FRANCE

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I Introduction

To this date, there have been few reported cases of claimants bringing actions for damages directly before French courts, in case of infringement of EC competition rules prohibiting anti-competitive practices. Often, claimants prefer to lodge a claim first with the competition authorities in order for the alleged behaviour to be proven and declared unlawful, and then, go to courts in order to be awarded damages on the basis of the decision of the competition authority. Another reason why there have been few reported cases may be that claimants might reach a settlement before the case is heard by the judge.

French competition law distinguishes between two different types of practices : anti-competitive practices ("pratiques anticoncurrentielles": Article L. 420-1 to Article L. 420-5 of the French Commercial Code[1], equivalent to Article 81 and 82 EC), and restrictive practices ("pratiques restrictives": Article L. 442-1 et seq. Com. Code for which no textual equivalent exists in EC law). There are no fundamental distinctions in France between the actions for damages for breach of EC competition law and actions for damages for breach of the two types of practices defined in national law.

The French jurisdictional system is divided between l'ordre judiciaire (civil courts lato sensu encompass civil and commercial courts, as well as criminal courts) and l'ordre administratif (administrative courts). Any of these courts may apply competition law[2] either when the breach of competition law is the object of the main action ("action à titre principal") or is invoked as a secondary matter ("action à titre incident").

In spite of the diversity of the courts that may theoretically enforce competition law, the general principle is that actions for damages for breach of competition law rely on the same legal basis, i.e. the French general regime of torts, regardless whether EC or national competition law is concerned.

Therefore, the report will, to a large extent, describe and explain the general rules of French tort law, whether those be substantive or procedural. It will be mainly focused on the procedures that are usually used for such actions, i.e. the procedures before commercial and civil courts, and will only mention some particularities of the procedures before administrative and criminal courts.

II Actions for damages - status quo

A What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

1. General considerations

Actions for damages for breach of EC competition law are based on the general provisions applicable to all actions for damages. These provisions are not specific to competition law.

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1 Hereinafter "Com. Code".
2 Unless specified otherwise, "competition law" refers to both EC and national competition law.

Similarly, they apply equally to breaches of EC and national competition law.

The statutory basis for actions for damages is the general regime of torts law, i.e. Article 1382[3] *et seq*. of the French Civil Code (hereafter "Civ. Code")[4].

The statutory basis for all actions for damages in contractual claims is Article 1147[5] *et seq*. Civ. Code. This Article is not specific to competition law related claims[6].

2. One specific provision in national competition law

There is one particular provision, Article L. 442-6 of the French Commercial Code (hereafter "Com. Code"), that provides ground for an action for damages on its own, separately from Article 1382 Civ. Code. This provision can be seen as an application of the general regime to particular behaviours (discriminatory practices and abusive termination of trade negotiations).

However, the regime laid down in this provision is somewhat specific. Where behaviour is in breach of this article, the action for damages may be brought by the victim but also by the Public Prosecutor ("*Ministère Public*"), the French Minister of Economic Affairs and the President of the French Competition Council ("*Conseil de la Concurrence*").

This provision does not relate to anti-competitive practices (i.e. Article 81 or 82 and their French equivalent) but is specific to restrictive practices in national competition law.

3. The particular situation of criminal proceedings

When behaviour constitutes a criminal offence ("*infraction*"), the person responsible may be fined and/or imprisoned. During the same procedure, a victim of this offence, acting as a *"partie civile*", may obtain damages.

Following a reform of French competition law in 1986, most of the criminal offences in competition matters were abolished. Since then, breach of national competition law is mainly a non-criminal issue. However, one provision still remains. Under Article L. 420-6 Com. Code a maximum fine of 75 000 EUR and / or 4 year imprisonment can be imposed on a natural person for fraudulent participation in an illicit restrictive agreement or in an abuse of dominant position prohibited by Articles L. 420-1 and L. 420-2 Com. Code (the national equivalent of Articles 81 and 82 EC).

This provision only refers to Articles L. 420-1 and L. 420-2 Com. Code but not to EC competition law. The question whether such criminal action may be brought for violation of EC competition law has been discussed. However, no case deciding this issue has yet been reported, and the principle of strict interpretation of criminal law may lead to the opposite conclusion.

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3 This Article states that any act of a person, which causes damage to another, obliges the person by whose fault it occurred, to compensate it.

4 Cour de Cassation (hereafter "Cass."), chambre commerciale (hereinafter "Com".), 1 March 1982, Syndicat des expéditeurs et exportateurs / Société d'intérêt collectif Sipefel, Bull., IV-n°76.

5 This Article states that a party to a contract shall be ordered to pay damages either by reason of the non-performance of his contractual obligations, or by reason of delay in performing them, whenever he does not prove that the non-performance is due to an external cause which may not be ascribed to him and provided that there is no bad faith on his part. However, it has to be noted that in a contractual claim where the contract is null, the legal basis for an action for damages is Article 1382 Civ. Code. See for example Cass. Civ. 18 December 1972.

6 It has to be noted that in the case of a contract which is in breach of competition law, the contract is null in principle. Therefore, any claim for damages from one party to this contract against the other party, would be based not on contractual liability, but on torts. Only when the contract is not null can contractual damages be awarded.

B Which courts are competent to hear an action for damages?

(i) Which courts are competent?

1. Civil and commercial courts

Both civil and commercial courts are competent to hear claims for damages for breaches of EC as well as national competition law.

There have been plans to restrict the number of courts competent to hear cases related to anti-competitive practices (Articles 81 and 82 EC and their French equivalents). In this regard, Article L. 420-7 Com. Code which states, in its 2001 version, that the only civil and commercial courts competent to hear cases where Articles L. 420-1 to Article L. 420-5 Com. Code are invoked, will be listed in a decree. However, this decree has not been adopted yet. Even if not specified in Article L. 420-5 Com. Code, it seems likely that this reform is not limited to national competition law and would also apply to cases where Articles 81 and 82 EC are invoked.

Another possible solution would be to restrict the number of Courts of Appeal competent to hear these cases when the judgment of a civil or a commercial court is appealed.

Furthermore, it has to be noted that very specific issues must be referred to other courts and cannot be decided upon by the civil and commercial courts. This is the case for the annulment of an administrative act (exclusive competence of the administrative courts) and the statement that a criminal offence has been committed (exclusive competence of the criminal courts).

- Commercial courts ("*Tribunaux de commerce*")

  The commercial courts are the French courts that have jurisdiction over litigation between traders ("*commerçants*") in the course of their business, and over any litigation concerning commercial acts *("actes de commerce*"). A non-professional claimant can choose to bring an action against a professional before either the civil or the commercial court.

  As actions for breach of competition law are usually brought by undertakings for damages suffered in commercial matters, commercial courts are the most likely to hear such actions.

  Judges with the commercial courts are non-professional elected judges who do not necessarily have a specific knowledge of competition law.

  There have been ongoing plans to reform the commercial courts and to bring professional judges into these courts alongside the non-professional ones. However, this reform has not been passed yet.

  On appeal of a judgment by a commercial court, the commercial division of the Court of Appeal ("*Cour d'Appel*") hears the case. It is composed only of professional judges. Further appeal to the Supreme court ("*Cour de Cassation*") is possible, but only on legal issues as opposed to factual issues.

- Civil courts ("*Tribunal de Grande Instance*" *and* "*Tribunal d'Instance*")

  The civil courts are normally competent to hear actions in tort and contractual matters, and especially actions for damages for breach of competition law. However, as mentioned above, the vast majority of

these actions are brought by professionals against other professionals and therefore, brought before the commercial courts.

Nevertheless, the civil courts are the only competent courts where the defendant is not a professional, or where the claimant is not a professional and decides not to bring its action before the commercial court.

When the value of the claim is not in excess of 7.600 EUR, the competent civil court is the *Tribunal d'Instance*. When the value of the claim exceeds 7.600 EUR or can not be determined, the competent civil court is the *Tribunal de Grande Instance*.

On appeal of a decision from a civil court, the civil section of the Court of Appeal is competent. The Court of Appeal as well as the civil courts are only composed of professional judges.

2. Administrative courts ("*tribunaux administratifs*")[7]

Since the French Administrative Supreme Court (the "*Conseil d'Etat*") has integrated competition rules, including EC rules, into the rules of reference[8] (the "*Bloc de légalité*")[9], the administrative courts must apply these provisions, especially when exercising their exclusive jurisdiction to annul delegated legislation or administrative contracts. However, administrative courts do not have the obligation to apply all the rules contained in the "*Bloc de légalité*" ex officio, but only if the parties invoke them[10].

Accordingly, when delegated legislation or any act of a person acting with prerogatives of public authorities ("*prérogatives de puissance publique*") is taken in breach of competition rules, the administrative courts may annul the act or contract, and award damages[11].

One such action was brought by EDA against Aéroports de Paris, a public company, before the administrative court. EDA asked the court to annul a decision taken by Aéroport de Paris in violation of the national competition rules[12].

Most relevant to this study is the competence of administrative courts to hear any action relating to public procurement. Where, in a public tender, two competing undertakings have agreed on their respective offers, the contracting authority may bring an action for damages for breach of competition law, in order to compensate the cost resulting from the artificially high price paid due to the cartel[13].

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7 The main principles in administrative proceedings are the following: written procedure, contradictory procedure and important role played by the judge in preliminary investigations (contrary to civil proceedings, where a wider scope is left to the initiative of the parties). In principle, representation by a lawyer is obligatory, for the claimant as well as the defendant. Administrative proceedings are normally cheaper than civil proceedings (excluding legal fees, which are approximately the same). In administrative proceedings, there is no serving of writ as in civil proceedings, but an application ("*requête*") is made before the judge. It is the judge who runs the hearings ("*débats*").

8 Conseil d'Etat (hereafter "CE"), 8 November 1996, FFSA, Europe, (1996), comm. n° 468; CE, Sect. 3 November 1997, Sté Million et Marais, RFDA 1997, p. 777.

9 The "*Bloc de légalité*" is the set of rules which includes all the provisions (constitutional, legislative, regulatory provisions, as well as European community law provisions) which delegated legislation or administrative contracts have to comply with, and on the basis of which an administrative court may annul such delegated legislation or contracts.

10 Only the "*moyens d'ordre public* " (public policy arguments) have to be applied ex officio by the administrative courts (such as : lack of jurisdiction of the court, contradiction between an administrative decision and a court decision, etc.). The violation of legal provisions regarded as being of public policy is not as such a "moyen d'ordre public".

11 See for example Paris Court of Appeal, 2nd July 2002, Syndicat National des Producteurs Indépendants d'Electricité Thermique.

12 See Case law summary at the end of this report.

13 It may happen that an undertaking which offer has not been retained due to concerted practices between competing undertakings, obtains damages from the administrative body organizing the tender. See for example a case where the administrative body, which was not responsible for the concerted practices, was considered to have committed a fault in the attribution of the tender : Bastia Administrative Tribunal, 6 February 2003, SARL Autocars Mariani / Département de la Haute Corse.

Some of the first actions to be brought in such situation were brought by the *Société Nationale des Chemins de Fer Français* (SNCF). It brought 39 actions relating to practices that had taken place between 1989 and 1991. Three of these actions led to the SNCF / Dumez TP *et al*. Case, the SNCF / Bouygues case, and the SNCF / SOGEA case[14]. The legal basis invoked was the wilful misrepresentation ("*dol*") in the formation of the contract, which is one application of Article 1382 Civ. Code[15].

In that case, however, the French competition authority *("le Conseil de la Concurrence*") had previously sanctioned the undertakings concerned and this decision was the basis of the claim.

The number of actions of this type may well increase in the future. One could see several reasons for such increase. In particular, the integration of competition law into the rules of reference by the French Administrative Supreme Court is recent (1996). And, since then, the reference to principles of competition law in public rules and public procurements is more and more frequent. Furthermore, in the event of a positive outcome (i.e. success for the claimant) in the near future, of the first actions of this type brought to courts (especially in public procurements), the development of similar actions may well be encouraged.

Appeals of decisions from administrative courts of first instance are brought before Administrative Courts of Appeal also composed of professional judges, but who not necessarily have great experience of competition law.

It has to be noted that administrative courts have exclusive jurisdiction to annul an administrative act. These courts must be referred the question of the validity of an administrative act when this question is raised in a case heard by a civil or a commercial court16.

3. Criminal courts ("*tribunaux correctionnels*")

Criminal courts, and the Court of Appeals when a decision of the lower criminal court is appealed, are composed of professional judges.

Criminal courts are competent to award damages for breach of Article L. 420-6 Com. Code which refers to Article L. 420-1 and L. 420-2 Com. Code, when the victim of this specific offence acts in the criminal proceeding as a "*partie civile*".

As the role of these courts in the awarding of damages to victims of breach of competition law is very limited, it will not be a focus of the present study.

4. Arbitration proceedings

Claims for damages may also be brought in the framework of arbitration proceedings.

In the case *Mors / Labinal*[17], the Paris Court of Appeal ruled that an arbitrator, while not able to impose injunctions or fines, may however decide upon the civil consequences of the violation of EC and national competition law.

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14 Paris Administrative Tribunal, 15 December 1998, Société nationale des chemins de fer français (SNCF) v. Dumez TP, *et al*.; Paris Administrative Court of Appeal, 22 April 2004, SNCF v. Bouygues *et al*. on appeal of Paris Administrative Tribunal, 17 December 1998; Paris Administrative Court of Appeal, 22 April 2004, SNCF v. Sté SOGEA *et al*, on appeal of Paris Administrative Tribunal, 15 December 1998.

15 Damages were not directly claimed for competition law breach, but for wilful misrepresentation. The reason may be that this claim was brought before an administrative court. And, at the time of the claim, the case law integrating competition rules into the "bloc de légalité" was very recent, and therefore less well known that wilful misrepresentation rules.

