Special Section: Cooperatives and other fields of law

COOPERATIVE RELATIONSHIPS AND FRENCH AND EUROPEAN COMPETITION LAW

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Abstract

This article examines the confrontation of relations between cooperative societies and their members with competition law. Competition law trivializes cooperative relationships when it comes to protecting the market. Thus, the terms of membership and exclusion, as well as the obligations imposed on cooperative members, are examined by French and European anti-competitive practices law, and in particular cartel law, objectively in function of their effects on competition, regardless of the cooperative specificities. On the other hand, cooperative law regains its place when cooperative relationships are assessed on a competitive level with regard to the individual situation of members; the French restrictive practices law (« pratiques restrictives ») is thus set aside, to preserve the cooperative pact.

Introduction

Applicable to economic activities, competition law is a pragmatic law, a law of behaviour: its scope is governed by a principle of legal neutrality, according to which « *the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed* »[2]. Carrying out economic activities, cooperative societies are therefore, despite their specific legal status, subject like any other company to competition law, prohibiting anti-

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[2] Case C-41/90 Höfner, 23 April 1991, *Rec.* p. I-1979. Commercial code (FR), article L 410-1: « Les règles définies au présent livre s'appliquent à toutes les activités de production, de distribution et de services, y compris celles qui sont le fait de personnes publiques, notamment dans le cadre de conventions de délégation de service public. » (« The rules defined in this book apply to all production, distribution and service activities, including those carried out by public entities, in particular within the framework of public service delegation agreements." (translated by myself).

competitive practices and, in French law only, restrictive practices (« pratiques restrictives ») committed against other market operators[3].

What about the relationships that cooperatives have with their members when they are themselves businesses? In France, these relationships are organised by the legislative and regulatory cooperative texts, the statutes and the internal regulations of cooperatives: is competition law therefore intended to intervene, at the risk of being perceived as « a bull in a china shop »?

The answer cannot be unequivocal in this area. The anti-competitive practices law is sovereign when the cooperative organisation brings into play the imperative of protecting the market; in this context, cooperative relationships are trivialized in terms of competition (I). On the other hand, competition law, understood as the French restrictive practices law (« pratiques restrictives »), is discarded in favour of cooperative law which regains its full impact when it comes to assessing the strictly individual impact, on cooperators, of cooperative relations (II).

I - MARKET PROTECTION: A SOVEREIGN COMPETITION LAW

The national and European anti-competitive practices law, consisting essentially of the prohibition of cartels and abuses of a dominant position, aim to fight against business practices having an anti-competitive object and/or effect on the market[4]. In this context, the cartel law has been particularly mobilized to examine the validity of the elements of the cooperative organisation affecting the functioning of the market.

The belonging of a company to a cooperative society does not in itself remove its commercial, economic and financial autonomy[5]. On the contrary, cooperatives are considered in this context by French and European case law as associations of undertakings, covered by Article 101(1) of the TFEU, and whose decisions are susceptible, both in EU and national law[6], to establish illegal cartels attributable to the

[3] Recent examples of the condemnation of cooperatives for cartels aimed at fixing prices and/or sharing markets: Aut. conc. (French Autorité de la concurrence), 6 March 2012, n° 12-D-08; CA Paris (Court of Appeal Paris), 15 May 2014, Sté Primacoop et a., n° 2012/06498; Cass. Com. (French Court of cassation, commercial chamber), 8 décember 2015, Président de l'Autorité de la concurrence, n° 14-19589, forthcoming publication; Case C-671/15 Président de l'Autorité de la concurrence, 14 November 2017; Cass. Com., 12 September 2018, n° 14-19589, forthcoming publication. Aut. conc., 26 July 2018, n° 18-D-15; Aut. conc., 17 December 2019, n° 19-D-24. Restrictive practices (« pratiques restrictives »), v. not. Cass. Com., 8 July 2008, Ministre chargé de l'économie / Galec, n° 07-16761, *Bull. Civ. IV*, n° 143; CA Versailles (Court of Appeal Versailles), 29 October 2009, GALEC, n° 08/07356.

[4] TFEU, article 101 and Commercial code (FR), article L 420-1 (cartels); TFEU, article 102 and Commercial code (FR), article L 420-2 (abuses with a dominant position).

[5] Cass. Com., 16 May 1995, GIE GITEM, *Bull. Civ. IV*, n° 147.

