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France

COMPETITION LITIGATION

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This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in France.

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FRANCE
COMPETITION LITIGATION

1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

Any infringement of competition law, whether European or French competition law, can give rise to a competition damages claim. This includes cartels, bid rigging, vertical restraints and abuse of dominance infringements – as well as other practices specifically prohibited under French law, such as abuse of economic dependence or excessively low pricing (in both cases, irrespective of dominance).

Claims can be brought either on a contractual basis (if, for example, one of the clauses of the contract violates competition law) or under general tort law, either as a follow-on claim to an infringement decision by a competition authority, or stand-alone.

Given the evidentiary burden of establishing a competition law infringement in the context of a standalone claim, the vast majority of competition damages actions in France to date have been in the context of follow-on claims.

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

Actions for damages based on violation of competition rules are governed by (i) general tort law (articles 1240 et seq. French Civil Code), where applicable in combination with (ii) the specific competition law provisions laid down in the French Commercial Code following implementation of the EU Damages Directive (Articles L. 481-1 et seq. French Commercial Code). The Directive ((EU) 2014/104 of 26 November 2014) was transposed in France by Order no. 2017-303 of 9 March 2017. Some of the rules laid down by the Directive are only applicable from its implementation (i.e. March 2017 or, following the ECJ's 2022 judgment in Volvo-DAF, from the deadline for its implementation in December 2016 – see Q.25 below) while others (essentially procedural rules) apply to all claims from 26 December 2014.

Under general tort principles, it is necessary for the claimant to establish (i) a fault on the part of the defendant, (ii) loss or damage incurred by the claimant and (iii) a causal link between the two.

In terms of standard of pleading, a distinction needs to be drawn between (i) whether the claim is a standalone or follow-on claim, subsequent to an infringement decision by a competition authority (which establishes fault on the part of the defendant, with the claimant only needing to establish causation and loss); and (ii) claims brought before or after application of the EU Damages Directive and following which a number of presumptions will apply in respect of the criteria above.

In addition, as a general rule of civil procedure, a claimant must have standing in order to bring a claim – i.e. a direct, legitimate and personal interest in seeking the compensation claimed (whether as a direct or indirect victim of the competition law infringement). This raises specific issues in the context of collective redress and the ability of associations to bring collective actions on behalf of multiple claimants (see Q.11 below).

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

Claimants in competition damages claims may seek both monetary compensation for the loss suffered as well as, where appropriate, injunctive relief (for an example, see Société Pétanque Longue / La Boule Obut, Paris Court of Appeal, 7 Dec. 2016, no.16/15228 – grant of an interim prohibitory injunction in the context of an abuse of dominance and discriminatory pricing case, pending the outcome of the investigation by the competition authority).

With respect to contractual claims, where a contractual provision is found to infringe competition law, such provision – and if not severable, then the entire contract – will be declared null and void.

Damages are awarded on the basis of full compensation, plus interest. See Q.4 and Q.18 below.

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)?

Damages in France are governed by the principle of full compensation and are awarded on a strictly compensatory basis, i.e. they must make good all of the loss suffered, and nothing but the loss. French law does not allow for punitive damages to be awarded. There is no obligation on the claimant to mitigate loss.

Damages for competition law infringements can be based on a variety of categories of loss. Article L.481-3 of the French Commercial Code identifies the following potential claims:

- actual loss resulting from, e.g. increased costs (i.e. overcharge, and subject to the passing-on defence, see Q.12 below) and/or a fall in revenue (in the event of a lower price paid by the infringing undertaking)
- opportunity cost resulting from, e.g. loss of sales (due to a price increase resulting from increased costs)
- loss of chance; an
- non-financial loss (in France, termed “moral prejudice”), broadly resulting from the interference with the normal functioning of a competitive market (for an example, see: Doux Aliments, Paris Court of Appeal, 23 June 2021, no. 17/04101, where the claimants were awarded EUR 30,000 for the “moral prejudice” of negotiating with suppliers who were in fact “faking negotiations” as they had agreed on price increases with their competitors. This was also linked to the requirement for “good faith negotiations” under French contractual law.)

