

France Implements Damages Directive

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The Ordinance introduces new provisions in the Commercial Code that facilitate private actions brought by victims of competition law infringements.

Key points

- Directive 2014/104/ EU of 26 November 2014 (the Damages Directive) was implemented into French law by an Ordinance (the Ordinance) and its implementing Decree (the Decree) dated 10 March 2017.¹ A presentation circular dated 23 March 2017 was also published on 31 March 2017.
- The Ordinance introduces changes to existing law, which greatly benefit victims of competition law infringements.
- The implementation process also provided an opportunity to clarify and streamline the rules on private enforcement. However, some questions are left unanswered and will ultimately be decided by the courts.

Scope of the implementation Ordinance

As a reminder, private enforcement of competition rules includes both follow-on actions (following a finding of an infringement by a competition authority) and stand-alone actions. The latter require the claimant to prove the existence of an infringement of competition law in order to obtain compensation for the damage suffered

Substantive scope of the Ordinance

The provisions that the Ordinance introduced apply to actions brought by victims of a cartel or of an abuse of dominant position, even if such practices do not affect trade between Member States.² Going beyond what was mandated by the Damages Directive, these provisions also encompass prohibitions that are unique to French domestic law and have no equivalent in EU competition law, namely relating to the abuse of economic dependency,³ agreements on exclusive overseas import rights,⁴ agreements and practices in the transport sector,⁵ and abusively low pricing practices.⁶

Temporal scope of the Ordinance

In accordance with the general rules on transitional provisions, the new law shall apply to claims in which the infringement occurred after the Ordinance came into force, *i.e.* 11 March 2017.⁷

As an exception, procedural rules on disclosure and access to evidence are applicable to proceedings brought before the competent courts as of 26 December 2014, as stated in Article 22 of the Damages Directive.

Adjustment of common civil liability law to favor damages actions for infringements of competition law

Identification of the defendant

European competition law attaches liability to “undertakings.” An undertaking is a concept that departs from the notion of a legal person and focuses on the reality of an organization as an “economic entity” as defined by EU case law. For the purpose of competition law, an undertaking is an entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.

New Article L. 481-1 of the Commercial Code provides that natural and legal persons which constitute the infringing undertaking or organization may be held liable to pay damages.

In practice, the impact of this change is significant — particularly in the context of follow-on actions — for parent companies that have been sanctioned for infringements and that may have to pay substantial damages for infringements that their subsidiaries committed, even though the parent companies did not themselves participate in the infringement and may not even have been aware of it. This risk is all the more significant given that the EU courts have established a presumption of responsibility if the parent company holds 100% of the capital of its subsidiary.

Irrebuttable presumption of fault for follow-on actions

New Article L. 481-2 of the French Commercial Code introduces an irrebuttable presumption of fault (the anti-competitive practice) “*once its existence and imputation [...] are established by a decision [of the French Competition Authority] which can no longer be overruled through ordinary appeal procedures for the part relating to that finding.*” The ordinary appeal procedure does not include appeals before the Supreme Court (*Cour de cassation*), which is considered to be an extraordinary review.⁸ This presumption applies to the operative part of the decision in light of the statement of reasons set out in the decision.⁹

Article L. 481-2 is applicable to infringement decisions including settlement decisions before the French Competition Authority (the Authority) and injunction decisions. Decisions that identify competition concerns, such as interim measures proceedings, or commitment decisions may serve as *prima facie* evidence for instance, for market definition or the establishment of a dominant position.

Victims of anti-competitive practices may rely on this presumption in actions against leniency applicants, or undertakings that have agreed to a settlement, as soon as the Authority issues its decision, since that decision is final with regards to the finding of the infringement. In the future, undertakings and their counsel will need to assess whether a settlement procedure before the authority is still attractive considering the financial impact of private actions, which will transpire quickly after the settlement decision is published. This assessment should balance the financial gain of a reduction in fine against the potential bill for a damages claim.

Introduction of presumptions to facilitate compensation

The Ordinance sets out a series of presumptions intended to enhance compensation for the victims of competition law infringements.

