peculiar of French law, is ambiguous insofar as the list has for objet to punish the commercial practices between commercial partners while being considered as a protection of the economic public order.

The introduction of the restrictive practices of the article L.442-6 of the Commercial Code ensues from the different abuse that were able to born following the integration into French law of the ban of the resale at low costs / at a loss. The creation and the development the text is also, and especially, the result of the ineffectiveness of the ban of the abuse of economic dependence. Furthermore the combined intervention by the legislator on the double ground PAC and PCR modified the abuse of economic dependence and added in 1996 three texts concerning the abuses.

Indeed, in 1996, the law « Galland » established a loss leading threshold, below which the retailers could not sell on their products¹².

The threshold, represented by the price set out on the invoice, had a purely legal nature and it didn't take into account the economic reality of the commercial negotiations.

During the years 2000, the public authorities tried to remedy to the practice called of the retro-commission fees « *marges arrièrè* » by the distributors encouraged by the loss leading threshold.

So, the law was introduced to lower the loss leading threshold, and to include partially the retro-commission fees « *marges arrièrès* » on the calculation of the loss leading threshold, and to strengthen the formalism on the relation between the suppliers and the distributors¹³.

However, the law didn't have the expected results, and this is why the law Châtel n° 2008-3 of the 3dh January 2008 lowered the loss leading threshold¹⁴.

Finally, the law of modernization of the economy of the 4 August 2008 (called « LME »)¹⁵ strived towards the objective of the law Châtel repealing the old article L. 442-6 I 2° b) of the Commercial Code that punished the abuse of a relation of dependence and of purchasing and selling power, that assumed to characterize beforehand the position of purchasing and selling power of the author of the suspicious practice on the market and the ban of the abusive discrimination under the old article L. 442-6 I 1°, liberalizing also the negotiations between suppliers and distributors.

However, this largest freedom left to the economic actors was offset by the introduction of new commercial practices restrictive of the competition.

Can be quoted between the most emblematic restrictive practices:

- **Obligations that create a significant imbalance in the rights and obligations of the parties (2°) ;**
The paragraph 2° of the article L. 442-6 of the Commercial Code states that engages the liability of his author and obliges him to repair the caused prejudice the fact of « *Subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties* ».

¹² Loi Galland, n°96-588 du 1er juillet 1996.

¹³ Loi Dutreil, n°2005-882 du 2 août 2005.

¹⁴ Loi Chatel, n°2008-3 du 3 janvier 2008.

¹⁵ Loi LME n°2008-776 du 4 août 2008.

This new notion borrowed from consumer's law, was added to the article L. 442-6 by the LME aiming to punish the existence of an imbalanced relation of economic strength between the parties.

The Constitutional Council recognized the constitutional validity of the article L. 442-6 I. 2° of the Commercial Code, reminding that the notion of "significant imbalance" had been précised by the judge, particularly by the European's ones, and that it sufficient made a reference to the jurisprudence concerning consumer's law to award to the notion a definition sufficiently clear and precise aiming to not misjudge the article 8 of the Declaration of rights of man and of the citizens¹⁶.

The imbalance is evaluated considering the general economy of the contract and its effects on the parties.

However, it was admitted that some clauses characterizing an imbalance, established by the absence of reciprocity or by the disproportion between the obligations of the parties, may be considered illicit independently from their effects.¹⁷

Consequently, it won't be necessary to demonstrate that the clause effectively was applied and or that the aforesaid clause effectively has harmed one of the two parties for claim the liability of his author.

The definition of the outlining of this recent notion is still going on. At the time, are punished only the situation in which a commercial partner has deliberately implemented a contractual imbalanced relation in which it is taken advantage from the situation of legal or economic weakness. Also the imbalance, must be permanent, manifest and indisputable¹⁸ and the sanction « *has to be excluded it only the analysis of one clause, considered independently from the contract that contains it, allows to conclude the existence of a significant imbalance* »¹⁹.

For example²⁰, it was punished one of the clause imposed only for the benefits of one of the commercial partners that was written in general terms and without any limitation on its implementation²¹, or were also punished termination clauses.²²

- **Abruptly breaking off an established business relationship (5°) ;**

The article L. 442-6 I, 5° of the Commercial Code bans the fact of « *Abruptly breaking off an established business relationship, even partially, without prior written notice commensurate with the duration of the business relationship and consistent with the minimum notice period determined by the multi-sector agreements in line with standard commercial practices* ».

The text of the article L. 442-6 I, 5° of the Commercial Code retains only the criteria of the duration of the business relationship for the evaluation of the abruptly character or not of the breaking, but the jurisprudence takes also into account others criteria such as:

- The importance of the business volume exchanged ;

¹⁶ Cons. const., décision du 13 janvier 2011, n° 2010-85 QPC, DARTY.

¹⁷ CA Paris, 1er Octobre 2014.

¹⁸ CA Paris, 23 mai 2013, n° 12/01166.

¹⁹ TC Évry, 7 février 2013, n° 2009/F00727, Min. de l'Économie, de l'Industrie et de l'Emploi c/ SNC SPAL Boissons
²⁰ Voir aussi les décisions récentes Com. 3 mars 2015, Ministre de l'Économie c/PROVERA France et Ministre de l'économie c/Eurachan

²¹ TC Paris, 20 mai 2014, n° 2013/070793.

²² CA Paris, 7 juin 2013, n° 11/08674 ; CA Rouen, 12 déc. 2012, n° 12/01200.

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Commentaire [1]: Reference to Cour the Cassation

- The existence of an exclusivity agreement between the author of the breaking and the victim;
- The necessary time for the reconversion as remedy to the disorganization resulting from the breaking;
- The regular progression of the turnovers;
- The state of economic dependence of the victim in relation to the author of the breaking.

The state of economic dependence of the victim of the breaking is consequently not a condition for the application of the article L. 442-6, I, 5° du Commercial Code but may be taken into consideration for appreciating the delay of a reasonable notice that should have been agreed²³.

The notion of « abruptly » may ensue from the absence of a written notice, or from the inadequacy of the given notice. Furthermore, the absence of motivation of the breaking is indifferent for the appreciation of the abruptly character or not of the breaking, except in the case of fault or of non-fulfillment by the other parties of their obligations.

However, an established abruptly breaking of business relationships may be charged to the author of the breaking itself, even if he respects the delay of the standard commercial practices. The judges must analyze if the delay of notice of breaking of established business relationships is sufficient for him to avoid to consider the breaking as abruptly, and if not they must order to the author to compensate the prejudice caused to the excluded society.

