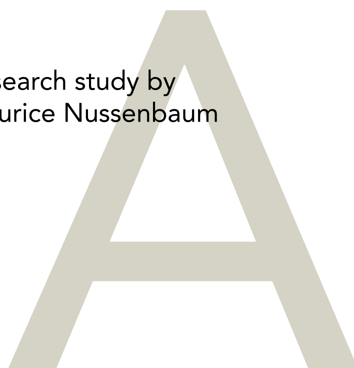
ÉTUDE **ECONOMIC LAW**

COMPETITION

Since the introduction of Directive 2014/104/EU of 26 November 2014 (the Directive) and its transposition into French law on 9 March 2017, the ECJ's aim has been to make remedies for private damages more effective. To this end, it has sought to remove certain evidential difficulties for victims.
Although case law in France is still recent in relation to these texts, since they only apply to cases brought after they came into force, there have already been enough applications for an initial assessment to be made.
The decisions reviewed in this study illustrate various contributions which these texts have made: the concept of an economic entity (the Skanska judgment), the 5-year limitation period, the presumption of damage (the Dortmund judgment), the issue of compensatory interest and loss of opportunity, 'passing on' reviewed on several occasions, and the disclosure of documents that is necessary but must not infringe business confidentiality.
It can be noted that, even though the application of the texts is uneven, they have already helped to strengthen victims' rights in obtaining compensation for damage caused by infringements of the competition rules.

The assessment of damages resulting from anti-competitive practices following the transposition of Directive 2014/104/EU



Research study by
Maurice Nussenbaum

Maurice Nussenbaum, Professor Emeritus, University of Paris-Dauphine-PSL, Financial expert approved by the Cour de Cassation (h), Chairman of Sorgem Evaluation

1. General introduction

1 - **Assessment of the application of Directive 2014/104/EU.** - An initial assessment can be made of the application of Directive 2014/104/EU of 26 November 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 (the Directive)[1] and its transposition into French law on 9 March 2017 by Order No 2017-303 and Decree No 2017-305 of the same date, relating to actions for damages resulting from anti-competitive practices[2]. It should be recalled that the ECJ's aim is to make remedies for private damages more effective and that the Directive is based on the principles of effectiveness and equivalence laid down in the Courage judgment of 2001[3].
To this end, it has sought to remove certain evidential difficulties for victims and to ensure that national rules governing the right to reparation are not applied more favourably in some States than in others.

2 - The Directive recognised that this could not be achieved by complying with all the rules of evidence and that, in particular, the burden of proof should not be placed entirely on the claimant. The burden of proof should be rebalanced by giving claimants the possibility of obtaining evidence relevant to their claim. This rebalancing must be carried out whilst protecting business confidentiality. In particular, where the passing on of a price overcharge is raised as a defence, it should be for the defendant to provide the evidence.
Similarly, where there are difficulties in quantifying the damage, there should be a rebuttable presumption that cartel infringements cause damage because they are by nature secret and make it more difficult for claimants to produce the necessary evidence (even though the quantum is not presumed).
In general, the principle of effectiveness suggests that the requirements of national law relating to the quantification of damages should not make it almost impossible or excessively difficult to exercise the right to damages.

3 - Although case law in France is still recent in relation to these texts, since they only apply to cases brought after they came into force, there have already been enough applications for an initial assessment to be made.
The decisions reviewed in this study illustrate various contributions which texts have made: the concept of an economic entity (the Skanska judgment[4]), the 5-year limitation period, the presumption of damage (the Dortmund judgment[5]), the issue of compensatory interest and loss of opportunity, 'passing on' reviewed on several occasions and the disclosure of documents that is necessary but must not infringe business confidentiality. It should be emphasised that these texts have already helped to strengthen victims' rights in obtaining compensation for damage caused by infringements of the competition rules.

A. - Main provisions

4 - **A reminder of the contributions of the Directive. -** The main lessons to be drawn from the Directive and its transposition into French law in terms of reparation for damage in the context of a private law action for damages relate to:
- the characterisation and proof of fault: any infringement of competition law constitutes a civil wrong for which the infringing party may be held liable. This is an irrebuttable presumption *(Commercial Code, Article L. 481-1)*; thus a national court before which an action for damages is brought in respect of a practice disallowed by the European Commission may not take a decision that goes against such ruling;
- the characterisation and proof of damage: the damage capable of remedy includes in particular loss suffered as a result of an overcharge or reduction in the price paid by the infringing party, loss of profit linked in particular to a reduction in sales volumes, loss of opportunity and non-economic damage *(Commercial Code, Article L. 481-3)*.

In addition, the victim is entitled to reparation including interest on the amounts lost, *"namely monetary erosion, and also loss of opportunity suffered by the injured party because of the unavailability of capital"*[6] which is *"clearly distinct […] from the damage resulting from the erosion of capital"*[7];

1 *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 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: OJEU No. L 349, 5 December 2014, p. 1; JCP E 2014, act. 943; Europe 2015, alerte 6; Contrats, conc. consom. 2015, étude 12.*

2 *Order No. 2017-303, 9 March 2017, relating to actions for damages resulting from anti-competitive practices: JO 10 mars 2017, texte n° 29. - Decree No. 2017-305, 9 March 2017, relating to actions for damages resulting from anti-competitive practices: JO 10 mars 2017, texte n° 31. - See JCP G 2017, 298, S. Carval: Contrats, conc. consom. 2017, alerte 26.*

3 *CJEU, 20 September 2001, Case C-453/99, Courage Ltd v. Bernard Crahan: Contrats, conc. consom.. 2002, comm. 14, S. Poillot-Peruzzetto.*

4 *CJEU, 14 March 2019, Case C-724/17, Vantaan Kaupunki v. Skanska Industrial Solutions and others: Contrats, conc. consom. 2019, comm. 88, note D. Bosco; Europe 2014, comm. 236, note L. Idot; JCP E 2019, 1286, note A. Constans.*

5 *Dortmund Regional Court, 30 September 2020, 8 O 115/14 (Kart), § 132: possibility for the Court "to assess freely the amount of the damage suffered where full clarification of all relevant circumstances entails difficulties disproportionate to the size of the disputed part of the claim" (ref. to Article 287(2) of the ZPO, the German Code of Civil Procedure).*

6 *CA Paris, ch. 5, pôle 4, 14 déc. 2016, n° 13/08975; JCP E 2017, 1582, Th. d'Alès and A. Constans. - See CA Paris, fiche 7: Comment réparer les prejudices liés à l'écoulement du temps? (How to remedy damage caused by the passage of time?) oct. 2017, referring to the judgment of the European Court of Justice (CJEC, 3 February 1994, Case C-308/87, Alfredo Grifoni, p. 40), which indicated the need to take account of inflation since the date of the damage in order to establish the amount giving rise to the application of default interest, and the submissions of Advocate General Saggio in the combined cases of Mulder and others v. Council and Commissions (CJEC, 19 May 1992, combined Cases C-104/89 and C-37/90, Mulder and others v. Commissions and Council: Rec CJEC 2000, p. I-203, pt 105). - See on fiche 7 of the Paris Court of Appeal: Actes pratiques et ingénierie sociétaire (Practical law and corporate engineering) 2021, n° 180, point on 6, M. Nussenbaum.*

7 *CA Paris, ch. 5, pôle 4, 10 mai 2017, n° 15/05918 : JurisData n° 2017-029329.*

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- the presumption of damage caused by the infringement applies, however, only to cartels *(Commercial Code, Article L. 481-7)*);
- the passing on of overcharges: prior to the transposition of the Directive, the purchaser had to show that he had not passed on the overcharges to his own customers. He now benefits from a simple presumption that the overcharges have not been passed on *(Commercial Code, Article L. 481-4)*.

A direct or indirect purchaser may be compensated for the overcharges he claims to have incurred if he can show that he has incurred them *(Commercial Code, Article L. 481-5, s. 1)*.
An indirect purchaser benefits from a simple presumption of passing on if he can show that, as a result of an infringement of competition law, the direct purchaser has incurred an overcharge and that the indirect purchaser has purchased from him the goods or services affected by the infringement *(Commercial Code, Article L. 481-5, 3°)*;
- the joint and several liability of the undertakings participating in the infringement;
- access to evidence in the proceedings: in this area, the Directive limits access to documents from the competition file only when the proceedings are closed[8] and does not allow access to evidence from leniency or settlement proceedings[9].

With regard to evidence covered by business confidentiality, it should be noted that the judge may restrict access to such evidence under a specific procedure set out in Articles L. 483-2 to R. 483-10 of the Commercial Code;
- the limitation rules for actions: a 5-year period is introduced which only begins to run when the claimant has knowledge of the facts, is aware that the practice has caused him damage and has knowledge of the infringing party. The limitation period does not run until the practice has ceased.

5 - The European Commission made an initial assessment of the implementation of the Directive in December 2020[10] and noted that since its adoption in 2014, *"the number of such actions brought before national courts has increased considerably"* and that they have also become more common in the EU. As a result, victims' rights have already been considerably strengthened[11].

The principle of effectiveness suggests that the requirements of national law relating to the quantification of damages should not make it almost impossible or excessively difficult to exercise the right to damages

6 - The purpose of the Directive is to facilitate private actions for damages, but it does not address methods for assessing damages. Such methods were the subject of another text previously drawn up by the Commission: the Practical Guide to the quantification of damages[12].

