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NEW RULES ON COMPENSATION OF VICTIMS OF ANTICOMPETITIVE PRACTICES: PUBLICATION OF A CIRCULAR BY THE MINISTRY OF JUSTICE

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On March 31st, 2017, a circular dated March 23rd, 2017 (the "Circular") on damages for anticompetitive practices was published in the Official Gazette of the Ministry of Justice.

The Circular comprises 14 technical datasheets reiterating existing rules and presenting the main measures reforming compensation of victims of anticompetitive practices, one of which includes a cross-reference table between the provisions of the directive and those of the law implementing them into French law. More specifically, the Circular provides very useful clarifications relating to Order No. 2017-303 of March 9th, 2017 (the "Order") on actions for damages based on anticompetitive practices and on implementing decree (the "Decree") No. 2017-305 of March 10th, 2017.

First, the Circular specifies the scope of the non-rebuttable presumption regarding the event triggering liability, recalling that this presumption facilitates the complainant's evidentiary burden regarding the event triggering liability and indicates that the courts should only refer to the *ratio decidendi* set forth in the holding section of decisions entered by competition authorities.

It adds that the decisions concerned by this presumption are those involving an accusation and imputation of an anticompetitive practice, meaning decisions entered in the context of litigation proceedings, regardless of whether they involve a fine or not, and decisions ascertaining a breach of competition law following a commitment procedure. Decisions entered following a negotiated settlement procedure will also be concerned provided that pursuant to the terms of such decisions, the French Competition Authority characterizes (i.e., establishes) the facts constituting the practice and imputes them to the settling party. As a result, the irrefutable presumption will not apply to decisions that do not ascertain the existence of an anticompetitive practice and its imputability: decisions of inadmissibility or dismissal, non-suit or interim measures, or decisions to accept competition commitments.

Regarding decisions taken by the competition authorities of a Member State of the European Union, the Circular specifies that *"the merely probative value of the foreign decision does not give it any normative effect binding on the French court, since the latter retains its power to characterize the offense and impute it to the defendant"*. Also, it notes that national courts will be unable to enter any decision that is inconsistent with a decision taken by the European Commission.

Secondly, the Circular specifies the rules on the assessment of the financial loss and identifies the procedural rules applicable, specifically to assess the overcharge if it is passed on across a distribution value chain. Henceforth, the assessment may lead the parties to implicate all of the operators across the distribution value chain of a product. This possibility of bringing a third party into the proceedings is available under §331 of the Code of Civil Procedure. In addition, the court, which must assess the loss suffered as precisely as possible, may invite the parties to assert the liability of all parties whose presence in the proceedings they consider necessary for its resolution, through application of §332(1) of the Code of Civil Procedure.

The Circular adds that as part of the measures organizing liability *in solidum* or waiving it in the Order (specifically §L. 481-9 of the Commercial Code providing for the *in solidum* liability of natural or legal persons having taken part in an anticompetitive practice), the courts should apply §1313 to §1319 of the Civil Code on the primary and secondary effects of liability *in solidum*. It also permits defining the limits of the *in solidum* liability exemption provided for SMEs. To benefit from the exemption under §L. 481-10 of the Commercial Code, several requirements must be met: (i) the company needs to show that it satisfies the criteria for membership of the "SME" category set out in Decree No. 2008-1354 of December 18, 2008, (ii) the exemption will only apply if the company can show that its market share in the relevant market was less than 5% throughout the entire period in which it was guilty of the anticompetitive practice, (iii) the company must show that, in case it is held liable *in soldium* to pay damages to a victim who is neither its purchaser nor its direct or indirect supplier, its economic viability would be compromised and its assets would lose all value. On these concepts, the Circular refers to §35 of communication 2006/C210/02 on the calculation of fines. In any case, no exemption will apply in any of the following situations: (i) the company was the instigator of the practice, (ii) the company induced other persons to take part in it, or (iii) a previous anticompetitive practice by the company has been ascertained by an authority or court. In other words, the scope of the exception is very limited.

