

1988

France

Recommended Citation

France, 22 INT'L L. 217 (1988)

<https://scholar.smu.edu/til/vol22/iss1/15>

This Current Developments is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

France*

I. Reform of Regulations on Competition and Prices

France has recently adopted a policy of freed prices.¹ This new policy applies to all production, distribution, and service activities, including those in the public sector, owned by the state or municipalities. The new rules concern the regulation of prices, competition, consumer protection, and procedures for applying the new rules.

A. REGULATION OF PRICES

Until recently, prices were set at levels determined by the government. In the future, prices will be freely set by competition in the marketplace. The government will be able to regulate prices in two instances, however the creation of monopolies and long-lasting problems of supply due to a crisis situation created by exceptional circumstances.

B. COMPETITION

1. *In-house Agreements and Dominant Market Position Abuses*

As before, in-house agreements and abuses caused by a company's enjoying a dominant market position are forbidden. Agreements that "aim to improve the management of small and medium sized businesses" are exempted, however.

Another new provision involves the abusive use, by a business or group of businesses, of the economic dependency of a client company or supplier. This practice is forbidden by the new policy. The maximum financial sanction applicable to a company amounts to five percent of the company's turnover before the value added tax (V.A.T.). Company directors will be punishable only if they have fraudulently played a personal and determining role in the conception, organization, and application of the illicit practices.

*Prepared by Professor B. Mercadal, Chaire de Droit Commercial, Conservatoire National des Arts et Métiers, Paris.

1. Enactment No 86-1243 of Dec. 1, 1986, J.O., Dec. 9, at 14773.

2. *Economic Concentration*

Concentrated business activities that result in giving one company determining influence over one or several other companies is subject to government control. This control is applied when the market-share held by the companies concerned is over twenty-five percent, or when these companies totalled a turnover before addition of V.A.T. of seven billion francs the previous year. The control is also applicable on the initiative either of the concentrated companies that notify the Minister of Finance and Budget of their agreement, or by this Minister asking the competition board for advice. The Minister can accept the concentration operation or can enjoin the companies to give up their plans and to reestablish the former situation, or to change their agreement or take the measures necessary to reestablish competition.

3. *Discrimination Practices, Refusal to Sell, and Twinned Sales*

Without exchanges among companies, discriminatory practices, refusal to sell, and twinned sales can lead to actions for damages by the victims of these measures. Refusal to sell is punishable by a prison sentence when decided in the consumer's favor.

4. *Dumping*

Selling finished goods at a price below the real cost price remains forbidden.

C. CONSUMER PROTECTION

Using sales with bonuses, refusing to sell, twinned sales, and forced and recommended prices remain forbidden.

D. PROCEDURES

Employees of the Ministry of Economy and Finance can carry out investigations and have free access to all places of business and all documents of the company in question. Seizures can only be conducted with court approval. Infractions of the rules of common understanding and abuses of the dominant position or economic dependence of the other companies will be submitted to the board of competition, which can decide on financial sanctions. Either the companies or the ministry can appeal to the board.

II. Abuses of Economic Dependence or Salvage Measures

For the first time, the board of competition has made three decisions in relation to the prohibition of a company's misuse of a state of dependence of a customer company or supplier.

The three cases in question² set distributors of electrical sound equipment against their suppliers. In the first case, the Chappelle Company took action against Phillips, claiming that Phillips's policy of price reductions resulted in the imposition of a minimum price on Phillips's retailers. In the other two cases, the same distributor and SEDA company respectively appealed to the board against Sony for refusing to sell laser turntables and against JVC Video-France for refusing to sell video cassette recorders. The board convened according to its emergency procedures because of the serious and immediate impact on the general economy, on the sector concerned, and because of the consumer interest, and the interests of those suing. The board handed down its decision nine days after commencement of the suit.

The board upheld SEDA's claim of urgency for refusal to sell by JVC because of the large share of deliveries by this supplier in the annual turnover of the distributor. On the other hand, the board refused the claim involving Sony's refusal to sell to Chappelle because this refusal did not figure largely enough in this company's annual turnover for its financial situation to be endangered.

