

Insight: Antitrust/Competition

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The French Competition Authority issues guidance on Antitrust Fines

On 17 May 2011, the *Autorité de la concurrence*, the French competition authority (the *Autorité*), unveiled its guidelines (the *Communiqué*) relating to the setting of financial penalties in antitrust cases. The *Communiqué* promised to herald a new, more sophisticated approach to competition law fines; but the final draft, in many important respects, is rather disappointing as it is largely in line with the European Commission's 2006 guidelines. That said, there are still many features that differentiate the French approach from the current European model.

Previously, there were no such guidelines in France. However, the Paris Court of Appeal, in a judgment issued on 18 January 2010, criticized the *Autorité* for the legal uncertainty in the way in which fines are calculated, and the subsequent lack of predictability for companies that are sanctioned.

In response to these criticisms, the *Communiqué* sets out the various steps to be followed by the *Autorité* when setting a fine:

- (i) First, the *Autorité* assesses the seriousness of the infringement, as well as the importance of the harm to the economy. Please note that unlike the EU rules, the French rules require that the harm to the economy be taken into account when setting a fine.

On the basis of this assessment, the *Autorité* sets the basic amount of the fine corresponding to a proportion of the value of each company's sales, usually that of the last business year of its participation in the infringement.

The proportion is established on a case-by-case basis in view of the seriousness of the facts and the degree of harm to the economy and ranges between 0 and 30% (between 15 and 30% in cartel cases). When setting this percentage, the *Autorité* also takes into account the duration of the infringement. However, the penalty for the second and subsequent years is 50% less than for the first year of infringement.



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- (ii) The second step is the “individualization”: the *Autorité* adjusts the basic amount, downwards or upwards to take into account the specific behavior and the situation of the company involved.

The existence of the following may be taken into account:

- aggravating circumstances (role of leader or instigator of the infringement, coercion or retaliatory measures towards other companies, specific capacity of influence or moral authority), or
- mitigating circumstances (competitive conduct for a significant portion of the products/services at stake to the point of having disrupted the very operation of the practice, coercion to participate, infringement authorized/encouraged by public authorities).

Other elements, such as the fact that the company concerned carries out its activities in one sector or that it enjoys significant economic power and financial resources may also play a role in the individualization of the fine.

- (iii) The *Autorité* then takes into account whether this is a repeat infringement. In this case, the amount of the fine may be increased by 15 to 50%. It should be pointed out that a repeat infringement is one that occurred 15 years prior to the taking of the subsequent decision.

- (iv) During the last step, final adjustments are made.

- The *Autorité* checks that the final amount does not exceed 10% of the highest worldwide pre-tax turnover achieved by the company in one of the financial years ended after the financial year preceding that in which the practice was implemented.
- Then, if applicable, the *Autorité* adjusts the amount in order to take into account reductions granted on account of leniency and/or settlement.
- Finally, individual difficulties encountered by companies may be taken into consideration if these companies provide evidence of their inability to pay.

It should also be noted that this represents a greater recognition of the rights of the defence: the investigators must set out, in the report preceding the hearing in front of the board, the essential points of law and of fact that will influence the setting of the fine. The latter will nonetheless be determined by the board, without any further debate.

According to French administrative case law, the Communiqué binds the *Autorité*: while the *Autorité* may deviate from its Communiqué in certain exceptional circumstances, if it does so, it is under a duty to state its reasons and these reasons must be well-grounded.

The Communiqué represents something of a disappointment as it does not significantly depart from the Commission's 2006 Fining Guidelines. These had been heavily criticized because they resulted in substantial fines on companies, an unfair burden in the current economic crisis, and they had knock-on effects on the downstream economy.