B. - Practical Guide of 2013

7 - **Presentation of the Practical Guide. -** This Guide[13] was supplemented in July 2019 by a Communication from the Commission on guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser[14].
The 2013 Guide is based on the principles of effectiveness and equivalence mentioned above.
Courts should be given the opportunity to decide on the basis of best approximate estimates or considerations of fairness.

8 - **Counterfactual Scenario -** The Guide first addresses the issue of the "but-for analysis", which is the cornerstone of compensation, as damage can only be established by comparing the actual or factual situation with that which would have prevailed without the infringement, the "counterfactual" situation.
However, as this counterfactual situation is hypothetical and generally cannot be observed directly, some form of estimation is necessary to construct a reference scenario with which the actual situation can be compared.
The Guide then outlines the methods applicable for constructing these scenarios, distinguishing between infringements that have led to price increases or overcharges and those that have led to exclusionary practices owing to abuses of a dominant position (ADP), which are by far the most complex in terms of evidence.
Three categories of method are distinguished:
- comparator-based (or *but for*) methods;

8 *See Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, Article 6, § 5.*

9 *Ibid, Article 6, § 6.*

10 *European Commission Staff Working Document "on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 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": SWD(2020), 338 final, 14 December 2020.*

11 *European Commission, press release, Anti-trust: Commission publishes report on implementation of Damages Directive, 14 December 2020.*

12 *European Commission, Practical Guide: Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union 2013.*

13 *European Commission, Practical Guide 2013, ante.*

14 *European Commission Communication No. 2019/C 267/07, Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser: OJEU No. C 267, 9 August 2019, p. 4.*

- simulation using econometric analysis;
- or financial approaches.

These methods all involve difficulties of application:

- before/after comparisons raise the issue of direct linkage, as the differences observed between the before and after situations may not be entirely attributable to the infringement. Econometric analysis may in some cases help to overcome these difficulties;
- comparisons over time and between markets (the difference in differences method) may make it possible to analyse the development of a price during a certain period on a market and compare it with the development of the same variable on a market unaffected by the infringement, provided the development of the price over the previous period was similar;
- simulation models consist of simulating the situation on the market based on economic models. These are theoretical approaches that may require large amounts of data to conduct econometric analyses.

9 - **Application of methods to determine the counterfactual scenario.** - The Guide applies these methods in two very different categories of damage: the case of cartels with the issue of passing on overcharges and the case of exclusionary behaviour.

10 - **Application of methods to determine the counterfactual scenario. Cartels and passing on overcharges.** - In the case of cartels, undertakings set excessive prices that constitute overcharges for direct or indirect purchasers at different levels of the supply chain.

The Guide considers that it may not be necessary for the claimant to quantify the effects of the cartel once the practice under Article 101 TFEU has been identified (agreements or practices aimed at influencing the parameters of competition through practices such as fixing purchase or selling prices or other trading parameters, the allocation of output or sales quotas or the sharing of markets, including the rigging of tenders)[15]

Indeed, studies carried out at the request of the Commission have shown that almost 70 % of cartels lead to overcharges of between 10% and 40%, with an average of around 20%. However, such an average is difficult to apply to a specific situation[16].

This analysis was also followed in a recent decision of the Dortmund Regional Court[17], which considered the methods difficult to apply in the particular case and proposed, following an analysis of the facts, an estimate of 15% of the effects of the cartel, supported by the results of economic studies into it.

The treatment of the issue of the passing on of overcharges incurred by the claimant in the action is made easier by the Directive, which provides for a rebuttable presumption that there has been no passing on. This makes the claim easier even though it is known that in practice the latter depends on the level of competition existing between direct or indirect purchasers, the elasticity of demand in relation to price and the sensitivity of the marginal cost to the level of production, for if the cost falls sharply with production, passing on will be less likely.

This issue, as mentioned above, was further explored in July 2019 by the European Commission in its guidance document mentioned above[18].

The European Commission has pointed out that an overcharge may be passed on throughout the production chain and concern both products and services.

In this context, full redress concerns direct and indirect purchasers who may suffer effects relating to both price (a price increase) and volume (a decrease in volumes produced).

Indirect purchasers may base their actions in damages on the passing on of the overcharges they have suffered from direct purchasers.

The benefit of the rebuttable presumption of pass-on by the direct purchaser may extend to indirect purchasers if the direct purchaser has suffered an overcharge and the indirect purchaser has purchased the goods and services concerned by the infringement.

These issues have already given rise to a large number of decisions in Europe.

In particular, we will look at the "*Doux Aliments*" decision of 2014[19] and the "*Cheminova*" decision of 2015 [20]. In the former case, the Paris Court of Appeal found that there was no pass-on owing to the highly competitive nature of the downstream market. But in the latter case, the court found that a pesticide producer had passed on 50% of the initial overcharge to its indirect customers. A volume effect was also recognised on the strength of an expert opinion based on the estimated price elasticity of volumes.

11 - **Application of methods to determine the counterfactual scenario - Exclusionary practices.** - Exclusionary practices by competitors covered by Articles 101 and 102 TFEU include foreclosure such as predation, exclusive dealing, refusal to supply, tied and bundled sales. They have the effect of driving competitors out of a market or preventing them from entering. They result in costs borne, loss of profit or loss of goodwill.

15 *European Commission, Practical Guide: Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013, ante, § 139, p. 32.*

16 *M. Boyer and R. Kotchoni, The econometrics of cartel overcharges: Cirano, 2011, s-35, available in French.*

17 *Dortmund Regional Court, 30 September 2020, 8 O 115/14 (Kart), § 135 to § 160.*

18 *European Commission, Communication No 2019/C 267/07, ante.*

19 *CA Paris, pôle 5, ch. 5, 27 February 2014, No 10/18285, SNC Doux Aliments Bretagne v. Sté Ajinomoto: JurisData No. 2014-003551; Europe 2014, comm. 236, L. Idot; Contrats, conc. consom. 2014, comm. 139, G. Decocq.*

20 *Danish Maritime and Commercial Court, 15 January 2015, No. SH2015.U-0004-07, A/S/Akzo Nobel Functional Chemicals BV and others*

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The purpose of the Directive is to facilitate private actions for damages, but it does not address methods for assessing damages

The Guide highlights the difficulty of proving this type of damage[21] because establishing the counterfactual scenario may require complex data relating to a hypothetical situation, especially when the foreclosed undertaking was not active before the infringement.

12 - **Lightening the burden of proof. -** The Guide suggests that in order to make the redress effective, it could be appropriate to "*provide less demanding requirements when it comes to quantification. Therefore, legal systems may allow courts to exercise some discretion as to the figures and statistical method to be chosen, and the way in which they are to be used to evaluate the damage*"[22]. As we shall see, this lightening of the burden of proof contradicts the usual rules of procedure and is difficult to implement, particularly in France.
The difficulty of proof is not the same for competitors who were active before the infringement took place, since establishing the counterfactual scenario is simpler as a rule (before/after comparisons, references to normative market shares to calculate loss of profit, etc).
The general idea is that the claimant may arrive at an initial estimate of the damage suffered that is sufficient to shift the burden of proof[23].
In the case of excluded new entrants, the Guide emphasises that *"legal systems should take account of the inherent difficulties of quantifying such harm and should ensure that damages actions by prevented market entrants are not made practically impossible or excessively difficult."*[24]
This is of course due to the difficulties inherent in building a sufficiently convincing counterfactual scenario, since there is a major difficulty in knowing how successful the undertaking would have been had it not been excluded.
Although the practical Guide recommends that the courts be open enough to accept cases on request, it cannot rule out the adversarial process and the possibility of challenging assumptions that are too random.
Indeed, in practice, the burden of proof is reversed since if a "lighter" standard of proof is accepted for the claimant, the main burden of proof is shifted to the defendant once the claimant has presented a number of facts and pieces of evidence capable of establishing with reasonable certainty the existence of harm.
It seems, however, that a debate is currently under way about the need in the case of a cartel to prove a direct link between the infringement and the quantum of damages alleged, following the decision of the Dortmund Regional Court[25] - described by some commentators as the "Big Bang"[26] - which held that where there is a right to reparation, the claimant benefits from the lightening of the burden of proof provided for in Article 287(1) of the German Code of Civil Procedure (Zivilprozessordnung, ZPO) and that the judge must make use of the option provided for… i.e. to estimate freely the amount of the damage suffered[27]. Nevertheless, these issues are for the national courts, which are free to assess the standard of proof required.

2. Lessons from case law

13 - It is questionable whether these decisions should be analysed today, given that the courts cannot retroactively apply the new provisions of the French Commercial Code resulting from the transposition of the Directive and that the relevant provisions therefore only apply to practices taking place after 10 March 2017.
The Commission notes that, despite these constraints, the ECJ has already issued six decisions in reply to preliminary questions raised in damages cases relating to infringements of Articles 101 and 102 TFEU[28].
However, as Irène Luc has pointed out[29], owing to the principle of effectiveness of European Union law, the courts cannot ignore the new rules and must interpret the existing rules in the light of the new legislative developments[30].