First, the new Article L. 481-7 of the Commercial Code provides that “*an anti-competitive agreement amongst competitors is presumed to cause damage.*” Therefore, contrary to the common civil liability law, the defendant must prove that the claimant has not suffered a damage. The Ordinance restricts the scope of the presumption to agreements between competitors. The wording of the presumption differs from the wording proposed in the draft ordinance that extended the presumption to all infringements of competition law, including abuses of dominant position.

In addition, the Ordinance introduces three articles relating to rebuttable presumptions on the passing-on of overcharges:¹⁰

- The direct or indirect purchaser of goods or services is presumed not to have passed on the overcharge resulting from the infringement of competition law to the purchaser’s customers. In this respect, the Ordinance departs from settled case law.
- The direct or indirect purchaser claiming to have suffered an overcharge due to the infringement must prove the existence of the overcharge. However, the indirect purchaser benefits from a rebuttable presumption of pass-on if (1) there has been an infringement of competition law (2) resulting in an overcharge and (3) the indirect buyer purchased the goods or services concerned by the infringement.
- These presumptions are also applicable to “*direct or indirect suppliers of the infringing undertaking who suffered harm due to a reduction in the price of the goods or services concerned by that anti-competitive practice.*”

Clarification of the types of losses that are recoverable

The new provisions introduced in the Commercial Code, without changing the existing law, clarify the types of recoverable loss in respect of infringements of competition law. The new Article L. 481-3 establishes a non-exhaustive list of the various types of damages, including the loss suffered (overcharge or price reduction), the loss of profit, the loss of opportunity and moral damages.

Moreover, the new Article L. 481-8 codifies the existing principle according to which damages awarded shall be assessed on the day of the decision, taking into account the passage of time. The question of interest, “*an essential component of compensation,*”¹¹ is not clearly addressed by the new legislation. The obligation to pay interest is not disputed under French law,¹² however, the starting point for the calculation of interest has been the subject of inconsistent case law in private enforcement. Therefore the evolving case law on this aspect will be of interest to undertakings.

Finally, with regard to the quantification of harm, Article R. 481-1 of the Commercial Code enables the courts to request guidance from the Authority. The Authority has a two-month period to answer, although it is not obliged to do so.

Confirmation of joint and several liability for infringing parties

Under the terms of the new Article L. 481-9 of the Commercial Code, where several undertakings “*participated in an anti-competitive practice, [...] they are jointly and severally liable for the harm caused by the infringement.*”

In practice, with regard to the question of splitting the contribution of jointly and severally liable parties, the Commercial Code states that joint infringers “*contribute to the damages in proportion of the gravity of their respective fault and their causal role in the realization of the damage,*” without, however, defining the new notion of the “*causal role in the realization of the damage.*” The Damages Directive could provide guidance in this regard, since it mentions in recital 37 the “*relevant criteria such as turnover, market share, or role in the cartel.*”

Notably, in conformity with the Damages Directive, the Ordinance introduces two adjustments to this joint and several liability concept:

- Articles L. 481-11 and L. 481-12 of the Commercial Code protect the immunity recipient pursuant to a leniency program. The immunity recipient will only be liable for the harm caused to its direct or indirect contracting parties. The immunity recipient should remain fully liable to other injured parties only if the injured parties are unable to obtain full compensation from the other infringers.
- Article L. 481-10 of the Commercial Code excludes the joint and several liability principle with regard to Small and Medium Enterprises (SMEs) for injured parties other than an SME’s direct or indirect contracting parties, subject to certain conditions (e.g. market share of less than 5% and the application of the joint and several liability principle jeopardizing its economic viability). This derogation shall not apply if the SME initiated the infringement, coerced other undertakings to participate in the infringement or committed an anti-competitive practice found by a decision of a competition authority or an appellate court.

Extended limitation period

The existing limitation period for bringing actions for damages has not changed and remains five years.

