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The French Court of Cassation clarifies the scope of the Adversarial Principle in Expert Proceedings and confirms the Standard of Proof required in Cartel cases

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Resume: *Several undertakings were sanctioned by the French Competition Authority for participating in cartels in the pork and charcuterie sector. They challenged the procedure for appointing the expert and the reliability of the notebook submitted by the leniency applicant. The French Court of Cassation held that the General Rapporteur may select the expert and define the scope of the expert's assignment without involving the parties in those decisions, and that this does not violate the adversarial principle. The rights of the defence are safeguarded provided that the undertakings can challenge the conduct and findings of the expert examination. Finally, the Court upheld the assessment of the notebook as part of a body of serious, precise and consistent evidence, the Court of Appeal having discretion to assess the probative value of the evidence submitted.*

On September 2, 2026, the Commercial Chamber of the Court of Cassation dismissed five consolidated appeals in the so-called "ham case"[1].

The case originated from complaint lodged by Establishments Guy Harang, an undertaking operating in the slaughtering sector, and leniency applications submitted by the Campofrio and Coop groups. The French Competition Authority investigated practices in the purchasing and selling of pork cuts and processed pork products.

In its decision of July 16, 2020[2], it found three anticompetitive agreements prohibited by Article L.420-1 of the French Commercial Code[3] and Article 101 of the Treaty on the Functioning of the European Union[4].

Among the evidence submitted was a notebook kept by the commercial director of Aoste, a company belonging to the Campofrio group, a leniency applicant. The notebook contained notes of telephone contacts concerning prices, namely no planned price increase for snacks, requests for 10% price increases for frankfurter and a

[1] Judgment of the Commercial Chamber of the Court of Cassation, 2 September 2026, No. 24-13.789.
[2] Decision of the French Competition Authority, No. 20-D-09, 16 July 2020.
[3] French Commercial Code, Article L.420-1.
[4] Treaty on the Functioning of the European Union (TFEU), Article 101.

change in quality equivalent to a 10% price increase. Under investigation the companies challenged the notebook's authenticity.

On 16 February 2018, a statement of objections was notified followed by a corrected statement on 13 April 2018. The Authority's General Rapporteur appointed a handwriting expert, on 14 November 2018, to determine whether it was manifestly a forgery in terms of its form. Indeed, the companies disputed the notebook's authenticity, arguing that its entries could have been written outside the time of the events. The expert's primary task was to examine how the notebook had been compiled; he was not required to verify the accuracy of the information it contained.

The sanctioned undertakings challenged the decision before the Paris Court of Appeal. In its judgment of 7 March 2024[5], that court varied the decision in part, particularly as regards the duration of certain infringements and the amount of certain fines. However, it rejected the challenges concerning the expert examination and the notebook's credibility. Thus, in its judgment, the Companies lodged five appeals on points of law, which were joined. The President of the Competition Authority and the Minister responsible for the Economy were among the respondents.

The appellants sought to have the Court of Appeal's judgment set aside, relying principally on three sets of grounds.

First, Cooperl argued that the principle of contradiction should apply to the expert's selection and terms of reference. It contended that consulting multiple experts could compromise fairness and the principle of equality of arms.

The companies challenged the reliability of the notebook. They invoked uncertain dates and unsubstantiated entries.

Second, Cooperl maintained that some of the information might have come from distributors rather than competitors.

Third, some companies requested interest on the fines refunded from the date of payment rather than notification on the appellate judgment.

The legal issue was whether the principle of adversarial proceedings applies from notification of the statement of objections and whether it requires the General Rapporteur to obtain the parties' consent before commissioning an expert examination and to involve them in selecting the expert and defining the terms of reference.

The Court of Cassation dismissed all appeals. Firstly, it upheld the General Rapporteur may freely determine which investigative measures are necessary. The parties' consent is therefore not required before commissioning an expert examination, nor must they participate in selecting the expert or defining the expert's remit.

[5] Judgment of the Paris Court of Appeal, No. 20/13093, 7 March 2024.

Secondly, regarding the notebook, the Court held the appellants were seeking to challenge the lower court's assessment of the evidential weight of the document, a matter within that court's discretion. Indeed, the appellants argued that the notebook's reliability was undermined by its assembly from separate documents and the uncertainty as to whether its entries had been written during the infringement period. Finally, the grounds of appeal were inadmissible because they alleged a failure to rule on a claim, remediable under Article 463 of the French Code of Civil Procedure[6].

