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The Paris Court of Appeal hands down an important judgement in a follow-on damages claims for the consequences of abusive practices in the telecommunications market *(Orange / Digicel)*

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Paris Court of Appeal, *Orange / Digicel*, 17/23041 - N° Portalis 35L7-V-B7B-B4VIF, 17 June 2020 (French)
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On June 17, 2020, the Paris Court of Appeal handed down an important decision in the Digicel / Orange case. Digicel has indeed initiated an action to be compensated for the consequences of the abusive practices implemented in the Antilles-Guyana zone by Orange-Caraïbe and Orange between 2000 and 2005. These practices had been sanctioned to the extent of 60 millions by the French Competition Authority in its decision no. 9-D-36.

The practices in question consisted mainly of the imposition of exclusivity clauses on independent distributors of mobile telephone offers and on the only local mobile telephone repairer in the zone in question; the implementation of a subscriber loyalty program; and unjustified price differentiation practices in its prepaid offers (customers of the offers in question paying more for calls to competing networks than to other Orange-Caraïbe customers). The judgment confirms the wrongful nature of these practices (by reversing the judgment of the Paris Commercial Court on the issue of exclusivity). Orange-Caraïbe and Orange were ordered to pay Digicel 181 million euros in principal and 68 million euros in interest.

Beyond the fact that this case represents one of the most important judgments of this type decided in France, the decision appears important in several respects with regard to the legal and economic analysis of the damage and its reparation.

Firstly, with regard to fault, this decision is an opportunity to recall a now well-established principle: a competitive offence 'necessarily constitutes a civil fault'. The decision is thus in line with the Lectiel decision (Paris Court of Appeals, May 27, 2015, Sté Lectiel, No. 14/147758), which established the principle of assimilation of competitive fault to civil fault.

Secondly, with respect to damages, the judgment offers interesting lessons on the typology of damages that can be compensated in competition law, apart from the classic characterization of the additional cost suffered. The Court of Appeal justifies its evaluation of damages by referring to the Manfredi decision (CJEU, July 13, 2006, No. C-295/04, Manfredi). However, it must be noted that the latter does not mention the loss of chance due to the unavailability of capital. The Manfredi judgment only observes that interest is a method of full reparation of the loss. This judgment thus confirms the importance that loss of chance due to the unavailability of capital can take on in private litigation for compensation. If the loss related to the additional costs incurred as a result of exclusivity agreements is 'classic' in this type of litigation, the invocation of a 'cash loss' has in fact considerably broadened the reparable loss.

The reparable cash loss takes the following forms:

- The loss of opportunity to invest in an identified project due to the unavailability of capital constitutes a compensable loss that can be compensated by applying the so-called 'WACC' (weighted average cost of capital) rate.

- The loss of the chance to pay down debt constitutes a reparable loss that requires the application of a discount rate.

Repairing the detrimental effects of time on the value of the compensation is important because it meets the specificity of 'competitive harm', the effects of which are progressive. However, the question arises as to whether it is relevant to drown the financial loss in the loss of the chance to pay down debt or the loss of the chance to make lucrative investments. This interpretation by the Court of Appeal leads to making the financial loss a loss of chance rather than an autonomous loss, which is not necessarily the most satisfactory solution.

It is tempting here to compare the decision with a decision of the Competition Appeal Tribunal (CAT) in Sainsbury's Supermarkets Ltd. v. MasterCard Incorporated et alii. In this decision, the CAT recalled that financial loss should be treated like any other damage: 'A claim for interest is a loss like any other, recoverable according to the usual rules. There is not any 'special' rule for interest'. Thus, compensatory interest is considered as a loss in its own right. The CAT assessed, in order to retain the compensatory interest as an autonomous prejudice, that Sainsbury's had had to increase its indebtedness as a result of the competition infringement [***1***]. By considering that the compensatory interest describes a global prejudice entitled 'financial prejudice' or 'cash flow prejudice', it is clear from this 'English' jurisprudence that it is not necessarily useful to make a detour by the loss of chance to calculate this financial prejudice and thus the compensatory interest.

Moreover, the loss of chance, which is defined as the certain disappearance of a favorable eventuality, raises the standard of proof for victims, who must be able to go back in time and produce robust economic analyses. This raises the question of whether the effectiveness of private litigation for reparation is not, above all, linked to the means that professionals are able to allocate for the proof of their prejudice, with the help of the best financial and economic experts.

