Association des Juristes Franco-Britanniques
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THE FOOD AND RETAIL INDUSTRIES

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How the French « Loi Hamon » emerged as a necessity?

- The French « Loi Hamon » adopted on 17 March 2014 falls under the continuity of former "suppliers-distributors" relationships' reforms which aim to **regulate commercial relationships** and try to **prevent imbalanced situations.**

- **Aim of the law:** Efficiency & application of the law

- **"Stacking" of ephemeral laws** (Galland on 1er July 1996, New Economic Regulations on 15 May 2001, Dutreil on 2 August 2005, Chatel on 3 January 2008, Modernization of the Economy on 4 August 2008)

- The French "Loi Hamon" has strengthened the **framework of negotiations** (mandatory detailed annual agreements)

- The French « Loi Hamon » has strengthened the **powers of the DGCCRF (Ministry of Economy).**

Who can tackle the buying power of distributors in France?

- **The Administrative Body** (General Direction of Competition, Consumption and Fraud Prevention- « DGCCRF »)
- **The Commercial Practices Review Panel** ("CEPC")
- **The Judge**
- **The French Competition Authority** (« FCA »)
- **The suppliers?**
- **The Communication of the European Commission (« EC ») to tackle unfair practices in the food supply chain?**

How the contract control could be an answer? The new French approach with article L.442-6 of Commercial code

1. Advantage which does not correspond to any commercial service actually rendered or manifestly disproportionate

- Article L.442-6 of the French Commercial code is relative to **restrictive competition practices**

- Obtaining or attempting to obtain from a business partner any **advantage without corresponding to a commercial service** actually provided or **manifestly disproportionate to the value of the service** is forbidden.

Such an advantage may consist in:

- participation, not justified by a common interest and proportionate without compensation, to finance an operation of commercial animation, acquisition or investment, particularly in the context of stores 'renovation or creation of common central purchasing bodies,

- an artificial globalization of turnover or a request for alignment with business conditions obtained by other clients.

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2. French « Loi Hamon » additional provisions

❖ **New example of an advantage which does not correspond to any commercial service actually rendered or manifestly disproportionate**

The list of practices prohibited by article L. 442-6 has been modified, particularly by insertion of a new example of an advantage which does not correspond to any commercial service actually rendered or manifestly disproportionate ("*additional request, during contract performance, aiming at abusively maintaining or increasing margins or profitability*").

❖ **Prohibition of invoicing or paying a product a different price than the price agreed upon in the annual agreement or set out in the General Terms of Sale (GTS)**

The practice consisting in **placing, paying or invoicing an order at a price diverging from the agreed price** resulting from:

- the implementation of the standard price list included in the GTS, when the same have been accepted by the buyer without negotiation or

- the price resulting from the negotiation and subject to the annual single agreement as further amended, as the case may be is added as a new practice under article L. 442-6-I-12° of the French Commercial code

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3. Significant imbalance in the rights and obligations of the parties

- **Significant imbalance in the rights and obligations** of the parties to a contract is some of the difficulties that companies frequently encounter in their business relations. Yet, the current legal framework prohibits these practices (art L. 442-6-I 2° of the Commercial code).

- The wording of the provision on significant imbalance " *It is forbidden to submit or attempt to submit a trading partner obligations creating a significant imbalance in the rights and obligations of the parties* » is general and wide enough to include an important margin for interpretation from the Judges and practitioners.

- The provision may apply to all sorts of production, distribution, service activities, and all contractual obligation, regardless to their nature, however, it is **mostly used in food retail sector** (Carrefour, Auchan, Casino, etc…)

- The Ministry of Economy initiated late 2009 a series of lawsuits against 9 big and well known distributors on the grounds of a "significant imbalance".

How the contract control could be an answer? The new French approach with article L.442-6 of Commercial code

3. Significant imbalance in the rights and obligations of the parties

❖ **Should each clause has to be analysed individually or regarding to the overall balance of the contract?**

- A large number of decisions are based on a clause by clause analysis and more precisely on the criterion of the lack of reciprocity of rights and obligations of the parties.

- But some courts analyse the contract in its entirety and evaluate whether certain clauses are not likely to compensate for the imbalance resulting from other clauses.

❖ " *The Judge can, where invoked, considers the entire agreement in order to appreciate if some provisions usefully are counterbalanced by others to rebalance the rights and obligations of the parties. However, in accordance with evidences common rules, the party which stated that some provisions become lawful thanks to the global economy of the agreement must prove it*" (**Ministry of Economy v/ Carrefour** -Paris Court of Appeal 01/10/2014)

How the merger control in retail trade could be an answer?

