INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Working Session

"Damage claims in competition matters: The dawn of a new era?"

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National Report of FRANCE

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CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT

1. How would you summarize in few lines the status quo of private enforcement in your jurisdiction?

   Individuals can file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (private enforcement Directive) in France.

   Both stand alone and follow-on actions may be initiated on the basis of general tort law.

2. Has your country already implemented/started implementing the private enforcement Directive?

   No:

   There is no particular concern on the difficulties France may have to meet the deadline. However no official information was delivered on the expected date of the coming legislation.

CHAPTER II: COURT AND PROCEDURE

3. What is (are) the court(s) in charge of antitrust private enforcement?

   a) Is there a specialized court specifically for antitrust based claims?
   16 specialized courts specifically for antitrust based-claims are designated by decree dated 30 December 2005. The provisions of said decree are codified under Article R.420-3, R.420-4, R.420-5 of the French commercial code.
   The court is composed only by judges. By the past, economic experts may have been nominated at the French Supreme Court ("*Cour de cassation*")?
   b) May the court impose interim measures?
   Articles 808 and 873 of the civil proceeding code provide that plaintiffs may file a claim to request an interim order to the president of a civil or a commercial court. For such measures, urgency must be established, and there must be no serious challenge to the claim. Or such measures may alternatively be granted to avoid imminent damages.
   c) May the trial proceed in parallel and independently of a National Competition Authority investigation?
   Yes. The Court may suspend the case up to the National Competition Authority decision on the basis of general civil proceeding provisions. The Court may also ask the National Competition Court for an opinion in order to contribute to the assessment of the case.
   d) Is the decision subject to appeal?
   Yes. Appeal of the first instance decision is brought before the Paris Court of Appeal according to Article R.420-5 of the French commercial code,

which assesses both the merit of the case and the law. However, the 3rd instance ("*Cour de cassation"*) assesses only the merit of the law.

4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an "anchor defendant" sufficient (*cf* ECJ, C-352/13))?

   In principle, the jurisdiction where the defendant is located will be competent according to Articles 42 and 43 of the French civil proceeding code. Should several defendants be involved in the antitrust infringement, the claimant can choose freely the jurisdiction of one of the defendants according to Article 42 al. 2 of the French civil proceeding code. In addition, the claimant may have following choices, depending on the nature of the claim:

   - In contractual matters, the jurisdiction where the product was effectively delivered or the services were provided.

   - In tort matters, the jurisdiction where the damage action took place or where the damage was suffered.

   The claimant benefits from a large choice of jurisdiction, provided that the specialization rules are respected (see question 3)

5. How long does a single (or collective) antitrust private enforcement action in first instance usually take?

   In principle, a single (or collective) antitrust private enforcement action in first instance takes usually at least one (1) year. But it depends of course of the work load of the jurisdiction, the behaviours of the case and the characteristics of the proceeding. Judicial expertise renders

6. Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?
   In the French legal system, reimbursement of legal costs is governed in civil proceedings by two main articles: Section 695 and Section 700 of the civil procedure Act.
   In fact a distinction is traditionally drawn between two types of legal costs: on one hand, the "dépens" are regulated by section 695 and correspond to any tax, judicial expertise costs etc.. due in case of judicial actions. In principle its amount does not depend of the value of the dispute. On the other hand, the "Section 700" fees correspond to attorney's fees, which do not include the fees already granted on the basis of Section 695.
   Judges are not necessarily obliged to rule on legal fees, unless they are expressly asked to do so. Moreover, judges may take into account equity before deciding which party will have to reimburse the attorney's fees of the winning party. It means that a large discretionary power is given to the judge to assess the amount of

"Section 700" fees without particular justification. Therefore the final "Section 700" fees awarded do not often correspond to real costs supported by clients.
Mostly, the costs of section 700 rely on the person who is also in charge to pay the Section 695 regulated costs. Often the losing party has to pay them. However, the judge may decide to deprive the winning party of his right to obtain reimbursement under section 700.

7. In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in your jurisdiction that could allow third parties to buy claims from cartel victims?
   Fees contracts must necessarily be concluded in writing as soon as the client is a consumer. The written form of the fees convention is also required as soon as a success fee is agreed upon. However, success fees may only partially correspond to the total fees to be paid by the client.
   Claims bundling are possible since no conflict of interest for the lawyer exists.
   Assignment of claims is not often performed since formalities for claim assignment ("*cession de créances litigieuses*") are difficult to be put into place.

8. Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?
   - If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?
     On October 1, 2014, the law introducing the class action (Law No. 2014-344 dated 17 March 2014 in connection with Decree No 2014-1081 dated 24 September 2014) came into force in France. Several consumers are entitled to claim damages before the competent district court for the same violation of statutory or contractual obligations. However, they have to be represented exclusively by consumer national organizations, which have been certified by the State. In other words, only consumer national organizations with state accreditation may initiate class actions. This representation duty is meant to prevent the French class action from developing excessively and from becoming an American-like class action. The French class action can be also based upon the legal violations resulting from restrictions on competition provided by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and the corresponding provisions of the French commercial code.

   - Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?
     Collective redresses operate through an opt in system.

   - How is it coordinated with the individual actions' framework?
     Only pecuniary loss resulting from material damage can be repaired through class actions. Any non-pecuniary losses, such as losses resulting from bodily

injury or environmental damage are excluded from the scope of the class action. Therefore individuals are entitled to bring parallel to the class action an individual action to claim for these specific damages.

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

9. Are National Competition Authority decisions relevant for individual antitrust claims, in particular
    - as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)

National Competition Authority decision may have different impacts to antitrust claims depending on the nature of the decision of said authority and of the form of the legal action (class action / individual action). National Competition Authorities' decisions are in principle only considered as a factual element among others.

- in terms of the *quantum* of the compensation?

In case of follow-on claims, the quantum of the compensation is not necessarily evaluated in light of the fines imposed by the national – or supranational – competition authority. Indeed, the French Competition Authority protects the public economic law and order and tends to punish the infringing party and to dissuade it to act so in the future. For the national courts, the aim is to award damages to the victims.
However, the calculation of fines by the Competition Authority is generally of some help for the national courts to determine the scope of the damages suffered and the gravity of the infringement.

- for the limitation period?

Article L. 462-7, para. 4 of the French commercial code provides that the limitation period amounts 5 years as of the date of the final decision of the French Competition Authority. Such a limitation period applies to single as well as to collective private enforcement actions. However and concerning class actions only, Article L.423-18 of the French consumer code indicates that the limitation period cannot exceed in any case 5 years.

- else?

In the realm of class action, Article L423-17 of the French consumer code provides that a final decision of a competition authority (National Competition Authority or European Commission) stating the infringement of a professional ("*constat[ant] les manquements*") necessarily prove the infringement for collective antitrust claim.

10. What are the relevant limitation periods (taking into account question 9 above)?

Limitation period for private enforcement actions before the civil or commercial judge amounts 5 years according to Article 2224 of the French Code civil. Before the criminal jurisdiction, the relevant limitation period amounts 3 years according to Articles 8 and 10

of the French criminal proceeding code. Article L.225-251 of the French commercial code – based claims [action brought against D&O] benefit from a 3-years limitation period time.

11. What is the liability regime as regard parents for the infringement of their subsidiaries?

In principle, subsidiaries and parent companies are considered as two distinct legal entities. In the *JCB Service* decision dated 15 November 2011, the French Supreme court stated that the sole designation of a group in an European Commission's decision was not sufficient to held the French subsidiary liable, since only the parent company was clearly identified as the author of the infringement in the European Commission's decision *(Cass. com., 15 nov. 2011, n° 10-21.701).* In same file, the Court of appeal indicated in 2013 that the subsidiary may have been held liable if the claimant would have been proved a civil fault establishing the material participation to the infringement.

12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartelists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

An applicant may seek the liability of several undertakings under the same complaint.

French jurisdictions may therefore consider several undertakings as being individually liable for an infringement to competition law. In such cases, penalties will be calculated after an assessment of the level of participation of each undertaking in the cartel (Conseil d'Etat, 19 December 2007, n° 268918).

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The National Competition Authority follows a similar logic: after assessing the liability of each participant to a cartel, the Authority determines whether specific circumstances may justify a decrease or an increase of the amount of the penalties appointed (Article L. 464-2 para 3 of the French Commercial code).

CHAPTER IV: DISCLOSURE OF EVIDENCE

13. What evidence is admissible in individuals' actions for antitrust infringements?

- Is there any pre-trial discovery procedure available?

Under French legislation, there is no pre-trial discovery procedure available, similar to those that exist in common law countries.

However, prior to any lawsuit on the merits, one party may request a court order investigation in view of an upcoming claim to reveal key facts and evidence (article 145 of the CPC). Such investigations will only be ordered if the inquiries are deemed necessary to resolve the dispute, and the Court may amend them (scope, nature…) at any time.

- Is there any evidence protected by legal privilege?

Under article 66-5 of the Law of 31 December 1971, all information and documents linked to the lawyer's activities (relating to litigation or advice) are privileged. Therefore, consultations and exchanges between a lawyer registered with a French bar and his clients, as well as between lawyers, are under the scope of the privilege.

In-house counsels, as they are not registered as independent lawyers under a French bar, do not benefit from the privilege.

Legal privilege is recognized by French jurisdictions, French police and French administrative entities such as the French Competition Authority.