16 This applies to a lesser extent to criminal courts.

17 Paris Court of Appeal, 19 May 1993, Europe (1993) n°300.

Therefore, the arbitrator may award damages to the victim of a breach of competition law.

Arbitration proceedings are of particular interest as arbitration clauses are common between professionals. Therefore, litigation over the implementation of a contract, when competition law-related, may often escape the jurisdiction of the usual courts.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

There are no specialised courts for bringing such actions.

C Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?

Similar rules apply to commercial, civil and administrative courts.

Limitations. In order to bring an action, the claimant has to justify *locus standi* (an interest in the case and the right to sue).

The claimant's interest in the case must be personal, existing, real and legitimate[18] in order for the claimant to have the right to sue.

There are no specific limitations to the standing of legal persons as long as the law or their by-laws provide them with legal personality and allow them to bring actions before the courts.

Standing of persons from other jurisdictions. There are no specific limitations to the standing of legal or non-national natural persons.

Non national natural claimants have standing under the same conditions as nationals. Non national legal persons have in principle standing provided that they enjoy legal personality under the law of the country in which they are incorporated[19].

Non-national claimants must have an address in France, when bringing an action in front of the French courts. This address may be the address of their lawyer.

Connecting factors. The plaintiff must bring its action before the territorially competent jurisdiction. The following rules apply in order to determine which French courts are competent.

As regards establishing that French courts have jurisdiction at all in international conflicts of jurisdictions and when EC Regulation 44/2001 does not apply, the principle is that the majority of the internal rules of conflicts (see below) may be applied for international conflicts of jurisdictions. However, several specific rules may be applied :

- Article 15 Civ. Code provides that French courts may always have jurisdiction when the defendant is French, even in cases involving non French plaintiffs for foreign obligations (foreign contract or fault committed abroad).
- Article 14 Civ. Code provides that French courts may always have jurisdiction when the plaintiff is French in cases involving foreign obligations (foreign contract

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18 Article 31 of the New Code of Civil Procedure ("*Nouveau Code de Procédure Civile*", hereafter "NCPC"). This article only refers to legitimacy but the courts also require the interest to be real ("*positif et concret*" : TGI Le Mans, 4 March 1984), and existing ("*né et actuel*" : Cass. Soc., 19 June 1985). See Vincent., J., Guinchard, S., Procédure civile, Dalloz, 2003 at §*102 et. Seq.*

19 Paris Court of Appeals, 30 April 1997, M. Menjucq, Bull. Joly – Août-Septembre 1997 p. 780.

or fault committed abroad), even when the defendant (the other party to the contract or the person responsible for the fault) is not a French national.

Within France, the principle is that the competent court is the one of the place where the defendant is established, i.e. the place of residence for a natural person, and the registered office for a legal person ("*siège social*"). However, case law has also allowed actions before courts having a branch of a company (as opposed to the place of the registered office) located in their territorial jurisdiction. This only applies when this branch may represent the company and is responsible for the practice at stake[20]. Some other conflict of jurisdictions rules may also find application[21].

In tort actions, the plaintiff may also bring the action before the court of the place where the anti-competitive practice has taken place or where the damage has been suffered[22].

In contractual claims, the court of the place of execution of the main obligation of the contract also has jurisdiction to hear the case[23].

The same rules apply for commercial courts[24], with the noticeable exception that jurisdiction clauses are licit and very common in commercial matters.

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Under French law, there is no equivalent to class actions as they exist in the United States. However, under certain circumstances, it is possible for certain associations to institute proceedings, to represent either several individual interests or a collective interest. In any case, associations need an explicit mandate to act for their members. It seems that these actions may oscillate between representative actions and public interest litigation.

Actions by an association, either in the individual interest of its members (action in joint representation or "*action en représentation conjointe*"[25]), or for the protection of the collective interest it represents[26], are available. However, these associations must respect very strict conditions to be able to bring actions[27]. Furthermore, in the case of "*action en représentation conjointe*" the association may represent the interests of its individual members only if they have given the association an explicit mandate to represent their interests. It has to be noted that the association can not publicly ask for mandates in the press. Therefore, the use of these actions is limited. To our knowledge, these actions have not been used in damages actions for breach of competition law[28].

As regards administrative courts, the Administrative Supreme Court (the "*Conseil d'Etat*") has admitted that associations may bring actions before such courts either to defend their own interests or to defend the collective interest they represent[29]. Unlike in other proceedings, these associations do not need to be "authorised".

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20 This theory is called "*jurisprudence des gares principales*", which can also be applied in international conflicts of jurisdiction, see for example Cass. Com. 18 June 1958.

21 For example : the court in the jurisdiction of which a real estate property is located, when the case relates to this property; the court in the jurisdiction of which a defendant is established, even when other defendants in the same case are not established within the jurisdiction of this court; more generally when the defendant accepts to be sued in a court lacking territorial jurisdiction. These rules may be of application in international conflicts of jurisdictions.

22 Article 46 NCPC.

23 Article 46 NCPC.

24 Articles 42 to 48 NCPC.

25 Article L. 422-1 Consumer Code.

26 Articles L. 421-1 and L. 421-7 Consumer Code.

27 These associations must be duly "authorised (*agréées*)" by the public authorities. And, in order to be duly authorised an association must be considered representative, which means that it must have been formed for at least one year, it must exercise an effective and public activity for the interest of the consumers and it must have a sufficient number of members (10.000 members for national associations).

28 This could be explained by the requirement that an association must be duly authorised (which is fulfilled by only a limited number of associations) and by the fact that these actions are aiming at the protection of consumer interests, whereas competition cases for damages are mainly exercised by competitors.

29 See for example, CE 28 December 1906, *syndicat des patrons-coiffeurs de Limoges*.

Furthermore, an action more similar to what is defined as public interest litigation action exists[30], whereby the public prosecutor (*Procureur de la République*), the Minister for Economic Affairs or the chairman of the Competition Council can bring an action for damages on behalf of individuals. However, this action is only open where damages arise from a restrictive practice[31], and not from an anti-competitive practice.

D What are the procedural and substantive conditions to obtain damages?

In order to be awarded damages, the plaintiffs need to establish a fault, damage, and causation, in tort actions as well as in contractual claims. The breach of a legal provision (e.g. a European or national competition law provision) is considered to be a fault. Nevertheless, behaviours other that the breach of a legal provision may also be considered a fault.

(i) What forms of compensation are available?

Even if somehow less satisfactory than other forms of compensation, the plaintiff often obtains compensation of a financial nature. However, the plaintiff may obtain other forms of compensation (restitution, i.e. "*réparation en nature*").

In contractual claims, the principle is that failure to perform a duty to act or a duty not to act ("*obligation de faire*" and "*obligation de ne pas faire*") should result in the award of damages[32] whereas the failure to perform other kind of duties ("*obligation de donner*") should be compensated with restitution.

In order to receive compensation in tort cases, the claimant must have suffered an injury that is direct and certain ("*préjudice direct et certain*"). Future injuries may be taken into account as long as they are certain. These conditions are generally met by the victim of a breach of competition rules seeking damages. However, a parent company may not be deemed to have suffered a direct injury if, before bringing the suit, the subsidiary concerned by the anti-competitive behaviour is sold to another undertaking[33]. In contractual claims, the damage suffered needs not only be direct and certain, but must also be foreseeable.

As long as it is direct and certain, any type of damage can be compensated : material, moral, loss of amenities, loss of a chance[34], loss of profits, etc. Concerning loss of a chance, the result that could have been obtained by the victim had the chance not been lost would in principle not be awarded in its entirety since what is lost is a chance to obtain a certain result, and not the result itself. The more likely the result was (i.e. the higher the probability of the chance was), the greater the amount awarded by the judge would be. This is assessed by the judge. For example, in Mors / Labinal, one of the damages suffered was the loss of a chance to access other markets. It was therefore necessary to calculate what the probability was that Mors would have entered these markets had the anti-competitive practices not occurred.

1. Financial compensation ("*réparation par équivalent*")

Where an injury is suffered due to the breach of competition law, the most common way to compensate it is to award the victim a financial compensation. Therefore, most compensations are of a financial nature and are usually seen by the judges as the easiest way to compensate an injury.

An award of damages aims at compensating the entire injury suffered by

30 Article L. 442-6 Com. Code

31 Article L. 442-1 *et seq*. Com. Code for which no textual equivalent exists in EC law : discriminatory conditions of sales, abuse of purchase power in order to obtain undue or disproportionate commercial advantages, etc.

32 Article 1142 Civ. Code.

33 Cass. Com, 30 November 1976.

34 See for example Versailles Court of Appeal, 11 September 1997, SA BMW France v. SARL Rotative Typo Offset Imprimeries, BRDA 98-1, p. 14.

the plaintiff. Hence the evaluation of this exact injury suffered is critical. There are no punitive nor exemplary damages under French law.

2. Restitution and non financial compensation ("*réparation en nature*")

One purpose of tort law is to allow the victim to benefit from compensation that would not only be of a financial nature, but would rather put the victim back to the situation in which it was prior to the breach of competition law ("*statu quo ante*").

In this regard, French judges have significant power. Firstly, the claimant may obtain an injunction addressed to the defendant ordering him to cease an anti-competitive practice. Injunctions may be obtained in emergency proceedings ("*procédure de référés*"). In Mors/Labinal, the Court of Appeal ordered Labinal to cease its anti-competitive practices. This injunction was accompanied by a daily fine for non-compliance[35].

Secondly, a judge may annul a contract that breaches competition law.

Thirdly, a judge may order the judgment to be either published in newspapers or quoted in the annual report of the undertaking concerned. In the UGAP / CAMIF case[36], CAMIF had asked the Court of Appeal to order publication of the judgment in several French newspapers and periodicals. However, this request was rejected by the Court of Appeal.

The possibility to obtain publication of the judgment is quite widely available and usually takes place in relation to breach of rights by the media (defamation, infringement of privacy rights). This remedy is also very often used in cases of unfair competition ("*concurrence déloyale*") or breach of IPR. The grant of such a remedy seems to be less common in cases of breach of competition law.

In certain areas (such as unfair competition), publication of the judgment is based on a text. However, publication can be granted by the judge, even in the absence of a legal text, as a consequence of an action for damages[37]. The judge must however ensure that the remedy he is granting is proportionate to the breach. When the commercial or professional reputation of the claimant has been infringed, publication will allow for the damage to cease in the future.

(ii) Other forms of civil liability (e.g. disqualification of directors)?

There is no other form of civil liability available and related to this type of action.

However, directors may be dismissed as a result of their management when they have led to the violation of the law by the undertaking (e.g. competition law). If the chief executive officer and the chairman of French companies may be dismissed without justification, a fair reason ("*juste motif*") is necessary to dismiss the executive directors ("*directeurs généraux*") of French *Sociétés Anonymes* and managers of French *Société à Responsabilité Limitée*. The violation of competition law would constitute a fair reason in this regards.

Furthermore, shareholders[38] of a undertaking sanctioned for illicit conducts (e.g. anti-competitive practices) could bring a specific action before the court (the "*ut singuli*" action)[39]. This action is designed to allow the shareholders of an undertaking to act on behalf of the undertaking when the directors have failed to do so, in order to obtain compensation for a damage suffered by the undertaking.

35 See also Paris Court of Appeal, 1st February 1995, SARL Parfumerie Jerbo v. SNC Estée Lauder, RJDA 5/95 n°560

36 See the case law summary at the end of this report.

37 Cass 5 December 1989

38 The shareholders must represent a certain share of the capital of the undertaking in order to bring such action.

39 Articles L. 225-252 and L. 223-22 Com. Code; and Article 1843-5 Civ. Code.

This action can be brought by the shareholders against the directors of the undertaking. The damages obtained are to be awarded to the undertaking itself and not to the shareholders.

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

To succeed in an action under Article 1382 *et seq*. Civ. Code, three elements have to be proven : a fault, damage, and a causal link between the fault and the damage. This section will focus on fault.

The rule is the same for contractual claims.

1. The fault

There is no definition of the notion of fault under French law.

Any breach of the law constitutes a fault under 1382 Civ. Code. Therefore, it is sufficient that the victim of an anti-competitive behaviour prove that French or EC competition law has been breached. In that case, consideration of negligence, intent and standard of care is not relevant in principle[40].

When a given practice has been sanctioned by the European Commission or the French Competition Council, proof of the infringement, and thus of the fault, is already made[41] although it should be noted that neither decisions from the European Commission nor the French Competition Council bind national courts[42]. This is one reason why many victims of anti-competitive practices first lodge a complaint before the competition authorities and, on the basis of a decision sanctioning the practice, go before the courts to ask for damages.

The judge may also consider that "unreasonable behaviour" constitutes a fault. As a consequence, in the absence of breach of competition law, for example when all the conditions required to establish a breach of Article 81 EC are not met, the victim of "unreasonable behaviour" may still theoretically prove that this behaviour constitutes a fault.

Finally, negligence can constitute a fault as well and give rise to actions for damages.

In contractual claims, the nature of the fault that has to be proven depends on the nature of the contractual obligation that was not performed.

Contractual obligations may be classified in two categories : the "*obligations de moyen*" which encompass any obligation by which a party is bound to act in a certain way by all possible means, and the "*obligations de résultat*" by which the party is bound to achieve a certain result. As regards to the former type of obligations, fault is established when the plaintiff proves that the defendant has not used all means in order to perform its obligation. Regarding the latter type of obligations, the mere fact that the result agreed in the contract is not achieved is sufficient to establish a fault. In this case, fault is therefore easier to establish.

Negligence may also consider to constitute a fault in contractual claims.

2. The intent

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40 The only exception would be when the proof of negligence, intent, or breach of a duty of care, is necessary in order to determine whether the law has been breached.

41 See for example, the Peugeot / Eco system case, Paris Commercial Tribunal, 22 October 1996.

42 However, and according to EC law, when national courts rule on agreements, decisions or practices on which the Commission has already taken a decision, these courts cannot take decisions running counter to the decision adopted by the Commission.

