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The cover features several large, dark green leaf-like shapes scattered across the background, creating a natural, organic feel. The leaves vary in size and orientation, with some pointing upwards and others downwards.

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# Cartels

Second Edition

France

Fourgoux Djavadi et Associés

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## Law and Practice

*Contributed by Fourgoux Djavadi et Associés*

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**Fourgoux Djavadi et Associés** brings together ten experienced lawyers with an extensive litigation practice in competition law. The partners and associates are trained in building legal strategies, and also in assisting the legal

departments of large companies in the field of competition law (dawn raids, criminal proceedings, public and private enforcement).

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## 1. Basic Legal Framework

### 1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

The legal basis for challenging cartel behaviour in France is Article L.420-1 of the Commercial Code. French competition law is largely based on EU competition regulation as well, so Article L.420-1 of the Commercial Code is quite similar to Article 101 of the TFEU and prohibits all agreements, concerted practices and alliances which have as their object, or may have as their effect, the prevention, restriction or distortion of competition in a market. Cartels are the most famous example of practices with an anti-competitive object.

### 1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The general antitrust enforcer is the French Competition Authority (FCA or *Autorité de la concurrence*), which is an administrative authority independent from the government. The FCA is divided between the investigation services placed under the authority of the General Rapporteur and the Panel that adopts the decisions, which is made up of 17 members who do not participate in the investigations. The FCA investigates cartel matters and other competition law infringements through the implementation of the Commercial Code, and works to ensure compliance with the competition rules in general. The Authority will also apply Article 101 of the TFEU to cases or cartels affecting trade between the Member States. The Panel's decisions are subject to appeal to the Paris Court of Appeal.

The DGCCRF (*Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes*), which is part of the French Ministry for the Economy, also has powers to deal with cartels, initiating prosecutions in liaison with the FCA. Pursuant to Article L.464-9 of the Commercial Code, the DGCCRF can investigate anti-competitive practices (for the purpose of informing the FCA), impose injunctions and propose financial settlements if the following conditions are met:

- it affects the local markets (ie, the turnover of each of the companies in France does not exceed EUR50 million and their combined turnover does not exceed EUR200 million);
- non-application of Article 101 of the TFEU; and
- the undertakings concerned have a limited turnover (ie, the individual turnover in France of each undertaking is under EUR50 million, and the combined turnover of the undertakings does not exceed EUR200 million).

French law also provides for the criminal responsibility of employees or managers if they took a personal and determining part in the conception, organisation or implementation of a cartel. Under Article L.420-6 of the Commercial Code, individuals can be sued and incur criminal penalties (up to four years' imprisonment and a EUR75,000 fine), but sanctions remain very rare, having been enforced in only a few decisions (mostly in cases of public tenders). As far as is known, no decision has been issued in the past 12 months but some files, linked to FCA investigation, are under scrutiny.

### 1.3 Private Challenges of Cartel Behaviour/Effects

There is a private right of action for challenging cartel behaviour in France in relation to damages claims complementing the public enforcement. Private parties who suffered a personal loss from a cartel can bring a private damage claim before the civil courts. Such actions are currently governed by the ordinary French rules of civil liability and can be brought even if the FCA has not issued a decision regarding the anti-competitive practice in question. Within a private enforcement case, the plaintiff should prove an infringement of the competition rule, the damage suffered and a causal link between the fault and the damage. French courts apply the principle of full reparation of damages but do not use punitive damages.

In “standalone” actions, claimants have to prove the existence of the cartel and quantify the level of the damage, which can be very complex and may require the intervention of experts. However, regarding anti-competitive practices and more particularly cartels, the French Commercial Code facilitates and softens the action for the claimant. The Commercial Code implementing the UE directive on damages introduced an irrebuttable presumption of fault within sanction and injunction decisions pronounced by the Competition Authority (Article L.481-2). Indeed, if the Competition Authority condemns a cartel, the judge of damages will be bound by this finding with an irrebuttable presumption regarding the existence and imputability of the anti-competitive practice, which significantly alleviates the difficulty of proving a causal link between the proven wrong and the alleged harm.

