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Highlights of the notice issued by the french competition authority on financial penalties in antitrust cases

On May 16, 2011, the *Autorité de la concurrence* (French Competition Authority or hereinafter the "FCA") published a notice on the method according to which it sets financial penalties in cases of cartels and abuses of dominant position[1] (the "Notice").

Article L.464-2 of the French Commercial Code already specified the legal criteria according to which financial penalties must be set (the seriousness of the infringement, the importance of the damage to the economy, the individual situation of the concerned company and the potential reiteration of the offence(s)) as well as the maximum amount of said penalties, i.e. 10% of the turnover.

Yet, in the course of the decisions rendered by the FCA, the need emerged for guidelines that would be even more explicit on the method for calculating fines in order to increase, in the eyes of companies, the predictability of the financial penalties incurred and, thereby, to improve their two-fold objective of punishment and deterrence.

The divergent positions adopted by the Paris Court of Appeals and the Competition Council (the FCA's predecessor) in recent cases finally convinced the FCA of the necessity to adopt such guidelines as a matter of emergency. Indeed, in the so-called steel cartel[2], the Paris Court of Appeals reduced by 80% the fines imposed by the Competition Council, which discredited the calculation method used by the latter.

The adoption of guidelines – that eventually took the form of the Notice – was, therefore, eagerly awaited.

The Notice not only clarifies and explains the calculation method used by the FCA for setting fines **(2)** but also significantly improves in various ways the rights of defense of companies accused of antitrust infringements

(1). In addition, while the publication of the Notice has indisputably virtuous effects, including primarily increased transparency and legibility, it might as well entail a pernicious consequence: the risk of a significant rise in the level of financial penalties **(3)**.

1- The Notice significantly improves the rights of defense of companies accused of antitrust infringements

a) The Notice is "*enforceable*" against and "*commits*" the FCA

#7 of the notice expressly specifies that it "*commits*" the FCA, that it is *"opposable"* to it and that it is considered to be "*a guideline in the sense of the case-law of the administrative courts" (*#14 of the Notice). As such, the FCA is supposed to follow the calculation method detailed in the Notice.

Yet, refusing the principle of a "*mechanic scale*", the FCA reserves the right to set aside the Notice to the extent that it "*sets forth, in the reasoning of its decision, the specific circumstances or the motives of general interest that lead it to depart from it in a given case*" *(*# 7 of the Notice).

A certain degree of legal uncertainty remains because of this margin of appreciation or discretion granted to the FCA. This is, for example, the case when the FCA, in assessing the turnover achieved by the infringing company, decides to retain the figures of a financial year other than the ultimate financial year of participation in the infringement(s) – which is theoretically the reference period. Indeed, according to #37 of the Notice, the FCA may opt for a financial year that it considers more appropriate to the extent that it sets out the reasons for its choice[3].

b) The exercise of the power to impose penalties is more transparent

The Notice offers the advantage of enlightening companies on the concrete method to be applied by the FCA to set financial penalties, which increases the predictability of incurred fines.

However, the Notice should not be considered as an exhaustive list of all the factors that are likely to be taken into account in setting financial penalties (#15 of the Notice).

c) The Notice introduces more adversarial elements in the procedure

The adoption of the Notice also improves the adversarial process.

During the investigation, the FCA shall point out to the concerned entity the essential points of law and facts contained in the file that are likely to have an influence on the setting of the financial penalty in order to put such entity in a position to make observations in this respect (#17 of the Notice). For companies, this requirement further increases the predictability of the fines likely to be imposed.

2- Convergences and differences between the methods of calculating penalties applied by the FCA and the European Commission respectively

Generally speaking, the method of calculation defined by the FCA is mainly inspired from the one detailed by the European Commission in its 2006 guidelines[4] (hereinafter the "Guidelines"), except that the FCA's method appears to be less stringent in several respects.

The method applied by the FCA to set financial penalties is divided into four steps: the determined basic penalty amount (a) is then adjusted under a so-called individualization mechanism (b). The reiteration of the offense(s) (c) as well as a number of other adjustments factors (d) are taken into account to obtain an evaluation of the penalties that is as individualized (i.e. customized) as possible.

a) The basic amount of the financial penalty

The basic amount of the financial penalty corresponds to a proportion of the value of the sales of the products or services to which the infringement(s) relate(s), ranging between 0% and 30% (with a minimum floor of 15% for cartels). Past experience showed that the total turnover achieved by the infringing company is not sufficiently representative of the infringement.

The determination of the precise applicable percentage within the aforementioned range, on the basis of the ultimate full financial year of participation in the infringements(s), is made according to two criteria

- The seriousness of the infringement(s): nature of the infringement(s) (horizontal or vertical agreements) and nature of the activities, sectors or markets at stake (public utilities, public procurement, etc.); and
- The damage caused to the economy: geographical coverage of the infringement(s), activities, markerts or sectors impacted by the infringement(s) (barriers to entry, price-elasticity, etc.) and impact on prices (overcharge, obstacle to a foreseeable price decrease, etc.).

Only after that will the FAC take into account the duration of the infringement(s) to refine the determination of the basic amount.

Regarding the determination of the basic amount, it must be noted that the calculation method used by the FCA and that applied by the European Commission clearly converge: both authorities refer to the sales "*to which the infringement(s) relate(s)*" (#33 of the Notice), with a slight difference for the European Union that refers to the sales of goods and services "t*o which the infringement directly or indirectly relates*" (#13 of the Guidelines). Lacking a definition of the adverbs "directly or indirectly", it is difficult to be absolutely sure that the terms "*to which the infringement(s) relate(s)*" means exactly the same thing for the FCA and for the European Commission.

