



The Court of Appeal of Paris on the basis of an expert report condemns jointly and severally two firms to compensate the prejudice they caused for their anti-competitive practice.

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Resume: *After the European Commission fined companies for a cartel on animal feed phosphates in 2010 including Timab and CFPR companies, a follow-on action has been brought by the Doux Aliments companies before the French courts in order to be compensated for the prejudice caused to them by the cartel. The Court of Appeal of Paris, basing its decision of June 23, 2021 on an expert report, finally condemned jointly and severally the two companies to compensate the prejudice up to the amount of 109,176 euros.*

I - The case brought in front of the Court of appeal of Paris

Industries and CFPR were convicted for participating in this agreement from September 16, 1993, to February 10, 2004.

Facts and procedure

The European commission in a decision of July 20, 2010, sanctioned for agreement six groups of producers of phosphates for animal feed to the payment of a fine of 175 647 000 euros. This agreement lasted 30 years and consisted in sharing the European market for phosphates for animal feed. This share of the European market took place in the form of sales quotas by region and by customer as well as a coordination of prices and sales conditions. The firms Timab

From 1992 to 2004, the firms *Doux Aliments Bretagne*, *Doux Aliments Sologne* and *Doux Aliments Vendée* produced food products for poultry and included phosphate purchased from both Timab and CFPR firms. Based on the decision of the European Commission, the above-mentioned companies intended a follow-on action against Timab and CFPR for compensation of their loss concerning illegal over-billing. *Doux Aliments Bretagne* and *Doux Aliments Vendée*, sued the company CFPR, and then, together with the company *Doux Aliments*

Sologne, they sued the firm Timab, on December 17, 2014, before the commercial tribunal of Quimper.

The commercial tribunal of Quimper by judgment of October 9, 2015, declared itself incompetent and referred the two cases to the commercial tribunal of Rennes. The latter by judgment of January 12, 2017 dismissed the case, and the firms have filed an appeal before the Court of Appeal of Paris on February 23, 2017.

The Court of Appeal of Paris in a judgment of February 6, 2019, overturned the decision of the commercial Tribunal of Rennes and stated that CFPR and Timab have committed faults, within the meaning of the former article 1382 of the civil code in its version then in force (1240 now), and ordered an expertise to evaluate the prejudice caused to the *Doux Aliments* companies by the agreement. The expertise must establish a counterfactual scenario to evaluate what would have been the price level if the agreement wouldn't have taken place, in order to, in particular, evaluate the additional costs incurred and the prejudice update rate to calculate the alleged cash flow prejudice.

The expert submitted his report to the clerk of the court of appeals on October 15, 2019.

The evaluation of the prejudice thanks to the expertise

On the expert report about the prejudice inferred by the agreement

The expert report stated that « to evaluate the effects of the agreement excluding the impact of exogenous factors such as variations in the prices of the main inputs, the expert used an econometric comparison over time in order to statistically determine the impact of each variable on the price and to identify the possible additional cost that would be specifically attributable to the agreement ». The expert evaluated 3 periods during the agreement where prices have fluctuated, the first from 1993 to the end of 2000 where prices were stable, the second from the end of 2000 to January 2003 where the evolution of prices of phosphates for animal feed does not follow the cost of the downward evolution of phosphoric acid, and finally, a third period from February 2003 to the end of agreement where prices of phosphates for animal feed undergo a significant drop independently from the cost of phosphoric acid.

The expert conclude that the effect of the agreement can be inferred from the rise of prices of phosphates for animal feed between November 2000 and February 2003 leading to an additional cost of 7.7%. He then concludes that the additional costs caused to

the company *Doux Aliments* amounts to 81,937 euros, without any repercussion on indirect clients. After updating this amount in October 2019 by applying the legal interest rate, he establishes that the amount of the cash flow loss is equal to 27 239 euros. The final prejudice caused to the company *Doux Aliments* is estimated to 109 176 euros.

On the 1993-2000 time period

- About the evaluation of the prejudice and the invocation of the European directive 2014/104

The *Doux Aliments* firms argue on the basis of article 17 of the European directive 2014/104 and the principle of effectiveness of European regulation, that the expert didn't follow the principle under which an agreement necessarily infers a prejudice because he established that the absence of certain comparative elements for the period 1993-2000 made it impossible to evaluate a prejudice. On this argument *Timab* and *CFPR* answer that the firm can't find any basis on the European directive to justify its claims because it is inapplicable to the case at hand since the action was filed on December 17, 2014, so before the Directive came into force. They also agree on the evidence Brought by the report under which the lack of certain comparative prevent from evaluating a prejudice.

The court answers that the European directive 2014/104 is not applicable here but it invokes the *Courage* judgment of 2002 and the *Manfredi* judgment of 2006 under which « any victim of an anti-competitive practice must be able to bring an action before the national courts to claim compensation for their loss » and « the victim must be able to ask for compensation not only for the actual damage but also for the loss of income, without being able to enrich himself. », to explain that the firms are able to ask before national court the compensation for their prejudice which they have to prove.

- About the lack of effect of the agreement from September 1993 to October 2000

Doux Aliments firms blame the expert for not inferring any prejudice from the agreement for the period 1993-2000 due to a lack of comparative elements. They explain that « requiring the victim of an anti-competitive agreement to be able to provide all the elements of comparison for a period of more than twenty years is equivalent to making it impossible or excessively difficult to obtain compensation for the prejudice ». On this element, *Timab* and *CFPR* hold that the firm can't find any factual basis for their allegations and that « the allegation that "common sense and evidence" would suggest

that the agreement necessarily produced an effect has no bearing ».

