

# **REPORT**

## **On assessing penalties for infringements of competition law**

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## **I) INTRODUCTION**

Infringements of competition law cover a wide range of practices of varying degrees of seriousness (abuse of dominant market positions, vertical restraints, horizontal price fixing, etc.) Cartels, in the strictest sense, are the most extreme form of horizontal price fixing and are considered the most serious infringement. French competition laws have had to adapt constantly to keep pace with globalisation and changing practices.

The main penalties used in France to sanction infringements of competition law are fines, which are assessed on the basis of four elements: the seriousness of the infringement, the damage done to the economy, the individual circumstances of each undertaking and repeat infringements (see Article L.464-2 of the French Commercial Code). The provisions leave a great deal of latitude for choosing the method used to calculate the fine.

Under these circumstances and following the judgment of the Paris Court of Appeal on 19 January 2010 reducing fines imposed by the Competition Council<sup>1</sup> on 16 December 2008 which illustrated a lack of predictability and legal certainty in the method for calculating fines, the Minister for the Economy, Industry and Employment initiated a study mission. The mission's letter of engagement<sup>2</sup> calls for the panel of experts to study the assessment of penalties for infringements of competition law in order that the different competition regulation stakeholders agree to a common viewpoint, which could lead to setting binding or non-binding rules that are accepted by all parties.

The mission heard many different experts witnesses from various sectors<sup>3</sup> to inform its discussions. Their testimony enabled the mission to identify the shortcomings of the current system and propose areas for improvement.

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<sup>1</sup> The Competition Council became the Competition Authority in 2009.

<sup>2</sup> See Annex A.

<sup>3</sup> See the list of witnesses heard in the Annex.

## II) FOREWORD

The assessment of penalties for infringements of competition law (infringements) fits into a broader economic and legal context that should be mentioned. The different methods chosen to penalise infringements have been debated frequently in France, in Europe and at the international level.

### A. Penalties and compensation for damages

There are two main types of sanctions that may be used separately or jointly: criminal penalties and administrative penalties, to which civil damages actions can be added. Deterrence may play a more or less important role in these various penalties.

Criminal penalties: these penalties exist in a number of European countries, including the United Kingdom, and they play an important role in the United States. Criminal penalties may apply to corporations as well as individuals committing offences. The risk of a criminal penalty is considered to be a very strong deterrent. In France, Article L. 420-6 of the Commercial Code provides for criminal penalties for infringements of competition law, but they are rarely applied.

Administrative penalties: these are the most commonly used penalties for infringements of competition law in most Member States of the European Union. The penalties can take many forms, such as behavioural commitments, bans on bidding for public contracts and publication of notices, but in most cases, they involve fines, especially in the most serious cases, such as price fixing. In France, as in Europe more generally, fines are used as both penalties and deterrents. They also provide compensation for the damages suffered by the community (but not for damages suffered by individuals). There is some debate as to the best method for calculating these fines, as we shall see later.

Civil damages actions: Civil damages actions depend greatly on the various remedies provided for under domestic legislation. In the United States, civil damages are widely sought because of a number of mechanisms that favour suits, such as class actions, treble damages and contingent fees for attorneys. In France, damages actions are governed by general tort law, based on the theory of fault (Article 1382 of the Civil Code) and strictly limited to the damages proven by the plaintiff.

In order to define an appropriate and equitable penalty policy for infringements of competition law, it is necessary to consider the various types of available penalties and damages, as well as the potential interactions between them.

## **B. International economic context**

Penalties for infringements of competition law are often imposed on undertakings with worldwide operations. Each country may keep its own rules, but it seems difficult today to apply penalty policies without any consideration of the policies implemented in the leading developed countries.

The objective of economic policy is to maintain genuine competition and penalties for infringements of competition law must consider economic conditions and the economic situation of offenders. This objective is set out in most of the legislation in force<sup>4</sup>, yet there is a great deal of debate about its application, especially with the onset of the world economic crisis in 2007. The substantial increase in fines in Europe and in France during difficult economic times has been widely criticised<sup>5</sup>. Consideration of economic circumstances when imposing fines for infringements of competition law has become an important issue that calls for an exacting approach.

## **C. European context**

Assessment of penalties for infringements of competition law takes place in a European context. The “direct effect” of European Union law at the domestic level<sup>6</sup> and the enforcement of Articles 101 and 102 of the Lisbon Treaty by domestic courts and competition authorities<sup>7</sup> require a degree of consistency in the Member States’ penalty policies. The rules are legally binding, which would make difficult for a Member State to apply a penalty policy that is in contradiction with European principles<sup>8</sup>. Regulation 1/2003 of the European Council encourages collaboration between the European Commission and the various National Competition Authorities. It divides jurisdiction between the Commission and national authorities<sup>9</sup>, giving the Commission exclusive jurisdiction for cases involving trade between Member States. In practice, a broad interpretation of this criterion by the European authorities enables the Commission to take up most of the cases involving more than one country.

However, the Commission has worked for many years to enhance cooperation between the Member States’ competition authorities and to promote consistent policies. This process has

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<sup>4</sup> In France, Article L. 464-2 of the Commercial Code explicitly provides for individual penalties and consideration of the circumstances of the infringing undertaking.

<sup>5</sup> See the 2009 European Commission Report on Competition Policy COM(2009)0374.

<sup>6</sup> Decision of 24 May 1975, Court of Cassation, Mixed Chamber (*Jacques Vabre*) and Decision of 20 October 1989, Conseil d’État (*Nicolo*).

<sup>7</sup> Articles 3, 5 and 6 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty give national competition authorities the power to apply Articles 101 and 102 of the Lisbon Treaty (formerly Articles 81 and 82) directly in their own countries.

<sup>8</sup> It would be contrary to the “useful effect” of Community law, which was recognised as a general principle of European law in the ECJ’s *Von Colson* judgment, Case 14/83 (1984).

<sup>9</sup> Article 11 of Regulation 1/2003.

been based on confidence and would be jeopardised by initiatives that stray too far from commonly held principles. Therefore, the national competition authorities meet periodically in the European Competition Network (ECN), which is a forum for adopting joint resolutions regarding various competition practices. The ECN has issued recommendations on penalties for infringements of competition law (see III A. below). In light of these various elements, and even though Member States maintain a degree of autonomy for adopting specific rules regarding penalties for infringements of competition law, their rules must still be compatible with European practices.

Finally, the adoption of the Lisbon Treaty enshrines the European Union's adherence to the European Convention on Human Rights (ECHR) and this could have major consequences for rights of defence with regard to the European Commission's practices<sup>10</sup> and, thereby, on the practices of national competition authorities<sup>11</sup>, particularly with regard to the application of the provisions of Article 6-1<sup>12</sup>.

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<sup>10</sup> The accession of the European Union to the ECHR entails integration of the case law of the European Court of Human Rights in Strasbourg.

<sup>11</sup> Even though France has already acceded to the ECHR, changes at the European level could affect the practices of the Competition Authority. Furthermore, the practices of the new Competition Authority, which has its own investigative staff, have not yet been subject to any decisions by the European Court of Human Rights in Strasbourg regarding defendants' rights.

<sup>12</sup> Article 6-1 of the ECHR stipulates that, "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*"

### III) SANCTIONS FOR INFRINGEMENTS OF COMPETITION LAW IN THEORY

#### A. Objectives

The sanctions for infringements serve several purposes. Distinctions are made between punishment, deterrence and compensation for damages. Compensation for damages is the one purpose that lies largely outside of the government's jurisdiction. It is a matter for the civil courts.

According to the ECA, a working group made up of the European Union competition authorities (belonging to the ECN) and the competition authorities from the European Free Trade Association, the sanctions should “effectively sanction and deter the offender from repeating an infringement, as well as deterring any other potential offenders”.<sup>13</sup> In the same vein, Guy Canivet, the former Presiding Judge of the Court of Cassation, speaking at an OECD roundtable in 1997, stipulated: “As a general rule, any sanction has a dual function: the first function is to punish the offender for the offence committed. This is what we call retribution. The second function is to deter others who might be tempted to commit a similar offence. This is what we call exemplarity. In the context of a policy for regulating competition, the usefulness of a penalty is assessed according to its deterrent effect, meaning its capacity to persuade business operators that infringing the competition law is no longer in their interest so that they refrain from doing so.”

The real issue is how to reconcile the deterrence and punishment objectives, as well as to work out how compensation for damages fits in with these objectives.

#### B. The optimal sanction according to economic theory

After many years of studying the formation, stability and effects of infringements, especially price fixing, recent economic literature on the subject (and on cartels in particular) has focused primarily on two issues: determining the optimal system for setting fines and assessing the current and past practices of various competition authorities.

##### *Basic principles*

Economic analysis of the optimal sanction takes as its starting point the need to deter a rational individual from infringing the rules. The fine should be based on the illicit gains and the likelihood of detection. If the offender is risk neutral, deterrence can be achieved by merely setting a fine that is greater than the ratio of gain to the likelihood of being convicted. The fine will also have to be modulated in consideration of the potential offenders' decision-making

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<sup>13</sup> See the first point of the *Principles for convergence* report by the ECA Working Group on pecuniary sanctions imposed on undertakings for infringements of competition law.

process<sup>14</sup>. If the sanction involves more than just a fine, the reasoning is more complex, even though its nature is unchanged: a monetary equivalent of the potential criminal sentence needs to be calculated and subtracted from the amount of the relevant fine.

### *The economic effects of infringements*

The basis for calculating the fine raises a problem. The usual basis is the illicit gain, but we need to examine the notion of damage to the economy, which calls for a more complex definition.

