

How Two Landmark Rulings Have Strengthened Paris' Position as a Competition Litigation Hub

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As the volume of competition law damages actions continues to increase in Europe, particularly in France, we propose to revisit – as a reminder of Paris' recent transformation into a competition litigation hub – two landmark court decisions from 2017 that have set a precedent on the application of interest in competition damages claims brought under French law.

Background

On 9 December 2009, the French competition authority fined French incumbent telephone operator *France Télécom* (now Orange) and a subsidiary, Orange Caraïbe, €63 million for abusing their dominant position in the market for mobile telephony services in the French West Indies and French Guyana between 2000 and 2005[1] Orange Caraïbe implemented a series of practices intended to discourage clients from using rival mobile operators, including Outremer Telecom and Digicel. These two competing operators subsequently filed a suit with the Paris Commercial Court to claim damages: €75 million by Outremer Telecom and €494 million by Digicel. The quantum of damages in both cases had increased substantially because of the almost decade's worth of interest charges – with very different outcomes at trial.

Outremer Telecom

In its 2017 judgment awarding Outremer Telecom €2.6 million plus interest, the Paris Court of Appeal confirmed that the interest component of a claim seeking compensation for loss resulting from an impaired cash flow position may either be based on the statutory rate or – establishing a new precedent for these types of claims – the weighted average cost of capital (“WACC”).[2]

The Paris Court of Appeal considered the WACC to be an adequate interest rate for competition law damages actions if the claimant can demonstrate on the balance of probabilities that, as a result of its reduced cash flow, it:

- (a) lost opportunities to make clearly identifiable investments (with any projected return on those lost investments amounting to the average cost of capital), or
- (b) in the alternative, faced difficulties in refinancing its business.

However, on the merits, the court concluded that Outremer Telecom had failed to meet the above test for an award of interest based on its WACC, and therefore considered the application of interest on its damages at the statutory rate of 0.5% per annum until full payment, to be sufficient compensation.

Digicel

Digicel's dispute with Orange had a much different outcome when it came to calculating the interest component of its claim. On 18 December 2017, the Paris Commercial Court ordered Orange to pay rival operator Digicel €180 million in damages plus 10.4% interest per year for a total of €346 million, a record for French competition damages claims.[3] In contrast to Outremer Telecom, Digicel was found to have sufficiently demonstrated its loss of opportunity and therefore obtained compound interest based on its WACC, estimated at 10.4% per annum. The Paris Court of Appeal later dismissed an appeal by Orange on 6 February 2018.

However, Digicel now claims in an ongoing appeal that the award should be €426 million – €80 million higher – as the interest should have been calculated on a compound basis rather than the simple interest formula used by the Paris Commercial Court. We will continue to monitor the outcome of Digicel's appeal closely.

Conclusion

The impact of these court rulings is significant — particularly in the context of competition damages actions relating to often decades-old infringements — in demonstrating to prospective claimants a real willingness by the French courts, particularly in Paris, to award significant compensation in the form of interest on damages. The decisions are also a helpful reminder that, under French law, the burden of proofs rests on the claimant to prove on the balance of probabilities – having regard to any alleged loss of opportunity or financial difficulty – that it is entitled to an interest award above the statutory rate.