Finally, regarding the prejudice suffered by the victim of the breaking, the judges multiply mostly the medium gross margin for the number of months of notice not covered²⁴.

1.4.2 The structural Injunction

The LME of 4 August 2008 confided to the French Competition Authority the power of ordering structural injunction on the sector of the retail trade²⁵.

The law n°2012-1270 of the 20 November 2012 concerning the overseas economic regulation released and completed the powers of the French Competition Authority, following the example of the British Competition Authority, allowing the Authority to deliver structural injunctions.

However, the aforesaid measures provided by the article L. 752-27 of the Commercial Code are applicable only to the overseas collectivities and departments.

The project of law for growth, activity and equality of economic chances, called « Loi Macron », suggests extending the power of structural injunction to the entirety of French territory.

At the time of the present report, the article 11 of the project of law Macron is not yet adopted.

1.4.3 Anti-competitive local practices

The Minister of Economy, through the officers of the DIRECCTE, has, since the regulation of the 13 November 2008, carrying the modernization of the regulation of competition²⁶, a power to deliver

²³ CA Paris, 17 May 2002, n°2000-21198.

²⁴ CA Paris, 12 September 2012, RG n°10/04096

²⁵ Article L 752-26 du Code de commerce

²⁶ Articles L.464-9 et R.464-9-1 à R.464-9-3 du Code de commerce français

structural injunctions for anticompetitive practices with a local dimension. In this case the qualifications are the same, it is the implementation which differs.

The procedure regards anticompetitive practices of all kinds, affecting on or more markets of local dimension, and committed by a firm of which the individual turnover is less than 50 millions of euro and less than 200 millions of euro for the whole of liable firms and when the practices are not falling under the article 101 and 102 of TFUE and only when the Competition Authority doesn't refer itself of the case.²⁷.

Since 2008, 34 affairs were concluded by transactions/ injunctions pronounced by the Minister of the Economy (62 transactions and 80 injunctions) for an individual maximum amount of the transaction on rise (approximately 30 000 € between 2010 and 2012, of 47 000 € between 2013 and 2014 and of 75 000 € between 2014 and 2015). The decisions pronounced concern, firms, interest groupings, trade unions and professionals associations, manly in presence of an exchange of information between competitors.

The amounts of the sanctions depends, according with the Administration, on the degree of implication and equally on the benefit obtained by the firm, author of the practice.²⁸.

The instructions of this file and the connections with the Competition Authority have been précised by decree of the 10 February 2009²⁹.

2. DEFINITION OF 'ABUSE'

2.1 Definition of 'abuse under the French law

It doesn't exist a legal definition of the abuse in the French law.

However, the definition of « abuse » accepted by the Competition Authority and by the French's supervision jurisdictions is the same one that the one resulting by the constant jurisprudence of the European's Courts.

The notion of « abusive exploitation » is an objective notion that concerns the behaviors of an undertaking in a dominant position likely to influence the structure of the market³⁰.

3. EXPLOITATIVE AND EXCLUSIONARY ABUSE

It doesn't exist under the provisions of French law a distinction between exclusionary and exploitative abuse.

²⁷ Montant résultant de la loi du 17 mars 2014

²⁸ Pour une présentation du bilan de cette procédure voir le Réactus de l'AFEC (Association Française d'Étude de la Concurrence) du 13 mars 2014, « Actualité du droit des pratiques anticoncurrentielles de dimension locale », André Marie, Chef du bureau politique de la concurrence à la DGCCRF, www.afec.asso.fr.

²⁹ Décret n° 2009-140 du 10 février 2009 pris pour l'application de l'article L. 464-9 du code de commerce

³⁰ CJCE, 13 février 1979, Aff. 85/76, *Hoffmann-La Roche/Commission*, point 91 ; CJCE, 3 juillet 1991, Aff. C-62/86, *AKZO/Commission*, point 69 ; CJCE, 11 décembre 2008, Aff. C-52/07, *Kanal 5 et TV 4*, point 25 ; CJUE, 17 février 2011, Aff. C-52/09, *TeliaSonera Sverige*, point 27 ; CJUE, 6 décembre 2012, Aff. C-457/10 P, *AstraZeneca AB/Commission*, point 74.

Before to establish a distinction between exclusionary and exploitative abuse, the French Competition Authority opposed the structural abuse (conduct of a firm in a dominant position harming the structure of competition) at the abuse of behavior (conduct of a firm that takes benefits from its dominant position).

From now on, the Competition Authority as the French supervision entities distinguished the exclusionary and exploitative abuse for evaluate the abusive nature, referring to the decisions pounced by the European's Courts³¹.

The Competition Authority précised by an advice of the 14 December 2010, the criteria to distinguish between the exclusionary and the exploitative abuses³².

Firstly, concerning the exclusionary abuse, the Authority considered that those were ranked « *This category traditionally includes strategies that a company in a dominant position pursues to try to discourage, delay or eliminate competitors through methods other than competition on merit: raising artificial barriers to entry, coupling products or services put on the market, predatory pricing, excessive customer retention policy, lock-in' exclusivities, etc.* »³³

Secondly, the Competition Authority added that « *In addition to these so-called crowding-out practices, which competition authorities examine as a priority, so-called abuses of operation also contravene competition law; these consist in a company disrupting the operation of other markets through exorbitant conduct (excessive prices, unjustified discrimination, etc.).* »³⁴

The ranking of the abuse of dominant position by type of abuse, exposed at the point 5.1 chart 5.1h, based on the decisions of punishment pronounced by the Competition Authority during the last five years, demonstrates that no any decision of punishment was pronounced concerning the notion of exploitative abuse.

The national courts align themselves with the jurisprudence of the Competition Authority and of the European's one concerning the distinction between the exclusionary and the exploitative abuses.³⁵

4. PRICE-BASED AND NON-PRICE-BASED ABUSE

Without establishing an automatic distinction between price-based and non price-based abuse (essentially a doctrinal distinction), the Competition Authority bans different abusive price-based practices of a firm in dominant position:

- Excessive pricing ³⁶ ;
- Prix fixing agreement³⁷ ;
- Price discrimination³⁸ ;

³¹ Voir par exemple ADLC, décision n° 14-D-02 du 20 février 2014 relative à des pratiques mises en œuvre dans le secteur de la presse d'information sportive, pt. 114

³² ADLC, avis n° 10-A-29 du 14 décembre 2010 sur le fonctionnement concurrentiel de la publicité en ligne.

