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Landmark Decision in French Private Enforcement of Competition Law: Clarifying Anticompetitive Damage Assessment and Compensation

Arnaud MAMELLI

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Resume: *The recent Cour de cassation decision (Cass. Com., June 7, 2023, n°22-10.545, 2 11.099, 22-11.100, B) highlights the evolving focus on harm in private enforcement cases. The case addresses the existence of damage, recognition of the umbrella effect, and partial pass-through. It also delves into complex issues regarding financial loss quantification, interest rates, and liability apportionment. In a nutshell, this decision underscores the intricate nature of competition law debates in private enforcement, where competition law and civil non contractual logics are intertwined.*

The *Cour de cassation* has issued a decision that provides a clear illustration of how the focus of competition law debates is shifting entirely towards the issue of harm in private enforcement follow-on actions[1]. In this context, the compensation judge's function is reinforced[2]. Although part of the Damages Directive's aim was to make it easier to provide proof of the event giving rise to liability when national and European competition authorities issue final sanctions, today's evidential complexity lies in the determination of damage, its extent and even its reparation[3]. The decision under review is a striking illustration of this. Unusually lengthy for the French judicial highest court, the ruling handed down on June 7 and published in the *Cour de cassation*'s *bulletin* is of major importance for the development of French,

1 Cass. Com., June 7, 2023, n°s 22-10.545, 2 11.099, 22-11.100, B.

2 For an analysis of the judgement under discussion through the specter of the judge's function, see J. GRANGEON, "L'évaluation du préjudice concurrentiel : les enseignements de la Cour de cassation relatifs à l'office du juge de la réparation", *JCJ, G.*, n° 36, 2023, act. 997.

3 See art. 9 of the Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 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 Text with EEA relevance; and its transposition in the French Commercial Code Art. L. 481-2 ; and for an overview of the French transposition see M. CHAGNY, "Directive sur les actions en dommages et intérêts du fait des pratiques anticoncurrentielles : Le gouvernement français publie l'ordonnance de transposition et le décret correspondant", *Concurrences* n° 2-2017, art. n° 84095 ; R. AMARO, "Transposition de la directive Dommages en France : Regards sur le nouveau titre VIII du livre IV du Code de commerce", *Concurrences* n° 2-2017, art. n° 84026, p. 70

and more broadly European private enforcement of competition law.

In the present case, the French national competition authority had sanctioned the members of a dairy products cartel that lasted for six years from 2006, until it was eventually disclosed through a clemency procedure in 2015[4]. Two years later, in 2017, two retail companies sued the members of the cartel and their parent companies before the commercial tribunal of Paris, for they claim they have suffered a loss in buying the products subject to the said cartel.

Having lost the case at first instance, the plaintiffs appealed against the decision. The Paris Court of Appeal then overturned the initial court judgment and ordered the companies to pay €2,044,220 to one retail company and €332,580 to another one, these amounts having been adjusted according to the actualization rates of 3.65% and 2.79%[5].

Various appeals to the French Cour de cassation were then lodged by the dairy companies, all discussing the existence of a loss resulting from an umbrella effect suffered by the plaintiffs, the periods considered to determine the excess, the existence of a financial loss, the contribution to the debt and the liability of the parent companies in respect of the subsidiaries responsible for the practices.

The *Cour de cassation*, censures the court of appeal's decision but only on four grounds. For the rest, it approves the conclusions that were drawn relating to the recognition of an umbrella effect as well as of a partial passing-on, to the liability of the parent company and finally to the period considered when calculating the harm.

Acting as a perfect illustration of the raging debates now seen in courts, this decision provides new clarification on the existence **(I)** the assessment **(II)** and the compensation **(III)** of the anticompetitive damage.

I. Debates over the existence of a loss: the recognition of an umbrella effect and of a partial pass-on

As soon as the question of the event giving rise to liability is resolved by the irrebuttable presumption created by a final sanction decision of the French competition authority, the cartel defendants adjust their defense to deny the mere existence of a direct and certain loss. In this instance, the dairy companies first challenged the presence of an umbrella effect on certain own-brand products that were used as comparators according to the "double-effect" test **(A)**. Then, they challenged the partial passing-on solution decided by the court of appeal **(B)**.

