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Abuse of Dominance under French Law: Desirable Evolutions

Louis Vogel and Joseph Vogel
Vogel & Vogel

Under French law, the concept of abuse of dominance covers three rather diverse kinds of offences:

- abuse of a dominant position (article L420-2(1) of the Commercial Code);
- abuse of economic dependence (L420-2(2) of the commercial Code); and
- abusively low pricing (L420-5 of the Commercial Code).

The French notion of abuse of a dominant position is largely inspired and derived from EU competition law. Article L420-2(1) of the Commercial Code and its relevant case law are in fact substantially comparable to article 102 of the TFEU and its judicial interpretations. As with restrictive agreements, article 420-4 of the Commercial Code provides for exemptions for abuses of dominant position. Such a practice is always examined by reference to a specific market.

Economic dependence, however, is assessed with respect to inter-business relations. The statute was originally meant to protect suppliers against abusive practices of large retail outlets, but has mostly been invoked by distributors for refusal to supply or other discriminatory practices on the part of suppliers. Above all, the success of article L420-2(2) has been limited as, since 1987, the defining conditions of the prohibition have rarely been met.[1] Article 420-4 of the Commercial Code also provides for exemptions for such practices.

Finally, article L420-5 of the Commercial Code, which prohibits excessively low prices, completes this legislative arsenal. It requires demonstration that the perpetrator holds sufficient market power to eliminate another undertaking or prevent it from gaining market access. Such practices cannot be exempted under article 420-4 of the Commercial Code.

In case of an abuse of dominance, the relevant French authorities to refer to are the Competition Authority (which investigates infringements and imposes fines) and the specialised commercial and civil courts (for civil remedies).[2]

Abuse of a dominant position

According to the wording of article L420-2 of the Commercial Code, the abuse of a dominant position is prohibited but the dominant position itself is not. In other words, all behaviour by an undertaking in a dominant position is not abusive. Behaviour must be abnormal (ie, beyond what is necessary to protect the legitimate interests of the undertaking in question).[3] Furthermore, a dominant position can be individual or collective. Accordingly, the expression 'collective dominant position' should be understood as a dominant position held by two or more economic entities legally independent of each other, provided that from an economic point of view they present themselves or act together on a particular market as a collective entity.[4]

Article L420-2, like article 102 of the TFEU, provides no definition of a dominant position. The French Competition Authority uses a definition of the dominant position consistent with the European law definition, consisting of 'a position allowing it to evade competition from other operators present on the same market'.[5]

Market definition

The relevant market combines the product market (attributes and properties of products or services,[6] prices, conditions of production), the geographic market, and the more rarely mentioned temporal market.

The concept of a relevant market implies that effective competition can exist between the products that are part of it. This in turn presupposes a sufficient degree of interchangeability in terms of use for all the products included in the same market.[7]

As under EU law, consumer behaviour largely determines the limits of a market. According to the Paris Court of Appeal, two products belong to the same market from the demand side if they are sufficiently substitutable.[8] This descriptive approach is sometimes supplemented by an econometric analysis, with the test for cross-elasticity of demand being the most-often used out of the available methods. This test consists of measuring the relationship between price fluctuations of one product against the sales of another.

Dominant position

The dominant position of an undertaking is simply the legal translation of its market power, which itself is a reflection of the degree of elasticity of supply and demand: the more consumer demand is insensitive to variations in price (inelasticity of demand) and the more difficult it is for other offerors to adapt their production to meet the same need (inelasticity of supply) then the greater the market power of the company in question will be. This is directly related to the market share held by that undertaking.

The Competition Authority considers many factors in establishing whether an undertaking is in a dominant position or not, such as:

- the relative disproportion in market shares between the leading undertaking and its competitors;[9]
- the economic structure of the market and, in particular, the intensity of competition in the market and the possibility for competitors to enter the market;
- the corporate structure of the undertaking (market leadership, brand image, etc);
- a specific competitive advantage (commercial organisation, diverse product range, know-how, etc); and
- certain other behaviour and performance criteria.