Proof of intent is not required under French tort law.

Therefore, the only intent that the claimant would have to prove would be the particular intent required as a constitutive element of a statutory offence.

One could also refer to Article L. 420-6 Com. Code, which establishes that fraudulent participation in an illegal restrictive agreement or in an abuse of a dominant position constitutes a criminal offence. As any serious criminal offence (namely "*délits*"), intent is required in order to hold the author of a certain behaviour criminally liable.

3. The appreciation of the fault

Appreciation of the fault by the judge in tort law, and therefore in competition matters as well, is neither entirely subjective nor entirely objective.

In order to establish whether certain behaviour constitutes a fault, the judge assesses the behaviour with reference to what a person exercising average care and diligence ("*bon père de famille*") – objective part of a test- would have done in the same situation - subjective part of the test. The actual abilities of the person whose behaviour is under consideration, are not to be taken into account by the judge.

As regards professional undertakings, the degree of care required is generally greater than for a non professional as the objective behavioural standards are not the same as those of the average man.

The rule is the same in contractual claims.

E Rules of evidence

(a) *General*

(i) Burden of proof and identity of the party on which it rests

1. General

As a general principle of law, the burden of proof lies with the person making an allegation. Therefore, when an action is based on a fault, for example alleged anti-competitive practices, the claimant must prove the fault, i.e. the reality of these practices.

It has to be noted that the existence of a damage does not automatically imply the existence of a fault.

As already mentioned, the burden of proof is on the claimant to show infringement, damage and causation. Nevertheless, and even if the defendant does not theoretically bear the burden of proof, the defendant will not be held liable if he can prove that one of the three conditions of Article 1382 is not met. The person that does not bear the burden of proof (the defendant) is given the benefit of any doubts as to the significance of any piece of evidence.

The judge may consider, even in the absence of one decisive evidence, that an allegation is presumed to be true taking into account several elements or pieces of evidence provided by the claimant[43]. Such a presumption would thus shift the burden of proof to the other party. The law also

43 Article 1352 Civ. Code. For example, the absence of any complaint from the owner of a bank account after reception of his account statements, as regards transactions that occurred on his account, may presume the reality of these transactions. See Cass. Com. 13 May 1997.

institutes legal presumptions that automatically shift the burden of proof[44]. In such case, it is to the other party to prove, when possible, that a presumed fact is not established. Nevertheless, none of these presumptions seem to be of direct relevance to damage actions for breach of competition law[45].

Refusal to produce documents may be taken into account by the judge who is sovereign in the evaluation of evidence[i]. No application of this principle to EC competition law related cases seem to have been reported. In general, the refusal of a party to produce a document will not, in itself, lead the judge to the conclusion that this document exists, and contains decisive evidence supporting the other party's arguments. However, in addition to other piece of evidence or presumptions, such a refusal may be decisive.

2. Actions for breach of competition law

The French Supreme Court ("*Cour de Cassation*") generally applies the principles of civil procedure regarding evidence and burden of proof to competition law cases.

However, there appears to be an exception to this rule as regards franchise contracts. For many years, the Supreme Court reversed the burden of proof by requiring producers and manufacturers to prove the lawfulness of franchise and distribution contracts.

Although, following criticism, the position of the Supreme Court has changed on this point as regards distribution contracts, it continues to follow this line as regards franchise contracts. [46]

Thus, for franchise contracts, it is markedly easier for a plaintiff to establish illegality (as the burden of legality falls on the defendant), than to establish illegality in other cases of breach of competition law.

(ii) Standard of proof

In contractual matters, the claimant must prove, depending on the obligation that was not performed properly, either that a certain result has not been reached ("*obligation de résultat*"), or that the defendant has not comply with his obligation to adopt a certain conduct by all means ("*obligation de moyen*").

As regards the infringement in tort claims, the claimant must prove a fault i.e. either a breach of the law, or the fact that the defendant's behaviour was not that of a person exercising average care and diligence in the same situation *("bon père de famille*").

There is no definition of this notion, and the judges adopt a case-by-case approach. The absence of a textual definition allows more flexibility in the appreciation of the behaviour of a particular person or of a professional undertaking by the judge.

Furthermore, in actions for damages, the standard of proof "beyond reasonable doubt" does not exist. The only criteria is that the evidence presented by the parties must convince the judge ("*emporter la conviction du juge*"). This is a general principle of French law with no specific legal basis[47]. As an example, in Mors/Labinal, the judgment mentioned that the expert's opinion had convinced the judge ("*emporter la conviction*") as to the elements of the damage that was suffered by Mors. In practice, "*emporter la conviction du juge*" means that the parties need to place the judge in the situation where he does not need any

44 Article 1350 Civ. Code *et seq*.
45 Legal presumptions may either be rebuttable or not rebuttable (e.g. Article 1384-5° Civ. Code : masters and employers are presumed responsible for the damage caused by their servants or employees in the functions for which they have been employed).
46 Cass. Com., 10 October 2000, Sté Catimini / Sté Cofotex, Les Petites Affiches, 20 April 2001, n° 79, p.5.
47 J-L., Aubert, Introduction au droit, 9th editions, Armand Colin, p. 233 et seq.

additional facts to be proven by the parties, in order for him to be able to decide a case in a certain way.

In any event, the applicable principle is the one of free evaluation of evidence by the judge[48]. In practice, this means that the judge evaluates the respective importance of the different pieces of evidence at his disposal according to his own conscience[49].

(iii) Limitations concerning form of evidence

There are a number of rules concerning admissible forms of evidence[50], and a distinction is drawn in French law between legal acts ("*actes juridiques*") and legal facts ("*faits juridiques*"). The general principle for legal facts, regardless of whether the case concerns commercial or civil matters, is that any form of evidence is admissible as long as it is not obtained in an illegal manner.

The general principle regarding legal acts is that there is a limitation on the admissible forms of evidence[51] and a hierarchy between the different types of evidence. The list of admissible evidence is wide, and includes "presumptions". Furthermore, this principle knows many exceptions.

Legal acts must be proven by documentary evidence in civil matters (between two non-traders, or where the defendant is a non-trader). This rule only applies to the parties to this act. Therefore, where the litigation relates to the execution of a contract and opposes the parties to a contract, the principle is that the contract must be proven by documentary evidence[52]. However, in commercial matters, which is the most frequent situation concerning breach of competition law, this rule does not apply.

Generally, documentary evidence carries more weight than other forms of evidence. This is especially true with official or notarised documentary evidence. Such evidence shift the burden of proof to the other party regarding the facts contained in the document, as these facts are presumed to be established[53].

The judge enjoys wide powers of investigation. In particular, the judge may call any person as a witness or order various measures[54]. A witness may not refuse to testify except if he has a legitimate interest not to[55]. The legitimacy of the interest not to testify is assessed by the judge. Professional privilege (e.g. lawyer, doctor, priest) is considered to be a legitimate reason to refuse to testify. Similarly, Article 206 NCPC also provides that parents or persons with direct family relationships with one party or his spouse may also refuse to testify[56].

However, the judge can never order any additional investigation simply because the party bearing the burden of proof has not presented any evidence.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis:

Pre-trial, there is a possibility for the victim of a certain practice who can justify of a legitimate reason, to request a judge to protect or establish the proof of a specific fact when the solution of a future claim will depend on this specific fact[57].

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48 This is a general principle, deriving from Article 12 NCPC but with no specific textual legal basis.
49 For example, a judge may consider the testimony of a certain witness to be more convincing that an inconsistent testimony of another witness.
50 Articles 1315 *et seq*. Civ. Code.
51 These are documentary evidence, oral evidence, parties statements, direct witnesses (for the fact they can personally confirm) and presumptions.
52 Article 1341 Civ. Code states that this rules applies to contract valued at 800 EUR or more. Below this amount, any form of evidence is admissible.
53 Articles 1319 and 1320 Civ. Code.
54 Articles 143 *et seq*. NCPC.
55 Article 206 NCPC.
56 There exists other specific textual provisions stating limitations for witnesses, such as diplomatic agents, or persons incapable of testifying (Article 205 NCPC).
57 Article 145 NCPC.

During a trial, even if in principle, the plaintiff bears the burden of proof and therefore has to produce all necessary documents backing its allegations, the court still enjoys wide powers to investigate a case itself : order the disclosure of any type of documents[58] from the parties, third parties, or public bodies, call witnesses[59], hear consultants[60], appoint experts, make personal verifications[61]. These powers are not limited to the part of the national territory covered by the territorial jurisdiction of the court, though these powers do not extend beyond France.

Any piece of evidence regularly obtained can be produced before a judge, even if it has been obtained abroad. Therefore, it should be possible to produce "foreign discovery" if regularly obtained.

It has to be noted that when requesting the judge to order (to the other party or to third parties) the production of a document, it is not required for the party to name the exact document he is asking for, but must at least specify what kind of document he wants to be produced.

Such disclosure can be ordered on the application of one of the parties, or ex officio by the judge himself. The judge has a discretionary power to decide whether to issue such an order[62]. As stated previously, any type of document can be ordered to be produced.

1. Defendants

Where a party to the litigation, potentially the defendant, is withholding an item of evidence, the judge may, at the request of another party, order him by injunction to produce this item[63]. The party concerned may then refuse to comply only where he has a legitimate interest to do so[64]. As explained below, the legitimacy of the interest is assessed by the judge, and business secrets are only considered to be a legitimate reason in very limited circumstances.

A refusal to facilitate the establishment of the truth by the court may be sanctioned by a judge, and may give rise to the possibility of awarding damages[65], except where the party has a legitimate interest for refusing to comply.

2. Third parties

The judge may order third parties to produce documents[66]. The third parties must comply, whether they are legal or natural persons, unless they have a legitimate reason not to do so. The legitimacy of the reason is assessed by the judge himself.

In this regard, professional privilege is considered by case law as constituting a legitimate reason. It is for the judge to assess whether there is a professional privilege justifying the refusal to produce the document. The "professional privilege" reason is only admitted in a limited number of cases. Documents that affect the interests of a third person can be refused to be produced. A lawyer ("*avocat*") can refuse to produce documents that are part of a case he is handling for one of his clients. Similarly, a bank can refuse to produce the bank accounts

58 For example internal documents, accounting documents, contracts, etc.).
59 Article 204 to 221 NCPC.
60 Articles 249 to 262 NCPC.
61 Articles 179 to 183 NCPC.
62 See for example Cass. Civ 1, 4th December 1973
63 Articles 11 al. 2 NCPC and 142 NCPC.
64 Artcile 142 NCPC and its interpretation by case law.
65 Article 10 Civ. Code.
66 Article 11 al. 2 NCPC, articles 138 to 141 NCPC.

belonging to its clients[67]. Therefore, documents affecting the interests of a third person can legitimately not be produced.

The "Business secrets" reason will only be considered legitimate in very limited circumstances, such as where the document contains trade secrets or information protected by patents, or information on the commercial structure of a competitor. But less sensitive documents such as accounting documents will not be protected by business secrets.

Theoretically, a failure to disclose could be fined, but in practice, this happens rarely. However, an order to disclose can be accompanied by periodic penalty payments, and in practice, this is quite common. There are no imprisonment sentences for a failure to disclose.

Similarly, the judge may call witnesses, ex officio or at the request of a party. Witnesses cannot, in principle, refuse to testify. When a witness does not comply with the request of the judge, without legitimate reason, a fine of 15 to 1.500 EUR may be imposed[68].

3. Competition authorities (national, foreign, Commission)

Article L. 462-3 Com. Code states that the French Competition Council may be consulted by the courts regarding the anti-competitive practices defined in articles L. 420-1, L. 420-2 and L. 420-5 Com. Code. Such a consultation suspends the effect of the statute of limitations[69], but the courts are under no obligation to follow the opinion of the Competition Council.

The text only refers to articles L. 420-1, L. 420-2 and L. 420-5 (the French equivalent of Articles 81 and 82 EC). No opinion has been asked about the application of EC competition law[70]. However, it seems that the Competition Council may render its opinion on the basis of EC competition law as well[71].

Over the past 13 years, more than 30 opinions have been requested from the French Competition Council. These opinions can relate to any issue, whether they be factual or legal. When consulted by a court, the Competition Council can conduct an investigation in order to render an opinion. These investigative powers allow the Competition Council to give detailed opinions[72].

For instance, the Council has been asked in the past whether a particular behaviour constituted an abuse of dominant position[73]. It has also been consulted on the definition of relevant markets[74], and about undertakings' market shares[75].

Opinions of the Council may be published at the end of the procedure (Article L. 462-3 Com. Code). The publication is therefore not obligatory. When published, the publication may occur a long time after the opinion has been rendered, since it cannot occur before the national court has rendered its judgment.

Given the great experience of the Council in competition law, its level of

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67 Cass. Com. 13 June 1995, Bull. Civ. IV. N° 172. D 1995. IR 166
68 Article 207 NCPC.
69 Article L. 462-3 Com. Code.
70 Momège, C., and Idot, L*., Application of Articles 81 and 82 EC by the French Ordinary Courts: A Procedural Perspective* (Hart, 2003) European Competition Law Annual Report 2001*: Effective Private Enforcement of EC Antitrust Law* at 233-252.
71 Godet, R., *La participation des autorités administratives indépendantes au règlement des litiges juridictionnels de droit commun: l'exemple des autorités de marché* (2002), RFDA at 957-967.
72 See for example UGAP / CAMIF case. Note supra.
73 UGAP / CAMIF case.
74 CE, 26 March 1999.
75 UGAP / CAMIF case. Note supra.

expertise on economic issues, and the fact that prior to giving its opinion, the Council may investigate the case, its opinions are undoubtedly very useful to the courts.

There is a discussion on whether the Council is obliged to give an opinion when asked by a court. However, according to the wording of the legal provision, it does not seem that the Council may refuse. In any case, such refusal is highly unlikely.