4 Aut. conc., dec. n° 15-D-03, March 11, 2015, on practices in the fresh dairy products sector.

5 CA Paris, November 24, 2021, n° 20/04265.

A. Proof of overcharge: Clarifications on the umbrella effect, the "double effect-method" and the "period affected" considered

Debates over the identification of the harm lead to complex economic reviews, that are often contradictory between the parties. In the case at hand, the harm demonstrated was mostly one of overcharges which leads to a series of questions[6].

First and foremost, the *Cour de cassation* approves of the court of appeal's decision as to the possible inadequacy between the period of activity of the illicit agreement and the period when the harm was effectively suffered. Compensation judges can even, according to the Court, take into account for the affected-prices period, a period of "war on prices" between the members of the cartel if, in fact, the victims are not affected by the normalization of the prices. In this case, the claimants were not. Only other competitors benefited from the war between the cartel members.

Then, the determination of the overcharge lead in the present case to debates over the existence of an umbrella effect. It is necessary to highlight that the recognition of an "umbrella effect" in competition law was not self-evident, and it took a judgment from the Court of Justice of the European Union to acknowledge it[7]. As per the *Cour de cassation*'s own formulation in the case under consideration, the "umbrella damage" "consists of the circumstance in which companies, not themselves party to an agreement, intentionally or unintentionally set their prices at a higher level following the actions of this agreement, than the conditions of competition would have allowed them to do".

In the case under discussion, defendants argued that there was a contradiction in the court of appeal's reasoning. This alleged contradiction arose from the court's use of retailer's own brand products as comparative items in the "double effect" method. Indeed, this method involves comparing the prices of products that were directly affected by the collusion to the prices of other products. They contended that it was contradictory for the court of appeal to employ these retailers' brand products as comparators while also acknowledging that these products were subject to an "umbrella effect." The latter effect implying that the retailers had purchased these products at artificially higher prices than they would have absent the collusion. However, the *Cour de cassation* rejected the defendants' argument and did not find any contradiction in the court of appeal's approach. On the contrary, it upheld the court of appeal's decision, concluding that it was consistent to include

6 Obs. under decision D. BOSCO, "Affaire des produits laitiers : la Cour de cassation revient sur l'évaluation du préjudice" *CCC*, n° 8-9, August-September 2023, comm. 139.

7 CJEU, judgment of June 5, 2014, [N] and others, C-557/12.

the retailers' brand products in the comparison, despite they were indeed affected by the umbrella effect. To make this point, the Court logically affirms that including these products in the control group to assess the existence of an overcharge on the products subject to the cartel "only served to reduce the extent of the surcharge detected". As it was underlined, this solution leads to strategic thinking by the victims who risk diminishing the amount of the overcharge and subsequently the number of damages that could be obtained[8].

B. Pass-on: the recognition of a partial pass-on of the overcharge

Competition law offenders have long used the passing-on argument as a defense. This economic theory refers « to the situation where an injured party passes on its actual loss resulting from an antitrust infringement ('overcharge') to the next level of the supply chain, by increasing the price of its products or services sold to its own customers at the downstream market-level ('indirect purchasers') »[9]. Therefore, the concept of pass-on in competition law cases can function in two distinct ways. On the one hand, it can serve as a 'sword' when an indirect purchaser asserts that the overcharge has inflicted harm upon them due to the pass-on of increased costs up the supply chain. Contrarywise, it can furthermore operate as a 'shield' when a party accused of infringing competition rules invokes it as a defense. In this defensive scenario, the alleged infringer contends that any downstream pass-on of increased costs by the claimant has effectively reduced the actual harm suffered by the claimant. This dual nature of pass-on illustrates its versatile role in antitrust litigation, where it can be used both offensively and defensively to shape the legal outcome of a case[10].

The court of appeal's ruling addressed the question of whether it was appropriate to acknowledge a partial pass-on of the overcharge. This marked a departure from the standard binary reasoning typically used by compensation judges[11]. Traditionally, compensation judges tended to take one of two positions: either they concluded that the direct purchaser had fully transferred the entire overcharge to its own customers, or

8 Obs. under judgement, D. BOSCO, *CCC*, n° 8-9, August-September 2023, comm. 139.

9 T. SCHREIBER, Carsten KRÜGER, M. SEEGERS, "Passing-on", in *Global Dictionary of Competition Law*, Concurrences, Art. n° 88937.

