ABUSE OF ECONOMIC DEPENDENCE IN THE DECISION-MAKING PRACTICE OF THE FRENCH COMPETITION AUTHORITY

Assessment of an underutilised provision and prospects for the digital economy

Claire-Emeline Auduc

Under the supervision of Professor David Bosco

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ABSTRACT

Abuse of economic dependence is a French standalone violation that was added to the Competition toolkit with the objective of fighting off abusive practices implemented by non-dominant undertakings towards their trading partners. However, the French Competition Authority has always favoured a restrictive approach of the conditions required to define the abuse. As a consequence, abuse of economic dependence has been considerably disregarded by case law – until last year. On March 16th, 2020, the French Competition Authority found Apple guilty of different abuses including abuse of economic dependence. This decision has raised questions regarding the possible developments of abuse of economic dependence. The debate essentially surrounds the use of abuse of economic dependence to encompass abusive conducts of dominant and non-dominant undertakings in the digital economy. This paper aims at providing an assessment of abuse of economic dependence in the decision-making practice of the French Competition Authority. It also aims at offering lines of thoughts regarding the possible tracks of evolution of abuse of economic dependence.

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INTRODUCTION

A national specificity. Abuses of dominance are dealt with under Article L.420-2 of the French Commercial code, the first paragraph of which transposes Article 102 of the Treaty on the Functioning of the European Union ('TFEU') regarding abuse of dominant position. Article L.420-2 also provides for another type of abuse which is abuse of economic dependence, a notion that does not originate from European Union law and is foreign to United States Antitrust law.

Economic dependence has been briefly defined as arising "when a supplier is economically dependent on a buyer or vice versa."[1]

Although abuse of economic dependence may have been used as a factor to evaluate dominance at a European level[2], the Commission has left it to EU member states to implement it in their national legislation. Indeed, Council Regulation 1/2003 states how Member States can adopt and implement on their territory stricter national competition laws that prohibit or sanction unilateral acts by companies and specifies they "*may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings*".[3]

This specific type of abuse can be found in different member states such as Belgium[4], Italy and Germany, whose 1957 legal text served as an inspiration for the French provision[5]. The goal in Germany was to target the oil sector and to protect Small and Medium Enterprises ('SMEs') more generally.[6]

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[1] Këllezi P. Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence (2008)

[2] See Këllezi, supra 1. European Commission, Decision 77/327/EEC ABG/Oil companies operating in the Netherlands [1977] OJ L 117/1 , Judgment of the Court of 25 October 1977 ; Metro SB-Großmärkte gmbh & Co. KG v Commission of the European Communities ; Case 26-76, European Commission, Decision IV/D-2/34.780 Virgin/British Airways [2000] OJ L 30/1

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Recital 8

[4] Art. IV.2/1 in the "Code de droit économique" added by the law of 4 April 2019

[5] « Gesetz gegen Wettbewerbsbeschränkungen (GWB) », July 25th, 1957: Section 20(1) of the GWB forbids discrimination by dominant undertakings and Paragraph 2 extends this rule to all undertakings engaged in contractual relationships (smes) For an application of relative Marktmacht see BGH, 20.11.1975, KZR 1/75, wuw/E BGH 1391, 1392 „Rossignol" NJW 1976, 801

[6] Taube, "Das Diskriminierungs- und Behinderungsverbot für 'relativ marktstarke' Unternehmen", 31 (2006), with references to the discussions in the Bundestag (German parliament)

Context of creation and debates over a twofold objective. Abuse of economic dependence was introduced in France in 1986 to encompass abusive practices implemented by non-dominant undertakings towards their trading partners[7].

The objective was to create a tool to address practices from firms with superior bargaining power that affect competition, in the same way that abuses of dominance and cartels are dealt with by competition law. The specificity of abuse of economic dependence lies in the fact that it occurs between two economic entities within a contractual relationship and might yet have an effect on competition. As Marty explains, abuse of economic dependence tries to fight off "the abusive exercise of economic power likely to endanger public economic order"[8].

Therefore, its objectives are twofold: loyalty in distribution relationships and protection of the market. As abuse of economic dependence appeared in French law, some authors raised concerns about this double dimension it embodies of protection of competition and search for balance between private operators.[9] By implementing such a provision, lawmakers originally aimed at controlling the influence of retail distribution undertakings towards their suppliers.[10] Interestingly enough, it has rarely been applied for this purpose.

An underutilised provision. The conditions required to conclude to an abuse of economic dependence are a state of economic dependence, an abusive exploitation of the economic dependence, and an impact on the structure or functioning of competition. These conditions – especially the latter – were always considered under a very strict view by the French Competition Authority ('FCA') and so other tools were preferred.

One explanation could lie in liberal influences defending the goal of efficiency. Indeed, Chicago School advocates believe that protection of small businesses should not be an antitrust consideration and that market power actually conveys positive effects for consumers. Under such influence, the principle of contractual freedom goes against a wide application of abuse of economic dependence in a market economy. Without elaborating on the objectives of French Competition law, it is interesting to note that the FCA is unclear on its position. The reluctance to apply abuse of economic dependence contrasts with the law

[7] Ordonnance n° 86-1243 du 1 décembre 1986 relative à la liberté des prix et de la concurrence

[8] « Une approche critique du contrôle de l'exercice des pouvoirs privés économiques par l'abus de dépendance économique », Frédéric Marty, Patrice Reis, Revue internationale de droit économique 2013/4 (t. XXVII), pages 579 à 588

[9] L. Boy, « Abus de dépendance économique : reculer pour mieux sauter ? » Revue Lamy de la Concurrence, Editions Lamy/Wolters Kluwer, 2010, pp.21 ; Pirovano A., Droit de la concurrence et progrès social, D. 2002, p. 62

[10] Avis du 14 mars 1985, Rapport de la Commission de la concurrence, 1985, pp. 12 et s.,

on *pratiques restrictives de concurrence* (restrictive practices), which is quite protective of small businesses.[11] As a consequence, practices between two private operators tend to be explored under the scope of restrictive practices under Article L.442-1 of the French Commercial code, or contract law.

Another reason abuse of economic dependence is not more popular could lie in the FCA's tendency to apply Article 102 for abuses of dominant position in the presence of market power. Although abuse of economic dependence can be applied without a dominant position, one condition of applicability is for competition to be affected by the litigious practice. However, the undertaking would need to have a certain market power for competition to be effectively distorted. Yet, in the case of a strong market power, authorities are more prone to conclude to an abuse of dominant position, especially under the scope of abuse of exploitation as seen in recent case law. Whether this tendency comes from the restrictive interpretation of the conditions of abuse of economic dependence is a chicken and egg problem.

These preliminary remarks partially explain why abuse of economic dependence has not had the favour of the FCA since it was created.

Recent revival of abuse of economic dependence. In March 2020, a decision by the FCA has shone a new light on abuse of economic dependence where the Authority fined Apple €1.1 billion for practices implemented for the distribution of its products [12]. The FCA found Apple guilty of division of products and customers as well as resale price maintenance – both practices were sanctioned on the ground of Article 101 of the TFEU and Article L.420-1 of the French Commercial code. But more importantly, the FCA found that Apple had committed an abuse of economic dependence towards some of its distributors called Apple Premium Resellers.

This decision has led some scholars and practitioners to wonder if the FCA was taking a turn on its approach to abuse of economic dependence. An arguably more flexible approach to abuse of economic dependence targeted against a firm active in the digital sector appears in line with the recent decision-making practice of the Authority regarding big tech firms. Indeed, the priorities announced by the FCA for 2021 essentially focus on adapting to the

[11] J-C. Roda, Droit de la concurrence, Première édition, 2019, Mémentos Dalloz, p. 28
[12] Decision 20-D-04 of 16th March 2020 related to practices implemented by Apple for the distribution of Apple products

digital era[13], which is in line with the priorities that the European Commission has set for the years to come[14]. A renewal of abuse of economic dependence in a case against Apple necessarily raises the question of a potential use of abuse of economic dependence as a new tool against abusive practices of firms active on digital markets. However, it is unclear whether this is an angle the FCA is likely to use again, as no decision has upheld this 'renewal' yet.

The application of abuse of economic dependence in case law and its unpopular evolution need to be assessed in order to acknowledge the following question:

To what extent can abuse of economic dependence be considered an efficient antitrust tool and potentially encompass abuses in the digital economy?

Chapter 1 will examine the extent to which abuse of economic dependence may be considered an efficient antitrust tool in practice, by showing the restrictive interpretation of the conditions of application of abuse of economic dependence as well as the other legal tools that have been favoured by the French Competition Authority, including *pratiques restrictives de concurrence* and lately, exploitative abuses. Chapter 2 will discuss potential perspectives of application of abuse of economic dependence in digital markets in light of the recent Apple decision by the French Competition Authority and evolutions in other EU member states, as well as characteristics of data-driven markets and the platform economy.

[13] Press release « Après une activité très soutenue en 2020, l'Autorité de la concurrence annonce ses priorités pour 2021, qui seront centrées sur l'économie numérique » available at https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/apres-une-activite-tres-soutenue-en-2020-lautorite-de-la-concurrence-annonce (in French)

[14] "Political Guidelines For The Next European Commission 2019-2024", Ursula von der Leyen, https://ec.europa.eu/info/strategy/priorities-2019-2024_fr

CHAPTER 1 - ABUSE OF ECONOMIC DEPENDENCE: AN OVERLOOKED ANTITRUST TOOL?

Three conditions must be fulfilled to conclude to an abuse of economic dependence, but they appear to be hard to demonstrate due to a restrictive interpretation (A) which results in the abuse rarely being applied in case law (B).

A. THE CHALLENGING MEETING OF THE CONDITIONS OF ABUSE OF ECONOMIC DEPENDENCE

Article L.420-2 paragraph 2 of the French Commercial code provides that "The abuse of the state of economic dependence of a client or supplier by an undertaking or group of undertakings is also prohibited, if it is likely to affect the functioning or structure of competition." Therefore, abuse of economic dependence requires proof that an undertaking is abusing the economic dependence of a contractual partner (1) and that this practice is effectively having a negative impact on competition (2).

1. Assessing an abusive exploitation of a state of economic dependence through narrow criteria

Two cumulative conditions must be met, which are the economic dependence of the undertaking (1.1); and an abuse of this state of economic dependence (1.2).

1.1 Assessing an economic dependence: the restrictive interpretation of the conditions

Case-specific assessment of the notion of dependence. Dependence can be the result of several situations such as a major negotiating power from a buyer, market power or a situation of monopsony (a single buyer is faced with a large number of suppliers)[15]. The FCA stated that dependence should be assessed "in the context of bilateral relations between two companies*"* and therefore "evaluated on a case-by-case basis and not globally for the entire profession".[16] Moreover, the scope of the article is restricted to undertakings engaged as clients or suppliers, which excludes situations where undertakings have not exchanged

[15] Roda, supra 11

[16] Decision 03-D-42 of 18 August 2003 relating to practices implemented by Suzuki and others on the motorcycle distribution market

products or services directly.[17] As confirmed by the FCA, there is no threshold that could indicate an economic dependence.[18] Instead, authorities mainly rely on four cumulative criteria which are: (i) the reputation of the brand or product, (ii) market shares, (iii) the share represented by the undertaking's products in the dependent party's turnover, and mainly (iv) the lack of an equivalent solution.

Lack of an equivalent solution: the main indicator of dependence. The absence of alternative to the contractual relationship either as a customer or as a supplier is considered absorbing the other criteria of dependence, according to most authors[19]. Indeed, the French Civil Supreme Court stated that the main criterion was the existence of a lock-in situation for the undertaking, i.e., the impossibility to switch to other undertakings.[20] For the retailer, this means the inability to obtain equivalent products from other suppliers. The burden of proof lies on the alleged victim to show this state of dependence.[21] The Court adds that the criteria being cumulative, the sole fact that a distributor makes most of its turnover with one supplier is not sufficient to conclude to economic dependence[22] if no evidence shows that it was prevented from switching to another supply network[23]. Vogel explains that the authority should check within what timeframe and at what cost the distributor could have an alternative supply.[24]

This condition is not interpreted in favour of the plaintiff. Indeed, it appears that 'equivalent solution' should not be interpreted as 'identical solution' but that the equivalent solution can lead to difficulties or shortfalls for the undertaking.[25] Generally, the solution is considered equivalent when it can be reached within an acceptable timeframe, uses comparable economic networks and does not entail prohibitive costs[26], which results in the condition being interpreted quite strictly and therefore rarely fulfilled.