This list is not exhaustive. Other potential claims include costs incurred to maintain a market position and/or loss due to eviction and loss of investment (also termed financial/treasury loss) linked to the impossibility of making an investment return on sums lost as a result of the infringement.

The multiple facets of damages and their difficult assessment adds to the complexity of competition damages cases (see Q.17 below). Efforts are being made to harmonise the types of damages that can be claimed and to help quantify them. Following the European Commission’s example in its *Practical Guide on Quantifying Antitrust Harm in Damages Actions*, the Paris Court of Appeal has also published guidance notes on the establishment of damages in competition litigation cases, which it updates regularly based on the evolution of the case law – with the latest set recently published on 1 February 2024 (https://www.cours-appel.justice.fr/paris/la-reparation-du-prejudice-economique).

The highest damages award to date in France in the context of a follow-on claim was made in the *Orange Caraibe/Digicel* case – with respect to an abuse of dominance by the incumbent French telecoms operator in the French overseas territories. The Court at first instance awarded Digicel some EUR 350m in damages (from an initial claim in excess of EUR 700m), subsequently reduced to c. EUR 180m on appeal. The case, which was the subject of a landmark judgment by the French Supreme Court earlier this year, is still ongoing, with respect to the calculation of interest (*Orange and Orange Caraibe/Digicel*, Cour de cassation, 1 March 2023, no.20-18.356).

Liability for competition law infringements is generally joint and several, with some protection offered to leniency applicants – see Q.16 and Q.19 below.

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

The limitation period for bringing a competition damages claim in France – whether under contract or tort and whether before or after implementation of the EU Damages Directive – is 5 years. This can be interrupted (with the full limitation period starting to run anew) by:

- *any judicial act*: this includes *any claim*, even with respect to interim measures, and even if the claim is brought before the wrong jurisdiction or is otherwise procedurally void (Article 2241 French Civil Code); and
- *any investigation by the French Competition Authority* (or by the competition authority of another Member State and/or the European Commission). In this case, the limitation period is interrupted until the decision of the competition authority or of the ensuing court of appeal can no longer be the subject of an ordinary form of judicial review (i.e. excluding therefore an appeal to the Supreme Court on a point of law).

Start of limitation period: In principle, the 5-year limitation period starts to run from the day on which the claimant "*knew or should have known*" of the facts enabling them to exercise their rights. Following implementation of the EU Damages Directive, this requires specifically, knowledge (actual or implied) of: (i) the acts or facts and the fact that they constitute an anti-competitive practice; (ii) the fact that this practice has caused harm to the claimant; and (iii) the identity of at least one of the authors of the practice at issue. In addition, the limitation period only starts to run after the end of the infringement.

In the context of follow-on claims, French courts generally consider this to mean that the limitation period starts to run once the competition authority has issued a decision establishing the existence of the anticompetitive practices – though this is not a hard and fast rule and each case should be assessed on its own facts to determine the point at which the claimant can be deemed to have had enough information to allow it to bring a claim:

- In some circumstances, the limitation period has been found to start to run *prior* to the decision of the competition authority – for example, when the claimant took part in the anti-competitive practice at issue and/or when they initiated the procedure before the competition authority, thereby indicating that they knew of the facts on which their claim would later be based (*Cinesogar*, Fort de France Court of Appeal, 24 January 2017, no. 15/00486 and *Signalisation Routière*, Paris Court of Appeal, 14 September 2022, no.20/17560).

However, this equally is not a hard and fast rule and conversely, in another case in which the claimant had extensively participated in the FCA's investigation, the Paris Court of Appeal ruled that the claimant could not have been certain, either of the characterization of the conduct as anticompetitive or of the resulting harm, until adoption of the FCA's decision (*CNAM/Sanofi*, Paris Court of Appeal, 9 February 2022, no. 19/19969, confirmed by the French Supreme Court on 30 August 2023, Cass. Com. no.22-14.094).