In order to determine the consequences of an infringement, and the damage that it causes, the observed situation in the presence of the infringement needs to be compared to a counterfactual situation, without the infringement. To give an idea of the mechanisms in play, on a purely theoretical level, we can compare a situation of perfect competition with the least competitive situation possible: a monopoly. This line of reasoning enables us to distinguish three major phenomena relating to the damage to the economy<sup>15</sup>:

1. A **medium-term loss of economic efficiency** (dynamic effect). The infringement means that production is not distributed strictly according to undertakings' efficiency and this gives an advantage to less productive undertakings. This gives rise to a long-term problem with the allocation of resources.
2. An immediate loss of welfare for the entire economy. This is what economists call the "**deadweight loss**". The idea is that the infringement leads to higher prices than in a pure competition situation. This reduces demand and fewer goods will be traded than in a pure competition situation. It is important to note that this deadweight loss is a loss for the infringing undertakings as well. It is a loss for everyone.
3. A **wealth transfer** to the detriment of the infringing undertakings' customers.

The second and third phenomena occur immediately and are qualified as "static". A simple diagram can provide a clearer picture of these phenomena.

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<sup>14</sup> Generally speaking, firm executives do not assess the probability of being caught and convicted correctly. They tend to give more weight to recent cases that they are familiar with, such as cases in a similar business sector (availability bias). All else being equal, there is also an overconfidence bias that leads them to overestimate their ability to avoid detection.

<sup>15</sup> In theory, we could also offset these damages against the "benefits" of an uncompetitive situation. However, it is not our intent here to engage in a detailed discussion of these gains and their comparison to damages.

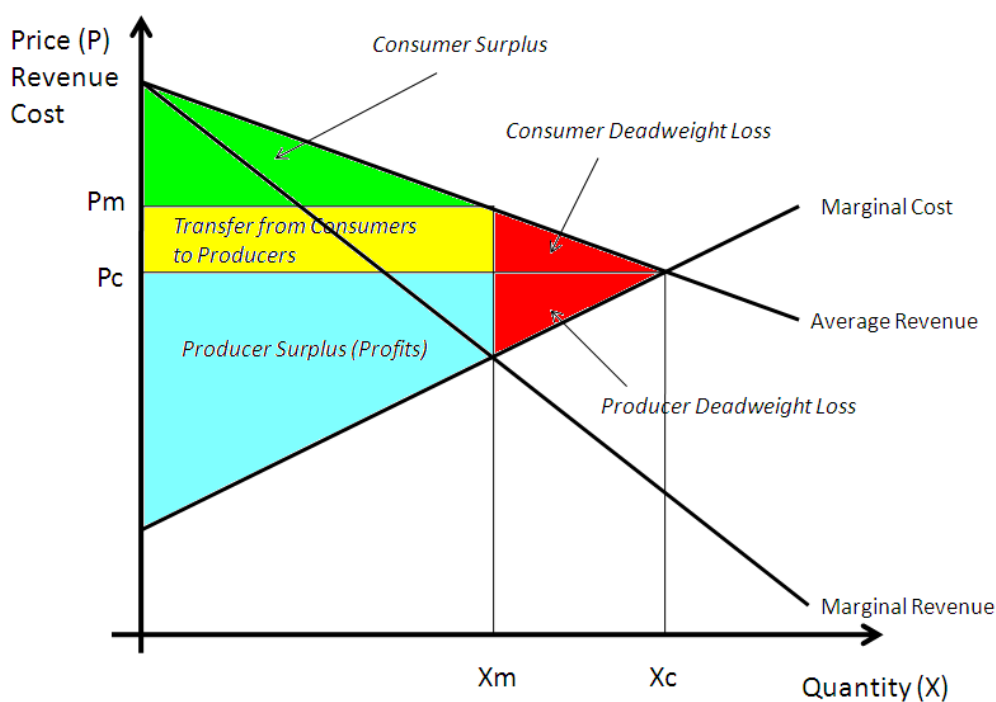
### *Illustrating the deadweight loss and the wealth transfer*

This diagram represents a market, with the quantities traded on the  $x$ -axis and prices at which they are traded on the  $y$ -axis. The first curve, which is usually descending, represents demand. In this elementary case it is the same as the average revenue of a representative undertaking. A rising curve represents the undertakings' marginal cost of production.

We compare two static situations instantaneously. First situation: with pure and perfect competition, the price is established by the supply and demand equilibrium point, which is the point where the average revenue is equal to the marginal cost (quantity  $X_c$  and price  $P_c$  in the diagram below). In a monopoly situation, equilibrium is reached at the point where marginal revenue (instead of average revenue) is equal to marginal cost. We just have to take note that the price will be higher ( $P_m > P_c$ ) and the quantity traded lower ( $X_m < X_c$ ).

The area in the diagram between the horizontal line representing price and the line representing cost is the undertaking's profit. In a pure and perfect competition situation, undertakings' profit is represented by the blue triangle and the lower part of the red triangle. In a monopoly situation, profit corresponds to the blue and yellow areas.

The area between the demand curve, at the very top of the diagram, and the price line represents the consumer surplus. This "surplus" is a way for economists to reason by approximating consumer utility with a monetary value that is commensurable with profit. In a pure and perfect competition situation, the consumer surplus corresponds to the sum of the green triangle, the yellow rectangle and the upper part of the red triangle. In a monopoly situation, only the green triangle remains.



This provides a very simple illustration of the effects discussed above. The red triangle is the deadweight loss mentioned above (effect 2). It is what the entire economy (producers and consumers) would have gained if quantity  $X_c$  had been traded instead of quantity  $X_m$ . The yellow rectangle is the transfer of wealth between consumers and producers.

With the switch from perfect competition to a monopoly, consumers lose some of their surplus because of the deadweight loss, a part of which affects them, but they also lose some of their surplus because of the transfer of wealth, represented by the yellow area. Producers also lose some of their surplus because of the deadweight loss, represented by the lower part of the red triangle, but they gain from the transfer of wealth. From a static point of view, the economy as a whole suffers a loss corresponding to the entire deadweight loss, represented by the entire red triangle. The transfer of wealth is not a loss for the economy as a whole: it is a transfer between two categories of agents.

According to strict economic analysis, the damage to the economy is the sum of the medium-term loss of efficiency and the deadweight loss (both hard to measure), which is not the same as the transfer of wealth. If we were to compare infringement of competition law to theft, we could say that the deadweight loss corresponds to the pure losses for society created by the theft (e.g. destruction of property), which are lost in any event.

The transfer of wealth from consumers to producers is a loss for consumers but an (ill-gotten) gain for undertakings that infringe competition law. Going back to the theft metaphor, it is the proceeds of the theft which are transferred from the victim to the thief, and may be paid back in the form of compensation for damages.

#### *Optimal deterrence level*

The choice of an optimal sanction level for infringements also relates to the debate about the optimal degree of competition. It could be imagined that excessive competition become a problem. Keen rivalry between undertakings and the looming threat to existing undertakings of innovative newcomers arriving on the market probably constitute the most effective drivers of growth. Yet, the debate has not been settled, because the relation between competition and innovation is ambiguous. According to the classical argument put forward by Schumpeter in 1934, monopoly rents are a critical incentive for innovation. Keener competition is assumed to reduce innovation rents and thereby the incentive for innovation. This means governments' competition policies have to make a trade-off between the gains associated with keener competition, which may be expressed in terms of welfare gains for consumers or more efficient allocation of resources, and the ambiguous dynamic effects of competition on future growth.

On this last point, it should be noted that some cases of price fixing, such as that of the steel cartel, are harmful to customers that are themselves producers and their competitiveness is consequently undermined.

### **C. Problems with the application of these principles**

In practice, several problems come up and, more specifically, problems with measuring and estimating the various notions discussed above, along with the problem of the links between the various objectives and instruments of the competition regulation system.

#### *Estimates*

Even if we agree to base the sanction on the theoretical economic calculation presented above, the various elements of the sanction are hard to estimate.

- a) There is debate about the probability of detection. A classical way of estimating this probability is based on the cartel cases actually brought to trial. We consider the average duration of a cartel before it is detected to deduce the probability that a cartel will be detected each year. Based on historical data from 1980 and 1990, the estimated probability ranges from 13% to 17%. There are two defects in this method. First, the available estimates do not take account of recent developments, and, more specifically, improved detection due to the rapid spread of leniency procedures. Some analysts estimate that the probability of detection is now closer to 30%. Second, they overestimate the probability of detection by considering only cartels that are actually detected. This means that undetected cartels are not counted. This is a critical number, since, depending on the estimate used, the theoretical amount of the fine ranges from 3 to 7 times the illicit gain, or even more.
- b) Measuring the illicit gain for each year is based on the excess price due to the infringement, the reduction in sales due to the higher price and the reduction in the profits that undertakings earned before the infringement started<sup>16</sup>. The method that most competition authorities around the world use consists of estimating the increase in price that can be attributed to the infringement and applying this to the sales revenue concerned<sup>17</sup>. This means estimating the price increase due to a cartel (the European Commission uses an estimate of 20% to 25% that corresponds to the median result of empirical research into historical cases), the price elasticity of demand and the undertakings' profit margin. There is a broad consensus on all of these estimates, but there is still some dissent. Furthermore, the undertakings' representatives want the gain to be estimated by observation of the infringing undertaking's actual profit, which raises the issue of interpreting the accounting data, rather than by the sales revenue affected by the presumed increase in price.
- c) If damage to the economy is taken into consideration, the problem becomes even more complex. Generally speaking, only the transfer of wealth from customers to infringing

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<sup>16</sup> The decrease in quantities sold where the undertaking earned a positive margin offsets some of the illicit gain.

<sup>17</sup> In fact, the price-elasticity of demand should also be considered. This is the slope of the demand curve shown above.

undertakings is fairly easy to measure using the methods discussed above, but this does not really measure the damage to the economy.

Damage to the economy, as we have defined it, is very difficult to measure. It is difficult to come up with a convincing estimate of the deadweight loss, except in rare cases, such as when demand is totally insensitive to price, in which case the deadweight loss is null. And it is virtually impossible to assess the dynamic effects. The fact that they are both aware of these practical difficulties undoubtedly explains why the Competition Authority and the Paris Court of Appeal both refrain from quantifying the “damage to the economy” mentioned in Article L. 464-2 of the French Commercial Code (see IV A). The Court of Cassation, on the other hand, requires the extent of this damage to be demonstrated, and not just presumed (see IV A).

