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The recommendations of the “frs” report of september 20, 2010 on the assessment of sanctions in antitrust infringements

The so-called “steel cartel” case revealed differences of assessment between *the Autorité de la concurrence* (French Competition Authority, hereinafter the “Authority”) and the Paris Court of Appeals in respect of sanctions to be imposed on companies that have taken part in antitrust infringements. In the “steel cartel” case, the Paris Court of Appeals reduced by 80% the fines imposed by the Competition Council (the Authority’s predecessor) in its decision n°08D-32[1].

Faced with this “*lack of predictability and legal certainty in the calculation of the fines*”, the French Minister of the Economy, Mrs. Christine Lagarde, appointed three experts and entrusted them with the mission of proposing a method of assessment of sanctions in antitrust cases in France in order to make such sanctions “*increasingly efficient and deterrent but also more predictable, if possible by the end of the year 2010*”.

After five months of consultations and interviews with recognized specialists in antitrust and competition law, the “FRS”[2] report (the “Report”) was delivered to the Minister of the Economy on September 20, 2010. The Report includes a certain number of recommendations inspired by EU law and decisions of the European Commission[3].

These recommendations do, indeed, improve the predictability of sanctions and, therefore, legal certainty by calling for an adversarial debate on incurred sanctions right at the beginning of the proceedings (1) and by clarifying the method of calculating fines imposed in antitrust cases (2).

1- The sanctions likely to be imposed must be discussed at an early stage of the proceedings

Given the quasi-criminal nature of the penalties which may be imposed in antitrust cases, the report considers that “*the issue of sanction is addressed only at a very late stage of the proceedings*”, which prejudices the rights of the defense.

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Indeed, even though the statement of objections addresses the issue of sanction in very broad terms, the parties only become fully aware of the sanctions at the time the decision is rendered.

The author of the Report took into account the interviewees' insistent requests for the introduction of an adversarial debate on contemplated sanctions (given their unpredictability and the significance of the fines imposed) as early as possible in the proceedings.

As such, the Report specifies that "*companies must benefit from guarantees of fair trial and due process and be offered the possibility to defend themselves as early as the notification of the statement of objections, and in any event no later than upon communication of the report on the assessment of the damage to the economy, the contemplated sanctions and the criteria applied for the calculation of the fine, if any*".

Consequently, the Report recommends "*staging an adversarial debate on sanctions earlier in the proceedings. A reference instrument such as guidelines could stipulate that the rapporteur should, at the stage of the communication of the report, disclose not only his assessment of the damage to the economy but also the nature of the sanctions he suggests and, if he suggests pecuniary sanctions, the recommended fine range*".

2- Clarification of the method for calculating sanctions/fines

a) The absence of an established method of calculation in France: application of the criteria set forth in Article L.464-2 of the French Commercial Code

Contrary to EU law[4], French law does not provide for any methodology for calculating fines, which increases unpredictability and legal uncertainty for companies.

The Report recalls that "*the main instrument used in France to sanction antitrust practices is the fine, calculated on the basis of four elements: gravity of the antitrust infringement, extent of the damage caused to the economy, situation of each concerned company and, as the case may be, repetition of the antitrust infringement (see Article L.464-2 of the French Commercial Code*[5]*). This leaves a great latitude for calculating the fine*".

These criteria are widely used by most competition authorities across the EU, to the exception however of the "damage to the economy" criterion, that remains a quite controversial criterion… and for a good reason.

The "damage to the economy", as a criterion used to determine the amount of the appropriate fine, is quite difficult to assess on an economic level. The Report noted "*it is probably because they are aware of the concrete difficulties that the Autorité de la Concurrence as well as the Court of Appeals, sharing the same view on this issue, refrain from quantifying the "damage to the economy" set forth in Article L.464-2 of the French Commercial Code*".