### 1.4 Definition of ‘Cartel Conduct’

There is no exact definition of cartel conduct within the Commercial Code. The term “cartel” is generally used to describe a group of independent companies that join together to limit production, fix prices or share markets or customers between them. Pursuant to Article L.420-1 of the Commercial Code, cartels are covered by the prohibition of anti-competitive agreements, as detailed under **1.1 Statutory Bases for Challenging Cartel Behaviour/Effects**. In practice, the FCA follows the European Commission Guidance and the ECJ case law, even if the European competition rules are not applicable.

Article L.420-4 of the Commercial Code sets out exemptions for cartel prohibitions that are excluded in the application of Article L.420-1 of the same code. One exemption concerns practices resulting from the implementation of a law or regulation (tariffs for the consultation and for certain surgical acts). Another exemption is about practices that ensure economic progress and reserve a fair share in the resultant profit for users (used for certain practices in the agricultural sector).

### 1.5 Limitation Periods

The limitation period for actions before the FCA and/or for private damage is five years.

Article L.462-7 of the French Commercial Code makes it possible to interrupt the public and civil limitation period with “*any act tending to the investigation, detection or sanction of anti-competitive practices.*”

The five-year limitation period for civil actions for damages begins to run only when “the plaintiff knew or ought to have known cumulatively” the acts complained of and the fact that they constitute an anti-competitive practice. In any event, the requirement does not run until the anti-competitive practice has ceased.

Since March 2014, Article L.462-7 of the Commercial Code has provided that the prescription of the civil action of these victims was interrupted by the opening of proceedings before the Competition Authority, the European Commission or a competition authority of a Member State. This interruption has effects until the final decision.

### 1.6 Extent of Jurisdiction

The FCA is a member of the European Competition Network (ECN), and is entitled to punish any cartel that has a possible effect in the French territory. The same practice affecting trade between Member States may be pending before several National Competition Authorities (NCAs), whether or not they have been seized automatically, and whether they were seized by different or the same complainants.

An interesting decision relating to cross-border issues is decision No 12-D-09 of the FCA dated 13 March 2012, partially confirmed by the Court of Appeal in 2014, in which the FCA fined a cartel in the packaged flour industry in the food retailing sector. An application for leniency was submitted in parallel before the French and German competition authorities by a German miller. Dawn raids were conducted in both France and Germany.

### 1.7 Principles of Comity

In France, there is no principle according to which authorities should take other countries’ important interests into account while conducting their law enforcement activities, in return for them doing the same.

## 2. Procedural Framework for Cartel Enforcement – Initial Steps

### 2.1 Initial Investigatory Steps

The FCA appoints one or two rapporteurs to investigate the case. They make an initial assessment in line with the General Rapporteur, who decides whether or not to carry out investigations (simple investigations or dawn raids).

### 2.2 Dawn Raids

Dawn raids require an order of the judge of freedoms and detention (JLD) of the court in the jurisdiction in which the places to be visited are located, or a delegated judge authorising visits and seizures, before they can be carried out.

Dawn raids will be authorised on the request of the General Rapporteur upon the FCA showing presumptions of a cartel. If the JLD authorises the dawn raid, the rapporteurs are accompanied by a police officer.

The authority of the court authorising the search must be notified, and the company has the right to be assisted by a lawyer.

### 2.3 Restrictions on Dawn Raids

The decision authorising the dawn raid fixes the extent of the collection of documents allowed. There is no limitation on the search measures for these visits – investigators can search the office's cabinets, vehicles, computers and mobile phones.

### 2.4 Spoliation of Information

Investigators work in groups and prohibit employees of the company being investigated from making phone calls, in order to avoid the spoliation of potentially relevant information. They also seal the premises, if necessary, as well as documents and other evidence collected during the operation process.

