The sanction of antitrust violation in France at the crossroads

The French Competition Authority may impose fines on companies which have taken part in antitrust infringements. The law provides that such fines shall be proportionate to the gravity of the infringement, the damage caused to the economy and the individual situation of each company concerned, taking into consideration, where applicable, any repeating of the infringement. Moreover, for companies, the final amount shall not exceed 10 % of the consolidated worldwide turnover.

Prior to the decision discussed below, the French Competition Authority had not published guidelines or any particular method of setting fines. Most decisions would comment on the gravity of the infringement, the damage to the economy and the individual situation of each company concerned, and then provide a list of final amounts without disclosing the methodology followed to reach such amounts.

In January 2010, the Paris Court of Appeals however divided by 8 the fines imposed on a steel cartel by the Competition Authority, explaining than the Authority had not set proportionate fines in a number of respects.

A report recommending more transparency and due process in the setting of fines.

Following the steel cartel decision, the Minister for the Economy appointed a group of experts in order to assess the resulting unpredictability of fines and propose ways forward. This group gathered Jean-Martin Folz (former President of Peugeot’s Board of Directors), Christian Raysseguier (First Advocate General to the French Supreme Court) and Alexander Schaub (former Director General of DG COMPETITION at the European Commission).

The group of experts delivered its report on 20 September 2010, suggesting ways forward not only on amounts and calculation methods, but also on the procedure itself:

- The group of experts first recommends increasing the transparency of the calculation of fines and suggests several options, notably the adoption of a calculation method similar to the European Commission’s. In that respect, the group advises basing fines on a share of turnover in the market concerned between 5 and 15 %, rather than the share up to 30 % practiced by the European Commission.
- The group of experts also identifies a “lack of due process” in the procedures of the Competition Authority as concerns fines: the investigation service of the Competition Authority only addresses the merits of the case in the debate with the parties, leaving to the members of the Authority to decide on sanctions. As a result, companies may not be heard on elements likely to weigh significantly on their fines.
- Finally, the group of experts supports the development of personal sanctions including criminal fines and disqualification orders.

A decision by the French Competition Authority revealing a new method of setting fines.

Against this backdrop, also on 20 September 2010, the French Competition Authority released a decision prohibiting an interbank check fee agreement, which reveals a new method of setting fines:

- The basic amount is determined by the addition of the turnover in the relevant market and the total turnover achieved in France by each company. This differs significantly from the method of the European Commission, based only on the turnover in the market concerned.
- This basic amount is multiplied by a ratio reflecting gravity, duration and damage to the economy. In that case, the same ratio was applied to all companies, i.e. 0.26251 %.
- Then, aggravating and mitigating circumstances are added (in the present case 10 % for leading role and 20 % for repeat offenses).
This new method resembles the EU one but presents one major difference: adding the consolidated turnover to the turnover achieved on the market concerned increases significantly the basic amount of the fine. The French ratio of gravity is then necessarily lower than under the EU standards (0.26251 % in that case to compare with the 0 to 30 % ratio applied by the European Commission). At the end of the day, the French method is not equivalent as it maximizes the fines of diversified groups and reduces accordingly the fines of companies active only on the market concerned.

Practical consideration

This new method still needs to be detailed and refined in the next decisions adopted by the French Competition Authority as well as in guidelines on fines expected for late 2010 or early 2011.

The report and the banks’ decision have already produced a number of practical consequences:

- All fines estimates made in pending cases have to be reviewed according to this new method of calculation, which may lead to higher sanctions.
- Companies should expect more differentiated sanctions between large diversified groups and smaller companies.
- Companies also need to anticipate more intensive utilization of criminal sanctions in the competition sector, notably those provided in article L420-6 of the Commerce Code (up to 4 years imprisonment and/or 75,000 € of fine for individuals fraudulently taking a personal and decisive part in the conception, organization or implementation of a prohibited practice).

If you have any questions about any of the issues raised in this legal update, please contact:

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