#### *Link between the various objectives*

In terms of compensation for damages, the infringing undertaking should theoretically be required to make good the damage to the economy (deadweight loss and dynamic damages) and compensate society as a whole. It should also be required to pay back its customers for the illicit transfer of wealth.

In terms of deterrence, however, only the ill-gotten gains are important (the transfer of wealth), and they can be estimated, as we have seen above. In this theoretical framework, the fine should be based on the illicit gain and on the probability of detection in order to be a deterrent. Since the probability of being convicted is small, the optimal fine should be several times greater than the illicit gain. The theoretically deterrent fine would also broadly compensate for damage to the economy. However, if compensation has already been provided for the transfer of wealth by other means, the amount of the transfer should be deducted from the fine.

## IV) CURRENT APPLICABLE LAW ON SANCTIONS FOR INFRINGEMENTS OF COMPETITION LAW

### A. Administrative penalties

*The general principles set by Article L 464-2 of the French Commercial Code*

Article L 464-2 of the French Commercial Code was introduced by Ordinance 86-1243 in 1986. It was then amended in 2001 (“New Economic Regulations Act”) and again in 2004. The latest version has been in force since 15 November 2008<sup>18</sup>. The main previous amendments concerned (i) the maximum fines (which increased from 5% of pre-tax turnover in France in the first version to 10% of worldwide turnover in the latest version), (ii) the introduction of leniency procedures and commitments to the Competition Authority and (iii) the Competition Authority’s powers to impose fines and conduct investigations.

The article sets out four main principles for calculating fines: (i) the seriousness of the infringement, (ii) the damage caused to the economy, (iii) repeat infringements and (iv) the offenders’ individual situation (see Annex).

These principles are similar to the criteria used by most of the competition authorities in the European Union, except for the damage caused to the economy. This principle, which is discussed in more detail below, is a French specificity and has been the subject of much debate.

The policy stipulates that the severity of the penalty should correspond to the type of infringement (vertical restraint on competition, abuse of dominant market position, information exchange, price or volume cartels, etc.), as well as the duration of the infringement, with vertical restraints generally being seen as the least serious infringement and cartels on prices as the most serious.

The scale of damage to the economy is a more general criterion, which may be difficult to distinguish from the seriousness of the infringement (price fixing, for example, generally has a more negative effect on the economy than a vertical restraint on competition does). It may also be seen as a measurement of the effectiveness of the infringement: the more effective it is, the more damage will be done to the economy. From a legal point of view, it seems to encompass two main aspects: (i) a loss of economic efficiency (damage to the economy in general or damage to the general interest) and (ii) damages to the victims of the infringement. In the past, the Court of Cassation has agreed that damage to the economy might be characterised simply according to a number of factors, such as the size of the market concerned, the type of infringement, the effects of the infringement on economic conditions, the duration of the infringement and the characteristics of the sector concerned. The Court did not require any quantification or estimate of damages and agreed that the presumption of the seriousness of the

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<sup>18</sup> Ordinance 2008-1161 of 13 November 2008 (Articles 2 et 4).

infringement is virtually automatic in the case of cartels<sup>19</sup>. The Court of Cassation's judgment of 7 April 2010 on the penalties imposed on Orange<sup>20</sup> reversed its past decisions and affirmed that damage to the economy could not be presumed merely on the basis of the factors cited above. The Court also stipulated that the extent of the damage to the economy should be proven with due consideration to price elasticity. This recent decision does not necessarily mean that the Competition Authority has to quantify damage to the economy exactly, but it does require it to estimate this damage, taking economic variables into account. The Authority can no longer simply presume that damage has occurred based on the seriousness of the infringement. As the law stands now, damage to the economy must be measured with due consideration of the price elasticity of demand, but does not necessarily have to be quantified precisely.

The duration and repetition of infringements are widely used as criteria for evaluating penalties. However, the law does not define precisely how they are to be taken into account and it gives the Competition Authority a great deal of discretion on these specific points.

Consideration of the offender's individual situation is a fundamental principle for calculating penalties. Implementation of this principle could be clarified with regard to the liability of parent companies and their subsidiaries<sup>21</sup>.

#### *Competition Authority practices and judicial review*

In practice, the Competition Authority always devotes part of its ruling to the assessment of the penalties for infringements. This section refers to each of the principles set out in Article L. 464-2 and applies them to the case in point. The assessment of the seriousness of the infringement is usually analysed more thoroughly. The Authority's rulings establish a hierarchy of infringements that is quite similar to the one found in the European Commission's practices. It considers horizontal price fixing, particularly in public procurement bid tenders<sup>22</sup>, to be one of the most serious infringements. Bid rigging and boycotts come next<sup>23</sup>. The seriousness of abuse of dominant market position cases varies depending on the circumstances; they are generally

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<sup>19</sup> Judgment of 13 October 2009, Court of Cassation, Commercial Chamber, bulletin n°910.

<sup>20</sup> Judgment of 7 April 2010, Court of Cassation, Commercial Chamber, bulletin n°430.

<sup>21</sup> The Competition Authority's decision-making practices established that a subsidiary (even when wholly owned by the parent company) can be found solely liable for the infringements it commits as long as it has adequate autonomy and that it can develop its own business strategy (see Decision 08-D-25, paragraph 28). However, the Competition Authority regularly applies Articles 101 and 102 of the Lisbon Treaty, alongside French law. When it applies European law, it must follow European case law, which requires a reversible presumption of liability on parent companies that wholly own infringing subsidiaries.

<sup>22</sup> For recent cases see Decision 09-D-05 and Decision 09-D-25.

<sup>23</sup> For recent cases see Decision 09-D-17 and Decision 09-D-07.

deemed to be more serious if the offender has historically held a dominant position<sup>24</sup>. Vertical restraints on competition are generally deemed to be the least serious infringements.

The Paris Appeal Court may review the merits of the penalties according to the general principles defined in Article L. 464-2 of the Commercial Code. This means that the Court also plays a key role in assessing the seriousness of infringements. The Court is not bound by any specific calculation method used by the Competition Authority and may re-assess penalties on the basis of the general criteria set out in law.

Recent rulings by the Paris Court of Appeal varying fines imposed by the Competition Authority include:

- The Paris Court of Appeal judgment of 29 September 2009 in *Ets Mathé SA* relating to a plywood cartel, in which the Court reduced the fines because of the financial situation of some of the undertakings concerned (an undertaking undergoing a court-ordered reorganisation, a storm that affected production, etc.) In consideration of the offenders' individual circumstances, the Court reduced the fine from 260,800 euros to 200,000 euros for Mathé SA and from 4,240,000 euros to 2,400,000 euros for Plysorol.
- The Paris Court of Appeal judgment of 6 May 2008 in the “Corsican cement case”, where the Court substantially reduced the fines from 17 million euros to 8 million euros for Lafarge and from 8 million euros to 4.5 million euros for Vicat. The Court justified the reduction of the fines by the fact that the damage caused to the economy was bound to be limited. The Court added that fines had to be reduced to be more proportionate, because of the size of the market, the duration of the infringements, and the plaintiffs' roles and turnover. The Court of Cassation then set aside the Court of Appeal's judgment, but only with regard to the potential abuse of a dominant position.
- The Paris Court of Appeal judgment of 2 October 2007 on a bid rigging case concerning EFT and STPV, where the Court reduced the fines from 1 million euros to 750,000 euros for EFT and from 250,000 euros to 100,000 euros for STPV. The Court cited the small size of the contract concerned for STPV and the individual circumstances of the undertaking for EFT as justification for reducing the penalties.
- The Paris Court of Appeal judgment of 26 June 2007 in the “perfume” case, in which the Court reduced the fines imposed by the Competition Council on the grounds that the Council did not give due consideration to the seriousness of the offences committed by each undertaking. The Competition Council had imposed virtually the same penalty on all of the infringing undertakings, equivalent to 1.7% of their annual turnover. The Court reviewed the individual circumstances of the penalties and re-assessed the seriousness of the infringements. It reduced the fines by an average of 30% to 40%, and up to more than 70% for Givenchy. The Court of Appeal ultimately set aside the Competition Council's

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<sup>24</sup> Undertakings with a historical dominant position must be especially careful not to skew competition, see Decision 09-D-10 or Decision 09-D-24.

judgment on 10 November 2009 because of the duration of the proceedings. This judgment has been appealed to the Court of Cassation.

- An older judgment on much smaller penalties also resulted in a very substantial reduction. In this case, the fine was reduced by nine tenths, from 500,000 francs to 50,000 francs (Paris Court of Appeal judgment of 19 September 2000, *Syndicat des négociants détaillants en combustibles du Nord*). The Court justified this reduction on the grounds of proportionality of the penalty and, more specifically, the duration of the infringements and the limited nature of the damage to the economy.

### *The “steel trading” case*

The judgment handed down on 19 January 2010 in the “steel trading” case<sup>25</sup> highlights a major divergence between the approaches of the Competition Authority and the Paris Court of Appeal when calculating penalties. The Court of Appeal reduced the fines imposed by the Competition Authority from 575 million euros to 75 million euros.

In this case, the Competition Authority affirmed the purpose and application of the legal maximum, and then, as is its custom, went through the principles in Article L. 464-2 one by one to assess the penalty. In this process, the Authority generally focuses on the parties’ acts and arguments to establish the scale of the infringement. In keeping with the Authority’s previous practice, its decision does not mention any specific calculation, even though it considers the scale of the markets concerned and the economic clout of the infringing undertakings in order to assess the amount of the fines. The seriousness of the infringements seems to be the most decisive criterion for justifying the amount of the fines, and the duration and sophistication of the infringements seem to be some of the most important factors for assessing the fines. In the “steel trading” case the Authority focused on five factors to establish the “exceptional seriousness” of the infringements: (i) the prevalence of the infringements on the market, (ii) the persistence of the infringements, (iii) the geographical scope of the infringements, (iv) the material scope of price fixing and (v) the sophistication of the infringements.

