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Purchasing Power and Buyers' Cartels – Note by France

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1. Introduction

1. Purchasing power gives a buyer the ability to obtain better supply terms from a seller, in particular owing to its size. Joint purchasing accentuates this power by strengthening the position of buyers.

2. These joint purchasing agreements are also likely to entail competitive risks: illicit exchanges of information, less inter-brand mobility, exclusionary conducts towards certain players (manufacturers, SMEs or small-scale retailers), reduced supply (either directly by reducing product ranges or innovation, or indirectly by demanding advantages without compensation, etc.).

3. In the last few years, a trend has been observed, both nationally and internationally, towards a strengthening of these purchasing agreements, and the emergence of growing concentration, in particular within the mass retail distribution sector, accompanied by an increase in joint purchasing agreements, and frequent changes in alliances[1]. This increasing level of concentration has prompted the French legislator to assess whether the positive law makes it possible to find the right balance between efficiency issues and the risks of anticompetitive practices.

4. Indeed, partnerships between purchasing offices are likely to be scrutinized primarily from the perspective of the rules on cartels or abuses of dominant position, and therefore *a posteriori*.

5. This is what the **French legislator** sought to remedy with the framework introduced by the so-called "Macron" law in 2015, which allows the *Autorité de la concurrence* to be notified of the most important joint purchasing agreements before they are implemented. This mandatory notification framework introduced in Article L. 462-10 of the French Commercial Code (*Code de commerce*), was reinforced by the so-called "EGAlim" law of 2018, which established a mechanism for the *Autorité* to monitor notified agreements four months before they are implemented, and assess their impact on competition.

6. This framework, which draws on both merger control law (mandatory notification of agreements *a priori*) and the law relating to anticompetitive practices (interim measures and injunctions), has been applied twice[2] by the *Autorité de la concurrence*. It has made it

[1] Joint purchasing agreements are nothing new, but have been topical in recent years as illustrated by two successive waves of joint purchasing agreements (i) in 2014 with the creation of the Auchan/Système U, Intermarché/Casino and Carrefour/Provera purchasing offices and (ii) in 2018 with the creation of a joint "Horizon" purchasing office by Auchan, Casino, Metro and Schiever and (iii) also in 2018 with the Carrefour/Tesco purchasing office.

[2] The joint purchasing agreements of Casino, Auchan, Metro and Schiever: the companies proposed commitments, which were accepted by the *Autorité de la concurrence* in Decision 20-D-13 of October 22, 2020, which resulted, in particular, in an amendment of the existing agreement concerning the supply of private labels, and a narrowing of its scope by excluding several families of agricultural products (milk, eggs) or sourced from sectors experiencing economic difficulties (cold meats, cider); the joint purchasing agreements of Carrefour and Tesco: the *Autorité de la concurrence*, in Decision 20-D-22 of December 17, 2020, made commitments binding that excluded certain product families from the agreement concerning private labels, limited their cooperation for

possible to amend the agreements as initially conceived (in particular by excluding certain product families from the scope of cooperation or limiting cooperation for other families).

7. In addition to this framework, French law has for many years had rules on restrictive competitive practices ('RCP') which prohibit a co-contractor being placed in a situation of significant imbalance, without the condition of a dominant position or the condition of effects on the market; this framework is particularly well suited to trade relations between manufacturers and the mass retail distribution sector.

2. Assessing purchasing agreements from the perspective of anticompetitive practices

8. Purchasing alliances between competing firms consist of aggregating the individual purchasing power of these firms to create larger purchasing power that can allow them to lower the cost of purchasing for certain products, whether inputs or products intended for resale as is. This kind of cooperation can be implemented by setting up a separate entity from the parties, dedicated to the negotiation, or more simply, exclusively through a contractual agreement, in particular a mandate, which lays down the terms of the alliance.

9. As such, these agreements can be scrutinized under Article 101(1) of the Treaty on the Functioning of the European Union (hereinafter "TFEU") and Article L. 420-1 of the French Commercial Code (*Code de commerce*).