The court establishes that it is not because the expertise doesn't show any effect that there are not, but the only increase in sales prices is not enough specific to show a potential effect of the agreement. It also explains that the excessive burden of proof alleged by Doux didn't « make the exercise of the right to damages practically impossible or excessively difficult ». The court dismissed the claim for compensation on this ground.

- o About the loss of opportunity to negotiate better prices

Doux Aliments firms consider that they have suffered a loss of opportunity to negotiate better prices, which would have permit them to get a drop in prices of 15% and *Timab* and *CFPR* argue that they don't legally justify their request.

The court states that the *Doux Aliments* firms don't establish that *Timab* and *CFPR* would have been able to grant a discount during the period 1993-2000 in the absence of an agreement.

The court finally states that no prejudice has been established and it dismisses the claim for compensation on this period.

On the 2000-2003 time period

Based on the decision of the Commission and on the expertise, *Doux Aliments* firms infer a price increase due to the agreement on this period and claim the reparation of the prejudice caused. They claim a price increase of more or less 10% each year from 1999 to 2003 with a price increase of more than 10% in 2001. *Timab* and *CFPR* « do not question the calculation of the gross margin level and the conclusion that it was higher in the second period ».

However, *Timab* and *CFPR* contest a few point of the expert report including the fact that the agreement would necessarily have an effect on the price of phosphates for animal feed for the sale of *Timab* to the *Doux Aliments* companies because taking into account the « assessment of *Timab's* entire 10.5 years of participation in the agreement would be inappropriate ». *Timab* also contests the fact that the expert would have concluded that the « the 15% increase in demand for phosphates for animal feed in Europe during the BSE crisis would have had no effect on their selling price ».

Timab and *CFPR* also claim that *Doux Aliments* companies didn't prove the prejudice allegedly caused by them.

Timab and *CFPR* declare that the distinction of three periods in the expert report would disregard the terms of the decision in which the Commission insisted on the continuity of practices throughout the duration of the agreement.

The court states that the expert found a significant effect of the agreement on phosphates for animal feed prices between November 2000 and January 2003 leading to an additional cost of 7.7%. To evaluate the additional costs, he takes into consideration but doesn't consider the demand shock effect of the BSE crisis as the only cause of the increase in prices billed by *Timab* to *Doux Aliments* companies over this period because his econometric analyses shows that the crisis only partially explains these additional costs.

On the contestation of *Timab* about the alleged wrongful division of 3 period by the expert, the Court confirms the division of the expert explaining that « the expert highlighted that these three periods reflect different situations in the phosphates for animal feed market and that the continuity of the practices throughout the duration of the agreement does not lead to the existence of an effect without being able to distinguish according to distinct periods ».

Finally, the court validates the cash flow loss being equal to 27 239 euros and

condemns *Timab* and *CFPR* companies jointly and severally to pay that the prejudice of 109 176 euros caused to *Doux Aliments* companies for the rime period corresponding to 2000 to 2003.

The evaluation of the moral prejudice caused

The *Doux Aliments* companies invoke a moral prejudice of 30 000 euros caused by *Timab* and *CFPR* companies consisting in negotiating « for years with suppliers who simply pretend to negotiate because they have agreed to price increases with their competitors and that this breach of good faith is causing it definite prejudice ».

Timab and *CFPR* companies contest the admissibility pf the moral prejudice and state that the claimants mistake fault and prejudice and don't justify the nature and extent of the prejudice.

The Court approves the admissibility of the claim for moral prejudice and grants the application of 30 000 euros for the latter explaining that, excluding contractual good faith, the agreement necessary inferred a prejudice which must be repaired, without dwelling on the explanations.

The decision of the court

The court condemns *Timab* and *CFPR* companies jointly and severally to pay to *Doux Aliments* the sum of 109,176 euros in compensation for the prejudice caused during the period from November 2000 to January 2003, and the sum of 30,000 euros in compensation for the moral prejudice.

II - Notes on the decision

Providing the victims of anti-competitive practices remedies can be challenging for the courts. Various tools can be used to help them determine the alleged prejudice caused and one of them is the expert report. The decision of the Court of Appeal of Paris studied here shows the interest of jurisdiction to rely on expertise to evaluate the prejudice caused in cases of an anti-competitive practices. Those reports will help the courts determine the value of the prejudice, but they will have to verify that the report in itself is coherent and not relying blindly on it. The Court of Appeal of Paris also published a compilation of methodological notes in 2017 which has been updated in 2021 to guide legal practitioners through the evaluation of the prejudice for economic loss in order to compensate it before the court. The compilation contains 23 methodological notes including one about

the compensation of prejudices caused by an anti-competitive practice. There is also a section «The role of expertise», to help practitioners on which expertise to choose and the applicable principles.

It also important to note that here the decision, due to the fact that the action was filed on December 17, 2014, could not benefit from the disposition of the European Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, which came into force on December 26, 2014. The directive has been put up in place to help facilitate repairing the prejudice caused to the victims of an anti-competitive practice and has been transposed in France by the ordinance n° 2017-303 of March 9, 2017 which inserted the provisions at article L481-1 and following of the commercial code. For example, article 17 of the directive (L481-7 of the commercial code), which was here invoked by the claimant and then deemed inapplicable by the court, states in his paragraph 2 that «it shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption ». If this article would have been applicable, here the burden of proof would have fallen on *Timab* and *CFPR* instead of *Doux Aliments* companies, but also, the court and expert would have based their analysis on

the fact that the agreement caused a prejudice to the claimant. The path is then easier for the victim in order to access remedies. The way the upcoming decisions of the Court of Appeal of Paris on the compensation for the prejudice of anti-competitive practices will be handled, will be of a lighter process for the

victim who won't have the burden of proof, but also, this prejudice thanks to the European directive will be easier to detect regarding the conditions laid down in the text.

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