Finally, trade secrets may be privileged on a case-by-case basis, where the judge will determine whether there is a legitimate reason not to provide the piece of evidence in question.

14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

Article 9 of the Civil procedure code states that the burden of proof relies on the claimant, therefore the defendant has no disclosure obligation other than the obligation to disclose the documents he relies on in his argumentation.

However, article 10 enables the judge to order any measure of inquiry necessary for him to decide on the case. And article 11 allows a party to ask the judge to order the opposing party to disclose documents he detains which are necessary to prove the alleged facts. The opposing party will be able to resist such orders for legitimate reasons, such as claiming that the documents in question are covered by legal privilege or protected by confidentiality rules (article 141 of the CPC).

Besides, in competition cases, it is common for a judge to appoint an expert to comprehend certain technical issues. Such expert will usually be entitled to request that any party provides him with any information relevant to the enquiry.

15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

Parties may request that the Court order the French Competition Authority and the French Directorate General for Competition, Consumers Affairs, and Repression of Fraud (DGCCRF) to submit investigation reports or statements (article L.462-3 of the French commercial code). This is usually allowed and has considerably facilitated the proof of anti-competitive infringements (on requests for reports of the Authority, see: Paris Appeal Court, 2 July 2014, n° 08/23061; Commercial

chamber of the Cour de Cassation, 9 October 2012, n° 11-28.498, 983; Paris Appeal Court, 16 November 2011, n° 09/16817).
However, it shall be distinguished between the requesting parties.

- Should the requesting party not being party of the public enforcement proceeding, an investigation request shall be formulated before the civil judge, in accordance with the normal procedure of disclosure of evidence (articles 10, 11 CPC). The French competition authority may invoke some exceptions in order not to provide information.
  Such exceptions may be based on the normal rules of civil procedure: pursuant to articles 11 para 2 and 141 CPC, a "legitimate impediment" can be alleged in order to refuse the disclosure of information.
  Special procedural rules for commercial litigations also provide exceptions: for example, Article L.462-3 para 2 of the French commercial code excludes any transmission of pieces of evidence contained in the leniency application.
- Should the parties be also involved in the public enforcement proceeding, they may then produce spontaneously pieces of evidence contained in the previous file, provided that the instruction secret, protected in Article L.463-6 of the French commercial code, be respected. Such a secret may however be limited should the communication of the pieces of evidence be necessary to a fair trial (*Cass. com., 19 janv. 2010, n° 08-19.761 - CA Paris, 24 sept. 2014, n° 12/06863, DKT International*).

CHAPTER V: THE PASSING-ON OF OVERCHARGES

16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

    Article 1382 of the Civil code sets out three cumulative conditions for proving tort liability: a fault, a damage and a causal link between both. Victims of anticompetitive behaviours must prove the existence three conditions to claim compensation.

    Therefore, indirect purchasers are not, *per se*, barred from claiming compensation but they will have to prove that they actually suffered a damage directly linked to the fault of the defendant.

    The harm must be direct and certain and the causal link direct as well. Quite often, courts consider that victims do not sufficiently prove the causal link (injury resulting from the unfair behaviour) and parties are therefore not compensated.

17. Are victims of "*umbrella damages*" entitled to protection against antitrust infringements and to compensation in court?

    See above: victims must prove a direct and certain harm and a direct causal link between the fault and the harm. If they can, they will be entitled to compensation.

18. Is the passing-on defence allowed?

The passing-on defence is allowed and will result in the diminution of the damages awarded. As plaintiffs receive damages depending on the harm actually suffered, if a victim passed on a part of the price increase resulting from the anti-competitive activity, the amount of damages will be reduced.

For instance, recently, the *Cour de Cassation* ruled that the victims of a cartel had not suffered any harm as they passed on the price increase to final consumers. It is for the claimant to prove the absence of passing-on, while proving the amount of damages suffered (Commercial Chamber of the Cour de Cassation, 15 May 2012, n° 11-18.495).

CHAPTER VI: DAMAGES

19. What form of compensation can be granted by national courts for antitrust violations?

In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

For antitrust violations, the usual compensation granted by national courts are damages, which are assessed on a case-by-case basis depending on the harm actually suffered by the victims.

National courts cannot accord punitive damages or treble damages. The court's only objective is to compensate the entire injury (but no more) sustained by the plaintiff.

Apart from damages, articles 808 and 873 of the CPC provide that plaintiffs may file a claim to request an interim order to the president of a civil or a commercial court. For such measures, urgency must be established, and there must be no serious challenge to the claim. Or such measures will alternatively be granted to avoid imminent damages.

Finally, the claimant may ask the court, in cases of confirmed unfair anticompetitive practices, to order the termination of such practices.