It is the judge himself who decides whether to ask the Council's opinion. However, the parties may, in their written submissions, request the judge to ask for such opinion. The decision of the judge to ask for the Council's opinion is discretionary and depends on the complexity of the case. Such requests are granted only on complex cases. It has to be noted that neither party has to pay for the Council's opinion nor the costs it incurred.

Similarly, according to Article L. 470-5 Com. Code, the Minister for Economic Affairs or his representative may, before civil or criminal courts, give its written opinion and develop it orally during the hearing, in order to ensure compliance with the provisions of national competition law.

(b) *Proving the infringement*

(i) Is expert evidence admissible?

Expert evidence is admissible before French courts. Firstly, litigants may have recourse to their own experts, in order to help them prove the anti-competitive practice, the causation or the damage, or, on the contrary, to rebut these elements. Such an expert only assists a party and does not have a specific weight in the procedure.

Secondly, the court itself may appoint an independent expert and ask him to write a report[76] on particular factual issues[77] identified by the court. The expert is called upon to express himself, as someone having technical knowledge in a specific field, with a view to helping the court in its decision. The report may equally relate to the proof of the fault, the causation or the damage, depending on what needs to be proven. Such an expert does play an important role in a proceeding and are usually followed by the courts. However, the expert does not substitute its assessment of the case to the one of the court, but rather provides the court with factual information and several hypothesis of compensation, in order for the court to decide on the case[78].

An expert can gather his own evidence. However, an expert cannot be appointed only to make up for the deficiency in the production of evidence of the party bearing the burden of proof. An expertise on a particular fact may be ordered only if the party lacks the means to prove that particular fact[79].

The court may appoint experts from official lists established by the Supreme Court or the Court of Appeals, but may also choose experts from outside those lists[80].

Some might see the intervention of an expert as not very helpful when it is meant to prove secret anti-competitive practices, since it will be necessary in such cases to conduct a thorough investigation to find elements of proof[81]. Nevertheless, experts may be of great importance in the evaluation of the

76 Articles 263 to 284-1 NCPC.
77 Article 232 NCPC
78 Nussenbaum, M., *Le rôle de l'expert économique*, in Revue de jurisprudence commerciale, II, 46e année, Novembre 2002, numéro spécial Colloque de la Baule
79 Article 146 NCPC.
80 Article 1 of the law 29 June 1971, relating to judiciary experts.
81 Emmanuel, J., *L'expertise commerciale* (2000) 13 Dalloz 209.

damage, especially in competition law cases[82]. It has to be noted that the evidence of expert witnesses generally carry more weight if they are appointed by the Court rather than by the parties, given the possible lack of independence of an expert appointed by a party.

It has to be noted that experts lack the necessary powers to obtain information or documents from the parties that are needed to conduct his investigations. The only way for the expert to by-pass the opposition of a party is to go before the court and ask for a court injunction[83].

(ii) To what extent, if any, is cross-examination permissible?

There is no cross-examination as such in French proceedings. However, compliance with the general and mandatory adversarial principle *("principe de la contradiction")* may lead to the same result. The adversarial principle must be respected at all times, and this principle binds the parties as well as the judge[84].

During the procedure, each party has to communicate its arguments and evidence to the other in due time, and witnesses are heard in the presence of all the parties[85]. Parties may request that the judge asks certain questions to the witness, which comes very close to cross-examination[86]. The general principle is that the parties must be present when the witnesses are heard. The parties cannot ask any questions directly to the witness.

The judge convenes the witnesses, either ex officio, or at the request of one of the parties.

Similarly, when an expert is appointed by the court, he must ensure that the adversarial principle is respected when conducting his investigations. Therefore he must invite the parties and their representatives to be present in the different operations he undertakes.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

A decision by the French Competition Council does not bind a court in France. Therefore, the risk of contradiction between a decision by the Council and a decision of a court exists. However, given the Council's level of expertise in competition matters and its wide investigative powers, courts are likely to consider a decision of the Council as critical evidence of the existence of an infringement. The same might possibly be said of decisions from national competition authorities from other EU Member States. To our knowledge there is no reported court judgments mentioning decisions of national competition authorities from other member states other than factually.

The decision of a competition authority may, to a great extent, help prove the fault, by demonstrating that competition law has been breached, whereas it may only help occasionally to establish the damage, and the causal link.

In the Eco system / Peugeot case, the commercial court stated that the interim measures taken by the Commission established that there was a link between the practices (fault) and the damage.

As previously mentioned, French courts may ask the opinion of the French Competition Council. Such an opinion is not binding for the court, but is likely to be considered as critical[87].

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82 For example in the Mors / Labinal case (supra), as in many other cases, an expert was appointed by the court in order to evaluate the damage suffered by the claimant.
83 Article 275 NCPC.
84 Article 16 NCPC.
85 Article 208 NCPC.
86 Article 214 NCPC.
87 Although see UGAP / CAMIF for an example of where the Competition Council's opinion was not followed.

(c) *Proving damage*

(i) Are there any specific rules for evidence of damage?

One of the conditions of application of article 1382 Civ. Code is that damage must be proven. The courts are always very careful to ensure that this condition is fulfilled. There is no specific provision regarding the evidence necessary to prove the damage except that the damage be direct and certain[88], as well as foreseeable in contractual claims. Only the damage suffered, or to be suffered as long as it is certain, may be compensated and the evaluation often requires the appointment of experts. Therefore, although future damage may be compensated, such as loss of profits and loss of future earnings, likely or potential damage may not[89]..

The "direct and certain" test may be difficult to satisfy for the loss of future profits. In such case, the court must assess the probability of the lost profits. The court may consider that only a chance of future profits has been lost, or that future profits as such have been lost due to the breach of competition law. When the probability of receiving future profits was high, the compensation of the lost chance would tend to reach the same amount as if the damage awarded was the exact amount of the lost profits themselves. It is likely that in most cases it is rather the loss of a high chance of future profits that will be compensated rather than the loss of future profits as such. Nevertheless, it can not be excluded that loss of future profits may satisfy the "direct and certain" test, and there is no legal provision excluding losses of future profits to be compensated.

It is often[90] the case in competition law cases that a partial judgment is rendered where the existence of the damage can be determined but not its extent. Such a judgment may state, in the same decision, that a damage exists, and appoint an expert with the task to determine its exact extent[91]. The judge may appoint an expert only if further investigations are necessary for the judge to decide upon a point of law (fault, causation, the assessment of the damage…). The expert may be appointed ex officio by the judge, or at the request of the parties.

(d) *Proving causation*

(i) Which level of causation must be proven: direct or indirect?

French courts are not always consistent on the level of causation that is required, and the solution may depend on the area of law concerned. Two theories may be applied, either the theory of the determining factor ("*causalité adéquate*" whereby a causal link only exists between the damage and the determining factor among all the factors that caused the damage) or the theory of the equivalence of conditions ("*équivalence des conditions*", whereby a causal link exists between the damage and any of all the circumstances that led to the damage).

In competition law, the courts seem to favour the first theory[92], and to require the proof of a direct link between the fault and the damage[93]. Therefore, it can be said that in France, the case law requires direct causation to be proven. Nevertheless, this does not exclude the possibility of claims of damages by

88 The action brought by the *Département de la Charente Maritime*, which had suffered from the same anti-competitive practices than SNCF, were dismissed by the court. The reason was that it was not established that the price obtained by the *Département de la Charente Maritime* was lower than the market price. In particular, the price paid by the undertaking had matched the evaluation the *Département* had made before launching the tender.

89 See also below point F (ii)2

90 Amongst the damages cases for breach of competition law we know of (see summary of cases at the end of this report), a partial judgment has been given in four of these cases, an expert being appointed.

91 The legal basis for giving a partial judgment in which an expert is appointed to evaluate the damage is article 482 NCPC.

92 Vogel, L., Blanchot, A., Fasquelle, D., Gallot, J*., Le juge civil, le juge commercial et le droit de la concurrence* (1999) Atelier de la concurrence.

93 Fasquelle, D., *La réparation des dommages causés par les pratiques anticoncurrentielles* (1998) 51 RTD com.

indirect purchasers, since indirect purchasers may have suffered a damage directly linked to the initial fault.

In the Eco system / Peugeot case, the Paris Commercial Court awarded damages to Eco system because the fault of Peugeot had had a "direct incidence" on the evolution of Eco system's activities.

Similarly, in the Mors / Labinal case, Mors had asked for the compensation of its injury suffered on adjacent markets. The court refused to compensate this injury because the link between the anti-competitive practices and the fact that Mors had been prevented from entering adjacent markets was not established[94].

In the case Concurrence / Sony[95], the Paris Court of Appeal was asked to award damages to the victim of anti-competitive practices that had been previously sanctioned by the French Competition Council. The Court analysed the causal link between each practice and the alleged damage, in order to disregard the practices for which no causal link was established. Only the practices of Sony that had had a direct effect on the turnover of the undertaking Concurrence were taken into account.

In particular, Sony had been sanctioned by the Competition Council for discriminatory and unfair conditions of sale. Rebates had been granted to three types of customers : to eight distributors (not including to the undertaking Concurrence), and to a public purchase centre. The Court considered that the grant of rebates to the public purchase centre did not directly affect the undertaking Concurrence's sales because the two companies were addressing different type of clients[96].

It has to be noted that the lower courts, in practice, are not always very rigorous in their assessment of causation as compared to their assessment of fault and damage. Even if they always mention causation as being one condition for the award of damages, it may be observed that their motivation on this issue is not always very substantiated and the reader may have the impression that the proof of the damage sometimes presumes, in practice, the causal link with the fault[97]. This obviously facilitates the role of the claimant. However, this is done without any legal basis and is not systematic. This tendency is not specific to competition cases and can generally be observed in lower courts decisions.

F Grounds of justification

(i) Are there grounds of justification?

There are four grounds of justification in French law : act of God ("*force majeure*"), act of a third party ("*fait d'un tiers*"), act of the victim ("*fait de la victime*"), and act of Government ("*fait du prince*").

The "*Force majeure*" refers to an event which is unpredictable, irresistible, and external to the defendant. When such an event has forced the defendant to adopt a behaviour that constituted a fault, and then caused the damage suffered, the defendant may not be held responsible for it.

The intervention of a third party in the occurrence of the damage may influence the

94 The court, following the experts' opinion, considered that there could be many other reasons why Mors could not have entered adjacent markets. In particular, the court stated that there was no precise element leading to the conclusion that the reputation of specialist Mors would have enjoyed had it been awarded the contract at stake, would have been sufficient for Mors to enter the adjacent markets. This case illustrates that identifying the determining factor, and thus proving causation, may be difficult in cases of foreclosure.

95 Paris Court of Appeal, 22 October 1997. The decision from the Court of Appeal has been partially annulled by the Supreme Court on 3 March 2004. However, this partial annulment does not have consequence as regards the study

96 The public purchase center was a distance selling company whereas the undertaking Concurrence was not active in distance selling.

97 Theoretically, one could find difficult to distinguish between the concepts of "direct and certain damage" and "direct causal link".

responsibility for that damage that can be attributed to the defendant. When the third party is considered as having caused part of the damage, the responsibility will be shared between the defendant and the third party in proportion to the degree of fault of each party.

When the victim has committed a fault[98], and when this fault can be considered as having at least partly caused the damage, the liability will be shared between the defendant and the victim, in proportion to the degree of fault of each party. Nevertheless, any fault of the victim not linked to the injury suffered can not be taken into account to limit the damages awarded. When the fault requirement is met because competition law has been breached by the defendant, the claimant's fault would therefore be taken into account when evaluating the damages to be awarded[99]. Finally, it has to be noted that when the fault of the victim constitutes a "*force majeure*" situation for the defendant, the latter would be fully acquitted. This situation seems unlikely in competition cases.

The "act of Government" justification encompasses the situation where the behaviour at stake has been imposed by the Government, for example by passing specific compulsory legislation.

The recent ECJ judgment in the CIF case[100] may have consequences for this ground of justification. In a claim brought before the French Competition Council by the company Towercast against TDF for an alleged abuse of dominant position, the French Competition Council did refer to the CIF judgment[101]. The decision rendered only concerned interim measures asked by Towercast and the case was not decided on the merits to date. A 7 year exclusivity contract had been entered into between Radio France and TDF, for the transmission of Radio France's radio programmes, in application of a 1986 national law granting TDF a monopoly for the transmission of Radio France's radio programmes on FM. Towercast considered that TDF had abused its dominant position on the market of the transmission of public programmes on FM in entering into such a contract. The Council decided that the monopoly of TDF granted by national legislation should not be protected anymore since the entry into force of Directive 2002/77/EC with which the national law was incompatible. As a consequence and as an interim measure, the Council required TDF not to invoke its exclusive rights until the case is decided on the merits. The Council added :
"If the Council was to decide on the merits that TDF had committed anti-competitive practices imposed by national legislation, this undertaking would not be sanctioned for practices having taken place before the day of the final decision, but could be sanctioned if these practices were to take place after this date".

The judgment of the Paris Court of Appeal hearing the appeal confirmed the decision of the Competition Council. The Court of Appeal stated that the Competition Council was obliged not to apply the 1986 national legislation incompatible with EC law, and that the interim measures decided by the Council implied not to apply the exclusivity provision of the contract between TDF and Radio France, during the time of the procedure, were justified.

Additionally, Article 81(3) EC and its French equivalent (Article L. 420-4 Com. Code) may also be seen as constituting grounds of justification.

(ii) Are the 'passing on' defence and 'indirect purchaser' issues taken into account?

1. The passing on defence

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98 For instance when the acceptance of the risks by the victim is considered to be a fault *("théorie de l'acceptation des risques*").