2.1. The necessary distinction between cooperative purchasing agreements and purchasing cartels

10. In this context, a distinction must be made between cooperative purchasing agreements and purchasing cartels, which are illegal agreements that are heavily sanctioned on account of their harmful effect on competition[3]. Conversely, the Commission, like the *Autorité de la concurrence* ("the *Autorité*"), does not consider joint purchasing agreements to be necessarily illegal, and believes that they can have a beneficial effect on competition in certain circumstances, particularly when the reduced purchasing costs result in lower prices for consumers[4].

other product families and guaranteed SMEs the possibility of bidding for tenders launched by the two groups for their private label procurement.

[3]Autorité de la concurrence's Decision 13-D-03 of February 13, 2013 regarding practices in the pork sector § 394 (freely translated): "*The fact that the practice concerned a purchase price, and not a selling price, does not call this assessment into question, as illustrated by Commission Decision C (2005) 4012 final of 20 October 2005 in the so-called "Raw tobacco Italy" case (OJL 353, p. 45 of 13 December 2006), qualifying a practice of fixing common purchase prices comparable to the one in question here as very serious*".

[4] (freely translated) "*Purchasing power can be beneficial for competition in that it provides a counterweight to market power that encourages producers to reduce their margins and production costs. These effects of purchasing power can then spread to the downstream market, to the benefit of end consumers if the intensity of competition in this downstream market is high. Indeed, the reduced purchasing costs can have various motivations, depending on whether the distributor intends to rebuild its margins or regain competitiveness by lowering its prices to consumers" (*Opinion 15-A-06 of March 31, 2015, on the partnerships concluded between purchasing and referencing offices in the mass retail distribution sector for food, §34).

11. Joint purchasing agreements are distinguished from purchasing cartels, on the one hand, by the possible lawfulness of their object and, on the other hand, by their impact on the market.

2.1.1. The question of the lawfulness of the object of the purchasing agreement

12. A joint purchasing agreement that aims solely at lowering certain purchase prices, and where both the contractual operating terms and the conduct of the parties during the implementation of the agreement do not go beyond what is strictly necessary for the object of the cooperation, does not generally constitute a restriction of competition by object.

13. This is not the case when the purchasing partnership is actually used to support an anticompetitive agreement, with a similar object to what can be found in cartel cases, such as fixing purchase prices or allocating quantities[5]. In such cases, the purchase agreement would no longer be a lawful form of cooperation but would be a cartel with the object of distorting competition on the market.

14. The secret nature of an agreement with respect to the commercial conditions relating to the purchase price of products and/or services constitutes additional evidence of an illicit agreement. In so doing, the parties to the agreement decide to artificially alter the commercial negotiation, and thus ultimately the market.

15. In contrast, in a joint purchasing agreement, the suppliers are aware that the agreement exists, which allows them to decide on their positioning with full knowledge of the facts.

2.1.2. The impact of the purchasing agreement on the market

16. The impact on competition of a purchasing agreement depends on the market power of the parties to the agreement. There is no absolute threshold above which it can be presumed that the parties to a purchasing agreement have such market power that it is likely to have restrictive effects on competition. However, if the parties to the purchasing agreement have a combined market share of no more than 15% on both the purchase and sales markets, it is unlikely that market power exists. In any event, it is likely in this case that the conditions of Article 101(3) TFEU are met[6].

17. Conversely, it is not necessary to conduct an in-depth analysis of the effects on competition and the market power of the members of a purchasing cartel (which therefore has an anticompetitive object), on the grounds that such agreements are by their very nature

[5] Commission Decision C (2005) 4012 final, 20 Oct 2005, Case COMP/C.38.281/B.2 - Raw Tobacco - Italy; No. 2007/534/EC, 13 Sep. 2006, Case COMP/38.456, Bitumen - The Netherlands. ADLC, Decision 20-D-09 of July 16, 2020 regarding practices implemented in the buying and selling of pork cuts and cold meat products.