³³ Idem, pt.299

³⁴ Idem pt.331

³⁵ A titre d'exemple : CA Paris, 18 décembre 2014.

³⁶ CDLC, décision n° 07-D-13 du 6 avril 2007 relative à de nouvelles demandes de mesures conservatoires dans le secteur du transport maritime entre la Corse et le continent.

³⁷ CDLC, décision n°99-D-45 du 30 juin 1999 relative à des pratiques constatées dans le secteur du jouet.

³⁸ CDLC, décision n°09-D-04 du 27 janvier 2009 relative à des saisines de la société les Messageries Lyonnaises de Presse à l'encontre de pratiques mises en œuvre par le groupe des Nouvelles Messageries de la Presse Parisienne dans le secteur de la distribution de la presse.

- Margin squeeze ³⁹ ;
- Excessively low prices⁴⁰ ;
- Fidelity rebate⁴¹ ;
- Predatory pricing⁴²...

Beyond these types of practices strictly identified by the competition's authorities, the French Competition Authority punishes equally some abusive price-based conducts that do not match those categories.

So, the Authority punished in 2012 two operators of mobile phones for having implemented practices of « price discrimination » that ensued from the commercialisation of unlimited call offers of the clients of those operators towards many number of their own network⁴³.

Considered that the two operators hold a dominant position on their own market of call termination, the Competition Authority judged that this differentiation between *on net* and *off net* call, had the potential effects to create networks and « snowballing » effects likely to exclude the competitors on the market.

N'est ce pas un peu excessif d'évoquer un alignement ?

The national jurisdictions follow the decisional practice of the Competition Authority concerning the price-based and non-price based abuse of an undertaking in a dominant position and especially for the practices strictly identified by the ADCL⁴⁴.

Stricter rules than those contained in Article 102 TFEU in the sense of Regulation 1/2003 Article 3(2):

The article, L. 420-2 paragraph 2 of the Commercial Code punishes the abusive exploitation of a state of economic dependence that cannot be considered as a rule stricter than the ones concerning the abuse of dominant position.

Indeed, this anticompetitive practice, particular of French law, needs the demonstration of difficult conditions for its implementation and may be claimed at the same time than the abuse of dominant position.

³⁹ ADLC, décision 09-D-24 du 28 juillet 2009 relative à des pratiques mises en œuvre par France Télécom sur différents marchés de services de communications électroniques fixes dans les DOM.

⁴⁰ ADLC, décision n°14-D-02 du 20 février 2014 relative à des pratiques mises en œuvre dans le secteur de la presse d'information sportive.

⁴¹ CDLC, décision n°07-D-08 du 12 mars 2007 relative à des pratiques mises en œuvre dans le secteur de l'approvisionnement et de la distribution du ciment en Corse (montants des sanctions réformés par la Cour d'appel de Paris).

⁴² CDLC, décision n°04-D-17 du 11 mai 2004 relative à la saisine et à la demande de mesures conservatoires présentées par les sociétés AOL France SNC et AOL Europe SA.

⁴³ ADLC, décision n°12-D-24 du 13 décembre 2012 relative à des pratiques mises en œuvre dans le secteur de la téléphonie mobile à destination de la clientèle résidentielle en France métropolitaine. Cette décision a fait l'objet d'un recours devant la Cour d'appel de Paris (CA Paris, 19 juin 2014, No 2013/01006) qui a sursis à statuer et saisi la Commission européenne pour avis.

⁴⁴ A titre d'exemple : Cour de cassation – Chambre commerciale – 3 mars 2009 – n° 08-14.435, n° 08-14.464 ; CA Paris – 20 décembre 2012 – n° 2011/05667 ; CA Paris – 20 décembre 2012 – n° 2011/05667 ; Cour de cassation, civile, Chambre commerciale, 6 janvier 2015, 13-21.305 13-22.477 (Orange Caraïbe) ; Cour de cassation, arrêt du 9 mars 2009, pourvoi n°08-14.435.

Finally, contrary to European law, the article L.420-4 of the Commercial Code contemplates the conditions under which a firm may be exempted from an abuse of dominant position.

The article specifies particularly that are not submitted to the provisions of the article L.420-2 of the Commercial Code the practices (i) that result from the implementation of a statute or regulation adopted in application thereof, or (ii) those for which the authors can prove that they have the effect of ensuring economic progress.

However, this provision barely implemented due to the almost systematic rejection by the Competition Authority.

In addition, even if it is not applied, the article L 420-5 of the Commercial Code previously mentioned, is also a matter of the right of the PAC.

5. Enforcement

5.1. Decision-Making Practice⁴⁵

5.1.1 Analysis of the decisions of the Competition Authority regarding unilateral abuse of dominant position

The prohibition of the anti-competitive conducts called « unilateral » calls to the notion of abuse of dominant position of the article L. 420-2 of the Commercial Code, assuming that a firm in a situation of dominance on the relevant market, abuses alone of this position. This assumption is distinguished from the case of an abuse of dominant position called « collective ».

Is here going to be analyzed, from the source, the decisions pronounced by the Competition Authority (below the « Authority ») – public enforcement – and more particularly, where it is possible, the cases of unilateral abuse of a dominant position. We will compare these data to those of other anticompetitive practices (below « PAC ») that we had already picked out.

The chart 5.1 (a) and the figure 5.1 (a) present quantitatively the cases submitted to the evaluation of the Competition Authority, according with the cited anticompetitive conducts, during the last five years.

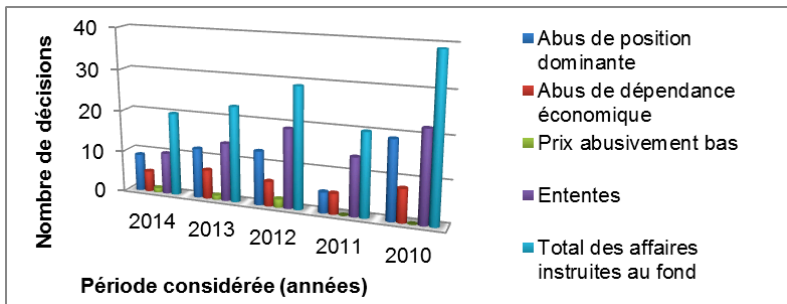
Chart 5.1 (a) Number of affairs resulting in a decision of the Competition Authority in relation to the number of affairs conducted on a judgment on the merits

Years	Abuse of dominant position	Anticompetitive agreements	Abuse of economic dependence	Prices excessively low	Total of affairs conducted on the merits
2014	9	10	5	1	20
2013	12	14	7	1	23

⁴⁵ L'ensemble de l'étude statistique, qu'il s'agisse des tableaux ou des graphiques, a été réalisé, d'une part sur la base des données chiffrées consultables sur les rapports de l'Autorité de la concurrence, et d'autre part en analysant les décisions publiées au Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des fraudes, à moins qu'il n'en soit explicitement indiqué autrement.

