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Competition Authority's Upgraded Fining Policy in France — Who Will Be Next?

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The French Competition Authority on 17 May 2011 published first fining guidelines (the Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties) to address issues which have grown over the last years and culminated with a court decision in January 2010 calling into question its methodology and procedures.

Meanwhile, similar debates have arisen numerous Member States as well as at the European Union level. The European Commission has released Fining Guidelines[1] a long time ago to provide more transparency on the calculation of fines. However, there have been several recent cases where the European Commission had to revise *ex post* the amount of fines imposed on companies, following errors made on the relevant turnover of the companies concerned[2]. As a result, Competition Commissioner Joaquín Almunia recently announced procedural changes aimed at making more effective the right to be heard in the setting of fines[3].

[1] Guidelines on the method of setting fines issued in 1998 and amended in 2006.

[2] In the prestressing cartel case, the European Commission had to review twice the fines imposed on several companies, IP/10/1297 dated 6 October 2010 and IP/11/403 dated 4 April 2011.

[3] Speech 11/268 by Joaquín Almunia at the 15th International Conference on Competition on 14 April, 2011, Berlin.

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At the national level, few competition authorities had published detailed guidelines until their decisions were challenged on that basis. In the UK, a first guidance document was established in 2004, but the OFT's policy attracted more scrutiny when fines started to increase; and that agency's policy was heavily criticized recently by the Competition Appeal Tribunal in the construction cartel case. The first judgments indeed divided by 10 the fines imposed[4]. The OFT has just issued a press release stating it will review its penalty policy accordingly, including considering whether changes should be made to its 2004 penalties guidance, as well as its internal penalty setting processes[5].

Unsurprisingly, issues debated at the EU, French, and UK levels have a lot in common: the importance of organizing sufficient transparency on the methodology followed, the right to be heard during the process on the main elements of the fine calculation, the assessment of the level of seriousness of an infringement, the dangers of a ''one size fits all'' approach, how groups of companies should be treated compared to mono-product companies, and whether companies engaged into compliance efforts should receive a fine reduction.

Evolutions at the EU and national levels on the issue of fines are indeed more interrelated than ever. As the EU Court noted in a 2009 judgment, the effectiveness of the penalties imposed by the national or EU competition authorities is a condition for the coherent application of EU antitrust rules[6]. More generally, national court decisions on these issues may reveal relevance when assessing similar factors under different national rules or under the EU ones: if rules differ, they share common concepts and the proportionality requirement applies throughout the EU.

Naturally, the subject is debated in common, notably within the European Competition Authorities' informal group. Principles for convergence, largely based on the EU model, were even adopted within that forum in 2008[7]. A number of national competition authorities have adopted these principles, which also serve as a basis for the determination of the new French rules and, in such an interrelated environment, court decisions or guidelines adopted in a given Member State may provoke new developments in other Member States and at the EU level.

In such circumstances, the French fining guidelines, published on 17 May 2011, and the amendments the French Competition Authority (FCA) brought to its first draft following the consultation process, may be of interest beyond just those companies operating in France.

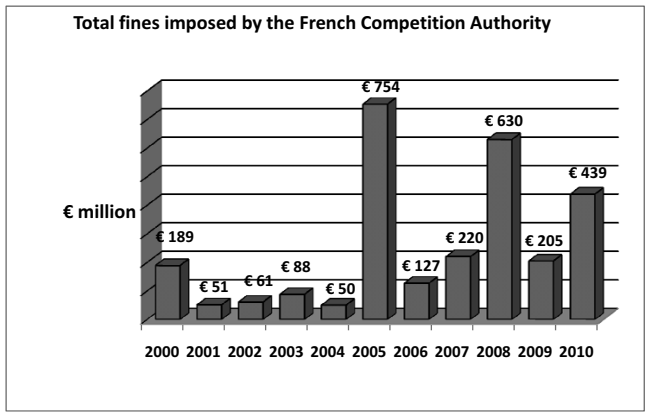
First, the French example illustrates the need to upgrade these fining policies when fines increase and the difficulty to switch to a new methodology under the pressure of judicial challenge. The new methodology adopted also shows how consistency can be organized within the EU while maintaining national specificities or suggesting new mechanisms including in the way groups of companies are addressed. Finally, the FCA is among the firsts to address, within its fining guidelines, the procedural safeguards that are to be observed when stakes are so high.

1. Upgrading fining policies: a difficult and challenging process when carried out under the pressure of judicial challenge

The FCA is an independent administrative authority with powers of investigation and decision to apply French and – where applicable – EU competition rules.