14 - Several issues need to be considered:
- the entity responsible for the damage and the right to act;
- the length of the limitation period;

21 *European Commission, Practical Guide 2013, ante, § 193, p. 67.*
22 *European Commission, Practical Guide 2013, ante, § 193, p. 67.*
23 *European Commission, Practical Guide 2013, ante, § 197, p. 71.*
24 *European Commission, Practical Guide 2013, ante, § 200, p. 72.*

25 *Dortmund Regional Court, 30 September 2020, 8 O 115/14 (Kart), ante.*
26 *Ch. Kersting, Big Bang in Dortmund: offhand free estimate of cartel damages: D'Kart Antitrust Blog, 7 October 2020.*
27 *European Commission, Practical Guide 2013, ante, § 133.*
28 *European Commission, Staff Working Document "on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 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": SWD (2020), 338 final, 14 December 2020, ante, pt 17 and 18.*
29 *I. Luc, Actions en réparation des pratiques anticoncurrentielles : état des lieux en France et dans l'Union (Actions for damages in respect of anti-competitive practices: the present state of play in France and the Union), Interview of 28 March 2019: Concurrences May 2019.*
30 *See also, T. com. Paris, 28 January 2019, No. 2017025084, Norma v. Novandie-Andros: "Whilst the transposition texts of this Directive are not applicable to the present proceedings, nevertheless the principles laid down by the Directive and its transposition texts must be taken into account as such by this court," quoted by N. Doster, Actions en réparation des pratiques anticoncurrentielles : état des lieux en France et dans l'Union, ante, webinar of 17 to 22 June 2020: Concurrences May 2019.*

- the international jurisdiction of the French court (and the scope of the "binding effect");
- the presumption of damage inferred from the infringement;
- compensatory interest;
- passing on;
- the disclosure of documents.

In this context, one may also add the issue of taking account of business confidentiality, which stems from the same texts *(See, in particular, Commercial Code, Article L. 483-1, where it is specified that the judge must ensure that the effective implementation of the right to reparation is reconciled with the protection of the confidential nature of the evidence whose disclosure or production is requested)*. Law No 2018-670 of 30 July 2018[31] and Decree No 2018-1126 of 11 December 2018[32] on the protection of business confidentiality, which themselves are the transposition into French law of Directive No 2016/943 of 8 June 2016 on the protection of undisclosed know-how and commercial information (trade secrets)[33], have supplemented the resources available to judges and litigants.

15 - The main topics relating to the establishment of damage will be discussed in turn.

A. - Entity responsible for the damage

16 - Under competition law, the entity responsible is not only the legal entity that commits the infringement but the undertaking in the sense of *"any entity carrying on an economic activity regardless of [its] legal status [...] and the way it is financed"*[34]. There is thus a fundamental difference between the concept of economic entity in the civil courts, which can only sanction the legal entity responsible (and in particular neither its parent company nor its group), and that of the competition authorities, which can go so far as to include any purchasers that have taken over the commercial activities concerned[35] (the principle of economic continuity)[36].

In the Skanska case[37], the defendants, who had been found guilty of anti-competitive practices, had disputed that an action for damages could concern them as purchasers, because of their separate legal personality.

In this judgment, the ECJ established the link between the concept of undertaking and the principle of the full effectiveness of competition law, which must enable victims to obtain reparation for the damage they have suffered once the causal link between the anti-competitive practice and the damage is established.

Advocate General Wahl noted that the same broad notion of undertaking must be used both to impose fines and to compensate for the damage suffered: these *"two limbs that should be regarded as a whole"*[38].

Moreover, this concept of a responsible entity is governed by European Union law and not that of the Member States[39].

This judgment also contains a reminder of the concept of economic continuity: acquiring entities are successors that have provided the *"economic continuity of [infringers]"*[40]: they take over the assets and liabilities including *"infringements of EU law"*.

This concept of extended liability, in order to give full effect to the concept of effective reparation, also applies where owing to the causal link the claimant is an indirect victim of the prohibited practice, based on the rule that everyone is entitled to seek reparation for the damage suffered where there is a causal link between such damage and a cartel or a practice prohibited by Article 101 TFEU.

17 - In another case, the ECJ[41] ruled that participants in a cartel may be liable for the consequences of their practices which have affected economic stakeholders who are not in the market affected by the infringement, even if domestic law does not permit such an action. In that case, a body granting subsidies in the form of soft loans to the Land of Upper Austria sought reparation from the cartelists (Otis, Schindler, Kone and Thyssen Krupp) because the overcharges derived from the cartel led to an increase in the subsidies granted. The domestic law rule prohibited the Land's claim for reparation in this case. The ECJ stated that *"any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to reparation in order to ensure the effective application of*

31 *Law No. 2018-670, 30 July 2018, relating to the protection of business confidentiality: JO 31 juillet 2018, texte n° 1; JCP E 2018, act. 687; JCP G 2018, 888, brief overview S. Schiller; Propr. industr. 2020, comm. 48, J. Larrieu.*

32 *Decree No. 2018-1126, 11 December 2018, relating to the protection of business confidentiality: JO 13 déc. 2018, texte n° 6; JCP E 2018, act. 946; JCP G 2019, 60, interview by M. Danis and Th. Lautier; Rev. int. Compliance 2019, comm. 35, S. Scemla and E. Nouchy.*

33 *Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure: OJEU No. L 157, 15 June 2016, p. 1.*

34 *CJEC, 23 April 1991, Case C-41/90, Klaus Höfner and Fritz Elser v. Macroton GmbH, pt 21: JurisData n° 1991-500013.*

35 *Wolters Kluwer France Actualités du droit, 22 juill. 2019.*

36 *See, on the principle of economic continuity, JCl. Europe Traité, Synthèse 160: Mise en œuvre des articles 101 et 102 TFUE (Implementation of Articles 101 and 102 TFEU), n° 52. - JCl. Europe Traité, fasc. 1400, Droit de la concurrence de l'Union européenne : champ d'application des articles 101 et 102 TFUE (Competition Law of the European Union: Scope of Articles 101 and 102 TFEU), n° 28 à 30.*

37 *CJEU, 14 March 2019, Case C-724/17, Skanska, ante.*

38 *Opinion of Advocate General N. Wahl under CJEU, 14 March 2019, Case C-724/17, Skanska, ante, pt 76.*

39 *CJEU, 14 March 2019, Case C-724/17, Skanska, ante, pt 34.*

40 *CJEU, 14 March 2019, Case C-724/17, Skanska, ante, pt 50.*

41 *CJEU, 12 December 2019, Case C-435/18, Otis and others v. Land Oberosterreich and others (Otis II), pts 19 and 30, request for a preliminary ruling: JurisData n° 2019-023981; Contrats, conc. consom. 2020, comm. 28, note D. Bosco.*

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Article 101 TFEU and to guarantee the effectiveness of that provision"[42].

18 - In the same vein, the Tibor-Trans judgment[43] raised the question of the place where the harmful event occurred and the ECJ specified that this place could be any place where the harmful event occurred, that is to say, the place where market prices were distorted and in which the victim suffered damage even if it had not established contractual relations with the cartel participant.

B. - Length of limitation period

19 - It was recalled earlier that Order No. 2017-303 of 9 March 2017 defines "*a period [of limitation] of five years*" which "*begins to run from the day on which the claimant knew or ought to have known [the facts]*" (*Commercial Code, Article L. 482-1*). Moreover, the ordinary law is based on Article 2224 of the French Civil Code which, when applied to anti-competitive practices, has led to the view that the 5-year period only runs from the date of the decision of the Competition Authority (ADLC).
This new rule has already resulted in several applications.

20 - **The Cogeco Communications case. -** In a preliminary ruling of 28 March 2019[44], the ECJ held that facts reported by Comecon which had taken place before the expiry of the time limit for transposition of the Directive and even before its publication should, owing to the principle of effectiveness, be time-barred under the rules laid down in the Directive and not those of the national rules in force which:
- provide for a period of 3 years after the date on which the injured party became aware of his right to reparation, even if the person responsible for the infringement is unknown, and;
- does not provide for any possibility of suspension or interruption of the time limit during proceedings before the national competition authority.

The principle of effectiveness has thus resulted in the obligations of the Directive being applied even before its transposition.

Indirect purchasers may base their actions in damages on the passing on of the overcharges they have suffered from direct purchasers

21 - **The EMC2 case. -** Similarly, as Irène Luc has pointed out[45], the Paris Court of Appeal declared that actions for damages concerning public procurement cartels brought in 2014 were not time-barred, even though the cartel had ended in 2006, as the victim could only effectively learn of the facts at the time of the ADLC's decision on 22 December 2010[46].
Moreover, as noted in factsheet 10^{b} of the Paris Court of Appeal[47] for in respect of events occurring after 11 March 2017, an anti-competitive practice is irrefutably proved by a decision of the ADLC or the national court having established its existence in ordinary proceedings.

22 - These decisions create a presumption of infringement, but the claimant retains the burden of proving the extent of the damage suffered, the existence of which is presumed only in the case of cartels.