Based on these elements and in consideration of the undertakings’ financial situations, the Authority established the amount of the fines according to the undertakings’ participation in the infringement and their turnover. There is an apparent link between the amount of the fines and the assessment of the general criteria in Article 464-2, but the Authority does not rely on any specific calculation method and simply announces the amounts of the fines<sup>26</sup>. In the process, the Authority makes sure that none of these amounts is greater than the legal maximum of 10% of worldwide turnover stipulated in Article L. 464-2.

The Paris Court of Appeal took a very different approach to assessing the penalties. The Court of Appeal upheld the Authority’s appreciation of the merits of the case and, more specifically, the

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<sup>25</sup> Decision 08-D-32.

<sup>26</sup> *Ibid.*, paragraphs 517-528.

illegality of the infringements, but its reasoning with regard to the assessment of the penalties differed on a number of points.

First, the Court of Appeal did not find that the Authority was wrong in considering the existence of aggravating circumstances, such as the sophistication and geographical scope of the infringements, but it did find that the Authority failed to consider the lack of aggravating circumstances at the level of each individual infringing undertaking. The Court of Appeal also found that the Competition Authority had underestimated the role of a “maverick” in its assessment of the seriousness of the infringement and of the damage done to the economy - this showed that the cartel probably was not as effective as expected.

But the two most significant criticisms of the Court of Appeal are based on (i) the failure to consider the economic crisis affecting the sector<sup>27</sup> and (ii) the method for calculating the penalty. On the first point, the Court of Appeal felt that the Authority failed to give due consideration to the economic crisis, but without actually stipulating how much of a reduction of the fines should have been granted. On the second point, the Court of Appeal deemed that a predominant role should have been given to the legal maximum fines stipulated in Article L. 464-2. This second point attracted the most comment. The Court of Appeal referred to criminal procedure policy to deem that the amount of the fine should have been determined based on the maximum penalty (10% of the total turnover of the undertakings concerned). This means that the maximum in Article L. 464-2 becomes the starting point for calculating the amount of the fine. This approach is in sharp contrast to that of the Authority, which consists of determining the amount of the fine solely on the basis of its analysis of the assessment criteria in Article L. 464-2 and then, and only then, ensuring that the legal maximum in Article L. 464-2 has not been exceeded.

The “steel trading” case shows a lack of consistency in the assessment of sanctions for infringements of competition law between the Competition Authority and the Court of Appeal that creates some legal uncertainty for undertakings. The divergence in the approaches and in particular in the method for calculating the fine highlights the timeliness of defining a more specific method of assessing sanctions.

## **B. Compensation for damages**

Under French law, several procedures for damages to individuals are possible (suits for damages caused to the general interest are not heard by the civil courts).

First, it is possible to initiate a conventional civil suit. This option is particularly attractive for cases where the number of victims is small and the damages are large (especially when the victims are undertakings).

Since 1970, the use of collective-interest actions has developed when the victims are consumers whose individual losses are too small to warrant a civil suit. They are brought by the eighteen authorised national consumer associations, which may initiate several types of proceedings:

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<sup>27</sup> The Court deemed that the Council’s discussion of the economic crisis was “too brief”, judgment of 19 January 2010, Paris Court of Appeal, pages 29-30.

- Articles L. 421-1 to L. 421-5 of the Consumer Code enable authorised consumer associations to initiate court proceedings in defence of consumers’ *collective* interests. The damages considered in such proceedings are not the damages to individual consumers, but the damages suffered by all consumers, and the settlement goes to the association.
- Article L. 421-7 enables associations to initiate civil court proceedings to stop unlawful activity by a professional or obtain the voiding of unlawful clauses in the contracts that the professional usually signs with the public.
- Since 1992, a procedure has been put in place to sue for damages on behalf of consumers themselves: suits with joint representation (Articles L. 422-1 to L. 422-3). The consumers must have suffered individual damages of the same origin caused by the same professional and they must appoint the association to act on their behalf to obtain compensation. In practice, such suits have almost always been unsuccessful. The impossibility of prevailing with such suits leads to periodic calls for introducing class actions in France. The Coulon Report called for class action suits, as did an opinion of the Competition Council and several bills tabled in the French Parliament.

It is difficult to measure the actual impact of civil damages actions. The use of out-of-court settlements is also increasing, leading to a proportionate decline in court proceedings. Furthermore, when undertakings are victims of infringements of competition law, they can obtain hidden compensation through further business dealings. This means that court cases do not represent all of the settlements for damages.

### **C. Personal liability**

Article L. 420-6 of the Commercial Code stipulates that individuals can be held criminally liable for infringements. The Article sets very strict conditions, requiring that the offender “fraudulently takes a personal and decisive part” in conceiving and implementing the infringement. Since it is difficult to present evidence of such acts, this Article has been applied only in cases of proven fraud that often involve other offences, such as misuse of corporate assets. The coordination of criminal proceedings with proceedings before the Competition Authority is one of the reasons that they are rarely used, as stressed in the report by the working group on decriminalising business (“Coulon Report”) published in January 2008. The Authority also refers few cases to the criminal courts in order to preserve the leniency procedure established.

### **D. Methods used at the European level and in certain neighbouring countries**

A review of legislation and recent case law with regard to calculating fines for infringements of competition law shows that there are clear similarities in the way sanctions are assessed at the European level, by the Member States and in the United States of America. In most European countries, competition authorities follow a method, which is generally set out in guidelines, where the fine is based on a certain percentage of the affected sales revenue. This is an implicit reference to the notion of illicit gains. The differences relate to the consideration of the duration

of the infringement, with the European Commission multiplying the basic amount by the number of years, whereas Germany and the United Kingdom merely change the percentage rate used to calculate the basic amount.

a) *European level*

**Legislation**

In 2006, the European Commission adopted fining guidelines, which were an amended version of the 1998 guidelines. These guidelines stipulate a specific calculation method for fines for infringements of competition law. This method calculates fines in two steps: (i) calculation of a basic amount plus a fixed amount (entry fee) for entering into the infringement and (ii) adjustments to the basic amount depending on the circumstances.

- Basic amount:
  - starts with a proportion of the “value of sales” of the affected products of up to 30%, which is then multiplied by the number of years of participation in the infringement (paragraphs 12-24)
  - an entry fee is added (paragraph 25)
- Adjustments for:
  - aggravating circumstances (paragraph 28)
  - mitigating circumstances (paragraph 29)
  - deterrent effect (paragraph 30-31)
  - legal maximum of 10% of total consolidated turnover (paragraphs 32-33)
  - cooperation (paragraph 34)
  - ability to pay (paragraph 35)

The main differences between the 2006 and the 1998 guidelines are:

- Basic amount:
  - the calculation places greater importance on the value of the sales of the affected products
  - greater importance is placed on the duration of infringements (this is a major difference: the 1998 guidelines stipulated an increase of only 10%)
  - an entry fee for entering into the infringement has been added
- Adjustments: adjustments are specified with greater precision in the 2006 guidelines

**Case law**

The European Court of Justice and the Court of First Instance have modified the fines imposed by the Commission on undertakings for uncompetitive behaviour on the market in many cases. However, the fines have rarely been reduced by as much as the fines were in the “steel trading” case. There are two main reasons for this:

1. The European courts’ review function has traditionally been limited to correcting “obvious errors” committed by the Commission in its assessment, even though, in practice, the courts leave themselves a great deal of latitude and, in theory, Regulation 1/2003 grants them unlimited jurisdiction specifically for the calculation of fines.
2. At the European level, there are normative instruments, such as the 1998 and 2006 guidelines, that provide a fairly specific framework for calculating fines for infringements of competition law.

In most cases where European courts have reduced the fines imposed by the Commission, the reduction stemmed from consideration of mitigating or aggravating circumstances, such as the degree of cooperation<sup>28</sup>, the role of an infringing undertaking and respect for its rights of defence<sup>29</sup>, or procedural errors. The Court of First Instance even increased the fine imposed by the Commission in the BASF case after rejecting the mitigating effect of cooperating with the investigation<sup>30</sup>. In the majority of cases however, the calculation of the basic amount is not questioned and the adjustment of the fine does not exceed 10% of the amount originally imposed by the Commission. This means that the courts do not contest the calculation method used by the Commission.

Recent judgments that modified fines included:

- The Archer Daniels Midland Co (ADM) case<sup>31</sup>. In this judgment, the Court rejected the evidence that the Commission used to classify the defendant ADM as a leader of the cartel, since this evidence was not mentioned in the actual text of the Statement of Objections. Consequently, ADM was unable to exercise its rights of defence effectively. This meant that the Court could not rule out the effect of cooperating with the investigation on the grounds that ADM might have been an instigator of the cartel. Therefore, the court reduced the fine from 36.69 million euros to 29.4 million euros.
- In the Hoechst GmbH case<sup>32</sup>, the Court of First Instance deemed that a reduction of 10% should be granted, which reduced the fine imposed on Hoechst from 74.03 million euros to 66.63 million euros. In this case, Hoechst explicitly stated that it did not contest the case made by the Commission. The Commission deemed that this statement did not entitle Hoechst to a fine reduction for cooperating with the investigation. However, the

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<sup>28</sup> *Archer Daniels Midland Co*, case C-511/06P, 9 July 2009.

<sup>29</sup> *Hoechst GmbH*, case T-161/05, 30 September 2009.

<sup>30</sup> Cases T-101/05 and T-111/05, 12 December 2007.

<sup>31</sup> Case C-511/06P, 9 July 2009.

<sup>32</sup> Case T-161/05, 30 September 2009.

Court asserted that, even though the undertaking did not provide evidence to clarify its participation in the cartel, the fact that it did not contest the case had facilitated the Commission's work and, consequently, Hoechst was entitled to a 10% reduction of its fine as stipulated in the Leniency Notice.

