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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- By Judge Irène Luc --

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THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

By Judge Irène Luc[*]

1. Summary

1. Before presenting the specific powers of the Court of Appeal of Paris, it is necessary to present the manner in which competition law is applied in France.

2. The French Competition Authority (FCA) is the sole administrative authority that may punish anti-competitive practices by imposing monetary sanctions.

3. The application of competition law is carried out by specialised commercial courts under the terms of the Decree of 30 December 2005, which, in application of Article L. 420-7 of the French Commercial Code, lists and defines the scope of these specialised jurisdictions.

4. These specialised commercial courts have concurrent jurisdiction with the FCA to declare that practices are anti-competitive and order that they cease. However, the commercial courts do not have the authority to impose monetary sanctions. That said, they have the authority to nullify contract clauses they consider anti-competitive and to award compensation or provisions for compensation. Note also that urgent proceedings (*référé)* allow the judge to rule on urgent cases of anti-competitive practice and order that they cease.

5. Victims of anti-competitive practices can either engage follow-on actions, under which they file a complaint with the FCA requesting that it investigate and prohibit an infringement of competition law and then launch a claim for compensation in the commercial courts, or stand alone actions, under which they file a complaint directly with a commercial court to seek recognition of and compensation for anti-competitive practices.

6. The Court of Appeal of Paris is the specialised appellate court for both public and private antitrust enforcement actions.

7. It centralises appeals against decisions of the French Competition Authority as well as appeals against decisions of the eight specialised commercial courts in France (Article R. 420-5 of the French Commercial Code) which have the right to rule on practices in competition law and to award compensation either directly or following a decision by the FCA.

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This note reflects only the view of its author. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries. but not that of the institution to which he belongs.

8. Appeals against decisions of the French Competition Authority are handled by a specialised chamber within the Court of Appeal (Chamber 5-7), and another chamber handles stand alone disputes or follow-on actions for compensation (Chamber 5-4).

2. The instruments for encouraging private enforcement actions

2.1 The general principles of compensation

9. Victims of anti-competitive practices can seek compensation in the specialised commercial courts, either directly or subsequent to a decision by the French Competition Authority.

10. The rules governing actions for damages are the general rules of tort law. The victims are acting on the basis of Article 1382 of the French Civil Code, which stipulates, "*Every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it*". An infringement of competition law is a fault that needs to be repaired, providing that the damage resulting from the infringement and the causal link between the infringement and the damage can also be proved.

11. The principle of entitlement to full compensation requires the judge to: *"(...) restore as exactly as possible the balance destroyed by the fault and restore the victim to the original situation before the fault occurred"* (Cass. civ. 2, 28 Oct. 1954, JCP 1955, II, 8765, and, for contractual matters: Cass. civ. 3, 6 May 1998, B. III, n°91).

12. The value of the loss incurred is established on the day that the judge rules on the matter.

13. The purpose of damages awarded is to make good the loss, but only the loss. Punitive damages are not available under French law.

2.2 Who can bring actions for damages?

14. Actions for damages can be brought by the direct or indirect victims of anti-competitive practices.

15. The entry into force of the Hamon Act[1] introduced class action into French law under Articles L. 423-1 *et seq*. of the French Consumer Code[2], thereby allowing consumer organisations to file civil lawsuits to recover compensation for individual losses suffered by consumers who find themselves in the same or similar situations for breaches of consumer law or from anti-competitive practices censured by Title II of Book IV of the French Commercial Code and Articles 101 and 102 of the Treaty on the Functioning of the European Union.

16. Under competition law, these class actions are always considered to be follow-on actions. In order to bring their action the consumers with claims have to obtain a decision establishing the professional's liability issued by the competition authorities or the competent national or European Union courts or tribunals, and against which no further appeal is possible in terms of the liabilities established. In this case, the professional's liability is deemed irrefutably established for the purpose of the application of Article L. 423-3 of the French Consumer Code.

1 Law No. 2014-344 of 17 March 2014.

2 See the circular by the Ministry of Justice dated 26 September 2014 setting out the provisions of Law No. 2014-344 of 17 March 2014 on consumer affairs and Decree No. 2014-1081 of 24 September 2014 on class action for consumers.

17. Note that the new class action is only available to individual consumers. Therefore, corporations with claims are not allowed to use the class action. Moreover, the High Courts (*tribunaux de grande instance*) within whose jurisdiction the defendant is domiciled have the authority to hear them, but not the specialised commercial courts. Lastly, the class action may only be used to seek remedies for material losses suffered by consumers.