[6] See for example, Case T-61/89 Dansk Pelsdyravlerforening, 2 July 1992, *Rec.* II-01931; Cons. conc. (French Conseil de la concurrence), 17 September 1996, n° 96-D-53 (CA Paris, 13 June 1997, SA Allo Taxi).

cooperatives themselves[7]. Thus, « whilst the fact that an undertaking is organized in the particular legal form of a cooperative society does not in itself constitute conduct which restricts competition, such a mode of organization may, regard being had to the context in which the cooperative operates, nevertheless constitute a means capable of influencing the commercial conduct of the cooperative's member undertakings so as to restrict or distort competition on the market in which those undertakings carry out their commercial activities »[8].

Four key elements of the cooperative organisation, presenting high competitive risks, were confronted with cartel law. The first concerns the membership and exclusion procedures implemented by cooperatives (A). The following three are made up of obligations imposed on members: non-compete obligations leading to a geographical distribution of cooperators (B), so-called cooperative loyalty exclusives (C) and the obligation to respect common prices within the framework of a network sales policy (D).

A - Membership and exclusion from the cooperative

The conditions of membership and the terms of exclusion of cooperatives may fall under the scope of the cartel law when they constitute a barrier to market entry[9]. Cooperatives do not receive any preferential treatment from European and French jurisprudence and can be sanctioned like any other type of business group[10].

For example, a case before the French Conseil de la concurrence[11] has highlighted cartels the object and/or the effect of which is to limit market access and free competition from the conditions of membership and exclusion of an artisanal taxi cooperative. Thus, a refusal of an application for membership as well as the impossibility of joining the cooperative in the event of possession of private means of communication in the vehicle were deemed to be anti-competitive, because they were intended to prevent the development of an occasional transport offer competing with the taxi operators[12]. Regarding the obligations imposed on the former members of the cooperative, the prohibition to use telecommunications means was considered to constitute a cartel creating barriers to market access,

[7] There is no need to demonstrate that they were implemented by cooperatives separately, with autonomy, from their members. See for example, Aut. conc., 24 November 2016, n° 16-D-26.
[8] Case T-61/89 Dansk Pelsdyravlerforening, 2 July 1992, paragraph 51; Case C-399/93 H. G. Oude Luttikhuis e.a., 12 December 1995, paragraphs 12 and 13.
[9] Cass. Com., 22 February 2000, n° 97-17020, *Bull. Civ. IV*, n° 35.
[10] See for example, Aut. conc., 11 May 2010, n° 10-D-15 (Economic Interest Group); Cons. conc., 22 April 1996, n° 96-D-22 (professional association).
[11] Replaced in 2009 by the French Autorité de la concurrence.
[12] Cons. conc., 17 September 1996, n° 96-D-53, confirmed by CA Paris, 13 June 1997.

because of its excessive nature in its duration and scope in relation to the nature and conditions of exercise of the activity concerned[13].

B - Non-compete obligations and geographical distribution of cooperators

1) The qualification of a horizontal market-sharing cartel

In general, non-compete clauses are not unlawful per se, but they cannot be disproportionate in their scope or duration, and cannot lead to excessive restriction of competition by affecting the atomicity of suppliers and free access to the market. In this context, the clauses aiming to distribute the market geographically among the cooperators « must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers »[14]. But knowing that horizontal market-sharing agreements are hard core cartels that must be severely punished, the French and European competition authorities are very hostile towards these clauses: « une répartition territoriale du marché est présumée constituer une restriction de concurrence par objet dès lors que les opérateurs entre lesquels cette répartition est organisée, sont des concurrents au moins potentiels »[15].

In the GIE GITEM decision of the French Cour de cassation, handed down twenty-five years ago, a EIG (Economic Interest Group) grouping together cooperatives was condemned for cartel, on the basis of clauses « aimed at enforcing a distribution between cooperators absolute territoriality and thus eliminate all competition between independent operators without strengthening their commercial dynamism »[16]. Thus, the French Conseil de la concurrence, then the French Autorité de la concurrence, have repeatedly sanctioned cooperatives for horizontal market sharing agreements. For example, a retail traders' cooperative was condemned for the implementation in its internal regulations of a clause on the geographical distribution of the activities of its cooperators « weakening competition between them by preventing them from operating freely in the zones on which they consider themselves competitive and might wish to develop their activity »[17]. Likewise, the French Autorité de la concurrence has sanctioned a cooperative having introduced in its statutes, its internal regulations and its membership agreements, non-compete clauses prohibiting its cooperators from canvassing clients referenced by others members and