2012	13	19	6	2	29
2011	5	14	5	0	20
2010	19	22	8	0	39

Fig 5.1 (a) Graph representing the number of affairs resulting in a decision of the Authority in relation to the number of affairs conducted on a judgment on the merits.



Interestingly, as a preliminary point, is remarkable that not all the practices alleged result in an investigation on the merits, reason why the total amount of the four mentioned practices (abuse of dominant position, abuse of economic dependence, excessively low prices and anticompetitive agreements) is not equal to the number of affaires conducted.

The first statement that can be done is that a decreasing number of cases seem to be conducted by the Authority. On the whole, the proportion of each anticompetitive practice remains globally stable, except for the abuse of economic dependence of which the numbers stays approximately constant despite of the decreasing number of cases. The decisions questioning a pretended anticompetitive agreement (on purple) are quantitatively the most important comparing with other practices, for each one of year considered. The legal foundation of the prohibition of the anticompetitive agreements is also more often cited than the abuse of dominant position either unilateral or collective. We remark that furthermore during 2010 the activity of the Authority was particularly important, and this might be explained, by the will of the Authority to discharge the stock of the oldest files.

Once that the basis of the PAC is cited, under what proportions the Competition Authority pronounces a sanction? We can try to estimate this using the chart 5.1 (b) below.

Chart 5.1 (b) Proportion of cases effectively sanctioned by the Competition Authority according to the cited PAC

Years	Abuse of dominant position	Anticompetitive agreements	Abuse of economic dependence	Prices excessively low
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2014	11,1%	30,0%	0,0%	0,0%
2013	33,3%	35,7%	0,0%	0,0%
2012	23,1%	42,1%	0,0%	0,0%
2011	0,0%	42,9%	0,0%	0,0%
2010	5,3%	50,0%	0,0%	0,0%
Average	14,6%	40,1%	0,0%	0,0%

Statistically, a firm striving towards the fundament of the abuse of dominant position is more likely to benefit of a non punishing decision, than a firm suspected to have been involved on an anticompetitive agreement: the risk is almost three times more important. Interestingly, not any judgment regarding the abuse of economic dependence or the prices excessively low was rendered under the considered period.

Specifically, through the chart Plus 5.1 (c), we can evaluate the treatment of the abuse of dominance distinguishing the case in which they are evaluated individually or collectively.

Chart 5.1 (c) Comparison between unilateral and collective abuse of a dominant position, cited in front of the Competition Authority, followed by an estimation on percentage (en %).

Years	Unilateral abuse of a dominant position claimed	Unilateral abuse of a dominant position sanctioned	Percentage of the abuse of dominant position sanctioned	Collective abuse of a dominant position claimed	Collective abuse of a dominant position sanctioned	Percentage of the collective abuse of dominant position sanctioned
2014	5	0	0,0%	4	1	25,0%
2013	9	2	22,2%	3	2	66,7%
2012	12	2	16,7%	1	1	100,0%
2011	5	0	0,0%	0	0	0,0%
2010	17	1	5,9%	2	0	0,0%

The unilateral abuses of dominant are more often cited than the collective abuses (for each year), but proportionally less punished.

5.1.2 Analysis of the Court ruling regarding unilateral abuse of dominant position

In France the civil, commercial and administrative courts (cf. **point 5.2**) – have a competence regarding competition law in many ways, but not having official data concerning each one of the competent courts, the present analysis would be reduced at the study of the appeals in front of the Appeal Court of Paris (Chambre 5-7) in *public enforcement* on the basis of the article R. 420-5 of the Commercial Code (5.1.2.1), of the appeals to the “Cour de cassation” regarding those decision (5.1.2.2), and finally of the

claims started in front of the civil and commercial jurisdictions on *private enforcement* according with the articles L. 420-7, R. 420-3 et -4 of the Commercial Code (5.1.2.3).

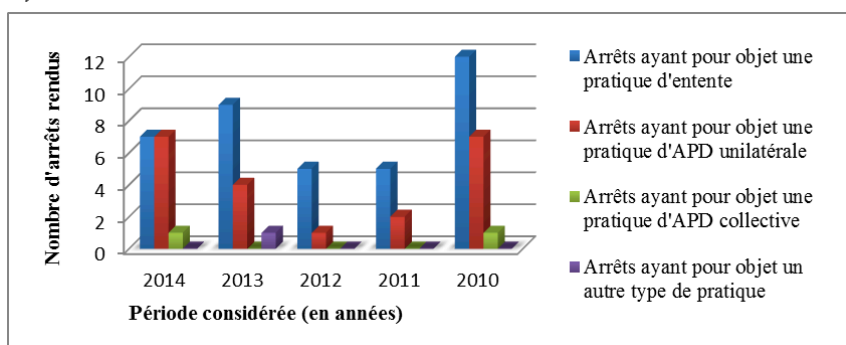
5.1.2.1 Analysis of the Court of appeal of Paris judgments ruled in public enforcement

The chart 5.1 (d) and the figure 5.1 (d) illustrate the quantity of pronounced judgments by the Chamber 7 of the Pole 5 of the Court of Appeal of Paris against a judgment of the Authority, during the last five years.

Table 5.1 (d) Number of judgments of the Court of Appeal of Paris on *public enforcement*

Years	Judgment concerning an anticompetitive agreement	Judgment concerning an unilateral abuse of dominant position	Judgment concerning an unilateral abuse of dominant position	Judgment concerning other types of conducts
2014	7	7	1	0
2013	9	4	0	1
2012	5	1	0	0
2011	5	2	0	0
2010	12	7	1	0

Fig. 5.1 (d) The Graph represents the judgments of the Court of Appeal of Paris regarding *public enforcement*



In an overall, the number of the judgments pronounced by the Court of Appeal of Paris regarding the claims against the judgments of the Authority, was stable during the considered five years, and this, even if the volume of cases treated by the Authority in the same period was decreasing. So, we can deduce that there is an intensification of the appeals aiming to question the decisions of the Authority from 2013. Instead, is remarkable a notable weakening of the appeals during the years 2011 and 2012, that is in part explained by the fall of the number of affaires of 2011 claimed in front of the Authority.