C. - International jurisdiction of the French court

23 - In a judgment dated 7 January 2020, the Paris Court of Appeal[48] upheld a decision relating to jurisdiction made by the Paris Commercial Court on 27 June 2019[49] in order to rule on the company's claims regarding the websites it operates on French territory, intended not only for the French but also the European public[50].
On this occasion the Court of Appeal noted the case law of the ECJ which, in determining jurisdiction as regards location, draws a distinction between the financial loss consequent upon damage and the initial damage to the protected interest, which

42 *CJEU, 12 December 2019, Case C-435/18, ante, pt 30. - See also, G. Decoq, Tout préjudice ayant un lien de causalité avec une infraction à l'article 101 du TFUE doit être susceptible de donner lieu à reparation (Any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to reparation): RJ com. 2020, n° 1, pp. 52-54.*

43 *CJEU, 29 July 2019, Case C-451/18, Tribor-Trans v. DAF trucks NV: JurisData n° 2019-014733; JDI 2020, chron. 4, obs. M. Chagny; Europe 2019, comm. 406, L. Idot; JCP E 2019, act. 565.*

44 *CJEU, 28 March 2019, Case C-637/17, Cogeco Communications: JurisData n° 2019-005955; Europe 2019, comm. 207, note L. Idot.*

45 *I. Luc, Actions en réparation des pratiques anticoncurrentielles: état des lieux en France et dans l'Union, Interview of 28 March 2019: Concurrences May 2019, ante.*

46 *Aut. conc., déc. n° 10-D-39, 22 déc. 2010, relating to practices implemented in the vertical road signs sector. - CA Paris, pôle 5, ch. 4, 28 fév. 2018, n° 15/11824, B. et EMC2 c/ SA Signaux Girod and others. - See Cass. com., 27 janv 2021, n° 18-16.279 (rejet).*

47 *Factsheet 10^{b}: comment réparer les préjudices causés par une pratique anticoncurrentielle (How to compensate the damage caused by an anti-competitive practice)? - See also Actes pratiques et ingénierie sociétaire 2021, n° 180, point sur 6, M. Nussenbaum.*

48 *CA Paris, 7 janv. 2020, n° 19/12553, Google c/ Le Guide.*

49 *T.com. Paris, 27 juin 2019, n° 2017015670.*

50 *R. Amaro and B. Thomas, Le contentieux de la réparation des pratiques anti-concurrentielles (Litigation for the reparation of anti-competitive practices) (déc 2019-mai 2020): Concurrences n° 3-2020, p. 216 à 218, § 27 à 42.*

is the only factor taken into account to determine the *"place where the harmful event occurred"*[51].
On the basis of this analysis, the Court of Appeal found that the market affected by the alleged ADP is that of the Member State in which the company develops and operates its websites and not the markets of the Member States for which such websites are intended[52]. However, the Court of Appeal did not specify, as the ECJ had done, that France constituted *"the market essentially affected"*[53].

D. - Presumption of damage inferred from the infringement and its quantum

24 - This presumption exists only until the contrary is proved (it can be rebutted), applies only to horizontal cartels, only concerns the existence of the causal link between infringement and damage and says nothing about the extent of the damage.
Even in this case, the causal link between the infringement and the extent of the damage must be well established, as illustrated by the Provera judgment[54] in a case between (1) SAS Provera France, Cora and Supermarchés Match and (2) the Lactalis Group. It should be remembered, however, that this case related to events which took place before the Directive came into force. Although its reasoning took into account the presumption of damage, the Paris Commercial Court dismissed the claimants' application on the grounds that the two distributors had not proved the link between the producers' cartel and the price increases of non-cartel producers and of the retailers' brand products.
In particular, the court found that they had not taken sufficient account of the effect of passing on price increases to their customers. Moreover, the existence of the price overcharge had not been proved.
However, mention should be made of the Dortmund judgment[55], where the court dispensed with the establishment of a counterfactual scenario in order to assess damages by relying on a set of indicators arising from the existence of a cartel.

25 - We will refer to other landmark decisions in this respect, three concerning horizontal cartels and two concerning the consequences of foreclosure:

- The case of Doux Aliments v. SARL Doux Aliments v. SA Roullier and SAS Timab Industries;
- The case of B. and EMC2 v. SA Signaux Girod and others ;
- The case of SASU Johnson and Johnson v. SAS Carrefour France;
- The case of SCP B. R. v. Orange;
- The case GIE Pari Mutuel Urban v. Betclic.

1° Cases of horizontal cartels

a) The SARL Doux Aliments case: limitation period and presumption of damage

26 - The Doux Aliments case[56] raises both the issue of limitation (*Commercial Code, Article L. 481-1, L. 481-3, L. 481-5, and Commercial Code, Article L. 481-8 to L. 481-14, for the rules on the limitation of claims for reparation*)[57] since the cartel events occurred before 10 March 2017, the date on which the order transposing the Directive entered into force, and the issue of the presumption of damage (*Commercial Code, Article L. 481-5, L. 481-4, L. 481-6 and L. 481-7, for presumptions*) in the case of a cartel.

27 - **Limitation period. -** As regards limitation, the Court of Appeal indicated that the damage was only revealed to the Doux Aliments companies when the European Commission's decision of 20 July 2010[58] was issued.
This decision stated that the main supplier of the Doux companies had been penalised for being engaged in an unlawful cartel. This is therefore the date which must be taken as the starting point of the limitation period and not on 29 January 2009, which corresponds to the commencement date of the Commission's proceedings. This date had been used by the Rennes Court in its judgment of 12 January 2017[59], which had held that the action was time-barred. Indeed, the companies did not have sufficient knowledge of the infringement at that date.
The limitation period was interrupted by the commencement of the Commission's proceedings, in the spirit of the Directive which had not yet been transposed into national law at the time of the events, but which the judge must take into account when interpreting national law in the light of the Directive.

51 *Consistent case law since the Bier judgment, CJEC, 30 November 1976, Case C-21/76.*

52 *R. Amaro and B. Thomas, Le contentieux de la réparation des pratiques anti-concurrentielles (Dec 2019-May 2020): Concurrences n° 3-2020, ante, p. 218, § 41 and 42.*

53 *CJEU, 5 July 2018, Case C-27/17, Fly LAL: JurisData n° 2018-012418; Europe 2018, comm. 405, note L. Idot; Procédures 2018, comm. 290, C. Nourissat.*

54 *T.com. Paris, 3e ch., 20 fév. 2020, n° 2017021571, SAS Provera France e.a. c/ SA Groupe Lactalis e.a.*

55 *Dortmund Regional Court, 30 September 2020, 8 O 115/14 (Kart), ante.*

56 *CA Paris, pôle 5, ch. 4, 6 fév. 2019, n° 17/04101, SARL Doux Aliments c/ SA Roullier and SAS Timab Industries: Contrats, conc. consom. 2019, comm. 89, obs. G. Decocq. - CA Paris, 23 juin 2021, n° 17/04101.*

57 *I. Luc, Actions en réparation des pratiques anti concurrentielles: état des lieux en France et dans l'Union, Interview of 28 March 2019: Concurrences May 2019, ante, p. 5.*

58 *European Commission, 20 July 2010, Decision relating to a procedure for the application of Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/38866 - Phosphates for animal feed).*

59 *T.com. Rennes, 12 janv. 2017, n° 2015F00497.*

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Under competition law, the entity responsible is not only the legal entity that commits the infringement but the undertaking

28 - **Presumption of damage.** - In this case[60] the parties did not challenge the infringement but the claimants only presented as evidence of the causal link between the cartel and the damage the existence of two meetings where the cartel members had decided to increase prices for the claimant.
The judgment indicates that the claimant did not provide evidence of the overcharges incurred as it was unable to construct a counterfactual scenario to measure the additional costs suffered.
The decision states that the main supplier of the Doux companies had been penalised for being engaged in an unlawful cartel.
With respect to the uncontested infringement by the defendants, the claimants argued that the sanctioning of the respondents' price cartel on 20 July 2010[61] resulted in a causal link between the alleged damage and the infringement of competition law.
The defendants considered that Doux had not shown that the cartel had had an effect on prices and that Doux had not been able to source from non-cartel suppliers to avoid the overcharges imposed by them.
They therefore disputed, even in the case of a cartel, the existence of a causal link between the cartel and the alleged damage.
However, the Paris Court of Appeal held that the fact that the victim was unable to calculate its damage did not mean that its claim should be rejected outright.
It therefore ordered an expert's report to determine the quantum of the damage by asking the expert to establish a counterfactual scenario to determine the price level that would have prevailed in the absence of the cartel, including using a "before/after" approach, *"particularly with regard to subsequent price trends […] after the cartel ended"*.
As a result, the claimant did benefit from a presumption of damage, but its scope and quantum were still to be established.
The judgment given by the Paris Court of Appeal, after the submission of the[62] expert's report, found that the failure of the report to reveal the facts of the cartel did not mean that the cartel had had no effect, but only that it had not been possible to establish the existence of an overcharge attributable to it. The judgment also ruled out the possibility of a loss of opportunity and therefore limited the compensation to €109,176, to which it added €30,000 for non-material damage.