### 2.5 Procedure of Dawn Raids

The subject companies and their employees must co-operate with enforcers and respect the provisions relating to the dawn raid. The breach of a seal or any damage to the integrity of an e-mail system constitutes an obstruction within the meaning of Article L. 462-4 of the French Commercial Code. On 22 May 2019 the FCA fined a company EUR900,000 for such practices (FCA 19D09).

### 2.6 Role of Counsel

The role of lawyers in dawn raids has been the subject of much discussion. Investigators previously refused to allow lawyers to take an active part in the operations, for the verification of seized documents, reservations, the posing question, oral explanations, etc. However, several judgments of the Court of Cassation have censured this practice, restating that the right to counsel cannot be limited to a role of mere observer, although the lawyer should require the police officer judiciary to revert to the judge if there is an issue during the investigation. After the dawn raid, the lawyer can directly file a claim for an unfair and/or excessive dawn raid.

### 2.7 Requirement to Obtain Separate Counsel

Individuals are generally not required to have separate counsel, unless they are personally charged for obstruction and/or they left the company and were involved in the infringement.

### 2.8 Initial Steps Taken by Defence Counsel

As soon as the dawn raid starts, the counsel must analyse the request for investigation with in-house counsels and set up a team (lawyers and/or company workers) to follow the investigators, to make sure that the company's rights are preserved (ie, the protection of privileged documents, etc).

### 2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

Companies may spontaneously give information regarding the conduct of competitors. They can either make a formal complaint or provide informal information for the FCA to pursue investigations. The FCA can then launch a simple or heavy inquiry.

The simple inquiry is provided for in Article L. 450-3 of the French Commercial Code. Investigators or rapporteurs can access all business premises, request the communication of professional documents, obtain or take copies of professional documents by any means and in any medium, and collect on the spot any documents and information necessary to maintain control of the proceedings. Unlike the heavy investigation, there are no forcible searches, seizures, or access to authorised private premises. Investigators come without a warrant or judicial authorisation. Various circumstances may give rise to this type of investigation, including simple inspection visits, preliminary investigations, complementary investigations after heavy inspection, etc.

The heavy investigation is provided for by Article L. 450-4 of the French Commercial Code. Investigators can have access to business premises and private premises. Investigators authorised by the JLD can organise visits/searches in premises, grounds and non-professional means of transport, including the homes of employees or representatives of the company when there may be documents there relating to the offences. They have the same powers as in the business premises, but they can seal commercial premises only. If there is any obstruction, the investigators can ask the judicial police officer to make use of the public constraint. They have the right to search premises and digital devices, and can seize or copy any document or information medium, whether private or professional, original or copy. Investigators can still interview the occupant of the premises and record his or her answers, but cannot search their bag or purse, nor proceed to a search of the body, without authorisation.

### 2.10 Procedure for Obtaining Other Types of Information

See 2.9 Enforcement Agency's Procedure for Obtaining Evidence/Testimony.

### 2.11 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

As far as is known, no decision has been issued regarding the seizure of documents located in the cloud. Companies/indi-

viduals are compelled to produce documents or evidence that are available to them.

### 2.12 Attorney-client Privilege

During dawn raids and/or for any FCA inquiry, a company may refuse access to any document covered by the legal privilege within the meaning of French law. Written communications (including emails) between the company and an independent lawyer outside the company that are intended to provide legal advice or are related to pending or potential legal proceedings are protected by this statute.

Written communications involving in-house lawyers but no outside lawyer are not protected by the French legal privilege, and can therefore be copied or captured by investigators. If the protected status of a document is in dispute, the company cannot prevent the copying or seizure of this document by investigators, and will have to verify that the challenge under the legal privilege is included in a report. At the end of the visit/search, the company may challenge the copy or seizure before the First President of the Court of Appeal of the same jurisdiction as the JLD.

### 2.13 Other Relevant Privileges

Regarding the privilege against self-incrimination, companies cannot be forced to admit that they have committed an offence, but they are in any case obliged to answer questions with factual information and to produce requested documents, even if such information can be used to establish the existence of an infringement by them or another undertaking.