Moreover, it seems that the volume of judgment concerning the unilateral abuse of a dominant position (on red) is always less high or equal to the volume of judgments pronounced regarding anticompetitive agreements (on blue). On average, the volume of affairs treated in front of the Court

of Appeal, concerning anticompetitive agreements get closer to the number of affairs concerning the abuse of dominant position.

5.1.2.2 Analysis of the Supreme Court judgments ruled in public enforcement

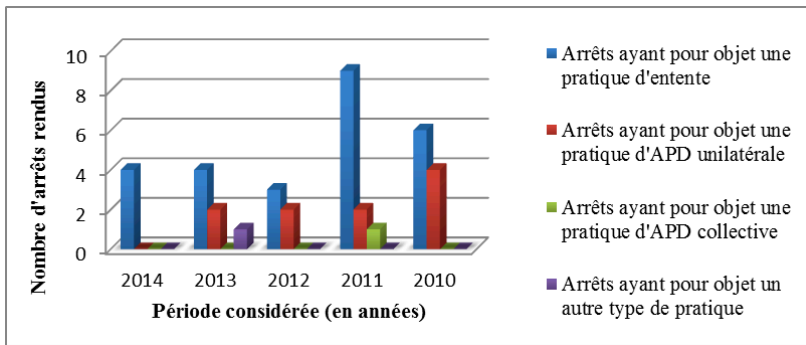
Le chart 5.1 (e) and the figure 5.1 (e) illustrate the number of judgments pronounced by the Court de cassation concerning a decision against a judgment of the Chamber 7 of the Pole 5 of the Court of Appeal of Paris, pronounced on an appeal against a decision of the Competition Authority, during the last five years.

Chart 5.1 (e) Number of power resulted on a judgment of the about *public enforcement*

Years	Judgment concerning an anticompetitive agreement	Judgment concerning an unilateral abuse of dominant position	Judgment concerning an unilateral abuse of dominant position	Judgment concerning other types of conducts
2014	4	0	0	0
2013	4	2	0	1
2012	3	2	0	0
2011	9	2	1	0
2010	6	4	0	0

Fig 5.1 (e)
Graph repres

enting the number of judgment of the Cour de cassation regarding *public enforcement*



In an overall, the volume and the proportion by considered PAC stays stable during the those five years, with two exceptions: in 2011, there is a peak of judgments of the *Cour de cassation* regarding anticompetitive agreements, and on 2014 even not one judgment of the *Cour de cassation* was pronounced regarding the abuse of dominant position. The peak of judgments concerning anticompetitive agreements on 2011 (on blue) is very likely to be the consequence of the peak that was recorded on 2010, the figure 5.1 (d) concerning the judgments pronounced by the Court of Appeal of Paris. The number of judgments pronounced by the *Cour de cassation* concerning the unilateral abuse of a dominant position was also relatively stable but only between 2010 and 2013 (between 2 and 4 affairs), because no judgment was pronounced on this subject in 2014. Concerning the collective abuse of dominant position, only one decision was pronounced on 2013.

5.1.2.3 Analysis of the judgments ruled in private enforcement

The chart 5.1 (f) and the figure (f) illustrate the proportion of judgments pronounced by the jurisdictions of first degree (Tribunaux de grande instance et Tribunaux de commerce) during the last five years. There is no official database available in France on this matter, and that is why we had to use a private study, that is not exhaustive.

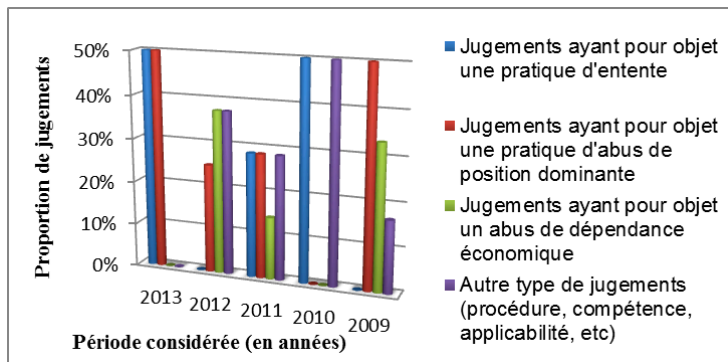
Chart 5.1 (f) Proportion of judgments pronounced concerning *private enforcement*

Years	Judgment concerning an anticompetitive agreement	Judgment concerning an abuse of dominant position	Judgment concerning an abuse of economic dependence	Other type of judgments (<i>procédure, compétence, applicabilité, etc.</i>)
2013	50%	50%	0%	0%
2012	0%	25%	38%	38%
2011	29%	29%	14%	29%
2010	50%	0%	0%	50%
2009	0%	50%	33%	17%

Source : Study realised by the l'AFEC Jeunes on 2014⁴⁶

Fig 5.1 (f) Graph representing the proportion of judgment pronounced on *private enforcement*

Source : Study realised by the l'AFEC Jeunes on 2014



The first remark that could be made regarding those data is the very weak quantity of judgments available (while, as it would be shown at the following point, the judgments of the Court of Appeal are more numerous). For this reason, being weak the representative value of this data, we chose to represent them in percentage.

In an overall, the anticompetitive agreements and the abuse of dominant position are more often in concomitance with the affairs concerning the abuse of economic dependence, which seems to be

⁴⁶ Disclaimer: Ces données chiffrées sont le fruit d'une étude empirique réalisée en 2014 par l'Association Française d'Etude de la Concurrence Jeunes, sur la base des jugements publiés et disponibles sur les sites des principaux éditeurs juridiques français. Cette étude empirique n'a pas la prétention d'être exhaustive et ne prétend pas représenter l'ensemble des jugements rendus par les juridictions françaises en matière de pratiques anticoncurrentielles. En revanche, nous estimons que les données de cette étude pourront constituer une première base de réflexion.

expressed itself more in front of the courts of first degree than in front of the Authority. Likewise, the affairs concerning anticompetitive agreements (on blue) and of abuse of dominant position (on red) are more frequently in an equal proportion.

The analysis continues with the study of the chart 5.1 (g) and of the figure 5.1 (g) that point up the judgments pronounced by the Court of Appeal ruling on *private enforcement*.