- The notion of "decision" has also been the subject of litigation, concerning decisions by the European Commission. While the European Court of Justice has ruled – in the context of the trucks cartel litigation – that this should generally be interpreted to refer to publication of the summary of the decision in the official journal of the EU (ECJ, 22 June 2022, *Volvo-DAF*, C-267/20), the Paris Court of Appeal has recently ruled, with respect to the same infringement decision, that the limitation period in this case started to run from the Commission's press release – which it considered on the facts contained all necessary information to damages actions in France (*SAS Transports Fasciale Frères c/ Renault Trucks*, Paris Court of Appeal, 1 June 2023, no. 22/18814).

Questions of limitation are thus a highly contentious issue in practice in the context of damages actions and each case will turn on its own facts. Claimants should tread very carefully in this respect to avoid the risk of being time-barred.

In **the context of standalone claims,** the question of when the limitation period starts to run is evidently more difficult.

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

Depending on the nature of the claimant or the defendant, competition damages claims in France are brought before the civil, commercial or administrative courts. Civil courts have jurisdiction in particular over matters involving a consumer, commercial courts over matters between commercial parties, and administrative courts have jurisdiction where either the claimant or the defendant is a public entity (and irrespective of the identity of the other party).

In practice, the vast majority of private damages actions are lodged by companies, before the commercial courts.

With respect to civil and commercial courts, competition damages claims have been exclusively attributed to the courts of the following eight cities, following a "rule of specialization": Bordeaux, Fort-de-France, Lille, Lyon, Marseille, Nancy, Paris and Rennes. All appeals are heard exclusively by the Paris Court of Appeal. There is no equivalent rule of specialization with respect to administrative courts.

These procedural 'rules of specialisation' were, until very recently, an additional source of complexity for claimants with potentially extremely severe consequences. A wrongly seized court had a duty to decline jurisdiction (even in the absence of any lack of jurisdiction argument raised by the defendant)- . and the inappropriately filed claim did not suspend or interrupt the limitation period – so that in practice, claimants who initially seized the wrong jurisdiction would very likely found themselves subsequently time-barred.

However, in a landmark judgment of 18 October 2023 (Cass. Com. No. 21-15.378 *Aimargali/Locam*), the French Supreme Court overturned its previous case law in this respect, considerably limiting both the *scope* for raising a lack of jurisdiction argument on the basis of court specialization and its *effect* on the claim. Going forward, any lack of jurisdiction argument will need to be raised as a matter of priority *before* any other procedural or substantive arguments and *at first instance only*. Ultimately, even where the lack of jurisdiction defence is successfully raised, a wrongly filed claim will no longer be irreceivable but can simply be re-allocated to the competent court. And importantly, the limitation period will, in any event, be interrupted.

It is worth noting that, while on the facts of the case, the Supreme Court's judgment does not directly deal with competition law claims, its reasoning is, however, transposable in this respect. As such, the judgment represents a very significant claimant-friendly development, which should ensure a wider access to justice for competition law claims in France.

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

In terms of private international law, French courts have jurisdiction over a private antitrust action in any of the three alternative cases:

i. when the claim is directed against a defendant whose residence or place of business is in France;
ii. when the anticompetitive practice took place in France; or
iii. when the damage was suffered in France.

In addition, in application of Regulation (EU) No.1215/2012 of 12 December 2012 (*Brussels I Recast*), claimants can bring a claim against all participants in a cartel in the courts for the place where any one of them is domiciled (Article 8).

In the case of contractual claims, where the contract includes a choice of jurisdiction clause, the competent courts will be those designated by the parties under the contract provided that the choice of jurisdiction clause can be deemed to cover litigation for infringements of competition law, which is up to the national judge to decide (Article 25 of *Brussels I Recast Regulation* and ECJ, 21 May 2015, *CDC Hydrogen Peroxide*, C-352/13).