Investigators are bound by professional secrecy. The existence of strategic documents among the documents seized is worth mentioning, as a non-confidential version can then be added to the file. If there is a disagreement regarding the status of a document, a record of disagreement is drawn up, and a copy of the disputed document is placed in a sealed envelope pending the decision of the Tribunal.

### 2.14 Non-co-operation with Enforcement Agencies

Initial requests for information are not commonly resisted, and doing so is severely sanctioned. In the absence of co-operation, the company may incur liability, which may result in a fine of up to 1% of worldwide turnover, and a penalty of up to 5% of the average daily turnover. In any case, blocking, destroying parts or breaking seals exposes firms to an aggravating circumstance for calculating the fine. For instance, on 22 May 2019 the FCA applied a sanction of up to EUR900,000 for obstructing the conduct of visits and seizures carried out by the Authority (breakage of seals and alteration of the operation of a mailbox).

In the absence of co-operation, there is also a French offence of obstruction, which can possibly lead to criminal responsi-

bility for the individual (a fine of EUR7,500 and/or imprisonment of six months).

### 2.15 Protection of Confidential/Proprietary Information

Business secrecy can be opposed but only towards third parties and not towards the investigators – see **2.13 Other Relevant Privileges**.

### 2.16 Procedure for Defence Counsel to Raise Arguments Against Enforcement

Defence counsels may raise arguments after the target of a cartel investigation receives notification of the statement of objections.

When the company receives the formal notification, the company under investigation may choose to prepare a defence memorandum, addressing all or part of the grievances stated by the FCA, or may file for a leniency or a transaction process.

### 2.17 Leniency, Immunity and/or Amnesty Regime

On 2 March 2009, the FCA adopted a new procedural notice relating to the French Leniency Programme. According to the leniency programme, the FCA may grant an undertaking that is liable to be fined for taking part in an anti-competitive agreement or concerted practice full or partial immunity if the undertaking helps to establish the existence of the agreement or practice. In principle, the agreements concerned are cartels between undertakings consisting of the fixing of prices, the allocation of production or sales quotas or the sharing of markets, including bid-rigging, or any other similar anti-competitive behaviour between competitors. Thirteen decisions have been published based on the leniency programme since 2009.

In 2015, the FCA adopted a revised text of its procedural notice on the leniency programme, which notably took into account the results of the 15 April 2014 leniency study and the changes made to the European model programme in November 2012.

## 3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

### 3.1 Obtaining Information Directly from Employees

The FCA can summon employees to an interview. Employees must co-operate and answer the investigators' questions.

### 3.2 Obtaining Documentary Information from Target Company

The FCA can ask for information by sending questionnaires.

### 3.3 Obtaining Information from Entities Located Outside this Jurisdiction

The FCA can ask for information by sending questionnaires.

### 3.4 Inter-Agency Co-operation/Co-ordination

There is significant co-operation between the FCA and the DGCCRF for the investigation and sanction of anti-competitive practices, provided for by Article L. 464-9 of the Commercial Code.

The Minister in Charge of the Economy may order companies to put an end to the practices referred to in Articles L. 420-1 to L. 420-2-2 and L. 420-5, or contrary to measures taken pursuant to article L. 410-3, when these practices affect a local market and do not concern facts falling under Articles 101 and 102 of the TFEU, provided that the turnover of each company in France during the last financial year does not exceed EUR50 million, and their cumulative turnover does not exceed EUR200 million.

The Minister in Charge of the Economy can also, under the same conditions, propose a settlement. The amount of the transaction may not exceed EUR150,000, or 5% of the last known turnover in France if this value is lower. The terms of the transaction are set by decree. The timely performance of the obligations resulting from the injunction and the acceptance of the transaction extinguish any action before the FCA for the same facts. The Minister in Charge of the Economy informs the FCA of the concluded transactions.