[13] Prohibition within a radius of 50 kilometers around the city of Cannes for three years.
[14] Case C-250/92 Gottrup-Klim, 15 December 1994, *Rec*., p. I-5641, paragraph 35.
[15] « A territorial distribution of the market is presumed to constitute a restriction of competition by object since the operators between whom this distribution is organized are at least potential competitors » (translated by myself): Aut. conc., 24 November 2016, n° 16-D-26, paragraph 72 (confirmed by CA Paris, 18 January 2018, G.I.F. SA, n° 2017/01703; *RTD Com*., 2018 p. 399, D. HIEZ).
[16] Translated by myself. « Visant à faire respecter entre coopérateurs une répartition territoriale absolue et à supprimer ainsi toute concurrence entre des opérateurs indépendants sans pour autant renforcer leur dynamisme commercial »: Cass. Com., 16 May 1995, GIE GITEM, n° 93-16556, *Bull. Civ. IV*, n° 147.
[17] Translated by myself. « Affaiblissant la concurrence entre eux en les empêchant d'opérer librement sur les zones sur lesquelles ils s'estiment compétitifs et pourraient souhaiter développer leur activité »: Aut. conc., 24 November 2016, n° 16-D-26, paragraph 105.

respond to requests from these customers; this agreement « led to a severe limitation of the commercial autonomy of the members of the group, to reduce the alternatives available to customers and therefore to hinder the free formation of prices »[18].

2) The lack of exemption

The exemptions on the basis of economic progress resulting from these geographical restrictions are extremely rare, if not non-existent, because they are granted by the judge only if there is no other means as effective as the restrictions of competition to obtain the economic progress in question[19].

With regard specifically to retail traders' cooperatives, the argument according to which territorial restrictions would be necessary for the proximity between members and their customers, thus ensuring a quality service within the framework of a common commercial policy, is generally considered as inoperative by the French Autorité de la concurrence. Thus, in the « Groupement des Installateurs Français » case, the Authority considered that other means than territorial restriction could be proposed, such as the admission of new members to areas where the Group is still not very well established, as well that free cooperation between members, to ensure a part of subcontracting or a better after-sales service[20].

C - Exclusivity obligations and cooperative loyalty

Members are often held to exclusive sourcing obligations as customers or suppliers of their cooperative. The French and European competition authorities do not condemn these cooperative loyalty clauses per se, but apply the method followed for exclusivity clauses in general. Thus, they assess their conformity by engaging in a competitive balance, taking into account the economic context and their conditions of application: «The compatibility of the statutes of such an association with the Community rules on competition cannot be assessed in the abstract. It will depend on the particular clauses in the statutes and the economic conditions prevailing on the markets concerned». In any case, they «must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers»[21].

In this context, judges examine the competitive interest of cooperative loyalty clauses. Thus, about the exclusive supply obligation from a cooperative: «such dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers. Prohibition of dual

[18] Translated by myself. « A conduit à limiter fortement l'autonomie commerciale des membres du groupement, à réduire les alternatives à la disposition des clients et donc à entraver la libre formation des prix »: Aut. conc., 28 October 2019, n° 19-D-21.
[19] TFEU, article 101(3) and Commercial code (FR), article L 420-4.
[20] See for example Aut. conc., 24 November 2016, n° 16-D-26, paragraph 107 et seq.
[21] Case C-250/92 Gottrup-Klim, 15 December 1994, paragraphs 31 and 35. See in French law: Cass. Com., 16 May 1995, GIE GITEM, n° 93-16556, *Bull. Civ. IV*, n° 147.

membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article 85(1) of the Treaty and may even have beneficial effects on competition»[22]. The same applies to the exclusive supply or delivery clauses by the cooperators: «Depending on the facts and actual circumstances in which the market in question operates, an exclusive supply agreement may, by guaranteeing to the producer sales of its products and to the distributor security of supply, be such as to intensify competition in terms of the prices and services offered to consumers on the market in question, thereby helping to improve the interplay of supply and demand in that market»[23].

