



## The temporal delimitation in French law of the application of the non-passing on presumption initiated by the European directive.

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To quote this paper: N. FEDDAL, “The temporal delimitation in French law of the application of the non-passing on presumption initiated by the European directive.”, *Competition Forum*, 2023, n° 0050, <https://competition-forum.com>.

**Resume:** In a recent decision (Cass. Com., October 19, 2022, No. 21-19.197), the Court of Cassation ruled on the litigation concerning the application of Directive No. 2014/104 in the context of follow-on actions brought before French courts. The dispute involved a major distributor seeking compensation for alleged harm caused by an anticompetitive practice implemented by the defendant. The significance of this decision lies in the judges' decision to clarify the interplay of articles transposing the European directive. The application of this text is crucial for the plaintiff, as it spares them the burden of proving a surcharge on their own customers resulting from the anticompetitive practice.

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In this case, a supplier was sanctioned by the Competition Authority <sup>1</sup> for violating provisions under Articles 101(1) of the Treaty on the Functioning of the European Union and L420-1 of the Commercial Code. Johnson & Johnson Santé Beauté France (JJSBF) colluded with competitors on the supply prices of hygiene products in large distribution. Carrefour, a leading retailer, sued the supplier for damages resulting from this practice in the French market. The Paris Court of Appeals dismissed the plaintiff on the grounds that they failed to prove the alleged harm. The dismissed party appealed,

alleging that the Court of Appeals did not apply the appropriate laws, which stipulate that the defendant must prove the non-passing on of the price to customers. Carrefour argued the direct effect of European texts, including the application of Directive 2014/104 of the European Parliament and Council on antitrust damages actions. It was also argued that the rules governing the burden of proof should be applied in accordance with the directive, even for events predating its national transposition. The crux of this decision lies in

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<sup>1</sup> Aut. conc., December 18<sup>th</sup>, 2014, n° 14-D-19

the Court of Cassation's interpretation of the directive.

In turn, the High Court judges rejected the plaintiff's appeal. The commercial chamber justified its decision by emphasizing that national courts cannot interpret European law contrary to French law, even after the transposition deadline for the directive has passed. In essence, the directive cannot create direct obligations for individuals<sup>2</sup> and cannot be invoked directly against the defending company. The Court of Cassation ruled that the burden of proof rests with the plaintiff under the national law in force at the time of the events. With this decision, the Court of Cassation establishes, in French law, the substantiality of the presumption rule of non-passing on of the surcharge<sup>3</sup> provided by the European text<sup>4</sup>.

The initial post-transposition litigations of the "Damages" directive focus on its material and temporal interpretation.

The situation of a plaintiff forced to provide evidence of non-passing on of the surcharge **(I)** transforms into a favorable situation after the transposition of this directive, which shifts the burden of proof **(II)**.

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<sup>2</sup> CJUE 19 janv. 2010, aff. C-555/07, pt. 46

<sup>3</sup> J. Catala Marty, R. Beydon, "3 questions - Présomptions de préjudice de la directive « damages » : ont-elles permis de faciliter les actions en follow-on ? », *La Semaine Juridique Entreprise et Affaires*, n°13, 2023, p.308

## **I. A plaintiff forced to provide evidence of non-passing on of the surcharge.**

In 2001<sup>5</sup>, the Court of Justice of the European Union established the right for any victim of an anticompetitive practice to seek compensation for resulting harm before national courts. The proof being challenging to establish (A), a legal climate was born to facilitate its presentation (B).

### **A. The burden of providing purportedly unreasonable evidence.**

The private enforcement scheme draws inspiration from civil actions for damages based on Article 1240 of the Civil Code<sup>6</sup>. The victim of an anticompetitive practice opposes the offending company. As the Court of Cassation emphasizes, the burden of proving harm caused by anticompetitive practices lies with the plaintiff. It involves demonstrating that the plaintiff could not pass on the additional cost to customers. In other words, the plaintiff must not have increased their margin on the price of products or services to offset the loss caused by this illicit practice. To prove the harm suffered, the plaintiff must provide evidences. Providing these evidences seems to weigh on the victim, who

<sup>4</sup> Directive 2014/104/EU of the European Parliament and of the Council from November 26, 2014