Prior to the 2001 NRE law[27], the lack of an equivalent solution was expressly mentioned in Article L.420-2 of the French Commercial code. Although it has been

[17] Com. 7 janvier 2004, n°02-11014, Bull. Civ. IV, n°4
[18] Avis 15-A-06 du 31 mars 2015 relatif au rapprochement des centrales d'achat et de référencement dans le secteur de la grande distribution
[19] L. Vogel, Traité de droit économique, Tome 1 Droit de la concurrence, Droits européen et français, 2015, Bruylant, p. 1482
[20] Cass. Com. 3 mars 2004, société Concurrence c/ société Sony, n° 02-14.529
[21] Ch. Com., 3 oct. 1995, Contrats, conc. Consom. 1995, n° 203, note L. Vogel
[22] Cass. Com., 16 déc. 2008, société Concurrence c/ Sony, n° 08-13423
[23] Paris, 15 janvier 2014, lawlex1448
[24] Vogel, Supra 19
[25] For example: Cons.conc. N°89-D-39 21 novembre 1989, Paris, 12 juillet 1990, Cons.conc. N°90-D-10 du 7 février 1990, Paris, 16 octobre 1992
[26] Paris, 30 mars 1992 and more in Vogel, supra 19, p. 1483
[27] Loi n° 2001-420 relative aux nouvelles régulations économiques

suppressed, it is commonly agreed that the condition is inherent to a state of economic dependence and is therefore still applied[28] with a constant restrictive interpretation[29].

Subsidiary relevance of the other criteria. They appear to be other indicators to be studied along with the lack of an equivalent solution.[30] For instance, the reputation of the brand is a characterising factor but does not determinate a situation of dependence if it is not supported by other evidence.[31] As for the share of turnover achieved with the other party, it can determinate a situation of dependence unless this share results from a deliberate choice of the undertaking[32]. Indeed, for dependence to be proven, it must not come from a strategic choice of the dependent party. Chagny argues that economic dependence should be found even when it results from a choice of the victim, so that abuses could cease – but that this choice could have an impact on their right to damages, for instance. Such an interpretation would allow abuse of economic dependence to become more than a 'symbolic' tool.[33]

1.2 Abusive exploitation of the economic dependence: possible conducts

An abusive behaviour is an abnormal behaviour. Once a state of economic dependence has been demonstrated, an abusive exploitation is necessary to conclude to abuse of economic dependence. The abusive exploitation of a state of economic dependence is constituted by the abnormal behaviour of an undertaking towards the other. Indeed, to be constitutive of an abuse of economic dependence, the alleged abusive practices must be deemed 'abnormal' in the framework of the contractual relationship or uses in the field[34]. Moreover, a strong causality link must be found between the economic dependence and the abusive exploitation.

Types of abusive conducts: non-exhaustive list. According to L.420-2 of the French Commercial code, abusive practices can include refusals to deal, tying and bundling, range

[28] Cons. Conc., déc. N°01-D-49, 31 août 2001 : BOCC 2001, p.260 ; Paris 9 avril 2002, n°2001/17568 : jurisdata n°2002-248796

[29] Aut. Conc., déc. N° 10-D-08, 3 mars 2010, relative à des pratiques mises en œuvre par Carrefour dans le secteur du commerce d'alimentation générale de proximité

[30] Cons.conc.n°98-D-32 du 26 mai 1998 : a share of turnover equal to 50% did not characterize dependence as other solutions were available.

[31] Décision n° 93-D-21 du 8 juin 1993 relative à des pratiques mises en œuvre lors de l'acquisition de la Société européenne des supermarchés par la société Grands Magasins B du groupe Cora, p.12 ; Cass.com, 20 mai 2014

[32] Paris, 5 juillet 1991

[33] Abus de dépendance économique collective - L'interprétation restrictive de la dépendance économique a toujours les faveurs du Conseil de la concurrence - Commentaire par Muriel CHAGNY, Communication Commerce électronique n° 1, Janvier 2007, comm. 9

[34] The Paris Court of Appeal ruled that the price proposed by a cable television broadcaster to a programme publisher for the broadcasting of a thematic channel, considered abusive by the Competition Council, was not abnormal in the sense that it did not exceed the "limits of free negotiation", 17 juin 1992, BOCCRF n° 13/92

agreements and unfair trading conditions (as per articles L.442-1 and L.442-3 of the French Commercial code). According to the wording of the text, the abusive conduct can be constituted by any practice that the undertaking is able to implement because of the state of dependence the other party is in. The mere mention of a clause such as an exclusivity clause could constitute an abusive conduct. In practice, it appears that for undertakings dependent as retailer/distributor, claims are based on refusal to deal[35], discriminatory practices[36] or breach of contract[37]. For undertaking claiming dependence as suppliers, they rely on discrimination, discontinuation, or threat of such.[38] However, the Authority operates a restrictive interpretation of this second condition as well. One of the practices listed in article L.442-1 is sudden termination of established commercial relationship, and it appears that a few cases of abuse of economic dependence were found on this ground. The FCA will rely on the stability and length of the relationship to determine how sudden the termination was.[39] However, it appears that the mere termination cannot be considered abusive; the brutality of termination can only constitute an abuse when it is not objectively justified.[40]

In addition to proving a state of dependence and an abusive exploitation of this state, the alleged dependent undertaking must demonstrate that the abusive practice has an effect on the functioning or structure of competition, which proves complicated in practice.

2. Impact on the functioning or structure of competition: the restrictive approach favoured by the French Competition Authority

The vague scope of the condition must be discussed (2.1) to understand why it is hardly fulfilled and how it hinders the application of abuse of economic dependence (2.2).

2.1 Vague scope of the condition

Necessary impact of the abusive exploitation of abuse of economic dependence. It is necessary for its application to demonstrate that the abuse of the economic dependence is likely to have a negative impact on competition, that is to say that it has affected 'the

[35] For instance, Cons.conc.n°87-MC-03 du 25 mars 1987
[36] Paris, 17 juin 1992, Cons.conc.n°04-D-44 du 15 septembre 2004
[37] Claims rejected for instance in Cons.conc.n°90-D-36 du 16 octobre 1990
[38] For examples where abuse of economic dependence was characterised, see: Paris, 15 mai 1994, Cons.conc.n°93-D-59 du 15 décembre 1993
[39] Cons. Conc, Décision 04-D-26 du 30 juin 2004 relative à la saisine de la SARL Reims Bio à l'encontre de pratiques mises en œuvre par le groupement d'intérêt public Champagne Ardenne, point 71
[40] Décision 08-D-31 du 10 décembre 2008 relative à une saisine de la société Concurrence, pt. 36, CCC 2009, comm. 49, ops. M.Malaurie-Vignal

functioning or structure of competition'. Article L.420-2 Paragraph 2 of the French Commercial code states that it is sufficient for this impact to be potential. Abuse of economic dependence is therefore a *per se* infringement of competition law.[41] However, the Cour de cassation (the French Supreme Court) emphasised that only a significant impact on competition can characterise an anticompetitive practice.[42]

The aim of abuse of economic dependence primarily is to encompass abuses by non-dominant undertakings. Therefore, abuse of economic dependence should potentially be found in the absence of significant market shares. Indeed, it was not aimed towards dominant undertakings but instead aimed at addressing 'buyer power' in mass distribution, as the French Competition Authority recently recalled[43]. The Authority also reaffirmed that the situation of economic dependence must be appreciated in regard to the commercial relationship on the undertakings and not to the position held on the market.[44] But although the situation of dependence takes place between two undertakings, a potential or actual impact on competition is needed to fulfil the conditions.

Necessary impact… but on which market? For abuse of economic dependence to function as an antitrust tool, the definition of a relevant market should be a requirement to the analysis.[45] Some debates were raised regarding the necessity to proceed to the determination of the relevant market, as authors deemed it out of place when assessing abuse of economic dependence between two undertakings.[46] On the one hand, some authors consider that there is no reason not to proceed with the same approach than when assessing other anticompetitive practices.[47] On the other hand, it has been argued that a classical antitrust reasoning should not be applied when it comes to buyer power.[48] Thus, some say the market needs not necessarily be defined because economic dependence can be exploited even in the absence of superior market shares. However, market definition is not only about market shares. Indeed, Eben defines the rationale for market definition as providing "a tool to draw the boundaries within which to assess a particular question, most prominently

[41] C. Grynfogel, Lexis Nexis, JurisClasseur Commercial, Fasc. 260 : Droit Français Des Abus De Domination – Article L. 420-2 du Code de commerce, 13 février 2017
[42] Cass. com 15 juillet 1992, BOCCRF n° 15/92, Cass com 4 mai 1993, BOCCRF n° 15/93
[43] Apple decision, supra 12, 994
[44] Apple decision, supra 12, 554
[45] "The starting point for any competition analysis is the definition of the relevant market", OECD
[46] Vogel, supra 19, 825 and 836 ; Droit de la distribution, F. Buy, J-C. Roda, M. Lamoureux, LGDJ, 2019
[47] M. Glais, "Analyse économique de la définition du marché pertinent : son apport au droit de la concurrence », Economie rurale, n°277-278, 2003, p.41
[48] Stucke, Maurice E., Looking at the Monopsony in the Mirror (June 27, 2012). 62 Emory Law Journal 1509 (2013), University of Tennessee Legal Studies Research Paper No. 191, Available at SSRN: https://ssrn.com/abstract=2094553 or http://dx.doi.org/10.2139/ssrn.2094553

concerning the conduct, theory of harm, and anti-competitive effects alleged".[49] Therefore, market definition should not be neglected as a tool to assess the frame of reference of the alleged abuse of economic dependence, and the impact on competition.

Lack of precise threshold or indicator. As Roda points out[50], the difficulty for the FCA lies in identifying situations where the structure of the market paves the way for a potential abuse of dependence. Contrary to other antitrust provisions such as abuse of dominant position where authorities establish presumptions from undertakings' market shares, abuses of economic dependence based on buyer power do not provide the same clues. As already mentioned, the FCA admitted to not setting any threshold indicating potential dependence.[51] However, the Authority has in some way drawn inspiration from the European Commission practice regarding mergers in the sector of mass distribution, which is encouraged by some authors as providing an indicator of the affectation of competition[52]. In the case *Carrefour c/ Promodes*[53] where both companies were active in the retailing of consumer products in supermarkets, the Commission identified a threat rate of 22%[54], above which it was assumed that the retailer had enough buyer power to impose abusive commercial conditions. This threshold as nonetheless been criticised[55] for being unsuitable for a general application, which the FCA has confirmed by explaining that the threat rate depended on other criteria.[56]

Overall, it results from those uncertainties that the impact on competition is truly hard to prove for most firms claiming abuse of economic dependence.

2.2 Rare meeting of the conditions in practice

The restrictive interpretation of the conditions, as well as the lack of precise indicator on how to interpret the last criterion that is affectation on the market are some of the reasons abuse of economic dependence has not been used much by the FCA.

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[49] M.Eben, The Antitrust Market Does Not Exist: Pursuit Of Objectivity In A Purposive Process, Journal Of Competition Law & Economics, 2021; Nhab001, Https://Doi.Org/10.1093/Joclec/Nhab001 pp. 15, 16
[50] Droit de la distribution, supra 46
[51] Avis 15-A-06, supra 18
[52] Marty, supra 8
[53] Comm. CE, déc. 25 janv. 2000, *Carrefour c. Promodès*, aff. n° IV/M. 1684
[54] This threshold was already identified in several cases: *Décision n° 93-D-21 du 8 juin 1993 relative à des pratiques mises en oeuvre lors de l'acquisition de la Société européenne des supermarchés par la société Grands Magasins B du groupe Cora* in France ; Commission Decision of 3 February 1999 relating to proceedings under Council Regulation (EEC) No 4064/89 (Case No IV/M.1221 - Rewe/Meinl)
[55] Benzoni L. « Violence économique, dépendance économique et enjeux de la juste mesure de la puissance d'achat », AJ Contrat 2016
[56] Avis 15-A-06, supra 18

Rare findings of abuse of economic dependence between suppliers and retailers. Regarding abuses of economic dependence from distributors, only few cases upheld dependence claims from suppliers. In a case from 1996 in the sector of advertisement, a few channels were in a situation of economic dependence towards a central buying office for advertising space, who was able to impose financial conditions on them due to its buyer power.[57] Otherwise, claims from suppliers tend to fail on the grounds that they had behaved independently, that they brand had a certain renown, or that supply was already concentrated.[58] More examples feature abuses from suppliers, and it appears that they all share the same double characteristic: they featured both abuse of economic dependence and abuse of dominant position.