[6] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (2011/C 11/01), paragraph 208.

intended to restrict competition[7]. However, such a cartel is likely to have a greater impact if it covers a significant share of the market[8].

18. The impact on competition also depends on the way in which the practices affect the autonomy of the operators involved: the more autonomy is affected, the greater the impact of the practices is likely to be. In this regard, in the case of purchasing agreements, the companies theoretically retain a certain degree of autonomy on the upstream market, while the reduced autonomy is strictly limited to what is necessary for the purposes of the cooperation. By way of illustration, in the context of a joint purchasing agreement in the mass retail distribution sector, cooperation is limited to the negotiation of certain purchase price parameters, with the parties to the agreement remaining autonomous with regard to some important parameters of competition, whether in terms of making purchases as such, or in terms of the way in which the business plan is implemented (product ranges, innovations, services in particular).

19. Conversely, in the case of a purchasing cartel, the commercial autonomy is likely to be impaired to a greater extent, as the exchanges may potentially cover more parameters of competition[9], in particular on account of the secret nature of the coordination.

2.2. The framework for analysing purchasing agreements by the *Autorité de la concurrence*

20. For several years, the *Autorité* has specifically focused its attention on the issue of purchasing agreements, both in an advisory and a litigation contexts.

2.2.1. Opinion 15-A-06 on the partnerships concluded between purchasing and referencing offices in the mass retail distribution sector for food

21. Since the end of 2013, the mass-market retailers have been engaged in a price war in France in order to safeguard or increase their market share[10]. During the course of 2014, the retailers, firstly, passed on the cost of this price war to suppliers, through demands for additional financial benefits to compensate for their loss of margin. Secondly, within an extremely short space of time, they concluded three partnerships between purchasing

[7] "*It must however be pointed out that, under point 18 of those guidelines, it is not necessary to examine the actual effects on competition and the market of agreements that have as their object a restriction of competition by means of price fixing, output limitation or sharing of markets or customers, since those agreements are presumed to have negative market effects. Since the Commission considered that the agreements in question aimed by nature at the restriction of competition (recital 165 of the contested decision), it was therefore not required to carry out a detailed analysis of the market power of the members of the W5.*" (judgment of the General Court, 27 September 2012, Case T-362/06, Ballast Nedam Infra BV, §84).

[8] In the above-mentioned case regarding practices implemented in the pork sector, the *Autorité* sanctioned a purchasing cartel between operators on the Brittany pork market who accounted for 70% of purchases on the market (Decision 13-D-03 of February 13, 2013, § 398).

[9] For example, in the case regarding practices in the pork sector, in which a purchasing cartel was sanctioned, the companies not only agreed to fix a purchase price, but also exchanged sensitive information relating to the withdrawal price of the slaughterers implicated (Decision 13-D-03 of February 13, 2013, § 272 et seq.).

[10] The consumer price survey published by the INSEE in June 2014 indicated a net decline in food prices (-1.5 % year-on-year). The price of fresh products fell by 10.6 % year-on-year, while the prices of fruit and vegetables and fresh fruit also fell sharply year-on-year, by -9.9 % and -14.5 % respectively.

offices[11] with the stated aim of obtaining better purchasing conditions from suppliers in order to enhance their competitiveness.

22. In this context, the *Autorité* received a request for an opinion by the Minister of the Economy, Industry and Digitisation, and by the Economic Affairs Committee of the French Senate. The *Autorité* issued an opinion[12] in March 2015, in which it established a general assessment grid and a mapping of the potential competitive risks that joint purchasing agreements could entail, both on the upstream supply markets and on the downstream markets of the mass retail distribution sector for food.

