This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in France. For a full list of jurisdictional Q&As visit legal500.com/guides
The authors would like to thank Claudia Cavicchioli and Hubert Delerive (associates in the Dispute Resolution department of Linklaters in Paris) for their valuable help.

**Introduction**

In France, victims of competition law infringements are entitled to claim compensation for the harm suffered as a result of such infringements.

Although competition damages actions are less developed in France than in other European countries such as the United Kingdom, the Netherlands and Germany, France is increasingly becoming an active jurisdiction in this field.

The French legislative framework governing competition damages proceedings is based on general civil (tort and contractual) liability rules and has been augmented by the implementation into French law of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union (Damages Directive). The Damages Directive was implemented into French law by Ordinance No. 2017-303 (Ordinance) and its implementing Decree No. 2017-305 (Decree), both of 9 March 2017 relating to actions for damages resulting from anticompetitive practices. The Ordinance and Decree have been codified under articles L. 481-1 and subs. and R. 481-1 and subs in the French Commercial Code (FCC).

The Ordinance and Decree are supplemented by two sets of non-binding provisions, namely Guidelines (*Circulaire*) of the Ministry of Justice of 23 March 2017 and 12 methodological sheets published by the Paris Court of Appeal on 20 October 2017 focusing on the assessment of economic damages (*Fiches Méthodologiques*).

The procedural provisions of the Ordinance and Decree are applicable to competition damages actions launched since 26 December 2014. However, the substantive provisions (e.g. presumptions) introduced by the Ordinance and Decree are only applicable to damages actions related infringements of competition law that occurred after 11 March 2017. Therefore, it will be several years before these substantive provisions are implemented by French courts.

Overall, this new legislative framework is likely to facilitate the compensation of victims since it will ease the burden of proof for the damages claimants and their access to evidence.
1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

In France, competition damages claims can be based on any violation of European and French competition law (article L. 481-1 FCC, introduced into French law as part of the implementation of the Damages Directive), covering:

- Anticompetitive agreements, including cartels and vertical agreements, based on article 101 of the Treaty on the Functioning of the European Union (TFUE) and/or article L. 420-1 FCC (which mirrors the provisions of article 101 TFEU);
- Abuses of a dominant position, based on article 102 TFUE and/or article L. 420-2 FCC (which mirrors the provisions of article 102 TFEU); and
- Specific infringements of French competition rules, including abuses of a state of economic dependence (article L. 420-2 FCC), abusively low prices (article L. 420-5 FCC), agreements in the French overseas territories granting exclusive import rights to a company or a group of companies (article L. 420-2-1 FCC), and specific agreements in the sector of individual public passenger transport services and occasional collective passenger transport services (article L. 420-2-2 FCC).

Victims of the above infringements can bring actions before the competent French courts, either on the basis of a prior decision of the French Competition Authority (FCA) or the European Commission (Commission) establishing the infringement (follow-on action), or absent any prior infringement decision from the FCA or the Commission (stand-alone action).

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

Victims of anticompetitive behaviour can sue the infringers on the basis of tort law (article 1240 of the French civil code (civil code), which provisions are mirrored in article L. 481-1 FCC, or contractual law if the anticompetitive behaviour derives from prior contractual relationships between the parties (article 1231 of the civil code).

The three following cumulative conditions must be met to trigger the defendant’s liability:

- A wrongful act (fault) on the part of the defendant. In competition damages claims, the competition law infringement (see above the answer to Question 1) will be the wrongful act;
- A damage suffered by the claimant; and
- A causal link between the wrongful act and the damage suffered.

The claimant will have to summon, through a court bailiff, the author of the alleged anticompetitive practices before the competent French court (see below the answer to Question 6 on the courts’ jurisdiction). The summons should (i) clearly identify the contentious practices and demonstrate that they are in fact anticompetitive, (ii) describe and quantify the claimant’s damage and (ii) establish that this damage was directly caused by the anticompetitive practices.

3. What remedies are available to claimants in competition damages claims?

The main type of remedies available to claimants in competition damages claims are damages.

It must be noted that there is an important distinction between public and private competition law enforcement actions under French law.

Competition damages claims (i.e. private actions) are introduced by those who have suffered from anticompetitive practices. These actions are thus aimed at compensating the claimant(s)’ damage which was caused by anticompetitive practices. French courts therefore only award compensatory damages. Punitive damages are not available.

Conversely, public actions, which are initiated by public bodies such as the FCA or criminal prosecutors, are aimed at identifying and sanctioning anticompetitive behaviours and usually result in large punitive fines being imposed on the infringing parties (up to 10% of the worldwide annual turnover of infringing corporate groups and up to four years of imprisonment and 75,000 euros for individuals).

This distinction has two important consequences:

- Damages awarded in private actions are only aimed at putting the victim of an antitrust infringement in the same situation as if the infringement had not occurred; and
- Fines imposed in public actions are not taken into account by French courts when awarding remedies in private actions as they are strictly focused on compensating the claimant(s)’
4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

**Measure of damages**

Under French law, damages are not punitive but compensatory, i.e. victims of an infringement should be fully compensated but not over-compensated (see above the answer to Question 3).

In principle, any victim that has suffered harm as a result of an infringement of competition law is entitled to claim compensation for its actual loss and the loss of profit, plus interest.