No impact without dominance? As a matter of fact, abuse of economic dependence only seems to be found in the presence of a dominant position. Indeed, rare examples of cases where abuse of economic dependence was found from a supplier also feature findings of dominance.

In the case *Reims Bio*[59] regarding the blood products market, the supplier had a quasi-monopoly on the market and the delivery of blood products amounted approximately to 90% of the buyer's supplies, who did not have an equivalent solution. The Competition Council (former name of the FCA) sanctioned the supplier for abuse of economic dependence, constituted by interruption of the supply and discriminatory practices. The Council also found that the supplier held a dominant position and abused it.

The same year, a supplier was also sanctioned for abuse of economic dependence and abuse of dominant position in the case *Filmdis*[60]. Independent cinemas in the Antilles were economically dependent on a film distributor who was in a situation of quasi-monopoly on the market. The Council found that they did not have alternative solutions and that Filmdis abused this dependence by imposing non-compete provisions and supplying them late. As Këllezi explains[61], the Council observed that the facts could be analysed both under the scope of dominant-position and economic-dependence provisions even though their constitutive elements are distinct.[62]

[57] Decision 96-D-44, 18th June 1996
[58] Décision Cons.conc. n°94-D-60 du 13 décembre 1994, confirmed by Paris, 13 décembre 1995. For more details see Vogel, supra 19, 826.
[59] French Competition Council, Decision 04-D-26 of 30 June 2004 SARL Reims Bio. Upheld by the Paris Court of Appeal, Decision of 25 January 2005, and the French Supreme Court, Decision of 28 February 2006
[60] French Competition Council, Decision 04-D-44 of 15 September 2004 Filmdis-Ciné-Théatre du Lamentin. See also Paris Court of Appeal, Decision of 29 March 2005
[61] Këllezi P, supra 1
[62] French Competition Council, Decision 05-D-44 of 21 July 2005 La Provence.

The Competition Authority is well aware of the possibility of a double incrimination based on abuse of dominant position when assessing abuse of economic dependence. However, while referring to these two cases, the Authority observed that "*Although the Competition Council has only sanctioned operators in a dominant position in its past decisions, it has never ruled out the possibility of applying the aforementioned article to a retail affiliation network whose head is not in a dominant position"*[63]. The FCA acknowledged the possibility of finding a non-dominant undertaking guilty of abuse of economic dependence and relies on a 2010 decision involving Carrefour. However, no abuse of economic dependence was found in this case, despite the apparent meeting of the conditions.[64] Boy indeed describes a lock-in situation where suppliers were dependent of Carrefour. In this case, although the contractual provisions of the franchise agreements showed a diminution of the franchisees' freedom and freedom to set prices, the Authority rejected the claims on the grounds that the state of economic dependence is assed *in concreto*: "either in the bilateral relationship between two economic operators or, more broadly, in the relationship between a supplier and its distribution network, provided that this network constitutes a group of undertakings with sufficiently homogeneous characteristics, the members of which are placed, with regard to this supplier, in the same economic and legal position"[65]. It judged that in this case, the franchisees were in different contractual situations. This decision has been criticised as embodying the Authority's restrictive interpretation of the abuse of economic dependence.[66]

To conclude, although the FCA would, in theory, accept to find abuse of economic dependence in the absence of dominance, it seems that it has refused claims on this ground and maintained a restrictive interpretation.

The restrictive interpretation of the conditions needed to find an abuse of economic dependence could explain why other legal tools have been preferred.

[63] Decision 20-D-04 supra 12, paragraph 995
[64] L. Boy, supra 9
[65] Aut. conc., déc. n° 10-D-08, 3 mars 2010, relative à des pratiques mises en œuvre par Carrefour dans le secteur du commerce d'alimentation générale de proximité, paragraph 165
[66] Marty supra 8 ; also a « surprising » decision for Boy, supra 9 ; an « odd » decision according to : A. Ronzano « Abus de dépendance économique : L'Autorité de la concurrence rappelle que l'état de dépendance économique s'apprécie in concreto (Carrefour), 3 mars 2010, Concurrences N° 2-2010, Art. N° 65415, www.concurrences.com"

B. ABUSE OF ECONOMIC DEPENDENCE SCARCELY APPLIED IN CASE LAW: THE ALTERNATIVES CHOSEN BY THE FRENCH COMPETITION AUTHORITY

It appears that the French Competition Authority has favoured other legal provisions over abuse of economic dependence. This part will explore the interplays between economic dependence, restrictive practices and contract law (1) as well as the role of exploitative abuses compared to abuse of economic dependence (2).

1. Anticompetitive practices, restrictive practices and contract law: synergy or potential conflicts?

As economic dependence occurs within a contractual relationship, lawmakers tried to overcome the reluctance of courts to apply it as an anticompetitive practice. It did so by prohibiting abuse of economic dependence in the scope of restrictive practices (1.1) and by establishing economic duress as a defect in consent (1.2).

1.1 Economic dependence as *pratique restrictive de concurrence* in Article L.442-1 of the Commercial code

In the beginning: one situation, two provisions? French competition law makes a distinction between anticompetitive practices and *pratiques restrictives de concurrences.* Provisions on anticompetitive practices ensure an effective competition on the market. Therefore, anticompetitive conducts must have by object or effect to restrict competition to be prohibited. Abuse of economic dependence under Article L.420-2 is an anticompetitive practice and requires an impact on competition to be applicable, even if it can be potential, as explained in Part A. The French Commercial code also contains provisions on *pratiques restrictives de concurrences*, which are practices aiming at regulating commercial relations between professionals in order to ensure a "competitive balance between professionals operating on the same market".[67] They target practices occurring in a contractual relationship and which are likely to have an effect on the market. Those provisions are listed under Article L.442-1 et seq (former L.442-6) of the Commercial code.

[67] N. et D. Ferrier, Droit de la distribution : LexisNexis , 2020, 9th edition, mentioned in A-C. Martin, R. Pihéry, Fasc. 720 Pratiques Restrictives De Concurrence – Procédures de contrôle et de sanction, JurisClasseur CC LexisNexis

The 2001 NRE law introduced abuse of economic dependence in this article as a restrictive practice regardless of any impact on the market. Indeed, the FCA's restrictive interpretation of the conditions – especially the latter – resulted in the failure of claims based on L.420-2, which led lawmakers to introduce the concept as a restrictive practice.[68] This pleased those who considered abuse of economic dependence to be more of a contract law matter than an antitrust one.[69] The article originally prohibited "abusing the relationship of dependence [emphasis added] in which the undertaking holds a partner, or its buyer or trading power by imposing unjustified commercial conditions or obligations". The only difference between the abuse introduced by the NRE law and abuse of economic dependence under Article L.420-2 seemed to be the need to prove an impact on the market.

Wider scope of application: dilution of the notion of economic dependence. The 2008 LME law[70] widened the scope of the article by editing the wording of the provision to prevent "imposing or attempting to impose obligations on a trading partner that create a significant imbalance in the rights and obligations of the parties". It supressed the reference to the situation of economic dependence in order to circumvent the restrictive interpretation that the Cour de Cassation (French Supreme court) had confirmed.[71] At first glance, the wider scope given to the provision enables a larger number of situations to be apprehended. However, this evolution was also criticised, mainly because the whole article gathers different precise practices giving rise to liability next to more general ones like this 'vague' abuse.[72] Furthermore, 'trading partner' was replaced by 'the other party' in 2019[73] so that it can now be applied generally for situations of contractual imbalance if a certain submission can be proven – which is not as restrictive as the conditions of economic dependence under L.420-2.

Legal actions and sanctions: ensuring fair competition after all? According to Article L.442-4 of the Commercial Code, actions may be brought before certain courts not only by any person having an interest, but also by the public prosecutor, by the Minister of the economy, or by the President of the Competition Authority. In addition to the rights granted to victims, which are: right to order for the practices to end, have unlawful clauses

[68] M. Glais, "La sanction des abus de dépendance économique : entre désillusion et Espoir", Contrats Concurrence Consommation n° 12, Décembre 2006, 25
[69] L. Idot, « LA DEUXIÈME PARTIE DE LA LOI "NRE" ou la réforme du droit français de la concurrence », La Semaine Juridique Edition Générale n° 36, 5 Septembre 2001, doctr. 343
[70] Loi de Modernisation de l'Économie (LME LOI n° 2008-776 du 4 août 2008)
[71] For instance: Com. 23 oct. 2007, no 06-14.981 cited by F-X. Testu, Dalloz référence Contrats d'affaires Chapitre 13 – Traduction juridique de l'économie de l'échange, 2010
[72] Idot, supra 69; Testu, ibid
[73] Ordonnance 2019-359 du 24 avril 2019 réformant le titre IV du livre IV du code de commerce

or contracts declared null and void and to demand the return of undue benefits, the Minister can ask for a civil fine to be imposed. This fine has been modified several times in past reforms and is now capped to either 1) €5 Millions; 2) three times the amount of benefits unduly received or obtained; 3) 5% of the turnover achieved in France during the last financial year closed before the practices. While victims can obtain judicial remedies for unfair practices committed in their contractual relationship, the Minister of economy acts as a guardian of the economic public order. The role is not to interfere in contractual practices to protect small parties but to guarantee the proper functioning of the market.[74] It is not given whether this provision and abuse of economic dependence should go hand in hand as they safeguard the same objective, since a breach of Article L.442-1 can constitute an abusive practice in the sense of Article L.420-2, or if lawmakers have tried to make the first one a better antitrust tool than the actual anticompetitive practice. In any case, a victim is not prevented to engage into two actions; one before a judicial court on the ground of restrictive practices, and the other before the French Competition Authority for abuse of economic dependence[75] – although case law has proven that the first one stands a better chance of success.

Independently of the distinction between anticompetitive practice and restrictive practices, the very concept of economic dependence especially seems to have made a revival in the form of a particular sort of duress after the reform of the Civil code.

1.2 Economic duress in the 2016 reform of the Civil code

Notion and consecration in the Civil code. In the context of commercial relations, economic duress consists in "obtaining by threat a contractual advantage that would not have been obtained if the negotiations had taken place between partners with a relatively balanced bargaining power."[76] Economic duress has been recognised in case law[77] on different occasions, although courts were – unsurprisingly – reluctant to impose sanctions on this ground.[78] The 2016 French contract law[79] reform consecrated the notion in a new Article 1143 dedicated to the notion. Article 1143 states: "There is also violence where a party,

[74] N. Homobono, A. Marie, O. Cluzel, « Le rôle du ministre de l'Économie en matière de pratiques anticoncurrentielles et de pratiques restrictives de concurrence » AFEC, 7 juillet 2015, Concurrences N°4-2015
[75] Idot, supra 69
[76] Benzoni, supra 55
[77] Civ. 1re, 30 mai 2000, n° 98-15.242
[78] Civ. 1re, 3 avr. 2002, n° 00-12.932 (arrêt Bordas)
[79] Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations

abusing the state of dependence in which his co-contractor finds himself, obtains from him a commitment which he would not have entered into in the absence of such coercion and derives an obviously excessive advantage." The wording indicates that the legal regime is the same as 'regular' duress (the contract is void), however the conditions of applications are specific. First, a state of economic dependence must be proven that does not necessarily need to be 'economic' according to the wording of the text[80] and the will of lawmakers[81]. Indeed, the scope of the article is quite broad as it is meant to include financial dependence, technological dependence, psychologic dependence and so on. It is arguable that case law could eventually restrict it to economic dependence[82]. However, no criteria are offered by the text to assess this dependence. Then, an abuse of this state of dependence is needed: the abuse lies in the obtention of an advantage that would not have been granted without the alleged dependence. This calls for two criteria: the abuse; and the excessive advantage obtained – which lacks definition in the text. Indeed, it is said that the excessive advantage has to be obvious. Therefore, a restrictive interpretation by the judge could lower the efficacity of the provision.[83]