<sup>5</sup> CJUE, *Courage c/ Crehan* de 2001, aff. C-637/17

<sup>6</sup> J-C Roda, M-A Frison-Roche, *Droit de la concurrence*, *Précis Dalloz*, , 2022, page 200

must present an irrefutable allegation of the absence of passing on of the surcharge. Carrefour emphasizes that this *sine qua non* condition prevents the judges from confirming the existence of the harm<sup>7</sup>. In this regard, the Court of Appeals refuses to acknowledge the harm suffered by the retail chain, which failed to provide this proof conclusively. The plaintiff points out an error in the analysis of the lower court, which acknowledged the existence of harm based on the Competition Authority's decision but refused to compensate due to the lack of required proof. However, this existing harm justifies the loss suffered by the retail company. The Court of Cassation insists on the strict requirement for this proof. This justification supports the Court of Appeals' decision by adding that the plaintiff was free to establish a pre-cost on the relevant products. This argument is sufficient for the Court of Cassation to claim that the plaintiff did not provide evidence of non-passing on of the surcharge.

## **B. The legal context surrounding the facilitation of evidence for the victim.**

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<sup>7</sup> Cass. Com., October 19<sup>th</sup>, 2022, n°21-19.197

<sup>8</sup> -C Roda, M-A Frison-Roche, *Droit de la concurrence*, Précis Dalloz, 2022, page 202

To understand the significance of this decision, it is essential to recall that victims of illicit practices play a role in regulating the competitive market when they pursue compensation proceedings<sup>8</sup>. However, the burden of proof required of them seems unfavorable. The legislator had attempted to ensure the effectiveness of follow-on actions, particularly through the Galland Act.

This law<sup>9</sup> imposes transparent and identical general conditions of sale for all distributors. This legislative imprint serves as an argument for the plaintiff, claiming that this mechanism prevented any passing on of the surcharge to consumers. The Court of Appeals does not support this argument and does not examine whether passing on the surcharge was possible given these legislative constraints. In the plaintiff's arguments, it is noted that proving this harm is impossible. Carrefour relies on European law to emphasize that procedural rules should not unduly hinder recourse.

To illustrate this point, the plaintiff recalls the legal obligation to retain invoices for only a decade. As usual in this litigation, the Court of Cassation aligns with the Court of Appeals, recognizing the absence of evidence of non-passing on of the surcharge to customers.

<sup>9</sup> Law n°96-588 of July 1, 1996 known as the Galland law

True to its jurisprudence<sup>10</sup>, the Court of Cassation demands proof of non-passing on of the surcharge resulting from an anticompetitive practice, in line with customary commercial practices<sup>11</sup>. It took a European initiative aimed at promoting *private enforcement* for a change<sup>12</sup>. In a show of support for the victim, the European directive of November 26, 2014<sup>13</sup>, transposed into French law by an ordinance on March 9, 2017, established a rebuttable presumption regarding harm<sup>14</sup>. This new legal climate fuels litigations in the material and temporal interpretation of this text.

## **II. Plaintiff protection ensured by a presumption of non-passing on in a post-transposition situation.**

As of March 9, 2017, Article L481-4 was introduced into the Commercial Code<sup>15</sup>, stating that the direct or indirect buyer of the author of the anticompetitive practice is presumed not to have passed on the surcharge generated by the infraction to its customers.

The transposition of this European directive<sup>16</sup> leads to litigation regarding its temporal application. To determine this temporal application, it is necessary to examine the scope of this text **(A)**. The transposition of this innovative text always establishes this connection with other mechanisms serving private enforcement **(B)**.

### **B. Clarification about the application scope of the presumption of non-passing on of the surcharge.**

In order to facilitate the proof of harm, this text has enriched the litigation, as the plaintiff wishes to be subject to this favorable proof regime. In its arguments, the company Carrefour invokes the direct effect of European Union law on national law. The plaintiff argues that the rules governing the burden of proof must be applied in accordance with the directive.

The decision of the Court of Cassation brings forth the major issue of this judgment, which is whether the new law tends to apply to

<sup>10</sup> Cass. Com., june 15<sup>th</sup>,2010, n°09-15.816

<sup>11</sup> V. Téchené, « *Action en réparation du préjudice découlant de pratiques anticoncurrentielles : charge de la preuve de la répercussion du surcoût* », Le quotidien : l'actualité juridique par Lexbase, 2022, N3135BZ7.