But the value of exclusivity clauses must then be weighed against their potentially negative effects, in the light of the economic conditions in which they occur. For example, the European judge was able to consider as constituting an illegal agreement the exclusive purchase obligation imposed by a dairy cooperative on its members (and accompanied by the obligation to pay, in the event of resignation, a «not inconsiderable sum») on the basis of the fact that «the members now account for more than 90% of Netherlands cheese output» and that « the Cooperative is virtually the only supplier of rennet on the Netherlands market», which led to the restriction of the competition both on the national market and on the Community market[24].

In another case, an exclusive delivery clause was considered by the European judge to exercise « taken in its economic context, […] an anti-competitive effect on the market. On the one hand, […] the applicant has a strong position on the sales market for animal skins and, on the other, 75% of the applicant's members belong to its Emergency Assistance Scheme, which, as already stated, itself leads to rigidity in economic operators' conduct. Consequently, the stipulation in question does have a restrictive effect on competition by making it more difficult for the applicant's competitors to gain access to the Danish market in question»[25].

Conversely, the Court of Justice of the European Union validated the obligation of exclusive supply from an agricultural product distribution cooperative, estimating after analysis of the market that «it would not seem that restrictions laid down in the statutes, of the kind imposed on DLG members, go beyond what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers»[26].

[22] Case C-250/92 Gottrup-Klim, 15 December 1994, paragraph 34.
[23] Case T-61/89 Dansk Pelsdyravlerforening, 2 July 1992, paragraphs 99 and 109.
[24] Case C-61/80 Coop. Stremsel-en Kleurselfabriek, 25 March 1981, *Rec*., p. 851, paragraphs 12 and 13.
[25] Case T-61/89 Dansk Pelsdyravlerforening, 2 July 1992, paragraph 109.
[26] Case C-250/92 Gottrup-Klim, 15 December 1994, paragraph 40.

The competitive validity of cooperative loyalty clauses is therefore assessed as for any other exclusivity clause in the light of the economic context in which they operate, and not regarding their sole interest for the cooperative organisation.

D - Respect for common prices and network commercial policy

The practice of common prices as part of an overall policy is considered to strengthen cooperative networks compared to integrated networks. However, specialists in competition law have many reservations about this practice, with regard to the prohibition of price-fixing cartels. The French Conseil de la concurrence, consulted in 1999 on the common commercial policy carried out by retail traders cooperatives, indicated that this policy « cannot go so far as to limit the commercial freedom of these traders in terms of supply, expansion and price, when several members of one or more cooperatives concerned find themselves in competition on the same market. Likewise, it must not have the effect of protecting members against competition from third parties »[27].

However, French law enabled retail traders' cooperatives in 2001, and artisanal cooperatives in 2014, to « define and implement by all means a common commercial policy suitable for ensuring the development and activity of its partners, in particular […] by carrying out advertising or non-advertising commercial operations that may include common prices »[28]. Does this recognition by legislation then make it possible to justify the price agreements of these cooperatives on the basis of Article L 420-4, 1° of the French Commercial Code, which exempts « practices resulting from the application of a legislative text or a regulatory text adopted for its application »[29]?

There is little room for doubt: legislation relative to cooperatives cannot be seen as a blank cheque to commit price-fixing cartels. There is no question for cooperatives to undermine the autonomy of their members by imposing a minimum price practice on them, even in the name of a coherent network policy. The gravity of price-fixing cartels, considered hard core in both French and European law, makes any exemption on the basis of Article L 420-4, 1° of the French Commercial Code inconceivable, especially in view of the reluctance of the French Autorité de la concurrence to grant individual exemptions.

[27] Translated by myself. « Ne saurait aller jusqu'à limiter la liberté commerciale de ces commerçants en matière d'approvisionnement, d'expansion et de prix, dès lors que plusieurs adhérents d'une ou de plusieurs coopératives concernées se trouvent en concurrence sur un même marché. De même, elle ne doit pas avoir pour effet de protéger les adhérents contre la concurrence de tiers »: Cons. conc., n° 99-A-18, 17 November 1999.

[28] Translated by myself. « Définir et mettre en œuvre par tous moyens une politique commerciale commune propre à assurer le développement et l'activité de ses associés, notamment […] par la réalisation d'opérations commerciales publicitaires ou non pouvant comporter des prix communs »: Commercial code (FR), article L 124-1; with a similar formulation, article 1 of the Law n° 83-657 of 20 July 1983.