- In the joined cases BASF UCB, T-101/05 and T-111/05<sup>33</sup>, the Court of First Instance also recalculated the fines that the Commission imposed on BASF and UCB. Unlike the Commission, the Court asserted that there were grounds for considering the worldwide and European arrangements as two separate infringements. Consequently, the Court cancelled the reduction of 10% granted to BASF for cooperating because the information provided pertained solely to worldwide arrangements (an infringement deemed to be time-barred) and the information provided about European cartels was of minimal value. The Court raised the fine imposed on BASF from 34.97 million euros to 35.024 million euros. In the case of UCB, the Court deemed that its cooperation made it possible for the Commission to impose large penalties and, consequently, the Court granted UCB a reduction of 90% of the fine imposed on it by the Commission. Therefore, the Court reduced UCB's fine from 10.38 million euros to 1.807 million euros.
- In the Daiichi case<sup>34</sup>, the defendant appealed its fine resulting from the European Commission's Vitamins decision of 21 November 2001. The Court of First Instance granted an additional reduction of 15% on top of the 35% reduction already granted in the Commission's decision on the basis of Daiichi's full cooperation before the Statement of Objections was issued and Daiichi's decision not to contest the facts of the case. Therefore, the court reduced the fine from 23.4 million euros to 18 million euros.
- In the Danone case<sup>35</sup>, the Court of First Instance upheld the Commission's decision, but, nevertheless, it deemed that the Commission had improperly considered an aggravating circumstance, stating that the Commission had failed to provide sufficient evidence of a causal link between the threats made to another participating undertaking, Interbrew, and the extension of the cartel. Consequently, the Court reduced the fine from 44.043 million euros to 42.4125 million euros.

b) *United Kingdom*

**Legislation**

The 1998 Competition Act stipulates that the Office of Fair Trading (OFT) can impose financial penalties on an undertaking that intentionally or negligently infringes Articles 101, 102 of the EC Treaty or Chapter I or II of the Competition Act. The fine can be as much as 10% of the preceding business year's turnover for each of the undertakings participating in the infringement.

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<sup>33</sup> Cases T-101/05 and T-111/05, 12 December 2007.

<sup>34</sup> Case T-26/02, 15 March 2006.

<sup>35</sup> Case T-38/02, 25 October 2005.

In addition, there are criminal penalties for individuals in United Kingdom which have a deterrent effect. These measures were introduced in 2003<sup>36</sup> and in December 2007, the OFT sought criminal penalties for the first time against three individuals in the “marine hose” cartel. The OFT has also clearly stated its intention to seek prison sentences for infringements of competition law in the future.

The OFT uses guidelines: the “*Guidance as to the appropriate amount of a penalty*” (OFT 423) to calculate the appropriate amount of fines for infringements of competition law.

The Guidance is based on the following five-step method:

1. The starting point is calculated with regard to the seriousness of the infringement and the turnover of the undertakings in the products affected by the infringement.
2. Adjustment for duration.
3. Adjustment for other factors (deterrence, policy, undertaking’s circumstances, etc.)
4. Adjustment for further aggravating or mitigating circumstances (cooperation, repeat infringements, etc.)
5. Adjustment if the maximum penalty of 10% of the worldwide turnover of the undertaking is exceeded and to avoid double jeopardy.

The OFT’s decisions can be appealed to the Competition Appeal Tribunal (CAT). The CAT determines the appeal on the merits with reference to the grounds of appeal set out in the Notice of Appeal (Schedule 8, 3A1 and 1 of the Competition Act). The CAT may confirm, vary or revoke the amount of the fine.

The CAT’s decision may be appealed to a specialised Court of Appeal. In accordance with Article 49(1) of the Competition Act, an appeal regarding the amount of a fine imposed by the CAT is not limited to points of law.

### **Case law**

The *Argos* and *Littlewoods* cases illustrate the application of the guidelines. The Court ruled on different issues including whether the CAT is required to apply the OFT’s guidance as well as discrimination between undertakings that have been sanctioned by the OFT with a fine and undertakings that were able to obtain leniency. The Court of Appeal confirmed that the CAT could calculate a fine in its own way on the basis of the facts and points before it at the time of its decision. Even if it comes up with its own assessment of the fine based on the case considered as a whole, the CAT still has to consider the OFT’s guidance and approach in the case being appealed. This means that the CAT enjoys a large degree of freedom in its assessment, as long as it is not contrary to the main parameters of the OFT’s guidance.

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<sup>36</sup> See the provisions of the 2002 Enterprise Act, Section 188, which provide for a prison sentence of up to 5 years in prison for anti-competitive conduct.

c) *Germany*

**Legislation**

Section 81(4) of the competition act stipulates that the main criteria for calculating the fine are (i) the seriousness of the infringement and (ii) its duration. The Bundeskartellamt (BKartA) has published guidelines (Notice 38/2006) that describe in detail how the basic amount of the fine should be calculated and which factors are considered for adjusting the basic amount. The guidelines are inspired by the practices of the European Commission and the European Courts.

The BKartA guidelines are based on the following three-step method:

- The starting point, called the basic amount, is calculated. This amount can be up to 30% of the turnover in the product(s) affected by the infringement. The basic amount is largely dependent on two main criteria: the seriousness and the duration of the infringement.
- In a second step, the BKartA adjusts the basic amount according to the specific circumstances of each case and each undertaking concerned (repeat infringements, situation of the undertaking, etc.)
- The BKartA then verifies that the fines calculated do not exceed the maximum fine of 10% of the total turnover of the infringing undertaking.

Fines are generally reduced for crucial cooperation with the authorities and exemptions may also be granted under leniency procedures. The BKartA can also decide to increase the fine by up to 100% of the final amount to increase the deterrent effect (subject to the limit of 10% of total turnover of the undertakings concerned).

These guidelines are not, in principle, binding on appeal courts, but in practice, the basic method is rarely contested.

**Case law**

The main recent case involving a substantial reduction in the fines imposed by the BKartA is the cement cartel case.

On 29 June 2009, the High Court of Düsseldorf reduced the fines imposed on five cement producers from 649 million euros to 330 million euros. The Court confirmed the illegality of the infringements and the BKartA's analysis of the merits of the case, but it reduced the fines because the data used for the calculation were incomplete. It did not however question the main characteristics of the calculation method used.

d) *Spain*

**Legislation**

In February 2009, the Spanish authorities adopted guidelines to clarify enforcement of the Competition Act 15/2007 of 3 July 2007. The guidelines set out a method for calculating fines

more specifically that the Competition Act does. The method consists of the following three steps:

- First, the basic amount of the fine is determined. This basic amount is a percentage of the sales affected by the infringement. It is 10% of the value of the affected sales in the latest business year in which the infringement was committed. A further 10% may be added for serious infringements, and another 10%, which may or may not be cumulative, if the infringement concerns a market that could have knock-on effects on other markets incorporating the product or service (downstream markets). This means that the basic amount ranges from 10% to 30% of the value of the affected sales. The amount is then increased according to the duration of the infringement. The Spanish competition authority applies a diminishing multiplication coefficient for each year, using the following scale:

<u>Year:</u>	<u>Multiplication coefficient:</u>
1	1.00
2	0.75
3	0.50
4	0.25
5	0.15
6	0.10
7 or more	0.05

Year 1 is the most recent year. This means that an infringement that lasted for two years will result in the basic amount being multiplied by 1.75. If the infringement lasted for three years, the basic amount is multiplied by 2.25, etc.

- Second, the Spanish competition authority adjusts the basic amount for mitigating or aggravating circumstances listed in Paragraph 64.2 of the Competition Act 15/2007 of 3 July 2007 (repeat infringements, leading role, cooperation, etc.) The rules also stipulate that abuse of a dominant position in a recently deregulated market is an aggravating circumstance. Each aggravating or mitigating circumstance may increase or decrease the basic amount by between 5% and 15%.
- Finally, the Competition Authority ensures that the adjusted basic amount does not exceed the maximum fines stipulated in the Competition Act 15/2007 of 3 July 2007. Three types of maximum fines are stipulated: 1% of the infringing undertaking's total turnover for minor infringements, 5% of the infringing undertaking's total turnover for major infringements and 10% of the infringing undertaking's total turnover for the most serious infringements (Article 63 of the Competition Act).

## Case law

The guidelines for calculating sanctions were adopted by the Spanish Competition Authority following a public consultation. They are binding on the Authority only and are not, in principle, binding on appeal courts, even though the courts will probably have to consider them in practice. Because the guidelines are recent, there is not yet, to the best of our knowledge, any case law regarding their application.

e) *United States of America*

**Legislation**

In the United States, antitrust law is enforced by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). These administrative authorities do not have the absolute power to impose fines and must generally have the imposition of any final fine validated by a judge. In general, the authorities come up with the fines to be imposed and then start negotiating with the infringing undertakings. In order to avoid the time and expense of a long trial, infringing undertakings often reach a plea agreement that is then validated by the judge. Sentencing guidelines that apply to a number of illegal practices define the method for calculating fines. There is a specific section of the sentencing guidelines for antitrust offences. It is interesting to note that the method for calculating those fines is to some extent similar to that used in European countries.

A basic amount, called the base fine, is calculated first according to the volume of commerce affected. This base fine is then adjusted for a number of aggravating and mitigating circumstances. The United States has a very forceful deterrence policy and criminal sentences are handed down regularly. The fine imposed by the DOJ or the FTC may be as much as twice the illegal profits accruing to the undertakings and civil actions are very common<sup>37</sup>. These actions enable victims to receive up to triple damages for proven economic losses.

**Case law**

There have been many cases where American courts have reduced fines, but up until the Supreme Court handed down its *Booker* decision in 2005<sup>38</sup>, courts were required to follow the sentencing guidelines exactly. The *Booker* decision made the guidelines less binding and gave judges more autonomy, “*judges still must consider and take into account the Guidelines in determining and imposing sentence, along with other sentencing factors in 18 U.S.C. § 3553(a), but imposition of a sentence within the Guidelines range is no longer mandatory*”.

