

CLIENT MEMORANDUM

Transposition of the European Damages Directive into French Law

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Order no. 2017-303 dated March 9, 2017 (the “Order”), supplemented by its implementing Decree of the same date (the “Decree”), makes provision for transposing, into French law, Directive 2014/104/EU 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 (the “Directive”).

It was widely agreed that, so far, in Europe, the only attractive liability regimes, particularly in respect of follow-on actions (i.e. actions initiated following the adoption of an infringement decision by a competition authority), were that of the United Kingdom, the Netherlands and Germany, while France fell well behind.

With the transposition of the Directive, France henceforth benefits from a legal framework, that responds more effectively to private actions sought by antitrust infringement victims. Indeed, these new measures, and particularly those facilitating the burden of proof in favour of the claimant, could improve France’s attractiveness within the EU in terms of follow-on actions.

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1. The broader scope of the Order

The new provisions supplement the French rules of common civil liability law and that of civil and administrative procedure, which will continue to apply when consistent with the rules resulting from the transposition Order.

However, the material scope of the Order is broader than that of the Directive. Indeed, the rules extend to practices beyond cartels and abuses of a dominant position of both national and European dimension, covering also the French offences of abuse of economic dependence and excessively low pricing.

With regards to the temporal scope of the new provisions, although the Order came into force on March 11, 2017, Article 12 of the same text provides that certain procedural rules, in particular those governing access to evidence, shall apply retroactively to proceedings initiated as from December 26, 2014.

2. Clarifications on the applicable limitation periods

In accordance with the general rules of French civil law, the limitation period for bringing actions for damages is five years. However, the reform provides further clarification as to the starting point of this period. Indeed, by way of reminder, according to Article 2224 of the French Civil Code, the period of limitation runs *“from the day on which the right holder knew or ought to have known the facts enabling him to exercise his right.”* In line with this wording, the new Article L. 482-1 of the French Commercial Code (the “FCC”) provides that the limitation period shall not begin to run before the claimant *“knows or ought to know cumulatively”* (i) the behaviour or acts that constitute an infringement of competition law; (ii) the fact that the infringement of competition law caused the harm suffered; and (iii) the identity of the infringer. More specifically, this implies that the limitation period will start to run as from the day of the publication of the European Commission or French Competition Authority (the “FCA”) decision press release (or on the day of the publication of the FCA’s decision in the absence of a press release).

The same Article also specifies that the limitation period does not start to run until the infringement of competition law has ceased.

Further, in interrupting the limitation period when proceedings are initiated before a competition authority, the legislation has extended the time limit for follow-on actions. This will certainly favour the staying of proceedings until the competition authority pronounces a final decision.

3. Reduced burden of proof in favour of the applicant

With regards to the wrongful act for which liability is incurred, the reduction in the victim’s burden of proof results from the application of a new requirement set out in Article L. 481-2 of the FCC: the finding of a competition law infringement by a final FCA or review court decision, which can *“no longer be appealed by ordinary means,”* irrefutably establishes the

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anticompetitive practice for the purpose of an action for damages. This means that no contrary evidence may be advanced to rebut the presumption.

Besides facilitating the proof of fault, it is important to highlight that the reference to “ordinary” appeals procedures also benefits the claimants. Indeed, it should be recalled that, under the Code of Civil Procedure, an appeal lodged before the French Supreme Court constitutes a “special” channel of appeal. An anticompetitive practice could thus be “*irrefutably established*” after a Court of Appeal judgment, notwithstanding the fact that an appeal before the Supreme Court might still be pending.

Conversely, endorsing the position of the current case law, the Order confirms that a decision taken in another Member State constitutes *prima facie* evidence of the commission of the antitrust violation, unless proven otherwise.

With regards to the harm suffered, such demonstration is also simplified by means of legal presumptions in favour of the applicant. First, the legislation sets out a presumption, according to which a direct or indirect purchaser of goods or services is deemed *not* to have passed on the overcharge resulting from the infringement of competition law onto his contractors, unless proven otherwise by the author of the litigious practice (Article L. 481-4). This effectively discards the passing-on defence and departs from the French Supreme Court’s settled case law, wherein the burden of proof regarding the harm suffered lies with the claimant, who is therefore required to establish that he has not passed on the overcharge resulting from the practice. With the implementation of the Directive, the burden of proof shifts onto the defendant, in the victim’s favour.

In addition, while the direct or indirect purchaser who claims to have suffered from the passing on of extra costs must prove their existence and extent, the indirect purchaser benefits from a reduced burden in proving such a passing-on (Article L. 481-5).