The Minister cannot propose a transaction or impose an injunction when the same facts have previously been submitted to the FCA by a company, unless the FCA has rejected the referral.

If there is a refusal to compromise, the Minister in Charge of the Economy sends the file to the FCA. He also applies to the FCA in the case of non-execution of injunctions or the obligations resulting from the acceptance of the transaction.

On a broader level, on 31 January 2019, the DGCCRF and the French data protection authority (CNIL) signed a new co-operation protocol. The two authorities decided to strengthen their collaboration and adapt it to the new digital challenges. This new agreement is related to consumers' rights for data protection but may ease competition investigations in the future.

### 3.5 Co-operation with Foreign Enforcement Agencies

The European Competition Network (ECN) brings together the National Competition Authorities (NCAs) of the Member States of the European Union around the European Commission. In France, since the entry into force of the Law on the Modernisation of the Economy of 4 August 2008, and the ordinance for the modernisation of competition regula-

tion of 13 November 2008, the FCA has been designated by the government as the sole NCA as defined by European law, replacing the former system under which this function was shared between the Conseil de la concurrence and the Ministry of Economy (DGCCRF). In this capacity, it takes part in all proceedings of the European Commission's Directorate General for Competition (DG COMP) concerning individual merger or anti-competitive practices cases, and in drawing up legislation. A representative of the government, generally from the Ministry of Economy (DGCCRF), may also be called upon to take part in works on subjects other than individual cases.

Different NCAs in the ECN may co-operate in order to analyse practices in various sectors. For instance, the FCA and the German Bundeskartellamt published an opinion on competition and data in 2016.

### 3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

Criminal proceedings are independent from the administrative procedure before the Competition Authority. Therefore, the prosecutor, like the victim, can implement a public action where no procedure was launched before the Competition Authority.

The annulment of the transmission of the Competition Authority's file to the public prosecutor's office does not call into question the continuation of the proceedings before the criminal court. In fact, the public prosecutor is entitled under Articles 40 and 41 of the Code of Criminal Procedure to order a preliminary inquiry in light of all the information addressed to him.

Referral to the criminal court does not relieve the Competition Authority of the case, and the pronouncement of a sanction may possibly be added to the sanction pronounced by the criminal court.

### 3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

There is no specific procedure – only the French civil proceeding rules.

### 3.8 Enforcement Against Multiple Parties

Enforcement actions before the civil courts are autonomous proceedings brought against each party to a cartel. Victims cannot sue in multiple parties within one trial.

The victim has to sue each participant in the anti-competitive practice, and has to prove the damage directly suffered because of the participant's actions.

### 3.9 Burden of Proof

As described previously, the victim has to prove the damage suffered and the causal link between the defendant's acts

and the damage suffered when the qualification of the anti-competitive practice was previously made by the FCA.

### 3.10 Finders of Fact

As far as follow-on actions are concerned, the facts have previously been found by the FCA.

If there was no FCA decision prior to the proceeding, the party claiming to be a victim of anti-competitive practices must provide proof. The judge shall then apply the law to those facts.

### 3.11 Use of Evidence Obtained from One Proceeding in Other Proceedings

Evidence obtained in one proceeding may be used in other proceedings.

Pursuant to the directive on rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

- leniency statements; or
- settlement submissions.

### 3.12 Rules of Evidence

Apart from the irrebuttable presumption previously described, the general rules of evidence apply.

### 3.13 Role of Experts

Economists have a determining role in evaluating the damage to the market economy as a result of anti-competitive behaviour.

The FCA has its own economist service. Parties are generally accompanied by their own economist before the FCA and before the courts when arguing the alleged damage caused to the economy.

### 3.14 Recognition of Privileges

Please see 2.13 Other Relevant Privileges.

### 3.15 Possibility for Multiple Proceedings Involving the Same Facts

The principle of non bis in idem prevents the same facts from being judged twice.

Actions may be brought before commercial courts when there is no FCA decision, or after such a decision (follow-on), for the victims to obtain compensation for the loss suffered.