On 31 March 2021, the French Cour de Cassation rejected the appeal lodged against the judgment[63, 64].

b) The EMC2 case or impossible proof

29 - The existence of a cartel at the source of the claim for compensation was sanctioned by a decision of the ADLC of 22 December 2010[65] against the eight major manufacturers of road signs. The victims were local authorities and the claimant was not a direct victim of the cartel as it was simply a competitor who had been prevented from responding to a tender selling to competitors without being a producer of signs at uncompetitive prices.
Consequently, the Court of Appeal to which B. and EMC2 had appealed[66], rejected any presumption of a causal link between the facts at issue and the extent of the damage claimed, recalling that it was necessary to place matters within the strict confines of Article 1240 of the French Civil Code (infringement, damage, direct link), without any presumption being possible.
Consequently, the court noted that it is for the victim to prove that the practices for which it is seeking reparation constitute anti-competitive practices giving rise to civil liability and are directly responsible for the damage it alleges.
Similarly, as regards the foreclosure it has suffered, the court held that, having suffered foreclosure, it had 'chosen' to leave the market because it had sold that part of its business without proving that this was due to the cartel. It could not be compensated for loss of opportunity to make a profit on a business that it had chosen to abandon. It can be seen here that insufficient evidence to establish the quantum of damage can lead to the rejection of its existence, even in the case of a cartel.
In practice, the Court of Appeal found that EMC2 had not proved that it had purchased road signs for resale during the second period in which it had sold its business.
The Cour de Cassation[67] approved the reasoning of the Court of Appeal and noted that the latter had not made "*as a matter of principle, reparation for damage conditional on proving the operation of an effective business on the affected market*".
The mere fact that EMC2's turnover had fallen at the same time as the existence of the cartel did not justify compensation for this loss of turnover. The damage was confined to the loss of opportunity to win a tender.

60 *CA Paris, pôle 5, ch. 4, 6 févr. 2019, n° 17/04101, SARL Doux Aliments c/ SA Roullier and SAS Timab Industries: Contrats, conc. consom. 2019, comm. 89, obs. G. Decocq.*

61 *European Commission , 20 July 2010, Decision on a procedure for the application of Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement.*

62 *CA Paris, pôle 5, ch. 4, 23 juin 2021, n° 17/04101, SARL Doux Aliments c/ SA Cie financière et de participations Roullier, SAS Timab industries.*

63 *Cass. com., 31 mars 2021, n° 19-14.877.*

64 *See footnote 60.*

65 *Aut. conc., 22 déc. 2010, n° 10-D-39, concerning practices in the vertical road signs sector 1.*

66 *CA Paris, pôle 5, ch. 4, 28 févr. 2018, n° 15/11824, B. et EMC2 c/ SA Signaux Girod e.a.*

67 *Cass. com., 27 janv. 2021, n° 18-16.279, EMC2.*

In all cases, undertakings alleging damage must prove the causal link between the anti-competitive practice and the alleged damage, as the existence of damage, even if presumed, is not sufficient to establish its quantum.

c) The case of SASU Johnson & Johnson v. SAS Carrefour France

30 - Hopes that Order No. 2017-303 of 9 March 2017 would take effect early, in the interests of the principle of effectiveness, have been dashed by this recent decision[68].

SAS Carrefour France claimed to have been the victim of abnormal price increases by Johnson & Johnson, which had taken part in a cartel on hygiene products that was sanctioned by the ADLC in a decision dated 18 December 2014[69].

In keeping with the spirit of the Order, the court held that the ADLC's decision was the event from the date of which the victim could exercise its right. Similarly, the court held that this decision established both the existence of the infringement and the liability for it.

However, the court stopped short here and held that the claimants could not rely on the Order but must apply the ordinary law regime for damages actions arising from anti-competitive practices applicable before the entry into force of the Order for the transposition of the Directive. It was therefore for the claimant to prove that the infringement was the cause of its damage and to show that it did not pass on to consumers the overcharge linked to the infringement, even though the court had recognised the impossibility of such passing on[70]. The court therefore did not apply exactly the rules resulting from the transposition of the Directive[71].

2° Consequences of foreclosure and the presumption of damage

a) Foreclosure loss resulting from an anti-competitive practice

31 - This case[72] concerned the abuse of a dominant position (ADP) for which the presumption of damage was not accepted.

The claimant was active in the field of direct marketing and operated its own database. In 1991, it asked France Telecom to provide it with the list of people on this database, but they refused.

France Telecom's practices were penalised by the Competition Council (*Conseil de la concurrence*)[73], which found that France Telecom had committed an ADP.In the context of lengthy proceedings giving rise to several rulings by the Cour de Cassation[74], the Paris Court of Appeal held in a judgment dated 27 May 2015[75] that, as a result of the ADP by France Telecom, by then known as Orange, Lectiel had suffered damage by way of a loss of opportunity to develop its direct marketing activities.

The parties agreed to treat this damage (as upheld by the Cour de Cassation) as *"the loss of the opportunity to develop at a lower cost in the market, because the names of subscribers to the Orange list had been deleted from the marketing files supplied"*.

The problem lay in establishing the counterfactual scenario, for which an expert's report was commissioned on 3 July 2015[76].

The expert noted that he did not have enough information to quantify the hypothetical turnover that Lectiel would have had in the absence of anti-competitive practices and that the assumptions put forward by the parties did not take sufficient account of new players likely to enter the market during the period in question. It therefore estimated the impact of the damage as the loss of the opportunity to have achieved a turnover 30% higher than its actual turnover, i.e. a figure of €6.946m (whereas the claim was for €161m) which, taking into account the assumed margin rate, resulted in damage of €1.4m against a claim of €145m.

This case illustrates the difficulties inherent in establishing foreclosure loss.

Indeed, the defendant is always able to point out inconsistencies in the counterfactual scenario. In this respect, the value of the Directive lies essentially in its reversal of the burden of proof, as shown in the EMC2 case mentioned above where the court, whilst accepting that the claimant had been adversely affected by the cartel, held on the basis of the defendants' submissions that the quantum of the claims had not been substantiated[77].

68 *CA Paris, pôle 5, ch. 4, 14 avr. 2021, n° 19/19448, SASU Johnson & Johnson c/ SAS Carrefour France: Contrats, conc. consom. 2021, comm. 104, D. Bosco.*

69 *Aut. conc., déc. n° 14-D-19, 18 déc. 2014, on practices in the cleaning products and insecticides sector and in the hygiene and body care products sector.*

70 *T. com. Paris, 15e ch., 23 sept. 2019, n° 2017013944 : JurisData n° 2019-025241.*

71 *See D. Bosco, Actions privées : entre le droit d'hier et celui de demain (Private claims: between the laws of yesterday and tomorrow) : Contrats, conc. consom. 2021, comm. 104, ante.*

72 *CA Paris, pôle 5, ch. 4, 11 avr. 2018, n° 14/14758, SCP B. R. c/ Orange : JurisData n° 2018-005676.*

73 *Cons. conc., déc. n° 98-D-60, 28 sept. 1998. - Confirmed by the Paris Court of Appeal, 29 juin 1999, n° 1999/01269: JurisData n° 1999-023446.*

74 *Cass. com., 4 déc. 2001, n° 99-16.642: JurisData n° 2001-012012. - Cass. com., 23 mars 2010, n° 08-20.427 et 08-21.768 : JurisData n° 2010-002593 ; Comm. com. électr. 2010, comm. 122, M. Chagny. - Cass. com., 3 juin 2014, n° 12-29.482: JurisData n° 2014-012123.*

75 *CA Paris, 27 mai 2015.*

76 *It should be borne in mind that the author of this article was consulted by one of the parties in the case through Sorgem Evaluation.*

77 *CA Paris, pôle 5, ch. 4, 28 févr. 2018, n° 15/11824, B. et EMC2 c/ SA Signaux Girod e.a., ante.*

b) Foreclosure loss resulting from an abuse of dominant position

In all cases, undertakings alleging damage must prove the causal link between the anti-competitive practice and the alleged damage

32 - In a case between SAS 10 Médias and SAS L'Equipe[78], the Court of Appeal noted that, even though the civil wrong was established as a result of the earlier decision of the French Competition Authority[79], which had ruled that Editions Philippe Amaury had implemented a practice of excluding the daily newspaper Le10Sport.com from the market for the readership of the national daily sports information press, the victim of the anti-competitive practice must nevertheless demonstrate the existence of a causal link between such practice and the alleged damage.

In this context, the Court of Appeal accepted from the parties' written submissions the existence of damages (as the Paris Commercial Court had done previously[80]) and found that SAS 10 Médias had suffered a loss of profit over the effective period of publication of the daily newspaper Le10sport, as well as a loss of profit for the website Le10Sport.com but, unlike the court, it did not find that there had been any loss of opportunity for the website, on the grounds that there was no serious possibility of making a positive annual return on 10Sport.com after its marketing phase. The Court added non-material damages of €100,000, owing to the damage to the image of 10 Médias in the eyes of the public, as against a claim of €3 million.

In total, the Court of Appeal awarded damages of €2 million as against claims of approximately €50 million. The decision was taken on the basis, in particular, of the reports of the parties' expert advisers.

33 - This was also a case of an ADP not entailing a presumption of damage[81].

In a judgment of 22 February 2018, the Paris Regional Court (*tribunal de grande instance*)[82] held that the pooling of bets registered online and at its physical outlets between May 2010 and December 2015 by the GIE Pari Mutuel Urbain (PMU) constituted an anti-competitive practice and that the PMU had therefore abused its dominant position, even though the ADLC had not identified the practice.

The PMU having challenged this decision, the Paris Court of Appeal held that the practice had prevented the entry of new operators because the PMU had cornered the market, erected barriers to entry and had the potential to drive out alternative operators who could neither diversify their offer nor lower their prices.

Moreover, the advantage enjoyed by the PMU was not a reward for its past efficiency but a result of its exclusive rights and enabled it to offer the combinations of winnings most valued by bettors without any evidence of its greater efficiency.