In practice, the types of recoverable damage resulting from an infringement of competition rules include (article L. 481-3 FCC):

- The loss resulting from:
  - the incurred overcharge corresponding to the difference between the price actually paid by the damages claimant for the goods or services concerned by the infringement and the price that he would have paid absent this infringement, subject to the potential partial or total passing on of this overcharge to its direct contracting parties (customers); or
  - the lower price paid by the infringer(s) to the damages claimant;

- The lost profit suffered by the damages claimant resulting from e.g.:
  - the reduction in sales related to the partial or total passing on of the incurred overcharge to its direct contracting parties (customers); or
  - the ongoing effects of the reduced prices that the claimant had to apply as a result of the infringement;

- The loss of opportunity; and

- The moral prejudice.

Although article L. 481-3 FCC is only applicable to damages claims based on infringements of competition law that occurred after 11 March 2017, French courts already recognise such types of damage as recoverable.

The damages claimed should not be purely hypothetical but personal, direct and certain. Claimants usually base their claim on economic evidence. In this respect, they are generally assisted by economic experts to help them calculate the amount of their damage. Typically, in damages actions related to a cartel or an abuse of a dominant position, economic experts provide reports based on economic data and carry out a counterfactual analysis relevant to the competition law infringement. The counterfactual analysis provides a comparison between the situation as observed (i.e. where the infringement of competition law occurred) and a counterfactual situation (i.e. a situation where the infringement would not have occurred) (see below the answer to Question 17).

In the case of collective actions (see below the answer to Question 11), claimants may only sue for compensation for material loss, as opposed to non-pecuniary loss (article L. 623-2 of the French Consumer Code (consumer code)).

**Joint and several liability**

As a rule, companies that participated in a competition law infringement (whether or not established by a decision of the FCA or the Commission) are jointly and severally liable for the entirety of the damage caused by such infringement (article L. 481-9 FCC, introduced into French law as part of the implementation of the Damages Directive).

An infringer who has been ordered to pay damages to a claimant may however recover a contribution from any other infringer, the amount of which shall be determined in the light of the seriousness of their respective infringements and of their causal role in the occurrence of the damage (article L.481-9 FCC, introduced into French law as part of the implementation of the Damages Directive).

There are two exceptions to the joint and several liability of infringers which were introduced into French law as part of the implementation of the Damages Directive (articles L. 481-10 and L. 481-11 FCC):

- Small and Medium-sized Enterprises (SMEs) (i.e. undertakings with fewer than 250 employees whose turnover or balance sheet does not exceed EUR 50 million or EUR 43 million respectively (article 3 of Decree No. 2008-1354 of 18 December 2008 on the criteria for determining the category to which undertakings belong for the purpose of statistical and economic analysis)). SMEs are only liable to their own direct and indirect contracting parties (customers or suppliers)
where:
- their market share in the relevant market was below 5% at any time during the competition law infringement; and
- the application of joint and several liability would irreversibly jeopardise their economic viability and cause their assets to lose all their value.

By way of exception, SMEs remain jointly and severally liable for the entire damage in the two following cases:
- where the SME has instigated the relevant competition law infringement or has coerced other undertakings to participate therein; or
- where the SME has previously been found to have infringed competition law.

Immunity recipients are only liable to their direct and indirect contracting parties (customers or suppliers). However, by way of exception, immunity recipients can also be liable for the damage caused to other injured parties if these victims are unable to obtain full compensation from the other companies that were involved in the same competition law infringement.

The above provisions relating to SMEs and immunity recipients are only applicable to damages claims based on infringements of competition law that occurred after 11 March 2017.

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

French law includes specific limitation rules for competition damages claims.

Article L. 482-1 of the FCC provides for a five-year limitation period which starts from the day the claimant knew or should have known, cumulatively:
- of the existence of the practices as well as their anticompetitive nature, and
- that these infringing practices caused him a damage, and
- the identity of the author(s) of these anticompetitive practices.

This limitation period does not start running for as long as the anticompetitive practices are still on-going. As regards victims of leniency recipients, the limitation period only starts for them once they are in a position to initiate a claim against other defendants (other than the leniency applicant).

Article L. 462-7 of the FCC provides that the five-year limitation period is interrupted if the FCA, the Commission or any other Member State’s national competition authority takes any action for the purpose of investigating, establishing or sanctioning the relevant anticompetitive practices. Such interruption then lasts until the competition authority’s decision can no longer be appealed by an ordinary judicial appeal (ordinary judicial appeals exclude appeals on pure legal grounds to the European Court of Justice (ECJ) (if it concerns a Commission decision) and to the French Supreme Court (Cour de cassation) (if it concerns an FCA decision)).

6. Which local courts and/or tribunals deal with competition damages claims?

Depending on the profile of the parties, competition damages claims can be brought before commercial courts, civil courts or administrative courts.

If the claimant or the defendant is a public entity, the administrative courts may in certain cases be competent to deal with the competition damages action. The administrative court with territorial jurisdiction is the one in whose jurisdiction the public authority which took the contested decision or signed the disputed contract relating to the competition law infringement has its headquarters.

In other cases, competition damages actions can be heard by 16 specialised courts, comprising eight commercial courts (tribunaux de commerce) and eight civil courts (tribunaux de grande instance) having their seat in Bordeaux, Fort-de-France, Lille, Lyon, Marseille, Nancy, Paris and Rennes (articles L. 420-7, R. 420-3 and R. 420-4 of the FCC).