Nevertheless, according to the new Article L. 482-1 of the Commercial Code, the limitation period only begins to run when the practice has ceased and the claimant “has known or ought to have known” cumulatively (i) of the behavior or acts and the fact that the behavior or acts constitute an infringement of competition law, (ii) of the fact that the infringement of competition law caused harm to the claimant; and (iii) the identity of at least one of the infringing parties. In cases in which there is a successful immunity applicant, the limitation period begins to run only when the victims have been able to file a claim against the other participants in the infringement.

Finally, in order to be consistent with the existing class action regime in France, article L. 462-7 of the Commercial Code now provides that the limitation period for civil actions is interrupted by “*any act related to the investigation, the finding and the sanction of infringements*” by the French Competition Authority, any other EU national competition authority or the European Commission.

Promoting access to evidence

General principle

The new Article L. 483-1 of the Commercial Code recalls that the disclosure and access to documents are governed by the applicable provisions of the Code of Civil Procedure.¹³

The first major difference from the previous rules is the possibility of requesting disclosure of “*categories of evidence*.” Previously, the requested documents had to be specifically identified, or at least likely to be precisely identified, in order to prevent “fishing expeditions” that could happen when disclosing a large number of documents.

However, a new Article R. 483-1 introduced a safeguard that provides that “*the category of documents [...] shall be identified, as precisely and as closely as possible, by reference to common features of its constitutive elements such as the nature, object of the documents or the time during which they were drawn up or their content.*” The courts, therefore, may exercise a measure of discretion to the extent of such category and the proportionality of such request, perhaps creating a sort of French *discovery*.

Special regime for access to the Authority’s file

Article L. 483-4 of the Commercial Code specifies that the judge’s request to the Authority, the Ministry of Economy, the Commission or other national authorities to disclose evidence is auxiliary in nature. The court may therefore exclude situations “*where one of the parties or a third party is reasonably in a position to provide that document.*” The determination of “reasonable” requirement is left to the courts’ discretion.

In addition, the Ordinance restricts access to certain categories of documents¹⁴:

- **Gray list: limited prohibition to disclose** – This list includes documents that cannot be disclosed “*until the relevant proceedings are closed.*” This prohibition is nonetheless not applicable to “*a document which exists independently of the proceedings before a competition authority, whether or not it appears in the file of that authority.*”¹⁵ These documents concern the material prepared, drafted or created by the parties or the authority during the investigations, as well as written submissions or transcripts of oral statements of settlement submissions that have been withdrawn.
- **Black list: absolute prohibition to disclose** – In accordance with Article 6-6 of the Damages Directive, the Ordinance introduces in the Commercial Code an absolute prohibition on disclosure of the “*written statement or the transcription of oral statements*” by leniency applicants and undertakings involved in a settlement procedure before the Authority, the Minister for the Economy, the European Commission or other national competition authorities.¹⁶ The text extends this protection to “*parts of a document drawn up in the course of the investigations and which would include a transcription or literal citation of these statements.*” The transposition thus modifies, only in the case of private actions,¹⁷ the former protection of “*documents drawn up or collected*” from leniency applications. Indeed, these statements include all elements specifically drafted to file the application as well as documents attached such as emails, memos, internal notes, etc.

Notably, apart from disclosure in the context of private damages actions, the prohibition on the disclosure of documents obtained in the course of proceedings before the Authority remains. Failure to comply with this prohibition may lead to criminal sanctions.¹⁸

Sanctions

To ensure the effectiveness of these new provisions, the Decree provides for the imposition of penalties for various breaches relating to the rules on access to evidence. Fines may be imposed “*up to a maximum of € 10,000, without prejudice to damages which would otherwise be claimed.*” The court may also “*draw any consequence of fact or of right against the party from which any of the breaches occurred.*”¹⁹

Improvement of consensual dispute resolution

The Ordinance enhances the use of the settlement procedures to compensate injured parties through a number of new provisions. This discrete way of resolving disputes is particularly interesting for matters of competition law, since it allows for limited (or no) publicity for the undertakings involved. In this respect, other European countries, in particular the United Kingdom and the Netherlands, have also favored consensual settlement in competition damages cases.