23. Several competition-related risks were identified in the opinion. First, on the downstream market, the *Autorité* identified three types of risks :

- A risk related to the exchange of commercially sensitive information: such exchanges could allow retailers to compare the compensation they offer to suppliers, as well as the associated remuneration. Such exchanges could have the effect not only of smoothing down the compensation granted, whether for product ranges, innovation launches or commercial transactions, but also of increasing price transparency to their advantage. These exchanges could therefore reduce the competitive intensity between downstream retailers. To mitigate this risk, the *Autorité* recommended putting non-disclosure obligations in place, restrictions on the mobility of employees, and legal structures separated from the retailers, dedicated to joint negotiation.
- A risk related to the symmetry of purchasing conditions: purchasing agreements may also lead to homogeneous purchase prices for the main consumer goods, which could facilitate collusion in the retail distribution market.
- A risk related to reduced inter-brand mobility: purchasing agreements can ultimately reduce the incentive for partners to compete for the affiliation of new stores, which can freeze a significant proportion of existing stores.

24. On the upstream market, the *Autorité* identified two main risks :

- A risk of limiting supply, reducing quality or encouraging certain suppliers to innovate or invest: due to the lower supplier margins resulting from purchasing agreements, suppliers may be obliged to reduce their investments or the launch of innovations, or rationalise their offering.
- A risk of excluding suppliers that are not involved in the agreements: the lower prices agreed to by the suppliers involved in the agreements may lead to a drop in the turnovers of their competitors who are not involved, either because their sales will fall (volume effect) or because they will be forced to match the discounts agreed to by the suppliers who are involved (price effect).

25. In this opinion, the *Autorité* acknowledged that these agreements could also lead to beneficial effects for competition, in particular on the retail prices of consumer goods if a significant part of the price reductions obtained upstream through joint purchasing agreements were passed on downstream. Among other things, such benefits depend on how the cooperation is structured and the competitive conditions downstream.

[11] Between Système U and Auchan; Intermarché and Casino; and Carrefour and Provera.

[12] Opinion 15-A-06 of March 30, 2015 on the partnerships concluded between purchasing and referencing offices in the mass retail distribution sector.

26. The findings made in the context of this opinion prompted the *Autorité* to consider whether the legislative framework applicable at that time should be adapted, to allow it to intervene promptly when these agreements are concluded and implemented. The *Autorité* therefore favoured introducing a mandatory prior information framework, which would allow it to perform its monitoring role effectively.

27. This framework was introduced in Article L. 462-10 of the French Commercial Code (*Code de commerce*) by the Macron Law of 6 August 2015[13].

2.2.2. The introduction of a mandatory prior information framework in Article L. 462-10 of the French Commercial Code (Code de commerce)

28. Article L. 462-10 of the French Commercial Code (*Code de commerce*) created an *ad hoc* framework consisting of an obligation to notify the *Autorité* of any purchasing cooperation or referencing agreement between companies[14], two months before the implementation of the agreement.

29. Joint purchasing or referencing agreements fall under this obligation when :

- the total worldwide turnover excluding taxes of all the parties is more than €10 billion; and
- the total turnover achieved in France excluding taxes is more than €3 billion[15].

30. In 2018, without modifying these application thresholds, the Egalim law[16] strengthened the powers available to the *Autorité* under this framework, meaning that before their entry into force, and once they are implemented, these agreements can be subject to enhanced scrutiny with regard to competition law.

31. *Ex ante* first of all, the law introduced two measures: it extended the period that must be observed between the notification of an agreement to the *Autorité*, and its implementation, from two to four months; and it introduced the obligation for the parties to provide the *Autorité* with an 'information file' at the same time as the notification of the agreement[17].

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[13] Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities

[14] (freely translated) "*Any agreement between companies or groups of natural or legal persons operating, directly or indirectly, one or more retail stores for consumer goods, or operating in the mass retail distribution sector as a referencing or purchasing office for retail companies, aimed at negotiating, as a group, the purchase or referencing of products or the sale of services to suppliers*" (Article L. 462-10 I French Commercial Code (Code de commerce)).

[15] Decree 2015-1671 of December 14, 2015 on the turnover thresholds set for prior information to the *Autorité de la concurrence* regarding joint purchasing agreements, Article 1

[16] Law No. 2018-938 of 30 October 2018 for a balance in commercial relations in the agricultural and food sector and healthy, sustainable food accessible to all.

