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The state of economic dependence

By a decision dated February 12, 2013, the Commercial Chamber of the *Cour de Cassation* (French Supreme Court) provided an interesting illustration of a state of economic dependence that is defined as the impossibility, for a company, to benefit from a solution that would be technically and economically equivalent to the terms of the contractual relationship it has established with another company[1].

Article L.420-2§2 of the French Commercial Code, as amended by the Law of May 15, 2001 on new economic regulation, prohibits "*the abuse by a company or group of companies of the state of economic dependence in which a client or supplier finds itself, wherever it is likely to affect the operation or the structure of competition*".

Article L.420-2§2 thus sanctions abusive practices such as refusals to sell, tied sales, discriminatory practices[2], the so-called "wedding basket" practice whereby a distributor involved in a consolidation transaction that grants it a greater purchasing power renegotiates higher advantages from its suppliers[3], or even the "most-favored-customer clause" by which the business partner in a state of economic dependence is obliged to reduce the rebates it grants to third parties, etc.

For such practices to be considered as abusive, the victim must find itself in a state of economic dependence.

Prior to the aforementioned Law of May 15, 2001, Article L.420-2 of the French Commercial Code used to prohibit "*the abuse by a company or group of companies of the state of economic dependence in which a client or supplier that has no equivalent solution finds itself*".

The Law of May 15, 2001 thus removed the reference to "*equivalent solution*", thereby suggesting a forthcoming softening in the criteria applied to assess the existence of a state of economic dependence or, at the very least, a reorientation of applicable case-law.

But this did not happen…

The French Competition Council (the French Competition Authority's predecessor) swiftly re-affirmed the major importance of the lack of equivalent solution criterion, "*considering that, while the new wording of this text no longer includes any explicit reference to the absence of equivalent solution, it remains nonetheless that economic dependence, within the meaning of Article L. 420-2 of the French Commercial Code, may only result from the impossibility for a company to benefit from a solution that is technically and economically equivalent to the terms of the contractual relationship it has established*"[4].

This is precisely on this lack of equivalent solution criterion that the *Cour de Cassation* ruled on February 12, 2013.

The legal provisions referred to before the *Cour de Cassation* were not those set forth in the above-mentioned Article L.420-2 of the French Commercial Code but those of Article L.442-6 2° b) of said Code – as it was drafted prior to the entry into force of the Law of august 4, 2008 – (now Article L. 442-6 I 2°) that at the time prohibited "*the abuse of the dependent position of a partner […] by imposing unjustified business conditions or obligations*"[5].

In the commented decision, the company EAS Fret, specialized in the collection, transport and delivery of packages and documents, had been DHL's sub-contractor in the Côtes d'Armor area (located in Western France) since 1996. On October 25, 2004, DHL notified to EAS Fret the termination of their contractual relationship, subject to a three-month notice period. On December 22, 2004, the receivership proceedings that had been initiated against EAS Fret were converted into judicial liquidation proceedings.

The judicial liquidator summoned DHL before the court, arguing notably that it had abusively taken advantage of EAS Fret's economic dependence by imposing it unacceptable pricing conditions.

To substantiate its decision to dismiss the liquidators' claim and to uphold the judgment of the First Instance Court, the Paris Court of Appeals considered that EAS Fret's state of economic dependence was not established pursuant to the 5 criteria consistently applied by French courts to determine the existence of a state of economic dependence, i.e. :

- the share that a company's products or services represent in the turnover of its business partner (criterion n°1);
- the reputation of the brand (criterion n°2);
- the size of the business partner's market share (criterion n°3);
- the factors that led to the state of economic dependence (strategic or forced choice of the victim of the challenged behavior) (criterion n°4);
- the existence / lack of alternative solutions (criterion n°5).

The Paris Court of Appeals thus relied on an established line of decisions of the French Competition Council and Commercial Chamber of the *Cour de Cassation* that cumulatively apply such criteria to establish the existence of a state of economic dependence[6].

The judicial liquidator of EAS Fret complained that the appellate judges had ruled that the state of economic dependence ought to be established not only through the absence of equivalent alternative solutions but also by applying the four other above-mentioned criteria that, according to the judicial liquidator, should have been treated only as clues to capture the definition of a dependence relationship, the existence of which being reportedly established as soon as the dependent operator is deprived of equivalent alternative.

The subtlety of this argument failed to convince the judges of the *Court de Cassation* who did not even bother to respond on this specific point, contending themselves to consider this argument as superfluous.

However, the *Cour de Cassation*, to reject another ground of appeal put forth by the liquidator, recalled the importance of the first criterion concerning the existence / lack of alternative solutions that, in reality, is inferred from the other four criteria laid down by case-law.

Precisely, out of these four other criteria, only that concerning the reputation of the brand (criterion n°2) was met in the matter at hand. DHL was not a transportation and freight leader in the Côtes d'Armor and Morbihan areas (criterion n°1), the share that DHL represented in EAS's turnover was below 70%, as per expressly set forth by contractual provisions (criterion n°3) and, finally, DHL had not requested any sort of exclusivity. As such, it was up to EAS Fret to diversify its client base to anticipate a termination of the contractual relationship – a thing that can always happen (criterion n°4).

The *Cour de Cassation* thus recalled that the state of economic dependence is to be assessed solely according to the existence / lack of alternative solutions, a criterion whose very substance is appraised in light of the four other above-mentioned factors.

The *Cour de Cassation* inferred therefrom, contrary to what had been further objected to the Paris Court of Appeals, that the latter – to justify its ruling that EAS Fret had alternative solutions – did not merely demonstrate the absence of legal obstacle to the diversification through the lack of exclusivity clause. The *Cour de Cassation* also considered that it had been established that there was no factual and economic impossibility to find an alternative solution based on the other assessment criteria.

Trial judges had wisely considered that "*If there is no economic dependence, there cannot be an abuse of dependence*" and dismissed the judicial liquidator's 462,696.34 Euros claim corresponding to the liabilities of the company placed in judicial liquidation.

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[1] Commercial chamber of the *Cour de Cassation*, February 12, 2013, n°12-13.603.

[2] These abusive practices are expressly mentioned in Article L.420-2§2 of the French Commercial Code: "*These abuses may in particular consist of refusals to sell, tied sales, the discriminatory practices listed in Article L 442-6* or product range agreements".

[3] Decision n° 93-D-21 of the Competition Council dated June 8, 1993 relating to practices carried out during the acquisition of the company Société européenne des supermarchés by the company Grands Magasins B of the Coral Group.

[4] Decision n° 01-D-49 of the Competition Council dated August 31, 2001 relating to a seizure and a request for injunction made by the company Concurrence against the company Sony.

[5] In its current version, Article L.442-6 I 2° sanctions anyone who "*places or attempts to place a business partner under obligations that create a significant imbalance in the parties' rights and obligations*".

[6] See in particular decisions n° 04-D-28, 06-D-16 an 09-D-02 of the Competition Council and the decision n°00-13.921rendered by the *Cour de Cassation* on April 9, 2002.