Clarifications on actions for damages caused by anti-competitive practices under the general civil liability regime, prior to the application of the rules resulting from Directive 2014/104/EU (Ruling n° 412- 22-10.545)

07/06/2023

Ruling No. 412

Partial quashing

FRENCH REPUBLIC

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ON BEHALF OF THE FRENCH PEOPLE

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RULING OF THE COMMERCIAL, FINANCIAL AND ECONOMIC CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 7 JUNE 2023

I - (1) Groupe Lactalis, a public limited-liability company with a management board and supervisory board, with registered office at [Address 2],

(2) Lactalis Nestlé Ultra Frais MDD, a general partnership, (LNUF MDD)

(3) Lactalis Beurres & Crèmes, a general partnership,

both with registered offices at [Address 3],

lodged appeal No. S 22-10.545 against ruling No. RG 20/04265 delivered on 24 November 2021 by the *cour d'appel* (Court of Appeal) of Paris, Division 5, Chamber 4, in the dispute between them:

(1) Cora, a simplified joint stock company with registered office at [Address 1],

(2) Supermarchés Match, a simplified joint-stock company with registered office at [Address 4],

(3) Eurial Ultra Frais, a single-member simplified joint stock company, with registered office at [Address 5],

(4) Novandie, a general partnership, with registered office at [Address 6],

respondents in the quashing.

II - Eurial Ultra Frais, a single-member simplified joint stock company,

lodged appeal No. U 22-11.099 against the same ruling in the dispute between:

(1) Cora, a simplified joint stock company,

(2) Supermarchés Match, a simplified joint-stock company

(3) Groupe Lactalis, a public limited-liability company with a management board and supervisory board,

(4) Lactalis Beurres & Crèmes, a general partnership,

(5) LNUF MDD, a general partnership,

(6) Novandie, a general partnership,

respondents in the quashing.

III - The company Novandie, a general partnership, lodged Appeal No. V 22-11.100 against the same ruling in the dispute between:

(1) Cora, a simplified joint stock company,

(2) Supermarchés Match, a simplified joint-stock company

(3) Eurial Ultra Frais, a simplified joint stock company

(4) Groupe Lactalis, a public limited-liability company with a management board and supervisory board,

(5) Lactalis Beurres & Crèmes, a general partnership,

(6) LNUF MDD, a general partnership,

respondents in the quashing.

The companies Cora and Supermarchés Match lodged a cross-appeal against the same ruling in each of the appeals.

The plaintiffs in main appeal No. S 22-10.545 base their actions on four pleas in law and an additional plea for quashing.

Appellant No. U 22-11.099 bases its action on four pleas of quashing.

Appellant No. V 22-11.100 bases its action on four pleas of quashing.

The appellants in cross-appeals Nos. S 22-10.545, U 22-11.099 and V 22-11.100 base their actions on two pleas of quashing.

The case files were sent to the Prosecutor-General.

On the report of Ms Champalaune, judge, the observations of SCP Célice, Texidor, Périer, lawyers of Novandie and Eurial Ultra Frais, SCP Piwnica et Molinié, lawyers of Groupe Lactalis, Lactalis Nestlé Ultra Frais MDD, and Lactalis Beurres & Crèmes, SARL Boré, Salve de Bruneton and Mégret, lawyers of Cora and Supermarchés Match, and the advisory opinion of Mr Douvreleur, advocate-general, after debate in the public hearing of 12 April 2023, attended by Mr Vigneau, President, Ms Champalaune, judge-rapporteur, Ms Darbois, elder judge, Ms Poillot-Peruzzetto, Ms Michel-Amsellem, judges, Ms Comte, Ms Bessaud, Ms Bellino, Mr Regis, judge-referees, Mr Douvreleur advocate-general, and Ms Labat, Chamber Registrar,

the Commercial, Financial and Economic Chamber of the *Cour de cassation* (Court of Cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned president and judges, after deliberation thereof in accordance with the Law, has delivered this ruling.

1. Because of their connection, appeals Nos. S 22-10.545, U 22-11.099, and V 22-11.100 have been joined together.

Account of the dispute

Facts and procedure

2. According to the ruling under appeal (Paris, 24 November 2021) and the associated exhibits, by decision No. 15-D-13 of 11 March 2015, which became final, the competition authority (the Authority) stated that various companies had infringed Articles 101 of the Treaty on the Functioning of the European Union (TFEU) and L. 420-1 of the Commercial Code by carrying out concerted practices on the market for fresh milk products under a distributor's trademark (MDD) for a period, which varied according to each company, of between 6 December 2006 and 9 February 2012.

3. On 21, 22, 23, 27 and 29 March 2017, the companies Cora and Supermarchés Match (the company Match) have summoned, *inter alia*, Groupe Lactalis, LNUF MDD, Lactalis Beurres & Crèmes (Lactalis), Novandie and Eurial Ultra Frais (Eurial), before a commercial court, seeking compensation for the damage caused by said practices.

4. The parties produced economic analyses carried out by the firm RBB with regard to Cora and Match, by the firm Compass-Lexecon with regard to Lactalis, by the firm CRA with regard to Novandie and by Deloitte Finance with regard to Eurial.

