November 2021

French Competition Law Newsletter

Highlights

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The Paris Court of Appeals overrules Paris Commercial Court's dismissal of follow-on damage claim in the dairy products case

On November 24, 2021, the Paris Court of Appeals overruled the Paris Commercial Court's dismissal of the follow-on damage claim brought by two supermarket chains in the dairy products case.[1] The Court of Appeals considered that the applicants had sufficiently substantiated the economic assessment of their harm. It also considered that they had only partially passed on the additional costs and therefore could claim damages for the costs that had not been passed on to consumers.

Background

In March 2015, the French Competition Authority ("**FCA**") imposed a €192.7 million fine, reduced to €132 million on appeal,[2] on 10 producers of dairy products for having engaged in anticompetitive practices in the market for branded dairy products between 2006 and 2012 (the "**Infringement**"). Producers included subsidiaries of large groups, such as Andros and Lactalis/Nestlé.

Two years later, in March 2017, two entities of the Belgian retail group Louis Delhaize—Cora and Supermarchés Match ("**Match**")—initiated an action for damages before the Paris Commercial Court against the infringing companies. The Commercial Court considered that the economic assessment of the harm suffered by Cora and Match was insufficiently substantiated and that

[1] Paris Court of Appeals ruling of November 24, 2021 (no. 20/04265).

[2] *See* FCA Decision No. 15-D-03 of March 11, 2015 relating to practices implemented in the fresh dairy products sector and Paris Court of Appeals, ruling of May 23, 2017 (no. 15/08224).

their pass-on rate was likely close to 100%.[3] The Commercial Court found that most of the dairy product producers took part in the cartel and that all the major supermarkets were victims of the cartel. It also found that the market shares of supermarkets had remained similar over the Infringement period. Taken together, these elements suggested that the supermarkets had passed on all of the overcharge to consumers (if some of the supermarkets had not done so, they would have likely gained market shares compared to those which had passed on the overcharge and therefore offered higher prices). Cora and Match appealed the Commercial Court's ruling.

Appeal arguments

The appellants argued that the Commercial Court failed to rely on documents of the FCA's case file which showed that Cora and Match may have borne an extra cost because of the Infringement. They also argued that the Commercial Court had ignored the extensive economic analyses presented by Cora and Match and had thus miscalculated the pass-on rate.

The Paris Court of Appeals' assessment

First, the Court of Appeals upheld the Commercial Court's finding that the pre-Damages Directive legal framework was applicable to the case because the Infringement ended before the entry into force of the French law provisions implementing the EU Damages Directive (*i.e.* before March 2017). This shifted the burden of proof to Cora and Match. Indeed, under the pre-Damages Directive framework, it was up to the appellant to demonstrate that it had suffered a damage. In contrast, under the new legal framework resulting from the EU Damages Directive, it is *for the respondents* to prove that the overcharge has been passed on.

Second, the Court of Appeals carried out its own assessment as to whether the three conditions under French tort law were met (*i.e.*, fault, damage, and causal link between the fault and the damage). The Court of Appeals assessed whether the Infringement had caused "definite harm" to the appellants and verified the quantum of the alleged harm suffered by Cora and Match.

Regarding the definite harm suffered by the appellants, the Court of Appeals found that the economic analysis submitted by Cora and Match was sufficiently robust. It found that the pass on rate was limited due to Cora and Match's internal commercial policy to limit price increases on the affected products. To calculate the overall overcharge rate, the Court used three separate rates,[4] each relating to a different period of the Infringement. A first rate related to the start and end phases of the cartel. A second rate related to a middle phase of the cartel, when there was a "price war" between two infringing companies (Novandie and Senoble) which disturbed the functioning of the cartel. The third rate related to an inertia period following the end phase of the cartel.[5]

The Court of Appeals then adjusted the overall overcharge rate to take into account the passing on effect by which Cora and Match adjusted their own consumer prices to reflect the upstream cost increase. The Court relied on Cora and Match's economic analysis but also on their internal documents on pricing policy to conclude that Cora and Match had only partially passed-on the overcharge to their own customers. In particular, one internal marketing document showed that Cora had unilaterally decided *not* to raise customers' prices despite the additional costs suffered.

Regarding the quantum of the definite harm, the Court of Appeals relied solely on the economic study provided by Cora and Match to assess the total amount of damages to be awarded by each of

[3] *See* Paris Commercial Court, ruling of February 20, 2020 (no. 2017021571). "Passing-on" is an economic concept whereby an injured party passes on its actual loss resulting from an antitrust infringement to the next level of the supply chain ("overcharge"), by increasing the price of its products or services sold to its own customers.

[4] Interestingly, past judgments usually apply a single overcharge rate, applicable throughout the entire duration of the infringement at stake.