Thirdly, the Circular addresses a certain number of procedural issues pertaining to the communication and production of supporting documents (exhibits), in view of the Order's objective of facilitating proof by victims. The courts will apply the provisions of the Code of Civil Procedure in ruling on motions for the communication or production of supporting documents, in particular §132 through §142 and 145 of same on the production of evidence between the parties, on the obtaining of evidence held by a third party and on the production of evidence held by the other party. The courts will take these rules into account when deciding on motions for production. Also, in application of the last paragraph of §L. 483-1 of the Commercial Code, the courts will have to ensure the proportionality of the motion for production,

specifically by reference to the utility of the documents, the protection of their confidential nature and the preservation of the effective application of competition law. The Circular also details the tools given to the courts to maintain business secrecy in actions for damages due to competition law infringements. These procedural rules will apply to all of the documents contained in the records of the competition authorities, whether French, other EU or foreign competition authorities. It is also specified that if a party files a motion with a French court seeking to have it order the production of a document by the competition authority of another Member State, then the national court shall apply the procedures set out in EC Council Regulation No. 1206/2001 of May 28th, 2001. In any event, some documents will not be able to be produced in court: this is the case, in particular, for documents produced in the context of leniency or negotiated settlement procedures.

Fourthly, the Circular provides clarifications on the limitation period of an action for damages due to competition law infringements which is, pursuant to §2224 of the Civil Code, 5 years. Regarding the date when this limitation period begins to run, the Circular specifies that the expression *"knew or ought to have known"* leaves the court the necessary leeway to assess whether the complainant knew or should reasonably have known of the set of facts giving rise to its cause of action. On the suspension or interruption of the limitation period, the Circular indicates that all of the provisions of the Civil Code in relation to extinctive prescription, the causes deferring the point of departure or suspension of the limitation period, the causes interrupting the limitation period and conditions of extinctive prescription are applicable to actions for damages due to anticompetitive practices inasmuch as no special rule waives them. The result is that under the ordinary rule of law the limitation period will not run or will be suspended with respect to (i) whomsoever is unable to take action as a result of an impediment arising out of a law, convention or case of force majeure, (ii) unemancipated minors and adults under guardianship, (iii) spouses between themselves, as well as between partners in a PACS civil union, (iv) an heir accepting an inheritance up to the ceiling the net assets(meaning that he is only liable for debts up to the total assets inherited). The period may, for example, be interrupted by any legal proceedings, including summary proceedings. Additionally, in accordance with the provisions of the Order having amended §L. 462-7 of the Commercial Code, the civil action will no longer only be interrupted by the opening of proceedings but by any act taken by the competition authorities to identify, ascertain or sanction an anticompetitive practice. This definition is identical to that applying to the prescription of public action before the Competition Authority (§L. 462-7 of the Commercial Code). The case law in this area should therefore apply to the limitation period for private actions. Lastly, §2232 of the Civil Code on the 20-year time bar will also apply, it being specified that *"the pushing back of the starting point, the suspension or interruption of the limitation period may not have for its effect to extend the extinctive prescription more than twenty years as of the date the right arose"*. Fifthly and lastly, the Circular decides on the thorny issues of transitional provisions. Having recalled that the Order provides for its provisions to enter into force on the day following its publication and that the ordinary rule on the non-retroactive effect of the law is set forth in §2 of the Civil Code ("*Legislation provides only for the future; it has no retroactive effect*"), the Circular specifies that the provisions on the communication and production of supporting documents as well as those contained in the implementing decree will only be of immediate application in proceedings brought as of December 26th, 2014. The rules on presumptions, and on the admissibility of evidence, and on liability rules will only apply to *"claims for compensation arising out of an event triggering liability occurring after their date of entry into force",* in other terms to actions for damages brought after the Order has entered into force and, when based on a decision made by a competition authority, probably on condition that this decision is also entered after the Order's date of entry into force.

The measures on limitation periods, which push back the starting point when the period begins to run compared to the starting point under the ordinary rules of civil liability, and which extend the limitation period have, in accordance with §2222 of the Civil Code, no effect on limitation periods that have already run and apply when the limitation period has not yet expired on the date the Order enters into force (in which case the time already elapsed will be taken into account).

Thanks to the added precision and clarifications made by the Circular, French law now offers a comprehensive framework for the compensation of damages caused by anticompetitive practices, alongside that already existing to sanction such practices, and contributes to economic efficiency and to the protection of victims, whether these be companies, public purchasers or consumers.