Internally, the rules of specialization set out at Q.6 above apply.

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

In cases of cross-border anticompetitive practices, the question of applicable law is addressed by Regulation (EC) No.864/2007 of 11 July 2007 (*Rome II*), according to which (Article 6):

i. the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected; and
ii. when the market is or is likely to be affected in more than one country, a claimant who sues in the court of the defendant's domicile may choose the law of that country, provided that the market in that Member State is or has been directly and substantially affected by the restriction of competition; where the claimant sues more than one defendant in that court, the claimant can only choose the law of that court if the restriction of competition by each of the defendants also directly and substantially affects the market of that Member State.

The above rules on applicable law are imperative and may not be derogated from by agreement of the parties.

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

The EU Damages Directive (transposed into French law since March 2017 under Article L.481-2 of the French Commercial Code) has created an *irrebuttable presumption* in favour of final infringement decisions by domestic national competition authorities. French courts are therefore bound by the final decisions of the French Competition Authority. The same rule already applied, prior to 2017, for decisions of the European Commission. A finding of infringement by a final decision of the FCA or the European Commission (i.e. that can no longer be appealed, excluding judicial review on a point of law) is deemed irrefutably established for the purposes of follow-on litigation.

With respect to decisions of other EU competition authorities, these are treated as *prima facie* evidence of a competition law infringement, for the purposes of private damages claims before French courts. There is no specific provision with respect to decisions of

competition authorities outside the EU.

The FCA is fully conscious of the probative value of its infringement decisions and has indicated that it takes the issue of follow-on claims into account when drafting its decisions, in order where possible to facilitate damages actions (with respect to, e.g. characterization of the infringing conduct and definition of the products and markets concerned, establishment of a causal link as well as, where possible, elements that may be useful to the quantification of damages).

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?

Public and private enforcement of competition law may take place in parallel.

This issue has recently been the subject of a judgment by the European Court of Justice, with respect to investigations by the European Commission: in *Regiojet*, the Court confirmed that there is no requirement, under either Regulation 1/2003 or the EU Damages Directive, for national courts to stay their proceedings while investigation by the European Commission is pending – provided however that the national courts do not take any decision that would conflict with any decision adopted or contemplated by the Commission. In this context, it is up to the national courts to decide whether or not to stay their proceedings (ECJ, 12 January 2023, *Regiojet*, C-57/2).

The position is the same with respect to investigations by the French Competition Authority.

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 the following mechanisms for the consolidation of claims:

i. **Consolidation through case management:** as a general rule of civil procedure, separate claims may be consolidated through case management, where they present such connexity that consolidation is in the interests of good administration of justice. Consolidation in such cases may be made either at the request of the parties or on the court's own initiative and remains in any event at the court's discretion (Article 367 French Code of Civil Procedure);
ii. **Joint representation**: with respect to claims by consumers, joint representation allows certified consumer associations to act on behalf of multiple consumers who suffered harm from the same infringing conduct, upon the written mandate of each (Article L.622-1 of the French Consumer Code); and
iii. **Collective redress:** since 2014 (*loi Hamon*), there has been a limited possibility under French consumer law for certified consumer associations to bring collective actions on their own initiative, in respect of competition and consumer law infringements (Articles L.623-1 et seq. French Consumer Code). Such actions however are limited (a) to *certified consumer associations*; (b) in the context of *follow-on* (not standalone) claims; (c) on behalf of individual *consumers*; and (d) based on an *opt-in* mechanism according to which it is up to the individual consumers to establish that they are part of the group which the court has determined should be compensated.

Given these limitations, collective actions in France have been blatantly ineffective in practice. To date, no consumer collective action has been brought following an infringement decision by the French Competition Authority, despite several recent cartels relating to consumer products (e.g. sandwiches, ham and fruit compotes). A proposal to revisit the regime to facilitate redress is currently going through the legislative process.

