

# The French Competition Authority launches a wide public consultation on new antitrust fining notice

**On 17 January 2011, the French Competition Authority ("FCA") unveiled its draft notice on antitrust fines. Companies are invited to comment on this draft until 11 March.**

On 17 January 2011, the FCA issued a draft notice on antitrust fines, setting out for the first time in France a framework for the determination of fines to be imposed on companies that may infringe antitrust rules. This draft notice indeed provide guidance on the method that the FCA will apply in order to determine the level of fines.

**Companies are encouraged to contribute to the elaboration of the French fining policy.**

The FCA's initiative is the final step of a reflection process started one year ago: it indeed follows a report drawn up by a group of experts mandated by the French Minister of Economy in order to come up with suggestions for a new approach to antitrust fines.

The draft notice has been prepared by the FCA after consultation of its review courts (the Paris court of appeal and the *Cour de cassation*). It is now for companies to contribute to the review of the French fining policy by submitting their opinion on this draft notice. This consultation, open until 11 March 2011, will be followed by a public roundtable scheduled in Paris on 30 March 2011 in order to provide a further opportunity of discussing the draft.

For this purpose, this briefing note highlights the advances of the draft notice but also the issues that require specific attention from companies, especially during this public consultation period.

## A generally well-received initiative

This draft notice is welcome because it provides for the first time guidance on the method that the FCA will apply in order to determine the level of fines. Consequently, it can be expected that it will increase predictability of how fines are calculated (one of the chief concerns previously raised by companies), thus helping companies to better assess any potential fines.

The main innovation in the draft notice consists in the adoption, in accordance with the recommendations from the experts, of an approach similar to the European Commission - but apparently a little bit less severe on some points. In practice, this means that the FCA, when determining the level of fines, will use a two-steps methodology.

### Key Issues

The draft notice provides for the first French framework for the determination of fines to be imposed on companies accused of having infringed antitrust rules

The FCA has opted for an approach similar to the European Commission's one but less severe on some points

Despite the advances, some issues require specific attention from companies

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**First, it will determine a basic amount for each of the undertakings involved.** This basic amount will be set by reference to a proportion of the value of the company's sales of goods or services to which the infringement directly or indirectly relates (hereafter "the proportion"). Moreover, the draft notice stresses that the FCA will normally take the sales made in France by the undertaking during the last full business year of its participation in the infringement (hereafter "year of reference").

The proportion will depend on the degree of gravity and of the damage to the economy caused by the infringement. As a general rule, the basic amount may thus vary between 0 and 30% of the value of sales.

**Second, it will adjust that basic amount upwards or downwards,** depending on various factors. In this context, mitigating and aggravating circumstances can be taken into consideration as well as the size of the firm.

Another innovative point concerns the recidivism which, pursuant to French law, operates as a distinct and autonomous aggravating factor. In this regards, one can applaud the fact that the concept is accurately defined by the FCA. Moreover, it appears that the FCA's approach towards such a concept is not as severe and radical as the European Commission's one. For instance, contrary to the European Commission which is not bound by any limitation period when appraising recidivism, the French draft notice expressly provides for a limitation period of 20 years outside which recidivism cannot be taken into account.

However, it might be of interest for companies and trade associations to pay attention to some particular issues and maybe to use the opportunity of the public consultation to call for some changes before the FCA adopts the final version.

## Some particular issues need specific attention

First of all, even if the FCA 's approach appears less severe than the European Commission 's one, it has to be feared that companies will be fined more heavily than before, given that the FCA will now take explicitly into account the duration of participation in the infringement. For that purpose, the FCA will apply a specific method: for the first year of participation in the infringement, the FCA will apply the proportion to the total value of sales made during the year of reference, while for each successive year, the proportion will be applied to half that value only. As a result, the duration of participation, which so far was not clearly and expressly taken into consideration by the FCA, will now have a significant impact on the level of fines. However, it remains unclear at this stage how exactly the FCA will apply this method and how the latter will combine with the statute of limitation rules.

Furthermore, the draft notice indicates that the basic amount will depend, amongst other things, on the damage to economy caused by the infringement. However, this concept, which has long been subject to criticism, is in practice difficult to use and to quantify. It is thus regrettable that, on this point, the FCA did not follow the experts report's recommendation which suggested the abandonment of the "damage to the economy" criterion for the calculation of antitrust fines highlighting that it should be taken into account as a mitigating or aggravating factor and only where it is quantifiable.

Moreover, the draft notice stresses that as horizontal cartels are among the most harmful restrictions of competition, they will be heavily fined (with a basic amount of at least 15%). However, it is the only example given at this stage; the draft notice, for instance, does not make any reference to the level of basic amount in abuse of dominance cases.

Finally, the draft notice does not formulate any transitional measures. In order to be consistent with the non-retroactivity and legal certainty principles, the draft should indicate that it is intended to apply only to infringements committed after its adoption and not to past anticompetitive conducts. But, actually, the draft paper is presented as if it were merely describing the method presently used by the FCA; this is difficult to believe and could perhaps be a "trick" aiming at avoiding any conflict with the non-retroactivity principle.

## Some outstanding issues

The draft notice does not deal with all the issues highlighted in the expert report and that could play an important role within the fine-setting process.

In particular, the draft notice does not cover the issue of compliance programs. This may indicate that the FCA, in spite of several unofficial declarations, will not take them into account when setting the amount of fines.

Finally, the draft does not address the procedural related issues. The expert report had suggested that companies should be allowed to discuss the level of fines with the FCA earlier in the administrative procedure, so that these may build up defence arguments and better protect their interests. Although the FCA stated that the notice will facilitate the discussion with the parties during the run-up to the decision, it does not provide for any specific procedural guarantee for companies.

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