18. Five class actions have been launched since the Act came into force in October 2014. Most of them concern misleading commercial practices (12 May 2015, Familles Rurales/SFR) or other consumer disputes (UFC/Foncia). To date, no class action has been launched concerning competition law.[3]

2.3 The main characteristics of private enforcement actions

19. There are no specific procedural rules for actions for compensation arising from competition law. The claimant bears the burden of proof. The standards of proof are the same as for civil proceedings. An infringement must be identified, and the causal link between the infringement and the damage must be demonstrated.

20. Nevertheless, the Court of Appeal of Paris has concluded that anti-competitive practices or unfair competition necessarily result in a loss, thereby facilitating the burden of proof for victims, who nevertheless still have to quantify the damage suffered.[4]

21. The judge has a duty to calculate the loss and compensate it in its entirety.

22. A judgement by the French Court of Cassation ruled that a company which has been a victim of a price cartel has to prove that it has not passed on its overcharge to its end clients.[5]

23. The transposition into French law of directive 2014/104/EU of the European Parliament and of the Council on rules governing actions for damages under national law for infringements of the competition law will force some reforms. It presumes that cartel infringements result in harm. It also provides that the infringer must prove the existence and extent of pass-on of the injured party's overcharge as well as providing alleviated presumption for indirect purchasers.

3. The balance between public and private enforcement actions

3.1 Reconciling the investigation of an affair and access to case files

24. Problems may arise when one party intends to use the French Competition Authority's case files.

25. When a case is submitted to the FCA, the parties before it, i.e. the complainant and the respondent, naturally have access to the file. Under the provisions of Article 138 of the French Code of Civil Procedure, there is no reason to ask the FCA, as a third party to the proceedings, to release files if they are already in the possession of the parties. The parties may use case files covered by an obligation of secrecy under Article L. 463-6 of the French Commercial Code provided that they are being used to protect their own interests.[6]

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3 As far as the author is aware.

4 Court of Appeal of Paris, 26 June 2013, 12/04441.

5 Cass.com., 15 June 2010, 09/15816.

6 Cass. Com., 19 January 2010, Semavem, 08-19761

26. In a ruling dated 19 January 2010 (Semavem, 08-19761), the Commercial Chamber of the Court of Cassation stipulated that "the right to a fair hearing can only justify the disclosure, in a civil lawsuit, of information covered by the confidentiality of judicial investigations by the Competition Council, now the French Competition Authority, if the aforementioned disclosure, outlawed under Article L. 463-6 of the French Commercial Code, is necessary for the exercise of this right".

3.2 Access to the case files of the French Competition Authority

27. If, as is often the case, the evidence is held by the other party or a third party, the judge can use injunctive relief to force said party to produce the files.

28. The oral procedure in commercial courts is relatively flexible. Article 446-3 of the French Code of Civil Procedure stipulates that "*The judge may at any moment invite the parties to provide legal and factual explanations deemed necessary for resolving the dispute and instruct them to produce within a period that he/she shall lay down all the requisite documents and supporting evidence to inform his/her decision-making, failing which he/she may overrule the refusal and deliver a ruling while bearing in mind the implications of the failure or refusal of the party in question"*. The judge may therefore order the production of a document that the parties have not requested.

29. Judges in the High Court (*tribunal de grande instance)* or the Court of Appeal do not have the same procedural leeway. Under Article 11 of the French Code of Civil Procedure, any order to produce material supposes a previous request by one of the parties, as the judge cannot make an *ex officio* request for new material. This would be seen as excessive interference in the case.

30. This differentiates the French system from the German system, under which the judge can complete his file by requesting any material he wants and ordering, *ex officio*, not only the forced disclosure of material in the possession of one of the parties but also material in the possession of a third party. The second civil chamber of the Court of Cassation nonetheless acknowledged in a ruling dated 12 October 2006 (No. 05-12. 835), that the judge may "invite" a party to produce material. In addition, the judge can ask the parties to provide factual explanations, thereby enabling him to ask for details on the claims and to reformulate them (Article 8 of the French Code of Civil Procedure). However, this possibility is left entirely to his discretion (Civ II, 12 October 2006, 05-12835).

31. However, under French law there is no discovery or disclosure procedure that forces parties to reveal all the information related to a given affair, and the parties have to list all the material requested.

