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Antitrust Litigation 2021

France: Trends & Developments
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Trends and Developments

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The obvious "underdevelopment" of private enforcement in Europe 15 years ago (2004 Ashurst report) has given way to the emergence of substantive antitrust litigation. In a comprehensive pre-Brexit analysis covering the then 28 member states, 239 cartel damages actions (including 43 cases from France) were recorded in 2019, against 52 cases for which a first decision was rendered in 2018 and 24 in 2017 (Jean-François Laborde, *Cartel damages actions in Europe: How Courts have assessed cartel overcharges (2019 ed.)*, Concurrences No 4-2019). There is no indication that this trend will be reversed, especially considering the pro-plaintiff developments resulting from recent case law supporting the emergence of follow-on litigation, ie, litigation initiated during or after public enforcement.

2020, besides its peculiar context, has been a record-breaking year in terms of public enforcement in France with a record fine of EUR1.1 billion (subject to pending appeal) and an extraordinary year in terms of total amount of fines (EUR1.7857 billion) (vide the French Competition Authority's 2020 Annual Report, published on 8 July 2021). Private enforcement has also led to significant awards, with the highest one (around EUR250 million) given against Orange in a decision rendered by the Paris Court of Appeal on 17 June 2020 (Case reference: No 17/23041). Hence, antitrust litigation is most certainly adding to the deterrent effect of public enforcement in such a way that competition law is increasingly seen as a strategic challenge for companies and must be fully integrated in a sound compliance policy to prevent and manage competitive risks.

Directive 2014/104/EU (the so-called Antitrust Damages Directive), the European Court of Justice's case law and EU guidelines and practical guides have allowed the emergence and implementation of rules that undeniably encourage antitrust litigation resulting either in a court decision or a settlement. The Directive was implemented in the French legal framework through Order No 2017-303 and Decree No 2017-305 which passed on 9 March 2017 and entered into force on 11 March 2017 (although the provisions regarding the communication and production of documents applied to legal actions initiated as of 26 December 2014). These rules are not applicable to many pending cases brought before 11 March 2017. Therefore, as per the European Commission's position, expressed in its 14 December 2020 Staff Working Document on the implementation of the Antitrust Damages Directive: "sufficient evidence to carry out a meaningful evaluation of the Damages Directive is not yet available".

Yet, trends and developments can be identified.

Guidance from the Paris Court of Appeal

The Commission has published several documents providing guidance to national judges, experts, parties and anyone interested in interpreting EU competition law. The Communication and Practical Guide on quantifying antitrust harm in damages actions, the 2019 Guidelines on the passing-on of overcharges, and the 22 July 2020 Communication on the protection of confidential information form a set of soft law greatly useful when applying the rules deriving notably from the Damages Directive.

The Paris Court of Appeal has embarked on a similar process, although not specific to competition law, by proposing practical guides which are considered as soft law. There were 12 in 2017. The 2021 edition has 27. These guides were drafted by a working group composed of judges, in-house counsel, economists, accountants and lawyers and is chaired by Professor Chagny. It was created under the instruction of the first presiding judge of the Paris Court of Appeal.

These guides are divided into three categories: (i) general principles, (ii) specific examples and (iii) expert proceedings and include the following sheets:

- How to compensate for economic loss resulting from a loss of opportunity (Sheet No 4);
- How to compensate for loss linked to the passage of time (Sheet No 7); and
- How to manage confidentiality and respect business secrecy (Sheet No 9).

Two guides specifically target antitrust litigation:

- How to bring action for damages caused by an anti-competitive practice (Sheet No 10a.); and
- How to compensate for damages caused by an anti-competitive practice? (Sheet No 10b.).

While these guides serve an educational purpose, they will most likely be a reference in upcoming litigation and should be a go-to source of information for any plaintiff or defendant in antitrust litigation.

Building a Strong Case: Access to Documents

The most obvious trend in the field of antitrust litigation is to ensure the attractiveness of private enforcement for potential victims of anti-competitive practices. Hence, current and future litigation will most likely look at the balance between this goal and the core foundations of civil liability: the need to provide evidence of a loss and of a causal link.