This is also a real difficulty for magistrates to identify compensatory interests as a component in its own right, unless it is biased by the qualification of other damages such as loss of opportunity and/or loss of cash flow. However, this also has the consequence of raising the standard of proof for the victim (and mechanically leads to minimizing the effect of the loss of earnings on a company's business). One can observe that this is a problem partly linked to the fact that the European Commission, in its communication on damages as much as in its document on the quantification of damages, does not address this issue. It does say that it deals with damages,

but it never deals with the question of the calculation of interest to be taken into account, which is a crucial issue because of the delay that can occur between the fault and the court decision, if only in cartel cases that sometimes extend over more than a dozen years.

Finally, with regard to the causal link between the fault and the prejudice, the judgment relativizes the presumption of causality established in article L.481-7 of the French Commercial Code, which establishes a simple presumption as to the existence of prejudice following an agreement. In the case at hand, Digicel does not appear to have benefited from this presumption of causality since the company had to produce numerous documents demonstrating the link between the competitive fault arising from the exclusive agreements between Orange and distributors and the additional costs incurred.

However, the court validates the use of an overall assessment of the cumulative effects of all the practices considering that they contributed to the same prejudice. It noted that it is not possible to isolate the effects specific to each of the practices. The court thus validated the assessment of an additional cost prejudice suffered 'overall' when several anti-competitive practices were at issue. This aggregation of damages constitutes, to our knowledge, an innovation in relation to the doctrine of identifying a specific damage that is clearly attributable to each of the faults. It will be interesting to see whether this approach is subsequently justified by the particularity of the case or whether it will become established as a standard in order to simplify the assessment of damages, particularly when double counting may occur.

With regard more particularly to the loss of cash flow, the trial judges were very attentive to the proof of the causal link: they considered that the victim should have proved a direct link between the fault at the origin of the unavailability of the capital and the loss which here takes the form of a loss of chance to value the lost capital. In the present case, Digicel has not succeeded in demonstrating the link between the unavailability of the capital and the prejudice, namely, the investment opportunity of which it was deprived. The Court therefore rejects the claim for compensation based on this prejudice.

Nevertheless, Digicel demonstrated that the fault caused it a prejudice constituted by the loss of the opportunity to reduce its debt. The availability of sums related to the amount of the prejudice would have allowed it to save on financial charges. The average interest rate of 5.3% is the amount of the savings that would have been made if the practices had not occurred. This method of determining and assessing injury was adopted by the judges.

All in all, this decision makes several notable contributions. It is quite remarkable in that it takes into account the specificity of competitive injury as 'progressive' injury. In order to do so, it develops a 'global' approach to all practices and thus ensures the reparation of the prejudicial effects over time of the anti-competitive practice in order to calculate the amount of damages.

Secondly, while the judgment reaffirms the necessity of proof of the causal link between fault and damage, it testifies to a notable evolution towards the deterrent, and no longer merely reparative, function of civil liability. This reveals a better taking into account of the lessons of the economic analysis of civil liability as a mechanism for regulating corporate behaviour that may be detrimental to other actors. From this point of view, the judgment illustrates the role played by complementary private action in the fight against lucrative faults. The financial penalty exceeds 300 million euros, combining the fine imposed by the Authority and the damages of 249 million euros awarded by the Court of Appeal to Digicel). The double economic cost of the infringement (linked to the fine imposed by the Authority and the damages) thus reduces the incentive to commit the offence. Moreover, this

decision could call into question the interest of applications for a stay of proceedings. The more judges use high discount rates for damages, the more expensive it will be for the defendant to delay proceedings, which should deter the defendant from resorting to these procedural means only for just reasons.

Beyond this finding on the preventive or deterrent function of civil liability, the decision also demonstrates the importance of the place of economic reasoning in competition law and reparation. Indeed, each party produced solid economic analyses and arguments. The recourse to 'efficient' economic experts shows incidentally that the quality of the evidence depends on the means that the parties are ready to assign to the defense of their interests [*2*]. However, it should be stressed that this capacity is also a privilege reserved for some powerful but not all players, starting with small businesses that are often disadvantaged in this respect or consumers who are victims of a competition violation.

[*1*] This is similar to the Novacel jurisprudence, which nevertheless requires the characterization of the loss of the chance to reduce one's debt in order to determine the financial loss.

[*2*] This observation is not without reference to Gordon Tullock's criticism of civil procedure at common law, which emphasizes the defects of a system that encourages parties to invest considerable sums of money in litigation (Tullock, G., 1997, The case against the common law. Durham: Carolina Academic Press).