The judgment preserves the General Rapporteur's investigative discretion while ensuring an effective opportunity to challenge the expert examination (I). Moreover, this rule highlights two limits of cassation review: the Lower Courts' Assessment of the notebook's evidential weight and the procedural recourse available for a failure to rule on interest (II).

I- Upholding the expert examination: discretion over Appointment and mandate subject to the adversarial principle

The Commercial Chamber of the Court of Cassation affirms the General Rapporteur's authority to appoint the expert (A), while recognizing effective adversarial debate and procedural fairness as safeguards for the parties' rights (B).

A) The General Rapporteur's discretion in appointing the expert and defining the mandate

The legal significance of this judgment lies in the distinction between the preparation of the expert examination and its conduct. The adversarial principle applies only from the notification of the statement of objections. The General Rapporteur is not required to obtain the consent of the parties to order an expert assessment, nor to involve them in the choice of the expert or in the definition of his mandate. The General Rapporteur may decide to consult experts upon request at any time. The provision of the Article L.463-8 of the French Commercial Code, stating that "the investigation shall be conducted by the rapporteur or a party" does not preclude contacting several experts before appointing the one who will conduct the investigation. Both The Paris Court of Appeal and the Commercial Chamber of the French Court of Cassation have long recognized that the French Competition Authority is not bound by the expert's findings. Making the expert's

[6] French Code of Civil Procedure, Article 463.

work available to the parties allows them to discuss its content and conclusions[7].

More generally, an expert report prepared unilaterally can be used as evidence if the parties can challenge it and if it is corroborated by other evidence[8]. And in the Apple and Tech Data case, the Commercial Chamber held that adversarial requirements were satisfied when the evidence was accessible to the parties and could be challenged[9].

The Court's case law appears to adopt a relatively flexible approach to the adversarial principle. The September judgment follows this approach by allowing adversarial debate to take place when the expert's findings are discussed.

Nevertheless, in our case, there is a major issue: the selection of the expert and the formulation of the expert's terms of reference may influence not only the questions examined, but also the methodology and the uncertainties left unresolved. This issue is particularly significant in the "ham cartel" case. The undertakings argued that some entries might have been written outside the infringement period. Determining whether the notebook was fabricated in its entirety in a single sitting does not conclusively establish when each entry was written or whether each item of information is accurate. This tension is illustrated in Emma Bursztejn's commentary. The restriction relates to the parties' participation in preparatory decisions and should not be understood as a general exclusion of the adversarial principle from the investigation[10].

B) Effective Adversarial debate and procedural fairness as safeguards

Compliance with the principle is assessed by reference to the parties' effective opportunity to challenge the expert examination and the fairness of the proceedings, without requiring their participation at every procedural stage[11].

"The undertakings concerned were able to comment on both the preliminary report and the expert report, both during the investigation and before the Board of the French Competition Authority"[12]. Thus, we understand that the undertakings were able to raise their objections before the Authority's decision-making panel and the Court of Appeal and submit observations to the expert, comment on both the preliminary and

[7] Judgment of the Paris Court of Appeal, 28 June 2005, No. 2005/01605.

[8] Judgment of the Civil Chamber of the Court of Cassation, 5 March 2020, No. 19-13.509.

[9] Judgment of the Commercial Chamber of the Court of Cassation 13 May 2026.

[10] E. Bursztejn, « Une conception restrictive du contradictoire en matière d'expertise devant l'Autorité de la concurrence », *Dalloz actualité*, 30 September 2026.

[11] C. Husson-Rochcongar, « L'expertise dans la jurisprudence de la Cour européenne des droits de l'homme, révélateur d'un difficile contrôle juridictionnel de l'action publique ? », *Revue Française d'administration publique*, 2020/1, No. 173, p. 34-36.

[12] Judgment of the Commercial Chamber of the Court of Cassation, 2 September 2026, No. 24-13.789, Paragraph 15.

final reports during the investigation. Cooperl also submitted a report on appeal offering a critical assessment of the expert examination and the notebook itself. These opportunities enabled the undertakings to challenge the evidence at successive stages of the proceedings.

A clear parallel may be drawn with *Mantovanelli v. France*, in which the European Court of Human Rights considered whether the applicants had been afforded an effective opportunity to challenge an expert report likely to have a decisive influence on the determination of their claim. This comparison underscores the importance of effective participation in the expert examination[13].