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<sup>37</sup> Class actions, contingency fees for lawyers and the principle of treble damages have led to rising numbers of civil suits in competition cases.

<sup>38</sup> *United States v. Booker* 125 S. Ct. 738 (2005).

## V) THE MAIN CRITICISMS OF THE CURRENT SYSTEM

Many of the witnesses heard by the mission have raised different criticisms of the current sanctions system, although not always unanimously. Below is a description of the main criticisms.

### A. Proceedings

The nature of the proceedings before the Competition Authority came up many times during the hearings. The size of the sanctions imposed makes them virtually criminal sentences, as case law and policy attest. Under these circumstances, respecting the rights of defence is critical.

The organisational structure of the Competition Authority, with the separation of the investigation staff led by the General *Rapporteur* from the Competition Authority Board, which validates the decisions, provides some safeguards but the sanction itself is discussed very late in the proceedings. In practice, the case handlers ("*rapporteurs*") only mention the potential sanction in very general terms in the statement of objections or in the final report. The parties are, of course, able to put forward their arguments about the sanction and the amount of any fine in their written answers, but they only become fully aware of the amount of the fine and its calculation method when the decision is issued by the Authority. The Government Commissioner used to mention the amount of the fine he is seeking in the oral debates before the Competition Authority makes its final decision, but he no longer does so in every case.

There are insistent demands for a genuine two-sided debate at an earlier point in the procedure on the amount of the fine. The type of sanction being considered and the amount of the fine could be discussed more broadly in statement of objections or final report. Given the very large fines often imposed by the Competition Authority and the issues relating to the calculation of appropriate fines, several individuals heard wished for more frequent and more in-depth discussions of the sanctions by both parties during the procedure.

The possibility of setting up an independent enforcement commission also came up during the hearings. Some witnesses highlighted the advantages of such an arrangement, using the example of enforcement proceedings by the Financial Markets Authority (AMF), which allows for a genuine debate about the sanctions and ensures greater independence from the investigation staff.

More general issues came up during the hearings, such as the rights of defence and, more specifically, the need for transparency when submitting evidence, the importance and the scope of oral arguments, and the fact that lodging an appeal does not lead to a suspension of the sanction imposed by the Authority. With respect to these points, it should be noted that the Court of Cassation has confirmed that proceedings before the Competition Authority comply with the European Convention on Human Rights, since there is a remedy of full jurisdiction before the Paris Court of Appeal<sup>39</sup>. Furthermore, the hearing officer introduced by the Economic

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<sup>39</sup> Judgment of the Paris Court of Appeal on 30 March 2004, see also the judgement of the Court of Cassation of 28 June 2005, *Novartis Pharma*.

Modernisation Act to ensure that the proceedings are carried out properly should ensure better protection of the parties' rights. Legal professionals also mentioned the possibility of granting broader powers to the hearing officer to ensure better protection of client-attorney confidentiality when Competition Authority staff seizes evidence<sup>40</sup>.

Finally, the prosecutor's office could play a more active role in proceedings before the Paris Court of Appeal. Some witnesses mentioned the prosecutor's office's lack of resources, which restricts its action in competition proceedings, even though its participation generally reinforces the contradictory debate.

### **B. Lack of a specific calculation method**

The principles set out in Article L. 464-2 are very general and make it difficult to predict the sanctions incurred. The sanctions should not be totally predictable (see V I. below); however there should be a degree of predictability to avoid inconsistency in sanctions and to provide some certainty of law.

Most of the individuals heard agreed that the method of calculating fines needs to be more precisely defined.

The most commonly suggested solution is to take the value of sales affected by the infringement as a basis for the calculation. This would then require determining the criteria to consider when setting and adjusting the fine linked to the value of sales. The general wish is for a formula that sets a percentage, so long as it is flexible enough to give the Competition Authority and the judges of the court of appeal enough discretion.

### **C. Legal maximum**

Some witnesses criticised the maximum fines stipulated in Article L. 464-2. As a general rule, the very high limit of 10% of the group's worldwide turnover is rarely reached.

The individual heard questioned the fact that it refers to the infringing undertaking's worldwide turnover, and not its domestic turnover. This would be understandable in cases where the Competition Authority applies European law and the infringement has effects outside of France's borders, but the division of jurisdiction means that this type of infringement would be handled by the European Commission in most cases. Therefore, certain witnesses called for the legal maximum to apply to domestic turnover only.

Similarly, consideration of the "highest" turnover during the business years concerned by the infringement may not be warranted. If one of the purposes of the legal maximum is to limit the risk of an undertaking failing, it would be more appropriate to consider the turnover of the preceding business year, as is the case at the European level, or maybe the average turnover.

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<sup>40</sup> The hearing officer has no power to decide disputes between the Competition Authority and the parties. As opposed to the European Commission's hearing officer, the French Authority's hearing officer merely makes observations.

The legal maximum also leads to a difference in the treatment of small and medium-sized undertakings that sell only one product, for which the legal maximum is likely to reduce the fines incurred, and large, highly diversified enterprises, for which the legal maximum is unlikely to play a role. The competition authorities stand by this difference in treatment, since it is determined by the economic clout of the infringing undertaking: it means that an undertaking that is not diversified will not be too heavily penalised with respect to its financial situation.

It should be noted that the vast majority of the witnesses perceived the legal maximum as a cap on the total amount of the fine, once it has been determined, rather than as a starting point for determining the fine.

#### **D. Damage to the economy**

Some witnesses felt that this notion largely overlaps that of the seriousness of the infringement. Other witnesses felt that, on the contrary, it is a critical notion and this damage needs to be quantified. The notion of damage to the economy, as distinct from the seriousness of the infringement is specific to French law. From an economic point of view, it corresponds to aspects of the effects of the infringement that are very difficult to estimate (see III B above). The practices of the Competition Authority and the Court of Appeal have not clarified what is understood by the “scale” of the damage (see IV A. above), which makes this a vague notion for the defendants. It must be remembered that the Court of Cassation has just ruled that the extent of the damage must be proven and not just presumed (see IV A. above).

#### **E. Personal liability**

A punitive system with excessive emphasis on the undertaking as a corporate entity raises problems with regard to both effectiveness and ethics.

Many witnesses, especially competition economists, are in favour of a more diversified system of sanctions than just administrative fines paid by undertakings. They call for major emphasis on personal liability. Fines are not always the ideal way of deterring perpetrators of infringements of competition law, who are managers and executives of undertakings, since fines punish the undertaking in its entirety, including the shareholders. Furthermore, we see that infringements persist, despite fine inflation, which is a sign that the problem cannot be solved by relying on a single instrument.

Other witnesses were not in favour of encouraging sanctions for individuals. More specifically, these witnesses fear that it will turn out to be impossible to penalise senior managers and executives and that the penalties will be imposed on lower-ranking management personnel.

#### **F. Damages actions**

According to many witnesses, damages actions are not yet given due consideration as sanctions for infringements of competition law.

In cases heard at the European level, the European Commission always urges the victims to instigate damages actions. It also encourages the Member States to introduce civil law procedures to allow the victims of infringements of competition law to seek compensation, particularly since the publication in 2008 of a white paper on damages actions for breaches of EC antitrust rules.

Some witnesses, especially consumer associations, stress that compensation for damages makes a clearer distinction between the different aspects of the sanction (compensation for damages, deterrence). Other witnesses, especially business undertakings, want any compensation for damages to be considered when determining the amount of the administrative fine.

### **G. Lack of diversity in sanctions**

One frequently heard criticism is that the only type of sanction used is a fine. Other forms of sanction seem to be called for.

Other types of sanction being considered include behavioural commitments, like those required in cases of abuse of dominant market positions, suspended penalties with probation, publication of convictions, business bans, bans on bidding for public contracts, etc.

There are also many calls for more educational efforts aimed at business undertakings. For example, undertakings' compliance programmes and internal policies are given little consideration. The Competition Authority reports problems verifying their credibility and supervising their enforcement over time.

### **H. Liability at the group level**

Many witnesses spoke of the discrepancies between the Commission's approach and that of French law. The Commission uses a notion of an undertaking that includes the infringing subsidiary and the parent company, which is contrary to the principle of the autonomy of a corporate entity under French law. This presumption of the parent company's liability in the case of wholly owned subsidiaries, even though the parent company has not committed any infringements, turns out to be a conclusive presumption, which means that all of the legal entities presumed to represent the undertaking, including the parent company, are found liable for the penalties almost in each case.

There are two main types of case where the group may incur liability for the penalties:

- (i) when the parent company could not be unaware of the subsidiary's behaviour or when the parent company participated in the infringements or ordered them to be committed;
- (ii) when the subsidiary is insolvent or does not have the ability to pay all of the fines imposed.

There is broad acceptance of the group's liability in cases of insolvency, but the individuals heard stressed the importance of taking into account the specific organization of the infringing undertaking's group with respect to full liability.

The French Competition Authority's practices with regard to the liability of a subsidiary and its group are therefore deemed to be satisfactory, since they do not establish any legal presumption of the implication of the group, even when the subsidiary is wholly owned<sup>41</sup>. An approach that automatically makes the parent company liable is broadly rejected and is contrary to the principle of adapting penalties to the circumstances of the infringing undertaking. Similarly, the presumption of group responsibility when subsidiaries are wholly owned, as is the case at the European level<sup>42</sup>, is roundly criticised.

### **I. The importance of deterrence and predictability**

The administrative penalties necessarily have a deterrent aspect, but some witnesses regretted that the current language of the Commercial Code does not introduce the notion of deterrence, which is explicitly mentioned in the European legislation (see IV. D a) above).

There has also been a sharp increase in the amount of fines in France in recent years. This raises the question of whether they have reached a deterrent level. Academic witnesses feel that, in any event, fines have not exceeded this level, based on theoretical estimates made using historical fines data, but these witnesses question whether effective deterrence can be achieved with a single instrument.