[17] This information file, provided for in the Regulation of 9 September 2020 on the content of the information case and report provided for in Article L. 462-10 of the French Commercial Code (*Code de commerce*) must include in particular (freely translated): a "*description of the transaction*"; a "*presentation of the companies party to the agreements*"; a definition of the "*markets concerned*" by the agreement, upstream and downstream; the identity of the suppliers involved in the agreement and their main competitors; a "*detailed description of the methodology*" used to select the suppliers and sectors concerned by the agreement or, where applicable, to exclude them from it (see on this subject Opinion 20-A-02 of the *Autorité* of February 13, 2020 regarding the content of the information file and report provided for in Article L. 462-10 of the French Commercial Code).

32. Then *ex post*, the law created a procedure for a "competition-related assessment" of the implementation of these agreements, which may be initiated by the *Autorité* on its own initiative or at the request of the Minister of the Economy[18]. This procedure must allow the *Autorité* to (freely translated) "*examine whether this agreement, as implemented, is likely to cause significant harm to competition within the meaning of Articles L. 420-1 and L. 420-2 of the French Commercial Code*"[19]. To do this, the *Autorité* must assess (freely translated) "*whether the agreement contributes to economic progress in such a way that compensates any harm to competition, taking into account its impact on producers, processors, distributors and consumers alike*"[20].

33. If such harm or anticompetitive effects have been identified, the parties may undertake to take measures to remedy these within the time limit set by the *Autorité*. The law has therefore given the *Autorité* the possibility of taking interim measures on its own initiative, in the event that (freely translated) "*this agreement leads or is likely to lead immediately after its entry into force*" to "*sufficiently serious harm to competition*"[21].

2.3. The implementation of this analytical framework: the recent decision-making practice of the *Autorité de la concurrence* regarding purchasing agreements

34. A second wave of joint purchasing agreements took place in France in 2018, with the creation of four new alliances, between Auchan, Casino, Metro and Schiever; Carrefour and Tesco; Carrefour and Système U; and Intermarché and Francap, notified to the *Autorité* on the basis of Article L. 462-10 of the French Commercial Code (*Code de commerce*) when, in particular, the turnover threshold conditions were met. These alliances resulted in even greater purchasing concentration, as the top four buyers in the mass retail distribution sector[22] then accounted for more than 92% of the market, with the upstream HHI[23] rising from 2190 in 2014 to 2343 in 2018[24].

35. The first two alliances were broader in scope than the previous alliances in that they included retailers' private label products (MDD in French). In 2020, the Authority issued two commitments decisions, concerning these products[25].

36. In these cases, the *Autorité* opened an *ex officio* proceeding on the merits on the basis of Article L. 462-10 (II), in order to examine whether these various cooperation

[18] Governed by Articles L. 463-2, L. 463-4, L. 463-6 and L. 463-7 of the French Commercial Code (*Code de commerce*).

[19] Article L. 462-10 II paragraph 3 French Commercial Code (*Code de commerce*).

[20] The report provided for in the competition-related assessment procedure must include an update of the information contained in the information file and a presentation of the effects of the agreement on each market concerned, upstream and downstream.

[21] Article L. 462-10 III of the French Commercial Code (*Code de commerce*).

[22] Envergure (Carrefour, Système U and Provera); Leclerc; Horizon (Auchan, Casino, Metro and Schiever); and ITM/ Francap.

[23] Herfindahl-Hirschmann Index, which measures the concentration of a market.

[24] Calculations based on Kantar Worldpanel 2014 and 2018 data.