The *Cour de cassation* has been so far quite liberal in the assessment of the damage to the economy and, as

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pointed out in the Report, has accepted that this criterion be "*simply characterized on the basis of certain factors such as the size of the relevant market, the nature of the alleged practice(s), the cyclical effects of the practice(s), its duration and the characteristics of the relevant sector of activity*". So far, the damage to the economy did not have to be quantified and was, de facto, presumed in all cartel cases.

Yet, in a recent decision[6], the *Cour de Cassation* reconsidered this too flexible approach and now refuses that the damage to the economy be presumed (in cartel cases) and requires that the extent of such damage be demonstrated by using economic variables.

As a result, the Authority must now assess – if not quantify – the damage to the economy on the basis of some economic variables such as price sensitivity of demand.

Pursuant to the Report, it appears that the assessment criteria set forth in Article L. 464-2 of the French Commercial Code *are "quite general and provide little predictability as to the incurred fines"*. This is the reason why the Report promotes, following the example of other competition authorities in Europe, the development of a method for calculating fines".

b) Outline of a method for calculating fines

As underlined in the Report – the authors of which conducted a comparative analysis of the national competition and antitrust legislations in Europe – most of competition authorities across the EU follow a method, usually explained in guidelines, according to which fines are calculated as a percentage of the overall sales achieved in the cartelized market.

The Report retains this approach and recommends that the appropriate fines be calculated according to the following method:

(i) The calculation starts with the determination of a **basic amount** corresponding to a percentage of the value of the sales of products or services connected with the anti-competitive practice (for instance a percentage between 5 to 15% of the value of the sales, depending on the seriousness of the anti-competitive practice). According to the Report, only the sales truly connected with the anti-competitive practice must be taken into account (neither the aggregate sales of the infringing company nor the consolidated sales of the group to which the infringing company belongs). This basic amount is then adjusted according to mitigating or aggravating circumstances

(ii) This basic amount is then adjusted according to mitigating or aggravating circumstances

Some of these circumstances are "standard":

- the duration of the infringement: the report is favorable notably to the Spanish method (with a less digressive rate however) that multiplies the number of years of infringement by a certain coefficient. The amount obtained is then added to the basic amount of fine;

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- the cooperation, non-cooperation or obstruction to the investigation;
- the economic and financial situation of the infringing company;
- the repetition of the infringement;
- the leading role in the antitrust infringement.

The Report also recommends taking into account other circumstances such as:

- The average margin in the relevant market: according to the Report, the turnover of a company is not necessarily representative of the profitability of a market. With the same turnover, companies operating in the luxury industry or mass retail distribution sector will not earn the same profits. As such, the average margin seems to be a more worthy indicator of the profitability of a company that takes part in an antitrust infringement.
- The amounts of compensation directly proposed to injured parties by the infringing company in the framework of the administrative proceedings before the Authority, it being specified that these proposals are rarely made before the decision is rendered and are very often subject to confidential negotiations. In any case, the Authority is invited to take into account any other potential sanctions already imposed on the infringing company in order to avoid the "double punishment", in compliance with the *non bis in idem principle.*
- The existence of real and serious compliance programs and the effective implementation thereof.
- The damage to the economy: given the shifting nature of this criterion, the Report considers that the damage to the economy "*should only be taken into account as a mitigating or aggravating factor at the time of the fine adjustment, only in cases where it can be truly identified*".

c) Other elements concerning the determination and application of fines

- Juts like under EU law, the maximum legal amount of penalty set forth in Article L.464-2 of the French Commercial Code (see footnote 5) should be considered as a ceiling, not as the starting point for the calculation of the fine.
- Only the infringing company must be investigated and penalized: "*the liability of the parent company may only be sought if it has not reacted to the practices of its subsidiary or been negligent in the implementation within the group of a serious program for the prevention of anti competitive practices, was aware of the infringement or participated therein*". On this specific issue, the recommendations of the Report are in line with the decisions rendered by the Authority.
- Regarding vertical agreements (outside cartels), the Report considers the possibility to suspend the sentence in case of a first infringement. This suspension of sentence (potentially coupled with a period of probation) would be conditional to the adoption of an appropriate compliance program and a commitment not to repeat the infringement.
- Regarding the imputation of the infringement to the person(s) (whether legal entity or individual) who truly committed it, the Report suggests applying individual sanctions such as fines, prohibition from managing a business, prohibition from holding corporate mandates, etc. It is not always fair to have companies bear the financial consequences of isolated antitrust infringements autonomously committed

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by one of its employees.