32. Moreover, forced disclosure can only be ordered if the request is sufficiently clear, which requires a detailed list of the material requested, and if the request is necessary for the resolution of the dispute and was submitted by a litigant who is not in possession of the documents in question.

33. Lastly, the party in possession of the material of which the forced disclosure is requested may present a legitimate impediment to submitting the material (trade secret, secrecy of correspondence).

34. In the event that those in possession of the material do not comply with the judge's orders, they can face being fined. In any case, failure to produce the material enables the judge to draw all the legal consequences.

35. The judge may also make an injunction to the administrative authorities to produce their case files, as material collected by the French Competition Authority, the European Commission or the Directorate-General for Competition, Consumer Affairs and Prevention of Fraud (DGCCRF) may be of great use for the complainants, especially to prove anti-competitive practices and to claim compensation before the court.

36. It has been pointed out above that the parties may use the case files to exercise their rights.

37. Third parties involved in proceedings before the FCA do not have direct access to said Authority's case files. They can only have access to the case files within the limits set by the law, i.e. paragraph 2 of Article L. 462-3 of the French Commercial Code: "*The Competition Authority may send all information that it has concerning the anti-competition practices concerned, except for documents prepared or gathered under IV of Article L. 464-2, to any court that consults it or asks it to submit documents that are not already at the disposal of a party to the proceedings. It may do this within the same limits when it makes observations on its own initiative before a court*".

38. Under this Article, the judge can ask the French Competition Authority to send material in its case files. Can he order the FCA to do so if it refuses, as the text contains no formal obligation to submit the information? Can restrictions to access to case files protected by leniency policies be opposed? The judge doubtless has to ensure that the principle of access to evidence prevails when it allows victims of Community-scale anti-competitive practices to obtain compensation. The judge may cite the principle of effectiveness of Community law, provided that the balance of interests has already been taken into account, in accordance with the Pfleiderer[7] and Donau[8] rulings, i.e. the interest of the French Competition Authority to preserve its leniency programme, and the interest of the victim to obtain compensation.

39. Before the European Commission, complainants do not have the status of parties and therefore only have access to the publically available version of the notification of objections and not the complete case. They are therefore unable to possess material and present it to the judge, as they can under national law. They nevertheless have direct access to the case files, in accordance with ruling 1049/2001 and subject to any exceptions to the disclosure of information that it allows.

40. The judge can also ask the Commission to send him information in its possession under Article 15 paragraph 1 of ruling 1/2003. The Commission nevertheless reserves the right to refuse if the national court cannot guarantee the protection of professional secrecy or "*for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it*".[9]

41. Lastly, statements and reports by DGCCRF officials for competition-related inquiries provided for in Article L450-1 of the French Commercial Code are considered to be administrative acts in accordance with Article 20 of the Law of 17 July 1978 and must be sent to all interested parties (EC, 01 March 2004, 247773). The same applies to investigation reports carried out under Article L. 464-9 of the French Commercial Code. It should be noted, however, that Article L. 465-2, VIII of the French Commercial Code imposes a restriction.

3.2.1 Trade secrets

42. There is a non-negligible risk that the claimant (and the defendant) will have to disclose strategic information during the trial. This disclosure can be justified by the interests of the other party. The commercial judge must use his own power of discretion to weigh the conflicting interests involved as trade secrets are not absolute and do not provide *per se* a legitimate impediment to disclosing this information. Similarly, the Court of Cassation ruled that trade secrets did not preclude the application of Article 145 of

7 CJCE, 14 June 2011, Pfleiderer, C-360/09

8 CJCE, 6 June 2013, Donau Chemie, C-536/11

9 Paragraphs 25 and 26 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (2004/C 101/04)

the French Code of Civil Procedure (Civ. 2°, 8 February 2006, No. 05-14.198) any more than the right to respect of one's home.

43. There are no provisions on this matter for protecting trade secrets before national courts as there are for protecting them before the French Competition Authority. Judges therefore have to invent ad hoc procedures, as is the case consistently for the Paris commercial court.

44. The summary procedure for preparatory inquiries provided for in Article 145 of the French Code of Civil Procedure gives rise to many cases of this balancing of interests. Notably, this procedure gives access to the content of companies' email systems, before any legal proceedings, as long as this is a necessary measure for conserving or seeking evidence before any legal proceedings.