Types of abuse of a dominant position

For an activity to fall within article L420-2, the Competition Authority requires that it be both anti-competitive and abusive.[10] In its opinion, this is normally the case with 'practices having as their object or effect the elimination of competitors', or practices by which

undertakings try 'to eliminate competitors or to prevent the arrival of new competitors on the market'.[11]

Article 420-2 of the Commercial Code sets out a non-exhaustive list of abuses, including:

- a particular refusal to sell;
- tied sales;
- discriminatory sales conditions; and
- range agreements.

Other types of behaviour that may amount to abusive practices include:

- abusive pricing practices such as predatory pricing, awarding fidelity rebates, market share rebates or tied discounts, tying and bundling and price alignment;
- refusal to buy or supply;
- engaging in vexatious litigation; and
- squeezing out competitors, etc.

A causal link is required between the dominant position and the abuse committed in all cases.

Effect on the market

The effect of abuse on the market is one of the most delicate questions in French law, which is currently very confusing on this specific point (see below).

Exonerations

Finally, in contrast with European law, abuses of dominance are subject to individual exemptions in the same manner as agreements, although they are rarely granted. Thus the practices of a dominant undertaking that fall under the scope of article L420-2 may be justified when they result from the application of a statute or a regulation for the application thereof.[12] An exemption may also be granted where the effect of the abusive practice is to ensure economic progress. According to the Court of Cassation, such is the case when the abuse is the consequence of a high-quality after-sales service being set up[13] or of a franchise network dedicated to the presentation and enhancement of luxury goods.[14]

Abuse of economic dependence

The prohibition under article L420(2) of the Commercial Code seeks to control the behaviour of undertakings who, while they do not hold a dominant market share in a particular product, nevertheless possess considerable economic power that they may be tempted to abuse.

A state of economic dependence within the meaning of article L420-2(2) of the Commercial Code comes with the following criteria, all of which must be present simultaneously:

- supplier brand notoriety;
- importance of its market share and the share of turnover with regard to the distributor; and
- the lack of an alternative solution.

Dependence is thus measured above all by reference to one undertaking's relative position of strength over another.

The burden of proof of economic dependence lies with the party claiming it. To this regard, it should be noted that even though a lack of figures does not prevent the supplier's position from being established, it is however essential that the elements of proof coincide for the finding of a state of economic dependence.[15] To establish a presumption of dependence, it is not necessary that all criteria point to the same conclusion; the concurrence of an adequate number of factors will suffice.[16]

Only the behaviour that is abnormal from the viewpoint of competition can fall within article L420-2(2).

The success of article L420-2(2) has been limited as it is rarely applied in practice. The ban is nevertheless maintained.[17] The reasons for its failure are numerous: a lack of complaints due to dependent undertakings' fears of reprisal; difficulty proving dependence, behaviours induced by a mandatory legal text;[18] or that the abuse has a restrictive effect on the market, etc. In response to these difficulties, lawmakers developed new rules on dependence and recent amendments of article L420-2 seek to ease somewhat the requirement of a negative impact on the market by eliminating the condition that there be no alternative solution.[19] However, recent modifications did not generate the results expected.

Abusively low pricing

Article L420-5 of the Commercial Code prohibits excessively low prices. Unlike abuses of dominance and abuses of economic dependence, this type of practice is not eligible for exemption under article L420-4 of the Commercial Code.

This practice requires the meeting of three cumulative conditions:

- the price must be a consumer sale price;[20]
- the proposed price level must not cover production, transformation and marketing costs;[21]
- the price has to reveal a will of eviction or must contain a potential eviction effect of the competitor or of a rival product.[22]

This provision is actually situated on the margin of rules on domination, as it does not require the undertaking committing the offence to enjoy a position of dominance in the market, nor that the victim be in a position of dependence. However, only practices emanating from undertakings with the power to eliminate other undertakings will be sanctioned under article 420-5 of the Commercial Code insofar as it demonstrates supplementary courses of action deriving from its financial capacities, commercial strength or activity structure.