Information asymmetry has been targeted as one of the main barriers preventing victims of anti-competitive practices from bringing standalone or follow-on claims. This was underlined in the Commission's 2005 Green Paper (COM (2005) 672 final, 19 December 2005) and in its 2008 White Paper (COM (2008) 165 final, 2 April 2008). It was also addressed by the Commission in the Antitrust Damages Directive, which provides for an EU-type disclosure. While the Commission called for a "minimum level of disclosure inter partes", it emphasised the need "to avoid the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuses" (2008 White Paper).

Rather than fundamental changes, the French legal framework needed a few adjustments to comply with the Directives' provisions in this respect, leading to the incorporation into Article L. 483-1 of the French Commercial Code of a two-step assessment. First the existence of "plausible harm caused by an anti-competitive practice", then the application of the proportionality filter, comprising two tests (Conference, *Implementation of the EU Damages Directive into member state law,* Laurence Idot "Disclosure of documents that lie in the control of the parties", Section 16, Concurrence No 3-2017):

- "the effective implementation of the right to compensation" versus "the effectiveness of the application of competition law by the competent authorities";
- "(...) usefulness of the evidence of which the communication or production is requested" versus "the protection of the confidential nature of such evidence".

The Paris Court of Appeal had embarked on such an assessment in a decision handed down on 25 October 2019, on the grounds of Article 145 of the French Code of Civil Procedure but also of new Articles L. 483-1 and R. 483-1 of the French Commercial Code.

The Court of Appeal notably granted the plaintiffs the communication of the statement of objections of the European Commission, the list of exhibits supporting the Commission's statement of objections and the confidential versions of several exhibits referred to in the European Commission's decision.

However, this decision was partially overturned by the French Supreme Court in a decision rendered on 8 July 2020 (Case reference: No 19-25065). The French Supreme Court considered that: "By ruling as it did, by merely referring to the usefulness of the exhibits and their confidential nature regarding only Renault Trucks, without seeking, as per its duty, whether their communication was adequate regarding, on the one hand, the protection of the confidential nature of the elements of proof retained concerning the third parties to the proceedings considered by Eiffage Infrastructures, and on the other hand, the preservation of the effectiveness of competition law implemented in the public sphere, the Court of Appeal deprived its decision of a legal basis".

The French Supreme Court therefore referred the case back to the Court of Appeal which will have to apply the proportionality test in its forthcoming judgment.

While the Directive has clearly alleviated the burden of proof in follow-on cases, through an irrebuttable presumption of fault, plaintiffs should not overlook the necessity of building a strong case and elaborating a sound strategy to obtain evidence, either prior to a trial and by way of petition or summary proceedings (the so-called measures in futurum of Article 145 of the French Code of Civil Procedure) or during a trial (Article 143 of the French Code of Civil Procedure). Such a request will have to be carefully drafted as the French Supreme Court has made clear that the proportionality test will have to be addressed thoroughly.

Assessing Damages: Expert Proceedings

Expert proceedings are an important part of antitrust litigation. So much so that several guides issued by the Paris Court of Appeal (see above) specifically relate to expert proceedings.

- Sheet No 20: What place for expert operations in an amicable process?
- Sheet No 21: What are the ethical rules applicable to the judicial expert?
- Sheet No 22: Which private expert operations in the evaluation of economic damages?
- Sheet No 23: Which judicial expert operations in the evaluation of economic damages?

Antitrust litigation is highly technical. While the Commission has provided a general Communication on quantifying harm, applying the available methods to quantify the overcharges, such as comparison over time and econometrics, requires substantial expertise.

As expressed by the Commission, "A major difficulty encountered by Courts, tribunals and parties in damages actions is how to quantify the harm suffered. Quantification is based on comparing the actual position of claimants with the position they would find themselves in had the infringement not occurred. In any hypothetical assessment of how market conditions and the interactions of market participants would have evolved without the infringement, complex and specific economic and competition law issues often arise. Courts and parties are increasingly confronted with these matters and with consid-

ering the methods and techniques available to address them" (Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07)).