99 In practice, this situation would only appear where an undertaking having breached competition law with other undertakings would itself suffer from a damage due to this breach. For illustration purpose, see Cass. Com. 23rd October 2001, Société Pompes Funèbres De Mémoris / Sté Pompes Funèbres Générales, RJDA, March 2002, n° 243.

100 Case C-198/01, Consorzio Industrie Fiammiferi (CIF)

101 Decision n° 03-MC-03 of 1, December 2003, Towercast / TDF, and on appeal, Paris Court of Appeal 8 January 2004.

The general principle in tort law, which is strictly complied with by the court, is that the injury compensated is the injury actually suffered by the plaintiff.

Therefore, where the claimant could pass on any charges attributed to anti-competitive behaviour to a subsequent purchaser, these overcharges would not be the source of any damage actually suffered by the plaintiff himself[102].

2. Indirect purchaser issue

One of the criteria to be awarded damages is that the injury suffered be direct and certain.

Indirect purchasers may also have suffered a direct injury, where for example, the overcharges attributed to anti-competitive behaviour were passed on to them by the direct purchaser, the increase in price constitutes a direct injury.

However, in this situation, indirect purchasers may experience difficulties in establishing the causal link between an anti-competitive behaviour and the increase in price they suffered.

Published case law concerning damages for breach of competition law is very rare and there are, to our knowledge, no examples of such cases where the passing on defence and the indirect purchaser issue were at stake.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

As mentioned above in the grounds of justification section (F(i)), the responsibility of the victim may be taken into account to limit the damages to be paid, but only to the extent the fault of the victim has a direct causal link with the injury. The liability would be shared in proportion to the respective gravity of each others' fault. In the event the fault of the victim would constitute a "force majeure" situation for the defendant, the latter would be fully acquitted. This situation seems unlikely in competition cases.

When the fault requirement is met due to infringement of competition law, it is difficult to determine the extent to which the defendant's commission of the infringement could be attenuated by the claimant's fault. Nevertheless, it has to be borne in mind that it is not the defendant's fault that would be attenuated but only the extent of the defendant's responsibility and obligation to indemnify a given damage. Since it is established that this damage has been caused by two distinct faults, both of them directly linked to the same damage, the defendant's obligation to indemnify ought to be attenuated.

In accordance with the general principle that only the injury suffered may be compensated for, any benefits to the plaintiff resulting from the infringement would be taken into account to limit the damages to be paid.

There is no general duty to mitigate in France[103], and the failure to mitigate does not, in principle, constitute a fault and would not limit the damages awarded to the victim of the breach of competition law[104].

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102 One could theoretically envisage the case where the plaintiff lost subsequent purchasers because of the increase in its prices caused by passing on. This loss of clients would constitute a direct and certain damage to be compensated.

103 The judgment of the Supreme Court, Civ. 2e. 19 June 2003 ,seems to suggest that the rule is the absence of any obligation for the victim to mitigate. However, the scope of this ruling is debated.

104 Nevertheless, this principle has very limited exceptions in very specific sectors, where a legal provision expressly states that the failure to mitigate constitutes a fault, for example in the insurance sector.

G Damages

(i) Calculation of damages

1. Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

In accordance with the general principle of law applicable to tort law, damages are assessed on the basis of the injury suffered by the plaintiff only, regardless of the profit made by the defendant.

Any type of damage can be compensated as long as the damage is direct and certain : material, moral, loss of amenities, loss of a chance, loss of profits, etc. Concerning loss of a chance, the result that could have been obtained by the victim had the chance not been lost would in principle not be awarded in its entirety since what is lost is a chance to obtain a certain result, and not the result in itself. The more likely the result was (i.e. the higher the probability of the chance was), the greater the amount awarded by the judge would be. This is assessed by the judge.

2. Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

In the assessment of damages there is no limitation under national law relating to the place where the injury was suffered.

3. What economic or other models are used by courts to calculate damage?

Firstly, it must be noted that the damage suffered must be evaluated precisely, and a lump sum price is not satisfactory[105].

There is no single method used consistently for the calculation of damages in such proceedings in France. On the contrary, it can be said that the calculation is made on a case-by-case basis, each expert and each judge applying his own method. For the victim, what really matters is to convince the judge of the reality of the injury.

Secondly, it is worth noting that assessments by experts do have a tangible influence on court's decisions in French proceedings. This is especially the case in competition cases, since judges generally do not have expertise in economics.

Below are examples of case law where the economic approach was described in more detail. These methods cannot be considered as representative of the way damages are evaluated in France. They are provided for illustration purposes only. One conclusion is that there is not much consistency between the method used in the Eco system / Peugeot case (comparison between two consecutive accounting years) and the method used in the Mors / Labinal case (more complex analysis).

Mors / Labinal case (concerning 81 and 82 EC)
In this case, the expert identified the scenario that would have occurred in the absence of the defendant's actions (abuse of dominant position, unfair competition, collusion with a competitor), and especially, in order to evaluate the damage, the profits that would have been earned by the claimant. He also proposed several hypothesis of compensation, each hypothesis varying in the type of damage being compensated in order for the judge to decide on which damage to compensate.

The anti-competitive behaviour of Labinal caused Mors, a competing

105 See Concurrence / Sony case.

company, delays in negotiations and loss of the chance to be awarded other contracts.

Firstly, while evaluating the injury due to delays in negotiations, the expert added all the additional expenses incurred due to the delay that would not have been incurred in the absence of such delay (additional studies, administrative costs, commercial costs).

In particular, for the costs of additional studies, the expert compared, in financial accounting ("*comptabilité générale*"), the difference between the forward budget ("*budget prévisionnel*") and the costs actually incurred. The expert noted that forward budgets are usually complied with in this sector. He could therefore evaluate the injury caused by the delay in negotiations on this basis. The court decided, however, that Mors did not succeed in proving that the entirety of the additional costs were due to Labinal's actions and therefore considered that no causal link was established regarding this specific damage.

Secondly, the anti-competitive practices had prevented Mors from participating in other tenders that it could potentially have won thanks to its good reputation deriving from this contract. This was identified as being the loss of a chance to win other sales on the markets for A 330/340, i.e., loss of future business opportunity, and was compensated. There again, in order to evaluate this injury, the expert tried to identify what would have been the scenario in the absence of the anti-competitive practices. Therefore, he first identified the potential markets and the probability for Mors to enter these markets. He then evaluated Mors customer penetration ("*taux de pénétration*") in these markets. Thanks to these figures, he could then calculate the market share that Mors would have had in the absence of the anti-competitive practices, and thus evaluate the damage.

For its evaluation, the expert also took into account the margins expected in these other potential markets and the impossibility of recovering non-recurring costs ("*frais non récurrents*"). The judge followed the expert's views on the questions that had been asked to him.

Eco system / Peugeot case (Concerning Article 81 EC)
In this case, the plaintiff invoked the loss of clients and therefore losses in operating income ("*résultat d'exploitation*"). The expert drew a comparison between two consecutive accounting years. In 1988/1989, where the influence of the Peugeot's anti-competitive behaviour had little impact, profits of Eco system amounted to 776 778 French Francs. In 1989/1990, where the anti-competitive behaviour had a stronger influence, Eco system losses amounted to 792 675 French Francs.

The judge then added the two figures : 776 788 + 792 675 = 1 569 463 French Francs to evaluate the damage (239 263 EUR).

Such a method is debatable given that it does not take into account the global economic context and the evolution of the company's activities.

4. Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

The traditional solution under French law is that damages are assessed on the date the judge renders a decision. Therefore, the judge must take into consideration the time elapsed between the date on which the damage arose and the date of the decision. This entails taking into account the intervening events between the infringement and the date of the trial in the determination of the compensation to be awarded to the victim[106].

106 Nevertheless, the intervening events may be taken into account only to the extent they do not constitute a separate directly related cause of the damage suffered, such a cause being distinct from the defendant's fault.

5. Are there maximum limits to damages?

There are no maximum limits to damages, as the entire injury should be compensated.

6. Are punitive or exemplary damages available?

Neither punitive nor exemplary damages are available in France.

7. Are fines imposed by competition authorities taken into account when settling damages?

The fines imposed by competition authorities are not taken into account when settling damages.

(ii) Interest

1. Is interest awarded from the date
   - the infringement occurred; or
   - of the judgment?; or
   - the date of a decision by a competition authority?

The date on which interests should start to accrue is a widely debated issue under French law, and one finds various decisions diametrically opposed.

The general principle laid down in the Civil Code is that when the origin of the awarded damages is a contract [107], a demand for payment is required for the interests to run. Interests will then run from this date. However, when such damages are the consequence of a tort, interests run from the date of the judge's decision[108].

However, the judge may decide discretionary that the interests should accrue from another date[109], depending on the facts of the case. For example, the judge may decide that the interests should accrue from the date of the filing of the lawsuit[110].

2. What are the criteria to determine the levels of interest?

For damages caused by a tort, the applicable rate of interest is the statutory rate stipulated by law each year. This rate is usually quite low. For instance, the rate for the year 2003 was 3,29 per cent.

3. Is compound interest included?

Compound interest may be included by the judge in its ruling, on the request of the claimant.

H Timing

(i) What is the time limit in which to institute proceedings?

The general time limit to institute proceedings is ten years from the day of appearance of the injury (either the appearance of an initial injury, or of the increase of a previous injury)[111]. In the event that the appearance of its own injury could not be known by the victim, the ten year period starts from the day the victim is aware of the injury[112]. When the plaintiff is a trader, judges usually

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107 Article 1153 Civ. Code
108 Article 1153-1 Civ. Code
109 Article 1153-1 Civ. Code
110 Cass. Civ. 18 January, 1989.
111 Article 2270-1 Civ. Code and Article L. 110-4 Com. Code.
112 In other words, the legal principle laid down by the Civil Code is that the limitation period starts from the appearance of the damage, but when this appearance was unknown to the victim until a certain date, it is this date that is taken into account.

consider that the ten year period starts from the day the trader could not reasonably ignore the injury, i.e. the date at which the damage ought to have been detected. To this regard, the required level of diligence is substantially higher for traders than for non traders. The time limit to bring civil actions for contractual damages is thirty years.

On this basis, one could ask whether, as regards injury resulting from anti-competitive conduct, the ten year period could be considered to start only from the day of the decision of a competition authority sanctioning the anti-competitive conduct, i.e. the day the existence of a fault, and possibly of a damage, is known.

When the case is related to administrative matters[113], very specific rules apply. The time limit may be significantly shorter, depending on the matter concerned.

The general rule is that when the injury results from the issuance of an administrative act (most often by an administrative body), the time limit to bring an action is two months from the publication of the act. When the injury does not result from an administrative act but from a specific conduct, the general rule is that the claimant must, prior to bringing an action before the courts, ask the author of the act itself to compensate his damage. The action is then directed against the refusal to compensate, and not against the conduct itself. The two months period starts to run on the date of the refusal, either explicit or tacit, from the administration.

There are several exceptions to this rule.

(ii) On average, how long do proceedings take?

It is very difficult to estimate the length of such proceedings as it very much depends on various factors: the complexity of the case, whether an expert has been appointed by the court, and whether the first instance decision is appealed.

Statistics are however available for the length of proceedings in all types of cases (not only actions for damages for breach of competition law), before the French Supreme Court ("*Cour de cassation*"). According to these statistics, the average length of proceedings in any type of case is of 966 days before the Commercial division of this court and of 711 days before the Civil division of the same court.

However, proceedings before certain courts might take longer than before other courts because of the different workload in the various courts in France.

For example, in the Peugeot / Eco system case, the proceedings lasted six years between the European Commission's decision sanctioning the behaviour and the decision of the commercial court, awarding the damages (1.6 million French francs; i.e. 243,918 EUR).

In the Mors / Labinal case, the anti-competitive conduct took place from 1988 to 1991. The judgment at first instance on the substance of the case was rendered in 1991, and this judgment was appealed. In a 1993 judgment, the Court of Appeal appointed an expert, who handed in his report in February 1998. The final judgment deciding on the quantum of damages dated September 1998, i.e nearly ten years after the commencement of the prohibited behaviour. One reason of the length of the procedure in this case was the difficulty for the expert to have access to the relevant piece of evidence in order to be able to conduct his investigations.

In the SNCF / Dumez TP *et al*. case, the practices sanctioned by the French Competition Council in 1995 had taken place in 1990. The action for damages was brought before the administrative court in January 1998. In December of the same year, the administrative court appointed an expert in order to evaluate the injury suffered by the SNCF. It seems that, six years on, the expert's report is not yet

113 It has to be borne in mind that an action before administrative court is not always related to "administrative matters". In the SNCF cases (public procurement matter), the time limit to institute proceedings was ten years, and not the specific period of time applicable to administrative matters.

completed. However, it must be noted that this case is one of the first cases where an action for damages was brought following a cartel in the framework of a public procurement procedure. As in the Mors / Labinal case, one explanation of the length of the procedure in this case was the difficulty for the expert to have access to the relevant piece of evidence.

To illustrate, it is worth noticing that the time period necessary for the Competition Council to give its opinion when it is asked for by the court, may oscillate between 3 and 20 months.

When no expert is appointed, proceedings may take substantially less time, but to our knowledge, there are no statistics available on this point. The reason why the use of an expert can extend the length of proceedings is twofold. Firstly, experts are used in proceedings where liability and quantum are usually split, and therefore, the overall proceedings may take longer. But secondly, and most importantly, expert are used in the most difficult cases i.e. those that are potentially longer to decide upon. The expert therefore has to conduct potentially complex investigations and these investigations may take time. Furthermore, the powers of the experts are limited and the time necessary to complete those investigations depends to a great extent on the co-operation of the parties to the case. When the parties do not co-operate fully, the expert needs to go regularly before the judge in order for the latter to give injunctions to communicate specific documents to the expert. These proceedings are time consuming.

(iii) Is it possible to accelerate proceedings?

The length of the proceedings depends on the complexity of the case, and there is no possibility of accelerating proceedings for complex cases.