10 VERBOVEN (F.) et VAN DIJK (T.), « Cartel Damages Claims and the Passing-on Defense », *Journal of Industrial Economics*, 2009, vol. 57, n° 3, p. 457 ; A. RONZANO, "Actions privées en réparation du dommage concurrentiel: La Commission européenne publie une étude sur l'évaluation économique de la répercussion du surcoût", October 25, 2016, *Concurrences* n° 1-2017, Art. N° 83231

11 A. RONZANO, "Damages actions: The Commercial Chamber of the French Supreme Court confirms the findings that two supermarkets suffered definite 'financial' damage as a result of the illicit cartel between dairy product manufacturers, and censures the Paris Court of Appeal on the setting of interest rates to compensate for the additional damage caused by the unavailability of the sums lost as a result of the cartel, as well as on the authors' contribution to the debt to compensate for the damage (Cora; Match)" , 2023, *Concurrences* n° 3-2023, art. N° 113096

they asserted that no pass-through had occurred whatsoever[12].

In this context, the Commercial Chamber of the French *Cour de cassation* braced the idea of recognizing a partial pass-on of the additional cost. Consequently, the court of appeal, mindful of the fact that victims of wrongdoing are not under an obligation to minimize their damages, properly determined that the decision of the dairy companies to pass on only a portion of the resulting extra cost did not preclude seeking compensation for the portion of the extra cost that still burdened them. This remaining burden was considered the actual damage suffered by these companies.

Indeed, it shall be reminded that in French law, it is a well-established principle that the victim of a tort is not under any legal obligation to mitigate their harm. This principle has been consistently repeated by the French *Cour de cassation*, as exemplified in its decision on July 2, 2014[13]. This means that when someone suffers harm due to another party's wrongful actions, they are not required to take steps to minimize the extent of the harm suffered. Unlike in some other legal systems, the French approach places the onus of responsibility squarely on the wrongdoer, emphasizing their liability and the victim's right to seek full compensation without having to mitigate the damage themselves. In a nutshell, this principle guarantees that victims are not burdened with additional obligations and can focus on obtaining redress for the harm they have endured.

II. Quantification of the loss: the complex debates regarding the financial loss

In the context of the judgment being discussed, *the Cour de cassation's* decision pertains to the financial loss aspect, which here again demonstrates the sophisticated and technical nature of the disputes surrounding private enforcement.

The specific issue at hand revolves around the calculation of financial loss due to the unavailability of funds resulting from anticompetitive practices. Indeed, it needs to be reminded that the *Cour de cassation* rendered a decision in March 2023, by which it recognizes such a financial loss[14]. Naturally, such a decision leads to more numerous debates regarding the interest rates that should be applied to the updated financial loss.

In the present case, the Cour de cassation set aside the judgment of the court of appeal due to the misapplication of the principle of full reparation without loss nor profit to the victim. It needs to be underlined here that this principle drives the entire non-contractual civil liability system in French law

12 L. CAMPOS, "Economic assessment of damages actions in competition law: An overview of EU and national case law, 15 mars 2018", *Concurrences*, art. N° 86232.

13 Cass. 1ère Civ., July 2, 2014, n°13-17.599.

14 Cass. com., March 1, 2023, n°s 20-18.356 and 20-20.416.

which does not allow any form of punitive damages.

First, the court of appeal is censured for its decision to apply an interest rate exceeding the legal interest rate without providing a specific and well-founded rationale for this deviation. This implies that the court of appeal failed to adequately justify the selected interest rate in light of the case's circumstances. Indeed, according to the *Cour de cassation* a more comprehensive and substantiated explanation was imperative when departing from the legal interest rate.

Second, the court of appeal also faces censure for its practice of averaging the interest rates applied by victims who had resorted to additional financing due to the artificial price increases.

Third, the court of appeal failed to consider the progressive nature of the financial harm experienced by the victims. In essence, it neglects the dynamic nature of the financial loss over time and does not employ a nuanced analysis that accommodates the evolving impact of anticompetitive practices on the financial well-being of the victims.

In essence, this decision highlights the complexity of determining the appropriate interest rate for compensating financial loss in cases of anticompetitive practices. It emphasizes the importance of thoroughly demonstrating the specific financial impact and reasonable use of the unavailable funds to claim higher interest rates for damages and more broadly underscores the technical nature of debates surrounding private enforcement in the context of competition law.

III. Compensation for loss: debates over liability

The last argument used by the defendants in a private enforcement case resides in the compensation for loss phase. This case is once again striking evidence of how cartel members try to deny their liability, whether because they were not the author of the anticompetitive practice, but solely the parent company of one of them **(A)**, or because their share of the apportionment of liability was wrongly examined by the compensation judges **(B)**. In the case under discussion, the compensation for loss phase depicts how public enforcement and private enforcement are closing intertwined. The first one of competition law logic, reshapes the fundamental tenets of civil law[15].