Therefore, parties to an antitrust litigation will most likely appoint private experts who will draft several reports and courts will tend to appoint judicial experts who will assess the robustness of said reports and quantify the overcharges.

Integrating the need for expert proceedings (either private – ie,appointed by the party and/or judicial – ie, appointed by the Court) is an essential part of a plaintiff's or a defendant's strategy in managing a case. Any request for a court-appointed expert will have to be carefully drafted. If French courts rely significantly on judicial experts to assess damages, they are reluctant to order expert proceedings if the causal link between the fault and the alleged loss is not established beforehand.

In a decision handed down on 6 March 2019 (Case reference: Paris Court of Appeal, Section 6, Chamber 4, 6 March 2019, No 17/21261), the Paris Court of Appeal ruled that "As regards EDF's predatory abuse practices, which were sanctioned by the Authority for the period from 2007 to April 2009, it cannot be ruled out that they may have had medium-term structuring effects on the complainant operators, even after they ceased and that, consequently, they may seek compensation for them, because of the benefits they would have been deprived of after the practices ceased, owing to the still appreciable effects of the infringement which was terminated. But it is up to the victims to establish a causal link. This causal link between the anti-competitive practices and the alleged damage suffered by competitors after the cessation of the practices is a more complex level of evidence to establish than the damage contemporaneous with the practices". Considering the absence of any prima facie evidence of a causal link, the Paris Court of Appeal rejected the appellants' request as well as their request for judicial expert operations.

As noted by Professor Amaro, "once the fault has been established, the plaintiff will have to convince the Judge of the existence of his/her loss and of the causal link with the fault. If he/she fails to do, he/she will be disqualified. If he/she succeeds, however, regardless of whether he/she fails to establish the exact amount of his/her loss, he/she may rely on the appointment of a Court-appointed Expert" (Rafael Amaro, *Le Contentieux de la réparation des pratiques anti-concurrentelles (*Sept 2018 – June 2019), Concurrences No 3-2019, pp. 230-246).

Other Trending Topics in Recent Case Law

The statute of limitations or the detrimental effect of time have been recurring important issues discussed before courts.

Statute of limitations

The statute of limitations for private litigation in antitrust cases is governed by ordinary law, ie, Article 2224 of the French Civil Code, which provides that personal or movable actions are time-barred after five years from the day when the holder of a right knew or should have known the facts enabling them to exercise it.

In a ruling dated 27 January 2021 (Case reference: No 18-16.279), the French Supreme Court confirmed that the starting point of the five-year limitation period is the Competition Authority's decision. Although the director of the plaintiff had, prior to creating his own company, exercised functions within two companies "pivotal to the cartel", the Supreme Court considered that "knowledge of pre-existing and separate agreements [sanctioned by the Competition Council

on February 4, 2003] or imprecise knowledge of the cartel in question did not allow Mr. U. and EMC2 to determine whether any damage had been caused to them, and by which operators".

In a ruling dated 17 June 2020 in the Digicel/ Orange case (Case reference: No 17.23041), the Paris Court of Appeal considered that the starting point of the limitation period was the date when the Competition Authority's decision was published, although Digicel had denounced Orange's practices to the Competition Authority as soon as 2004.

These decisions are in line with the majority trend: courts will assess on a case-by-case basis whether or not knowledge of the facts enabling a right-holder to initiate proceedings can be dated prior to the publication of the Competition Authority's decision. However, we should expect such cases to be quite rare as courts tend to consider that such a decision is necessary to obtain full knowledge of the extent of the fault at stake.

Detrimental effect of time

The above-mentioned decision rendered by the Paris Court of Appeal on 17 June 2020 in the Digicel/Orange case (Case reference: No 17.23041) is also interesting regarding the appreciation of the detrimental effect of time. It ought to be noted that one of the guides published by the Paris Court of Appeal specifically addresses this issue (Sheet No 7).

This decision confirms the following.

Full compensation for the damage suffered must include compensation for the detrimental effects of time through two clearly distinct losses: monetary erosion and the loss of opportunity suffered by the injured party as a result of the unavailability of capital.