With reference to its scope, abusively low pricing only applies to sales of goods and services to consumers. In this particular context, the Paris Court of Appeal has defined a consumer as a natural person or legal entity without any professional experience in the field in which it is contracting, and who aims to satisfy his own personal needs by using the product or service purchased for his sole purpose.[23]

It should be noted that resale of goods in their original state, with the exception of sound recordings (ie, compact discs) is excluded from the scope of the text. To this regard, the notion of 'processing' has raised questions as to what actions are to be included. For example, although it is accepted that cutting up a product is a transformation of the purposes of the provision, it is not clear whether the same is true of defrosting or repackaging. While the sale of a product in its original packaging undeniably represents a sale in its original state, the actual construction of the product or the supply of items necessary for the functioning of the product can constitute a transformation.[24]

Actions based on article L420-5 follow the pattern of civil liability; it is necessary to demonstrate the existence of:

- an actual fault (offering goods for sale at an abusively low price);
- harm (actual or potential elimination from or entry barrier to the market); and
- a causal link between the fault and the alleged harm.

The burden of proving that a competitor is practising abusively low prices falls to the undertaking claiming to be the victim thereof. To this regard, the concept of abusively low pricing should be interpreted by authorities along the same lines as community and national case law on predatory pricing.[25] The applicant must therefore provide evidence relating to, for example, its purchasing costs, production costs for the products at issue, its financial situation, the link between that situation and the alleged practices, and any proof that could establish the objective of a competitor to eliminate that undertaking.[26]

Moreover, selling at an abusively low price must have an anticompetitive object or effect for it to incur sanctions. According to the Competition Authority, 'Low prices will only be held to be abusive if the practice is sufficiently permanent and widespread such as to deduce a deliberate strategy to lure away a competitor's customers and eliminate him from the market.'[27] The extent of the practice is evaluated with regard to the difference in prices, the importance of the products concerned in the respective activity of the undertakings, and possibly the combined effect that could ensue from several undertakings pursuing the same commercial policy.

Desirable evolutions

Although the French rules on abuse of a dominant position are on the whole coherent, they now contain two major weaknesses that need to be addressed. These two weaknesses are, respectively, the concept of collective dominant position and the sanction of alleged abuses in the absence of any effect on the market.

Overuse of the concept of collective dominant position

The doctrine regards the collective dominant position as a 'trap' concept and it is the subject of considerable reservations. Indeed, although one can understand how an operator at the origin of his dominance and controlling his actions is responsible for those actions if they are abusive, it is much more difficult to penalise an undertaking by reason of a position held collectively on the market.

Similarly, although the use of this concept in the framework of merger control – where its purpose is structural, preventive and prospective – can be readily understood, it is more difficult, from a legal point of view, to understand its use in abuse of dominance cases where their object is backwards-looking and behavioural.

Generally, French case law cumulatively combines the classic criteria taken from structural links (in particular capital or contract-based links) and criteria taken from links arising due to an oligopolistic market structure that were identified in the *Airtours* merger control case.

There is, however, a trend to challenge abuses of collective dominant position mainly by characterising it in the light of the criteria set in the *Airtours* case. Such applications of the *Airtours* criteria to litigation on abuses are problematic for more than one reason. This leads to a situation where structural and prospective criteria are applied to retrospective analysis. Such an economical approach is subject to an assessment necessarily uncertain and is also source of a strong legal insecurity. This is hardly admissible when it conditions the granting of fines. In any case, the use of this concept should be moderated and limited to exceptional circumstances.

The sanction of alleged abuses in the absence of any effect on the market: towards a new approach?

The prohibition on the abuse of a dominant position ignores the object/effect distinction that is specific to the rules on restrictive agreements; neither article 102 of the TFEU nor article L420-2 of the French Commercial Code makes the slightest reference to any distinction between the object and the effect of the envisaged practice.