The Report certainly takes into accounts the concerns and worries raised by companies in relation to the lack of predictability and absence of rationality in the calculation of fines under French competition and antitrust law. For Christine Lagarde, the Report *"constitutes a solid basis for the development of guidelines by the Autorité de la concurrence"* that should consequently promptly start working on such guidelines that Mrs. Lagarde would like to be published before the end of the 2010.

This issue should then hit the news again in the coming months.

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[1] Decision n°08-D-32 of the Competition Council relating to practices implemented in the steel products trading market in France. The Competition Council fined eleven steel trading companies and the main industry association, the *Fédération Française de Distribution des Métaux* (French Federation of Metals Distribution), a total of 575.4 million Euros for setting up a hardcore cartel between mid-1999 and mid-2004 that affected prices, customers and contracts. In a judgment rendered on January 9, 2010, the Paris Court of Appeals partially overturned the Competition Council's decision by reducing the fines to 72 million Euros.

[2] The "FRS" acronym refers to the names of the authors of the report: Jean-Martin Folz (former chairman of PSA's management board), Christian Raysseguier (first advocate general to the *Cour de cassation* – French Supreme Court) and Alexander Schaub (attorney-at-law and former Director General of DG Competition and DG Internal Market and Services of the European Commission).

[3] The powerful influence of EU law on the determination of the method for calculating fines can be explained, according to the authors of the report, by the fact that "*the direct effect of EU law at the national level and the application of Articles 101 and 102 of the Lisbon Treaty by national competition authorities require a certain consistency in Member States' sanction policy. In this restrictive legal context, it would be difficult for a Member State to apply a sanction policy that would conflict with European principles".*

[4] In 1998 and 2006, the European Commission adopted guidelines that specified the commonly used method for calculating fines.

[5] Article L.464-2 §3 and §4 of the French Commercial Code stipulates: *"The financial penalties shall be proportionate to the gravity of the alleged facts, to the extent of the damage caused to the economy, to the situation of the body or company being penalized or the group to which the company belongs and to any repetition of practices prohibited by this title. They shall be determined individually for each company or body being penalized and in a reasoned manner for each penalty.*
If the offender is not a company, the maximum amount of the penalty shall be 3 million Euros. The maximum amount of the penalty for a company shall be 10% of the highest global turnover (VAT excluded) made during one of the financial years closed since the financial year prior to that in which the practices were carried out.

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If the accounts of the company concerned have been consolidated or combined pursuant to the texts applying to its legal form, the turnover taken into account shall be that appearing in the consolidated or combined accounts of the consolidating or combining company."

[6] In its decision dated April 7, 2010, the *Cour de cassation* held :
"Having regard to Article L. 464-2 of the French Commercial Code;
Whereas pursuant to this Article the amount of the fine imposed in relation to a practice whose object or effect is or may be the prevention, restriction or distortion of competition, must be proportionate to the extent of the damage caused to the economy by such practice; whereas such damage may not be presumed;
Whereas, to dismiss the appeal lodged by Orange, the challenged judgment specified that the Competition Council made an accurate assessment of the damage to the economy caused by the exchange of information, the damage to the economy being presumed in cartel cases;
Whereas by ruling so, the Court of Appeals violated the aforementioned article (…);
Having regard to Article L. 464-2 of the French Commercial Code;
Whereas the judgment holds that the elements enabling to measure the extent of the damage to the economy are insufficient, the Competition Council having notably highlighted the significant size of the relevant market and the fact that all existing operators on that market had participated in the information exchange;
Whereas by ruling so without taking into account the price sensitivity of demands, the Court of Appeals rendered a decision that has no legal basis" (emphasis added)

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