45. The judicial officer carrying out certifications is often asked to make electronic or paper copies of messages on the professional emails of heads of companies when the aim is prove that illegal practices have taken place.

46. The "seized" messages may often contain numerous trade secrets or secrets of correspondence. The Paris commercial court has put in place a well-established procedure for protecting secrets that it would be appropriate to enact into law.

47. The *juge consulaire* (a non-professional judge elected by the chamber of commerce to settle commercial disputes in the first instance) accompanies his order with an obligation to confiscate the "seized" documents until a trial judge rules on their fate after a procedure in which all parties are heard. Confiscation is the only means by which the judge can guarantee that the documents and material in question cannot be accessed by the claimant, who will only receive the report by the judicial officer. The order instructs the claimant to issue the defendant with summons to attend detailed proceedings or urgent proceedings in order to obtain the release of the confiscated items in order to use them.

48. Another solution is to order the confiscation of certified items for a duration of fifteen days as of the publication of the certified report in order to give the party that is the object of the complaint enough time to present a request that the order be withdrawn if said party considers that its trade secrets are at risk.

4. How can public actions help private actions?

4.1 The role of the national competition authority before national courts

49. National courts are helped, in their assessment of the practices submitted to them, by the opinions and rulings on disputes of the French Competition Authority, as well as the rulings of the European Commission and Community case-law.

4.1.1 Judicial opinions

50. National courts can also ask the French Competition Authority for an opinion.

51. Article L.462-3 of the French Commercial Code stipulates that "The courts may consult the Competition Authority regarding the anticompetitive practices defined in Articles L. 420-1, L. 420-2, L. 420-2-1 and L. 420-5 of this Code and Articles 101 and 102 of the Treaty on the Functioning of the European Union, when they are raised in the cases referred to them. The Competition Authority may issue an opinion only after a procedure in which all parties were heard is concluded. (…)".

52. The court stays the proceedings pending the opinion of the French Competition Authority. Once it has been obtained, the parties exchange their observations.

53. The courts have had to deal with various issues. For example, price-scissoring by the INSEE on large prospect files (01-A-18 of 28/12/01); exclusive ticket selling arrangements by the French Tennis Federation (03-A-01 of 10/01/03); predatory gas sale prices (07-A-08 of 27/07/07).

54. The opinion is not binding but in most cases is heeded by the courts.

55. The French Competition Authority was recently referred to by the Court of Appeal of Paris on the subject of two rulings: the ruling of 28 September 2011 Carrefour, and of 16 November 2011, Carrefour Proximité France, with regard to the validity, from an antitrust point of view, of post-contractual non-reaffiliation clauses.

56. It was also referred to for the assessment of claims of predatory pricing by Google, in a ruling dated 20 November 2013 (12/02931).

4.1.2 Amici curiae

57. The national competition authority and the European Commission can also act as an "*amicus curiae*" before the national courts.

58. The Competition Council, and its successor, the French Competition Authority, have acted as an "*amicus curiae*" on several occasions to clarify a decision, in the case of practices with respect to the use of special telephone numbers for unlimited calls (decision 06-D-20), to explain the commitment proceedings in the DKT case (10-D-29). It is nevertheless unfortunate that the courts do not have the ability to request these interventions at their own initiative.

4.2 Precisions on the decisions of the French Competition Authority

59. Decisions by the French Competition Authority finding an infringement are used as the basis of the victim's claim for compensation. They facilitate the first step in the burden of proof as they prove the existence of the fault.

60. The statement of reasons for the decisions must be as accurate as possible and, in particular, must allow for identification of the victims.

61. Even when European settlement decisions and decisions under French law not to contest complaints ascertain an infringement, the statement of reasons is much less detailed. It is therefore more difficult for the victims to use them. It should nevertheless be noted that complainants sometimes use decisions by the French Competition Authority that accept commitments to seek compensation regardless of the fact that these decisions do not rule on guilt.[10]

4.3 The value of the decisions of the French Competition Authority

62. At present, the decisions of the French Competition Authority have no value as findings which are binding to the courts. Nevertheless, Article 9 of Directive 2014/104/EU requires the courts to accept the irrefutability of the decision before the transposal deadline of 27 December 2016, as this is already the case for class actions (Article L. 423-17 paragraph 2 of the French Consumer Code).

63. Under the aforementioned Article 9, "an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law".

[10] Commercial Court, 30 March 2015, DKT International.