## 4. Sanctions and Remedies in Government Cartel Enforcement

### 4.1 Imposition of Sanctions

Pursuant to Article L. 464-2 of the French Commercial Code, the FCA may impose fines on bodies or companies that have breached Article L. 420-1 or L. 420-2 of the French Commercial Code. The amount of the individual fines is set according to the seriousness of the facts, the extent of the harm done to the economy, the situation of the body or company that is being sanctioned or of the group to which it belongs, and whether it is a repetition of previous infringements of competition rules.

In accordance with the same article, the maximum amount of the fine is 10% of the tax-exclusive global turnover of the group to which the fined company belongs.

For private damages, the parties must file a case before the commercial court.

### 4.2 Procedure for Plea Bargaining or Settlement

A settlement is a kind of plea bargaining, which succeeds the Non Contestation of Grounds and was introduced into the Commercial Code in Article L. 464-2 III by the law for growth, activity and equal economic opportunity, known as the “Macron Law” of 6 August 2015. This procedure allows companies that waive the right to challenge the grounds notified by the investigation services of the Competition Authority to have the General Rapporteur of the Authority propose a transaction setting the maximum and minimum amount of penalty. After acceptance of the transaction by the companies, the General Rapporteur proposes that the panel pronounces the pecuniary sanction within the limits fixed by the transaction. Companies can also commit to changing their behaviour in the future, and the General Rapporteur can take this into account in his or her transaction proposal.

### 4.3 Collateral Effects of Establishing Liability/Responsibility

See 1.3 Private Challenges of Cartel Behaviour/Effects regarding the existence of an irrebuttable presumption of the existence of anti-competitive behaviour after a decision of the FCA. The presumption does not exist where the company agrees with FCA validated commitments.

### 4.4 Sanctions and Penalties Available in Criminal Proceedings

The FCA is responsible for the protection of the economic order, but it is not a criminal court and does not pronounce criminal judgments.

During the investigation at the request of the plaintiff and/or the Ministry of Economy and/or on its own initiative, interim measures can be imposed on parties in the FCA believes there is a serious and immediate threat to an economic sec-

tor or company. Such measures may take the form of an injunction, such as the removal of anti-competitive clauses in a contract or the modification of statutory provisions.

At the end of the investigation phase, the FCA may adopt the following decisions:

### **The acceptance of commitments**

Article L.464-2, I of the French Commercial Code (modified by Article 2 of Ordinance No 2008-1161 of 13 November 2008 for the modernisation of competition regulation) grants the FCA the power “*to accept commitments proposed by undertakings or associations of undertakings and to put an end to anti-competitive practices, in compliance with articles L. 420-1, L. 420-2 and L. 420-5.*”

### **Fines**

Pursuant to Article L.464-2 of the Commercial Code, the FCA may impose a penalty of up to 10% of the global turnover of the company. In each case the penalty is proportional to the seriousness of the practice, the damage dealt to the economy of the sector, the business situation, and the possible repetition of facts.

If the company agrees not to contest the allegations and to change its behaviour in the future, it can achieve a reduction of the penalty incurred.

### **Injunctions**

Article L.464-2 of the Commercial Code also states that the FCA may require the company to stop the anti-competitive practice complained of, or to modify its behaviour positively in order to comply with competition law (commitment procedure).

In addition, pursuant to the provisions of Article L. 462-6 of the French Commercial Code, the FCA may refer the case to prosecutors “*when the facts seem to him to justify the application of Article L. 420-6 of the Commercial Code*”, noting that Article L. 420-6 of the French Commercial Code imposes a punishment of four years’ imprisonment and a fine of EUR75,000 on any individuals who “*fraudulently take [a] personal and decisive [part] in the design, organisation and implementation practices referred to in Articles L.420-1 and L.420-2.*”

### **4.5 Sanctions and Penalties Available in Civil Proceedings**

The sanctions are fixed by the court after a hearing. The parties communicate economic studies on the amount of the damage suffered. If the court is not convinced, the claim can be dismissed, and if the court cannot decide between opposite economic studies, an expert’s opinion can be imposed on the parties.