In addition, the FCA and the European Commission retain the same maximum percentage of sales, i.e. 30%

(#40 of the Notice, #21 of the Guidelines) and the same minimum floor, i.e. 15% for the most reprehensible agreements (#41 of the Notice and #25 of the Guidelines).

On the other hand, the analysis of the two calculation methods reveals a divergence of view between the FCA and the European Commission on the taking into account of the duration of the infringement. The FCA appears much less strict than the European Commission: if the infringement lasted more than one year, the FCA retains, for the first year, a proportion of the total sales between 0% and 30% and, for the subsequent years of participation in the infringement, only half of this proportion.

While the FCA resolved to apply a ratio of 0.5 for years above the first year of participation in the infringement, the European Commission continues to apply a ratio of 1.

b) The individualization of the financial penalty

Regarding the individualization of the financial penalty, it should be noted the FCA takes up most of the mitigating circumstances (such as, for example, the fact that the company at stake is a "single-product" company) and aggravating circumstances (such as the significant size of the company at stake or the economic power of the group to which the company at stake belongs) set forth in the Guidelines of the European Commission.

The Notice also specifies that the belonging of the company to a group is now taken into account in the assessment when the infringement is also attributable to the group entity that controls the company at stake. As such, the financial penalty can be adjusted upwards if there is a link between group membership and attribution of liability for the infringement(s) to the parent company.

The position adopted by the FCA with respect to mitigating circumstances may seem stricter than that of the European Commission insofar as the FCA considers that the amount of the financial penalty may not be adjusted downwards because of the voluntary termination of the infringement, the fact that the infringement has been committed as a result of negligence, the adoption of compliance program or cooperation by the company at stake (except for leniency programs).

In fact, the FCA plans to issue in autumn 2011 a press release dedicated to compliance programs. In this respect, in a footnote on page 1 of the Notice, the FCA specifies that "*it will soon provide guidance on its general approach to compliance, in order to assist business on this matter. In parallel, the conditions in which it may take into account proposals of commitments to set up antitrust compliance program, in the context of the settlement procedure provided by Section III of Article L.464-2 of the Code of commerce, by granting a reduction of the financial penalty if it deems those programs to be relevant, trustworthy and efficient, will be explained in a forthcoming procedural notice relating to this procedure*".

c) The variation of the financial penalty considering the reiteration of the

infringement

Reiteration is of course considered as an “aggravating circumstance” by the FCA event though the latter’s position on this issue may seem less strict than that of the European Commission.

According to the FCA, reiteration is established when the following four cumulative conditions are met:

- A previous infringement to competition law must have been found before the termination of the practice at stake;
- The practice at stake must be identical or similar, in its objects of effects, to the one that has given rise to the prior finding of infringement;
- The prior finding of infringement must have become definitive by the day the FCA takes its decision on the practice at stake; and
- The period of time between the prior finding of infringement and the starting point of the practice at stake must be taken into account.

The position adopted by the FCA with respect to reiteration is less strict than that of the European Commission because:

- The FCA decided to assess possible reiteration of infringements over a limited period of time. As such, it does not intend to raise the issue of reiteration when the period of time between the prior finding of infringement and the starting point of the practice at stake exceeds 15 years (#51 of the Notice);
- In case of reiteration, the basic amount of the financial penalty may be increased by the FCA by 15% to 50% per established infringement, as compared to 100% by the European Commission (#28 of the Guidelines);
- To assess reiteration, the FCA only takes into account prior findings of infringement that have become definitive on the date it takes its decision on the practice at stake whereas the European Commission does not require that such findings be definitive[5].

d) Final adjustments

In any events, the FCA must check that the final amount of the financial penalty – following the individualization of the basic amount and after the taking into account of reiteration – will not exceed the maximum amount set forth by law, i.e. 10% of the highest worldwide turnover achieved during one of the financial years preceding that during which the infringement(s) has(ve) taken place, where the infringer is a legal entity.

The amount of the financial penalty can be further reduced on account of the total or partial immunity granted under the leniency procedure or on account of the so-called settlement procedure (i.e. the “no defense against objections” procedure).

Lastly, the financial penalty can also be reduced when the infringer claims that it encounters financial

difficulties affecting its ability to pay, it being specified, however, that the alleged difficulties must be "*actual and real*", specific to the infringer (i.e. not related to the cyclical economic difficulties affecting the industry in which the infringer operates) and must concretely prevent it from "paying, in whole or in part, the financial penalty that may be imposed on it" (#65 of the Notice).

3) The pernicious effect of the method applied by the FCA to set financial penalties: the risk of an increase in the amount of imposed fines

Since the calculation method adopted by the FCA is now binding, the number of financial penalties imposed should drastically increase.

In addition, the determination of the basic amount of financial penalty in the aforementioned range of 0% to 30% – and that will probably be around 15% to 20% in practice – de facto increases the amount of the fines likely to be imposed.

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[1] http://www.autoritedelaconcurrence.fr/doc/notice_antitrust_penalties_16may2011_en.pdf

[2] Paris Court of Appeals, January 19, 2010, Société AMD Sud-Ouest et a, RG n° 2009/00334

[3] #37 of the Notice: "*In the cases where the Autorité deems the ultimate full accounting year of participation in the infringement(s) to be manifestly not representative reference, it opts for an accounting year that it considers more appropriate, or for an average of accounting years. It sets out the reasons for its choice*".

[4] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF

[5] CJEE, June 10, 2010 Lafarge SA, C-413/08*: "it is sufficient for the Commission to be entitled to take account of repeated infringement that the undertaking has previously been found guilty of an infringement of the same type, even if the decision concerned is still subject to review by the courts*".

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