The court therefore held that the causal link between the ADP and any possible damage was sufficiently established in this case by the evidence submitted to the court. It did not refer to a possible presumption of damage since it concerned an ADP.

However, it found that it did not have sufficient information to assess the damage because the studies presented by Betclic were not sufficiently conclusive; it therefore upheld the expert's decision issued by the Paris Regional Court, adding an assessment of possible future damage and an appropriate discount rate for the damage.

34 - At this stage it can be seen that, if we place ourselves in the spirit of the Order, foreclosure losses are not in principle rejected for lack of evidence, as in the EMC2 case referred to above, but are upheld in principle and referred to an expert for assessment.

We saw in the Lectiel case that the results are based on assumptions which may remain conjectural, especially when the facts cover a long period of time and are not necessarily sufficient to substantiate the extent of the loss.

However, these examples show that despite the efforts at harmonisation called for by the Commission, particularly through the guides it has drawn up, there is still a wide variety of approaches to damage.

In the area of cartels, the courts have been very receptive to the causal link. As regards other practices, the causal link is established by the evidence in the case. So far as the European Court of Justice is concerned, it applies a very broad interpretation of the causal link, governed by Article 101 of the TFEU, as was shown by the Otis decision[83].

78 *CA Paris, pôle 5, ch. 4, 23 févr. 2022, RG n° 19/19239.*

79 *Aut. conc., déc. n° 14-D-02, 20 févr. 2014.*

80 *T. com. Paris, 11 juin 2019, RG n° 2013004738.*

81 *CA Paris, pôle 5, ch. 4, 12 sept. 2018, n° 18/04914, GIE Pari Mutuel Urbain v. Betclic: JurisData n° 2018-015451.*

82 *TGI Paris, 22 févr. 2018, n° 15/09129: JurisData n° 2018-004044; Contrats, conc. consom. 2018, comm. 93, G. Decocq.*

83 *CJEU, 12 December 2019, Case C-435/18, ante.*

E. - Compensatory interest

35 - The whole debate on this issue stems from the reaffirmation by the Directive of the existence of two distinct losses resulting from the passage of time: monetary erosion and the loss of opportunity caused by the unavailability of capital, which gives rise to the award of compensatory interest.
As the Digicel decision[84] notes: *"the loss of cashflow results from the loss of opportunity suffered by the injured party through the unavailability of the capital awarded by way of compensation for the initial loss from the time the damage arose until the date of the compensation judgment. It is remedied by the payment of compensatory interest"*.
However, we have established[85] that acceptance of this principle does not entail the systematic existence, in terms of quantum, of a loss distinct from that resulting from the passage of time. This has been acknowledged in several recent decisions.
It should be borne in mind that, in case law prior to the transposition of the Directive (prior to 2017), various decisions relating to the telecoms industry were based on the rates of return set by ARCEP (the French electronic communications regulatory authority) for the return on capital employed for cost accounting and tariff control purposes in regulated businesses[86].
The Paris Commercial Court[87] and the Paris Court of Appeal[88], in another sector, that of tourism (the Switch judgment[89]), taking into account the twofold component of damage - monetary erosion and loss of opportunity - had overruled an expert's report which had decided to apply the statutory rate, taking the view that it had only taken into account the monetary erosion component, and adopted the rate requested by the claimant, i.e. the average capitalisation rate in the tourism sector. This decision was open to criticism because, whilst the principle was correct, the actual loss of opportunity was not established.
Recent decisions have sought to establish the existence of a genuine loss of opportunity for the victim[90].

84 *CA Paris, pôle 5, ch. 4, 17 juin 2020, n° 17/23041, SA Digicel Antilles Françaises Guyane c/ SA Orange; Contrats, conc. consom. 2020, comm. 129.*

85 *M. Nussenbaum, Le préjudice du temps qui passe : approche économique des intérêts moratoires et compensatoires (Damage caused by the passage of time: an economic approach to default and compensatory interest): RD bancaire et fin. 2017, étude 26, § 10. - See M. Nussenbaum, La place des intérêts compensatoires (ou « pre-judgment interest ») dans l'évaluation des préjudices (The place of compensatory interest (or "pre-judgment interest") in the assessment of damages): Contrats, conc. consom. 2018, étude 13.*

86 *ARCEP, déc. n° 2015-1370, 5 nov. 2015, fixant le taux de rémunération du capital employé pour la comptabilisation des coûts et le contrôle tarifaire des activités mobiles régulées pour les années 2016 et 2017 (setting the rate of return on capital employed for cost accounting and tariff control purposes in regulated mobile businesses for the years 2016 and 2017).*

87 *T. com. Paris, 15e ch., 16 mars 2015, n° 2010/073867.*

88 *CA Paris, pôle 5, ch. 4, 14 déc. 2016, n° 13/08975 : JurisData n° 2016-031086.*

89 *Cass. com., 29 janv. 2020, n° 17-15.156.*

90 *See RD bancaire et fin. 2017, étude 26, M. Nussenbaum, ante.*

1° Paris Court of Appeal, Division 5, Chamber 4

a) Outremer Telecom v. Orange

36 - This case concerned compensating the victim for the consequences of a delay in payment of amounts corresponding to the damages awarded by the court[91].
It therefore involved identifying and assessing any loss of opportunity.
The court held that it was for the victim undertaking to prove such loss of opportunity resulting directly from the unavailability of the amount. *"Whilst the company must establish that such unavailability led it either to limit its business without being able to find alternative financing by way of loans or equity, or to give up duly identified investment projects which were likely to yield the equivalent of the average cost of capital [...] which is not a rate of profitability but a rate required by providers of capital [...]"*.
It noted, however: *"In the present case, Outre-mer Télécom [...] has not established that the unavailability of the amount would have led it to abandon its investment projects [...]"*.
"Indeed [...] it only mentions general and vague prospects for the development of its business in its IPO document and not specific and completed investment projects that it would have had to abandon [...], still less the returns expected from such projects".
As a result, only the statutory rate could be applied, but the court decided to increase it by 0.5 % without any particular justification other than, in our view, to take account of the loss of opportunity mentioned above.

b) SCP B. R. v. SA Orange

37 - The Court of Appeal reiterated the principle that there are two components to the loss - monetary erosion and loss of opportunity - but limited compensation to the capital sum plus statutory interest only, owing to the lack of evidence of a loss of opportunity to carry out more profitable projects[92].

c) Doux Aliments v. Roullier and Timab Industries

38 - The court referred to an expert the task of determining "the discount rates of the losses", enabling "the alleged cash flow loss" to be calculated[93].
The expert discounted this amount by applying the statutory rate of interest, in the absence of any information from Doux about its loans and debts and the use it would have made of the amounts it was deprived of[94].

91 *CA Paris, pôle 5, ch. 4, 10 mai 2017, n° 15/05918, Outremer Telecom c/ Orange : JurisData n° 2017-029329.*

92 See *§ IV 2. 2.2.1.*

93 *See CA Paris, pôle 5, ch. 4, 6 févr. 2019, n° 17/04101, ante - § IV 2. 2.1.1.*

94 *See CA Paris, pôle 5, ch. 4, 23 juin 2021, n° 17/04101, ante.*

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These three cases thus reveal a common principle but solutions that have evolved over time.

In the area of cartels, the courts have been very receptive to the causal link

d) SA Digicel Antilles Françaises Guyane v. SA Orange[95]

39 - This case was to confirm the current legal doctrine.
In it the Paris Commercial Court[96] had determined compensation by taking a capitalisation rate equal to the WACC.
"Whereas the court considers that compensation for the loss of opportunity suffered due to the unavailability of capital can only be validly granted on the basis of a discount to the cost of capital (in this case, the rate to be used will be that of the return on capital for mobile business calculated by ARCEP, i.e. 10.4%)".
However, the Paris Court of Appeal[97] rejected the use of the WACC rate as the capitalisation rate for the unavailable amounts, taking the view that Digicel had not proved that such unavailability had led it to forego investment projects that would have yielded the equivalent of the WACC, especially since the company had distributed dividends during the period in question, which was interpreted by the Court of Appeal to indicate a lack of more profitable alternative uses.
It agreed instead to capitalise the amount representing the loss at the rate of 5.3%, which corresponds to the rate of borrowing incurred by Digicel between 2002 and 2005, on the grounds that if it had had the amount available it would not have had to take out the loan but would have financed its development from its own funds. As a result, in this case the loss of opportunity to avoid taking out the loan was almost certain. In fact, while the court generally treats such unavailability of cash flow as a loss of opportunity, in the present case of awarding compensation at the borrowing rate it held *"that there is no need to include a contingency factor as the average interest rate of 5.3% is the definite amount that would have been saved if the practices had not occurred"*[98].
For the subsequent period, it used the statutory rate for risk-free investments.
It should also be noted that the court took as the starting point for the discounting the date on which the practices began, which is more consistent with the principle of full reparation than the date of the summons or the date on which the practices ended.