Furthermore, fines should be predictable, but only to a certain extent. Some witnesses called for a precise method for calculating fines, but others maintain that a degree of uncertainty should remain so that future offenders cannot anticipate the amounts exactly.

### **J. Problems in applying the leniency procedure**

The witnesses approved the principle of the competition authorities' leniency procedure, but still had some criticisms. Most of the individuals heard favoured the development of the procedure, which helps fight infringements more effectively, but the possibility of criminal charges is still a real risk that severely limits its development. A manager who provides information about an infringement committed by his or her undertaking may hope to see the fine imposed on the undertaking reduced. On the other hand, the Competition Authority cannot guarantee that the same information will not be used in a civil or criminal trial seeking to establish the manager's personal liability.

Some of the witnesses stressed that fine reductions under the leniency procedure were uncertain and failed to provide adequate incentives.

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<sup>41</sup> As mentioned above, the Competition Authority's practice is to hold the subsidiary liable for the infringement (even in the case of a wholly owned subsidiary), if it has a degree of autonomy and the capacity to determine its business strategy. The parent company's is not held liable, unless it has participated in the infringements or ordered its subsidiary to commit them.

<sup>42</sup> This presumption was upheld by the Akzo Nobel judgment, cases C-97/08 and T-112/05.

## VI) RECOMMENDATIONS

The working group has drawn up various recommendations based on the witnesses' contributions and its own discussions. These recommendations have several objectives: predictability, proportionality and transparency of sanctions.

### A. Recommendations

#### *Procedure*

The hearings revealed a lack of transparency and of contradictory debate when determining sanctions. The sanction handed down by the Competition Authority is virtually a criminal penalty and, as such, it should be based in a procedure that complies with the general principles of a fair trial and the rights of defence enshrined in national law and international agreements<sup>43</sup>. The severity of the penalties imposed means that we should draw inspiration from the criminal procedure and the principle of the legality of offences and sentences. The procedure before the Competition Authority has been recognised as compliant with the general requirements of the ECHR<sup>44</sup>, but the debate before the Competition Authority on the actual sanction and its amount seems to be restricted and open to improvement.

The Paris Court of Appeal maintained that the principle of hearing both sides of the case was respected, as long as both parties could present their observations at every step in the procedure, adding that the rapporteur did not have to answer all of the arguments put forward by the parties in his or her report<sup>45</sup>. However, this situation does not seem to be very satisfactory with regard to the determination of the sanction. Undertakings should be sure to benefit from a fair hearing and have the possibility to defend themselves once the Statement of Objections is issued and, in any event, before the final report is submitted, with regard to the assessment of damage to the economy, the sanctions being considered and the criteria used for calculating any fines.

- Therefore, it is recommended that both sides debate the sanction at an earlier stage in the procedure. A reference document, such as guidelines, could stipulate that the rapporteur.

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<sup>43</sup> The Constitutional Council's decision of 10 June 2009 on the "Hadopi" Act affirmed that the exercise of a sanctioning power by an independent administrative authority must be covered by measures to ensure the protection of constitutionally guaranteed rights and freedoms. French courts have confirmed on several occasions that Paragraph 1 of Article 6 of the European Convention on Human Rights applies to independent administrative authorities with sanctioning powers (Court of Cassation 5 February 1999, COB v Oury, Court of Cassation 5 October 1999, SNC Capenon Bernard SGE).

<sup>44</sup> Judgment of 30 March 2004, Paris Court of Appeal, see also the judgment of 28 June 2005, Court of Cassation (*Novartis Pharma*).

<sup>45</sup> Judgment of 24 November 2009, Paris Court of Appeal (*Chevron Products Company*).

while preparing the report, should reveal the assessment of damage to the economy, the nature of the sanction recommended and, in the case of fine, a range for its actual amount.

- There is a very positive perception of the introduction of the hearing officer. The hearing officer’ function and means of action could be clarified and extended, if necessary.<sup>46</sup>
- Further discussion should take place about the value of setting up an enforcement commission on sanctions that is separate from the Competition Authority, which would have the advantage of ensuring independence between the investigation of cases, on the one hand, and sanction decisions, on the other hand.

### *Method for calculating fines*

Several calculation methods have been considered:

- A method similar to the one used by the European Commission, which takes a percentage of the value of sales affected by the infringement and multiplies it by the duration, and then adjusts the fine for mitigating or aggravating circumstances.
- A method that consists simply of clarifying the principles in Article L. 464-2 that link the fine to the infringement without any mathematical calculation method. This method could stipulate the starting point for the calculation, the role of the legal maximum and list more specific criteria to be considered when determining the seriousness of the infringement.
- A basic amount should be defined and weighted according to the mitigating or aggravating circumstances, following a method that is very similar to the one used by the European Commission, as well as by the majority of European countries.
- A reference instrument should stipulate the basic amount to be used and this amount should correspond to a percentage of the value of sales of products or services affected by the infringement (e.g. 5% to 15% of the value of sales). This means that the fine should be calculated on the basis of the value of sales affected by the infringement only (in other words, not on the total turnover of the infringing undertaking nor on the consolidated group turnover). Therefore, the basis for the calculation is the turnover affected by the infringement. Specific percentages should not be stipulated for each type of infringement (vertical restraints on competition, abuse of dominant market positions, information exchange, cartels, etc.), instead the fine should be determined within a range of between 5% and 15%, according to the seriousness of the infringement.

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<sup>46</sup> For example, the hearing officer could be given power to decide disputes between the parties and the Authority regarding the procedure under the supervision of the Board of the Competition Authority.

- Duration is inarguably a highly aggravating circumstance. The fine should be calculated accordingly, following a clearly defined and familiar mechanism. The purpose of the reference instrument would be to define this mechanism. Three ways of doing this could be considered: multiplying the fine by the number of years, as the European Commission has done since 2006, multiplying the fine by a diminishing annual coefficient, as the Spanish competition authority does, or simply adjusting the percentage, as the German competition authority does. The working group prefers the Spanish model, but with an annual coefficient that diminishes more slowly.

Mitigating and aggravating circumstances:

After determining the basic amount, weighting factors must be applied to reflect mitigating or aggravating circumstances. Some of these weighting factors are classic and already well known, but they could cover other topics. It would not be helpful or desirable to quantify each weighting factor exactly so as to avoid turning the guidelines into a set of arithmetic formulae, thus depriving the Competition Authority of any discretion.

**Conventional aggravating or mitigating circumstances:**

- These are as follows: cooperation, economic and financial situation of the infringing undertaking, repeat infringements, impeding or failing to cooperate with the investigation and playing a leading role in the infringement.

**Other suggested weighting factors:**

- The basic amount should be weighted for the average profit margin in the relevant business sector. This measure has the merit of taking into account the fact that some business sectors have higher margins than others. One of the drawbacks of using the turnover affected by the infringement as the starting point for calculating the fine is that it fails to take into account the inherent profitability of the relevant business sector and, consequently, the undertakings' ability to pay. A given amount of turnover in a sector such as luxury goods generates profits that are of a different order of magnitude than the same turnover would generate in the retail sales sector. Therefore, we propose taking profit into account as a mitigating or aggravating circumstance, without basing fine amounts on profits, since determining the average profit margin can be a very delicate matter.
- Compensation that undertakings pay directly to victims as part of the administrative proceedings before the Competition Authority, as well as personal penalties, should be counted as mitigating circumstances.<sup>47</sup> The administrative sanction that the Competition

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<sup>47</sup> However, this raises various types of problems. First, compensation has not yet been paid, as a general rule, when the administrative decision is made, and the Authority can hardly base its assessment on the possibility of a future decision. Undertakings are naturally reluctant to announce compensation, thus acknowledging their liability, before the administrative decision has been made. Furthermore, settlements may be confidential, which makes it

Authority imposes on a company should be carefully separated from compensation for damages, which is a matter for the civil courts or an out-of-court settlement, as well as from legal sanctions imposed by a criminal court on individuals or legal entities. This is especially important since it avoids double jeopardy and complies with the principle of *non bis in idem*<sup>48</sup>. Therefore, when it assesses the administrative sanction, the Competition Authority should consider compensation decisions (settlements with victims) and disciplinary sanctions (dismissal of the guilty employees) that the infringing undertaking has taken on its own during the administrative procedure before the Competition Authority. Highlighting such mitigating factors is bound to have a favourable impact on undertakings' behaviour.

- The existence or absence of real state-of-the-art compliance programmes and their effective implementation by undertakings should be considered as mitigating or aggravating circumstances.
- Damage to the economy is a notion that is specific to French law. It is a vague concept and it is very hard to quantify. Therefore it should only be considered as a mitigating or aggravating circumstance in those cases where it can truly be identified.

#### *Legal maximum and liability for the infringement*

- The legal maximum fine stipulated in Article L. 464-2 is based on the group's consolidated worldwide turnover if the company found liable belongs to such a group. The maximum should act as a cap on fines and not a starting point for calculating the amount of the fine. It should only be applied after the basic amount of the fine has been determined following the procedures discussed above.
- In keeping with the Competition Authority's practices, liability for the infringement should be restricted to the company concerned. The parent company should not be found liable, unless it was indifferent to its subsidiary's actions, it was negligent in setting up a serious infringement prevention programme within the group, it was aware of the infringements or took part in the infringement.<sup>49</sup> It is only fitting that the parent company also be required to ensure that its subsidiary pays the fine imposed, which is capped at 10% of the consolidated turnover (solvency requirement).

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(continued...)

hard to take them into account. Finally, a question could arise, if the civil court actions take place outside of France (UK or USA), as to whether they should be taken into account for a French decision.

<sup>48</sup> Principle recognised by the ECJ in *Walt Wilhelm v. Bundeskartellamt*, 1969.