Concluding observations. Article 1143 of the Civil code undoubtedly conveys a wider material scope than those of Articles L.442-1 and L.420-2 §2 of the French Commercial code. Indeed, the two last ones only apply to commercial contracts between undertakings and in a situation of economic dependence whereas Article 1143 applies to any contract when duress can be proven. Where does that leave us? It is true that economic dependence makes an appearance in general contract law, in quite general terms that should be able to encompass a wide range of contractual situations. However, this should perhaps not be applied to undertakings when *pratiques restrictives de concurrence* can apply, which is too simple a solution for Claudel, but would go in the sense of the saying *Specialia generalibus derogant* (the specific derogates from the general). However, it can be noted that sanctions based on the Commercial code are more favourable for victims.[84] The success of anticompetitive practices, and the neglect of abuse of economic dependence have already been evoked. As for the execution of Article 1143, the interpretation of the judge will allow

[80] S. Pellet, « L'abus de dépendance est une violence ! », l'essentiel du droit des contrats, 11 mars 2016, p. 4
[81] H. Barbier, « La violence par abus de dépendance », La Semaine Juridique Edition Générale n° 15, 11 Avril 2016, 421
[82] Civ. 1re, 18 févr. 2015, n° 13-28.278 ; Com. 9 juill. 2019, n°18-12.680
[83] E. Claudel, « L'abus de dépendance économique : un sphinx renaissant de ses cendres ? (commentaire de l'article 1143 nouveau du code civil et de la proposition de loi visant à mieux définir l'abus de dépendance économique) », RTD com. 2016. 460
[84] Ibid, for a detailed comparison.

to state on its efficiency. What is certain for now is that Article 1143, Article L.420-2 and Article L.442-1 are all provisions likely to support claims for relationships within commercial contracts, in particular distribution contracts.[85]

However, when it comes to practices impacting competition law in presence of market power, the tendency is to recognise exploitative abuse in the sense of an abuse of dominant position. The next part will dwell on this concept.

2. Exploitative abuses and abuses of economic dependence, two lively concepts moulded on one stem

Abuse of economic dependence and abuse of exploitation stem from the same concept that is exploitation of a trading partner. Nevertheless, they operate according to different regimes. Exploitative abuses have been put aside by EU competition law (2.1) but seem to recently return at a national level (2.2).

2.1 Exploitative abuses set aside an EU level

Article 102 TFEU: the origins. Exploitation is defined in textbooks as "conducts whereby the dominant undertaking takes advantage of this market power to exploit its trading partners (customers or suppliers)"[86] or behaviours suggesting "the earning of monopoly profits at the expense of the customer"[87]. In the sense of the drafters of the TFEU, exploitative conducts are primarily meant to be covered by Article 102. Indeed, the example given in Article 102 (2) (a) is that of unfair purchase or selling prices or other unfair trading conditions. In fact, several authors such as Akman consider it the main case to which abuse of dominant position could apply.[88] However, cases based on exploitative abuses have decreased whilst exclusionary abuses have become the main concern of EU courts.

"Increasing neglect of exploitative abuse cases"[89]. It appears that the European Court of Justice ('ECJ') case-law has quickly shifted to sanctioning exclusionary abuses,

[85] H. Lecuyer, « Déséquilibre significatif, violence économique : vers un nouvel équilibre du contrat ? », Le Blog des Juristes, 23 févr. 2016
[86] A. Jones, B. Sufrin, N. Dunne, Jones & Sufrin's EU Competition Law: Text, Cases, and Materials, OUP Oxford, 2019, 7th edition, p. 361
[87] R. Whish, D. Bailey, Competition Law, OUP Oxford, 2018, 9th edition, p. 208
[88] P. Akman, « Searching for the Long-Lost Soul of Article 82 EC" » (2009) 29(2) Oxford Journal of Legal Studies, p. 295 (as supported by the French and German versions of the text); Jones and Sufrin, supra 86.
[89] Bougette P, Budzinski O, and Marty F, 'Exploitative Abuse And Abuse Of Economic Dependence: What Can We Learn From An Industrial Organization Approach?' (2019) 129 Revue d'économie politique

with cases such as *Continental Can*[90] establishing that Article 102 was fitted to treat exclusionary abuses; and *Hoffman-LaRoche*[91], that defined the concept of an exclusionary abuse. This can be explained by different factors. According to Jones and Sufrin, this is partly due to the fact that an undertaking's ability to exploit customers for a significant amount of time indicates that something is wrong with the market.[92] However, reasons inherent to the (lack of) definition and framework for exploitative abuses are also to blame.

Lack of framework for exploitative abuses. The dual definition of exploitation itself must be taken into account to understand this 'neglect' of exploitative abuses in case law. Two different definitions show that 'to exploit' can either mean 'to take advantage of in an unfair or unethical manner; to utilize for one's own ends' or to 'make full use of and derive benefit from [a resource]'[93]. Indeed, for Röller, pro-competitive behaviours involve exploitation, as it is an incentive to compete.[94] According to Akman, it is unclear what meaning is implied in Article 102 TFEU and what conduct should be considered abusive. In other words, "it is not straightforward when the conduct of the undertaking 'exploits' its customers rather than making full use of its resources" [95]. While the very anti-competitive nature of exploitative practices has never been questioned[96], a lack of framework remains regarding the assessment of abusive practices in case law, as the restrictive interpretation of the ECJ shows in recent cases.[97] The reluctance to take a stronger stand on exploitative abuses echoes the choice made to disregard abuse of economic dependence at an EU level, which can be explained by the similarities in the characteristics of both types of abuses. The lack of clear definition and framework to assess abuses which could be considered abusive under Article 102 is probably one of the reasons the EU has neglected exploitative abuses.

[90] Judgment of the Court on February 21, 1973, Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities, Case 6-72
[91] Judgment of the Court on February 13, 1979 – Hoffmann-La Roche & Co. AG v Commission of the European Communities, Case 85/76
[92] Jones and Sufrin, supra 66, p.365
[93] See 'exploit, verb' Oxford English Dictionary, Third Edition, June 2016, latest version published online December 2020
[94] L. Röller, "Exploitative Abuses" in Ehlermann C, and Marquis M, European Competition Law Annual 2007: A Reformed Approach To Article 82 EC (1st edn, Hart 2008)
[95] P. Akman, « Exploitative Abuse in Article 82EC: Back to Basics? » (December 25, 2008). Cambridge Yearbook of European Legal Studies, Vol. 11, 2009, ESRC Centre for Competition Policy CCP Working Paper No. 09-1, Available at SSRN: https://ssrn.com/abstract=1328316, p.7
[96] Bougette, supra 89 ; Akman, supra 88
[97] Opinion of the Advocate General Nils Wahl, Case C-177/16, Biedrība "Autortiesību un komunicēšanās konsultāciju ag`entūra – Latvijas Autoru apvieñība" v Konkurences padome, 6 April 2017 ; see Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência* (2018) ECLI:EU:C:2018:270 for a high standard of proof set for exploitative price discrimination

This being said, commentators and particularly economists often plead in favour of an effects-based approach which would considerate exploitative abuses more thoroughly.[98]

There seems to be a movement towards more application of abuse of exploitation, arguably at an EU level[99] but most certainly at a national level as seen in the recent decision-making practice of the FCA.

2.2 Abuse of exploitation returns: the new trend by the French Competition Authority

Although abuse of exploitation has been set aside for a long time in the EU, it seems to make a comeback in the decision-making practice of the French Competition Authority.

The *Sanicorse* series. The first episode features a decision by the FCA[100] in the sector of the disposal of infectious medical waste. The FCA had imposed a fine of €199 000 to Sanicorse for abusing its dominant position from 2011 to 2015. It judged that the "sudden, substantial, persistent and unfounded increase in the fees charged to Corsican hospitals and clinics for the disposal of waste from health care activities" constituted an abusive conduct aiming at exploiting clients of the service.[101] The ground for the decision lied without surprise in Article 102 a) which prohibits "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". This decision is one of a first in a new trend of the Authority to sanction abuses of exploitation, although it has been overruled in a second episode.

Indeed, a decision from the Paris Court of Appel from 2019 overturned this decision from the FCA.[102] It recalled the two conditions needed to conclude to an abuse of exploitation that are (i) advantages obtained thanks to a dominant position – often summed up as the requirement of a causal link; and (ii) unfair trading conditions. As Bosco points out[103], the Court quite sharply judged that the second condition was not fulfilled and that it was not "up to the Authority to replace the management bodies of the dominant company in determining what its policy, in particular pricing, should be on the relevant market, and it is

[98] Akman, supra 88, Bougette, supra 89, Röller, supra 94
[99] Comm. UE, 10 févr. 2021, AT. 40394 (IP/21/524), Aspen, obs. L. Idot, « Concurrence : l'activité des autorités », LexisNexis, Europe n° 3, Mars 2021, comm. 114 ; C. Mongouachon « Vers la fin d'un modèle « ordolibéral » de régulation du marché ? », Revue Lamy de la concurrence, Nº 103, 1er mars 2021, p.3
[100] Aut. conc., déc. n° 18-D-17, 20 sept. 2018, relative à des pratiques mises en œuvre dans le secteur de l'élimination des déchets d'activités de soins à risques infectieux en Corse
[101] Decision n°18-D-17, 201.
[102] CA Paris, pôle 5, ch. 7, 14 nov. 2019, n° 18/23992, Sanicorse SARL, JurisData n° 2019-020845
[103] D. Bosco « Sanction des abus d'exploitation : la cour d'appel de Paris douche l'enthousiasme de l'Autorité de la concurrence », Contrats Concurrence Consommation n° 1, Janvier 2020, comm. 12

only when the conditions of transactions between this enterprise and its economic partners can be objectively qualified as unfair that the Authority as a right to intervene"[104]. The Court of Appeal judged that the mere increase of prices did not constitute excessive pricing in the sense of Article 102 if it was not demonstrated that the prices themselves were excessive.

This decision is questionable in the sense that the Court could have judged otherwise, looking at the wording of Article 102. Indeed, "unfair trading conditions" do not necessarily exclude the brutal increase of prices from a dominant undertaking having negative effects on the market. By overruling the FCA's original decision, the Court chose to act as a safeguard against an excessive use of abuse of exploitation. As Bosco points out, courts always seem reluctant to intervene in abuses taking place in contractual relationships, especially with a legal tool that has blurrier contours than abuse of economic dependence.[105] This case thus called for a better framework for exploitative abuses. Although this decision based on an exploitative abuse was overruled – as recently confirmed by the Cour de cassation[106] – the FCA's new approach towards exploitative abuses was launched.

Exploitative abuses by digital actors. The premise of this trend can be observed in a 2015 decision where Gibmedia requested interim measures to the FCA due to the unclear rules regarding account suspensions.[107] The FCA refused to impose interim measures but decided to continue the investigation on the merits – even if the practices took place in a contractual relationship[108].

In a later decision, the FCA granted interim measures against Google Ads at the request of Amadeus.[109] The practice at stake was the sudden termination of their commercial relations under non-transparent and non-objective conditions. The FCA judged that these practices could potentially be constitutive of an abuse of exploitation. Interestingly enough, Amadeus also claimed an abuse of economic dependence from Google, that the FCA dismissed by saying that the investigation on the merits would stress that point out, and that it was "not necessary to rule on this ground since Google appeared likely, at his stage of the investigation, to hold a dominant position on the French online advertising market".[110] This

[104] Decision n°18-D-17, 92.
[105] Bosco, supra 103.
[106] Com, 7 juillet 2021
[107] Décision n° 15-D-13 du 9 septembre 2015 relative à une demande de mesures conservatoires de la société Gibmedia
[108] D. Bosco, « Le retour de l'abus d'exploitation » Contrats Concurrence Consommation n° 11, Novembre 2015, comm. 259
[109] Décision 19-MC-01 du 31 janvier 2019 relative à une demande de mesures conservatoires de la société Amadeus, Autorité de la Concurrence, confirmed by CA Paris, pôle 5, ch. 7, 4 avr. 2019, n° 19/03274, JurisData n° 2019-005167
[110] Decision 19-MC-01, 132.

support the views that the same practices are likely to be considered under abuse of exploitation and abuse of economic dependence. Since the *Sanicorse* decision, a number of decisions involving interim measures for potential abuses of exploitation have been directed against digital platforms.