However, the plaintiff may request interim measures in emergency procedures (“*procédure de référé*”) from the president of the civil or commercial court. Injunction proceedings take place in prima facie cases.

There are two different types of “*référés*”. The first one[114] requires two conditions to be met : there must be an emergency and there must be no serious contestation of the facts as presented by the plaintiff (“*absence de contestation sérieuse*”) or dispute (“*existence d’un différend*”). The second type of “*référé*”[115] requires the proof of an obviously unlawful act (“*trouble manifestement illicite*”) or imminent injury. Under this second type of “*référé*”, there is no need to prove the emergency, and the existence of a serious objection by the defendant is not an obstacle.

Such proceedings are often used in competition matters, and especially in cases of abuse of a dominant position. Competition law may be the basis for the main action or invoked as a defence.

In such proceedings, the president of the court may order that behaviour amounting to unfair competition cease. He may also award injunctions (to cease, to communicate a given document, to perform a contract, etc.), or interim payment (partial payment in advance by the defendant, of the damages to be awarded), especially where injury results from a fault.

However, in such proceedings the president of the court can not evaluate the exact injury suffered nor award full damages.

Besides the possibility to request interim measures in emergency procedures (“*procédure de référé*”), it is possible to ask for fixed date summons (“*assignation à jour fixe*”) for a judgment on the merits. If there is an emergency, the president of the court can, on request by the claimant, decide to set a day on which the judgment will be given. This allows a judgment on the merits to be rendered quite quickly, but under the condition of emergency.

114 Article 872 NCPC (commercial courts) and Article 808 NCPC (civil courts).
115 Article 873 (1) NCPC (commercial courts) and Article 809 (1) (civil courts).

(iv) How many judges sit in actions for damages cases?

The principle is that in actions for damages, before either commercial or civil courts, three judges sit to hear the case.

In administrative courts, a collegial court would hear the case. The exact number of judges varies according to the complexity of the case, but is often either 3 or 5 (in any event, an odd number of judges would sit). Exceptionally, small tort cases (less than 8 000 EUR) can be heard by one judge.

(v) How transparent is the procedure?

Thanks to the adversarial principle and many other general principles of procedure, it can be said that the procedures before the French courts are transparent. For example, all documents produced in court must be communicated to the other party which has then the opportunity to give its own view. Similarly, the expert, when appointed, has to comply with this adversarial principle when conducting his investigations[116]. Briefs or expert reports are not made public but to the parties.

The most important element is that litigants are supposed to be involved in every important stage of the procedure, and especially when an appointed expert conducts his investigations.

I Costs

(i) Are Court fees paid up front?

In principle, court fees are paid at the end of the procedure. However, when an expert is appointed, the court may determine a certain sum that the claimant has to pay in advance in order for the investigations to be conducted. If the claimant is successful, he may be reimbursed by the defendant. When the expert is appointed on the defendant's request, which happens less often, it is the defendant who has to pay in advance the sum the judge determines. He may be reimbursed if the claimant loses the case.

(ii) Who bears the legal costs?

As a general principle[117], the unsuccessful party is ordered to pay the taxable charges incidental to proceedings listed in Article 695 NCPC ("*les dépens*"), which includes the fees of legal experts appointed by the court. Lawyers fees are not included in taxable charges. Only the part which is regulated is included, which does not represent a significant amount.

However, the judge may order that another party pay the taxable charges incidental to proceedings, either in full or in part.

Furthermore, according to Article 700 NCPC, the judge may order the unsuccessful party to pay a certain amount determined by the judge on the basis of the sums disbursed by the successful party and not included in the taxable charges incidental to proceedings[118]. The judge shall take into consideration the rules of equity and the economic condition of the party ordered to pay. For reasons based on the same considerations, the judge may rule that there is no need for such

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116 This does not mean that the appointment of an expert by the Court enhances the transparency of court procedure as such, but means that the expert, as does the court, conducts its investigations in a transparent way. Of course, this allows the parties to have their views heard on any step of the expert's investigations.

117 Article 696 NCPC.

118 Taxable charges include all fees that are incidental to proceedings, taxes, government royalties or emoluments levied by the clerk's offices of the courts or by the tax administration, translation fees, indemnities for witnesses, fixed amount disbursements, emolument of public officers, etc. All other fees are not included in taxable charges, such as travel costs, or fees paid to experts appointed by the parties themselves.

order. Lawyers' fees are included in the costs that can be reimbursed on the basis of Article 700 NCPC.

In the course of a procedure, when the court decides to appoint an expert, it determines a certain amount that has to be paid in advance to the expert by the party requesting its intervention. At the end of the expert's intervention, the court determines the amount to be paid to the expert, taking into account the expenses incurred.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

In principle, it is prohibited for lawyers to accept a payment based solely on the outcome of a case (contingency fees)[119]. Therefore, "no win no fee" is not possible in France. However, contingency fees which only come as a complement to usual fees are permitted if the client agrees in writing. According to the French Supreme Court, this does not mean that it is prohibited that the major part of the fees is contingency fees, even if a literal interpretation of the rule could have led to such conclusion. Therefore, there seem to be no obstacle to a very low usual fee plus an important bonus in case of success. This bonus may be expressed as a percentage of damages won. It should be noted that an excessive percentage would however likely be refused by the Courts as being not justified because it would not correspond to the necessary "complementary" nature of contingency fees[120].

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

Please refer to section (ii).

(v) What are the different types of litigation costs?

Litigation implies various costs. Many of them are negligible such as taxes, fees for public officers or the notification of official acts.

However, other costs may have a deterrent effect, such as experts or lawyers fees, especially in actions for damages for breach of competition law, where complex economic issues may have to be considered, notably as regards the evaluation of the injury suffered.

(vi) Are there national rules for taxation of costs?

There are specific rules relating to the taxable charges incidental to proceedings laid down in Articles 695 *et seq*. NCPC.

If the claimant withdraws his claim, he bears the costs of the proceedings[121].

The rule is that the unsuccessful party bears the taxable costs. However, the judge may decide to apportion taxable costs between the parties in a reasoned decision, for example for reasons of equity.

(vii) Is any form of legal aid insurance available?

Legal aid ("*aide juridictionnelle*") is available for every type of proceedings (in administrative, civil, commercial and criminal proceedings)[122]. Since corporations cannot benefit from any legal aid, the rules on legal aid are not of great interest in competition law cases.

To benefit from legal aid, natural persons must be French or EU nationals, or must be a French resident. In order to benefit from the full legal aid, a natural person

119 Article 11.3 of the harmonized internal regulation of French bars (*Règlement intérieur harmonisé des barreaux de France).*
120 No relevant case law may be quoted as published case law on these issues is rare.
121 Article 399 NCPC.
122 Law of 10 July 1991

must have monthly earnings inferior to 788,92 EUR. Partial legal aid is available for natural persons having monthly earnings inferior to 1.183,61 EUR. Legal aid can be asked for before, or during, the proceedings.

There has been a tendency for insurance companies to develop legal assistance contracts [123] ("*garantie d'assurance protection juridique*"). Such legal assistance is contractual, and therefore varies according to each contract. These contracts may benefit individuals as well as legal persons and may cover any disputes or proceedings involving the insured person (as a plaintiff or a defendant). Each legal assistance contract generally sets out a list of the risks insured and / or the risks for which the assistance is excluded[124]. The use of such legal assistance in competition law based claims might be limited considering the fact that these contracts usually set out a maximum guaranteed amount. This amount might reveal not to be sufficient in comparison to the actual costs of proceedings in competition law based damage cases.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

It is not possible to give average costs for such an action as it will depend to a great extent on the length of the procedure, the complexity of the case and the necessity of the intervention of an expert among other factors.

It has to be borne in mind that competition litigation will most often than not be complex and an undertaking will have to invest a lot of resources prior to filing a suit, e.g. to prepare the suit. This can reveal costly (in-house experts, legal fees etc.) and time consuming.

A rough range of estimate of the costs involved in pursuing a claim for 1 million Euro, where there is an easily provable hardcore restriction, would be between 20.000 EUR and 50.000 EUR, of which the biggest part would represent the lawyers fees.

The serving of a writ costs approximately 100 EUR, when there is only one defendant. The registry costs are approximately 100 EUR, and the costs of notifying the pleadings ("*frais de signification pour dépôt des conclusions*") is of 1,90 EUR for each notification.

J General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

The answers given above are not specific to private enforcement of competition rules. However, one aspect of such actions which merits underlining is the complexity of such cases. Experts are very likely to be appointed, which can be time consuming and costly, but they do not always have the full required expertise for a specific competition law case (the required expertise usually covers many different fields). In particular, experts appointed in competition matters are often accountants who therefore have a very specific expertise. It can be observed that the experts appointed by courts frequently require to be assisted in their task by persons having specific and complementary knowledge ("*sapiteurs*").

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

The fact that EC competition rules are regarded as being of public policy[125] is of importance in France. This implies that undertakings cannot agree to avoid the

123 On the basis of Article L. 127-1 Insurance Code

124 For example, legal assistance may be excluded in the case of intentional fault committed by the insured person.

125 Paris Court of Appeal, 9 February 1994, SA Fiat Auto France c/ Sté Carrosserie Corroy.

application of these rules by agreement. A rule regarded as being of public policy invoked by a party prevails over any contractual clause contrary to it. This is a general principle of law.

The question whether the courts have to apply competition rules ex officio is a rather complex and debated issue[126], which is based on an interpretation of Article 12 NCPC.

The courts have to resolve the disputes in accordance with the corresponding legal rules[127]. The general principle is that the parties decide on the facts and the courts decide on the law. The courts must give the exact legal qualifications to the facts that are exposed by the parties, and is not bound by the legal qualification given by the parties *("pouvoir de requalification du juge*"). This entails the possibility for the judge to apply ex officio purely legal provisions that have not been invoked by the parties[128].

It has been debated in case law and doctrine whether this is a possibility or an obligation for the court. However, when the considered rules are regarded as being of public policy, there seems to be a consensus on the obligation for the judge to apply these rules ex officio[129]. Accordingly and theoretically, French courts would have to apply competition rules ex officio.

Nevertheless, this principle is more difficult to comply with when the application of these rules ex officio by the judge would require a reassessment of the facts as they were disclosed by the parties, or a change of the factual grounds of the claim. The court does not have the power to change the factual grounds of the claim, and would therefore need to ask the litigants to clarify and complete the information in its possession. This would be more difficult before the Supreme Court as this court cannot examine factual arguments, but only decides on legal issues.

(iii) Are there any differences according to whether defendant is a public authority or a natural or legal person?

There are no differences worth mentioning here, and only slight procedural variations according to whether the defendant is a natural or a legal person exist.

Public authorities are generally not treated differently from other defendants. This may however have an influence on the competence of the jurisdiction. For instance, where a plaintiff has suffered damage caused by a public authority exercising prerogatives of a public authority ("*prérogatives de puissance publique*"), the competent court would normally be the administrative court.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

In France, there exists a leniency programme as well as a settlement procedure. Firstly, there is no specific provisions as to interaction between leniency programmes and actions for claims for damages, given that the leniency programme only relates to the proceeding before the French Competition Council and to possible reduction of fines. It has nothing to do with the award of damages for which the Council is not competent.

Furthermore, an application for leniency does not have any consequences on the culpability of the applicant nor on the lawfulness or unlawfulness of a particular behaviour, but only on the level of the fine imposed. Therefore a court may base an award of damages to a victim on a decision of the French Competition sanctioning a particular behaviour of an undertaking even if no fine was imposed to this undertaking in accordance with a leniency programme. As stated above, the

126 The solutions explained below are debated. Furthermore, the situation seems somehow, and surprisingly, different before the administrative courts. See section II.B (I) 2.

127 Article 12§1 NCPC.

128 When the application does not require any new assessment of the facts, i.e. when the court bases its decision on a purely legal ground.

129 See Vincent., J., Guinchard, S., Procédure civile, Dalloz, 2003 at §*584 et. Seq*

level of fine imposed does not influence the evaluation of the damages by the courts.

Then, a decision from the French Competition Council relating to certain behaviours does not bind a court when hearing an action for damages based on the very same behaviour.

Secondly, a settlement procedure ("*transaction*") is available under French law for proceedings before the French Competition Council. This procedure allows an undertaking under investigation to settle with the French authority in order to obtain a reduction in fines. However, even when a settlement is reached, the French Competition Council adopts a formal decision stating that the law has been breached.

(v) Are there differences from region to region <u>within</u> the Member State as regards damages actions for breach of national or EC competition rules?

There are not many differences worth mentioning from region to region in France as regards damages actions for breach of national or EC competition rules.

It may however be noted that the composition of commercial courts in the Alsace Moselle regions differs from the other commercial courts in France. In these regions, commercial courts are not composed only of non-professional judges as in other commercial courts, but are composed of one professional judge and two non-professional, elected judges.

It may also be noted that all courts in France that could hear action for breach of competition rules do not have the same experience in competition law. For instance, many jurisdiction clauses in commercial contracts aim at referring cases to the Paris commercial court. Furthermore, the Paris Court of Appeal, which is *inter alia* competent to hear appeals against decisions from the French Competition Council, has developed a specific expertise in these matters. This means that there is a discrepancy between the level of expertise in competition matters developed over time by the Paris Court of Appeals and that of courts in other jurisdiction.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

No other major relevant issue is to be mentioned.

However, it could be noted here that as regards non-contractual competition based damages claims, in the situation of conflicts of law, the general rule applicable in France is the rule of *lex Loci delicti commissi*, i.e. the law of the place of the infringement[130]. When the damage and the infringement have taken place in different countries, the solution seems debated, nevertheless, some importance is given to the principle according to which the applicable law should be the law of the country with the closest connection to the case. In specific areas of law, the law of the country where the damage is suffered prevails[131].