The allocation of the damages cases between these commercial and civil courts depends on the profile of the parties involved. Disputes between commercial parties are heard by the commercial courts (article R. 420-3 and Appendix 4-2 of the FCC) while the civil courts have jurisdiction over disputes between non-commercial private litigants (article R. 420-4 and Appendix 4-1 of the FCC). In practice, most competition damages actions involve companies and are thus brought before commercial courts.

The territorial jurisdiction of the above commercial and civil courts is determined on the basis of articles 42 et
The court having jurisdiction is the one of the defendant’s domicile (article 42 of the civil procedure code). In contractual matters, the claimant may alternatively choose to bring a case before the court of the place of the delivery of goods or where the service is to be provided (article 46 of the civil procedure code). In tort matters, the plaintiff may alternatively choose the court where the infringement causing the damage occurred or where the alleged damage was suffered (article 46 of the civil procedure code).

### Seat of the specialised commercial and civil courts

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<tr>
<th>Territorial jurisdiction of the specialised commercial and civil courts</th>
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<tr>
<td><strong>Northern and Northern-western part of France:</strong></td>
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<tr>
<td>Covers the jurisdiction of the Courts of Appeal of Amiens, Douai, Reims and Rouen</td>
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<tr>
<td><strong>Northern-eastern part of France:</strong></td>
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<tr>
<td>Covers the jurisdiction of the Courts of appeal of Besançon, Colmar, Dijon, Metz and Nancy</td>
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<tr>
<td><strong>Paris region, Central part of France and La Réunion (French oversea territory):</strong></td>
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<td>Covers the jurisdiction of the Courts of Appeal of Bourges, Orléans, Paris, Versailles and Saint-Denis de la Réunion</td>
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<td><strong>Western part of France:</strong></td>
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<tr>
<td>Covers the jurisdiction of the Courts of Appeal of Angers, Caen, Poitiers and Rennes</td>
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<td><strong>Central-eastern part of France:</strong></td>
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<tr>
<td>Covers the jurisdiction of the Courts of Appeal of Chambéry, Grenoble, Lyon and Riom</td>
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<td><strong>South-western part of France:</strong></td>
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<tr>
<td>Covers the jurisdiction of the Courts of Appeal of Agen, Bordeaux, Limoges, Pau and Toulouse</td>
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<tr>
<td><strong>South-eastern part of France:</strong></td>
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<tr>
<td>Covers the jurisdiction of the Courts of Appeal of Aix-en-Provence, Bastia, Montpellier and Nîmes</td>
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<tr>
<td><strong>French Carribean territories:</strong></td>
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<tr>
<td>Covers the jurisdiction of the Courts of Appeal of Basse-Terre, Cayenne and Fort de France</td>
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All appeals of the above specialised and commercial civil courts’ judgments are heard by the Paris Court of Appeal (see article R. 420-5 of the FCC). The Paris Court of Appeal’s judgment can in turn be appealed before the Cour de cassation. This latter appeal is limited to legal issues.

### 7. How does the court determine whether it has jurisdiction over a competition damages claim?

Once a competition damages claim is filed, the court verifies ex officio whether it has jurisdiction over the dispute.

This ex officio verification covers international jurisdiction if the dispute presents a cross-border element (see below), as well as territorial and subject-matter jurisdiction (see above the answer to Question 6).

### International jurisdiction

In a competition damages case, the court will primarily determine whether it has jurisdiction pursuant to the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels I Regulation). The Recast Brussels I Regulation applies where the claim relates to a civil and commercial matter and the defendant is domiciled in a European Member State (whether in France or elsewhere), irrespective of the place of establishment of the claimant.

Based on the Recast Brussels I Regulation, French courts have jurisdiction over competition damages claims brought against a defendant whose residence or place of establishment is in France, or when the anticompetitive practice occurred in France or the damage is suffered in France. If the anticompetitive practice derives from contractual obligations, the competent court is the court of the place of performance of the relevant contractual obligation (i.e. for a sale of goods, the place of delivery of the goods and for a provision of service, the place of provision of the service).

The court’s jurisdiction can also be mutually agreed by the parties pursuant to jurisdiction clauses. However, the applicability of jurisdiction clauses depends on the nature of the infringement triggering the competition damages claim and the wording of these jurisdiction clauses:

- Jurisdiction clauses can be applied to an action for damages for an infringement of article 101 TFEU provided that these clauses expressly refer to disputes relating to liability incurred as a result of an infringement of
competition law (see case C-352/13, CDC Hydrogen Peroxide case, ECJ judgment of 21 May 2015);
- This condition is not required in the context of a competition damages claim brought by a distributor against its supplier on the basis of an abuse of a dominant position in violation of article 102 TFEU (see case C-595/17, Apple, ECJ judgment of 24 October 2018). In the Apple case, the ECJ ruled that, while an unlawful cartel under article 101 TFEU is in principle not directly linked to a contractual relationship between a member of that cartel and a third party affected by the cartel, an abuse of a dominant position prohibited by article 102 TFEU can ‘materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms’.

On a subsidiary basis, if French courts do not have jurisdiction on the basis of the above provisions, the civil code provides for a special forum based on the nationality of the parties and thus grants jurisdiction to French courts over disputes involving a French claimant or a French defendant.

8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?