In addition, assignment of multiple claims to a third-party funder (who will therefore aggregate them) is also possible – see Q.24 below.

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

Under general principles of French tort law, the burden is on the claimant to substantiate its loss.

Therefore, where the passing-on defence is raised – according to which it is alleged by the defendant that the claimant passed on any overcharge from the

infringement on the upstream market to its own customers on the downstream market – failure by the claimant to demonstrate that it genuinely incurred the loss and did not pass it through to customers will generally result in the claimant being denied compensation. In practice, this has often proved a significant obstacle to compensation (for a recent example, see in the context of follow-on litigation from the hygiene products cartel: *Carrefour/Johnson&Johnson*, Cour de Cassation, 19 October 2022, no.21-19.197).

However, recent cases also show the courts trying where possible to interpret this defence restrictively – for example, by adopting the notion of "*partial pass-on*", i.e. where the costs were passed on only partially, by allowing the defence to work only in relation to the portion of costs which were effectively passed on and allowing for compensation for the remainder (*Cora*, Cour de cassation, 7 June 2023, no. 22-10.545).

Following implementation of the EU Damages Directive, the burden of proof on this point has been reversed and, for cases where the new provisions apply, there is now a rebuttable presumption in a competition damages claim that the claimant: (i) if a direct purchaser of the cartelized products, did not pass on the overcharge or (ii) if an indirect purchaser, that they suffered loss as a result of a pass-on of the overcharge from the direct purchaser (Articles L. 481-4 and L.481-5 of the French Commercial Code). Going forward, this should therefore considerably facilitate the award of damages – though for now, the presumptions under the Directive still largely remain inapplicable to cases currently being brought.

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?

Expert evidence is in practice indispensable in competition law damages claims – in particular to assess often very complex quantifications of damages.

The expert can be appointed by the court or the parties, or both – with the court sometimes requesting additional expert evidence to help quantify the damage as a complement to that submitted by the parties (see, e.g. *Doux Aliments*, Paris Court of Appeal, 23 June 2021 no. 17/04101 and *Sanofi*, Paris Court of Appeal, 9 Feb. 2022 no. 19/19969). Judicial experts are independent and subject to their own professional ethics rules and have a duty of impartiality.

Judicial expertise is relatively rare in practice – given in particular the time and costs involved. However in accordance with the principle of adversarial debate, the court cannot rely on the unchallenged expert evidence of one party only.

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?

Cases before the civil, commercial and administrative courts are generally decided by a three-judge panel.

Evidence must be adduced by each party to support its claim and must be disclosed to the other parties as part of the adversarial debate. Trials before commercial courts are based on the principle of freedom of evidence, which means that claims can be established by any means.

Judges in France also play an active role with respect to evidence. While there is no general discovery under French procedural rules, the judge can order the disclosure of evidence at the request of a party, provided such request is necessary and proportionate (see Q.22 below).

French procedural rules do not allow for the cross-examination of witnesses. However, parties can submit their questions to the judge, to be asked to the witness.

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?

Competition damages claims are often complex and lengthy cases. The time from the issuance of the claim to trial will vary depending on the complexity of the case and any investigatory measures ordered by the judge with respect to, e.g. document production, appointment of experts, consultation with the French Competition Authority etc. There has been an effort to accelerate proceedings in recent years, with first instance proceedings typically taking between 1-2 years in total on average.

In France, there is one level of appeal (with all appeals of competition damages claims being heard exclusively by the Paris Court of Appeal, see Q.6 above) followed, if applicable, by judicial review on a point of law by the Supreme Court (*Cour de cassation* for civil and commercial courts, or *Conseil d'Etat* for administrative

courts). Following such judicial review, the case may then be sent back to the Court of Appeal – with several "back and forths" possible between the Court of Appeal and the Supreme Court. Proceedings usually take between 12-18 months before the Paris Court of Appeal and between 12-24 months before the Cour de cassation.