The abusive exploitation of a dominant position should be understood by national and European authorities as an act with actual concrete effects on the functioning of a market.

However, French case law is confusing. French authorities had first held an effect-based approach before the Commission: the absence of any real effect led the Competition Council and the Paris Court of Appeal to rule out the classification of an abuse of dominant position in many cases.[28] This position then changed, analysing both the object and the restrictive effect on competition: a recent decision has held that the review of the actual effects on the market is necessary only in the absence of an anti-competitive object.[29] This case law goes against the new approach adopted by the European Commission.

Indeed, the Commission underlines the importance of identifying the effects of the alleged practice for it to be considered. According to point 20 of the Commission's Guidance Paper of 24 February 2009 on enforcement priorities in applying article 82 of the EC Treaty (now article 102 TFEU) to abusive exclusionary conduct by dominant undertakings,[30] 'the Commission will normally intervene under article 102 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure'. Where the behaviour at issue is sufficiently old, proof of actual foreclosure may be sought. Where the assessment is prospective, the Commission will review how the situation is likely to evolve if the practice continues.

Recently European case law seems to be influenced by the position of the Commission.[31]

While the French position seems henceforth reluctant to adopt an effect-based approach, the Competition Authority recently refused the classification of dominant abuse due to an absence of potential effect on the market.[32] French authorities should harmonise and stabilise their decisions in this way.

Indeed, a solely object-based approach towards a practice should be abandoned. Only those practices having an actual or a real potential effect should be penalised. Regarding the concept of potential effect, it must be placed within a strict framework and be limited to practices that are pursued preventively and whose prospective effects are being searched. A potential effect cannot be assessed retroactively such as the pursuit of effects where none have been produced on the basis that they might have been produced hypothetically.

The current case law is very unsatisfactory, as it leads the Competition Authority to allocate important resources to the assessment of alleged abuses which have had no effect, and sometimes even to penalise undertakings for practices that could not feasibly be regarded as abusive.

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The French system built itself around the EU conception of abuse of dominance. However, the French model could still be enhanced on certain points regarding the concept of collective dominance and the effect of a practice to establish its anti-competitiveness.

The current situation is not satisfactory as it leads to a confusing and diverse case law where some decisions will not establish any abuse without an effect[33] and others will require a simple anti-competitive object to establish an abuse despite the real effect of the practice on the competition and the market.[34]

Therefore, one of the major problems lies in these hesitations; the French conception of abuses needs to become more streamlined.

While the European Commission reaffirmed the necessity and the priority of focusing on the actual effect of a practice in its recent communication on article 102 of the TFEU,[35] the French conception on the abuse of dominance appears to be at a crossroads.

Future developments will reveal whether the French authorities will adapt their assessment of practices likely to be caught under article 420-2 of the Commercial Code by setting aside the object to focus essentially on the effect of a practice in order to be in line with the European authorities' position.

Notes

1 Competition Council decision No. 87-MC-03 of 25 March 1987, LawLex200202379JBJ, Report for 1987, 88; No. 93-D-59 of 15 December 1993, LawLex200202516JBJ, Report for 1993, 394.

2 Litigation regarding the application of article L420-2 and L420-5 of the Commercial Code and/or articles 101 and 102 TFEU can only be brought before certain specialised commercial or civil courts: Marseille, Bordeaux, Lille, Fort-de-France (Martinique), Lyon, Nancy, Paris and Rennes. Appeals against the rulings of these courts are brought before the Paris Court of Appeal.

3 See ECJ Case 85/76 – *Hoffmann-La Roche v Commission* – [1979] ECR p. 461, LawLex200204107JBJ; Case 27/76 – *United Brands v Commission* – [1978] ECR p. 207, LawLex200204112JBJ.