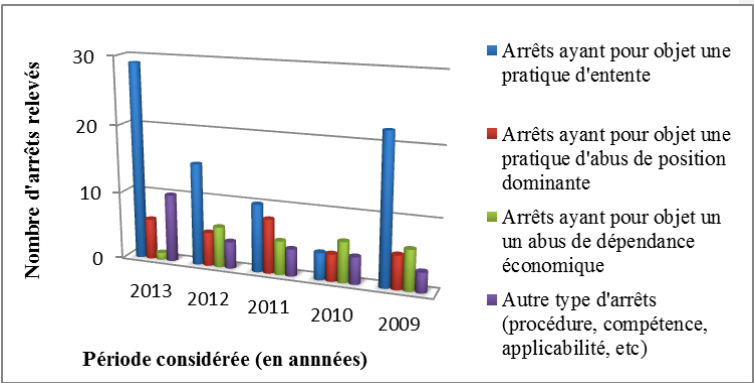
Chart 5.1 (g) Number of judgments pronounced by the Court of Appeal on *private enforcement*

Years	Judgment concerning an anticompetitive agreement	Judgment concerning an abuse of dominant position	Judgment concerning an abuse of economic dependence	Other type of judgments (procédure, compétence, applicabilité, etc.)
2013	29	6	1	10
2012	15	5	6	4
2011	10	8	5	4
2010	4	4	6	4
2009	22	5	6	3

Source : Study realized by the l'AFEC Jeunes on 2014

Fig 5.1 (g) Graph representing the number of the judgments pronounced by the Court of Appeal on *private enforcement*

Source : Study realized by the l'AFEC Jeunes on 2014



At first sight, two peaks appear clearly, on 2009 and 2013, representing the cases cited in front of the Court of Appeal concerning anticompetitive agreements. This observation tends to put into perspective the previous comments (concerning the chart 5.1 (f) and the figure 5.1 (f)), as once again, the conducts of anticompetitive agreements are more frequently cited than the one of abuse of dominant position.

For the rest, it might be remarked that the conducts of economic dependence are enough regularly cited within the claims of the parties, affairs of 2009 and 2012 (and a little less on 2013), that

correspond approximately at the cases collected in front of the Competition Authority (cf. chart 5.1 (a) and figure 5.1 (a)).

The study realized by l'AFEC Jeunes doesn't present a sufficient number of judgments of the *Cour de cassation* concerning the PAC, so the point won't be tackled in our analysis.

5.1.3 Proportion of exploitative and exclusionary abuses in the cases decided by Competition Authority and the Courts

The distinction between exploitative and exclusionary abuse, as clarified above (cf. **3. Exploitative and exclusionary abuse**), is not easy to qualify in practice, insofar as it doesn't exist a detailed study on the subject realized en France.

Aiming to answer this question, we analyzed the types of conducts of abuse of a dominant position punished by the Authority, during the last five year. (cf. Table 5.1 (h)).

Preliminary, it is interesting to notice that the terms might be misleading on the decision of the Competition Authority. The Authority, recalls often, if not automatically, the definition of abuse stated by the judgment *Hoffmann-La Roche* (mentioned above), that mentions an « abusive exploitation » of the position for which the firm is incriminated. But it doesn't necessarily concern the exploitative abuse intended *stricto sensu*. Instead, in certain respects, the Authority qualifies and precise the case where the abuse is likely to be an abuse leading, or potentially leading, to exclusionary effects.

Chart 5.1 (h) Ranking of the abuses of dominant position by type of abuse on the basis of the decisions of punishment of the Competition Authority.

Years	Decision of the Authority	Exploitative abuse	Exclusionary abuse
2014	14-D-08	∅	14-D-08
2013	13-D-21	∅	13-D-21
2013	13-D-20	∅	13-D-20
2013	13-D-11	∅	13-D-11
2013	13-D-06	∅	13-D-06
2012	12-D-25	∅	12-D-25
2012	12-D-24	∅	12-D-24
2012	12-D-06	∅	12-D-06
2011	∅	∅	∅
2010	10-D-39	∅	10-D-39

Generally, it is more difficult to track down the exploitative abuse in the decisions of the Authority. For example, in the decision n°13-D-20 du 17 December 2013 concerning the conducts of EDF on the sector of services intended for the production of photovoltaic electricity, the Authority evaluated that the subsidiary of EDF exploited the trademark and the notoriety of EDF, guarantying to herself a consistent advantage on competition. However, the Authority doesn't clearly state that this conduct constitutes an exploitative abuse. Instead, according to the Authority, the support given by EDF to his

subsidiary society, leads to a risk of exclusionary effects, of marginalization or distortion of the competition game: this conduct was qualified as an abuse of dominant position.

In accordance with this chart, it is clear that the Authority did not pronounce any judgment concerning the exploitative abuse during the last five years, meanwhile into each one of those decisions was characterized an exclusionary abuse. For those reasons, it doesn't seem possible to truly identify the exclusionary and the exploitative abuse in France. The exclusionary abuse are the priority for the competition Authorities.

5.2 Competent Courts and Authorities

The French legislator assigns the litigation concerning the articles L. 420-2 or L.442-6 to special courts or authorities. The prohibition of resale at a loss and imposed resale prices are meanwhile the jurisdiction of the criminal courts of general jurisdiction.

- Article L.420-2 of the Commercial Code:

It is proper to distinguish the sanction contemplated for the abuse of dominant position and the one of the abuse economic dependence under the civil litigation.

The Competition Authority (ADLC) is an administrative and independent authority that has the power to record a competition « infringement », and to sanction or exempt it. The General Direction of competition, consumption and repression of frauds conducts also competition investigations.

The ADLC can pronounce injunctions and fines that cannot exceed the 10 % of the amount of turnovers of the exercise preceding the one during which the conducts were implemented, and the fine has to be proportionate with the gravity of the alleged facts, to the importance of the damage caused to the economy and to the situation of the firm or organism punished, or of the group from which the firm comes from, and to the potential reiteration of the conduct. These sanctions are determined individually for each firm or organism sanctioned and each one is motivated. The Authority can also adopt conservative measures or even decision giving mandatory effects to the engagements signed by the firms.

Concerning the so called **PAC locales**⁴⁷, the Ministry of Economy can commend to the firms to put a term to the recorded anticompetitive conducts and to pay to the State an amount which may rise to 150 000 € within the limit of 5 % of their turnovers in France. If the firm refuses to obey to the injunctions and /or transactions, the case is transmitted to the Competition Authority.

According to the article L. 420-6 of the Commercial Code, a criminal court can also be referred and can punish any physical person that would have took a personal and determinant part into the conception, the organization, or the implementation of the conducts relevant under the article L. 420-2. However these provisions are not applied to abusive practices. No transmission of case occurred to date according to our information.