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

While leniency applicants are not immune from follow-on damages claims, the main protection granted in the context of leniency relates to disclosure and access to file. Under the EU Damages Directive, leniency applications are protected from disclosure to claimants in follow-on damages actions, who cannot gain access to self-incriminating statements submitted in support of leniency or settlement discussions (Article L.483-5 French Commercial Code).

Where full immunity has been granted to a leniency applicant, joint and several liability with other participants to the infringement will be limited (i) to its direct or indirect customers and suppliers or (ii) to other injured parties, only to the extent that full compensation cannot be obtained from the other defendants (Article L.481-11 French Commercial Code).

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?

Measuring damages in the context of competition law claims is a significant issue both for claimants and for the courts. Even where the EU Damages Directive has established a *rebuttable presumption of harm* resulting from cartels to facilitate claims (Article L. 481-7 French Commercial Code), it is still up to the claimant to *assess the extent* of the harm suffered and the damages claimed.

This can often prove extremely difficult in practice, with the need for both (i) a *counterfactual* to assess what would have happened absent the infringement and (ii) an analysis of potentially multiple causes at play to isolate the loss resulting specifically from the anticompetitive practice at issue as distinct from, e.g. general market conditions and/or business decisions of the claimant. In this context:

- Courts can seek the help of expert evidence to assist them in this respect, even where such evidence has already been submitted by the parties (see Q.13 above).
- The EU Damages Directive also provides that the court may consult the competition authority who adopted the infringement decision, to help assess damages, with the authority to make its observations within two months of any such request by the court (Article R.481-1 French Commercial Code) – though this possibility is rarely used in practice.
- Finally, where quantification of damages is impossible or excessively difficult, the judge may also, in order to ensure effective compensation, estimate damages on the basis of court-appointed expert evidence – although this possibility must be interpreted restrictively and should not result in a shifting of the burden of proof and dispense the claimant from carrying out a necessary assessment of damages (ECJ, 16 Feb. 2023,*Traficos Manuel Ferrer S.L., Ignacio / Daimler AG*, C-312/21).

With respect to economic methodology, courts follow the guidelines of both the European Commission and the Paris Court of Appeal on the establishment of damages in competition litigation cases (see Q.3 above). For the calculation of overcharge for example, one of the most common methodologies is a comparison of prices over time on the market concerned or, where that is not possible, the "*difference in difference*" approach – whereby the evolution of prices is examined on a distinct but similar market to the one at issue.

Umbrella effects – whereby it is claimed that an anticompetitive practice enabled even companies not party to the infringement to maintain artificially high prices and allowing claimants to claim for the resulting loss – as established by the European Court of Justice in its 2014 *Kone* judgment (ECJ, 5 June 2014, C-557/12) are recognized under French law. For recent examples of cases where they were successfully claimed, see: *Cora*, Paris Court of Appeal, 24 November 2021, no. 20/04265 (confirmed upon application for judicial review by Cour de Cassation, 7 June 2023, no. 22-10.545); and *SNCF,* Paris Administrative Court of Appeal, 17 Feb. 2023, no. 14PA02419).

18. How is interest calculated in competition damages cases?

Interest – to compensate both monetary erosion and the

unavailability of capital resulting from the competition law infringement – is an important factor in competition damages claims and a common point of litigation itself. In principle, interest is to be calculated from the start of the infringement until the date of the judgment – with additional statutory interest due thereafter on the sums awarded until actual payment.

