Published on 1 September 2010 by **Jean-Luc Soulier**, Member of the Paris Bar
jl.soulier@soulier-avocats.com
Tel.: +33 (0)1 40 54 29 29, + 33 (0)4 72 82 20 80

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Confirmation of full dismissal in the bee case after 7 years of litigation: what lessons can be learned?

In a judgment dated September 2, 2010, the Investigating Chamber of the Toulouse Court of Appeals upheld the full dismissal rendered on January 30, 2009 by the investigating judge of Saint-Gaudens in the publicized so-called “bee case”.

More than seven years have elapsed since Regent, a seed-coating product successively owned by Bayer CropScience and BASF Agro, was accused of being responsible for the abnormally high death rate observed among the bee population in France.

As legal professionals, what lessons can we draw from this case in which we defended the interests of BASF Agro?

How could this product have been wrongly accused? Why did it take seven years of proceedings before it was finally established that Regent had nothing to do with the abnormally high death rate observed among the bee population in France?

This legal monstrosity was borne from the association of unprecedented media hype and the first investigating judge’s errors in appointing experts in a case successively examined by three different investigating judges.

On the first aspect, companies, whatever their size, see themselves completely powerless when they are accused on the evening news of causing harm to human health or to the environment (often both of them at the same time).

Sometimes, this is just a spark that fades away. Sometimes, for reasons that can hardly been explained, the information spreads like wild fire and sets in for months, if not years.

The information then gets out of control and nothing can turn back the tide, neither the judges' decisions nor reports from official French and European experts responsible for assessing the accused product. The information then becomes an "urban legend", taken out of the real world, and becoming a fantasy. Believing – or not believing – in such information takes an ideological dimension, even almost a religious one, for some environmental advocates.

On the second aspect, the bee case would certainly not have reached such a magnitude and would not have firmly settled in the general public's mind and imagination if the investigating judge had not knowingly decided as a first move to appoint non-registered experts with close links with the civil parties. The contents of such experts' biased reports, some of which were only two pages long, were divulged to the press in clear violation of the investigation secrecy principle and before BASF Agro itself had been granted access to the file.

The investigating judge then commissioned analysis laboratories that had not been granted the necessary accreditation to conduct research on the residues of the accused product and required them to apply a non-published and non-validated analytical method developed by a researcher having connections with the civil parties.

These questionable choices did not prevent the discovery of the truth… but they indisputably delayed it.

Even though the three laboratories successively commissioned by the investigating judge applied the non-validated method imposed by him, they failed to establish any relationship between the abnormally high death rate observed among the bee population in France and the use of Regent by French bee-keepers. In this respect, the Investigating Chamber of the Toulouse Court of Appeals noted "certain findings, quite alarming ones, were invalidated because of the technique used that generated false positive reactions".

During these seven years of proceedings, several reports authored by official experts working for food safety agencies in France, i.e. the AFSSA (French Food Safety Agency) and the AFSSE (French Agency for Environmental Health Safety), and in Europe, i.e. the EFSA (European Food Safety Authority), confirmed the harmlessness of BASF Agro's seed-coating product. Regent's active substance (fipronil) was also included into Annex I of Directive EC/91/414 in the framework of the Community assessment of all active substances used in plant protection products, and Regent continued to be offered for sale in the 70 countries where it had been granted a market authorization.

As legal professionals, we must ask the following question: what should be changed in the rules governing the expertise process in criminal proceedings to prevent such abuses from happening in the future?

This issue does not only concern companies. Every day, judicial experts are appointed by investigating judges in cases involving individuals.

The serious abuses that impacted the investigation process in the bee case could probably have been avoided if the appointment of experts by investigating judges was better regulated by law.

In the first place, the French Code of Criminal Procedure does not – contrary to the French Code of Civil

Procedure – provide for any possibility to challenge the choice of an expert for lack of independence or impartiality.

In the bee case, one of the experts appointed by the investigating judge had already been involved as a private expert commissioned by the largest bee-keeper association (UNAF) that acted as civil party to an action before the *Conseil d'Etat* (France's highest administrative court) . The same expert had also participated in a colloquium organized by the UNAF where he made particularly virulent comments against companies operating in the agrochemical industry. This, however, did not prevent the investigating judge from entrusting him with nine expertise assignments, despite our impassioned objections.

Other experts, equally biased and activist, were appointed and we were not legally entitled to challenge such appointments.

If these experts had been appointed in the framework of civil proceedings, we could have filed a petition with the summary judge to obtain their immediate recusal. This would have prevented pseudo expertise reports from self-proclaimed experts from being used in a press campaign orchestrated by the civil parties in defiance of the investigation secrecy principle.

In the second place, while Article 157 of the French Code of Criminal Procedure stipulates that the investigating judge must appoint experts among the individuals or legal entities duly registered with the *Cour de Cassation* (French Supreme Court) or with a Court of Appeals, it also states immediately after that the investigating judge, in a "reasoned decision", may "as an exceptional measure" appoint an expert not registered on any list.

Yet, too often, the *Cour de Cassation* has upheld decisions that contained grounds as succinct and unverifiable as the "unavailability of the registered experts" or the "specific competence" of a non-registered expert, which in fact gives the investigating judge full latitude to appoint any experts of his/her choice without any restriction whatsoever.

In a Law dated March 5, 2007, the legislator tried to introduce a small adversarial component to the expertise process in criminal proceedings. Pursuant to Article 161-1 of the French Code of Criminal Procedure, the parties' attorneys may request the investigating judge to amend or complete the assignment entrusted to the expert or to appoint – together with the expert already appointed – another expert of their choice selected among the list of experts registered with the *Cour de Cassation* or with a Court of Appeals. Yet, the judge may reject such request in a reasoned decision that can be appealed before the President of the Investigating Chamber within ten days. The decision of the President of the Investigating Chamber is not subject to appeal.

In the third place, the investigating judge should only be authorized to commission "GLP" laboratories, i.e. laboratories that have been granted the "Good Laboratory Practice" label, officially accredited for analyzing residues.

Any breach of the French and Community rules applicable in respect of sampling and analysis of residue should be sanctioned during the investigation process and result in the nullity of the findings. Presently, the

relevance and weight of a judicial expertise report are left to the assessment of the court that can refuse to admit it if it believes the report is not probative.

The parties should be entitled to file at any time (i) a petition with the President of the Investigating Chamber to have an expert removed for lack of independence of impartiality and (ii) a petition with the Investigating Chamber for nullification for non-compliance with French and Community rules applicable in respect of sampling and analyzing by laboratories. In addition, the parties should be able to appeal any decision of the Investigating Chamber and of its President before the *Cour de Cassation*.

Such provisions would reduce the risk of judicial errors and allow a more diligent adjudication of cases where the outcome depends on technical and scientific expertise assignments.