[29] Translated by myself. « Les pratiques qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris pour son application ». Article L 420-4, 1° of the Commercial code (FR) has no equivalent in EU law which only provides for an exemption for technical or economic progress (TFEU, article 101(3)).

Likewise, it is difficult to see how price-fixing cartels could be considered as the only means allowing any economic progress to be achieved and as such benefit from an exemption on the basis of Article L 420-4, 2° of the French Commercial Code and Article 101(3) of the TFEU. While competition law is fully intended to intervene to sanction attacks by the cooperative organisation on the proper functioning of the market, the situation is quite different when it comes to the protection of cooperators in their individual relations with their cooperative.

II - INDIVIDUAL RELATIONSHIPS: A DISCARDED COMPETITION LAW

The French law on restrictive practices (« pratiques restrictives ») is not intended, like the anti-competitive practices law, to protect the market. Its objective is to fight against practices establishing unbalanced power relations between economic partners and to establish transparent and loyal relations between professionals[30].

In the context of disputes with their cooperatives on their withdrawal or exclusion, cooperators have mobilized two French incriminations involving the liability of their author:

- the significant imbalance between the rights and obligations of the parties: it is « in the context of commercial negotiation, the conclusion or the execution of a contract […] of submitting or attempting to submit the other party [and no longer the « trading partner » since the ordinance of 24 April 2019] to obligations creating a significant imbalance in the rights and obligations of the parties. »[31] (Commercial code (FR), article L 442-6, I, 2 °, now article L 442-1, I, 2 ° since the ordinance **n° 2019-359 of 24 April 2019)**;

- and the sudden break of established business relationships: the fact of « abruptly terminating, even partially, an established commercial relationship, in the absence of written notice which takes into account in particular the duration of the commercial relationship, with reference to commercial practices or inter-professional agreements. »[32] (Commercial code (FR), article L 442-6, I, 5 °, now article L 442-1, II since the ordinance of 24 April 2019).

[30] Commercial code (FR), article L 442-1 et seq.
[31] Translated by myself. « Dans le cadre de la négociation commerciale, de la conclusion ou de l'exécution d'un contrat […] de soumettre ou de tenter de soumettre l'autre partie à des obligations créant un déséquilibre significatif dans les droits et obligations des parties. »
[32] Translated by myself. « Rompre brutalement, même partiellement, une relation commerciale établie, en l'absence d'un préavis écrit qui tienne compte notamment de la durée de la relation commerciale, en référence aux usages du commerce ou aux accords interprofessionnels. »

French jurisprudence has refused to apply these two incriminations to cooperative relations, giving priority to cooperative law over competition law (A). The basis of this position seems to be the specificity of relations based on the dual quality of members (B).

A - The primacy of cooperative law over French law on restrictive practices

In two decisions concerning the termination of an established business relationship, the French Cour de cassation has given precedence to cooperative law over the restrictive practices law. Thus, in its decision of 8 February 2017, published in the Bulletin: « Vu l'article L. 442-6, I, 5° du code de commerce [devenu L 442-1, II] et l'article 7 de la loi du 10 septembre 1947; Attendu que les statuts des coopératives fixant aux termes du second de ces textes, les conditions d'adhésion, de retrait et d'exclusion des associés ces textes, les conditions dans lesquelles les liens unissant une société coopérative et un associé peuvent cesser sont régies par les statuts de cette dernière et échappent à l'application du premier de ces textes »[33].

Then in a decision of 16 May 2018: « les conditions dans lesquelles les liens unissant une société coopérative de commerçants détaillants et un associé peuvent cesser sont régies par les dispositions légales propres aux coopératives et ne relèvent pas des dispositions de l'article L. 442-6, I, 5° du code de commerce »[34].

These two decisions are based on the link between Article L 442-6, I, 5°, now L 442-1, II of the French Commercial code, and French cooperative law, which militates in favour of an implicit implementation of the adage *specialia generalibus derogant*[35]. A provision of French restrictive practices law potentially protecting cooperators is thus erased in favour of cooperative law[36].