One decision particularly stood out where Google was fined for an abuse of dominant position in the sector of online advertising.[111] The FCA judged that the lack of clarity, objectivity and transparency of Google Ads could result in a discretionary application by Google which would have negative impacts on the markets, and therefore constituted an exploitative abuse. Consequently, it imposed a fine of €150 million and ordered Google to clarify the wording of the Google Ads operating rules and the account suspension procedure. Because of this application of abuse of exploitation and the amount of the fine, this decision confirms the tendency of the FCA to refer to exploitative abuse for digital firms.

This view was recently confirmed by a criticised decision from April 2020[112], where Google was suspected of different abuses in its relationship with publishers and press agencies following Google's implementation of the law transposing the DSM directive.[113] Google has decided that it would no longer display article excerpts, photographs and so on within its services unless publishers gave their permission for free. Consequently, the FCA has imposed interim measures and forced Google to enter into negotiations with good faith to conclude licensing agreements. One can wonder about the role of the French Competition Authority in ensuring the respect of copyright and related rights. Well, the FCA found three practices likely to constitute an abuse of dominant position: unfair trading conditions, discrimination, and 'circumvention of the law'. Although the two first grounds are not unusual practices committed by dominant firm, punishing an undertaking for 'circumventing the law' on antitrust grounds sounds quite novel. In this decision, the FCA also dismissed a claim on abuse of economic dependence with the same wording that this used in the Amadeus decision: there is no need to rule on this ground because of Google's dominant position. Abuse of economic dependence appears like a subsidiary ground that could only

[111] Aut. conc., déc. n° 19-D-26, 19 déc. 2019 relative à des pratiques mises en œuvre dans le secteur de la publicité en ligne liée aux recherches

[112] Aut. conc., déc. n° 20-MC-01, 9 avr. 2020 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse

[113] See Loi n° 2019-775 du 24 juillet 2019 transposing Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

be accounted for in the absence of a dominant position, which contrasts with early case law as explained in part A 2.2.

Concluding remarks. What is the meaning of this return of exploitative abuses? It appears that the lack of framework for exploitative abuses serves the Authority quite well. Indeed, it seems that abuse of exploitation can encompass a wide range of potential anticompetitive practices – which appears convenient in light of the priorities targeting digital firms. This arguably poses a threat to legal certainty, a common critic made about novel abuses of dominant position in the digital economy.[114] But in the light of our subject which is abuse of economic dependence, this also raises questions as to the future of exploitative abuses more generally. We saw that abuses of exploitation and abuse of economic dependence stem from the same conducts, and that those conducts can be apprehended under both provisions. Does the broad application of abuse of exploitation trump abuse of economic dependence, like in the case Google Amadeus and the Google case against press publishers? It seems from recent case law that the Authority has favoured applying abuse of dominance in cases where abuse of economic dependence could also have been found. But ultimately, could this trend be the beginning of a greater recognition of exploitative abuses in contractual relationships? The French Competition Authority's growing 'conceptual boldness'[115] seems to allow it.

As the intervention of competition authorities expands regarding digital platforms, abuse of economic dependence could serve as a new way to apprehend certain conducts, and the next chapter will show that the Authority has already used it for that purpose, and could reiterate this approach.

[114] About the Google Shopping case (European Commission), see for example Magali Eben (2018) Fining Google: a missed opportunity for legal certainty?, European Competition Journal, 14:1, 129-151, DOI: 10.1080/17441056.2018.1460973

[115] D. Bosco, « Nouvelle décision contre Google suspecté d'abuser des éditeurs de presse », Contrats Concurrence Consommation n° 6, Juin 2020, comm. 101

CHAPTER 2 – ABUSE OF ECONOMIC DEPENDENCE IN A CHANGING ECONOMY: UNCERTAIN PERSPECTIVES OF EVOLUTION

Abuse of economic dependence has made a recent comeback in the decision-making practice of the French Competition Authority in a case against Apple although the extent of this comeback remains uncertain (A) which casts doubts over the possible applications of abuse of economic dependence in the future, in particular for the digital economy (B).

A. RECENT EVOLUTION IN CASE LAW: THE HOPE RAISED BY THE *APPLE* DECISION

A decision by the FCA sanctioning Apple has led abuse of economic dependence to resurface (1) but doubts remain as to the extent of this decision (2).

1. The French Competition Authority fines Apple a record of €1.1 billion: a renewed use of abuse of economic dependence[116]

On March 16th, 2020, the FCA exceptionally found Apple guilty of an abuse of economic dependence. It considered that Apple had managed to distort competition thanks to its dual position in the supply chain, both as a manufacturer and a reseller (1.1); and that all the criteria for applying abuse of economic dependence were fulfilled (1.2).

1.1 Focus on Apple's distribution network

Setting the scene: Apple's distribution system in France. Apple has not opted for a selective or exclusive distribution network but operates in an 'open' distribution network.[117]

On the upstream market, Apple sells products to two global electronic wholesalers (Tech Data and Ingram Micro). On the downstream market, Apple products are sold by retailers and resellers, depending on their size and activity. Retailers are supplied by Apple directly and are generally chain stores including electronic goods retail chains. Resellers are usually small-scaled electronic good dealers that operate with Apple under two formats. On the one hand, Apple Authorised Resellers (AARs) sell Apple products through a regular

[116] This section is part of an article published as: C-E. Auduc, "The French Competition Authority fines Apple a record of €1.1 billion: a renewed use of abuse of economic dependence", *Competition Forum – French Insights,* 2021, n° 0005 https://competition-forum.com

[117] For an overview of the whole network, see the layout by the FCA page 27 of the decision

distribution agreement. On the other hand, Apple has implemented a network specialised in the sale of its products, where the distributors called Apple Premium Resellers ('APRs') are chosen based upon selective criteria to ensure a high-quality customer experience. However, APRs are not protected against sales outside of the network.[118] APRs are supplied either by Apple or by the two wholesalers**.**

The practices implemented by Apple for the distribution of its products. The case was brought forward in 2012 by eBizcuss, a company listed as an APR. The practices held before the French Competition Authority included an exchange of information between the wholesalers and the division of Apple's products and customers. It also featured the diffusion of imposed prices by Apple, as well as the imposition of differentiated commercial conditions between the integrated retailers and other retailers, resulting in an abuse of economic dependence.

1.2 Finding of an abuse of economic dependence

The economic dependence of Apple Premium Resellers. The situation of economic dependence between Apple and the APRs was observed in different provisions and obligations stated in their contracts. For example, not only did the APRs contracts provide for exclusivity regarding Apple products, they also prohibited APRs to open any store selling competing products during the term of the contract and up to six months following its termination. Consequently, the Authority assessed the situation of economic dependence by concluding that APRs were unable to trade partners and sell another brand of products without risking a complete loss of value of their business, considerable investments and costs for rebuilding stores and training staff.

Apple's abusive conduct towards its Premium Resellers. The FCA found that Apple's conduct was abusive as the practices implemented aimed at keeping the distributors in a situation of dependence whilst restricting their commercial freedom[119]. The FCA noted difficulties regarding the supply of products, a discriminatory treatment towards APRs as well as a lack of transparency towards remunerating conditions. One aspect particularly concerned the receiving of products. Indeed, Apple limited the amount of product available for APRs especially those in demands, following the launching of a new product for instance. The FCA found that APRs were deprived of stocks whilst Apple Stores and other retailers

[118] Decision 20-D-04, paragraph 1055
[119] *Apple* decision, para 1119.

were still being supplied. As a consequence, APRs suffered a loss of their customers and even had to resort to ordering from other distribution channels (e.g., directly from Apple Store like any end costumer). Regarding Apple's new products, APRs testified that they were not informed in a timely manner of the launch of new products. Moreover, the FCA noted that the conditions listed in contracts between Apple and the APRs were quite unforeseeable.

A restriction of competition. The FCA concluded that these practices drove out resellers by excluding some APRs such as the complainant, due to the loss of customers. In all likelihood, these practices contributed to undermine the activity of APRs. Although Apple presents APRs and Apple stores as specialised competitors, the FCA considered that the practices conducted by Apple favoured its own network. Consequently, the abusive behaviour resulted in a restriction of intra-brand competition of Apple's products.

This decision thus constitutes a rare and recent application of abuse of economic dependence where all the criteria of Article L.420-2 were fulfilled.

2. The lack of further decision upholding the alleged renewal of abuse of economic dependence

The *Apple* decision could seem to pave the way for a wider application of abuse of economic dependence and a less restrictive approach long awaited (2.1) but has not been upheld by any element since last March (2.2)

2.1 Growing hopes of a less restrictive approach

Previous hopes of evolution for abuse of economic dependence. Changes in the approach to abuse of economic dependence under Article L.420-2 have been praised by authors ever since the restrictive interpretation of the Authority was asserted. Most recently and alongside the 2016 contract law reform, a draft law considered implementing changes in abuse of economic dependence and its interpretation to enable a better application in case law.[120] The Parliament aimed at fighting off economic unbalances between mass distribution and suppliers – which was consistent with the original intention behind the text.

The main evolutions lied in (i) simpler conditions to establish a situation of economic dependence, and (ii) changes as to the condition of impact on competition. First, it was

[120] Rapport fait au nom de la Commission des Affaires Économiques sur la proposition de loi visant à mieux définir l'abus de dépendance économique (n° 3571) par M. Damien ABAD and Proposition de loi n°703 visant à mieux définir l'abus de dépendance économique, M. Damien Abad

suggested that the notion of economic dependence be appreciated through two single criteria that would have been a) that the "termination of the commercial relationship between supplier and retailer would risk compromising the continuation of its activity"; and b) demonstrating that "the supplier does not have any replacement solution likely to be implemented in a reasonable timeline". An amendment also suggested setting a presumption of dependence over the threshold of 22% similar to the one chosen in the *Carrefour* decision[121]. Second, the 2016 proposal offered that the impact on competition could be appreciated "in the short to medium term". Such an edit would have allowed the Authority to appreciate the effects on some commercial relationships that do not always appear at the short-term, especially regarding SMEs.[122]

Some voices were raised against this proposal. It was claimed that the loosening of the conditions posed a threat to distributors, as they would risk delisting certain suppliers with whom they had excessive turnover in order to prevent them from being seen as dependent on them. It was also feared that the extension to a "short to medium term impact on the market" opened the door to random applications and therefore to legal uncertainty. Although it was adopted by the Commission of economic affairs, the proposal was quickly dismissed on the ground that it would have overlapped with the scope of Article L. 442-1 of the Commercial Code which, as previously explained, allows the Minister of the Economy to act before the commercial courts to sanction the abuse of purchasing power via the notion of 'significant imbalances'[123].

Rays of hope in the qualification of abuse of economic dependence in the *Apple* decision. Some saw in the FCA's decision against Apple a sign that the Authority was maybe taking the matter into its own hands by finally applying abuse of economic dependence again, with what could appear to be a lighter approach to the conditions required under Article L.420-2.

It can be noted that although the Authority focuses on commercial freedom of APRs on intra-brand competition, Apple's practices also limited inter-brand competition by obtaining a competitive advantage from the illegality of its network.[124] According to Bosco[125] this echoes recent decisions where abuse of exploitation has been upheld, which

[121] Supra 53
[122] Claudel, supra 83
[123] C. Grynfogel, supra 41
[124] Décision 20-D-04, pt 1137
[125] Pratiques anticoncurrentielles - L'organisation du réseau de distribution d'Apple sanctionnée par l'Autorité de la concurrence - Commentaire par David BOSCO, Contrats Concurrence Consommation n° 8-9, Août 2020, comm. 128

supports our view that the rise of exploitative abuses in the decision-making practice of the Authority does not necessarily trump a later rise of abuses of economic dependence as well, especially since the conditions could seem to be interpreted with more flexibility.