[5] The "inertia period" corresponds to the 10-month period following the end of the Infringement period defined by the FCA and during which the Infringement still produced effects on the Infringement's market.

the respondents. First, the Court awarded damages for the additional cost the appellants incurred as a direct consequence of the Infringement. Second, the Court offered compensation for the additional cost resulting from the higher prices of products bought from companies which compete with, but are not members of the Infringement (so-called "umbrella effects"). Such competitors were incentivized to raise their own prices because of the Infringement and thereby led the appellants to pay an overcharge, albeit for competing products.

Finally, the Court adjusted the amount of damages to take account of the loss incurred by the appellants due to the time-lapsed since the Infringement.

The Court of Appeals thus ordered dairy producers to compensate for their respective share of the financial loss suffered by Cora (of a total of c. €2 million) and Match (c. €0.3 million) and to cover the costs of the entire legal proceedings (total of c. €0.2 million).

Implications

The Court of Appeals' judgment (still subject to appeal) is yet another example of how important internal documents are in competition law cases, including in follow-on damages claims. It also shows the increasing number of successful damage claims before French courts, including claims from large retailers against their suppliers.

The French *Cour de cassation* upholds dawn raids conducted at Swarovski's headquarters

In a judgment dated October 19, 2021, the *Cour de cassation* quashed a Paris Court of Appeal's judgment invalidating inspections carried out by the French Competition Authority ("**FCA**") at Swarovski France's ("**Swarovski**") headquarters in July 2019.[6] The judgment is in line with recent *Cour de cassation* rulings favorable to the FCA.

Background

In July 2019, the FCA obtained an order from the liberty and custody judge ("**LCJ**") of the Paris Court of First Instance allowing it to conduct a dawn raid at Swarovski's French headquarters in relation to potential anticompetitive practices, including price fixing and abuse of dominance through exclusivity clauses imposed on its distributors.

Pursuant to Article L. 450-4 of the French Commercial Code (the "**FCC**"), Swarovski appealed.[7] The Paris Court of Appeals invalidated the LCJ's order on the grounds, *inter alia*, that (i) the FCA transmitted an incomplete file to the LCJ because it did not provide certain documents that were in its possession and were referred to in the evidence it produced to the LCJ to justify the dawn raid, and (ii) the FCA did not establish Swarovski was dominant on the market nor did it establish a presumption of the suspected anticompetitive practices to the required standard.[8] The Paris Court of Appeals also found that the FCA relied on contracts submitted by Swarovski's distributors which provided that their content could not be disclosed without Swarovski's consent. The FCA appealed the Paris Court of Appeals' judgment before the *Cour de cassation*.

The *Cour de cassation's* judgment

On October 19, 2021, the *Cour de cassation* overturned the Paris Court of Appeals' judgment.

First, it ruled that the FCA is not required to present to the LCJ all the documents it gathered

[6] *Cour de cassation*, Criminal division, October 19, 2021, Swarovski, No. 20-85.644.

[7] Paris Court of Appeals, October 7, 2020, *Swarovski*, RG 19/12686.

[8] In particular, the Paris Court of Appeals found that the economic studies submitted by the FCA did not evidence any dominant position of Swarovski and that the other documents submitted by the FCA, in particular vague emails and the complaint submitted by one of Swarovski's distributors, did not corroborate the alleged presumptions of anticompetitive practices.

during the investigation, nor even all the documents mentioned in the documents produced. Pursuant to Article L. 450-3-3, II, §5 of the FCC, the LCJ may authorize an inspection on the basis of a limited set of documents selected at the FCA's sole discretion—as long as those documents evidence the existence of presumptions of anticompetitive practices. **Second**, the FCA does not need to establish a dominant position for the judge to grant a search warrant for an alleged abuse of a dominant position. A mere *presumption* that such a dominant position exists is sufficient. **Finally**, the *Cour de cassation* ruled that the FCA may submit as evidence a contract including a confidentiality clause as long as it obtained the contract validly during its investigation.

Conclusion

The *Cour de cassation* judgment is consistent with existing case-law on the standard of proof that the FCA must satisfy to obtain search warrants in antitrust cases. In essence, it is sufficient for the FCA to establish a mere presumption that the alleged anti-competitive practices took place, based on evidence that the FCA has sole discretion to select.[9] The judgment is also another recent example where courts have fully upheld the FCA's dawn raid investigative powers.[10]

The French Competition Authority conducts dawn raids at employees' homes in the food retail sector

On November 10, 2021, the French Competition Authority ("**FCA**") issued a press release[11] indicating that it raided the premises of several companies in the food retail sector suspected of engaging in anticompetitive practices, as well as the homes of some employees.