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon

To our knowledge, no official statistics of this kind are available. This is to be expected, given the fact that there are few reported cases on actions for damages for violation of EC competition rules. However, we can provide statistics for the cases that were available to us and that were most relevant to the study[132].

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130 Cass. Civ. 25 March 1948, Lautour.

131 For instance in cases involving a breach of the right to privacy. For an example when the damage appeared because of the publication in the press : TGI Paris, 23 June 1976, Yasmina Aga Khan.

132 It has to be borne in mind that this report's focus is actions for damages based on the violation of EC competition rules in extra contractual matters. Therefore, the cases relating to contractual matters based on the violation of national competition rules, even if sometimes mentioned as examples when relevant,

Legal basis	
EC competition law based actions only	**3**[133]
National competition law based actions only	**6**[134]
EC and national competition law based actions	**3**[135]
Award of damages	
Cases where damages were awarded with respect to actions based on EC competition law only	**3/3**
Cases where damages were awarded with respect to actions based on national competition law only	**5/6**[136]
Cases where damages were awarded with respect to actions based on EC and national competition law based actions.	**2/3**[137]
Decision of a competition authority	
Court ruling preceded by a decision of the European Commission	**1**[138]
Court ruling preceded by a decision by the French Competition authority	**4**[139]
Court ruling preceded by an opinion by the French Competition authority	**1**[140]
Court ruling not preceded by any decision of any Competition authority (French or European), nor by any opinion	**6**[141]

have not been further compiled. The number included in the following table therefore only relates to the cases most often referred to in the elaboration of the study.

133 The three cases are : Eco system / Peugeot; Mors / Labinal; Syndicat des expéditeurs et exportateurs / Société d'ntérêt collectif Sipefel.

134 Concurrence SA / Sony; SNCF / Dumez TP *et al.*; SNCF / Bouygues *et al.*; SNCF / Sogea *et al.*; SARL Parfumerie Jerbo / SNC Estée Lauder ; SA BMW France / SARL Rotative Typo Offset Imprimeries.

135 UGAP / CAMIF; Société Catimini / Société Cofotex ; SARL P. Streiff Motorsport / Société Speedy France SAS.

136 In the SNCF / Dumez TP *et al*. and the SNCF / Bouygues *et al.* cases, a decision on the amount of damages to be awarded is nevertheless still awaited, and such decision might still be appealed. In the case SNCF / Sogea *et al.*, damages were not awarded.

137 The claim for damages was dismissed in the decision Société Catimini / Société Cofotex, as well as in the decision SARL P. Streiff Motorsport / Société Speedy France SAS but only as regard EC law, damages being awarded with respect to national competition law. In the case UGAP / CAMIF, damages were awarded.

138 Eco system / Peugeot

139 Concurrence SA / Sony ; SNCF / Dumez TP *et al*.; SNCF / Bouygues *et al.*; SNCF / Sogea *et al*

140 UGAP / CAMIF

141 Mors / Labinal; Syndicat des expéditeurs et exportateurs / Société d'ntérêt collectif Sipefel; Société Catimini / Société Cofotex ; SA BMW France / SARL Rotative Typo Offset Imprimeries ; SARL P. Streiff Motorsport / Société Speedy France SAS ; SARL Parfumerie Jerbo / SNC Estée Lauder

III Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

The obstacles. Only a small number of actions for damages for breach of competition law are brought in France. Some of the reasons for this are outlined below.

The first obstacle that may prevent a victim from bringing an action before a court, rather than before the French Competition Council, are the requirements in terms of evidence. Because the burden of proof rests on the plaintiff, he has the obligation to prove the fault, i.e. the breach of competition law. However, because of the unlawfulness of anti-competitive practices, they are often hidden. Thus, the plaintiff may not have access to the relevant evidence, and therefore may not be able to uncover the existence of alleged anti-competitive behaviour.

Where the plaintiff does have access to the relevant evidence, it may still encounter serious difficulties in proving and in evaluating its damage. To this end, even before bringing an action, an undertaking may consider necessary to mobilise personnel and resources for some time to make a first assessment of the damage suffered, and therefore, to evaluate the advantage of bringing a claim.

Even when the plaintiff believes it has access to sufficient evidence and has a rough estimate of the damage suffered and thus an interest in bringing an action, proceedings in France are long and costly. The main reason for this is that, given the judges' relative lack of expertise in complex damages evaluations, courts often appoint experts.

When appointing an expert, the court has to precisely define the expert's tasks. Such a definition is essential for the expert to efficiently conduct his investigations. The unclearness of the questions asked by the court may render the mission of the expert uneasy. However, the prior determination of the exact questions to be answered by the expert may be uneasy to do. In France, Article 266 NCPC provides the court with the possibility of re-defining in more detail the questions to be answered by the expert, after the first investigations have taken place. However, this procedure seems to be rarely used in competition cases.

The experts themselves do not always have the full expertise required to conduct such analysis, provided that for a competition law case, the required expertise may cover many different fields. Therefore, as an example, certified accountants may need to be assisted by specialists in specific areas (in the evaluation of assets' value, or in specific industrial sectors for example). The experts may also encounter difficulties in accessing the relevant information held by the defendant(s) (financial accounts regarding the period concerned by the practice at stake, for instance). Finally, experts often encounter strong opposition from the parties that retain information or documents needed to conduct investigations. The only way for the expert to be provided with these documents is to go before the courts and ask for injunctions from the judge.

The result of these many obstacles to actions for damages before the courts is that victims do not have many incentives to bring private actions for damages before the courts. Many victims prefer to launch a complaint first before the Competition Council to benefit from its wide investigative powers aimed at proving the unlawfulness of the practice. Then, in a second stage, having obtained the Competition Council's decision sanctioning the practices, it is much less hazardous for them to bring an action for damages, even if the proof of the damage is still necessary and difficult.

The improvements. The elements cited above (burden of proof, access to evidence, length and cost of the proceedings, lack of expertise of the judge,

difficulties encountered by the experts in the collect of the necessary information, lack of incentives for the victim) would require to be improved in order to facilitate private actions for damages.

In order to facilitate the evaluation of the damage, general guidance (e.g. guidelines, informal notice, etc.) could be of use. These guidance could include a description of the economic models available, the type of damages that may be compensated, the identification of the minimum necessary amount of evidence, the type of information needed to evaluate the damage, etc. One possible improvement would be the standardisation of the different methods of calculation.

Such a greater transparency given to the methods used by the experts would allow a greater understanding of these among the judges and the experts themselves. This could also enable potential claimant, prior to any proceeding, to identify with more ease to what extent a certain type of damage may be compensated, or otherwise identify the pieces of evidence that will be necessary for the evaluation of his damage. Therefore, this would help the victim to have a clearer idea what he stands to gain by bringing an action. The systematic publication of the expert analysis could also be envisaged, and the training of judges and experts could equally be a focus.

The powers of the court-appointed experts could be improved in order to allow them to rapidly obtain any document they may need to conduct their investigations, without having to go before the courts and ask for injunctions to deliver. The use of the procedure laid down in Article 266 NCPC should also be encouraged[142].

In order to share the litigation costs and provide assistance to the victims during the proceedings, the development of collective actions may be encouraged in France. This may not necessarily take the form of "class actions", given that the transposition of US-type class actions in France would be in contradiction with general principles of civil law and procedure. However, an improvement of existing collective actions may be possible in this regard.

Today victims resort primarily to the French Competition Council by launching a complaint and expecting the undertaking concerned by the practices to be heavily fined. Victims should be incentivised to bring actions for damages before courts. One solution would be to create the possibility of obtaining punitive damages. Victims would then be awarded directly large sums of money. However, such a solution would be in contradiction with general principles of French law and the legal doctrine seems rather opposed to the introduction of punitive damages in France.

In general terms, procedural amendments (powers and training of experts improved, competition law trainings of the judges, courts specialised in competition law) could improve this type of actions and render them more efficient, and therefore, more often used by the victims of anti-competitive behaviours.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Arbitration proceedings, often used in commercial matters, are confidential and in contrast to court proceedings, they may often end up being quicker and less costly.

If arbitrators may not impose fines, they may decide on damages for breach of competition law, as was held in the Mors / Labinal ruling.

Nevertheless, arbitrators do not enjoy the same investigative powers as judges, powers which might be of great use for discovery in complex economic cases.

Mediation is also available in France on a voluntary basis. Mediation proceedings

142 Nussenbaum, M., *Le rôle de l'expert économique*, in Revue de jurisprudence commerciale, II, 46e année, Novembre 2002, numéro spécial Colloque de la Baule

are more often used in commercial matters than in civil matters. In case a settlement is not reached, then parties may still turn to arbitration or litigation.

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Conseil d'Etat, 26 March 1999, Sté EDA, Dalloz (2000) at 204-208

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V National case law summaries

Sté Catimini v. Sté Cofotex, Cour de Cassation, Commercial Division, 10 October 2000, Les Petites Affiches (2001), at p.5

Facts and legal issues
Catimini, a company manufacturing children's clothes, sold its products through a franchise network, covering certain parts of the territory. In the areas not covered by the franchise network, Catimini sold its products through a network of multi-brand resellers, one of them being COFOTEX. One of the contractual clauses prohibited COFOTEX from selling outside a certain contractual territory. COFOTEX did not comply with this restriction, and Catimini therefore brought an action asking for an injunction ordering COFOTEX to stop sales outside the contractual territory, and asked for damages.

Held
The Paris Court of Appeal held that the territorial restriction was void because Catimini could not justify the need to protect its network. On appeal, the Supreme Court upheld the Court of Appeal's decision. It held that the burden of proving the legality of network (and of the territorial restrictions) rested on Catimini. Since Catimini failed in proving this, the Supreme Court considered that the Court of Appeal was right in deciding that Catimini could not benefit from a clause prohibiting sales outside the contractual territory. Therefore, the award of damages to Catimini was refused.

Sté EDA, Conseil d'Etat, 26 March 1999, Dalloz (2000) at 204-208

Facts and legal issues
Aéroports de Paris (ADP) consulted candidates for the award of a contract for the occupation of the public domain ("*convention d'occupation du domaine public*") for managing car rentals at Orly and Roissy airports. The undertaking EDA had submitted an offer which was rejected by ADP. EDA then brought an action before the administrative court, against ADP. It asked the court to annul the decision of ADP rejecting its offer and the decisions accepting the offers of three other companies. EDA claimed that these decisions were illegal because in breach of article L. 420-2 Com. Code, which prohibits the abuse of a dominant position. The *Conseil d'Etat* had to examine the legality of these administrative acts under article L. 420-2 of the Com. Code.

Held
The *Conseil d'Etat* asked the Competition Council for an opinion under article L. 462-3 Com. Code. The Competition Council was first asked to give its opinion on whether Roissy and Orly airports were two distinct or only one relevant market for the management of car rentals. The Competition Council was also asked to provide the *Conseil d'Etat* with any information of interest for deciding whether the fact that the candidates had to submit an offer for both airports (instead of only one airport) amounted to an abuse of a dominant position. This decision to consult the Competition Council meant that the *Conseil d'Etat* was to review the legality of an administrative act under French competition rules. No opinion by *the Conseil de la concurrence* nor decision by the *Conseil d'Etat* was given following this case, as EDA later withdrew its action[143].

Mors v. Labinal and Westland Aerospace; Cour de Cassation, Commercial Division, 14 February 1995; Paris Court of Appeal, 13 January 1998; Paris Court of Appeal, 19 May 1993 (Revue de l'Arbitrage, 1993, n°4, at 645-663); Paris Commercial Tribunal, 3 June 1992

Facts and legal issues
In July 1988, British Aerospace issued an invitation to tender for the fitting of Airbus A-330 planes with the Tyre Pressure Indication System (hereafter TPIS). In order to participate in this tender and in order to increase their chances against Labinal, a company specialised in these products, the companies Mors and Westland signed a

143 Decision 00-D-04 of the Competition Council, 22 February 2000

preliminary joint venture agreement. This agreement provided that if their tender was accepted, they would sign a final agreement and that any dispute would be settled by arbitration, applying Swiss law. The Westland/Mors group was then informed that their tender had been accepted. However, on 24 January 1991, Labinal was also accepted as a secondary and optional supplier of TPIS. On 19 April 1991, Westland signed a confidential agreement with Labinal. Mors accused Westland of having contracted with Labinal to exclude it from the market. It therefore brought an action for damages against both Labinal and Westland before the Commercial court, claiming that both companies were guilty of unfair competition and abusive conduct. It also claimed that competition law had been breached. The Commercial court first held that, despite the arbitration clause in the agreement between Westland and Mors, it had jurisdiction to examine the claims. It then decided that the agreement between Labinal and Westland was in breach of Article 81(1) EC and therefore illegal. It prohibited Westland and Labinal from implementing the agreement whose object was the elimination of all competition for the supply of TPIS. The Commercial court ordered Westland and Labinal to make an interim payment on the award of damages. Labinal appealed this decision.

Held

The Court of Appeal held that it only had jurisdiction concerning the claim by Mors against Labinal, but not against Westland, because of the existence of an arbitration clause (the dispute between Mors and Westland was to be settled in arbitration proceeding). The court confirmed that Labinal had committed practices contrary to articles 81 and 82 EC, thereby allowing Mors to claim damages under Article 1382 of the Civil Code. In order to assess the damage, the Court of Appeal appointed an expert. Following the expert's conclusions, the Court of Appeal awarded damages amounting to 5,213,756 EUR (34,200,000 French francs) for loss of markets to Mors. In order to evaluate these damages, the Court took into account the lost chance of selling TPIS on the whole potential market of A 330/340, and did not limit its analysis to the part of the market concerned by the offer of Labinal and on which the anti-competitive practices took place. However, no damages were awarded for lost sales on the adjacent markets for other categories of planes. The *Cour de cassation* confirmed the Court of Appeal's decision, (i.e. that Labinal had infringed articles 81 and 82 EC, and had to pay damages to Mors).