Regarding competition damages claims relating to contractual obligations:
- The applicable law is in principle the law chosen by the parties;
- In the absence of such choice, article 4 of the Rome I Regulation provides a set of rules relating to specific contracts, aimed at determining the applicable law. For instance, a contract for the sale of goods (and thus related competition damages claims) is governed by the law of the country where the seller has its usual residence. A contract for the provision of services (and thus related competition damages claims) is governed by the law of the country where the service provider has its usual residence. If the dispute involves other types of contracts, the applicable law is the law of the country where the party required to carry out the characteristic performance of the contract has its usual residence;
- The Rome I Regulation also contains a special rule concerning consumer contracts, pursuant to which the contract between a consumer and a professional is governed by the law of the country where the consumer has his usual residence, provided that the professional (a) pursues his commercial/professional activities in the country where the consumer has his usual residence, or (b)directs such activities to that country by any means (Rome I Regulation, article 6.1). If the parties to a consumer contract have included a choice-of-law clause in their contract, such a choice must not result in depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law of his usual residence (Rome I Regulation, article 6.2).

Regarding competition damages claims related to non-contractual obligations, they are governed by French law if the French market is directly and substantially affected by the anticompetitive practice upon which the claims are based (Rome II Regulation, article 6). If the French market is not affected by the anticompetitive practice, the applicable law is the law of the country where the market is or is likely to be affected.

In general, French courts set aside the law determined by application of the above conflict of law rules when the concrete application of that law is contrary to French public policy.

Applicable standard of proof

The claimant must cumulatively demonstrate the existence of a wrongful act (i.e. in competition damages claims, a competition law infringement), the damage suffered and the causal link between the wrongful act and the damage suffered (see above the answer to Question 2).

As a principle, any type of evidence is admissible to establish the existence of the above three conditions. However, in practice, the parties base their claim on written documentary evidence without resorting to oral evidence (see below the answer to Question 14). In particular, the parties submit economic expert reports to substantiate their alleged loss and its amount (see the
answers to Questions 4 and 17).

The FCC sets out a series of evidential presumptions that facilitates the claimant’s burden of proof in competition law damages cases, and thus its compensation.

First, regarding the proof of the competition law infringement, article L. 481-2 of the FCC specifies the evidentiary value of competition authorities’ decisions:

- An anticompetitive practice that is established by a final decision of the FCA or the Paris Court of Appeal is deemed to be irrefutably established for the purposes of follow-on competition damages claims. This is the case when the facts constituting the infringement can no longer be appealed through ordinary means (which excludes appeals before the Supreme Court (Cour de cassation));
- Likewise, the court hearing a competition damage claim cannot render a decision running counter to a final decision of the Commission finding an infringement of article 101 or 102 TFEU (see also article 16(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty [now articles 101 and 102 TFEU] (Regulation 1/2003)); and
- Final decisions of other Member States’ competition authorities or appeal courts establishing an anticompetitive practice constitute a means of proof of that anticompetitive practice for the purposes of related competition damages claims brought before a French court.

Secondly, article L. 481-7 of the FCC provides for a refutable presumption of the alleged harm and of the causal link between this harm and the competition law infringement in cartel-related damages actions.

These provisions are only applicable to damages claims based on infringements of competition law that occurred after 11 March 2017.

However, lower courts have already applied the above presumption establishing the existence of a competition law infringement on the sole basis of a prior infringement decision of the FCA. Contrary to the previous case law of the Cour de cassation, these courts considered that the establishment by the FCA of an anticompetitive practice automatically demonstrated the existence of a wrongful act for the purposes of a competition damages claim (see e.g. Versailles Court of Appeal, judgment of 24 June 2004, Vérimédia, No. 02/07434).

9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

See above the answer to Question 8.

10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

Under article 378 of the civil procedure code, courts have the possibility, but are under no obligation, to stay a private damages action if related public enforcement proceedings are pending before the FCA, the Commission or appeal courts.

11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?

French law provides for two mechanisms to aggregate competition damages claims, through a French model of class actions and joint representative actions. These mechanisms only apply to consumers’ damages claims, and not to companies suffering from competition harm. However, none of them has proven so far to be a successful means to compensate consumers for competition law infringements.

**Class actions**

Class actions were introduced in France by Law No. 2014-344 of 17 March 2014 on consumption (so-called “Hamon Law”).

French class actions are based on an opt-in system. They enable end-consumers to claim damages for the harm resulting from infringements of a series of legal rules, including competition law, by professionals. Only duly authorised consumer associations (there are currently 15) are entitled to launch such class actions on behalf of end-consumers (article L. 623-1 of the consumer code).

Class actions relating to anticompetitive practices cover the same types of conduct as individual competition damages actions (see above the answer to Question 1). They must be related to follow-on claims based on a decision from the FCA or the Commission (article L.
623-24 of the consumer code). Consumers are only entitled to claim damages for material loss, to the exclusion of non-financial loss (article L. 623-2 of the consumer code).

The class action procedure includes the following steps.

First, the court issues a declaratory judgment in which it establishes the professional defendant’s liability for the claimed infringement, defines the group of consumers that is entitled to compensation from this defendant, determines the type of harm that may be compensated and the elements on the basis of which the amount of damages should be determined for each consumer (articles L. 623-4 and L. 623-5 of the consumer code).

Second, any consumer belonging to the group defined in the declaratory judgment can join the proceedings, on an opt-in basis, within two to six months in order to obtain compensation (articles L. 623-8 and L. 623-9 of the consumer code).

Like individual competition damages actions, class actions are subject to a five-year limitation period running from the date when the decision of the FCA or the Commission becomes final (article L. 623-25 of the consumer code) (see above the answer to Question 5).

