

Platforms : how to deal with their bargaining power ?

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1. ANTITRUST LAW

Abuse of position dominant

- Exploitative abuse : practice which affects contractor's interest (for example : excessive price).
- Exclusionary abuse : practice which affects competitor's interest (for example : exclusivity clause, tying, predatory price...).

Exclusionary abuse

◆ Texts

- European competition law : Art. 102 TFUE
- French competition law : Art. L. 420-2, al. 1 Commercial code

◆ 3 conditions :

- Dominant position
- Anticompetitive foreclosure
 - Lock-in effects (for ex : MFN clause – Booking case)
 - Leverage effects (for ex : tying – Google case)
- Other means that competing on the merits

Abuse of economic dependance

- French competition law : art. L. 420-2, al. 2
commercial code : *The abuse of the state of economic dependance 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 the competition.*
- Very difficult and unusual to apply

Vertical restraint

- Vertical restraints are prohibited by european competition law (art. 101 TFUE) and french competition law (art. L. 420-1 commercial code)
- Clauses which are likely to prevent e-distributors (platforms) from accessing the market
- Pierre fabre and coty cases : possible to prohibit distributors from using third-party platform but not possible to ban totally e-commerce.

2. BUSINESS CONTRACT LAW

Commercial law : restrictive competitive practices

- Article L. 442-6, I, 2° commercial code :

I. - Any producer, trader, manufacturer or person recorded in the trade register who commits the following offences shall be held liable and obliged to make good the damage caused : (...)

2° Subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties.

- 3 conditions :
 - (i) A business relationship
 - (ii) An imbalance between rights and obligations
 - (iii) A subjection of a partner to another partner

Contract law

- article 1171 civil code : « *any term of a standard form contract which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written* »

3. SECTORIAL APPROACH

New provisions in french law

- Art. L. 420-2-2 commercial code : for the transport sector.
- Art. L. 311-5-1 tourism code : for the booking platform sector
- Criticism : incompleteness.

Other options ?

- Keep the actual provisions. Apply art. 102 TFUE, in prior for the practices which have leverage effects.
- Provide specific rules for platforms. (See : Proposal for a new regulation on promoting fairness and transparency for business users of online intermediation services, published by European Commission)
- Expand the criteria of abuse of dominant position. For ex., apply to key operators, not only dominant operators.