4 ECJ,16 March 2000, *Compagnie maritime belge v Commission*, aff C 395/96 and 396/96; LawLex200203596JBJ.

5 Report for 1994, 60, LawLex200200016JBA. See also Report for 1989, XXIV; 1990 XXXVI, LawLex200200038JBA LawLex200200043JBA, 1991; XLVIII, LawLex200200047JBA; 1992, 55, LawLex200200048JBA; 1993, 62, LawLex200200050JBA.

6 Paris Court of Appeal, 27 January 2011, LawLex2011000091JBJ.

7 Commission Notice No. 97/C 372/03 of 9 December 1997, LawLex20020000140JBA.

8 Paris Court of Appeal, 19 May 1998, LawLex200202455JBJ; Court of Cassation, commercial ch., 13 July 2010, No. 09-67.439LawLex20100000866JBJ; Competition Council, decision No. 10-D-37 of 17 December 2010, LawLex201000001451JBJ.

9 Competition Council, decision No. 10-MC-01 of 30 June 2010, LawLex20100000778JBJ.

10 Report for 1990, XXXVII.

11 Report for 1995, 58.

12 Paris Court of Appeal, 27 June 1990, LawLex200202831JBJ.

13 Court of Cassation, commercial ch., 14 November 1995, LawLex200203200JBJ.

14 Court of Cassation, commercial ch., 4 May 1999, LawLex200202830JBJ.

15 Competition Council decision No. 89-D-16 of 2 May 1989, LawLex200202653JBJ, BOCC, No. 12, 30 May 1989, 145. Adde: Competition Council decision No. 93-D-21 of 8 June 1993, LawLex200203056JBJ; BOCC, 25 July 1993, 197; Contrats Conc. Consom., No. 153, obs. Vogel, confirmed by Paris Court of Appeal, 25 May 1994, LawLex200202730JBJ, BOCC, 24 June 1994, 236; Contrats Conc. Consom., 1994, No. 119, obs. Vogel; Competition Council decision No. 01-D-49 of 31 August 2001, LawLex200203430JBJ; No. 02-D-77 of 27 December 2002, LawLex20030000715JBJ.

16 See Competition Council decision No. 87-MC-03 of 25 March 1987, LawLex200202379JBJ.

17 Competition Authority decision No. 10-D-08, 3 March, 2010, LawLex20100000262JBJ.

18 Court of Cassation, decision No 0917-474, 10 May, 2011, LawLex 20110000931JBJ.

19 On the Competition Council's maintaining this requirement after passage of the NRE law, see Competition Council decision No. 01-D-49 of 31 August 2001, LawLex200203430JBJ, BOCC, 30 October 2001, 960; No. 01-D42 of 11 September 2001, LawLex200203432JBJ, BOCC, 30 October 2001, 957; No. 03-MC-04 of 18 August 2003, LawLex200400006JBJ. See also Court of Cassation, commercial ch., 3 March 2004, LawLex20040000604JBJ.

30, avenue d'Iéna
75116 Paris
France
Tel: +33 1 53 67 76 20
Fax: +33 1 53 67 76 25

Joseph Vogel
jvogel@vogel-vogel.com

Stéphanie Boudin
stephanie.boudin@vogel-vogel.com

www.vogel-vogel.com

Established in France in 1990, Vogel & Vogel currently employs 35 lawyers. It specialises in EU and French competition law, distribution law, product liability, and consumer law, and is active on a French, European and international business level. The firm is known for being the largest specialised team on the market and for its high level of know-how across a broad spectrum of competition, distribution, product liability and consumer law activity. Vogel & Vogel is also well-known for its broad experience in all matters concerning the automotive industry.

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At a European level, the firm advises and represents clients on matters of competition law, selective distribution agreements, validity of exclusive distribution contracts, supply agreements, franchise and agency contracts, actions based on article 101 or 102 of the Treaty on the Functioning of the European Union, state aid and it coordinates merger notifications.