But the explanation cannot stop just there, especially since the French Cour de cassation used a different reasoning in a decision of 18 October 2017, published in the Bulletin, and relating both to the sudden termination of an established commercial relationship and on the significant imbalance: « l'arrêt énonce à bon droit que les dispositions de l'article L. 442-6, I, 2° et 5°, du code de commerce sont étrangères aux rapports entretenus par les sociétés en cause, adhérentes d'une société coopérative de commerçants

[33] « Considering article L. 442-6, I, 5° of the commercial code [now L 442-1, II] and article 7 of the Law of 10 September 1947; Whereas the statutes of cooperatives fixing under the terms of the second of these texts, the conditions of membership, withdrawal and exclusion of the partners these texts, the conditions under which the links uniting a cooperative company and a partner can cease are governed by the statutes of the latter and escape the application of the first of these texts » (translated by myself): Cass. Com., 8 February 2017, n° 15-23050, forthcoming publication (exclusion of a member of a cooperative of road freight transport companies).

[34] « The conditions under which the ties uniting a retail traders cooperative society and a partner may cease are governed by the legal provisions specific to cooperatives and do not fall under the provisions of Article L. 442-6, I, 5 ° of the Commercial Code » (translated by myself): Cass. Com., 16 May 2018, Société Système U centrale régionale Est, n° 17-14236.

[35] See for example M. BEHAR-TOUCHAIS, « L'exclusion brutale d'un associé coopérateur: quand le droit spécial chasse le droit plus général », *Bull. Joly*, 2017, p. 324 (regarding Cass. Com., 8 February 2017).

[36] For a critical approach, H. BARBIER, « De la légitimité douteuse de l'adage *specialia generalibus derogant* pour articuler les droits spéciaux entre eux », *RTDCiv*., 2017, p. 372 (regarding Cass. Com., 8 February 2017).

détaillants avec cette dernière »[37]. No reference this time to cooperative law, it is the relations between members and their cooperative that are put forward by the judge.

Admittedly, the French Cour de cassation answered the appeal which relied on the concepts of commercial relationship and of commercial partner to claim the application of Article L 442-6, I, 2° and 5°, of the French Commercial code (today Articles L 442-1, I, 2° and L 442-1, II). Nonetheless, by pointing out that restrictive practices law does not apply to cooperative relationships, it draws attention to what could be the basis of its case law.

B - The specificity of relationships based on the dual quality of members

Cooperative relationships can certainly have a commercial dimension, as the cooperators are clients or suppliers of their cooperative. To stop at this observation would be reductive, however, since it would ignore the dual quality of cooperative members. The cooperators are also associates; they participate in the governance of the cooperative, have the right to an equitable sharing of its profits and contribute to its losses. Cooperative relations thus include a social dimension, unrelated to the market, which takes them outside the scope of restrictive practices law[38].

What makes the richness of cooperative relations, and it is in our opinion fundamental to understanding the jurisprudence of the French Cour de cassation, is that beyond their double dimension, they form an inseparable whole, based on a subtle balance between the interests of each, cooperative and associate cooperative members. Within the framework of cooperative law, this balance is achieved thanks to the contractual freedom expressed in the statutes and internal regulations of cooperatives[39]. An application of the French restrictive practices law would disturb this balance, thus placing the burden of protecting the sole applicant cooperator on the cooperative community[40].

[37] « The judgment rightly states that the provisions of Article L. 442-6, I, 2° and 5°, of the Commercial Code are foreign to the relations maintained by companies in question, members of a retail traders cooperative society with the latter » (translated by myself): Cass. Com., 18 October 2017, n° 16-18864, forthcoming publication.
[38] M. CHAGNY, « Vers un principe d'interprétation stricte du droit des pratiques restrictives et son exclusion des relations « hors Marché » », *RTDCom*., 2018, p. 633 (regarding Cass. Com., 18 October 2017).
[39] Balance according to the cooperative activity, the characteristics of the members, the market, etc. The decision of 8 February 2017 relates to article 7 of the law of 10 September 1947, which refers to the statutes the task of determining in particular the terms of membership, withdrawal, delisting and exclusion of cooperative members. V. L. GODON, *Rev. des sociétés,* 2018, p. 250, emphasizing the importance of the concept of "contrat-organisation" (regarding Cass. Com., 11 May 2017, GIE Les Indépendants, n° 14-29717).
[40] D. HIEZ, « L'incompatibilité de l'identité coopérative avec l'application de l'article L. 442-6, I, 5°, du code de commerce à l'exclusion d'un coopérateur », *Rev. des sociétés,* 2017, p. 636 (regarding Cass. Com., 8 February 2017); M. BEHAR-TOUCHAIS, « La limitation du champ d'application de l'article L. 442-6, I, 2° du Code de commerce par la règle *specialia generalibus derogant* », *JCP G,* 2017, 763 (regarding Cass. Com., 11 May 2017, GIE Les Indépendants, n° 14-29717); G. PARLEANI, « Le coopérateur n'est pas un simple « partenaire économique », ou le cantonnement du droit des pratiques restrictives », *AJ Contrat,* 2018, p. 31 (regarding Cass. Com., 18 October 2017).