Excluding the undertakings from those preliminary decisions consequently makes their subsequent ability to challenge the methodology, scope and findings especially important. The strength of the Court's reasoning therefore lies on the effectiveness of those opportunities, which it found established in this case.

In its judgment, the Court of Cassation thus underlines that procedural fairness remains a requirement distinct from the adversarial principle. Thus, procedural fairness concerns the circumstances in which evidence is obtained, whereas the adversarial principle concerns the opportunity to challenge it[14]. In the ham cartel case, it examines the purpose of the preliminary consultations with prospective experts. Article L.463-8 of the French Commercial Code[15] does not prohibit the General Rapporteur from adopting this practice: this article allows the General Rapporteur to appoint an expert and determine the scope and deadline of the assignment on their own initiative. However, the absence of an express prohibition is not sufficient to rebut an allegation of procedural unfairness. The Court therefore assesses the purpose and actual substance of those consultations. And in this case, those consultations had neither the purpose nor the effect of identifying the expert whose findings would be most favorable to the prosecution.

This ruling confirms that compliance with the adversarial principle does not require the expert to grant every request made by the undertakings concerned. The safeguard lies in their ability to defend their position. The General Rapporteur retains the power to organize the investigation, while the undertakings must have an effective opportunity to challenge the evidence relied upon against them.

"However, it does not require the General Rapporteur of the French Competition Authority, who freely determines which investigative measures he considers useful, to

[13] European Court of Human Rights, 18 mars 1997, *Mantovanelli c. France*, No. 21497/93.

[14] C. Lemaire & S. Naudin, « Loyauté de la preuve : la Cour d'appel de Paris admet le caractère déloyal des enregistrement téléphoniques », 16 February 2012, Philips France, *Concurrences*, No. 2-2012.

[15] French Commercial Code, Article L.463-8.

obtain the parties' consent before commissioning an expert examination or to involve them in defining the expert's mandate or selecting the expert"[16]. Thus, the Court guarantees the freedom to prepare the expert examination, requiring compliance with the principle of procedural fairness at that stage. Any challenge must therefore address the substance of the exchanges that took place.
As Catherine Berlaud highlights in her article[17], the General Rapporteur's freedom to prepare the expert examination is accompanied by safeguards enabling the undertakings to challenge its findings.

The Court's ruling thus illustrates a balance within competition investigations between preserving the investigating services' initiative and ensuring an effective opportunity to challenge the evidence relied upon against the undertakings.

II- The limits of cassation review: the Lower Courts' Assessment of the notebook's probative value and the remedy for a failure to rule on interest

The Court of Cassation upholds the lower courts' sovereign assessment of the notebook's probative value (A), before declining to rule on interest (B).

A) The Lower Courts' Sovereign Assessment of the notebook's probative value

The judgment of 2 September 2026 left the assessment of the notebook's probative value to the lower court: "The grounds of appeal merely seek to challenge before the Court of Cassation the Court of Appeal's sovereign assessment of the evidential value of the disputed notebook. The Court of Appeal compared its content with the other evidence submitted to it and considered it part of a body of serious, precise and consistent indicia, in accordance with the standard of proof for an agreement prohibited by Article 101 (1) TFUE and Article L.420-1 of the French Commercial Code"[18]. It noted that the Court of Appeal had assessed it alongside the other evidence and found a body of serious, precise and consistent indicia, the standard of proof required to establish an infringement. Whether the evidence met those criteria fell within the Court of Appeal's sovereign power of assessment. The procedural regularity of the expert examination therefore does not render all the information recorded in the

[16] Judgment of the Commercial Chamber of the Court of Cassation, 2 September 2026, No. 24-13.789, Paragraph 14.
[17] C. Berlaud, « Loyauté et respect du contradictoire en matière de sanction par l'Autorité de la concurrence », *Gazette du Palais*, 15 September 2026, No. 28.
[18] Judgment of the Commercial Chamber of the Court of Cassation, 2 September 2026, No. 24-13.789, Paragraph 25.

notebook indisputable. This qualification is particularly significant because the notebook was supplied by a leniency applicant.

Jacques Buhart and Romain Maulin, two prominent French lawyers specializing in competition and economic law, emphasize the difficulties surrounding the reliability of evidence submitted under leniency programmes. Their analysis underscores the importance of corroborating the notebook's contents with other evidence in the case file[19].