[25] Decision 20-D-13 of October 22, 2020 regarding practices implemented in the major food retailer sector by the Auchan, Casino, Metro and Schiever groups and Decision 20-D-22 of December 17, 2020, regarding practices implemented in the major food retailer sector by the Carrefour and Tesco groups.

agreements were likely to significantly harm competition. The *Autorité* then opened an *ex officio* proceeding, on the basis of Article L. 462-10 (III), to examine whether interim measures needed to be ordered with respect to the cooperation relating to private label products. Indeed, the *Autorité*'s investigation unit had considered that the implementation of such cooperation was likely to raise various risks of harm to competition on the markets concerned.

37. Firstly, upstream, the agreements were likely to have contrasting effects. In a significant number of cases, the lower purchase prices that they were likely to generate concerned companies with limited market power due to the contractual and economic conditions under which these relationships were established. However, the suppliers could be involved in the innovation process, as private label products are not systematically defined unilaterally by distributors. Therefore, implementing the cooperation agreements carried the risk that the suppliers of private label products involved in the agreements would see their incentive to innovate and invest decrease.

38. Secondly, downstream, the agreements concerned private label products that were potentially distinguishable between retailers at the national level. Yet these products were intended to play an increasingly strategic role in the differentiation policy between retailers. As such, when the agreements concerned retailers who were also competitors on the retail market[26], the implementation of the cooperation agreements risked weakening competition between retailers.

39. The investigation unit of the *Autorité* considered that the conditions of Article L. 462-10 (III) on the adoption of interim measures were met, in particular in light of the "significant" harm to competition that these agreements were likely to cause, the fact that this harm was sufficiently serious and that it was immediate.

40. Against this background, the investigation unit proposed adopting interim measures; the retailers subsequently submitted a commitments proposal to the *Autorité* consisting of :

- Excluding certain categories of private label products from the scope of the cooperation. These exclusions were mostly justified by the characteristics of the market and generally concerned unprocessed or minimally processed agricultural products (such as milk, eggs, cold meats or fruit and vegetables), for which the suppliers have limited market power a priori. In the case of agreements involving operators who are also competitors downstream on the retail market, certain categories were excluded owing to their distinguishing character (such as potato chips, pâtés, and foie gras);
- Limiting their joint purchases to 15% in other private label product categories for which the characteristics of the sector and the weight of the parties on the market did not allow all competition-related risk to be ruled out (such as cotton, canned goods, cracker bread, potatoes or cheese).

41. For the other product families, the commitments allowed the cooperation to continue under the original conditions.

42. In their general economy, the commitments presented were consistent and strove to achieve a balanced result likely to limit the competition-related risks identified on the private label products. Indeed, the suppliers from whom the grouped purchases were fully or partially excluded from the scope of cooperation were from the upstream supply segment, which is the most fragile in terms of negotiating power. In particular, suppliers of

[26] Issues specific to the Auchan, Casino, Metro and Schiever agreement.

certain agricultural products, with little or no processing, generally had little market power, being generally small and operating in sectors that were not very concentrated, meaning that joint purchasing agreements could have an even greater impact on their level of remuneration, which was already considered too low by the government. It is precisely to remedy this situation that the government has implemented various provisions aimed at providing a fairer remuneration to farmers, through the Egalim 1 and 2 laws.

43. The approach taken, aiming at fostering dialogue with the retailers in a constructive and strictly proportionate manner to the competition-related concerns identified, prompted the retailers to agree to modify their behaviour via commitments, in the context of a procedure before the *Autorité*.

44. To the extent that they made it possible to address the competition-related concerns identified, these commitments were therefore accepted by the *Autorité* and entered into force shortly after the adoption of these decisions. The agreements between Auchan, Casino, Metro and Schiever on the one hand, and Carrefour and Tesco on the other, ended in 2021.

45. Overall, the retailers appear to have drawn the lessons of the various opinions and decisions of the *Autorité* mentioned above.

46. First, purchasing alliances now often provide contractual safeguards to ensure that the sensitive business data of the trading partners is secured. Various mechanisms are put in place, such as setting up one or more structures which are separate from the partners and dedicated to joint commercial negotiation, using IT systems that are separate from those of the purchasing partners, or using negotiators who are employees of the entity and who are subject to various non-disclosure and non-competition obligations in their contract, restricting their mobility during and at the end of the purchasing alliance.