Under article L 464-2 of the Commerce Code, the FCA may impose fines on companies infringing competition rules up to 10% of their consolidated worldwide turnover, the exact amount being determined according to the seriousness of the infringement, the importance of the damage to the economy[8], the individual situation of the undertaking concerned, and taking into consideration reiteration, where relevant.

Such fines may reach significant levels, especially since the maximum level of fines was increased in 2001 from 5% of the French turnover of the company concerned to 10% of the consolidated worldwide turnover[9]. As shown in the graph below, the first significant cases based on the new limit have been released from 2005 and the levels of fines before and after this year are indeed very different.



The change from 2005 is even more significant when one considers average individual fines, which have increased from €1 million to €4.4 million:

Period	2000-2004	2005-2010
Number of undertakings / groups fined	434	539
Total amount of fines (M€)	442.3	2 377.8
Average amount by undertaking or group (M€)	1.0	4.4

The highest individual fines have been imposed in the mobile telephony cartel case[10], with individual fines up

[4] Competition Appeal Tribunal, 11 March 2011, Kier, Ballast, Bowmer, Corringway, Thomas Vale and Sisk.

[5] Press release 61/11, 27 May 2011, OFT decides not to appeal recent Competition Appeal Tribunal judgments

[6] CJEU, 11 June 2009, X BV case C-429/07, at para. 37.

[7] ECA Working Group on sanctions, Pecuniary sanctions imposed on undertakings for infringements of antitrust law – Principles for convergence, May 2008.

[8] The obligation to set fines, *inter alia*, in relation to the importance of the damage to the economy is a specificity of French antitrust law. If the underlying idea is fully understandable, this provision has led to regular challenges of the decisions of the FCA on the ground that the FCA did not define precisely enough the damage to the economy caused by the practices concerned.

[9] Law on New Economic Regulations dated 15 May 2011.

[10] Autorité de la concurrence, 30 November 2005, case no. 05-D-65.

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to €256 million and in the bank interchange commission case[11] with individual fines up to €90 million.

However, the FCA had not so far contemplated the adoption of fining guidelines for a number of reasons. First, the FCA has always considered that too much predictability could undermine the deterrent effect of fines: if companies could pre-determine the fine incurred, they might try to offset such a risk in raising the benefits to be derived from the illegal practice. As noted by Bruno Lasserre, the President of the Authority, ''*one of the difficulties is to find the accurate balance between the requisite level of predictability and the share of uncertainty that is inherent to any deterrent effect*''[12].

In addition, the FCA has no regulatory power and cannot issue rules binding the courts reviewing its decisions. As a result, the FCA considered that guidelines on fines binding the FCA while the courts could still determine themselves on other grounds would not be of much interest.

Absent such guidelines, the exact calculation made by the FCA in each case was not disclosed: the decisions of the FCA would discuss at length the legal criteria but not their respective weight in the calculation of the fines; only the total turnover of the company concerned and the final amount of the fine were disclosed in the decision.

Several FCA representatives have explained in the press that there was a methodology, even though it did not appear in the decisions. However, the comparison of fines in similar cases always left doubts on the methodology that could produce such diverse results, not to mention the fact that, depending on cases, the FCA would consider the consolidated group turnover or rather the turnover of the entity concerned.

This apparent lack of scientific method led to regular challenges before the courts. In January 2010, the Paris Court of Appeals delivered a judgment criticizing the FCA's decision in the steel cartel case in several respects, notably for not taking sufficiently into account the economic crisis in that sector, a number of elements reducing the importance of the damage to the economy as well as several mitigating factors for a number of the companies concerned[13]. As a result, the court of appeals divided total fines by 8 in a cartel case the FCA considered as one of the most serious in the recent period.

As this judgment seriously called into question the methodology used by the FCA to determine fines and the weight attributed to the various criteria, the Minister for the Economy decided to appoint a group of experts in order to advise on the way fines should be set under French rules after hearing all parties concerned. The group was composed of Jean-Martin Folz, former President of the PSA group; Christian Raysseguier, Prosecutor in chief at the French Supreme Court; and Alexander Schaub, former Director General of the Directorate General Competition within the European Commission. The group of experts held numerous hearings and delivered its final report on 20 September 2010[14].

The FRS Report first recommended adoption of guidelines in order to improve predictability, proportionality, and transparency of the fines. Such guidelines could either detail the criteria and how they are likely to impact on the level of fines or go further and set a calculation methodology like in the EU Fining Guidelines. In such a case, the FRS Report advised setting the basic amount of fines as a percentage between 5% and 15% of the turnover achieved on the market concerned, multiplied by the number of years of the infringement (with a sliding scale so that additional years would weigh less).