To date, no class action relating to anticompetitive practices has been introduced before French courts (the class actions that have been initiated so far relate in particular to real estate, insurance and data protection matters).

The reasons why class actions have not yet gained significant traction in French litigation can be explained by the following factors:

- Consumers are not entitled to introduce class actions in their own name but have to rely upon authorised consumer associations. However, these associations are quite few in number (15), insufficiently known by consumers and have too limited resources (notably human and financial) to undertake a significant number of class actions and manage them efficiently;
- Due to the opt-in nature of class actions in France, only consumers who are aware of their rights may join the class. These de facto requirements of awareness and information of consumers hinder the development of class actions;
- Class actions relating to anticompetitive practices can only be introduced after a final decision of the Commission or the FCA establishing the infringement has been rendered (article L. 623-24 of the consumer code). In particular, the length of the action for annulment of an FCA decision, together with the length of the class action itself, may lead to proceedings lasting up to 15 to 20 years, thus having a deterrent effect on the initiation of class actions;
- French Courts are required to quantify the damage suffered by each of the claimants (article L. 623-2 of the consumer code), which can prove extremely difficult and burdensome in some cases.

Joint representative actions

Aside from the class action, authorised consumer associations can introduce joint representative actions on behalf of at least two consumers suffering harm from the same anticompetitive behaviour (article L. 622-1 of the consumer code). However, this mechanism has been rarely used.

12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

Aside from the traditional defences available to defendants in all civil cases (e.g. lack of standing, time limitations, lack of causal link between the competition law infringement and the alleged damage, etc.), defendants in competition damages cases may plead that the claimant passed on the whole or part of the alleged overcharge resulting from the infringement of competition law (pass-on defence).

Depending on when the infringement of competition rules occurred, the burden of proof of the pass-on lies either on the claimant or the defendant. In fact, the new provision introduced into French law as part of the implementation of the Damages Directive (article L. 481-4 FCC) reversed the burden of proof of the pass-on:

- For all claims based on infringements of competition law that occurred prior to the entry into force of article L. 481-4 FCC (i.e. prior to 11 March 2017), it is for the claimant to prove that it has not passed on the overcharge (see Cour de cassation, Commercial chamber, judgment of 15 June 2010, Ajinomoto Eurolysine, No. 09-15816);
- For all claims based on infringements of competition law that occurred after the entry into force of article L. 481-4 FCC (i.e. after 11 March 2017), the burden of proving the pass-
on lies on the defendant.

Furthermore, for claims based on infringements of competition law that occurred after 11 March 2017, indirect purchasers alleging that an overcharge was passed on to them are deemed to have proven this passed-on overcharge if they establish that:

- The defendant committed an infringement of competition law falling within the scope of article L. 481-1 of the FCC (see above the answer to Question 1);
- The infringement of competition law resulted in an overcharge for the defendant's direct purchaser;
- The indirect purchaser has purchased the goods or services that were the object of the infringement of competition law or has purchased goods or services derived from or containing them (article L. 481-5 FCC).

On 1 July 2019, the Commission published the final version of its Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser. These guidelines are meant to provide practical guidance to national courts on the relevant parameters that can be taken into account when dealing with economic evidence (provided in particular by economic experts) for assessing the passing-on of overcharges, including the relevant economic theory and methods for the purpose of quantifying the passing-on effects.

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Each party is allowed to provide expert evidence, whether legal or economic. Like any other evidence, it is submitted to the adversarial principle in order to be admitted and must therefore be provided to the other party who can respond to it. Typically, in competition damages claim, the Parties submit economic reports aiming at quantifying the alleged damage (see above the answers to Questions 4 and 17).

Furthermore, the court can decide, at its own initiative or following a request from the parties, to appoint an expert (article 232 of the civil procedure code). The expert will generally be appointed to assess the amount of the claimed damage. The parties can respond to the expert’s findings. The court is not bound by the expert’s findings (article 246 of the civil procedure code).

In addition, article L. 462-3 of the FCC provides for a special consultation process whereby a court may consult the FCA regarding alleged anticompetitive practices raised before it. The FCA can issue an opinion only after a hearing attended by all the parties, unless the FCA already has information on the alleged practices based on a previous investigation it has conducted. The FCA’s opinion is then provided to the parties and to the court. The FCA’s opinion is only published once the court has rendered its judgment. The FCA’s opinion is non-binding.

14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

The hearing is conducted by the judge presiding the hearing. As an introduction, the judge usually summarises the case as well as the parties’ pleas and arguments. The court hearing then follows a rather informal path, always led by the presiding judge. The judge then usually either:

- asks the parties to plead on whatever elements they wish to discuss (there is no time limit but the oral pleadings usually last for around 30 minutes) before a Q&A session

or

- ask the parties to respond to questions on specific elements of the case in the form of a Q&A session.

Before the commercial courts, evidence is freely presented by the parties. However, in practice, the parties base their claim on written documentary evidence disclosed prior to the hearing, without resorting to further oral evidence. As a principle, the burden of proof rests on the party who alleges a fact. There is no cross-examination process.

At the end of the hearing, the judge usually indicates when the court’s judgment will be rendered.

15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

It usually takes between two and three years between the introduction of a claim and the trial before a court.

Once the claim has been initiated, the parties exchange
briefs according to a timetable set by the court. Parties are able during this time to exchange written submissions to support their claims and defend themselves. Although there is no mandatory limit to the number of rounds, parties usually exchange briefs at least twice. Once the parties cease to exchange submissions and agree that the case can be heard, the relevant court summons them to attend a hearing.