95 The author of this article was consulted in this matter through Sorgem Evaluation.

96 *T.com. Paris, 15e ch., 18 déc. 2017, n° 2009016849, Digicel Antilles Françaises Guyane c/ Orange Caraïbes : JurisData n° 2017-029745.*

97 *CA Paris, pôle 5, ch. 4, 17 juin 2020, n° 17/23041 : Contrats, conc. consom. 2020, comm. 129, note D. Bosco.*

98 *CA Paris, pôle 5, ch. 4, 17 juin 2020, n° 17/23041, ante.*

2° The Paris Commercial Court

a) SAS Medias RCS v. SA les Éditions Amaury[99]

40 - The court[100] found that the claimant intended to recover the loss of opportunity due to the unavailability of this amount up to the date of judgment by applying a discount rate of 8.23%. But as SAS Medias did not provide the court with any information enabling it to assess the appropriateness of the figure it had put forward, the court ordered the defendants to pay *"the amount [...] with interest at the statutory rate and capitalisation of interest from the date of the summons"*.
This solution was endorsed by the Court of Appeal (see footnote 78 above), which stated that "the loss of opportunity may be assessed by applying the statutory rate of interest for a risk-free investment to the amount of money that the victim company has lost". In both cases, the rationale was that the claimant had not proved that it had been deprived of the opportunity to carry out a project with alternative financing, which meant that it had failed to prove it had suffered a specific loss.

b) SAS Carrefour France v. Vania Expansion SAS

41 - The court[101] pointed out the twofold component of the damage, monetary erosion and loss of opportunity, but noted *"that in this case Carrefour merely asserted that the amount remedying the damage could have been invested and consequently requested that the WACC* be applied*"*.
It noted, however, that SAS Carrefour had not mentioned any specific and successful projects that it would have had to forego owing to the loss caused by the punishable anti-competitive practices, and it ordered that the sum of €2 million be increased at the statutory rate from the date on which the practices ended until the sum was paid in full.
It can be seen, therefore, that the solution adopted involves applying the statutory rate, but the starting point is not the summons but the date on which the practices ended.
Moreover, as mentioned above the Court of Appeal did not find that there had been any loss in the case between Johnson & Johnson and Carrefour[102].
Since 2017, therefore, in most of the decisions mentioned, whilst the courts do recognise the twofold damage of monetary erosion and loss of opportunity, in order to determine the amount of the damage they have focused on requesting proof of genuine losses of opportunity on investment projects that the

99 The author of this article was consulted in this case through Sorgem Evaluation.

100 *T.com. Paris, 13e ch., 11 juin 2019, n° RG 2013004738.*

101 *T. com. Paris, 15e ch., 4 nov. 2019, n° 2017013952.*

102 *CA Paris, pôle 5, ch. 4, 14 April 2021, n° 19/19448, SASU Johnson & Johnson c/ SAS Carrefour France, ante.*

undertaking has been unable to carry out or finance by other means.
In practice, use of the WACC has been ruled out in recent decisions and appears difficult to prove, which is understandable by reference to the financial theory of the lack of a free lunch (it is not a case of rewarding a risk that has not been taken, but compensating for a loss of opportunity provided it has been thoroughly proven).

F. - *Passing on*

42 - The principle of harm to direct and indirect victims was set out in the Commission's Guide of 2013[103] and, particularly, its Communication of 9 August 2019[104].
It will be recalled that on this issue the Directive and the Order reversed the burden of proof by providing that it should be presumed that price increases resulting from cartels were not passed on to consumers and that it was for the defendant to establish such passing on. It was noted earlier that the recommendations of the Directive and the Order were not followed in the SASU Johnson and Johnson v. Carrefour decision mentioned above[105] owing to the date of implementation of these texts, thereby disregarding the scope of the principle of effectiveness.
A decision of November 2021 - SAS Supermarchés MATCH, SAS CORA v. SNC NOVANDIE, SNC LACTALIS NESTLE ULTRA FRAIS MDD and others[106], took into account the claimant's requests on the basis of economic research studies.

43 - Two decisions are mentioned in the European Commission's Communication[107]:
- Cheminova (2015)[108];
- Doux Aliments Bretagne v. Ajinmoto (2014)[109].

1° The Cheminova case

44 - The Danish court[110] found that a pesticides producer had passed on 50% of the initial overcharge to its indirect customers.
The court based its decision on market research studies showing that the market in which the direct customer was operating should be characterised as a monopolistic market, which partly enabled this passing on to indirect customers, whereas the claimant had argued that the market was highly competitive and prevented any passing on.

2° The Doux Aliments Bretagne v. Ajinmoto case

45 - This was a judgment on a referral back to the Court of Appeal after its decision had been set aside by the Cour de Cassation[111]. The Paris Commercial Court had rejected the initial claim by Doux Aliments Bretagne[112] on the grounds that it had not proved its inability to pass on an abnormally high increase in the price of lysine.
An initial ruling by the Paris Court of Appeal dated 10 June 2009[113] had overturned this judgment and ordered Ajinmoto Eurolysine to pay damages to Doux Aliments Bretagne.
The Cour de Cassation, in a widely discussed ruling of 2010, held that the Court of Appeal had not justified its decision to admit Doux Aliments' claims because the latter had not proved that it was impossible to pass on the price overcharges in their sale prices.
In its 2014[114] ruling, the Court of Appeal to which the case was referred found, however, that the claimant had indeed established that there had been no passing on in respect of lysine, an ingredient used in the production of chickens. In fact, lysine represented only 1% of the costs of producing the chickens and, as such, it was difficult to demonstrate that an increase in lysine costs led to an increase in chicken prices given the highly competitive nature of the indirect customer markets.

46 - In another Doux Aliments decision of 2019 mentioned above[115], relating to a producers' cartel of phosphates for animal feed, the Paris Court of Appeal ruled that Doux Aliments had suffered damage as a result of price overcharges imposed by the defendants and, relying on the reversal of the burden of proof introduced by the Directive, did not accept the defendants' argument that Doux Aliments should prove that the overcharge had not been passed on to its customers. However, the Court did not rule on the damage, which it referred to an independent expert.
In another case, SAS Supermarchés MATCH, SAS CORA v. SNC NOVANDIE, SNC LACTALIS NESTLE ULTRA FRAIS

103 *European Commission EU, Practical Guide 2013, ante.*

104 *European Commission Communication No 2019/C 267/07, Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser: OJEU No. C 267, 9 August 9 2019, p. 4.*

105 *CA Paris, pôle 5, ch. 4, 14 April 2021, n° 19/19448, ante.*

106 *CA Paris, ch. 5.4, 24 nov. 2021, n° 20/04265.*

107 *European Commission Communication No 2019/C 267/07, ante, § 110.*

108 *Handelsretten (Danish maritime and commercial court), 15 January 2015, SH2015.U-0004-07, Cheminova A/S v. Akso Nobel Functionnal Chemicals BV and others.*

109 *CA Paris, pôle 5, ch. 5, 27 févr. 2014, n° 10/18285, SNC Doux Aliments Bretagne e.a. c/ Sté Ajinomoto Eurolysine : JurisData n° 2014-003551 ; Contrats, conc. consom. 2014, comm. 139, note G. Decocq ; Europe 2014, comm. 236, L. Idot.*

110 *Handelsretten (Danish maritime and commercial court), 15 January 2015, SH2015.U-0004-07, ante.*

111 *CA Paris, pôle 5, ch. 5, 27 févr. 2014, n° 10/18285, ante, given following Cass. com., 15 juin 2010, n° 09-15.816 : JurisData n° 2010-009653; Contrats, conc. consom. 2010, comm. 232, M. Malaurie-Vignal.*

112 *T. com. Paris, 29 mai 2007.*

113 *CA Paris, pôle 5, ch. 4, 10 juin 2009, n° 07/10478.*

114 *See CA Paris, pôle 5, ch. 5, 27 févr. 2014, n° 10/18285, ante.*

115 *CA Paris, pôle 5, ch. 4, 6 févr. 2019, n° 17/04101, SARL Doux Aliments c/ SA Roullier et SAS TIMAB Industries, ante.*

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MDD and others[116], a follow-on action from the ADLC's decision of 11 March 2015 (15-D-03) which had penalised a cartel between various companies manufacturing dairy products, including the defendants in the case, the companies known as Cora and Match sought reparation for the damage they considered they had suffered as a result of the practices identified in the ADLC's decision. They relied on an economic research study to substantiate various overcharges incurred in their purchases, which they had identified over the entire period in question (between September 2009 and December 2015). In addition, they requested umbrella damages, taking the view that undertakings which were not parties to the cartel had followed in the footsteps of the undertakings involved to increases their prices[117].

The court acknowledged the existence of the overcharge based on the research study provided by the claimants, but then queried whether it could be passed on to consumers. Given the date of the case, the court relied on the principles of ordinary law in force before the transposition of Directive 2014/104 and stated that it was for the claimant to prove that it had not passed on the overcharges it had incurred. Since the defendants had criticised the passing on rates admitted by the claimants (between 32 and 35%) on the basis of theoretical research rather than data specific to the brands concerned, which the claimants had used to substantiate their claim, the court accepted the claimants' estimates. It also accepted the umbrella damage for a part of the period (until 2012) outside the so-called inertia period.

It is interesting to note the volume effect claimed by the claimants, who argued that they had suffered volume losses due to price increases. This claim was rejected by the court, which held on the basis of the defendants' arguments that demand for such products was relatively insensitive to price and that the loss of volumes had not been proved. This resulted in a loss of €2.3 million.

It can be noted that the burden of proof of passing on is left to the claimant, which in itself does not fully satisfy the principle of effectiveness, even though in practice the evidence provided by the claimants on the basis of specific economic research studies enabled their assumptions about the passing on rate to be accepted.