But the FRS Report also pointed out the deficit in the right to be heard in the procedures of the FCA. Indeed, the determination of fines is of the responsibility of the FCA members hearing the case concerned, whereas the procedure and the right to be heard is organized by the Investigation Services of the FCA, under the responsibility of the General Rapporteur, who is independent from the members. As a result, companies sometimes discover with the decision that the turnover used by the members to determine their fine is not the accurate one and/or aggravating circumstances which have not been discussed during the procedure.

The FCA could not wait until the release of the FRS Report to start elaborating on changes to its fining policy. All decisions adopted since the Court of Appeal's judgment were indeed at risk. The President of the FCA therefore announced rapidly that they were preparing guidelines which would describe precisely the way fines are calculated.

From that moment, the preparation of these guidelines raised a number of issues: adopting different rules could itself contribute to the doubts on past decisions up to the change of rules and testing them on pending cases before releasing the guidelines would have a number of benefits but would necessarily raise additional issues of due process.

The FCA nonetheless opted for the testing of the new methodology, which was applied and refined in cases adopted from their bank interchange decision, released exactly the same day as the FRS Report, on 20 September 2010. The application of the new methodology without prior disclosure and right to heard on the differences of the new methodology is among the grounds of appeals lodged from that decision until the Notice was disclosed and it still remains to be seen how the Court of Appeal will review the fines imposed during this interim period.

The draft notice, released on 17 January 2011, disclosed elements that did not appear by reading the first decisions, such as the integration of duration into the calculation and showed that the prior testing indeed allowed to refine the methodology. The draft opened a wide consultation process and the final version published on 17 May 2011 show that the FCA has amended its earlier draft in several respects in response to the comments.

[11] Autorité de la concurrence, 20 September 2005, case no. 10-D-28.

[12] Entrée Libre, May-August 2010.

[13] Court of Appeals of Paris, 19 January 2010, AMD sud-ouest.

[14] Rapport sur l'appréciation de la sanction en matière de pratiques anticoncurrentielles delivered to the Minister of the Economy on 20 September 2010.

2. The adoption of basic principles largely convergent with the EU Guidelines notwithstanding French law specificities

The Notice provides that the FCA will first determine the basic amount of the fine as a *proportion of the turnover achieved on the relevant market* by the company concerned. Thus, the FCA retains the European Commission's approach, also followed in a number of Member States as well as in the US Federal Sentencing Guidelines[15]. As suggested in the FRS Report, the total turnover is now indeed to be used only to define the maximum limit of fines, not as a starting point to calculate the fine as it has been done for a long time in France.

The Notice further provides that the relevant turnover is the direct turnover achieved in France by the company concerned on the relevant market during the last full year of the infringement, with limited exceptions where the turnover on the relevant market and/or the last full year are not the most representative, in which case the FCA will motivate the reasons (points 33 and seq.). In the draft notice, the FCA had contemplated referring both to the direct and indirect turnover to cover these exceptions but the reference to indirect turnover was considered as introducing too much legal uncertainty by most commentators and the FCA withdrew it from the final document.

The basic amount of the fine is constituted by a share of this annual turnover, in principle *between 0 and 30%* (and even between 15% and 30% for hardcore horizontal restrictions), reflecting the seriousness of the infringement and the importance of the resulting damage to the economy (points 40 and seq.). The maximum share is therefore set at the same level as under the EU Guidelines, and not limited to 15% as suggested by the FRS Report[16]. A number of comments received by the FCA asked for the maximum to be lowered at 15% but the FCA maintained this limit, considered as an important element for deterrence purposes and consistency with EU law.

The Notice also stresses that, under French law, an additional criterion of importance of the harm done to the economy is to be reflected in this share, in addition to the seriousness of the infringement. The Notice summarizes the standard of proof of the harm to the economy that has been set by the case law: the damage to the economy cannot be presumed; the FCA is to assess its importance in an objective manner, in view of all the relevant factors of the case at stake; however, the FCA is not to quantity that damage precisely (points 27 and seq).

The Notice then provides that *duration* is integrated to this amount according to a methodology which is meant to be less ''inflationist'' than the European Commission's. The FCA will apply a ratio of 1 for the first year, and then of 0.5 for each additional year. As a result, for a 10-year infringement, the basic amount will be multiplied by 5.5.

In practice, this methodology offers a wide margin of discretion to the FCA. First cases like the road signaling cartel case[17] show that the FCA has imposed very high fines without using much of these powers. Indeed, although the practices sanctioned undoubtedly qualified as hard core (pre-allocation of public works contracts during 10 years), the decision discloses a share of turnover applied to take into consideration seriousness, harm to the economy, including the aggravating factor for groups (see point 3 below) which appears unrelated to the rules laid down in the Notice. This share indeed went up to 20% resulting in very high fines for the larger groups (up to €18 million) but, considering the duration of 10 years of the infringement (5.5 multiplier), the share reflecting seriousness and harm to the economy was only 3.5% and not between 15% and 30% as provided in the Notice.