Two levels of appeal are available to a party that wishes to challenge the court’s judgment. Judgments rendered by commercial or civil first instance courts (see above the answer to Question 6) can be appealed exclusively before the Paris Court of Appeal within one month. Judgments of the Paris Court of Appeal can then be appealed within two months, but only on legal aspects, before the Cour de cassation. Decisions rendered by administrative first instance courts can be appealed before the relevant administrative court of appeal within two months. Judgments of the administrative courts of appeal can then be appealed before the administrative supreme court (Conseil d’État).

16. Do leniency recipients receive any benefit in the damages litigation context?

Immunity recipients (receiving full immunity from fines) and second-ranked leniency recipients (receiving fine reductions) are not immune from liability vis-à-vis victims of their competition law infringements.

However, based on the provisions introduced into French law as part of the implementation of the Damages Directive:

- immunity recipients are slightly less exposed to the risk of payment of damages than second-ranked leniency recipients and other participants to the infringement. Indeed, as a principle, an immunity recipient is jointly and severally liable only to its direct or indirect purchasers or suppliers (article L. 481-11 FCC) (see above the response to Question 4).

However, by way of exception, an immunity recipient may be liable for the damage caused to other injured parties only where these victims are unable to obtain full compensation from the other undertakings that were involved in the same infringement of competition law (article L. 481-11 FCC).

- Where an infringer which has compensated victims seeks contribution from other co-infringers, the amount of contribution of an immunity recipient may not exceed the amount of harm caused to its own direct or indirect purchasers or suppliers (article L. 481-12 FCC).

It should be borne in mind that these provisions are only applicable to damages claims based on infringement of competition law that occurred after 11 March 2017.

17. How does the court approach the assessment of loss in competition damages cases? Are “umbrella effects” recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

Assessment of loss

The court’s assessment of loss in competition damages cases is mainly based on economic evidence provided by claimants. This economic evidence, which is enclosed in reports prepared by economic experts, is increasingly carefully examined by judges. In this respect, the assumptions mentioned in such reports must be explained and be consistent with the main characteristics of the relevant market(s). Moreover, the data used in the reports must be verifiable and provided on request from the court. Finally, robustness tests must be provided with the analysis and the results presented in the analysis must be credible.

In practice, the courts quantify the damage by assessing the difference between the situation as observed (i.e. where the infringement of competition law occurred) and a counterfactual situation (i.e. where the infringement would not have occurred). Several methods can be used to construct and quantitatively assess the elements of the counterfactual situation.

The following economic methods are those most frequently used and recognised by French courts:

- **Comparator-based approaches**, in particular time-series comparisons (analysing prices before, during and/or after the infringement) and/or “differences-in-differences” models (analysing the change in price for a cartelised market over time, and comparing that against the change in price in a non-cartelised market over the same time period);

- **Econometrics analysis**, which use econometrics to assess all the factors that influence the formation of a variable (e.g. the price) “in normal times” (i.e. in a scenario where the infringement did not occur). Thus, it is the econometric model that constructs the counterfactual.
• **Change in trends detection** that shows that the infringement of competition law has led to a durable change in model (e.g. market or price).

Moreover, article R. 481-1 FCC (introduced into French law as part of the implementation of the Damages Directive) provides that judges may, in the context of a competition damages case, ask the FCA for guidance on the quantification of the damage. In this respect, it should be noted that the judge may not entrust the FCA with a general task of quantifying such damage but may ask it to give its opinion on the relevant assessment methods.

There has been an important, positive, evolution of first instance judgments, especially by the Paris Commercial Court, which are now usually very substantiated when it comes to the assessment of loss in competition damages cases (espec. Such clarity could be seen as the consequence of the Paris Court of Appeal establishing clearer principles on damage quantification in its *Fiches Méthodologiques* of October 2017.

**Umbrella effects**

When a cartel leads to an increase of the cartelists’ prices on the relevant market, competing undertakings not party to the cartel may respond by increasing their own prices to maximise their profits. Consequently, the damage caused by the cartel may harm the purchasers of the competitors of the infringers (*umbrella effects*).

The ECJ has recognised that any person is entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and the cartel (see case C-557/12, *Kone v. OBB-Infrastruktur*, ECJ judgment of 5 June 2014). In particular, in the Kone judgment, the ECJ rules that victims of umbrella effects may obtain compensation if it is established that:

- The cartel was liable for the harm they suffered; and
- The members of the cartel could not be unaware of the specific aspects of the market that render the umbrella effects possible.

In a 2020 case where the claimant argued he had suffered from umbrella effects, the Paris Commercial Court did not reject the principle of an umbrella effect but found that, in that case, the claimants had failed to prove its existence. The court held that the claimant had failed to demonstrate the causal link between the cartel and the prices of other products not affected by the cartel (Paris Commercial Court, judgment of 20 February 2020, *Cora v. Yoplait and others*, No. 2017021571).

**Interest**

The payment of interest is an important aspect of compensation.

In competition litigation, two types of interest may be awarded to the claimant: compensatory interest and default interest.

The purpose of compensatory interest is to compensate for the damage resulting solely from the delay in the payment of a sum of money. In this respect, French courts usually apply the legal interest rate. Such legal interest rate is established by decree every semester. For the second semester of 2020, the legal interest rate was established at 0.84%, running from the first day on which the damage occurred until the day the judgment is rendered.