Indeed, we saw in Chapter 1 that the choice of an undertaking to enter a situation of dependence led courts and authorities to reject claims based on Article L.420-2[126], which was constituent with the approach of the Cour de cassation.[127] However in the *Apple* decision, the FCA relied on a case from 2015, in which the Paris Court of Appeal stated that the situation of economic dependence was objective and that it was not sufficient to show that it resulted from a deliberate strategy to refute the existence of an economic dependence.[128] The FCA was able to conclude that "*The fact that the APRs deliberately placed themselves in this situation of dependence by signing the litigious contracts cannot be used to rule out the state of dependence of the APRs on Apple*".[129] For some, this could testify of a more flexible interpretation of the conditions of abuse of economic dependence by the FCA.[130] However, this flexible approach does not seem to have had the favour of the FCA since.

2.2 Maintaining a restrictive approach

The alleged flexibility initiated by the FCA does not seem to have impacted the decision-making practice of judicial courts, nor to constitute a choice by the FCA to make its practice evolve regarding abuse of economic dependence.

No stretch from judicial courts. A judgement from the Paris Commercial Court of February 10th, 2021 refused to qualify an abuse of economic dependence of an undertaking towards Google.[131] Oddly enough, the Commercial Court stated that the conditions needed to define the abuse (renown of the brand, importance of the part of turnover, and difficulty in finding equivalent solutions) were fulfilled. The Court went as far as to say that "there is

[126] For instance : Aut. conc., déc. n° 14-D-07, 23 juill. 2014, § 144 et s
[127] "*The state of economic dependence is ruled out when the size of the turnover is the consequence of a deliberate choice by the reseller to concentrate or refocus his activity with a single partner (Com., 10 décembre 1996, Bull. 1996, IV, no 310, no 94-16.192*)" Rapport annuel 2009 - Cour de cassation "Les personnes vulnérables dans la jurisprudence de la Cour de cassation Paris", La Documentation française, 2010, p.227,228
[128] Para 960, CA Paris, ch. 1, sect. H, 25 janv. 2005, n° 2004/13142, Établissement français du sang contre SARL Reims Bio
[129] *Apple* decision, para 1008
[130] Q. Soavi, « Droit de la concurrence - L'Autorité de la concurrence inflige une sanction pécuniaire record à Apple », Revue Internationale de la Compliance et de l'Éthique des Affaires n° 5, Octobre 2020, comm. 186
[131] Jugement du Tribunal de commerce de Paris, 10 février 2021, Oxone Technologies et a. c/ Google Ireland Ltd

no doubt that the economic dependence is established".[132] However, the judges rewound to the established interpretation regarding the 'chosen' aspect of the situation of dependence. They refused to conclude to an abuse of economic dependence on the ground that Oxone did not prove that its dependence on Google was not the result of a 'strategic choice'.[133] In that regard, the decision marks a difference in interpretation with the *Apple* decision where the FCA had seemed more open on that criterion.

However, the Commercial Court relied on decisions where the Competition Authority had characterised a dominant position of Google[134] to conclude that it abused this position by suspending ads from Oxone. As a conclusion, the Court ordered €1 million in damages and an injunction to resume relations with the plaintiff company. In this judgement, the Court once more acknowledged the existence of exploitative practices of Google's dominant position, which is consistent with the tendency identified in Chapter 1 to apply abuse of exploitation.[135] This tendency seems confirmed while the renewal of abuse of economic dependence is not followed by the Paris Commercial Court.

Abuse of economic dependence in the *Apple* case: a one-time thing? Despite hopes for a renewal of abuse of economic dependence following the *Apple* decision, the Competition Authority has not used it since. In fact, it refused to conclude to an abuse of economic dependence in a claim based on Article L.420-2 in a decision of February 24th, 2021.[136] The decision related to the industry of publishing and sales of professional software. In this decision, it found that the retailer had failed to demonstrate its state of economic dependence due to the lack of evidence regarding the renown of the brand and lack of an equivalent solution. The decision thus serves as an educational reminder of the four criteria needed to assess a situation of economic dependence, although it offers no sign of flexibility in their interpretation. The Authority concludes that since the situation of economic dependence is not proven, it is not necessary to state on potential exploitative behaviours.

Neither the FCA nor judicial courts have confirmed this 'renewal' of abuse of economic dependence that the *Apple* decision seemed to have launched. The plaintiffs appealed to both of these decisions, and it will be interesting to see if new lights are shed on abuse of economic dependence in further judgments.

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[132] Para 28
[133] Para 29
[134] Para 21 and 22, Decision n°19-D-26 ; Decision n° 19-MC-01
[135] Comment on the decision by Muriel Chagny, L'actu-concurrence n° 18/2021, A. Ronzano
[136] Décision n° 21-D-04 adoptée le 24 février 2021 à propos de pratiques dénoncées dans le secteur de l'édition et de la vente de logiciels professionnels.

Because of how singular the *Apple* decision is in the characterisation of abuse of economic dependence, the future of abuse of economic dependence is quite blurry. But looking at the evolution of recognition of exploitative abuses, abuse of economic dependence deserves a bit more interest than judges and practitioners have been willing to grant it in recent years.

B. HAZY PROSPECTS FOR ABUSE OF ECONOMIC DEPENDENCE IN THE DIGITAL ECONOMY

Some recent evolutions in EU member states lead to think that abuse of economic dependence could be applied more widely, in particular against abuses in bilateral relationships in the digital economy (1), although recent decisions do not plead in favour of a bright future for abuse of economic dependence (2).

1. Arguments for a broader application of abuse of economic dependence: an answer to challenges raised by the digital economy?

Abuse of economic dependence has the right characteristics to be an adequate antitrust tool (1.1) and could particularly encompass conducts on data-driven markets (1.2).

1.1 An adequate antitrust tool to reconsider

Legitimating abuse of economic dependence: a first step. The Commission has identified several practices likely to constitute exploitative abuses within the digital economy such as: delisting threats, suspension or suppression of accounts, unilateral, frequent and unannounced changes to contractual terms, ranking and search biases, imposition of costly or useless auxiliary services, prohibitive switching costs and personalised data, restriction to consumers' data portability, risk of discrimination among users, parity clauses, lack of effective dispute resolution mechanisms.[137]

Authors recognise that the competition process may be harmed if firms have difficulty accessing a market because of such practices, which also harms the individual freedom of market participants. As Bakhou explains, vertical behaviours may have horizontal effects because freedom to contract is linked with freedom to compete, which is a "fundamental pre-condition for a competitive market". As a consequence, "freedom of contract may affect

[137] Commission européenne, Business-to-Business relations in the online platform environment, Rapport final, 22 mai 2017, https://op.europa.eu/en/publication-detail/-/publication/04c75b09-4b2b-11e7-aea8-01aa75ed71a1/language-en

economic freedom which, in turn, may affect the competition process."[138] The threat on the freedom to compete in the market is the reason economic dependence must be dealt with by competition law. As previously mentioned, several authors praise for an effects-based approach. According to Bougette *et al.,* disregarding *per se* abuses based on exploitation and abuses of economic dependence contradicts the aims of an effects-based approach. They identify several ways those abuses can negatively affect competition and conclude that competition law should not always be concerned with sole 'direct efficiency-related considerations'. Indeed, consumer welfare could be indirectly impaired through increased prices, limited incentives to innovate and reduced choices. Consequently, a better recognition of abuse of economic dependence would not merely focus on the protection of competitors but would safeguard the competitive process in the benefit of consumers.

Increasing concern from member states. It appears that despite criticism addressed against abuse of economic dependence, EU member states have expressed interest in a better recognition of the abuse in their legislation.

In Germany, the 10th amendment to the ARC-Digitalisation Act has deleted the limitation of the provision to SMEs so that larger companies can enforce it against gatekeepers. Moreover, economic dependence on a firm's relative market power can now arise from the dependence on its data. Following that logic, the refusal to provide access to such data against an adequate fee will be constitutive of an abuse. Those evolutions could mark a better application of provisions against relative market power in Germany.

In Belgium, abuse of economic dependence was not prohibited until its introduction in Article IV.2/1 in the Belgian Code of Economic Law (CEL) in August 2020. The conditions stated are the same than those of Article L.420-2 of the French Commercial Code. A first decision was rendered on October 28th, 2020. The president of the Ghent Commercial Court found that a suppliers' refusal to supply a winter clothing collection to a retailer was constitutive of an abuse of economic dependence.[139] It found that the retailers' supplies entirely depended on the supplier. Interestingly enough, the judge did not rely on the last condition of the text which is an impact on the market. In that regard, doubts remain on how the Belgian provision on abuse of economic dependence will be applied in the future. That is unfortunate, given the fact that defining precisely the outline of abuse of economic

[138] M. Bakhoum, 'Abuse without dominance in competition law: Abuse of economic dependence and its interface with abuse of dominance' in Di Porto, F. and Podszun, R. Abusive Practices in Competition Law (ASCOLA competition law series) (Edward Elgar 2018), pp.157-184
[139] Vz. Orb. Gent 28 oktober 2020

dependence in case law is listed as a priority for 2021 by the Belgian Competition Authority.[140] One could argue that such a flexible appreciation of the criteria could avoid the shortcomings of abuse of economic dependence the way it has (not) been applied in France. However, the threat of legal uncertainty remains for undertakings likely to be considered involved in a relationship of economic dependence. To make abuse of economic dependence a useful antitrust tool, Belgium will have to find a balance between a strict interpretation of the criteria and an undefined one.

In Italy, abuse of economic dependence was already part of the legislation[141]. The Italian provision resembles a mix of restrictive practices and abuse of economic dependence, as the conditions needed in the text are the possibility to impose excessive imbalance of rights and obligations and lack of alternatives. It should be noted that the abuse is part of provisions on subcontracting in production activities, which restricts its scope of application. Similarly to France, Italian courts have maintained a restrictive approach to the conditions and only applied abuse of economic dependence in 'extreme cases' to favour the principle of contractual autonomy.[142] Indeed, although courts seem willing to apply abuse of economic dependence in different cases, stating on occasions that it could potentially apply to franchises, it rarely recognises the abuse as such.[143] However, the Italian Competition Authority has recently opened an investigation against the Benetton group for an alleged abuse of economic dependence regarding two franchise agreements entered into with an independent retailer of Benetton branded products.[144] This could testify of a will to renew abuse of economic dependence, if confirmed.

Although the evolution seems slow and uncertain in some member states, evolutions like the *Apple* decision or the German reform could pave the way for the recognition of abuses of economic dependence in the digital economy.

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[140] Politique de priorités de l'Autorité belge de la Concurrence pour 2021, Mars 2021, available in French at https://www.abc-bma.be/fr/propos-de-nous/publications/note-de-politique-de-priorites-2021

[141] Article 9 of the Italian Law n.192 of 18 June 1998 (Law on Subcontracting in Production Activities)

[142] S. Bortolotti, "ITALY: Critical remarks on the investigation opened by the AGCM against Benetton for abuse of economic dependence in franchising." 15 february 2021, International Distribution Institute, https://www.idiproject.com/news/italy-critical-remarks-investigation-opened-agcm-against-benetton-abuse-economic-dependence

[143] Trib. Milano, 12 oct. 2017, Next Mind c/ Vodafone Italia, n° 12344, published 6 dec. 2017

[144] Autorità Garante della concorrenza e del mercato, Press release, « A543 - ICA: Benetton under investigation for an alleged abuse of economic dependence in franchising agreements », 25 November 2020

1.2 Abuse of dependence in data-driven markets

"Personal data is the new oil of the internet and the new currency of the digital world."[145] As the digital economy relies on the collection of data to thrive, this phenomenon has given rise to situations that competition authorities struggle to comprehend. Indeed, data enable firms to innovate and become more powerful. Therefore, data could represent a barrier to entry; the lack of data could potentially exclude a competitor from the market as smaller firms cannot obtain the same quantity and quality of data as larger undertakings. Competition law has imagined different solutions against this, but arguably appears ill-suited to answer the challenges of an economy reliant on data, because of the 'free' quality of services granted and the consequent difficulty in defining relevant markets.[146]

It has been suggested that if the data owned by an undertaking are essential for another company to compete, the refusal to supply such data could amount to an abuse of dominant position, with the possibility to use the essential facilities doctrine for remedies.[147] However, it appears that the essential facilities doctrine could hardly apply to data because of the difficulty to fulfil some criteria[148] such as the indispensability criteria.[149] Moreover, this could only concern dominant undertakings. Yet, as Tombal explains, some undertakings may be powerful data holders without a dominant position.[150]