A. Clarification of joint and several liability between a parent company and its subsidiary

In the first plea, one of the defendants, a parent company, argued that the court of appeal wrongly applied the

15 On this matter see W. CHAIEHLOUDJ, "La percée de la responsabilité civile dans le droit des pratiques anticoncurrentielle", *RTD Civ.*, 2023 p.21.

presumption resulting from the transposition of article 9 of the Damages Directive. It argues that the provisions cannot be applied to a parent company for the actions of its subsidiary that occurred prior to the said transposition, which in France resulted from a 2017 order (Order n° 2017-303, March 9th, 2017, on actions for damages arising from anti-competitive practices).

This argument was doomed to fail from the start, since the other presumption, meaning the one of joint and several liability between a parent company and its subsidiary, results from a constant, famous, and historical case-law which was synthesized in the Akzo Nobel decision of the ECJ in 2009[16]. As the Court of Justice pointed out, under competition law, a parent company cannot be considered an autonomous entity, even though it has a separate legal personality from its subsidiary, as long as it exerts decisive influence over the latter. The Court noted, in the same 2009 decision, that decisive influence arises from the economic, organizational, and legal links uniting the two legal entities[17]. On this point, the Court of Justice had also ruled that a capital holding of 100% or almost creates a rebuttable presumption of decisive influence[18].

It is based on the notion of "undertaking" in competition law, and by expressly mentioning the decisions of the Court of Justice, that the Cour de cassation approves of the court of appeal's decision to set aside the application of the Directive over time. Having failed to overturn the rebuttable presumption, The company could not have effectively invoked the application of the Directive over time to escape from its obligations.

However, what appears to be unprecedented here is the High Court's application of the Court of Justice's *Skanska* and *Sumal* rulings, which transposed to private enforcement the conclusions of public enforcement regarding the joint and several liability of a parent company and its subsidiary[19]. As it has been pointed out, the French *Cour de cassation* finally sets the record straight on the application over time of the concept of imputability in French private enforcement of competition law.[20].

B. Apportionment of liability

Article 1240 of the French Civil Code, formerly known as Article 1382, establishes a fundamental principle in the realm of shared civil liability. According to case law, when

16 CJEU, September 10, 2009, C-97/08, *Akzo Nobel*, point 58 ; see ARCELIN (L.), "Notion d'entreprise en droit européen et interne de la concurrence", *JCl. Concurrence – Consommation*, n° 35, 2017.
17 Ibid
18 Ibid
19 CJEU, March 14, 2019, C-724/17, *Skanska Industrial Solutions Oy, NCC Industry Oy*, Asfaltmix Oy ; CJEU October 6, 2021, C-882/19, *SumalSL c/ Mercedes Benz Trucks EspañaSL* ; see on this topic BOSCO (D.), BRUEGGEMANN (N.), PEDRAZ CALVO (M.), PROVOST (M.), THILL-TAYARA (M.) et IDOT (L.), "Private enforcement in Europe after Sumal", *Concurrences* n° 1-2022, art. n° 105291, p. 28.
20 D. BOSCO, *CCC*, *ob. cit.*, §2.

multiple parties are held responsible for causing harm, their contribution to the reparations owed must be determined in proportion to the respective seriousness of their faults. In the case at hand, the *Cour de cassation* criticized the approximation made by the Paris court of appeal for deciding to calculate the contribution amount by considering the level of sanctions determined by the decision of the French National Competition Authority.

Such an approach was prone to censure because Article L. 462-8 of the French Commercial Code does not exclusively rely on the severity of the authors' behaviors. Indeed, the sanctions taken by the French National Competition Authority, based under Article L. 462-8, paragraph 2, of the Commercial Code, do not derive on the sole gravity of the practices. Thus, the court of appeal seems to have overlooked the complexity involved in assessing competition-related sanctions.

This case serves as yet another perfect illustration of the interaction between public enforcement, carried out by authorities like the Competition Authority, and private enforcement, where individual parties seek compensation for harm caused by anticompetitive practices. In this context, the determination of liability and the quantification of damages must be undertaken with due consideration of the multifaceted nature of competition-related sanctions and the nuances inherent in assessing individual fault.

Arnaud MAMELLI