And it would be paradoxical to qualify as a restrictive practice, suffered by a company in a market, an act resulting from a social pact to which the applicant member has freely consented.

The specificity of the cooperative relationship based on the dual quality has been highlighted by case law regarding the application of Article L 420-2 of the French Commercial code. This provision prohibits in French law the abuse of economic dependence (« abus de dépendance économique »), a hybrid practice because it ranks among anti-competitive practices but applies to individual relations between a customer and a supplier[41]. The judges rejected the application of Article L 420-2 of the French Commercial code to relations between the cooperative and its members: « après avoir rappelé les dispositions des articles 1, 2 et 7 de la loi du 11 juillet 1972 relative aux sociétés coopératives de commerçants détaillants, devenus les articles L. 124-1 et suivants du code de commerce, et notamment que ces sociétés ont pour objet d'améliorer par l'effort commun de leurs associés les conditions dans lesquelles ceux-ci exercent leur activité commerciale, la cour d'appel a pu retenir qu'en tant qu'associé coopérateur de la SCAPEST, la société Pontadis ne pouvait invoquer à l'égard de celle-ci le bénéfice des dispositions de l'article L. 420-2.2 du code de commerce »[42]. The relations between a cooperative and its members cannot be reduced to a client-supplier relationship: associate and cooperator, the member participates in the common effort and benefits from the services of the cooperative. Beyond *affectio societatis*, it is the rule of dual quality that is thus spotlighted by the French Cour de cassation.

French case law is therefore unambiguous: competition law, when it touches practices impacting individual relations between undertakings, is not intended to intervene in cooperatives. The same goes for relations within another type of auxiliary business group, the IEG (Economic Interest Group). The French Cour de cassation thus opposed, in a decision of 11 May 2017 published in the Bulletin, to the implementation of the incrimination of significant imbalance in the context of the withdrawal of a member of EIG: « Vu les articles L. 251-1, L. 251-8, L. 251-9 et L. 442-6, I, 2°, du code de commerce; attendu que sont exclues du champ d'application de l'article L. 442-6, I, 2° du code de

[41] Commercial code (FR), article L 420-2, 2nd paragraph: « Est en outre prohibée, dès lors qu'elle est susceptible d'affecter le fonctionnement ou la structure de la concurrence, l'exploitation abusive par une entreprise ou un groupe d'entreprises de l'état de dépendance économique dans lequel se trouve à son égard une entreprise cliente ou fournisseur. Ces abus peuvent notamment consister en refus de vente, en ventes liées, en pratiques discriminatoires visées aux articles L. 442-1 à L. 442-3 ou en accords de gamme. » (« In addition, when it is liable to affect the functioning or the structure of competition, the abusive exploitation by a company or a group of companies of the state of economic dependence in which it is located is prohibited. regard a customer or supplier company. These abuses May consist in particular of refusal to sell, tied selling, discriminatory practices referred to in Articles L. 442-1 to L. 442-3 or range agreements », translated by myself).

[42] « After having recalled the provisions of articles 1, 2 and 7 of the Law of 11 July 1972 relating to cooperative companies of retail traders, which have become Article L. 124-1 et seq. of the Commercial Code, and in particular that these companies aim to improve, through the common effort of their partners, the conditions under which they carry out their activity commercial, the Court of Appeal was able to hold that as a cooperative partner of SCAPEST, the company Pontadis could not invoke with regard to the latter the benefit of the provisions of Article L. 420-2.2 of Commercial code » (translated by myself). Cass. Com., 4 July 2006, Société Pontadis, n° 03-16443 (v. CA Reims, 5 May 2003, SA Scapest et autres, *Rev. des sociétés,* 2003, p. 865, B. SAINTOURENS); CA Versailles, 12e ch., 27 March 1997, *Rev. des sociétés,* 1997, p. 796, B. SAINTOURENS.

commerce les modalités de retrait du membre d'un groupement d'intérêt économique, prévues par le contrat constitutif ou par une clause du règlement intérieur de ce groupement » [43]. By reference to the statutes and internal regulations of the group, it is the social pact to which its members have adhered that is put forward by the Court[44]. Thus, in EIGs like in cooperatives, the restrictive practices law is not intended to call into question the decisions of social organs expressing the collective will of members, outside the sphere of the market.