### **4.6 Relevance of ‘Effective Compliance Programmes’**

The FCA changed its position in October 2018 and decided that compliance programmes are not intended, in a general way, to justify mitigation of penalties for competition law infringements, especially in the case of particularly serious offences such as cartels and the exchange of information on future prices and commercial policy.

### **4.7 Mandatory Consumer Redress**

There is no direct extension of sanctions to consumer redress. Consumers should file a case before the court to obtain damages.

### **4.8 Available Forms of Judicial Review or Appeal**

Appeals against decisions of the FCA are heard by the Paris Court of Appeal, which may annul or revise the decision of the FCA and order the suspension of the execution of the decision.

Cancellations are extremely rare; reformations are more frequent but are limited most often to reductions of sanctions or a stricter analysis of the qualification of agreement (see the cases regarding endives or flour, for example).

## **5. Private Civil Litigation Involving Alleged Cartels**

### **5.1 Private Right of Action**

The French courts handle claims for damages suffered by victims of anti-competitive practices (“private enforcement”).

Specialised civil and criminal courts (under the control of courts of appeal and the French Supreme Court) may be used by the victims of cartels for the compensation, cancellation or termination of anti-competitive practices prohibited by Article L.420-1 of the French Commercial Code (note that, pursuant to Article L.462-3 of the French Commercial Code, the FCA may be consulted by the courts regarding anti-competitive practices; such a consultation suspends the statute of limitation, but the courts are under no obligation to follow the opinion of the FCA).

### **5.2 Collective Action**

In March 2014, the French Commercial Code introduced the possibility of a class action, which is limited to consumers – ie, “*any physical person who is acting for purposes that are not part of his commercial, industrial, artisanal, liberal or agricultural activity*” (introductory article of the French Consumer Code) – and focuses exclusively on compensation for pecuniary loss. The collective action is based on an opt-in principle (which implies the voluntary adhesion of the consumer to the group). The right to bring action is reserved to duly authorised French consumer associations.

### 5.3 Indirect Purchasers and ‘Passing-on’ Defences

It follows from the new Article L. 481-5 that the indirect buyer “is deemed to have brought the proof of (the) repercussion when it justifies that:

1. *The defendant has committed an anti-competitive practice [...]*
2. *This practice has resulted in an additional cost for the direct contractor of the defendant;*
3. *He bought goods or used services concerned by the practice anti-competitive, or purchased goods or services derived from them or containing them.”*

It remains open to the defendant to prove that the repercussion did not take place or was only partial.

### 5.4 Admissibility of Evidence Obtained from Governmental Investigations/Proceedings

Evidence from governmental investigations or proceedings is admissible.

### 5.5 Frequency of Completion of Litigation

Most claims lead to a settlement. For claims that continue in court, there are more sentencing decisions than dismissals.

### 5.6 Compensation of Legal Representatives

There is no such system in French practice. Success fees are fixed privately with the client.

### 5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

Unsuccessful claimants must pay the defence costs, fixed by the court and not directly related to the real costs and attorney fees.

### 5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

The appeal is filed before the Paris Court of Appeal and there is no specific standard, only the French civil proceeding rules.

## 6. Supplementary Information

### 6.1 Other Pertinent Information

There are no other items of information that are pertinent to an understanding of the process, scope and adjudication of claims involving alleged cartel conduct in France.

### 6.2 Guides Published by Governmental Authorities

The FCA published the Guide for Companies on Antitrust Compliance and Compliance Programmes to help companies see how complying with the competition rules can be a winning investment for them. It presents some of the “good practices” to be followed, and provides practical suggestions for action that can be implemented regardless of the company’s size or other characteristics.

Regarding competition law enforcement:

- Procedural release dated 21 December 2018 on settlement;
- Procedural release dated 19 October 2017 on compliance; and
- Procedural release dated 16 May 2011 on fines.

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