The Notice also contains a specific section concerning the *setting of fines in bid-rigging cases*. In these cases, the FCA has decided not to apply this methodology but rather to retain a proportion of the total turnover achieved in France by the entity concerned or the group to which it belongs. This proportion will be defined taking into account the seriousness of the facts and the harm done to the economy (points 67 and 68).

3. A more balanced policy concerning the impact of the size of the group?

At this stage, the FCA proceeds to the individualization of the fine, based on *mitigating* (maverick conduct, participation under constraint, or with the encouragement of public authorities, etc.) and *aggravating circumstances* (ring leader, constraint exercised on other companies, specific capacity of influence, or moral authority such as entities entrusted with a public service mission, etc.). Prior infringements are also considered and *reiteration* may lead to an increase by 15% to 50%[18] (points 50 and seq.).

The Notice also mentions an *additional individualization factor* the FCA may consider: the size, the more or less significant economic power the company concerned enjoys, its overall resources, the group to which the undertaking belongs (points 47 and seq).

The FCA has received numerous comments on this additional size factor considering that the size of the group does not necessarily means the fine will be absorbed at the group level; similarly small companies may obtain funds from individual shareholders to pay the fine even though those individual shareholders do not qualify as a group. In addition, if the objective is deterrence, the size of the group should not be the only relevant factor: groups having engaged effective compliance programs might not deserve the same deterrence increase as others.

Following these comments, the FCA redrafted this paragraph to differentiate rather between diversified/single product companies or groups than between large groups/small and medium size companies. The Notice was also amended to add that the group overall size may be taken into consideration ''*in particular where the undertaking that controls the undertaking at stake*

[15] Christopher J Kelly and Joseph P. Minta, A US point of view on antitrust fines, Concurrences No. 1-2011, p.17.

[16] But the French Notice does not add an optional 15%-25% in addition where needed to ensure a sufficient deterrent effect as under the EU Guidelines.

[17] Autorité de la concurrence, 22 December 2010, case n°10-D-39.

[18] To keep the order of criteria established in article L 464-2, the Notice provides that reiteration is applied after the adjustment to the size of the group. However, for the sake of simplicity, reiteration is presented in this article among the other usual aggravating factors.

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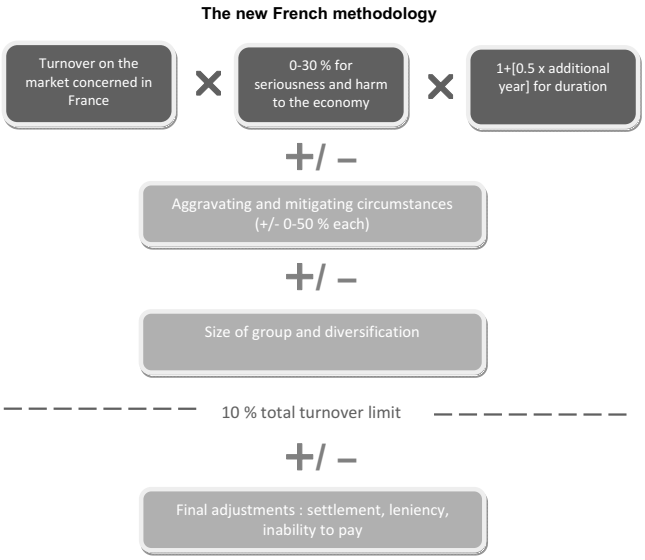
within the group is also liable for the infringement'' rather than in every instance (point 49).

The FCA has a rather proactive policy concerning compliance programs: the procedure of settlement allows companies accepting the objections and undertaking to implement strict compliance obligations to obtain reductions in fines and the FCA is to release a Notice on settlements to detail the conditions for compliance programs to be considered as effective. The FCA has not included developments dedicated to compliance within the fining guidelines but has nonetheless introduced a footnote in the final version of the Notice reminding this proactive policy.



The wording remains cautious, and it is yet to be seen how the Notice will be applied by the FCA; but the Notice provides more predictability than the EU Guidelines, which merely provide that the Commission may apply a final specific adjustment on undertakings which have a particularly large turnover in order to ensure deterrence. This specific adjustment has led to increases up to 70% although cases where it was applied are not numerous and the reasons for applying such increases in those cases are not detailed in the decisions concerned[19]. Here, the FCA limits cases where they would increase fines to particular cases and notably where the group is also liable for the infringement[20].