Moreover, the interest rate used by the court reflects the marginal rate of the claimants' loans, i.e. 2.79% and 3.65%, owing to the increase in the claimants' financing needs, confirming the very pragmatic approach adopted by this court.

It can be noted that the burden of proof of passing on is left to the claimant, which in itself does not fully satisfy the principle of effectiveness

47 - A recent case analysing the indirect effects of a cartel may also be mentioned in the context of the lifts cartel, which the Commission penalised in 2007[118].

The victim, the Land of Upper Austria, was neither a supplier nor a purchaser in the relevant market affected by the cartel, but it granted subsidies in the form of low-interest loans to assist in the construction of housing for citizens who, as a result of the cartel, suffered an increase in the price of their homes that was offset by the subsidies paid by the Land, whose damage consisted in the loss of the interest from which it would have been able to benefit had it not had to pay such subsidies, which would not have been necessary in the absence of the cartel.

The ECJ, to which the case was referred, held that the loss was recoverable if it resulted directly from the cartel[119] and that, as a result, the right to compensation could not be limited to the suppliers and purchasers affected by the cartel but should be extended to all the potential victims (note the difference between this approach and that of the Paris Court of Appeal in the EMC2 case mentioned above)[120].

It was recalled earlier that the implementation of the principle of effectiveness is tending towards improved compensation for victims. In particular, national courts may not reject arguments relating to passing on simply because a party is unable to quantify exactly the effects of the passing on[121].

G. - Disclosure of documents

48 - Access to evidence by the judge and litigants has been increased by new texts such as Directive 2014/104/EU and Order No 2017-303 of 9 March 2017, as well as Law No 2018-670 of 30 July 2018 and Decree No 2018-1126 of 11 December 2018 on business confidentiality. These texts allow the litigant to ask the judge to issue an order for the disclosure of documents.

This requirement to disclose documents is clearly defined in the Directive, which in particular specifies that the request must be circumscribed as precisely and narrowly as possible[122] and be

116 *CA Paris, ch. 5.4, 24 nov. 2021, n° 20/04265, ante.*

117 *CJEU, 5 June 2014, Case C-557/12, Kone AG and others : JCl. Commercial, Synthèse 40.*

118 *See n° 17. - Commission Decision C(2007), 512 final, 21 February 2007 relating to a proceeding under Article 81 of the Treaty establishing the European Community (Case COMP/E-1/38.823 - Elevators and Escalators): OJEU No. C 75, 26 March 2008, p. 19.*

119 *CJEU, 12 December 2019, Case C-435/18, Otis and others v. Land Oberosterreich and others (Otis II), ante, pt 33.*

120 *Paris Court of Appeal, pôle 5, ch. 4, 28 févr. 2018, n° 15/11824, B. et EMC2 c/ SA Signaux Girod e.a., ante.*

121 *European Commission, Communication No. 2019/C 267/07, July 2019, ante, § 33.*

122 *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, 26 November 2014, ante, art. 5, § 2.*

limited only to what is proportionate[123], taking into account the legitimate interests of all the parties and third parties concerned. This means that the judge must carefully assess the context of the request[124] in order to evaluate its proportionality.
This issue is crucial in follow-on actions, where access to evidence gathered by the ADLC is fundamental.

49 - Many European decisions are influenced by the principles set out in the Directive in terms of an increased requirement for disclosure.

50 - **Truck cartel - follow on actions.** - The Commission indicated that claimants seeking compensation must be able to understand as precisely as possible how the cartel operates[125]. It granted an order for disclosure of the Commission's documents, excluding documents unrelated to the dispute. This decision is consistent with previous decisions in the same area.

51 - ***Disclosure hearing.*** - The Competition Appeal Tribunal (CAT)[126] confirmed the need for the defendants to disclose all necessary information in terms of market data (prices and quantities) to enable them to carry out the expert assessments necessary to prove the damage they had suffered.

52 - **Orange v. SFR**[127]. - Organisation of a data room to allow experts access to the sensitive data needed to demonstrate the damage[128].

53 - Similarly, Article R. 483-1 of the French Commercial Code was influenced by these provisions and provided that the *"category of documents [...] shall be identified, as precisely and narrowly as possible, by reference to common and relevant characteristics of its constituent elements, such as the nature, purpose, time of preparation or content of the documents"*, so as to leave the courts a degree of discretion in assessing the relevance of requests.

123 *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, 26 November 2014, ante, art. 5, § 3.*

124 *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, 26 November 2014, ante, ante, art. 6, § 4.*

125 *EWHC 1994 (Ch) (Supreme Court of England and Wales), 16 July 2018, Suez Groupe SAS and others v. Fiat Chrysler and others - European Commission, Decision C(2016), 4673, 19 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824 - Trucks), § 17: OJEU No. C 108, 6 April 2017, p. 6.*

126 *CAT (Competition Appeal Tribunal - UK), 1291/5/7/18 (T), 15 January 2020, Ryder Ltd & Another v. MAN SE and Others*

127 *T. com. Paris, 19e ch., 28 juin 2017, n° 2015/038979 : JurisData n° 2017-029240.*

128 *P. Roth, President of the London CAT, Private Enforcement Conference, Paris webinar, 17 to 22 June 2020.*

54 - It should be noted, however, that in accordance with Article 6(6) of the Directive, documents disclosed in the context of leniency or settlement proceedings cannot be disclosed at the request of a party seeking compensation, which limits the application of the principle of effectiveness.
It should also be noted that the Cour de Cassation, in a judgment of 8 July 2020[129] quashing a decision of the Court of Appeal on the basis of Article L. 483-1 of the French Commercial Code interpreted in the light of Articles 5 and 6 of the Directive, made a point of recalling that the right to evidence of the claimants in the proceedings, although protected by Articles 5 and 6 of the Directive, must be examined by the judge and balanced against the defendant's rights as regards the confidentiality of the documents whose disclosure has been requested. The judge must therefore give reasons for the proportionality of the request in the light, *"on the one hand, of protecting the confidential nature of the evidence held regarding third parties to the proceedings contemplated by Eiffage Infrastructures and, on the other hand, of preserving the effectiveness of competition law in the public sphere"*. The judgment has in fact been criticised for only having regard to the usefulness of the documents to the claimant without considering the other interests at stake: preserving business confidentiality and *"preserving the effectiveness of competition law in the public sphere"*.
The Cour de Cassation thus sanctioned a failure to give reasons which would have to be remedied by the court to which the matter was referred.

55 - It should, however, be recalled in this respect that the right to compensation for private parties does not only reflect a desire to rebalance the rights of victims of anti-competitive practices, but is a means of improving the functioning of the markets and competition, and the challenge is above all to make reparation effective, i.e. not excessively difficult or even impossible. This presupposes a hierarchy between the right to reparation and the protection of business confidentiality, which cannot be too restrictive in opposing this right.

3. Conclusion

56 - Even though the new texts are not yet applied fully owing to the small amount of hindsight we possess, their spirit is broadly evident in most of the issues mentioned above and, most of the time, they are moving in the direction of the practical implementation of the principle of effectiveness.
As regards questions of fact, despite the Commission's desire for harmonisation there is still a wide diversity in their assessment between national and international courts.

129 *Cass. com., 8 juill. 2020, n° 19-25.065, appeal by Renault Trucks against a judgment delivered on 25 October 2019 (CA Paris, pôle 1, ch. 8, 25 oct. 2019, n° 19/05356) in a dispute between the claimants and Eiffage Infrastructures.*

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Many European decisions are influenced by the principles set out in the Directive in terms of an increased requirement for disclosure

Hence it is still necessary to prove the extent of any damage, even though its existence may be presumed in the case of cartels.
The two principles of effectiveness and equivalence have not yet been fully applied, so opposed are they to the traditional approaches of placing the burden of proof on the claimant.
A distinction must indeed be drawn between the two issues of the standard of proof and the burden of proof. Whilst the Directive has certainly brought about a change in the rules on the second point, particularly as regards cartels and passing on, there has not really been any move towards lightening the standard of proof.
However, the practical application of the principle of effectiveness implies a lightening that was already called for in the Commission's Guide of 2013[130].
This issue, though, comes up against the general principles applied to the establishment of proof. Moreover, lighter standards of proof have not been defined except for the use of lump-sum assessments as in the case of cartels - approaches that are otherwise prohibited, as the Cour de Cassation has often pointed out[131].
It should be noted, however, that Chamber 4, Division 5 of the Paris Court of Appeal and the 15th Chamber of the Paris Commercial Court have helped to bring about change without altering the standard of proof but by using expert evidence where necessary.
The progress made with regard to passing on is exemplary in this respect. The old approach placed the burden of proof on the claimant to show that there was no passing on of the price overcharges resulting from a cartel. This proof, which was often difficult to establish, was an obstacle to compensation. The Directive and the Commission's Communication of 2019 reversed the burden of proof by placing it on the defendant.
This changes everything, and it could be suggested that the same should be done for exclusionary damage resulting from an ADP, for this would be in line with the principle of effectiveness by making it easier for the victim to establish its claim, leaving the defendant with the burden of proving its unrealistic nature. ■

130 *European Commission, Practical Guide 2013, ante.*

131 *See Cass. com., 23 nov. 2010, n° 09-71.665 : JurisData n° 2010-021985 ; Propr. industr. 2011, comm. 20, J. Larrieu.*