The loss of opportunity must be carefully evidenced. In the Digicel / Orange case, the Court awarded damages for this loss but did not follow Digicel's arguments regarding calculation. According to the Court of Appeal, Digicel did not provide evidence that such unavailability had impacted its activity or forced it to abandon investment projects that could have brought in the equivalent of the Weighted Average Cost of Capital (WACC) rate. However, the Court did grant damages for such unavailability of capital referring to the rate of borrowing borne by Digicel, noting that if it had had the sums in question, it would not have had to take out a loan but would have self-financed its development from its own funds. For the subsequent period, the Court of Appeal retained the legal interest rate.

All the above-mentioned trends aim at ensuring application of the principle of effectiveness established by European case law. They, allegedly, enhance the attractiveness of the French legal system.

Collective Redress

While this article aims at focusing on trends and developments in French antitrust litigation, it is worth underlining the ineffectiveness of collective redress in France (*action de groupe*) in this field. On 11 June 2013, the Commission issued a recommendation (2013/396/UE) and a communication (COM (2013) 401 final) on collective redress, putting "forward a set of principles relating both to judicial and out-of-court collective redress that should be common across the Union" (Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the member states concerning violations of rights granted under Union Law (2013/396/EU), recital 11).

Such a group action was introduced in France by the *Loi Hamon* of 17 March 2014 (Law No

2014-344 of 17 March 2014). We will not detail the specifics of this opt-in action open only to approved consumer associations but wish to underline its ineffectiveness. As stated by French MPs in a June 2020 report published by the Law Commission of the French National Assembly regarding the assessment and prospects of the group action, since 2014, besides three actions introduced before the French administrative courts, 21 group actions were brought to civil courts, of which 14 were in the field of consumer law, three in the field of health, two in the field of discrimination and two in the field of personal data protection. In other words, none in the field of antitrust litigation.

Alternative procedures (notably joint collective action), which do not fall under the monopoly of approved associations and are not particularly complex, have largely contributed to the failure of the group action. Furthermore, the adequacy of the group action in antitrust litigation is questionable. As highlighted above, antitrust litigation is quite technical. While proof of a fault is not necessary (in follow-on cases, which are the type of cases open to group actions), it is still required to provide an assessment of the loss and evidence the existence of a causal link between the said loss and the fault, two tasks that prove to be quite challenging. This often requires the help of private experts, implying costs. Lastly, as a final decision from a competition authority is required prior to initiating such a group action, the time between the fault and the initiation of the action would be long. Consumers are not likely to wait five or even ten years before requesting compensation for a loss that, at an individual level, is usually quite low. Hence, the ineffectiveness of the group action in antitrust cases is likely to last.

Signature Litigation was founded in London in 2012 as a firm dedicated to dispute resolution and has been present in Paris since January 2019. Its lawyers in Paris (four partners, three senior associates and nine associates) all practised at major international law firms before joining Signature Litigation and are recognised for their expertise. The team mainly represents clients in commercial, antitrust, banking, corporate and post-M&A disputes, complex and international litigation, arbitration, product liability and insurance/reinsurance. The firm advises companies on the scope of their compliance and vigilance duties. Thomas Rouhette and Claire Massiera have developed the firm's antitrust litigation practice in Paris and are currently representing a French corporation in a follow-on case pending before the French Administrative Courts.

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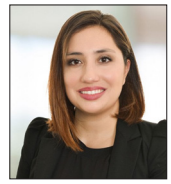
Thomas Rouhette is a founding partner of the Paris office of Signature Litigation and a leading commercial litigator. Previously a partner at a major international law firm, Thomas has 30 years' experience in litigation. He focuses on complex, "bet the company" litigation and is praised for his skills in high-risk litigation. Thomas has a wide and multifaceted practice, spanning from follow-on antitrust litigation to commercial, corporate and banking disputes as well as to fraud and asset tracing. He is an expert in international litigation. Thomas also serves as chair of the Superior Appellate Commission of the French Football Federation.



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