Syndicat des expéditeurs et exportateurs v. Société d'intérêt collectif Sipefel, Cour de Cassation, Commercial Division, 1 March 1982. Bull., IV-n°76

Facts and legal issues

A producer of vegetables (SICA) had organised an auction for the sale of its products in the Saint Malo region. The possibility to participate to this auction was limited by several requirements. In order to be able to participate, an undertaking had to be either a member of the SICA, or a member of the "*Syndicat des exportateurs*", and could only purchase the products for its own account and not on behalf of anyone else. One of the members (Mr. L.) entered into an agreement with a non-member, under which Mr. L. undertook to purchase products for the non-member. Mr. L. was then excluded from the auctions, and brought an action for damages under article 81 EC and its French equivalent. The Court of Appeal awarded him damages under Article 1382 Civ. Code for breach of article 81 EC.

Held

The Supreme Court confirmed the Court of Appeal's decision, holding that an action for damages under article 1382 could be brought when EC competition rules, such as article 81(1), had been breached.

UGAP v. SA CAMIF, Paris Court of Appeal, 13 January 1998, JCP G 1998, II-10217, and Paris Court of Appeal 22 October 2001

Facts and legal issues

The Union of Public Purchase Groupings (UGAP) was a public company with which State and local authorities could place orders for the purchase of supplies and services. UGAP had put several references in its catalogue which had the effect of forcing its co-contractors to deal exclusively with the UGAP. CAMIF, a buying co-operative also present

on the market of supplies to public authorities, brought proceedings against UGAP, claiming that it had committed an abuse of its dominant position in breach of Article 82 EC, and article 420-2 Com. Code, as well as a breach of article 81 EC and article 420-1 Com. Code. The Competition Council was consulted by the Court of Appeal, under the procedure defined in article L. 462-3 Com. Code. The Court asked the Competition Council to give its opinion on the definition of the relevant market, the parties' market shares, whether UGAP had a dominant position and, if so, whether it had abused that position. The Competition Council was of the opinion that UGAP and CAMIF were present on several markets, that UGAP had a dominant position on one of these markets, but that it could not be established that it had abused that dominant position.

Held

The Court of Appeal held that there was an abuse of dominant position in breach of both national and EC competition law. The following practices committed by UGAP were held to be abuses of a dominant position:

- the mention in its catalogues exceeding an objective presentation of its services, which could be interpreted as a warning to discourage public buyers to have recourse to open competition or to purchase directly from other suppliers
- annexing to procurements concluded with its usual suppliers a leaflet mentioning rebates that UGAP would give to its own clients, the local authorities, on these same products (this was also held to be in breach of Article 81(1) and the corresponding internal legislation
- mentioning, in the contracts concluded with local authorities, of minimum projected amounts of purchases of products corresponding to an important part of the budget awarded for these same products, and making advance payments which would decrease the corresponding amount of spending, thereby forcing an obligation of exclusive purchase

An expert was appointed to assess the amount of damages to be awarded. Another decision was rendered by the Court of Appeal, after assessment of damages by the expert[144]. The expert, in his assessment, gave a range of damages based on different hypothesis, for the court to retain one of them. First, the expert proposed a calculation based on the hypothesis of contracts made with local authorities in which the minimum projected amounts of purchases would correspond to one third of the budget, and also proposed a calculation based on a second hypothesis where the minimum amount of purchases would correspond to half of the budget. The Court retained the first hypothesis (one third of the budget). In a second step of its analysis, the expert calculated damages due to the advance payments that would decrease the corresponding amount of spending. Five hypothesis were proposed for the calculation, ranging from 60% of advance payment on the projected amounts to exclusivity benefiting UGAP (i.e. 100 %). The court retained the lowest figure (advance payments amounting to 60 % of the projected budget). Thirdly, the expert made a calculation of the damages that would have occurred if purchases of public local schools had been transferred towards regional councils, in regions closed because of the presence of the contested contracts. He then made a calculation in the hypothesis of an absence of such transfers, which the court retained. The Court, on the basis of the elements of the expert's report, awarded total damages of 1538.00 EUR (10,000,000 French francs) to CAMIF.

Concurrence SA v. Sony, Paris Court of Appeal, 22 October 1997

Facts and legal issues

Concurrence was a company specialised in the sale of electronic goods, as well as one of Sony's distributors. Compared to its other distributors, Sony had allegedly imposed unfair and discriminatory conditions of sale on Concurrence. Concurrence lodged a complaint before the Competition Council. The Competition Council decided that Sony was responsible for several practices contrary to article L. 420-1 Com. Code (the French equivalent of article 81(1)). This decision was confirmed by the Court of Appeal. Concurrence then brought an action for damages before the Commercial court, to get compensation for the damage it suffered as a result of these anti-competitive practices. The Commercial court held Sony liable for the injury suffered by Concurrence, and

144 UGAP / CAMIF, 22 October 2001

damages were awarded on the basis of a lump sum. Sony appealed this decision.

Held

The Court of Appeal held that Sony was liable to pay damages to Concurrence. However, the Court did not consider that Sony was liable to pay damages for all of the anti-competitive practices for which it had been fined by the Competition Council. The Court especially insisted on the importance of a causal link. For some of the anti-competitive practices, the causal link between the practices and the damage alleged could not be proved. Therefore the Court did not grant compensation for the damages caused by all these practices. Furthermore, the Court held that damages could not be awarded on the basis of a lump sum, but that the exact amount of injury suffered had to be assessed. It therefore appointed an expert to evaluate this amount.

The decision from the Court of Appeal was partially annulled by the Supreme Court on 3 March 2004. However, this partial annulment does not have consequence as regards the study.

Société nationale des chemins de fer français (SNCF) v. Dumez TP *et al*. ("section 21"), Paris Administrative Tribunal, 15 December 1998 ; SNCF v. Bouygues *et al*. ("section 43-C"), Paris Administrative Court of Appeal, 22 April 2004, Paris Administrative Tribunal, 17 December 1998 ; and SNCF v. Sté SOGEA *et al*. ("section 46-C"), Paris Administrative Court of Appeal, 22 April 2004, Paris Administrative Tribunal, 15 December 1998

Facts and legal issues

The French railroad company SNCF had issued invitations to tender to companies specialised in public works, for the building of rail tracks (the three cases summarised here refer to the tenders for sections 46-C and 43-C. of the *TGV Nord,* and section 21 of the *TGV Rhônes-Alpes*). These tenders were attributed to a group of companies that offered the lowest prices. A decision of the Paris Court of Appeal, on appeal of a decision of the French Competition Council, then established that a concerted practice had occurred between several of the bidding companies, thereby distorting competition and preventing SNCF to examine the bids under normal competitive conditions. SNCF brought several actions for damages against most of its former co-contractors, before the Paris Administrative Tribunal, on the basis of wilful misrepresentation, flowing from the anti-competitive practice (this legal ground allowed SNCF to ask for damages)[145].

Held

The Administrative Tribunal decided in three cases (judgment of 15 December 1998 relating to section 21, judgment of 15 December 1998 relating to section 46-C and judgment of 17 December 1998 relating to section 43-C) that these concerted practices amounted to a misrepresentation. In two of these judgments, the Tribunal considered that SNCF should be indemnified (tender for section 21 ; and tender for section 43-C for which the judgment was confirmed on appeal). It was held that the amount of damages would equal the difference between the price paid by SNCF and the price it should have paid in the absence of a distortion of competition. An expert was appointed to assess this amount. To our knowledge, the report from the expert has not yet been completed. In its third judgment (section 46-C), the Tribunal considered that SNCF should not be indemnified because at the time the contract resulting from the tender was finalised, SNCF was aware that investigations were conducted by the competition authorities. On appeal of this judgement, the Court of Appeal took into consideration not the date on which the investigations had started, but the date of the decision of the Competition authority sanctioning the concerted practices. The Court of Appeal considered that by finalising the contract afterwards, SNCF had definitively accepted its financial conditions, and could not claim any damages.

145 Damages were not directly claimed for competition law breach, but for wilful misrepresentation. The reason may be that this claim was brought before an administrative court. And, at the time of the claim, the case law integrating competition rules into the "*bloc de légalité*" was very recent, and therefore less well known than wilful misrepresentation rules.

Sté Eco system v. Peugeot; Paris Commercial Tribunal 22 October 1996; Case C-322/93, Peugeot v. Commission, (1994) ECR I-2727; Case T-23/90, Peugeot v. Commission (1991) ECR II-653

Facts and legal issues

Eco system was an agent buying new cars of different brands from car distributors established in other EU Member States, in the name and on behalf of individuals. Due to difficulties encountered in obtaining deliveries of cars from Peugeot distributors, following a letter sent by Peugeot to its distributors instructing them not to deliver cars to Eco System, the latter lodged a complaint before the European Commission. The European Commission decided that Peugeot was in breach of article 81(1) EC. Peugeot appealed the decision before the Court of First Instance who rejected the appeal, and the decision was confirmed by the European Court of Justice (ECJ). Consequently, Eco system brought an action for damages against Peugeot before the Paris Commercial Court. It claimed damages for loss of operating income and loss of business value ("*fonds de commerce*").

Held

The Commercial court held that a breach of articles 81(1) and 82 by Peugeot, (which had been recognised as such by the European courts), amounted to a fault under Article 1382 Civ. Code. The court recognised that Peugeot's fault had a direct influence on the evolution of Eco System's business activity. It then went on to state that the European Commission, in view of the danger presented by Peugeot's behaviour on Eco System's financial equilibrium, had taken conservatory measures, thereby recognising the causal link between the fault and the claimed damage. The Court held that Peugeot was liable to pay damages only for the loss of operating income that occurred while the letter sent to the distributors was in force, i.e 239 263 EUR (1,600,000.00 French francs). However, it held that it could not be proven that the loss of business value was due to Peugeot's fault, since the value of the business did not rest entirely on sales of Peugeot cars.

Paris Court of Appeal, 1st February 1995, SARL Parfumerie Jerbo v. SNC Estée Lauder

Facts and legal issues

The undertaking Parfumerie Gerbo was one distributor of the undertaking Estée Lauder, in its selective distribution network. A provision of the selective distribution contract imposed on Parfumerie Gerbo the obligation to purchase annually a certain amount of products. In a letter dated 8TH July 1991, Estée Lauder announced its intention to terminate its commercial relationships with Parfumerie Gerbo given that its turnover for 1990/1991 did not reach the set amount. Parfumerie Gerbo brought an action for damages against Estée Lauder and asked for an injunction ordering Estée Lauder to maintain its commercial relationships with Parfumerie Gerbo. The Court of Appeal had to examine the legality of the above-mentioned clause under national competition law provisions (Article 7 of the 1986 Ordinance, now L. 420-1 Com. Code).

Held

The Court of Appeal held that the provision at stake was manifestly excessive and anticompetitive because of the disproportion of the amount imposed in comparison with the actual market share of the product. Hence, the clause was considered to be in breach of article 7 of the 1986 ordinance and void. The Court of Appeal held that Estée Lauder was liable to pay damages amounting to 50 000 French francs (approximately 7.600 EUR) for the termination of the commercial relationships and ordered Estée Lauder to maintain its commercial relationships with Parfumerie Gerbo.

Versailles Court of Appeal, 11 September 1997, SA BMW France v. SARL Rotative Typo Offset Imprimeries

Facts and legal issues

A car manufacturer, SA BMW France, had recommended its distributors a certain company, SARL Rotative Typo Offset (RTO), as a direct supplier of printed forms for invoices. At a later stage, after a modification of the computer system within the group, the undertaking SA BMW France decided to switch to another supplier, and to act as an intermediary for the whole group in the purchase of these products. As a consequence, RTO could not supply its products to any member of the group, and therefore brought an

action before the Versailles Commercial Court, in order to be awarded damages. The Commercial court stated that SA BMW was liable to pay damages under article 7 of the 1986 ordinance to RTO. SA BMW France appealed this judgement.

Held
The Court of Appeal upheld the decision of the Commercial Court. It considered that by compelling its distributors to terminate their commercial relationships with their usual supplier, SA BMW France was instigator of an illegal agreement between the company and its distributors, and hence, liable to pay damages to RTO amounting to 70.000 French francs (approximately 11.000 EUR) for loss of chance to obtain a new supply contract within the group after the modification of the group's computer system.

Paris Court of Appeal, 28 June 2002, SARL P. Streiff Motorsport v. Société Speedy France SAS

Facts and legal issues
The yearly Elf Masters event, taking place in the Palais Omnisports of Paris, was sponsored by two undertakings, the main partner, Total Fina Elf in association with Elf Aquitaine, and the smaller partner, the undertaking Speedy. According to the contract entered into with the organisers, the undertaking Speedy was the beneficiary of the right to be allocated given advertising areas on its demand. In 1997, the undertaking Elf Aquitaine complained to the organisers about the presence as a sponsor of the event, of the undertaking Speedy which was its competitor on certain products. The organisers subsequently unilaterally reduced, substantially, the participation of Speedy in this event. Speedy brought an action against Elf Aquitaine and Total Fina Elf in order to obtain damages for loss of profits. It clamed that its reduced participation resulted from an abuse of dominant position of both Elf Aquitaine and Total Fina Elf on the market, as well as from an illegal agreement between the later and the organisers, and invoked both national and European competition rules.
Held
The Court of Appeal considered that Elf Aquitaine and Total Fina Elf were dominant on the market and had abused of their dominant position by encouraging the organisers to deprive Speedy of its contractual rights. The Court of Appeal held that the breach of Articles L. 420-1 and L. 420-2 Com. Code amounted to a fault under Article 1382 Civ. Code and that Elf Aquitaine and Total Fina Elf were liable to pay damages amounting to 300.000 EUR (2.000.000 French francs) on this ground. The court considered that Articles 81 and 82 EC could not be applied because of the absence of a proven effect on trade between Member States.

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[i] Article 11 NCPC.