CHAPTER VI: QUANTIFICATION OF HARM

20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

The claimant bears the burden of proof (Article 1315 of the French Civil code). Each party must therefore prove in court the amount of damage they actually suffered to successfully obtain compensation.

21. Is there a difference between stand alone and follow-on actions?

    Yes. Under a stand-alone action, the claimant will have to prove to the court that the breach of competition law occurred and that he suffered loss as a result of that breach (For example, see Paris Commercial Tribunal, 31 January 2012, SAS Bottin Cartographes c/ SARL Google France et Google Inc., n° 2009061231).

    Under a follow-on action, the breach of competition law may have been already established in an infringement decision taken by the European Commission or the French Competition Authority. This means that the claimant can rely on its decision, which may have a "*moral*" effect. In most cases (but not always) the claimant may focus its argumentation then on the suffered loss as a result of that infringement.

22. How is damage quantified?

    Judges must quantify the harm actually suffered by the plaintiff: both pecuniary (such as the overcharge suffered because of the difference between the price actually paid and the price that should have been paid if no anticompetitive behaviour had been implemented) and non-pecuniary (damages to the claimant's image for instance).

23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

    Based on the three conditions imposed by article 1382 of the French Civil code, defendants may only defend themselves in proving the absence of a fault, a damage, or a causal link between both. These are cumulative requirements; one condition missing being enough to successfully dismiss the claim.

24. What is the role of economic experts, if any?

    Generally, an economic expert is nominated to quantify the loss and damage supported, in order to give the judge an accurate estimation of the amount of damages that are due.

25. What other types of experts are typically engaged in your jurisdiction?

    Any types of experts may be engaged in French jurisdiction, such as programmer for instance to determine counterfeiting of software…

26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?

No, damages awarded by courts and fines imposed by the French Competition Authority do not pursue the same goal. For the national courts, the aim is to award damages to the victims, whereas for the Competition Authority, it is to punish the infringing party for the economic damage.

However, the calculation of fines by the Competition Authority is generally of some help for the national courts to determine the scope of the damages suffered.

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

27. Is there any form of alternative dispute resolution available in your jurisdiction? If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

Alternative dispute resolution is available in French jurisdiction:

- Negotiation
- Judicial mediation
- Out-of-court mediation
- And arbitration

Negotiation and mediation aim at seeking an agreement that could potentially be enforced in a civil proceeding.

CHAPTER VIII: SETTLEMENTS

28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:
    - settlements requiring court approval;
    - settlements outside of proceedings;
    - timing of settlement;
    - etc.

No special settlement mechanisms are required before French jurisdictions. The case can be settled at any time provided that all the parties expressly referred to and approved it before the Court.

CHAPTER IX: RECENT CASE LAW

29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

- In the telecommunication sector, SFR claimed against France Telecom the historical French and state-owned operator for abuse of dominant position

in the fixed phone with respect to holiday homes. In first instance, the Paris commercial tribunal condemned on 12 February 2014 France Telecom to pay SFR € 51,38 millions damages as a result of the loss of revenues with respect to holiday homes on the basis of Article L. 420-2 of the French commercial code. On 8 October 2014, the Paris Court of appeal reduced to zero the damage to be paid to SFR. According to the Court, the first instance jurisdiction failed to properly define the relevant market, as for example clarified in the European Commission's notice dated 9 December 1997. The Court was not convinced by the « Small but Significant Non transitory increase in Price », argued by SFR. It was not demonstrated that a relevant market limited to holiday homes, which represents less than 1% of the home phone market (about 330 000 clients) exists. The claimant did not also prove the exclusionary effect of the denounced practices.

- Bottin Cartographes obtained in first instance 500.000 € damages against Google for abuse of dominant practices in the map services sector (*T. com. Paris, 31 January 2012, n° 2009-0611231. – Paris Court of Appeal, Pôle 1, ch. 5, 12 avr. 2012*). However, this decision was not upheld by the Paris court of appeal after reviewing the French Competition Authority's opinion dated 16 December 2014. No damages were then awarded to Bottin Cartographes, becoming Evermaps in the absence of establishing predatory prices (*CA Paris, Pôle 5 ch. 4, 25 November 2015, n°12/02931*).

- After having terminated its franchise agreement, an operator opened a new store without respecting the non-reaffiliation clause held in its contract. The franchisor lodged several complaints against the operator and other parties involved in the termination. Before giving its ruling, the Paris Court of Appeal invited the National Competition Authority to give an opinion on the question of whether the non-reaffiliation clause, as written in the contract, respected competition law. The Authority confirmed that the clause was infringing competition law. Even though the applicant alleged that such an opinion was not of any legal significance and was not binding on the court, the Court of Appeal followed the argumentation of the Authority and rejected the claim (CA Paris, 2 July 2014, n° 08/23061).

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