47. Second, the most recent purchasing alliances notified to the *Autorité* are limited to supplier-branded products, and no longer include private label products, traditional fresh products derived from agriculture or fisheries, or national-brand products produced by small or medium-sized enterprises ("SMEs"). For example, Casino and Intermarché have now excluded private label products from the scope of their new cooperation.

48. This is a positive development, but at this stage it is based solely on the interpretation of contracts subject to the notification obligation set forth in Article L. 462-10 of the French Commercial Code (*Code de commerce*). The *Autorité* will be vigilant regarding the implementation of these alliances, which, in their application, could reveal practices that restrict competition, for example if the exchanges of information concern strategic elements and go beyond what is necessary, or if coordinated retaliatory measures against suppliers are implemented by the purchasing partners.

3. Assessing purchasing agreements from the perspective of restrictive competitive practices (RCP)

3.1. The substance of the framework for tackling restrictive competitive practices

49. Under French law, in addition to the rules on "anticompetitive practices", there is a framework to tackle abuses of purchasing power that can result from purchasing agreements in bilateral relations.

50. Joint purchasing agreements between competing retailers lead to a rise in the purchasing power of all retailers and, as such, are likely to raise concerns about a rise in

the imbalance between retailers and suppliers[27]. In this respect, the excessive weakening of farmers' income due to overly unbalanced trade negotiations threatens the general level of production and therefore the quality and diversity of food products, to the detriment of French and European consumers.

51. Moreover, the proliferation of joint purchasing agreements on the market for procurement in the mass retail distribution sector for food in France makes commercial negotiations more complex by distinguishing between several categories of suppliers and products and/or sub-categories of products, thereby multiplying the layers of negotiation.

52. This was illustrated by the findings of a parliamentary commission of inquiry into (freely translated) "*the situation and practices of mass retail distribution and their groups in their trade relations with suppliers*" set up on 26 March 2019 by the French National Assembly (*Assemblée nationale*). This commission of inquiry has collected various testimonies attesting to a particular difficulty in commercial negotiations in France and has in particular highlighted the difficulty of understanding the activities of international purchasing and service offices, whose operations are opaque and which appear to be based on a strategy of circumventing French law, even though the negotiations they conduct with suppliers have a direct impact on the French market.

53. In this context, the law on the acceleration and simplification of public action ("*loi d'accélération et de simplification de l'action publique"*, or "*ASAP*" law) of 7 December 2020, provides that the written agreement concluded between suppliers and retailers must now specify (freely translated) "*[...] The purpose, date, terms of performance, remuneration and products to which it pertains, of any service or obligation falling under an agreement concluded with a legal entity located outside the French territory, with which the retailer is directly or indirectly linked*. "

54. The abuse of purchasing power by retailers and the impact thereof on the economy, in particular on the upstream market, is one of the priorities of the Directorate-General for Competition, Consumer Affairs and Fraud Control (*DGCCRF*) under the rules on "restrictive competitive practices" and in particular Article L. 442-1 (I) and (II) of the French Commercial Code (*Code de commerce*) which prohibits (freely translated)[28] :

- obtaining or attempting to obtain an advantage for which there is no compensation or which is clearly disproportionate to the value of the compensation given ;
- submitting or attempting to submit the other party to obligations, creating a significant imbalance in the rights and obligations of the parties ;
- imposing logistics penalties which are disproportionate to the non-performance of contractual commitments and the automatic deduction of logistics penalties ;
- discriminatory conditions applied or obtained by a party to a contract relating to food or pet food products in the absence of real compensation, thereby creating a competitive disadvantage or advantage for its partner ;
- the abrupt, total or partial termination of an established commercial relationship, in the absence of a written notice that takes into account the duration of the trade relations, with reference to trade practices or interprofessional agreements.

[27] Opinion 15-A-06 of March 31, 2015 on the partnerships concluded between purchasing and referencing offices in the mass retail distribution sector.