In addition, the ability to increase, as well as decrease the fine will offer more flexibility in order to adopt a balanced approach. This adjustment will therefore definitely lead to more differentiated fine levels for single-product companies on the one hand and large and diversified groups on the other hand, but it does not call for systematically increased fines for groups of companies.

The draft notice provided that *final adjustments* including the reductions related to settlements (where a company does not contest the objections and undertakes to amend its behavior notably through structured compliance programs) and to leniency (where a participant to an infringement provides value added information before objections are stated) would then be applied, before the adjustment related to the 10% maximum limit is applied, where relevant. As a result, the benefit of a settlement or a leniency application could be lost.

Hopefully, the final version provides the contrary: reductions related to settlements and leniency will be applied *after* the 10% maximum limit is checked (points 55 and seq).

Finally, where relevant, inability to pay is taken into account to reduce or annul the final fine.

4. A pole position on due process requirements before the European Commission will itself improve its procedures

The FCA had not initially contemplated introducing procedural safeguards within the Notice. The first draft was totally silent on this issue, although the FRS Report had identified a deficit in the right to be heard and called for an improvement of the procedures in that respect.

Comments have been numerous to suggest that the difficulties pointed out by the FRS Reports called for explicit developments within the Notice itself.

The FCA first answered that neither the EU Fining Guidelines nor the guidelines adopted in the other Member States had detailed procedural aspects. Moreover, the FCA considered they had already improved their internal procedures up to the limit permitted by French institutional rules. Indeed, as noted above, the Investigation Services may discuss relevant factors for the determination of fines under article L 464-2, but the decisional power in that respect belongs to the members of the FCA who will hear the case, later in the process. The Head of Investigation Services had already asked Rapporteurs to develop this section in the Statement of Objections and Final Report, and there would be no possibility to go further without affecting the decisional power of the members of the FCA. Moreover, the Notice would itself improve the right to be heard by setting out clearly the relevant factors the FCA members could take into consideration.

However, past cases have shown that such a framework would not be sufficient in every instance. Indeed, in order for due process to be effective, it is necessary that the FCA members do not exercise their decisional power beyond the limits set by the effective exercise of the right to be heard: if, for example, the Investigation Services have not raised reiteration during the procedure, the final decision of the FCA cannot increase the fine of that basis, the company being deprived of the right to defend itself against such an aggravating factor. Similarly, the FCA cannot in our view use constituent elements of the fine such as turnover estimates on the market concerned which have not been debated during the procedure for the same reason.

In the meantime, the European Commission itself announced it was preparing to improve its procedures in that respect. The first announcement, made in Berlin in April[21], was further detailed during the European Com-

[19] See notably European Commission, 11 June 2008, Sodium chlorate case COMP/38.695.

[20] It should nonetheless be noted that the FCA has relied in a number of cases on the EU presumption of parental liability for 100% held companies, even though the group is not personally involved in the infringement. However, this approach is not as systematic as in EU cases.

[21] Speech 11/268 by Joaquín Almunia at the 15th International Conference on Competition on 14 April, 2011.

petition Day held in Hungary on May 30: ''*the main innovation [will be] the inclusion of a section on fines in the Statement of Objections. In the future, companies will have a better idea, at an early stage, of the elements taken into account to calculate the fines; such as the value of the cartelized sales, an indication of the gravity, and issues of recidivism. This innovation will open a channel for dialogue with the parties: it will help us exchange information relevant to the calculation of the fines, and avoid post-decision corrections which, although they remain rare, are always unpleasant for both sides*''[22].

These EU announcements opened the way for developments dedicated to due process in the French Notice. The three new paragraphs (points 16 to 18) provide that the Investigation Services will point out to the essential points of law or of fact that are likely to have an influence on the setting of the fine in the Final Report which follows the Statement of Objections and the Answer to the Statement of Objections. Naturally, the setting of the fine remains of the sole competence of the Members of the FCA but such a disclosure upstream in the process will improve the discussion between the parties and the FCA.

The Notice does not expressly limit the decisional power of the FCA to the elements disclosed by the Investigation Services, but, with these three paragraphs, it will be extremely difficult for the FCA to justify before courts increasing a fine by relying on other elements than those gathered by the Investigation Services.

These new developments, therefore, will certainly improve the right to be heard and limit in the future cases where companies discover in the decision a calculation based on erroneous figures or taking into account factors against which they would have presented defense arguments.

Integral English version.

[22] Speech 11/396 by Joaquín Almunia at the European Competition Day in Budapest on 30 May 2011.

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