Based on these statements, the board ordered that JVC respect standing orders for SEDA at the same level that deliveries had reached before sales were refused. If JVC chose not to accept this injunction, the board could fine it the maximum sum: five percent of the annual turnover of products, before V.A.T. has been added. The board justified its decision by pointing out that SEDA was in a state of economic dependence in relation to JVC because of three factors: (1) SEDA was the sole importer of products carrying the JVC brand name and the fame of this brand was such that a distributor had to offer it to consumers; (2) JVC held nine percent of the VCR market; and (3) the supplier's share of VCR sales by SEDA was approximately seventy-five percent. The board also found (1) abusive exploitation of this state of dependency, (2) that competition between retailers was nonexistent, and (3) that a refusal to deliver to discount houses was being justified by a desire to keep other distributors from aligning their prices on the distributors.

III. Corporations

An administrator of a limited holding company can be recalled at any time by the yearly general assembly. However, the person concerned is entitled to damages with interest if this right of recall is abused. In one case,³ the assembly recalled the chairman of the board of directors from

2. See Lefebvre, 1987/9 BULLETIN RAPIDE DE DROIT DES AFFAIRES 12.

3. Lefebvre, 1987/8 BULLETIN RAPIDE DE DROIT DES AFFAIRES 20.

his functions as administrator following disagreements between the chairman and other administrators over policy matters. This action effectively ended his role as chairman.

Two days before the assembly met, the chairman had received an accountant's report, concerning the company's financial situation. The Court de Paris (Paris tribunal) decided that this report put the chairman in a position to present his defense without the need for further time to prepare a counter-report. The board also ruled that the summons for him to turn in the keys to company premises and to his company car immediately were merely the consequence of his removal.

Frequently, when two companies of comparable size combine they create a new limited holding company in which both interested parties become shareholders. The shareholders, however, in order to maintain equal power in the holding company, give each other in a protocol agreement outside the company's statutes a right to veto and to adopt other measures comparable to those found in the United States in "closed corporations." This practice runs into obstacles because the law does not authorize "closed corporations" and forbids agreements on voting rights. As a result, the measures in the protocol agreement cannot be drafted into the holding company's statutes. The court of appeal has recently held that as soon as a holding company is formed, the company can only be governed by its statutes and the law.⁴ Clauses in the protocol therefore have no effect. The lesson to be drawn from this decision is abundantly clear. It is only possible to count on the stipulations in the statutes and there is no way to set up a balance of votes if the stockholders do not hold the same number of shares.

IV. Contracts

A. PENAL CLAUSE

Contracts can provide that a debtor who does not fulfill an agreed upon obligation is to pay the creditor an amount established beforehand in the agreement. This sum can be reduced by the judges if they decide the amount is grossly excessive.

The Appellate Court of Paris has decided that these measures require strict interpretation since they deviate from the common law on contractual obligations.⁵ Thus, the grossly excessive character of the clause must be respected when comparing it with penalties usually called for in agree-

4. Cass. Civ. Comm., Feb. 24, 1987; see Lefebvre, 1987/8 BULLETIN RAPIDE DE DROIT DES AFFAIRES 20.

5. *Id.* at 22.

ments having a similar objective. Accordingly, the court determined that there was no reason to change the leasing clause of a contract stipulating that any unpaid rent would be increased by 1.5 percent for each month of late payment.

B. VOIDING AN ERRONEOUS SALE

An order slip for a water softener stated in capital letters in red ink in the middle of the page: "guaranteed ten years." The same order slip stated in small letters, in the left margin on the same page, "electronic hard-water product" followed by "total guarantee—two years." Only careful study of the contract informed one that the ten-year guarantee concerned only the water softener itself and not the electronic hard-water product.

One buyer pointed out the importance to him at the time of purchase of the guarantee length. Under these conditions, a court declared the contract void by mistake on one of the main qualities of the product sold.⁶

C. LIMITS ON AN EXCLUSIVE-USE CLAUSE

Article 1 of the Law of October 14, 1943, sets a ten-year limit on any exclusive-use clause that a lessor may impose on a lessee with respect to material goods. Under this limitation a lessee may not, for the specified time, use similar or complementary equipment from another supplier. These measures were judged not applicable in the case of a rental-maintenance contract for telephone equipment because the contract set up not only a single rental but also guaranteed upkeep of the equipment in good working order.⁷

6. *Id.* at 23.

7. *Id.*