First, the new Article L. 481-13 of the Commercial Code amends the rules on joint and several liability in favor of the settling undertaking. Consequently, the injured party cannot ask non-settling co-infringers to compensate them for the harm attributable to the settling co-infringer. In any event, the other co-infringers cannot claim contribution to the settling undertaking. The victim may, however, bring an action against the settling co-infringer if the other co-infringers are unable to pay damages (although this could be excluded by agreement between the settling parties).²⁰

Finally, Article L. 464-2 I, paragraph 3, of the Commercial Code authorizes the Authority to reduce the penalty in public enforcement proceedings if the infringing party has settled with the injured party.

Enhanced protection of business secrets

The new Articles L. 483-2 and 483-3 of the Commercial Code set out several general principles on confidentiality of information exchanged and on the protection of business secrets: (i) the judge may decide to restrict publicity of proceedings; (ii) the judge may limit the communication of evidence, and (iii) any person with access to protected information is bound by an obligation of confidentiality.

Similarly, the Decree introduces, in Articles R. 483-2 to 483-10 of the Commercial Code, a procedure to apply for the protection of business secrets that is similar to the procedure before the Authority. Thus, the party or third party seeking protection of business secrets must provide the judge with “*a non-confidential version of the exhibit and the reasons which [...] confers on [each information or document] the character of a business secret.*”²¹ The judge will determine how the documents can be communicated, based on whether they wholly or partly contain business secrets, or whether they contain business secrets that are necessary to resolve the dispute.

Parties can bring a suspensive appeal before the first President of the Court of Appeal only against decisions ordering the disclosure of documents. Recently, such proceedings have also been introduced regarding the General Rapporteur of the Authority’s decisions on business secrets.²² This appeal must be brought within 10 days of the notification of the decision, the first President having one month to issue a decision.

Conclusion

While parties injured by anti-competitive practices may welcome the implementation of the Damages Directive into French law which greatly facilitates their actions for damages incurred, undertakings should carefully examine the new provisions to assess the financial consequences of violating competition law both from a public enforcement and private enforcement standpoint. The newly transposed private enforcement regime is expected to enhance France's attractiveness as a forum for seeking damages – the future will tell if it achieves its objective.

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1 *Ordonnance n° 2017-303 of 9 mars 2017 on damages actions for infringements of competition law* and its implementing Decree n° 2017-305 of 9 mars 2017.

2 Articles 101 and 102 du TFEU and articles L. 420-1 and L. 420-2 paragraph 1 of the Commercial Code.

3 Article L. 420-2 paragraph 2 of the Commercial Code.

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- 4 Article L. 420-2-1 of the Commercial Code.
 - 5 Article L. 420-2-2 of the Commercial Code.
 - 6 Article L. 420-5 of the Commercial Code.
 - 7 Article 12-I paragraph 1 of the Ordinance.
 - 8 Article 527 of the Civil Procedure Code.
 - 9 The presumption is not applicable to decisions issued by other competition authorities or competent appeal courts of other Member States, although they may constitute *prima facie* evidence of the infringement.
 - 10 Articles L. 481-4 to L. 481-6 of the Commercial Code.
 - 11 Recital 12 of the Damages Directive.
 - 12 *"In all instances, a damages judgement includes payment of interest at the statutory rate even in the absence of a claim for it or of a specific provision in the judgment. Unless otherwise provided by law, such interest accrues from the pronouncing of the judgment unless the judge rules otherwise."*, article 1231-7 of the Civil Code.
 - 13 See Articles 11, 132 to 142 and 145 of the Civil Procedure Code.
 - 14 Articles L. 483-5 to L. 483-11 and R. 483-11 to R. 483-13 of the Commercial Code.
 - 15 Article L. 483-9 of the Commercial Code.
 - 16 Article L. 483-5 of the Commercial Code.
 - 17 Article L. 462-3 paragraph 2 of the Commercial Code.
 - 18 Article L. 463-6 and L. 483-10 of the Commercial Code.
 - 19 Article R. 483-14 of the commercial Code.
 - 20 Article L. 481-13 paragraph 2 of the Commercial Code.
 - 21 Article R. 483-2 of the Commercial Code.
 - 22 Article 96 of Law n° 2016-1547 of 18 November 2016.