Dependence on data. Two cases in the United States show examples of firms with superior bargaining power refusing to provide access to their data. In 2013, Peoplebrowsr

[145] M. Kuneva, European Consumer Commissioner, Keynote Speech, Roundtable on Online Data Collection, Targeting and Profiling, Speech/09/156, Brussels, 31 March 2009

[146] For proposals on how to define the relevant market in the digital economy see Gebicka A. and Heinemann, A. 2014. Social Media and Competition Law. World Competition. 37(2), pp.149-172 for a test based on quality; Eben, M., Market Definition and Free Online Services: The Prospect of Personal Data as Price (July 3, 2018). I/S: A Journal of Law and Policy for the Information Society, Vol.14:2 (2018) 227. Available at SSRN: https://ssrn.com/abstract=3207201; for an analysis of cluster markets and their definition see H. Hovenkamp, Digital Cluster Markets (April 5, 2021). Available at SSRN: https://ssrn.com/abstract=3820062 or http://dx.doi.org/10.2139/ssrn.3820062

[147] Graef I. (2016) EU competition law, data protection and online platforms: data as essential facility. Kluwer, Alphen aan den Rijn

[148] The criteria for applying the essential facilities doctrine have been set by the cases Magill C-241-242/91 P RTE & ITP v Commission EU:C:1195:98 ; Case C-7/97 Oscar Bronner GmbH&Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag; C-418/01 IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG EU:C:2004:257

[149] Because of the non-rivalrous nature of data: the use of data by one party does not diminish the use that can be made of it by another party; and according to Lambrecht and Tucker, because consumers disclose information to different digital services, making the same information available to different companies: Lambrecht, Anja and Tucker, Catherine E., Can Big Data Protect a Firm from Competition? (December 18, 2015). Available at SSRN: https://ssrn.com/abstract=2705530 or http://dx.doi.org/10.2139/ssrn.2705530

[150] T. Tombal, 'Economic Dependence And Data Access' 51 IIC - International Review of Intellectual Property and Competition Law 51, 70–98 (2020). https://doi.org/10.1007/s40319-019-00891-0

sued Twitter who had cut off their access to data.[151] A Californian Court ordered the access to data to continue as interim measures, but the case was eventually closed by a settlement. A similar decision was adopted against LinkedIn, who had restricted hiQ's access to data because it wanted to provide the same kind of services than the firm itself. Consequently, a US federal district judge ordered LinkedIn to share the data to give the access back to hiQ's.[152] Both firms argued their *dependence* on the access to data, and the firms did not hold a dominant position. These cases hint at the idea that abuse of economic dependence could serve as an alternative solution for firms unable to behave independently on the market because of their dependence on data held by another undertaking. This would mean assessing if the conditions of abuse of economic dependence can be met, i.e. (i) a state of economic dependence – especially, the existence of an equivalent solution to the data. On this point, Tombal makes a difference between the 'absolute' indispensability under Article 102, and the *relative* dependence of abuse of economic dependence. This praise for applying abuse of economic dependence in such situations, as the test to find an economic dependence is relative and subjective as it is based on the existence of alternatives for the claimant. (ii) an abusive exploitation of that dependence, that could be termination of contract, or the refusal to give access; (iii) an impact on competition: in the two American cases mentioned, this seemed constituted by the 'leveraging' attitude of the most powerful firms to foreclose competition on a subsidiary market, and the decision aimed at allowing the smaller firms to compete.[153]

Dependence on gatekeepers. The collection of relevant data for dominant firms, along with other factors, can pave the way to 'super-dominance'[154]. An undertaking with a dominant position on one market can expand its dominance on related markets (e.g., online advertising). Röller explains that Article 102 only provides for conducts of firms that are already dominant.[155] According to him, conducts of firms should be examined along the road to dominance, because the way dominance is acquired is essential to the economic analysis. For Röller, market power acquired through competition on the merits is good for consumers. On the contrary, dominance acquired by other means is not, and that is why abuse of economic dependence could fill this gap, by preventing the anticompetitive harm of the

[151] Superior Court of the State of California, PeopleBrowsr, Inc. et al. v. Twitter, Inc. (PeopleBrowsr), No. C-12-6120 EMC, 2013 WL 843032, N. D. Cal., 6 March 2013
[152] hiQ Labs, Inc. v. LinkedIn Corp., No. 17-16783, 2019 WL 4251889 (9th Cir. Sept. 9, 2019)
[153] Tombal, supra 149
[154] Bruc É, 'Data As An Essential Facility In European Law: How To Define The "Target" Market And Divert The Data Pipeline?' (2019) 15 European Competition Journal p 223
[155] Röller, supra 94

abusive dependence from a firm with relative market power. This is particularly relevant to the platform economy. Indeed, Marty explains that the market power of platforms is all the more significant as they appear to sellers as essential gatekeepers for market access.[156] The French Authority itself even suggested that abuse of economic dependence could be used against dependence on marketplaces.[157] Thus, abuse of economic dependence could serve as a complementary tool in the digital economy to rebalance power between players in digital markets.[158] It could encompass abuses that are not caught by Article 102 of the TFEU but are likely to have an impact on competition. The *Apple* decision serves as an example in the sense that it assesses the effect of the anticompetitive practice on consumers.[159]

The concept of abuse of economic dependence appears better suited that the essential facilities doctrine for conducts involving dependence in the digital economy. A more efficient framework for abuse of economic dependence could serve the search of balance between the competition on the merits, and protection of the market. But to be applied in France and as demonstrated in Chapter 1, the conditions of Article L.420-2 would need to be interpreted with more flexibility. Some praise for a change in the wording of the text to comprehend exploitative abuses committed by platforms towards their contractual partners, without needing to show dominance on a market.[160] Furthermore, some argue that the fact that the focus is on relative power in a bilateral relationship rather than dominance on a relevant market could avoid the difficulties in defining fast-changing markets.[161]

In regard to the new challenges raised by the digital economy, abuse of economic dependence under Article L.420-2 of the French Commercial code could be considered a work in progress. But this view is not shared by practitioners, who tend to consider abuse of economic dependence to be a pipe dream.

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[156] F. Marty, "Online Platforms and Abuse of Dominant Position: Reflections on Possible Exploitative Abuse and Abuse of Economic Dependence", La Revue Juridique Themis, Universite de Montreal, Faculte de Droit, 2019, 53-2019, pp.73-104.
[157] Aut. conc., Concurrence et commerce en ligne, étude, mai 2020 (disponible sur le site de l'Autorité), pt 150
[158] Marie Cartapanis, Frédéric Marty, "Towards New Tools in Competition Law", Competition Forum: Law & Economics, 2020, art. n° 0008, available at: https://www.competition-forum.com/.
[159] Apple decision, supra 12, 1121: "By limiting this competition, the practices have limited the competitive process, capable of generating new local services for consumers"
[160] M. Chagny, Les plateformes numériques et le droit de la concurrence, Cahiers de droit de l'entreprise n° 3, Mai 2017, dossier 17
[161] A. Rinaldi, « Re-imagining the Abuse of Economic Dependence in a Digital World », Journal Article, European Competition and Regulatory Law Review, Co. Re. 2020, 4(3), 253-256

2. No room for abuse of economic dependence in the digital economy: to live and let Art. L.420-2 §2 die?

Some obstacles to a more popular application of abuse of economic dependence are inherent to the provision defining the abuse (2.1) while others lie in the existence or discussion regarding alternative tools to restore balance in digital markets (2.2).

2.1 Lack of popularity of abuse of economic dependence as an antitrust tool

Relative dominance and absolute dominance: better call exploitative abuses under Article 102 TFEU. As explained, the dominance needed to use Article L.420-2 §2 of the French Commercial code is *relative,* as the 'weak' undertaking is dependent on a dominant firm with relative market power. This contrasts with abuse of dominant position in which the dominance of the firm needs to be *absolute* to infringe competition law, as the scope is this of a whole market, in comparison with the scope of abuse of economic dependence which is a bilateral relationship. Choné-Grimaldi argues that this opposition needs to be tempered, as the criteria used for assessing the economic dependence are clues for assessing an *absolute* dominance as well.[162] Indeed, renown of the brand and market shares allow to measure the position of the undertaking on a relevant market and are also taken into account while assessing a dominant position. As for the main criterion which is the lack of an equivalent solution, she argues that there can only be an equivalent solution to the dominant firm when competitors on the market are able to offer a similar alternative. Consequently, the lack of alternative solution would testify of a situation of monopoly of the operator. In that case, the undertaking could likely be sanctioned under the scope of abuse of dominant position. As a matter of fact, economic dependence has been used at a European level to assess the dominant position of undertakings in case law.[163]

Coming back to the *Apple* decision from 2020, Choné-Grimaldi argues that the facts could have equally been considered under the angle of abuse of dominant position, based on a causality link between the different markets where Apple is active. Briefly summarised, several scholars consider that the renewal of abuse of exploitation, and lately of abuse of economic dependence, testify of competition authorities' will to fight off unbalanced contractual practices made possible by the concentration of market power among a few key

[162] A-S. Choné-Grimaldi, Les géants du numérique face à l'interdiction des abus de dépendance économique : Les Français contre-attaquent, novembre 2020, Concurrences N° 4-2020, Art. N° 97016, p. 84-92
[163] TPICE, 6 octobre 1994, *Tetra Pak*, aff. T-83/91, pt 109 ; TPICE, 23 octobre 2003, *Van den Bergh Foods*, aff. T-65/98, *Rec.* II-4653, pt 154.

players in the digital sector. However, most agree that abuse of exploitation is easier to conjure than abuse of economic dependence. This is because economic dependence arguably often opens the door to an *absolute* dominant position, and because of the persistent restrictive interpretation of the criteria.

Framework of Art. L420-2§2: to reshape or not to reshape? For this last reason, rewriting Article L.420-2§2 has been suggested numerous times, but the changes made have not been followed in practice (as seen in Chapter 1), and recent reforms have not succeeded (see part A). Therefore, the question of the necessity to rewrite the article remains. But the disagreements over this question probably explain why it is left unanswered. Some praise for suppressing the criterion of impact on competition and focus on the unbalance within the contractual relationship. A reasoning in two steps has been offered: assessing an economic dependence through the share of turnover, then controlling if this dependence is not the result of a choice.[164] Such a proposal is consistent with case law, but divides among authors, which is understandable. If a situation is likely to have an impact on competition – and potentially affect consumers – should the fact that it results from a choice trump its capture by competition law? This seems inconsistent with an effects-based approach. Chagny's suggestion to use the chosen nature of dependence in the calculation of remedies[165] appears a suitable compromise. A debate has also surrounded the criterion of lack of equivalent solution, that was deleted from the text in 2001 but still applied in case law. We do not find it desirable to remove this criterion from the FCA's decision-making practice. The *Apple* decision evidenced that the impossibility for the plaintiff to switch to other trading partners is particularly relevant to the assessment of a situation of dependence, which consists in a lock-in situation for plaintiffs. Furthermore, it should be noted that the concept of 'unavoidable trading partner' is not unknown to EU competition law, as it has been used in the evaluation of conducts under Article 102. This criterion could therefore serve as a model for the introduction of abuse of economic dependence as a European level.[166] However, the *reasonableness* of finding such an alternative should perhaps be insisted upon either in law or by judges, as a strict interpretation of this criterion is one of the main hurdles to the application of Article L.420-2§2.

[164] C. Grimaldi, Introuvable état de dépendance économique, RDC 2013, no 3
[165] Chagny, supra 33.
[166] "Is there a future for abuses of economic dependence in the European Union? Comparative research based on the French model and its applications in the platform economy", L. Hamidou, 2020.

Safeguarding competition: *Pratiques restrictives* vs. anticompetitive practices. In 2019, Amazon was sanctioned under the scope of restrictive practices, and the Court singularly noted that the firm represented an 'unavoidable partner' for its contractual partners.[167] The 'legislative rivalry' between Article L.442-1 and Article L.420-2 has already been evoked in Chapter 1 and will not further be developed in this section. However, it is worth mentioning that authors consider that the means given to the Minister of Economy and the high ceiling of fines grant restrictive practices the same repressive and dissuasive effect as anti-competitive practices.[168] Firms have indeed already been sanctioned for abuses in the digital economy on the ground of significant contractual unbalance.[169] Restrictive practices seem like a more efficient tool than abuse of economic dependence in situations of emergency for the plaintiffs; indeed, the Apple decision was initiated in 2012 and the abuse of economic dependence only found in 2020.