Finally, it is also presumed that cartel infringements cause harm (Article L. 481-7). It will be interesting to observe the evolution of the case law on this point, and particularly whether the courts will be willing to extend the scope of the presumption to other anticompetitive practices, namely abuses.

4. Restricted access to evidence

With respect to this essential issue of disclosure of evidence, it should first be recalled that the former French rules on access to evidence, as set out in Articles 11, 138 and 142 of the French Code of Civil Procedure, are essentially consistent with the principles of Article 5 of the Directive. The latter, transposed into French law by the Order and the Decree, enables the national courts to order the parties or a third party to disclose relevant evidence upon request of the defendant or the claimant.

Despite such a production order, it seems likely that the French judges will continue to exercise their control in the same way as they did prior to the enactment of the new provisions. Indeed, before the transposition of the Directive, the French

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courts undertook a proportionality assessment of the disclosure request on a case-by-case basis, as illustrated in the French Supreme Court *Semavem* case and in the Paris Court of Appeal *Ma liste de courses* judgment.

The real change here lies in the *content* of the disclosure request. Following the Directive, the Order provides that such requests may refer to specified items of evidence or “*categories of evidence*.” Although the latter must be defined “*as precisely and narrowly as possible*,” this constitutes a novelty under French law, as access could formerly only be authorised for specific and precise documents. Thus, caution will be needed with regards to the broad or restrictive interpretation that a civil judge will adopt.

Further, in line with the Directive, the Order introduces specific measures governing access to evidence included in a competition authority file.

In this regard, the new provisions state that a judge “*may not request the disclosure from the FCA, the Minister for Economic Affairs, any competition authority from another Member State, or the European Commission of evidence included in their file where a party or third party is reasonably able to provide that evidence*” (emphasis added), explicitly confirming the subsidiary nature of such a disclosure request. Indeed, this principle was already enshrined in Article L. 462-3 of the FCC, which authorises the transmission of evidence “*that was not already available to the parties to the proceedings*.”

Despite the restrictive wording of this provision, it is important to bear in mind that the French courts are rather inclined to approve access to the FCA’s files where the requested documents are necessary for the purpose of the parties’ rights of defence (*DKT c/ Eco Emballages*). Thus, the question arises as to the way in which the judges will interpret what seems to resemble an additional constraint on the disclosure of evidence held by the FCA. In this respect, however, the Order further clarifies that the transmission of documents may be temporarily limited “*until the proceedings are terminated*” (Article L. 483-8) or permanently prohibited (Article L. 483-5) where a leniency or settlement procedure is involved.

Finally, failure to comply with these rules governing access to evidence as laid down in the Decree may result in “*a civil fine, which cannot exceed €10,000 without prejudice to damages and interests which may be claimed*” (Article R. 483-14).

5. Calculating the quantum of the claim

The Order introduces into French law a controversial provision, which will undoubtedly generate lively debate in the near future. Indeed, the transposition enables the French courts to request from the FCA “*guidance on the determination of the quantum of damages*.” This is surprising, first, as it calls into question the FCA’s authority to assess the harm suffered by a victim of anticompetitive practices. Second, one may question its capacity and expertise to conduct such an evaluation. In what way is this regulatory body, the aim of which is to preserve competition and the public interest (rather than to analyse personal and individual damage), better placed than a civil judge to calculate the quantum of harm?

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In any event, the wording of the text seems to suggest that the FCA does have a way out of this delicate new task, insofar as it is not compelled to respond to the judge's request.

Further, and rather unexpectedly, the Order encourages the voluntary compensation of victims by the authors of damaging anticompetitive practices. Indeed, the transposition provisions set forth a new factor for the FCA to consider when determining the amount of pecuniary sanctions to impose: a fine reduction may be pronounced when the undertaking has "*paid compensation to the victim of its anticompetitive behaviour, pursuant to a transaction contract as provided in Article 2044 of the French Civil Code*" (Article L. 464-2). This raises the question of the practical implementation of such a disposition. In particular, should the FCA apply this criteria to the determination of penalties, one may wonder whether the fine reduction granted to the infringing party will be proportional to the compensation paid by the latter to the claimant.

Although there remain some grey areas unaddressed by the new provisions, such as the validity of litigation vehicles and the financing of such actions by third parties, we welcome the Order and the Decree for strengthening the French private enforcement regime in favour of antitrust infringement victims. It is now for the French courts to act to shape the case law on this topic.

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