While the press release does not give any details on the identity of the companies or anti-competitive practices suspected, it is noteworthy that the FCA inspected the homes of certain employees. Such inspections are provided for in the competition rules both at national and EU level, but have been rarely used in the past. Below is a short overview.

Background

Under national law, the FCA has broad powers to investigate possible infringements of competition law, including the power to conduct dawn raids at non-business premises. Under Article L. 450-4 of the French Commercial Code, the FCA has the right to enter "any place", including private homes, as long as documents relating to the suspected infringement are likely to be found there. Such inspections must be authorized by a court order from the liberty and custody judge.[12] In practice however, it seems that the FCA has never carried out inspections at employees' homes.

Similarly, at the EU-level, pursuant to Council Regulation (EC) No 1/2003,[13] the European Commission (the "**Commission**") may conduct dawn raids as part of an inquiry into possible anticompetitive practices on any premises, including the homes of directors, managers and other members of staff of the undertakings concerned, "[i]f a reasonable suspicion exists that

[9] Paris Court of Appeals, April 1, 2010, SNCF, RG 09/12488; *Cour de cassation*, Criminal division, March 21, 2018, *Free Mobile*, *Free*, *Illiad*, No. 16-87.193.

[10] Earlier this year, the *Cour de cassation* confirmed the validity of dawn raids authorized on the basis of another competition authority's request for investigative measures. *Cour de cassation*, Criminal division February 17, 2021, *Caudalie*, No. 19-84.310. Also see *Cour de cassation*, Criminal division, November 4, 2021, Syndicat National du Notariat, n°20-80.149 on documents covered by attorney-client privilege.

[11] *See* FCA's press release of November 10, 2021, available at: https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/le-rapporteur-general-de-lautorite-de-la-concurrence-indique-que-des-2

[12] A court order is always required when the inspected premises are also used for residential purposes. Therefore, inspections under Article 450-3 of the French Commercial Code (also known as "simple" inspections) can be conducted without a court order but only in business premises. In practice, while these inspections are often used by the General Directorate for Competition Policy, Consumer Affairs and Fraud Control, their use by the FCA is very limited. The FCA's inspections are usually conducted following receipt of an order from the liberty and custody judge.

[13] Council Regulation (EC) No 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation"[14] of Article 101 or 102 of the Treaty on the Functioning of the European Union are being kept there.[15] Such decision to inspect a private home requires the prior authorization from the relevant judge of the Member State concerned.[16]

Still, the power to conduct inspections of non-business premises has rarely been used in the past. The first time the Commission used the power to investigate non-business premises was in May 2007 during the *Marine Hoses* cartel investigation[17], when the Commission inspected the private home of a director of one of the undertakings concerned. Since then, the Commission carried out inspections at employees' homes on a few occasions, notably during the Commission's investigation of the *Shrimps* cartel in March 2009.[18]

Implications

With many employees increasingly working from home due to the Covid-19 pandemic and the introduction of hybrid working, it would not be surprising if competition authorities started to raid private premises more frequently going forward, given employees are more likely to keep business records at home. Interestingly, the UK government currently considers strengthening the UK competition authority's powers in relation to dawn raids at non-business premises by giving the authority the possibility to "seize-and-sift" evidence (*i.e.*, to take original documents off raided premises to establish at a later stage whether they are covered by the scope of the investigation) during inspections in private homes.[19]

Companies should ensure that they have comprehensive guidelines for dawn raids both at business and private premises. This is even more important in light of the recent statement by the EU Commissioner for Competition announcing "a new era of cartel enforcement", and a series of dawn raids in the months to come.[20]

[14] *Ibid*, Article 21.

[15] *See* also the judgment of the Court of Justice of the European Union of September 14, 2010, *Akzo Nobel Chemicals & Akcros Chemicals v. European Commission*, (Case C-550/07) EU C 2010 , para. 85: "As it is clear from Recitals 25 and 26 in the preamble to Regulation No 1/2003, the detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively and safeguard the effectiveness of inspections, the Commission should be empowered to enter any premises where business records may be kept, including private homes."

[16] The national judge may not call into question the necessity for the inspection, but should ensure that the inspection is neither excessive nor arbitrary, having regard for the seriousness of the suspected infringement, the importance of the evidence sought, the involvement of the undertaking concerned, and for the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the private home.

[17] Commission decision of January 28, 2009, case COMP/39-406 – *Marine Hoses*, para. 61.

[18] Commission decision of November 27, 2013, case AT.39633 – *Shrimps*, para. 34.

[19] *See* British Department for Business, Energy & Industrial Strategy, summary of the public consultation on "Reforming Competition and Consumer Policy", July 2021, para. 1.174.

[20] Speech by EVP M. Vestager at the Italian Antitrust Association Annual Conference – "A new era of cartel enforcement", October 22, 2021.

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