Conclusion

Competition law is perfectly legitimate to protect the market against anti-competitive damages resulting from the organisation of cooperative relations. In this context, an economic pragmatism is fully exercised: there is no compatibility or incompatibility in principle of the cooperative status with the anti-competitive practices law. This law is neutral when it comes to the legal status of market players and assesses the effects of their behaviour on competition on a case-by-case basis depending on the economic circumstances[45].

On the other hand, when the imperative to protect the market is not in question, the social pact to which the members of cooperatives (such as those of EIGs) have freely consented cannot be disrupted by the implementation of a French restrictive practices law intended to settle individual conflicts between customers and suppliers on a market: « The very societary grounds for the decision adopted by the French Cour de cassation only serves as a reminder of the irreducible specificity of membership in a group which aims to develop or facilitate the economic activity of its members »[46]

[43] « Considering articles L 251-1, L. 251-8, L 251-9 and L 442-6, I, 2 °, of the Commercial Code; Whereas the terms of withdrawal of a member from an economic interest group, provided for by the constituting contract or by a clause of the internal regulations of this group » (translated by myself): Cass. Com., 11 May 2017, GIE Les Indépendants, n° 14-29717, forthcoming publication; *D.*, 2017, p. 1583, E. CHEVRIER; *RTDCom*., 2017, p. 593, M. CHAGNY; D., 2017, p. 2335, E. LAMAZEROLLES et A. RABREAU; *AJ Contrat*, 2017, p. 337, F. BUY et J.-C. RODA; *Contrats Concurrence Consommation*, July 2017, n° 7, comm. 147, N. MATHEY; *JCP E*, 2017, 1304, N. DISSAUX; *RTDCiv*., 2017, p. 643, H. BARBIER; *Rev. des sociétés,* 2018, p. 250, L. GODON. If only the terms of withdrawal are covered, there is no doubt that the solution thus identified by the French Cour de cassation is intended to apply to all relations between a IEG and its members, as the visa of Articles L 251-1 and L 251-8 of the Commercial Code seems to indicate (M. BEHAR-TOUCHAIS, *JCP G*, 2017, 763).

[44] And the absence of a stipulation in the articles of association or the internal regulations of a notice in the event of the withdrawal of an EIG does not justify the application of Commercial code (FR), article L 442-1, II: Cass. Com., 3 April 2007, Société Maury, n° 06-10526; *Contrats concurrence consommation*, 2007, comm. n° 171, M. MALAURIE-VIGNAL.

[45] The same goes for the case law on the European State aid law (TFEU, article 107 et seq.), which refuses to condemn per se measures aimed at compensating for the handicaps of which the cooperative status would be the source: Case C-78/08 Ministerio dell'Economia e delle Finanze, 8 September 2011, *Rec*. I-p. 7611, paragraph 55 et seq.; *Rev. des sociétés,* 2012, p. 104, G. PARLEANI. For a conviction on the basis of a distortion of competition, see Case C-76/15 Vervloet, 21 December 2016, paragraph 101: « the extension of the guarantee scheme provided for by Belgian legislation to shares in cooperatives operating in the financial sector has the effect of conferring an economic advantage on those cooperatives in relation to other economic operators which are, in the light of the objective pursued by that scheme, in a factual and legal situation comparable to that of those cooperatives and, therefore, has a selective character ».

[46] Translated by myself (« La motivation très sociétaire adoptée par la Cour de cassation ne fait que rappeler l'irréductible spécificité de l'adhésion à un groupement qui a pour but de développer ou de faciliter l'activité économique de ses membres »): G. PARLEANI, « Le coopérateur n'est pas un simple « partenaire économique », ou le cantonnement du droit des pratiques

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