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Payment regulation: The French Supreme Civil Court requires at least a summary analysis by the Courts of the evidences during an unfair competition lawsuit for payment terms regulation infringement (*Agora / Speed Rabbit Pizza, Domino's Pizza France et DPFC*)

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Facts. The companies Speed Rabbit pizza (hereinafter "Rabbit") and Domino's pizza France (hereinafter "Domino") specialise in the sale of delivered and take-away pizzas. They operate through a franchise network. A subsidiary of Domino, the company DPFC (hereinafter "DPFC"), which is also a Domino franchisee, operated a sales outlet in Sceaux, not far from that of the company Agora (hereinafter "Agora") in Bourg-la-Reine, which is also a Rabbit franchisee. During the period in dispute, DPFC was dissolved and its assets were transferred to Domino. Agora accused Domino and DPFC of acts of unfair competition consisting in particular in granting payment terms exceeding the legal period (30 days end of ten-day delivery period for the payment of perishable foodstuffs or 60 days invoice date for other products), and ordered Domino and DPFC to cease these practices and to pay damages. According to Agora, DPFC benefited from abusive financial support from its franchisor and was thus artificially maintained on the market. Rabbit decided to voluntarily intervene in the proceedings to support its franchisee. The claims were dismissed by the Paris Court of Appeal because, according to the Court, the evidence in support of the claims did not demonstrate the alleged wrongdoing. Reference is made to the pleas in law annexed to the judgment of the Court of Cassation for further details. On Agora's appeal, the Court of Cassation dismissed the case, with reference to the Paris Court of Appeal, otherwise composed.

Trouble. The relevant issue is, in our view, more that of the depth of the Court of Appeal's analysis of the elements produced by the plaintiffs and the assessment of the reality of the facts complained of for the establishment of the unlawful nature of the payment periods granted, than that of the classification as a fault and act of unfair competition a failure to comply with the regulations on payment periods.

Solution. The Commercial Chamber considers that, under Article 455 of the CPC, "*the trial judges, who have a sovereign power of appreciation as to the value and scope of the elements submitted to them and who are not required to explain themselves on the evidence they decide to set aside, must carry out an analysis, even a summary one, of the documents on which they base their decision*". It notes that in order to rule out any fault of such a nature as to characterise an act of unfair competition, the judgment holds that various documents produced by Rabbit and Agora do not make it possible to demonstrate the wrongful acts of Domino and DPFC, while certain others do not concern Agora. It adds that the opinion of the CEPC (which it is regretted that no reference was given) does not make it possible to attribute to Domino certain overruns of payment deadlines and that the sole level of indebtedness of DPFC does not characterise the abusive support which it would have received. This is nevertheless insufficient to rule according to the Cour de cassation, because "*by ruling in this way, without analysing, even summarily, the DPFC company's balance sheets, drawn up between 2003 and 2008, which were used by Agora to establish the reality of payment delays exceeding the legal period granted by DPF to DPFC, the Court of Appeal did not satisfy the requirements of the above-mentioned text*".

Analysis. The problem of non-compliance with payment deadlines seems to have been, in recent years, a subject of interest or a generator of disputes within the networks, especially those of fast food restaurants. Thus, an examination of the contractual relations between a dozen or so franchisors and their franchisees conducted by the DGCCRF in 2015/2016 with regard to practices restricting competition revealed, among other things, that certain rules relating to invoicing or payment deadlines were not respected (DGCCRF joint report of 8 March 2016: Letter distributed 05/2020, N. Ereséo). The subject of excessive payment periods in the take-away and home delivery of pizzas has again given rise, in terms of anti-competitive practices, to a referral to the Competition Authority, without much success (Dec. No. 18-D-25 of 6 Dec. 2018: letter distributed 01/2019).

With the reported decision, the debate is taking place in the field of civil liability and unfair competition. It is generally known that an action for unfair competition can be justified whenever non-compliance with the regulations leads to a breach of the equality of means of competitive struggle, because the infringer places himself in an abnormally favourable situation in relation to his competitors (*rappr. Ord. ref. Trib. com. Béziers, 19 July 2010, Lettre distrib 09/2010, relating to the resale on the Internet, on a recurring basis, by a self-entrepreneur, of products at prices below the threshold of resale at a loss*). The fact that an operator is granted by its supplier payment terms that do not respect the legal ceilings is therefore likely to be a basis for an action in unfair competition. This was the action of a franchisee, supported by his franchisor, against a franchisee of a competing network and the latter's franchisor. Admittedly, the plaintiffs were dismissed on appeal from their claim for damages, for lack of having been able to establish the wrongful act, namely the unlawfulness of the payment periods which the competing franchisee had allegedly benefited from in violation of the legal provisions and the massive cash assistance provided to it by its franchisor and exclusive shareholder. However, the cassation is to be attributed to an insufficient analysis by the Court of Appeal of the evidence submitted by the plaintiffs, which the referring court will have to remedy. It will therefore be necessary to await the Court's analysis to determine whether, in this case, the wrongful act resulting from unlawful delays in payment has been established, opening the way to compensation for the damage suffered, provided that the other conditions for civil liability are met. Well beyond the fast-food and franchising sectors, the catalogue of acts of unfair competition could be expanded by new case-law concerning the practice of unlawful payment periods.