In France, the firm advises and represents clients on matters such as abuse of dominant positions or economic dependence, rules on buying power, mergers, general conditions of sales, bankruptcy law, intellectual property, misleading advertising, product liability, and criminal responsibility of directors. It also advises clients in all areas of distribution contracts such as negotiation, performance, assignment and termination of a contract, as well as in actions arising out of distribution contracts. Vogel & Vogel's consumer affairs team is also very experienced in problems raised by consumer law and proposes innovative solutions in all after-sales areas. The firm is particularly renowned for its work in the automotive sector.

20 Competition Authority decision No. 09-D-20, 11 June 2009, LawLex200900001862JBJ.
21 ECJ, 3 July 1991, case C 62/86, p. I-3359, LawLex200203986JBJ; Competition Council, decision No. 10-D-31 of 12 November 2010.
22 Opinion of the Competition Council No. 97-A-18 of 8 July 1997.
23 Paris Court of Appeal, 3 July 1998, LawLex200202597JBJ, BOCC, 16 July 1998, 396, D., 1999, Jur., 249, confirming Competition Council decision No. 97-PB-02 of 27 May 1997, LawLex200202536JBJ, BOCC, 30 August 1997, 619.
24 Council decision No. 98-PB-01 of 13 January 1998, LawLex200202396JBJ, 13 January 1998, BOCC, 28 February 1998, 104.
25 Competition Council opinion No. 96-A-05 of 2 May 1996, LawLex200200040JBA.
26 Competition Council opinion No. 96-A-05 of 2 May 1996, LawLex200200040JBA.
27 Competition Council opinion No. 96-A-05 of 2 May 1996.
28 Paris Court of Appeal, 15 May 2001, Institut National de la Consommation; Competition Council decision No. 03-D-33 of 3 July 2003; Paris Court of Appeal, 15 December 2005, *Canal Plus v TPS*; Competition Council decision No. 06-D-18 of 28 June 2006; Paris Court of Appeal, 4 April 2006; Competition Council decision No. 06-D-34 of 9 November 2006; Competition Council decision No. 08-D-11 of 19 May 2008.
29 Decision No. 09-D-14 of 25 March 2009 relying on ECJ Beef Industry judgment of 20 November 2008, whereas that case related to restrictive agreements only and its remedy cannot be transposed to an abuse of dominant position case. See also decision No. 09-D-10, 27 February 2009, SNCM, and LawLex200900007980JBJ, confirmed by Paris Court of Appeal.
30 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, OJ 2009/C 45/02.
31 EU General Court decision, No. T-321-05, AstraZeneca AB, 1 July 2010.
32 Competition Council, decision No. 10-MC-01 of 30 June 2010, LawLex20100000778JBJ.
33 Competition Council, decision No. 05-D-13, 18 March 2005, *Canal Plus*, LawLex200500005289JBJ; confirmed by Paris Court of Appeal, 15 November 2005, *TPS v Canal Plus*, LawLex2005000010168JBJ; Paris Court of Appeal, 4 April 2006, LawLex200600001057JBJ.
34 Competition Council, decision No. 09-D-10, 27 February 2009, LawLex20090000798JBJ.
35 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, OJ 2009/C 45/02.

Joseph Vogel
Vogel & Vogel

Joseph Vogel, a specialist in competition and distribution law for more than 25 years, advises his clients at both the European and French levels. A graduate of HEC and the IEP of Paris (Institut d'Etudes Politiques), he has a dual expertise in economics and law.

He practises before national and European competition authorities on behalf of various French and international companies, in connection with the most important proceedings that have taken place in the past 25 years.

Joseph Vogel is the author of several works and numerous articles on competition and distribution law.

Spoken languages: French, English and German.

Louis Vogel
Vogel & Vogel

Louis Vogel, president of Pantheon-Assas University (Paris 2), is a leading lawyer in the field of competition law. He advises major French and international companies and represents them before French and European competition authorities. Numerous French and European institutions also consult him as an expert in the area of competition law.

Louis Vogel has written numerous legal works and articles on competition and distribution law. He regularly holds conferences on competition and distribution law at various institutions.

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