While the default is the legal/statutory interest rate, claimants may seek the higher weighted average cost of capital (WACC) rate, where they can establish either (i) that the sums lost as a result of the competition law infringement would have been invested *with a return equivalent to the WACC*; or (ii) that the claimant otherwise suffered a reduction in activity due to the unavailability of funds, without being able to find alternative financing. This is often a high bar in practice (see, as a rare example: *Switch/SNCF*, Paris Court of Appeal, 14 Dec. 2016, no.13/08975). Alternative calculations that have also been applied by the courts include, e.g. the marginal financing rate (on account of the fact that the sums lost as a result of the infringement likely increased the claimant's financing needs) or an ad hoc interest rate determined by the court.

Further, compound interest may also be awarded, to reflect the fact that loss suffered as a result of a continuing competition law infringement is progressive and accumulates over time (*Digicel*, Cour de Cassation, 1 March 2023 – the case has been remanded to the Paris Court of Appeal for reconsideration on this issue).

19. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

Under general principles of French tort law, liability will generally be joint and several for infringements of competition law involving multiple defendants. This principle has now also been enshrined by the EU Damages Directive (Article L.481-9 et seq. French Commercial Code). Accordingly:

i. claimants can sue *any one party* for the entire loss caused by all infringers, with the defendant subsequently seeking either to join others to the action or a contribution from them at a later stage for the damages paid out. In France, this is relatively rare in practice; and
ii. if an award for damages is made against a group of defendants on the basis of joint and several liability, liability is apportioned by the court – either according to the harm caused by each defendant or by dividing damages between them equally.

By way of derogation, small and medium enterprises (SMEs) are not subject to joint liability, where this would irretrievably jeopardize their economic viability and provided that:

- their market share was at all times throughout the period of infringement below 5% on the relevant market;
- the SME neither led the infringement nor coerced any other undertaking to participate in it; and
- the SME has not previously been found to infringe competition law.

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

Settlement is a common option in competition damages claims – and can be attractive for defendants to avoid a public judgment and potential further claims.

Following implementation of the EU Damages Directive, where an infringer settles with the claimant, its co-infringers cannot claim contribution from that party (Article L.481-13 French Commercial Code).

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

Collective settlements are available under the same conditions as bilateral settlements.

In the case of collective proceedings by consumer associations (see Q.11 above), any settlement negotiated on behalf the group must be approved by the court (Article L.623-23 French Consumer Code).

22. 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)?

While there is no principle of general discovery in France, there are a number of mechanisms through which claimants can request the specific disclosure of categories of evidence. In each case, claimants should seek to identify such categories of evidence as precisely as possible and explain why disclosure is necessary and proportionate, with the judge then carrying out a balancing exercise between the parties' interests (Articles L. 483-1 and R. 483-1 French Commercial Code).

This can include:

- pre-existing evidence or new evidence to be created *ex novo* (for example through compilation of data) – as recently confirmed by the European Court of Justice in *Paccar* (ECJ, 11 Nov. 2022, C-163/21); or
- a request by the parties *prior* to the launch of proceedings for evidence to be provided or safeguarded, where this is reasonably necessary in anticipation of a potential future claim (*in futurum* investigation measures, Article 145 French Code of Civil Procedure).

However this does not extend to:

- evidence on the competition authority's file prepared specifically in the context of the investigation (e.g. statements of the parties, responses to questionnaires etc.), which is protected from disclosure while the investigation is still pending (Article L.483-8 French Commercial Code – see also, on this point, the ECJ's recent judgment in *Regiojet*); and
- leniency statements and settlement proposals, which are at all times prohibited from disclosure (Article L.483-5 French Commercial Code).

With respect to confidential information, where such information is necessary to the adversarial debate and/or the rights of a party and it is not possible to communicate only a redacted version:

- The judge can limit disclosure to specifically identified individuals (Article R.153-6 French Commercial Code). However, by law, the parties' legal representatives must also have access to the disclosed evidence and are not bound by any duty of confidentiality – therefore rendering this procedure ineffective in practice to ensure protection of confidentiality.
- While the use of "clean teams" or "confidentiality rings" – whereby confidential information is disclosed only to the parties' external advisers (who are bound by rules of professional secrecy or have otherwise signed a confidentiality agreement) – is not formally provided for under French procedural rules, the courts have used them in a number of cases. This practice follows the European Commission's own practice on confidentiality rings and is subject to the agreement of the parties.