It appears that abuse of economic dependence does not have the favours of authors nor courts and authorities. As a consequence, it does not serve as a reliable tool for victims of economic dependence and remains quite unpredictable for firms with relative market power.

2.2 Growing role of EU regulation in the fight against dependence in the digital economy

Some authors have noticed through recent decisions from the FCA that it intends to control contractual practices from digital actors and act as a regulator[170], which is part of a new trend identified by Bosco as 'post-modernisation'[171]. Does that leave any room for abuse of economic dependence? Not necessarily. Indeed, evolutions at an EU level seek to regulate relationship between digital actors and could make abuse of economic dependence aimless.

Restoring fairness and transparency: the platform-to-business ('P2B') regulation. The European Commission identified the "growing intermediation of

[167] T. com. Paris, 2 septembre 2019, RG n° 2017/050625
[168] Supra 161
[169] Booking and Expedia, for imposing contractual conditions that reveal a significant imbalance to the detriment of the partners listed on these platforms: T. com. Paris, 24 mars 2015, RG 2014027403; CA Paris, 15 septembre 2015, RG 15/07435 ; T. com. Paris, 13e ch., 7 mai 2015, RG 2015000040 ; CA Paris, pôle 5, ch. 4, 21 juin 2017, RG 15/18784. See V. E. Mouial-Bassilana, D. Restrepo et L. Colombani, Le déséquilibre significatif dans les contrats commerciaux : nouvel outil de lutte contre les GAFA, AJ contrat 2018, p. 471.
[170] M. Malaurie-Vignal, « Distribution - Sanction des pratiques contractuelles des géants du numérique », Contrats Concurrence Consommation n° 7, Juillet 2020, comm. 112
[171] D. Bosco, « L'ère de la « post-modernisation » ouverte par l'Autorité de la concurrence » Contrats Concurrence Consommation n° 3, Mars 2020, comm. 46

transactions through online intermediation services, fuelled by strong data-driven indirect network effects" leading to the dependence of business users and particularly SMEs. The Commission recognises the negative effects of superior bargaining power on businesses and consumers, as it is said that this superior bargaining power enables the providers of those services to "behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users and, indirectly, also of consumers in the Union."[172] – which is surprisingly similar to the aim of abuse of economic dependence in France. More precisely, Regulation 2019/1150 applies to online intermediation services and online search engines, and aims at ensuring accessibility and transparency of providers' terms and conditions[173]. Article 4 regulates the conditions of restriction, suspension and termination of services while Article 5 requires suppliers to be transparent about the procedure for ranking products and services offered through the intermediation service, which the Commission clarified through guidelines.[174]

The P2B regulation has been implemented in France under the so-called "DDADUE law"[175], whose article 9, II 1° completes Article L442-1 on *pratiques restrictives* by referring to breaches of the P2B regulation in general terms. According to some authors, the regulation does not bring any substantial change in the obligations of providers and the integration in French law should not clarify the situation for professional users.[176] It is therefore possible to think that the law on restrictive practices is unclear and turning into a jack of all trades, master of none.[177] However, As Buy *et al.* points out, the law on restrictive practices appoints its new target, switching from mass distribution to online platforms.[178] In all likelihood, this may reinforce the role of Article L.442-1 in fighting off situations of dependence in the platform economy, and potentially overtake any use of abuse of economic dependence for that matter. The P2B regulation marks the will of the European Commission to bring balance between actors in the platform economy, as further regulation proposals show.

[172] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, Paragraph 2
[173] Ibid, Article 2.
[174] Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council (2020/C 424/01), 8 December 2020
[175] Loi n° 2020-1508 du 3 décembre 2020 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économique et financière
[176] M. Boudou, « Les nouvelles pratiques restrictives résultant de la loi DDADUE », dans La loi DDADUE : Simple adaptation ou réforme du droit français de la concurrence ? Concurrences N°1-2021 pp.22-62
[177] L. Arcelin, « Adaptation du règlement P2B : Les errements de la loi DDADUE », in ibid.
[178] F. Buy, V. Durand, J-L. Fourgoux, Pratiques Commerciales Déloyales, Chroniques, Concurrences N°1-2021, pp. 150-158

Dependence on gatekeepers in the DMA. In December 2020, the European Commission presented its Proposal for a Digital Markets Act, which is supposed to be a landmark step towards a market regulation of the digital sector by regulating the conduct of 'gatekeepers'. According to Article 3 of the proposal a provider of core platform services shall be designated as gatekeeper if "(a) it has a significant impact on the internal market; (b) it operates a core platform service which serves as an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future."[179]

In the explanatory memorandum, it is stated that the proposal focuses on 'core platform services' where there is a (i) strong evidence of high concentration; (ii) "*dependence* on a few large online platforms acting as gateways for business users to reach and have interactions with customers"; (iii) "the power by core platform service providers often being misused by means of unfair behaviour vis-à-vis *economically dependent* business users and customers."[180] This mirrors the notion of fairness already established by the P2B regulation and confirms the will of the Commission to further regulate relationship between platforms and businesses. The proposal shows that the Commission is willing to take a stand against the economic dependence on platforms.[181]

The competitive aspect of the DMA has almost been as debated as its content.[182] However, there is no doubt as to the effect such a regulation would have in practice on digital actors. Nonetheless, it should be noted that only a small number of players seem to fall under the qualification of 'gatekeeper'. The DMA does not provide for situations of dependence arising from actors with relative market power in contractual relationships, and solely aims

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[179] Proposal for A Regulation of The European Parliament and Of the Council on Contestable and Fair Markets in The Digital Sector (Digital Markets Act) Com/2020/842 Final

[180] Also Recital 2: "*Other characteristics of core platform services are very strong network effects, an ability to connect many business users with many end users through the multi-sidedness of these services, a significant degree of* ***dependence*** *of both business users and end users, lock-in effects, a lack of multihoming for the same purpose by end users, vertical integration, and data driven advantages*."

[181] Recital 38: "*To prevent further reinforcing their* ***dependence*** *on the core platform services of gatekeepers, the business users of these gatekeepers should be free in promoting and choosing the distribution channel they consider most appropriate to interact with any end users that these business users have already acquired through core platform services provided by the gatekeeper*." ; Recital 64: "*The Commission should investigate and assess whether additional behavioural, or, where appropriate, structural remedies are justified, in order to ensure that the gatekeeper cannot frustrate the objectives of this Regulation by systematic noncompliance with one or several of the obligations laid down in this Regulation, which has further strengthened its gatekeeper position. This would be the case if the gatekeeper's size in the internal market has further increased,* ***economic dependency of business users*** *and end users on the gatekeeper's core platform services has further strengthened as their number has further increased and the gatekeeper benefits from increased entrenchment of its position*."

[182] A-S. Choné Grimaldi, supra 161 ; « Gating the Gatekeepers (2): Competition 2.0? » M. Eben, CREATe (UK Copyright and Creative Economy Centre University of Glasgow), March 23rd, 2021, https://www.create.ac.uk/blog/2021/03/23/gating-the-gatekeepers-2-competition-2-0/ accessed 10 April 2021

at preventing dependence from businesses and users on major digital actors. An argument that abuse of economic dependence under Article L.420-2 should be abandoned on this ground would therefore be flawed, as EU law does not currently – or will not even if the DMA becomes law – deal with situations of economic dependence generally. A national tool against economic dependence from platforms is therefore still needed. The law on restrictive practices can serve that purpose as it presents a wide scope and options of practices it can encompass. But it does not originally serve the same antitrust aim as Article L.420-2, which does not merely seek to protect the weak party of a contract, but to prevent further impact on competition.

CONCLUSION

It is safe to say that abuse of economic dependence has been overlooked in the decision-making practice of the French Competition Authority. Although it stemmed from a worthy initiative to regulate superior bargaining power likely to impact competition, the conditions for applying abuse of economic dependence have always been interpreted with a very strict view. By restricting its recognition of the abuse to extremely rare cases, the Authority did not implement the means necessary to make it an efficient antitrust tool.

Regulating abuses in bilateral relationships that might affect competition appears necessary. An argument against abuse of economic dependence based on a classical economic analysis that favours the principle of autonomy is incomplete. The classical economic theory relies on fairness for a free market to function.[183] Adam Smith wrote that fairness was the "*main pillar that upholds the whole edifice*"[184]. Ashraf *et al.* sum up the thoughts of the Scottish economist as follows: "*a mixture of concern about fairness (…) and altruism played an essential role in market interactions, allowing trust, repeated transactions and material gains to occur*"[185] Boulding explains that market interactions require "*a minimum degree of benevolence, even in exchange, without which it cannot be legitimated and cannot operate as a social organizer."*[186] Should this 'benevolence' be missing from market interactions, competition law should be here to prevent the consequences. Abuses committed within a contractual relationship from a firm with relative market power should be comprehended by competition law. The rationale behind sanctioning abuse of economic dependence is that freedom to contract is closely linked with freedom to compete. A diminished economic freedom may therefore affect the competitive process. Abuses of economic dependence also pave the way for dominance, and under the view or Röller, lead to anticompetitive practices that are not caught under exclusionary conducts. [187]

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[183] "These sentiments [fairness and altruism] are as much a part of classical economist theory as those expressed in the wealth of nations" M. Stucke, A. Ezrachi "Competition overdose: how free market mythology transformed us from citizen kings to market servants", 2020, Harper Business

[184] Smith, Adam. 1759 [1981]. The Theory of Moral Sentiments. D. D. Raphael and A. L. Macfie, eds. Liberty Fund: Indianapolis.

[185] "For Adam Smith, a mixture of concern about fairness (enforced by the fear of negative appraisal by the impartial spectator) and altruism played an essential role in market interactions, allowing trust, repeated transactions and material gains to occur"[185] Ashraf, Nava, Colin F. Camerer, and George Loewenstein. 2005." Adam Smith, Behavioral Economist." *Journal of Economic Perspectives*, 19 (3): 131-145.

[186] K. Boulding, "Economics as a Moral Science." American Economic Review. 59:1, pp. 1–12. (1969, p. 5)

[187] Röller, supra 94

In light of the dynamics of market concentration in the data-driven economy, it seems that abuse of economic dependence would provide the Competition Authority with the right tools to prevent abuses arising from a superior bargaining power. The *Apple* decision from 2020 paves the way for further recognition of the use of Article L.420-2 §2 as an antitrust tool. Moreover, it appears that several member states have recently evolved on that concept and implemented tools to address economic dependence at a national level. Although the European Commission also intends on restoring fairness in the digital sectors and particularly towards platforms users, this is not meant nor suited to cover situations arising from any firm with relative market power engaged in a contractual relationship. A recognition of abuse of economic dependence at a European level would harmonise national member states legislation on that subject[188], but it is doubtful that will happen in the near future, judging from the lack of framework for exploitative abuses. In the meantime, the French Competition Authority could sharpen the tools at its disposal. Reviewing the conditions of application of Article L.420-2§2 could be a first step towards a broader application of the abuse and may help avoid criticism based on legal uncertainty and an overly opportunistic use against tech giants. Let us recognise that an adequate measure on abuse of economic dependence is not given to the Authority, who must achieve a balance between "safeguarding competition in the market, respecting freedom of contract and protecting the freedom of competition of the weaker parties against powerful business partners"[189].

This paper has sought to assess the efficiency of abuse of economic dependence as an efficient antitrust tool to study if it could potentially encompass abuses in the digital economy. The future of abuse of economic dependence is quite uncertain. The reluctance of courts to apply it hinders the efficiency of the abuse as an antitrust tool. However, a better recognition of it, along with a less restrictive interpretation of the criteria needed for its application, would allow the Authority and courts to sanction certain abuses of relative market power in bilateral relationships. It would perhaps bring more legal clarity than abuse of exploitation, which has recently been used extensively, and would serve the search for balance in the digital economy.

[188] Tombal, supra

[189] Boy L, 'Abuse of Market Power: controlling dominance or protecting competition?' in Hanns Ullrich (ed.), The Evolution of European Competition Law: whose Regulation, which Competition? (Cheltenham and Northampton, MA, Edward Elgar, 2006) p 218

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