<sup>12</sup> J-C Roda, M-A Frison-Roche, *Droit de la concurrence*, Précis Dalloz, , 2022, page 202

<sup>13</sup> Directive 2014/104/EU of the European Parliament and of the Council from November 26, 2014

<sup>14</sup> J. Catala Marty, R. Beydon, “3 *QUESTIONS - Présomptions de préjudice de la directive « damages » : ont-elles permis de faciliter les actions en follow-on ?* », La Semaine Juridique Entreprise et Affaires, n°13, 2023, p.308

<sup>15</sup> Article L481-4 of the Commercial Code, creation Ordinance No. 2017-303 of March 9, 2017

<sup>16</sup> Directive 2014/104/EU of the European Parliament and of the Council from November 26, 2014

situations predating the transposition of the European directive into French law.

Its reasoning follows that of the Court of Justice, which began differentiating essential notions regarding this directive as early as 2019. In a decision in *Cogeco v/ Sport TV*<sup>17</sup>, the Court of Justice of the European Union specifies that substantive provisions apply to offenses committed after the transposition of the directive, while procedural provisions apply to actions brought before this transposition.

Later in a decision in *Volvo*<sup>18</sup>, the Court of Justice clarifies that this presumption of harm is a substantive rule. By deduction, at the European level, only actions brought subsequently are subject to this regime. In this sense, the Court of Cassation harmonizes its jurisprudence with that of the Court of Justice and rules in a decision on October 19, 2022<sup>19</sup>, that the presumption of non-passing on of the surcharge to consumers is a substantive rule. This solution justifies the refusal to apply Article L481-4 of the Commercial Code transposing the *Damages* directive<sup>20</sup> in the Carrefour litigation, to an action where the facts occurred before transposition.. The plaintiff is here subjected

to the burden of proving non-passing on of the surcharge, failing which their harm will not be indemnified. Ultimately, the non-application *rationae temporis* of the directive limits support for follow-on actions.

### **B. A presumption in accordance with the mechanisms of evidence production: leniency and discovery.**

In this judgment, the Court of Cassation aligns with a trend of consolidating the regime of damages actions aimed at encouraging follow-on actions while preserving legislative advantages that allow companies to self-report for benefits<sup>21</sup>. Indeed, leniency programs help regulate the market by involving market wrongdoers themselves.

A problem arises when a follow-on action is brought against a company that has benefited from a leniency program. Leniency has a primary advantage, which is confidentiality. However, the arrival of this directive led the Court of Justice<sup>22</sup> to clarify the utility of leniency: the goal is to reduce a fine or avoid disclosing written statements. In this sense, starting from non-confidential reports of authorities, plaintiffs can obtain information

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<sup>17</sup> CJUE, march 28<sup>th</sup>, 2019, aff. C-637/17

<sup>18</sup> CJUE, june 22<sup>th</sup>, 2022, aff. C-267/20

<sup>19</sup> Cass. Com., october 19<sup>th</sup>, 2022, n°21-19.197

<sup>20</sup> Directive 2014/104/EU of the European Parliament and of the Council from November 26, 2014

<sup>21</sup> J. Berlemont, « *L'impact des actions en dommages-intérêts sur le programme de clémence français* », *Revue Lamy de la concurrence*, n°130, 2023

<sup>22</sup> CJUE, Tribunal, 16 nov. 2012, T-341/12

about committed offenses and elements from leniency files.

The presumption guaranteed by the European directive aligns with the discovery mechanism<sup>23</sup> in the threat of confidential whistleblowing programs. The American discovery program allows for the forced production of evidence in civil or commercial actions. This mechanism aligns with the objective of the presumption of non-passing on. This practice allows obtaining crucial information in proving the existence of anticompetitive practices. Like the presumption, the discovery procedure threatens leniency since these mechanisms allow obtaining incriminating information about the company to support a follow-on

action. The European regulator, ever more cautious, introduces Article 6, Paragraph 6 in its directive<sup>24</sup>, aiming to find a balance between leniency procedures and follow-on actions. Indeed, Member States must ensure that, for the purposes of damages actions, national courts cannot at any time order a party or a third party to produce evidence, including statements made to obtain leniency.

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<sup>23</sup> J. Berlemont, « *L'impact des actions en dommages-intérêts sur le programme de clémence français* », Revue Lamy de la concurrence, n°130, 2023

<sup>24</sup> Directive 2014/104/EU of the European Parliament and of the Council from November 26, 2014