Reviewing pleas

On the first plea of appeal No. S 22-10.545 (civil liability of the parent company)

6. Groupe Lactalis objects to the ruling that ordered it to pay, *in solidum* with Lactalis Beurres & Crèmes, the sum of EUR 61,326.60 to Cora and EUR 9,983.40 to Match, whereas "Article L 481-2 of the Commercial Code now provides that an anti-competitive practice 'is presumed to be irrefutable established in relation to the natural or legal person designated in the same article once its existence and attribution to that person have been established by a decision that can no longer be the subject of an ordinary appeal for the part relating to that finding, pronounced by the competition authority or by the court', where said irrebutable presumption of fault or imputation of fault is only valid for fault committed after 2017, and cannot be applied retroactively to faults committed before the entry-into-force of the law; that by asserting that Groupe Lactalis could not contest its fault insofar as 'it is apparent from paragraph 260 of the Decision that the liability of Groupe Lactalis is established because of its status as a parent company that exercised a decisive influence on the conduct of its subsidiary Lactalis B&C, 99.99% owned, which did not dispute that it was the author of the anticompetitive practices during the period in which the practices were committed', after having found that the unlawful practices in question had been committed between December 2006 and February 2012, i.e. before the date of transposition of the 2014 directive, so that it was not possible to apply the legal presumptions inserted since 2017' and that the case therefore had to be examined as a case of civil liability, from which it follows that the presumption of fault applied to a parent company deemed to exercise a decisive influence could not be applied to acts prior to 2017, the*cour d'appel* (Court of Appeal), which did not draw the legal consequences of its own findings, infringed the former Article 1382 of the Civil Code, which became Article 1240 of the same code."

Statement of reasons

Court's response

7. According to settled case-law of the Court of Justice of the European Union, the conductof a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (rulings of 16 June 2016, [M] [X] and [W]/Commission, C-155/14 P, point 27, 10 September 2009, Akzo Nobel et al., C-97/08 P, point 58(e). When a parent company owns all or almost all of the capital of its subsidiary and which has breached EU competition rules, there is a rebuttable presumption that the parent company actually exercises a decisive influence over the conduct of its subsidiary or, in the case of indirect ownership, over the conduct of the interposed company and, through the latter, over the conduct of the subsidiary (rulings Akzo Nobel et al.,*supra*, point 60, 8 May 2013, Eni, C-508/11 P, point 48, 15 April 2021, Italmobiliare et al., C-694/19, points 47 and 55). In order to rebut that presumption, a parent company must provide all the information relating to the organisational, economic and legal connections between itself and its subsidiary in such a way as to demonstrate that the latter acted in the market independently and that they do not constitute one single economic entity (rulings of 15 April 2021, Italmobiliare et al., C-694/19, points 47 and 55, 20 January 2011, General Química et al., C-90/09 P, point 51).

8. These rules apply in domestic competition law.

9. Having noted that Groupe Lactalis held 99.9% of the capital of Lactalis beurres & crèmes, which had not disputed that it was the author of the anticompetitive pratrices in question, the cour d'appel (*Court of Appeal*) exactly held that, since it is apparent from its legal sudmissions that Groupe Lactalis did not claim that its subsidiary acted in the market independently, and without retroactively applying 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 (the so-called "damages" directive), Groupe Lactalis, like its subsidiary, with which it formed one single company, was liable for the fault resulting from the actions of that subsidiary.

10. The plea is therefore unfounded.

Operative part of the ruling

ON THESE GROUNDS, and without it being necessary to rule on the eleventh part of the second plea of appeal No. S 22-10.545, the Court

QUASHES AND SETS ASIDE the ruling delivered on 24 November 2021 between the parties by the*cour d'appel* (Court of Appeal) of Paris except in so far as it declares admissible submissions No. 2 of the companies in the Lactalis group and Eurial Ultra Frais of 30 August 2021 and in so far as it reverses the judgment whereby it rejected all the claims of Cora and Supermarchés Match and ordered them to pay the corresponding court and discretionary costs, it confirms the remainder, and, again ruling on the dismissed charges, states that Cora and Supermarchés Match suffered a certain "financial" damage as a result of the unlawful agreement between milk product manufacturers during the period of December 2006 to February 2012, and sets the amount of damages suffered by Cora at EUR 2,044,220 and the amount suffered by Supermarchés Match at EUR 332,780;

Declares that it is not fitting to exclude the companies Cora and Supermarchés Match from the proceedings;

Returns, except on these points, the case and the parties to the status existing prior to the said ruling and refers them to the *cour d'appel* (Court of Appeal) of Paris, otherwise composed;

Leaves each party to bear its own costs.

Pursuant to Article 700 of the Code of Civil Procedure, dismisses the claims;

Finds that, at the behest of the Prosecutor-General at the *Cour de cassation* (Court of cassation), the present judgment will be forwarded for transcription in the margin or at the bottom of the partially overturned judgment;

Thus decided by the *Cour de cassation* (Court of Cassation), Commercial, Financial and Economic Chamber, and pronounced by the President in a public hearing of the seventh day of June of the year two thousand and twenty-three.

President : Mr Vigneau
Advocate-general : Mr Douvreleur
Judge-rapporteur : Ms Champalaune
Lawyer(s) : SCP Célice, Texidor, Périer - SCP Piwnica et Molinié - SARL Boré, Salve de Bruneton and Mégret

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