1. The French specific threshold

- In **2008**, specific **lower threshold** have been anticipated for merger operations in the retail distribution sector (art L.430-2-II C.com).

- **Notification** is mandatory if at least 2 of the parties to the merger operate a retail trade store and:

  - The total worldwide turnover of all involved companies (tax excluded) is higher than **75 million of euros**,

  - The total turnover generated in France in the retail sector (tax excluded) by at least 2 of the parties to the merger is higher than **15 million of euros**,

  - The merger operation falls outside of the scope of EC Regulation 139/2004 on 20 January 2004.

- These specific threshold have been implemented in order ton allow the French Competition Authority to proceed to a **more detailed control** of merger, given the **specific competitive situation in the retail trade sector.**

- The same specific threshold exists on another **"narrow" market":** overseas territories (cf supra)

How the merger control in retail trade could be an answer?

2. The « Casino/Monoprix » case (13-DCC-90)

❖ **The French Competition Authority has authorized, subject to commitments, the acquisition of sole control of Monoprix by Casino on 10 July 2013.**

- Following a thorough examination, catchment area by catchment area, the FCA considered that the transaction would be likely to **harm competition** in a certain number of areas, as the acquisition of sole control of Monoprix thus **reinforces the position of the Casino Group in the market**, by giving significant market shares in 47 catchment areas in Paris, together with 3 areas located in the department of Var and 2 in Corsica.

- To address these concerns, Casino submitted several **commitments** proposals:

- In total, Casino has committed to **divest retail outlets in the areas concerned** to restore balanced competition conditions (a market share not to exceed 50% or the removal of the additional market share created by the merger). To this effect, Casino has committed to divest 55 food retail outlets in Paris and 3 in the other areas outside the Paris region (or, where relevant, to cancel affiliation contracts).

- For **ten years**, Casino will be **prohibited from acquiring direct or indirect influence over all or part of the assets transferred**. An independent trustee will be responsible for ensuring that these commitments are fully complied with.

How the merger control in retail trade could be an answer?

3. The pending "Carrefour / Dia" and "Kingfisher/Mr. Bricolage" cases

❖ **Carrefour / Dia (food retail distribution sector)**

The FCA will study the effects of the operation on all the local markets concerned: in Paris, the Parisian region, the major provincial cities and several provincial areas outside of the cities.

The FCA will also determine whether the operation is likely to harm competition in the upstream market for consumer goods supply.

❖ **Kingfisher / Mr. Bricolage (do-it-yourself and home-improvement products retail sector)**

The operation will create an industry leader with the superstores Castorama, Brico Dépôt, Mr. Bricolage and Les Briconautes/Les Jardinautes.

The FCA will carefully analyse the operation effects catchment area by catchment area and will particularly monitor those areas in which the superstores have a simultaneous presence.

The acquisitions' upstream effects, at the stage of the supply of do-it-yourself, gardening and home-improvement products, will also be examined.

How the merger control in retail trade could be an answer?

3.Oversea law on structural injunctions & Polynesian law adopting that measure

- A **specific threshold** for merger in retail trade sector in overseas territories has been introduced in the French commercial Code (article L.430-2) by "Lurel law"of 20 November 2012/ structural injunctions can be pronounced by the Competition authority too (art 752-27 of the commercial Code) (suggestion of the FCA in its opinion on 11 January 2012: The food retail sector in Paris).

- A first Competition Act on 26 June 2014 allows the Polynesian Competition Authority to impose **structural injunctions** where competition concerns are raised against companies in a dominant position.

If a company practices **higher prices or margin** than the average level usually noted in the sector, or has in a catchment area a **market share higher than 35%** representing a turnover higher than **5 millions of euros**, the Polynesian Competition Authority can inform him about its competition concerns.

The company has 2 month to submit commitments and whether they do not seem enough efficient to overcome the competition concerns, the Authority can impose to complete or terminate within 2 month all agreements which have made possible the practices observed. The Authority can also impose a **divestiture of assets**.

CONCLUSION

- Would companies really go to Court?

- That is exactly the statement done by the Communication, which encourages in its communication on 15 July 2014 to implement an « auto-regulation ».

- "*The economic impact of modern retail on choice and innovation in the EU food sector*"- report published on September 2014 by the European Commission