Sectoriel régulateurs as the Autorité de régulation des communications électroniques et des postes,

⁴⁷ Pour la particularité de ces pratiques, v. ci-dessus

Commission de régulation de l'énergie, Conseil supérieur de l'audiovisuel, have a power to sanction in situation that sometimes may concern the abuse of dominant position or of economic dependence. The risks of having contradictory decisions delivered by the Authority or by the sector-based authority are limited through the existence of bridges provided by the legislator (procedures of reciprocal consultations).

Moreover, the Conseil d'État estimated that: « *Must be respected, during the procedure of punishment in front of a regulator authority, the guarantees imposed by the article 6 of the European convention for the protection of human rights and fundamental freedoms that aim to guarantee, from the beginning of the procedure, its equitable character, by the respect of the contradictory debate.* »⁴⁸

The Constitutional Council clarified the conditions within the Authorities of regulation can exercise the power of sanction, in respect of the principle of impartiality⁴⁹.

The decisions of the Authority can be subjected, within the delay of one month, of an appeal for quashing or reforming it, in front of the Court of Appeal of Paris⁵⁰. The appeals have not suspensive effects. However, the first president Court of Appeal of Paris can order a stay of execution if the decisions lead to excessive consequences or if a new fact intervenes.

The judgments of the Court of Appeal can be the object of a power on cassation within a delay of one month following his notification. The power has not suspensive effects. The article **L. 464-8** allows the President of the Competition Authority to form an appeal in face of the Cour of Cassation against the judgment of the Court of Appeal of Paris, which quashed or reformed a decision of the authority.

If the Authority is referred of a claim of protective measures, its decision can be the object of an appeal within the maximum delay of ten days after the notification⁵¹. The Court of Appeal of Paris decides then within a delay of one month.

The ADLC is not competent to judge claims for quashing administrative acts, as are competent the administrative courts, as for the claims of damages and interests or the claim of annulment of contract of private law, that are submitted to the civil courts.

The conduct mentioned by the article L. 420-2 can be the object of an action for compensation or injunction/ cessation by the victim. The private action can be started in the presence of a definitive decision by the competition authority that verified the violation/ infringement of competition law (action **follow-on**), or in the same time then the public action (parallel actions) or even without that any competition authority pronounced a previous decision concerning the conducts or, conversely, before any decision of that kind intervened. (action **stand alone**).

The article L. 420-7 of the Commercial Code stated the the specialized court of civil law engaged to know of the «*disputes relating to application of the rules laid down in Articles L. 420-1 to L. 420-5 and*

⁴⁸ CE Sect., 27 octobre 2006 M. Parent n°276069 n°277198 et n°277460

⁴⁹ Cons Constit. 2013-331, QPC du 05 juillet 2013

⁵⁰ C. com. art. L. 464-8

⁵¹ C. com art. L. 464-7

Articles 81 and 82 of the Founding Treaty of the European Community, and those in which the said provisions are invoked». Also, eight courts of appeal and eight commercial courts (Bordeaux, Fort-de-France, Lille, Lyon, Marseille, Nancy, Paris, Rennes) profit since the 1th of January 2006 of an exclusive competence concerning anticompetitive conducts. The Court of Appeal of Paris is the only Court invested of the power to decide on the appeals formed against the judgments concerning litigation on the enforcement of competition law.

In French law the judgments pronounced by the Competition Authority do not benefit of any force or « res judicata » on the judgment of the civil or administrative jurisdictions. However, is contemplated an exception concerning the class action.

From the loi Hamon of the 17 March 2014, the article L. 423-1 of the Consumer Code stated that « An association for the defence of consumers that is representative at the national level and approved in accordance with article L. 211-1 may bring an action before a civil jurisdiction in order to obtain redress for individual damage suffered by consumers placed in an identical or similar situation and having as its cause a failure by one or the same professionals to comply with their legal and contractual obligations: With respect to the sale of goods or the supply of services; Or when such damages result from anticompetitive practices as defined in Title II of Book IV of the Commercial Code or articles 101 and 102 of the Treaty on the Functioning of the European Union».

According with the article L. 423-17 of the Consumer Code: « the professional's liability can only be held within the framework of the action mentioned at the article L 423-1 that on the basis of a decision delivered against the professional by the national of European competent authorities or court, acknowledging the infringements and no longer likely to be the subject of an appeal on the part relating to the finding of the infringements. In this case the infringements of the professional are considered indisputable established for the application of the article L 423-3».

The law establishes also the « follow-on » action, subjecting it to the exhaustion of the legal remedies, and also the primacy of *public enforcement*. This primacy doesn't prevent however, from the introduction of the class action before that a decision of the Competition Authority became definitive, and the referred judge must only stay to decide, as long as the decision of the Competition Authority is not definitive. Furthermore, the appeals blocking the judgment on the liability are the ones that are based on the « establishment of an infringement » and not the one that for example would be based only on the determination of the sanctions in case of not contestation of the grievance.

Article L.442-6:

The entry into force the 1th December 2009, of the le decree n° 2009-1384 of the 11 November 2009⁵² codified at article D 442-3 of the Commercial Code, confers the litigations concerning the article L. 442-6 of the Commercial Code to the same specialized courts as in regard to the anticompetitive conducts. The specialized courts have an exclusive competence in the moment where the plaintiffs based his demand, even subsidiarily, on the provisions of the article L442-6 of the same code the *Cour de cassation* considered that« the determination of the competent Court is not subjected to the exam of the

⁵² JO 15 nov. 2009, p. 19761

legitimacy of the claims»⁵³.

The void/nullity, the refund and the amend/redress are civil sanctions that may be claimed by the victims. The victims may rather appeal to the MARL, and particularly to the arbitration. The Cour de cassation clearly stated that the article L. 442-6-I-5° of the Commercial Code doesn't foil the application of an arbitration ⁵⁴ or of a mediation clause at the condition, however, that it would stay within the framework of its object.⁵⁵.

To compensate the incitation of the latter the legislator allowed the intervention of the public authorities.

The article L.442-6 III confers to the Ministry of Economy, to the state prosecutor and to the president of the Competition Authority⁵⁶ the power to act in front of the tribunal to stop the conducts restrictive of the competition, record the nullity of illicit clauses or contracts, order the refund of the undue payments done in application of void clauses or to repair the damages that resulted from this and to pronounce a civil fine against the author of the aforesaid conducts.