However, in recent cases, claimants have argued for alternative (higher) interest rate (in lieu of the legal interest rate), for the purpose of compensating their loss of a specific investment opportunity because the amounts owed were not available to them. In such cases, the interest was calculated by applying the weighted average cost of capital (WACC) which is set by taking into account the average annual rate of return expected by shareholders and creditors in return for their investment. In principle, to grant such higher interest rate, the claimant must demonstrate that the unavailability of the sums in question led to either a restriction of its activity or to being obliged to renounce duly identified investment projects (see e.g. Paris Court of Appeal, judgment of 10 May 2017, *Outremer Telecom v. Orange Caraïbe*, No. 15/05918 and Paris Court of Appeal, judgment of 17 June 2020, *Orange and Orange Caraïbe v. Digicel*, No. 17/23041). In these two cases, the Paris Court of Appeal judged, contrary to the Paris Commercial Court, that the claimants did not demonstrate that the unavailability of the sums in question led to either a restriction of its activity or to being obliged to renounce duly identified investment projects. However, in the above-mentioned Digicel decision, even if the Court of Appeal refused to apply the WACC, the judges still granted an interest rate higher than the legal interest rate for part of the damages. Indeed, they ruled that the claimant had demonstrated that without the practices, they could have used the funds to get out of debt and avoid a 5.3% interest rate between 2003 and 2005. Therefore, the damages were calculated using the 5.3% interest rate for the 2003-2005 period and the legal interest rate for the period after 2005.

Default interest aims at compensating the delay of any payment due. This interest is due from the date of the judgment and until the defaulting party pays the ordered amounts and is calculated according to the legal rate...
18. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

An infringer which has compensated victims may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law (article L. 481-9 FCC, introduced into French law as part of the implementation of the Damages Directive).

The amount of contribution of an immunity recipient shall, in principle, not exceed the amount of damage caused to its own direct or indirect purchasers or providers (article L. 481-12 FCC) (see above the answers to Questions 4 and 16).

These provisions are only applicable to damages claims based on infringement of competition law that occurred after 11 March 2017.

19. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

Parties may raise procedural objections (e.g. lack of jurisdiction, inadmissibility or procedural irregularity, statute of limitations) before their defence on the merits. A preliminary hearing on these issues can be requested before arguments on the merits are examined, which may allow those claims to be disposed of at a preliminary stage.

However, the court may decide that the procedural issues and the arguments on the merits of the case will be examined together.

20. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

Collective settlement of competition damages claims can be negotiated in the context of a class action. Only authorised consumer associations are entitled to negotiate such settlements (article L. 623-22 of the consumer code).

Once a settlement has been reached by the parties, it must be approved by the court, which ensures that the settlement complies with the interests of the consumer class and makes it legally enforceable (article L. 623-23 of the consumer code).

21. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

Disclosure of documents during a competition damages action before civil and commercial courts is regulated by the rules of civil procedure (article L. 483-1 FCC, introduced into French law as part of the implementation of the Damages Directive).

Disclosure of information from another party or from a third party

Under article L. 483-1 of the FCC, when the claimant establishes a plausible harm resulting from anticompetitive practices, it may request the disclosure of evidence relevant to its claim by another party or a third party.

When deciding on a request for disclosure, the court must consider the legitimate interests of all parties and third parties concerned. In particular, it takes into account the usefulness of the requested evidence, the protection of the confidentiality of such evidence and the preservation of the effectiveness and consistency of the application of competition law by the competent authorities.

The court’s order to disclose a piece of evidence can be challenged before the First President of the Paris Court of Appeal whose judgments can be appealed before the Cour de cassation.

A party or a third party who wishes to challenge this disclosure injunction has to file a request for confidentiality and establish that the production of the relevant documents, or parts of them, violates its business secrets or is protected by legal attorney-client privilege. It then has to hand over the relevant documents to the court together with a non-confidential version of them, a summary explaining the nature of the redacted information and an explanation of the reasons.
for its confidentiality. The court can also hear any interested party to this end.

After a careful review of the information provided to it, the court issues a reasoned order by which it decides whether and to what extent that information can be disclosed. Therefore, the court can either:

- prevent the disclosure of information which contains business secrets;
- order the partial disclosure of the requested information where only the information relevant to the claim is visible to the other party;
- order the complete disclosure of the requested information where that information is relevant for the claim and does not contain any business secret; or
- order the complete disclosure of the requested information where that information is relevant for the claim, even though it contains some business secrets. In that case, the court will limit the disclosure to a limited group of people (involving lawyers and economic experts), bound by a non-disclosure obligation.

Refusing to disclose documents following a court order can lead to fines of up to EUR 10,000 (article R. 483-14 of the FCC).

**Disclosure of information from a competition authority**

A court cannot order the FCA, the Commission or any competition authority from other Member States to disclose documents from their files if such documents can be provided by a party to the claim or when third parties can reasonably provide such document (Article L. 483-4 FCC). Moreover, documents from the competition authorities’ files containing self-incriminating statements provided in support of a leniency application, a settlement submission or submissions to benefit from simplified procedures can never be disclosed (article L. 483-5 FCC).

On this basis, claimants may request access to the FCA’s, the Commission’s or any other EU competition authority’s file.