[28] Article L. 442-1 of the French Commercial Code (*Code de commerce*).

55. The Minister of the Economy, in light of the findings of the DGCCRF, may summon the companies responsible for the illicit trade practices before the commercial court, with a view to sanctioning them[29]. In particular, the Minister may ask the court to order the cessation of the practices, the annulment of the clauses or contracts, which are the instruments of the abusive practice, the recovery of the sums unduly received as well as the imposition of a civil fine, the amount of which may not exceed the highest of the three following amounts :

- €5 million ;
- three times the amount of benefits unduly received or obtained ;
- 5 % of the turnover (excluding tax) generated in France by the party committing the practices during the last fiscal year since the year preceding the one in which the practices were applied.

56. It should be noted that since the entry into force of Law No. 2020-1508 of 3 December 2020 (known as the "*DDADUE*" law), the DGCCRF has the power to issue injunctions under periodic penalty payment (capped at 1% of turnover) in order to compel operators to remedy their contracts in accordance with the provisions of the French Commercial Code (*Code de commerce*) prohibiting the abusive commercial practices mentioned above.

3.2. The action of the Minister of the Economy

57. Under French law, tackling restrictive competitive practices helps safeguard economic public order. The aim of this framework is to guarantee the fairness and balance of trade relations relating to the purchase and distribution of goods on the French national territory.

58. The Constitutional Council has also had the opportunity to judge the constitutionality of these provisions. As such, in its decision 2011-126 QPC of 13 May 2011[30], the Constitutional Council ruled that (freely translated) "*the legislator has granted the government the power to act, to put an end to restrictive competitive practices"* and *"that in so doing, the legislator intended to suppress these practices, re-establish a balance in the relations between trade partners and prevent a recurrence of these practices; that, in view of the objectives of safeguarding economic public order* [emphasis added] *that it set for itself, the legislator reconciled the principle of freedom of enterprise with the general interest derived from the need to maintain a balance in trade relations"*.

59. The action of the Minister of the Economy is an autonomous action to protect the market enshrined by the *Cour de Cassation* (French Supreme Court)[31] and whose conformity to the European Convention on Human Rights has been recognised by the European Court of Human Rights[32].

60. The *Cour de Cassation* (French Supreme Court) has therefore ruled, in matters of significant imbalance in international disputes, that the Minister of the Economy is not bound by the jurisdiction clauses, nor by the applicable law clauses provided for by the

[29] Article L. 442-2 of the French Commercial Code (*Code de commerce*).

[30] Constitutional Council, Decision No. 2011-126 QPC of 13 May 2011, Société Système U Centrale Nationale et al., cons. 5.

[31] Supreme Court, 8 July 2008 n°07-16.761.

[32] ECHR, 17 January 2012, GALEC v/ France.

parties[33]. In a case involving the Minister of the Economy versus the companies of the American group Expedia, the Court held that (freely translated) "*the former article L. 442-6, I, 2° [...] of the French Commercial Code (Code de commerce) provides for imperative provisions, compliance with which is considered crucial for the preservation of a certain equality of arms and fairness between economic partners, and which are therefore essential for the economic and social organisation of France* [...]". The result is that these provisions (freely translated) "*constitute overriding mandatory rules [...] whose application is binding on the court seised, without the need to determine the conflict of laws rule leading to the determination of the applicable law*".

61. Consequently, it is up to the French State to impose the respect of this framework sanctioning unfair commercial practices to any person located on the French territory or to any legal relationship based in France.

62. In this perspective and in the context of its remit to control and protect the economic public order, the Minister of the Economy has initiated various judicial and administrative proceedings against national and international purchasing and service offices for non-compliance with the provisions relating to the above-mentioned abusive commercial practices.

[33] Supreme Court, 8 July 2020 n°17-31.536, Expedia vs. Minister; Commercial Court of Paris, 2 Sept 2019, No. 2017/050625, Minister vs. Amazon.