The *Cour de cassation*⁵⁷ and then the Constitutional Council⁵⁸ and the European Court of human rights⁵⁹ judged that the Ministry exercises an independent and not a representative action.

So, the ministry can seek the payment of the amounts on behalf of the contractors that do not, or do not want to claims them. These amounts do not belong to him, and they are delivered to an account of the Public Treasure and the victims can claim them from there.⁶⁰.

The Constitutional Council however introduced a reservation: it is necessary that the victim is being informed of the introduction of the action⁶¹. This reservation is not accepted by the CEDH. The judge of merits apply the reservation of the judges of the of the Constitutional Council in a strict way, searching each time if the information was acknowledged by the third part hurt⁶²

At the aforesaid action granted to the Economy Minister, it must be added the power conferred to the agents pointed by power under the conditions stated at the paragraph II of the article L. 450-1 of the

⁵³ Cass.com, 26 March 2013, n°12-12685

⁵⁴ Cass. 1^{re} civ., 8 July 2010, n° 09-67013, Sté Doga c/ Sté HTC ; Cass.civ 1ère, 25 Juin 2014, n° 13-23669

⁵⁵ Com, 12 Juin 2012, n°11-18852

⁵⁶ Dans une espèce ayant donné lieu à une action du Président de l'Autorité de la concurrence sur le fondement de l'article L. 442-6 du code de commerce, et dans laquelle le Ministre de l'économie était intervenu, la faculté pour le Président de l'ADLC d'interjeter appel était contestée. Il a été jugé que puisque le président de l'ADLC peut agir sur le fondement de l'article L. 442-6 III du code de commerce, il peut exercer les voies de recours comme cela est d'ailleurs expressément prévu à l'article R. 442-1, et donc interjeter appel, en dépit du fait que l'alinéa 2 de l'article L. 442-6 III, qui énumère les demandes pouvant être formulées, ne vise que le ministre et le ministère public (CA Caen, 1ère ch. civile, 26 mars 2013, Président de l'ADLC c/ société ... , RG 11/03883, un pourvoi a été formé contre cet arrêt).

⁵⁷ Com, 8 July 2008, n° 07-16761

⁵⁸ CC, 13 May 2011, n°2011-126 QPC

⁵⁹ Cour européenne des droits de l'homme, Galec contre France, 17 janvier 2012, n° 51255/08.

⁶⁰ CC, 13 mai 2011, n°2011-126 QPC ; TC Paris, 14 mai 2013, Société ... c/ Ministre, RG n°12/12993 (un appel a été formé contre ce jugement).

⁶¹ CC, 13 mai 2011, préc.

⁶² Cour d'appel de Nîmes, 26 janvier 2012, RG 09-05026 ; CA Paris, 20 nov. 2013

Commercial Code, to research and to record the violations or the breaches of obligations stated at the title IV of the book IV, to order, after a contradictory procedure, to all professional, giving them a reasonable delay, to conform themselves at their obligations and to stop all illicit actions and to remove all the illicit clauses. In virtue of the paragraph II of the article L. 465-1, when the professional did not defer under the given delay an injunction, that was notified to him in reason of a violation or a breach liable to be punished with an administrative fine, the administrative Authority charged of competition and consummation might pronounce on behalf of him and administrative fine of which the amounts cannot exceed 3 000 euro for a physical person and 15 000 euro for a legal entity. Furthermore, the law *Hamon* subjects numerous breach stated at the title IV of book IV to this new administrative fines , allowing each time an amount maximum of 75 000 € for physical person and of 375 000 € for legal entities ; those fines might be cumulative with the ones pronounced for not having respected the injunction.

Finally is desirable to notice the particular role of the Commission of exam of commercial conducts (CEPC). Even if it doesn't have of a power of punishment under the strict sense of the term, the Commission created by law of 15 may 2001 aims to give advises and recommendations concerning the questions, the commercial or public documents and the conducts concerning business relationships between producers, suppliers and resellers, that are submitted to it.

The commission can also decide to adopt guidelines regarding the question based particularly on the development of the good commercial conducts. It has a role of regular observation of these practices.

5.3 Approach Followed by Competent Courts and Authorities

The ADLC doesn't publish guiding lines for the evaluation of the abuse or even of the anticompetitive conducts in general. In fact, the "*document cadre pour soutenir les programmes de conformité dans les entreprises*" doesn't concern the notion of the abuse but only its sanction.

The thematic study elaborated by the ADLC concerning local market, on his the report of 2013 contemplates many cases of abuse of dominant position in this particular context.

Also, it might be noticed that the French courts do not deviate scarcely into their evaluation of the conducts referred by the article L.420-2 of the Commercial Code « *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* » published by the European Commission the 24 February 2009. However, contrarily to European law, French law stipulates exemptions for the abuse of dominant position.

The article L. 420-4 of the Commercial Code enforces a system of exemption identical for all the anticompetitive conducts. The aforesaid article states that «The following practices are not subject to the provisions of Articles L.420-1 and L. 420-2: 1° Those that result from the implementation of a statute or regulation adopted in application thereof»

The aforesaid exemption is rarely accepted and it is applied only if the recorded conducts are the

direct and necessary consequence of the cited text⁶³.

The article L. 420-4, I, 2o exempts only the conducts « for which the authors can prove that they have the effect of ensuring economic progress, including by creating or maintaining jobs» and the article L. 420-4,II «Certain categories of agreement or certain agreements, in particular when they are intended to improve the management of small or medium sized undertakings, may be recognized as meeting these conditions by a decree adopted following a favorable opinion from the Competition Authority».

However, it should be noted that this last possibility of exemption was applied with parsimony.

It would be desirable, within a concern of foreseeability of solutions and of legal security-certitude that the Competition Authority would publish such types of guide lines for the evaluation of the anticompetitive practices.

But aiming to clarify the approach of the abuse on the market, it is necessary to revise the organization of the French law particularly the articulation between the articles L.420-2 and L.442-6 of the Commercial Code and the complementarity between civil law of obligations and competition law. As an example of this tendency, the recent project of law reforming the general asset of contract's law, but also the proofs of the obligations, generalizes the abusive clause with the faculty for the judged to remove the clause in case of significant imbalance between the parties. (new art. 1169)⁶⁴,

⁶³ Avis n°03-A-21 du 31 décembre 2003, Décision n°03-D-03 du 16 janvier 2003 ; Décision n°08-D-06 du 2 avril 2008

⁶⁴ http://www.justice.gouv.fr/publication/j21_projet_ord_reforme_contrats_2015.pdf