With respect to access to the Commission’s file, the court, under Article 15(1) of Regulation 1/2003, can ask the Commission to provide such evidence. According to the Communication Notice on the cooperation between the Commission and the courts of the Member States of 2004, the Commission commits to provide the requesting court with the information within one month from the date it receives the request. The Commission may however refuse to transmit information to national courts where there is a need, *inter alia*, to safeguard the interests of the European Union or to avoid any interference with its functioning and independence.

A party may further request the court to order a foreign competition authority to disclose documents under Council Regulation n°1206/2001 (EC) of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. The court has to refer the request to the competent court of the Member State which will in turn, and after a careful review of the request, order the production of the requested document to its national competition authority.

One party can ask the court to review the content of the requested information to assess whether it can be disclosed or not (article L. 483-6 of the FCC) based on the rule set out in article L. 483-5 of the FCC.

The following information can only be disclosed after the competent authority has rendered a decision putting an end to its proceedings:

- Any information produced by a party or a public authority as part of an investigation carried out by the FCA, a competition authority of another Member State or the Commission;
- Any information established by the competent competition authority and handed over to one party during the proceedings;
- Statements provided in support of a settlement submission from a party who withdrew from the settlement procedure (article L. 483-8 of the FCC).

22. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

Recoverable litigation costs comprise:

- The court’s costs (*dépens*) listed in article 695 of the civil procedure code. They encompass the expenses which strictly relate to the judicial acts and procedure, such as taxes and administrative fees, translation fees where necessary, legal aid, etc.
- These costs are usually very low and born by
the unsuccessful party. However, the court can decide that the successful party will bear the whole or part of such costs (article 696 of the civil procedure code).

- The remaining costs which do not fall within the scope of article 695 of the civil procedure code, and which include the lawyer’s fees, the expenses relating to private experts, etc. Pursuant to article 700 of the civil procedure code, courts have a very wide discretion for the allocation of these costs. These costs are usually borne by the unsuccessful party but courts can also order that each party bears its own costs, whatever the outcome of the dispute.

The parties are bound by the discretionary ruling of the court regarding the award of the above litigation costs and lawyer’s fees.

23. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party’s costs? Are lawyers permitted to act on a contingency or conditional fee basis?

Third parties are permitted to fund competition litigation. However, there is no French legal framework governing third-party funding and this litigation model remains limited in France for the following reasons.

First, the French professional conduct rules for lawyers prohibit them from accepting fee payments from third parties. Consequently, third parties must arrange a way to fund the litigation that is compatible with this restriction.

Secondly, lawyers are permitted to act on a contingency fee basis provided that this is determined in advance and in writing between the client and his or her lawyer and that the lawyer’s fees are only partially contingent upon the outcome of the case, i.e. that the contingency fee is combined with e.g. a flat fee or an hourly rate fee.

24. What, in your opinion, are the main obstacles to litigating competition damages claims?

As a preliminary, French courts have generally adopted a claimant friendly approach in competition damages cases. For instance, some courts already applied presumptions introduced by the provisions implementing the Damages Directive into French law (see above the answer to Question 8) even before the Damages Directive entered into force (see e.g. Paris Commercial Court, judgment of 16 July 2012, *Saint Gobain a o v. Randstad*, No. 2012013030; Paris Commercial Court, judgment of 30 March 2011, *Numéricable v. France Telecom*, No. 2009073089, Versailles Court of Appeal, judgment of 24 June 2004, *Vérimédia*, No. 02/07434).

However, even if competition damages claims have significantly developed before French courts, there remain obstacles to litigating these claims in France. The main ones are as follows:

- As mentioned above, the provisions that were introduced into French law as part of the implementation of the Damages Directive, and which tend to facilitate the compensation of victims suffering from anticompetitive practices, do not apply to infringements of competition law that occurred prior to 11 March 2017. Thus, in theory, claimants still have to establish the existence of an infringement of competition law, of a damage, and of a causal link between that infringement and this damage. Although French courts now tend to relax this heavy burden of proof, it has proven difficult for claimants to bring evidence of all three elements;
- In particular, and although this is not specific to France, it remains difficult for claimants to quantify their losses. First of all, parties need to hire economic experts whose services may be costly. Secondly, and in particular in follow-on damages claims, the parties have to gather very old data which are sometimes no longer available. Indeed, FCA proceedings as well as the appeal process regarding the FCA decisions may last for several years. Therefore, competition damages actions will usually be initiated more than 7 or 8 years after the facts occurred;
- The length of the procedure of these competition damages actions (which can last up much longer than the average 2-3 years just for the first instance, especially when the case is being investigated in parallel by the FCA) can discourage victims of anticompetitive practices from introducing damages claims; and
- Class actions have so far not been successful to compensate end-consumer victims of anticompetitive practices.
25. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

The most significant development affecting competition litigation in the coming years will be the effective application of the new provisions that were introduced into French law as part of the implementation of the Damages Directive. Such provisions will ease the burden of proof on claimants and will probably encourage victims of competition law infringements to take more lawsuits against cartelists or undertakings that have abused their dominant position.

However, it remains to be seen how the damage quantification issue will be dealt with by the French courts. It should be noted that the provisions introduced into French law as part of the implementation of the Damages Directive have not really resolved this issue. Nevertheless, non-binding guidelines published by the Commission should help courts in this respect.

On 1 July 2019, the Commission published the final version of its Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser. These guidelines are meant to provide practical guidance to national courts on the relevant parameters that can be taken into account when dealing with economic evidence for assessing the passing-on of overcharges, including the relevant economic theory and methods for the purpose of quantifying the passing-on effects (see above the answer to Question 12).

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