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Are you a victim of anti-competitive practices? Then these new rules should help you to secure compensation

EU directive no. 2014/104/EU of 26 November 2014, which aims to help victims of anti-competitive practices to secure compensation, has finally been transposed into French law by presidential decree no. 2017-303 of 09 March 2017 relating to actions for damages based on anti-competitive practices.

1. A far-reaching scope

The new rules apply since 11 March 2017 (though purely procedural provisions apply to actions brought since 26 December 2014) primarily to compensation litigation initiated by businesses, although consumer class actions and claims issued before the administrative courts are also concerned. The rules apply to anti-competitive practices prohibited either under EU law (articles 101 and 102 TFEU) or by the laws of individual member states – in France for instance: **restraint-of-trade agreements, abuse of dominant position, taking advantage of a state of economic dependence, predatory pricing** (articles L420-1, L420-2, and L420-5 of the French Commercial Code).

2. Proof of the anti-competitive practice: an irrebuttable presumption

This is one of the reform's major points. Henceforth, the principle is that an anti-competitive practice is **irrefragably presumed proven** where its existence and the identity of the person responsible therefor have been established by decision of the French competition agency, the *Autorité de la concurrence*, or on appeal by the Paris Court of Appeal (article L481-2 of the French Commercial Code). In other words, victims of anti-competitive practices need not themselves prove restraint of trade or abuse of dominant position anymore where these have already been established by the *Autorité de la concurrence*: they need only refer to the competition agency's decision. Victims may also invoke the findings of the competition agencies of other EU member states, but such findings will only carry the probative weight of ordinary evidence.

3. Full compensation, proof made easier

As regards causation, horizontal restraints are presumed by article L481-7 of the French Commercial Code to have caused a loss, although this is rebuttable presumption, i.e., a presumption that is only valid until proof of the contrary. Conversely, the presumption should not apply to other anti-competitive practices (including vertical restraints) in which case victims must prove causation.

Article L481-3 lists the various losses that may be compensated: (i) any loss suffered either as a result of the extra cost incurred due to the difference between the price paid by the victim for the good or service and the price it would have paid had there been no violation or as a result of the reduced income due to the lower price paid by the violator, (ii) lost earnings (in particular such resulting from a reduction in sales due to the full or partial impact of the extra cost incurred or from the unquestionable and direct repercussions of the consequences of the price reduction the victim was forced to apply), (iii) lost opportunities, and (iv) moral prejudice. This is a non-exhaustive list; the guiding principle which the courts must follow is that of **full compensation** – this is why the list should include interest and compensation for tied-up capital.

Where the victim must prove both the existence and extent of their loss, the new rules seek to render proof easier. For instance, the courts may ask the *Autorité de la concurrence* to provide information for the assessment of the victim's loss.

Furthermore, the decree settles the issue of "**passing-on**" (of the extra cost incurred by the victim to its own customers or clients) which used to be the favourite defence asserted by violators to deny the right to compensation of their direct, but also sometimes indirect, victims. In order to make victims' compensation claims easier, article L481-4 provides that the direct victim of an anti-competitive practice is deemed not to have passed the extra cost incurred on to its own customers or clients until proof of the contrary. Although such a presumption will certainly make it easier for direct victims to prove their loss, it does conflict with yet another – also rebuttable – presumption, according to which indirect purchasers are deemed to have had the extra cost incurred by the direct purchaser... passed on to them.

Lastly, the decree seeks to maintain a just balance between helping the victims of anti-competitive practices to get their hands on hard data on the one hand and protecting the business secrets of defendants on the other hand (article L483-1 of the French Commercial Code). This aim is embodied in the four following rules:

- Requests for production of evidence may target not only such or such specific piece of evidence but also and above all **categories of evidence**.

- A **business secret** invoked by a party to the anti-competitive practice (or by a third party) is not *per se* an absolute obstacle to the production of evidence: article L483-2 of the French Commercial Code provides for a specific procedure and various practical measures to protect business secrets while allowing victims to access the relevant information.

- Where a party fails to comply with a judicial confidentiality order or discovery injunction or destroys the requested evidence, the court may order them to pay a **civil fine** in maximum amount of 10,000 euros and may also draw all factual and legal conclusions to the detriment of that party.

- The court hearing the case may **ask the *Autorité de la concurrence* to supply any evidence** included in the file under which the anti-competitive practice was established and the violator found guilty. This however is only a subsidiary procedure: the evidence must first be requested from the parties or third parties reasonably able to supply it (article L483-4 of the French Commercial Code).

4. Further improvements

The decree also includes the two following provisions that should help the victims of anti-competitive practices to secure compensation:

- Where several parties are guilty of an anti-competitive practice, they are **jointly and severally liable to compensate victims for the resulting loss** (article L481-9 of the French Commercial Code). Victims may therefore get full compensation for their loss from any of the parties to an anti-competitive practice, even though the courts will apportion liability between violators according to the seriousness of their respective conduct and its relative role in bringing about the loss. This duty to pay the entire debt can however be adjusted under certain circumstances, e.g. for SMBs or for businesses granted a total pecuniary penalty exoneration by the *Autorité de la concurrence* following clemency proceedings.

- The **statute of limitations** for actions for damages based on anti-competitive practices is five years. In order to protect victims, the decree provides that the statute starts to run no later than from the day on which the victim should have been aware cumulatively of the conduct amounting to an anti-competitive practice, of the fact that they incurred a loss as a result of such practice, and of the identity of at least one violator, but no sooner than from the day on which the anti-competitive practice ends.

In conclusion, victims of anti-competitive practices are now better armed against parties to restraint-of-trade agreements or abusers of dominant position to get full compensation for their loss, either by settling with them during or after the *Autorité de la concurrence*'s investigations, or by suing them before the competent commercial court (and possibly the Paris Court of Appeal thereafter) after taking cognisance of the French competition agency's decision establishing the existence of such a practice.

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