ARTICLE

NEW RULES ON THE COMPENSATION OF VICTIMS OF ANTICOMPETITIVE PRACTICES

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Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, resulting from the harmonization process launched in 2004 by the European Commission to ensure that the right to full compensation of victims of anticompetitive practices is enforced more effectively, was implemented in France on March 9, 2017 by Order No. 2017-303 governing actions for damages due to anticompetitive practices (the "Order") and Decree No. 2017-305 on actions for damages due to anticompetitive practices (the "Decree") (JORF No. 0059 dated March 10, 2017).

These provisions (codified in Book IV of the Commercial Code "On freedom of prices and of competition") aim to eliminate the procedural and evidentiary hurdles faced by victims of anticompetitive practices seeking compensation. They mesh with competition law to improve the competitive functioning of markets and to optimize interactions between the public and private spheres.

Easier access to evidence by victims

The principle posited by case law,[1] is now enshrined in the Commercial Code (§L.481-1): "[a]*ny natural or legal person forming a company or a body mentioned in §L.464-2 is responsible for the harm caused by the commission of an anticompetitive practice as defined in §L.420-1, §L.420-2, §L.420-2-1, §L.420-2-2 and §L.420-5 as well as in Articles 101 and 102 of the Treaty on the Functioning of the European Union"*.

The provisions then move on to the thorny issue of evidence, addressing all of the aspects of actions for damages.

First, evidence of conduct giving rise to liability is facilitated by the creation of an irrebuttable presumption in favor of sanction and injunction decisions entered by the Competition Authority, upheld, if need be, by the Paris Court of Appeal (§L.481-2).[2] In those decisions, the Competition Authority ascertains an infringement of competition law. The court hearing the action in damages will be bound by that finding, and the existence of conduct giving rise to liability cannot be disputed before it. This irrebuttable presumption does not apply to inadmissibility or dismissal, non-suit or interim measures, in the absence of any finding of infringement by the Competition Authority in such decisions. This being said, case law considers that a decision to accept competition commitments constitute *prima facie* evidence of conduct giving rise to liability.[3] Decisions by competition authorities of other Member States and by the European Commission are treated differently as the first type of decisions merely constitute *"a means of proof of the practice"* while the court cannot *"take any decision going against"* the second.

Secondly, evidence of the causal link is facilitated by the creation of a presumption, this time refutable. §L.481-7 creates *"a presumption, failing proof to the contrary, that a cartel between competitors results in harm"* (other anticompetitive practices, such as abuse of a dominant position, are not covered by this presumption).

Thirdly and lastly, proof of harm is also facilitated. §L.481-3 lists, on a non-exhaustive basis, the different types of harm suffered by victims of anticompetitive practices: loss due to the overcharge caused by the practices or due to the lower price paid by the infringer, the gain of which that person has been deprived (*lucrum cessans*), loss of opportunity and moral damages *(pretium doloris)*.

What §L.481-4 does especially is to create a presumption of the non-passing on of the overcharge by the direct or indirect purchaser. This argument ("*the passing on defense"*) was advanced by infringers claiming that their clients had passed on the overcharge caused by the anticompetitive practices to their own customers, and that this passing on reduced if not eliminated their losses. Henceforth, "[the] *direct or indirect purchaser of goods or services, is deemed not to have passed on the overcharge to its direct contractors, unless the defendant, perpetrator of the anticompetitive practices, can demonstrate that it was not, or not entirely, passed on"*. A direct or indirect purchaser claiming that he has suffered the application or passing on of an overcharge is required to provide evidence thereof but the burden on the indirect purchaser is made lighter when he can demonstrate certain evidentiary facts (§L.481-5).

Redress for the purchaser is therefore facilitated, regardless of whether he has contracted directly or indirectly with the infringer for the purchase of a good or the provision of a service.

It is also facilitated by the introduction of a procedure to obtain access to documents contained in the case file of the Competition Authority or in the possession of third parties, subject to the protection of business secrets, which procedure was largely modelled on existing solutions in French law.[4]

It is even further facilitated by the establishment (§L.481-9) of liability *in solido* between the different infringers. The Order allocates liability between the co-infringers *"proportionally to the seriousness of their respective share of liability and to their causal role in the production of the harm"*.

Change in limitation periods to the benefit of victims

Act No. 2014-344 of March 17, 2014 on consumer law ("Hamon Act") had improved the situation of victims of anticompetitive practices by providing, in §L.462-7 of the Commercial Code, that the running of the limitation period for the civil action of these victims was suspended by the initiation of proceedings before the Competition Authority, the European Commission or a competition authority of a Member State. This suspension remained in effect until the decision became final.

This provision only applied in the event proceedings before a competition authority had been initiated. It thus failed to protect victims seeking to go to court both to establish the practice and claim damages for harm.

The Order will remedy this situation by setting a general starting point, thereby departing from the ordinary legal rules, for actions for damages brought by victims of anticompetitive practices. The 5-year limitation period only begins to run once *"the complainant knew, or should have known on a cumulative basis"* of the litigious acts and of the fact that they constitute an anticompetitive practice, the harm caused to the complainant, as well as the identity of the perpetrators of the practice. In any event, the limitation period does not begin to run so long as the anticompetitive practices have not ceased. Also, the victims of a recipient with immunity from, or a reduction in fines for its involvement in a cartel under a leniency program, benefit from additional protection since the limitation period does not begin to run against them *"so long as they have been unable to take action against the perpetrators of the anticompetitive practices other than this immunity recipient"*.

The Order also broadens the cases of suspension of the limitation period under §L.462-7 of the Commercial Code. Now, like the limitation period before the Competition Authority, "[a]*ny action to find, ascertain or sanction anticompetitive practices"* suspends the running of the limitation period in civil actions.

The provisions on the limitation period apply when the limitation period has not expired on the date the Order enters into force (the day following its publication). The time already elapsed will be taken into consideration.

The provisions of the Order and of the Decree significantly improve the situation of victims of anticompetitive practices. It should also be stressed that these provisions, while being unable to remove the economic obstacles to redress for competitive harm (for example, the difficulty for a manufacturer to seek redress from one or more key client accounts for it), create an inducement for infringers to voluntarily compensate victims of their practices. The Competition Authority may decide to reduce the fine levied on a company if, during the course of the proceedings before the Authority, it *"pays the victim of the anticompetitive practice(s) being sanctioned compensation in performance of a settlement within the meaning of §2044 of the Civil Code"* (§L.464-2 as amended).

[1] ECJ, September 20, 2001, case C-453-99, Courage and Crehan.

[2] Even in case of an appeal before the French Supreme Court, the irrefutable nature attached to the decision by the Competition Authority would apply.

[3] Commercial Court of Paris, March 30, 2015, DKT International v Eco-emballages and Valorplast RG 20122000109.

[4] See our newsflash of September 17, 2012, "*Les pièces du dossier de the Competition Authority peuvent, sous certaines conditions, être obtenues par les demandeurs à une action en reparation*" [only available in French].