COMPETITION LAW – NEWS

Claims for compensation - Focus on actions founded on competition law

The Paris Court of Appeal recently published twelve sets of guidelines about compensation for economic losses on its web site.

These guidelines, which were drawn up by a group of experts (attorneys, judges, academics and accountant), are designed to provide practitioners with an operational tool to effectively assess the appropriate compensation for economic losses.

The first seven sets of guidelines cover the general principles of assessment (economic methods, determination of the causal link, the loss of opportunity, the loss of time, etc.); others lay down principles concerning the compensation of damage caused by specific causal events, such as acts of unfair competition, abrupt and unjustified termination of an established commercial relationship, the termination of a sales agency agreement or anticompetitive practices [1].

The last two sets of guidelines, which concern actions for compensation of losses caused by anticompetitive practices (File no. 11a) and the assessment of the resulting damages (File no. 11b) complete the legal regime recently instituted by France's statutory instrument and decree of 9 March 2017 and by the government circular dated 23 March 2017, concerning actions for damages owing to anticompetitive practices.

The common aim of these provisions is to facilitate the compensation of harm or losses incurred by the victims (competitors and consumers) owing to anticompetitive practices already established and punished by the authorities.

Previously, such actions for compensation were relatively rare and any claims for compensation that were brought were often disproportionate relative to the fine initially meted out by the authorities.

For instance, after the French competition authority fined the telecoms operator Orange 350 million euros for abuse of a dominant position[2], SFR sued Orange before the Commercial Court of Paris, claiming compensation for a loss that it estimated at 2.4 billion euros; Verizon and BT Group then in turn claimed 215 million and 150 million euros, respectively.

The new legal regime therefore aims to establish a fair balance between encouraging actions for compensation, preserving the effectiveness of public actions and protecting business secrecy.

To sum it up, it is now easier for victims of anticompetitive practices to take action, thanks to:

A set of three presumptions framing the conditions for establishing liability:

• A presumption that wrongdoing was committed occured: it is assumed that an anticompetitive practice has been irrefutably established, once it has been witnessed and attributed to the guilty company by the Competition Authority or by the appropriate court (Article L. 481-2 of France's Commercial Code).

• A presumption that harm was caused: collusion among competitors is presumed to cause losses (Article L. 481-7 of France's Commercial Code). In this respect, the notion of anticompetitive damage is given a wide interpretation: it may involve a loss, an additional cost, a loss of earnings, a loss of opportunity or moral prejudice (Article L. 481-3 of France's Commercial Code).

• A presumption that the additional cost resulting from the anticompetitive practice was not passed on: the direct or indirect buyer of the goods or services affected by the practices is presumed to not have passed on the additional cost to its direct contract partners, unless the person that engaged in the practice can adduce evidence to the contrary, a provision that overturns prior case law (Article L. 481-4 of France's Commercial Code).

1. Statutory Instrument no. 2017-303 of 9 March 2017 and Decree no. 2017-305 of 9 March 2017 concerning actions for damages arising from anticompetitive practices, which transpose European Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The abovementioned Statutory Instrument and Decree were completed by a presentation circular published on 23 March 2017, which is accompanied by 14 informational and educational files.

2. Decision 15-D-20 of the French Competition Authority dated 17 December 2015 concerning practices in the electronic communications sector.

A mean of access to the evidence that might sustain such actions:

• The possibility for the victim to request disclosure or production of "categories of documents", subject to the request being framed as narrowly and precisely as possible, by reference to common and suitable characteristics such as the nature, the purpose, the time of the drafting or the content of the documents, to prevent any attempt at industrial espionage (Articles L. 483-1 and R. 483-1 of France's Commercial Code).

• A relaxation of the rules of business secrecy for the documents contained in the case file of the Competition Authority: the party that invokes protection under the principle of business secrecy in response to a request for the disclosure or production of documents, must provide to the court the confidential version of the documents involved, a proposed non-confidential version, a summary of the document and a brief stating the grounds of the alleged confidentiality (Articles L. 483-2 and R. 483-2 of France's Commercial Code). Under this rule (which can turn out to be particularly onerous in case of a request for disclosure of entire categories of documents), the courts must rule in chambers on whether to order disclosure of all or part of the documents involved, of their confidential version or of their summary.

However, any self-incriminating documents drawn up by a company as part of a process of clemency, settlement or no-contest plea to the charges, are covered by an absolute prohibition from disclosure during the legal proceedings, failing which they are deemed inadmissible (Article L. 483-5 of France's Commercial Code).

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Although the demonstration of the prejudice arising from anticompetitive practices is henceforth made easier, the complainant is responsible for assessing the extent of its loss.

The courts, for their part, may request assistance from the Competition Authority for guidance on assessing such losses (Article R. 481-1 of France's Commercial Code).

However, the Competition Authority does not have to comply with such requests and given that it is usually reluctant in its own decisions to assess the prejudice caused, one wonders to what extent it would be prepared to provide assistance to the courts, other than providing them with methodological advice.

The Paris Court of Appeal's use of the guidelines and data sheets appended to the abovementioned circular will therefore be very useful for any enterprise that is a victim of anticompetitive practices, just like other more traditional tools such as the European Commission's guide on quantifying damage arising from anticompetitive practices published in 2013[3].

3. Practical guide quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, which lays down various methods for assessing losses, such as comparative methods, methods founded on costs, financial methods, simulation models, etc.

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