The ruling also highlights the distinction between the procedural validity of the expert examination and the substantive reliability of the notebook[20]. This distinction echoes Laurence Idot's discussion of the admissibility and evidential weight of evidence in competition proceedings[21]. A properly conducted examination does not establish that every entry is accurate. Similarly, uncertainty about the date or manner in which particular entries were transcribed does not necessarily deprive the entire document of evidential value. In this judgment, the relevant question is whether the material relied upon, considered alongside corroborating evidence, adequately supports the finding of an infringement.

Thus, the submission of the notebook as part of a leniency application raises questions about the reliability of the information supplied by the undertaking[22]. In this case, assessing the notebook alongside the other documents makes it possible to look beyond the declarant's credibility and identify corroborating evidence.

The reasoning consequently favors a contextual assessment over an all-or-nothing approach. A notebook containing contested notes may still contribute to proving an infringement where relevant information is independently corroborated. An assessment of the document must remain connected to the specific facts requiring proof.

The Court of Cassation does not independently authenticate the notebook or certify the truth of every statement it contains. It accepts that the Court of Appeal applied the appropriate evidential framework and refuses to substitute its own factual assessment.

B) <u>The Court's refusal to rule on interest</u>

Some undertakings sought interest accruing from the date of payment. They argued that interest on the amounts to be refunded following the reduction of their fines should run from the date of payment of the original fines, rather than only from

[19] J. Buhart & R. Maulin, « La preuve en matière de cartels : état des lieux et perspectives », *Concurrences*, No. 4-2011, p. 51-64.

[20] Judgment of the Commercial Chamber of the Court of Cassation, 2 September 2026, No. 24-13.789, Paragraph 25.

[21] L. Idot, « Réflexions sur l'évolution de la preuve des pratiques anticoncurrentielles devant les autorités de concurrence », *Concurrences*, No. 1-2017.

[22] N. Jalabert-Doury, « Les déclarations en droit de la concurrence : la preuve d'infractions peut-elle se déduire de « certitudes probables » ? », *Concurrences*, No. 2-2005.

notification of the Court of Appeal's judgment. However, the Court of Cassation does not determine that issue on the merits. Instead, it finds that the Court of Appeal failed to rule on the claim. Two situations must be distinguished.

First, where a court rejects a claim, its decision may be challenged through the appropriate appeal. And where it fails to rule on that claim, an application must be made to supplement its decision under Article 463 of the French Code of Civil Procedure[23].

"The companies belonging to the CA Animation and Savencia groups are in fact alleging a failure to rule on a claim" [24]. In this way, the undertakings must therefore apply to the Court of Appeal for a ruling on interest. This approach reflects Roger Perrot's analysis that an unexamined claim requires the court that delivered the judgment to supplement its decision[25]. And Maxime Barba likewise explains that the appropriate procedural remedy depends on whether the court adjudicated upon the claim[26].

A further procedural safeguard accompanies the decision. Before raising inadmissibility of its own motion, the Court invited the parties to submit observations under Article 16 of the Code of Civil Procedure[27]. The adversarial principle therefore operates here as a safeguard against an unexpected procedural recharacterization, allowing the parties to address the basis on which their grounds might be rejected.

Finally, inadmissibility must be distinguished from rejection on the merits. The Court in its judgment of 2 September 2026 does not hold that interest can run only from notification of the appellate judgment, nor does it reject the substantive argument for interest from the date of payment. The dismissal of the appeals therefore cannot be read as substantive approval of the contested treatment of interest.

To conclude, the Court preserves the General Rapporteur's investigative discretion. Indeed, this discretion is expressly provided for in Article L.463-8. It safeguards the adversarial principle during the expert's examination and the discussion of the findings, without requiring to apply to the expert's appointment of the definition of their mandate. It could be argued that, where the reliability of evidence depends on how it is produced, these preliminary stages should also be open to adversarial debate. However, the Commercial Chamber declined to extend the adversarial principle to the preparation of

[23] French Code of Civil Procedure, Article 463.

[24] Judgment of the Commercial Chamber of the Court of Cassation, 2 September 2026, No. 24-13.789, Paragraph 29.

[25] R. Perrot, « Jugement. Dispositif. Rejet de toutes autres demandes. Portée », *RTD civ 2000* ; quoted by Maxime Barba, *Dalloz actualité*, 23 January 2026.

[26] M. Barba, « La formalisation d'une déclaration d'appel à l'encontre d'un chef de rejet balai », *Dalloz actualité*, 27 March 2025, No. 22-21.602.

[27] Code of Civil Procedure, Article 16.

the expert examination and approved this restrictive interpretation of the law.

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