In practice, given these difficulties, confidentiality is another element that judges need to take into account when balancing the parties' interests and considering whether to order disclosure.

For a recent example, see, in the context of the trucks cartel litigation, *Eiffage Infrastructures/Renault Trucks*, in which the Supreme Court overturned, on the basis of confidentiality and in particular third party rights, the Paris Court of Appeal's judgment allowing for the disclosure of the European Commission's statement of objections and supporting evidence as well as certain confidential annexes to the Commission's decision (Cour de Cassation, 8 July 2020, no.19-25.065).

23. 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?

French procedural rules draw a distinction between (i) recoverable costs of the trial (including, e.g., court and witness costs and court-appointed experts fees) and (ii) irrecoverable costs (which include, in particular, legal fees).

While the losing party is generally liable for the recoverable costs of the trial, costs awards relating to other costs (including legal fees, which represent the bulk of the cost of litigation) are at the court's discretion and in practice do not cover the full extent of costs incurred (Article 700 French Code of Civil Procedure).

24. 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 party funding of competition law claims is available in France and is a developing feature of the market, although up until recently had been relatively limited in practice. This includes the possibility for potential claimants to sell their right to claim to a third party. There is no specific legislative or regulatory framework governing third party funding – other than for lawyers to ensure that they continue at all times to comply with the Bar rules (relating to, e.g. client confidentiality) in this context.

Lawyers in France are prohibited from charging on a fully contingent or "no win, no fee" basis. However, additional success fees are permitted, in combination with a non-contingent fee plan.

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

Competition damages claims have historically been difficult to bring. Their *complexity* (including the burden of proof of economic loss and issues of causation and quantification of damages), the *unequal situation of the parties* (in relation to, e.g. access to evidence) and the *time and cost of litigation* (including the need for economic experts) have meant that companies have long been reluctant to litigate.

While the EU Damages Directive has precisely aimed to address some of these issues, the obstacles for now still largely remain. Indeed, the presumptions established by the Directive to facilitate redress are often not yet applicable in France, with most damages claims currently before the courts still relating to practices that took place before March 2017 and the transposition of the Directive into French law. Much of the litigation relating to the Directive relates precisely to its temporal application. Despite some claims to the effect that, in order to give full effect to EU law, the provisions of national law prior to transposition should be interpreted in light of the Directive, the Paris Court of Appeal has consistently ruled that the principle of non-retroactivity prevents it from applying such presumptions to practices prior to implementation of the Directive in March 2017. Following the ECJ's ruling last year in *Volvo-DAF*, it is expected that this date will now be brought forward to 28 December 2016, i.e. the expiry date for transposition of the Directive into national law (ECJ, 22 June 2022, *Volvo-DAF*, C-267/20).

Collective redress of competition law infringements has also to date been blatantly ineffective. With reforms on this issue currently underway, this is a clear area for development for competition damages claims in France.

26. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

Competition damages litigation in France is rapidly expanding, with French courts adopting an increasingly claimant-friendly stance. Courts are showing both an increasing willingness and expertise to hear such claims, with companies equally showing an increasing willingness to litigate.

The most significant developments to come relate to the application of the various presumptions of the EU Damages Directive to future cases, in respect of anticompetitive practices post 28 December 2016, which will further tip the scales in favour of claimants.

With respect to cross-border litigation, although France has not traditionally been considered attractive for private antitrust litigation compared to other Member States, recent developments show the willingness of French courts to attract more cases and to facilitate redress. While the Paris Commercial Court and the Paris Court of Appeal for example now also each have a specific chamber where for international disputes proceedings can be held completely in English, to date, these chambers do not deal with actions for damages relating to anti-competitive practices.

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