<sup>49</sup> As stipulated in Decision 09-D-36 ("Orange Caraïbes" case), the Authority is required to follow the Akzo Nobel precedent when applying European law (see note 42 above). It is not certain that the Authority can maintain a different criterion under national law from that used in European law.

### *Suspended penalties*

- A possibility should be provided for a suspended penalty with probation for a first offence for limited infringements of competition law, such as vertical restraints on competition, but not for cartels under any circumstances. The Competition Authority should be able to suspend its penalties and put the infringing undertaking on probation, in the spirit of the European Commission's commitment procedures under Article 9 of Council Regulation 1/2003. This would make the enforcement of competition law more pedagogical and limit the systematic use of fines to sanction infringements. Suspended penalties would naturally imply an obligation not to repeat the infringement, since this would automatically make the suspended fine payable, and an obligation to establish convincing compliance programmes and make regular submissions to the Authority showing that the infringement has ended and that supervision of the behaviour of the undertaking and its employees has been enhanced.

### *Importance of personal sanctions*

While not exonerating the undertaking of its liability in any way, it may seem unfair to find the undertaking alone liable for the isolated and autonomous acts of one of its employees. Imposing a fine on an undertaking punishes the shareholders and customers, since the latter will pay higher prices to cover the fines if the pressure of competition is not too strong and the undertaking is able to raise its prices, for the acts committed by persons who, in some cases, may have left the undertaking in the meantime. In order to deter further infringements, not only will shareholders have to keep a closer watch on what the employees and senior managers of the undertaking are doing, they will also have to create a genuine culture of compliance with competition law within the undertaking.<sup>50</sup>

- Various personal sanctions should be developed: criminal sanctions (fines), bans on managing companies, on serving as corporate officers, etc. In addition to being deterrents, personal sanctions cannot be passed on, unlike fines imposed on the undertaking, which can be passed on in the form of higher prices. In France, Article L. 420-6 of the Commercial Code is rarely applied (see IV C.). There is also a potential risk of double jeopardy, since Article L. 420-6 can also be applied to legal entities in theory. It is up to the Authority to report unlawful personal conduct revealed by its investigations to the public prosecutor, and to do so without compromising the development of the leniency policy.

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<sup>50</sup> This raises the familiar dilemma in economics with the agency theory, which studies the difficulties that shareholders have making the incentives for managers consistent with the shareholders' interests.

## B. The appropriate reference instrument

There are several possibilities for implementing the above recommendations: a new law, a decree or guidelines.

- New legislation is not recommended. It seems that the general principles set out in Article L. 464-2 of the French Commercial Code need only to be made more specific and not substantially amended.
- The adoption by the Competition Authority of guidelines for calculating fines would clarify enforcement and the method for calculating penalties, thus providing greater legal certainty for offenders. The guidelines should be consistent with the ones that the European Commission applies to avoid any undermining of the effectiveness of European law<sup>51</sup>, but there is some degree of freedom at the national level for determining the sanction procedures which enable the implementation of the above recommendations. The guidelines would offer the additional advantage of being relatively easy to amend.
- The use of a decree stipulating the existence of the guidelines and the procedure for drawing them up is the preferred option of two of the three members of the working group. Article L. 470-8 of the Commercial Code stipulates that a decree examined by the Conseil d'État may determine the application procedures for Book IV "Pricing freedom and competition" of the Commercial Code. This could constitute grounds for using a decree that would stipulate the existence and the procedure for drawing up the guidelines for implementation of Article L. 464-2. The main advantage of using a decree is that it lends the guidelines a more official character and better assurance that they will be given due consideration by the Court of Appeal. This would avoid excessive differences in the assessment of the sanction by the Competition Authority and the Paris Court of Appeal. On the other hand, the third member of the working group felt that guidelines adopted by the Competition Authority and that are binding on itself only would not benefit from action by the executive branch. Such action could jeopardise the Authority's independence and it is not found in other Member States. Guidelines introduced without a decree would be more credible for this reason.
- The Competition Authority should consult broadly with all of the stakeholders (courts, ministries, consumer associations, business representatives and competition law practitioners) when drafting the guidelines in order to ensure the fullest support possible for them, whether they are backed up by a decree or not.

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<sup>51</sup> ECJ in *Von Colson*, 10 April 2004.

## **ANNEXES**

### **A. Letter of engagement**



LE MINISTRE DE L'ÉCONOMIE,  
DE L'INDUSTRIE ET DE L'EMPLOI

Paris, le 19 FEV. 2010

*Cher*

Monsieur le président,

Un récent arrêt de la cour d'appel de Paris du 19 janvier 2010, réformant une décision du Conseil de la concurrence du 16 décembre 2008 relative à une procédure d'entente dite « du cartel de l'acier » a rappelé la diversité des approches s'agissant de la détermination des sanctions en matière de pratique anticoncurrentielles.

Plus généralement, il conduit à s'interroger sur cet aspect essentiel de la politique de la concurrence, qui consiste à prononcer des sanctions qui doivent répondre à deux objectifs cumulatifs :

- l'adéquation au dommage à l'économie causé par les pratiques anticoncurrentielles ;
- mais également la dissuasion, pour inciter les entreprises à ne pas se livrer à ces pratiques qui déstabilisent le marché au détriment de tous.

Les sanctions doivent en outre être adaptées à la situation individuelle des entreprises fautives et répondre à une certaine exigence de prévisibilité, afin de prémunir les acteurs économiques contre un trop fort risque d'insécurité juridique.

En droit français, l'article L. 464-2 du code de commerce dispose ainsi que « les sanctions pécuniaires sont proportionnées à la gravité des faits reprochés, à l'importance du dommage causé à l'économie, à la situation de l'organisme ou de l'entreprise sanctionnée ou du groupe auquel l'entreprise appartient et à l'éventuelle réitération de pratiques prohibées par le présent titre. Elles sont déterminées individuellement pour chaque entreprise ou organisme sanctionné et de façon motivée pour chaque sanction.

*Si le contrevenant n'est pas une entreprise, le montant maximum de la sanction est de 3 millions d'euros. Le montant maximum de la sanction est, pour une entreprise, de 10 % du montant du chiffre d'affaires mondial hors taxes le plus élevé réalisé au cours d'un des exercices clos depuis l'exercice précédant celui au cours duquel les pratiques ont été mises en oeuvre. Si les comptes de l'entreprise concernée ont été consolidés ou combinés en vertu des textes applicables à sa forme sociale, le chiffre d'affaires pris en compte est celui figurant dans les comptes consolidés ou combinés de l'entreprise consolidante ou combinante. »*



Liberté est donc laissée à l'autorité de la concurrence sous le contrôle du juge d'appel pour déterminer le montant de la sanction.

En droit communautaire, la Commission s'est dotée de lignes directrices précisant le mode de calcul habituellement employé, mais ces préconisations n'ont qu'une valeur indicative et elle n'hésite pas à s'en écarter au cas par cas.

En droit français, de tels instruments n'existent pas, et les pratiques divergent.

Ces différences méthodologiques étant source d'une réelle imprévisibilité de la sanction pour les entreprises, il m'apparaît indispensable d'engager une réflexion concertée sur ce sujet, afin que les différents acteurs de la régulation de la concurrence puissent parvenir à des conclusions communes, qui pourront conduire à la fixation de règles, contraignantes ou non, admises par tous.

J'ai donc décidé de mettre en place un groupe de trois personnalités afin de conduire cette réflexion sur l'appréciation de la sanction en matière de pratiques anticoncurrentielles, pour laquelle je souhaiterais votre participation. Ce groupe travaillera en lien avec les différents acteurs (autorité de régulation, autorité judiciaire, entreprises, conseils, et services du ministère de l'économie) dans ce domaine.

J'ai également sollicité Alexander Schaub, ancien directeur général à la Commission européenne et actuellement avocat au barreau de Bruxelles, et Christian Rysseguier, premier avocat général près la Cour de cassation.

Pour mener cette réflexion à bien, vous pourrez utilement vous appuyer sur les services du ministère de l'économie, de l'industrie et de l'emploi, pour assurer la conduite de ces travaux, auxquels sera pleinement associée l'Autorité de la concurrence.

Vous voudrez bien me faire part de vos conclusions avant le 15 mai 2010.

Je vous prie de croire, Monsieur le président, à l'assurance de ma considération la meilleure.



Christine Lagarde

Translation :

Dear Mr Chairman,

A recent judgment by the Paris Court of Appeal on 19 January 2010 amended a decision handed down by the Competition Authority on 16 December 2008 in a cartel case known as the “steel cartel”, highlighting the diversity of approaches to determining sanctions for infringements of competition law.

In more general terms, this judgment leads to questions about this critical aspect of competition policy, which consists of imposing sanctions that must meet two cumulative objectives:

- proportionality to the damage to the economy caused by infringements of competition law;
- and also deterrence, to inhibit undertakings from engaging in practices that destabilise the market to everyone’s detriment.

Sanctions must also be adapted to the individual circumstances of the infringing undertakings and be somewhat predictable so as to protect economic operators from excessive legal uncertainty.

Under French law, Article L. 464-2 of the Commercial Code provides that, “*The financial penalties are proportionate to the seriousness of the charges brought, to the scale of the damage caused to the economy, to the financial situation of the body or undertaking penalised or to the group to which the undertaking belongs, and to the likelihood of any repetition of practices prohibited under this Title. They are individually determined for each undertaking or body penalised, with reasons given for each penalty.*

*If the offender is not a company, the maximum amount of the penalty is 3 million euros. The maximum amount of the penalty for an undertaking is 10% of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented. If the financial statements of the company concerned have been consolidated or combined by virtue of the texts applicable to its legal form, the turnover taken into account is that shown in the consolidated or combined financial statements of the consolidating or combining company.*

This means that the Competition Authority is free to determine the amount of the sanction, under the supervision of the Court of Appeal.

Under European law, the Commission has established guidelines that specify the usual calculation method, but these guidelines are only indicative and the Commission does not hesitate to override them on a case-by-case basis.

There are no such instruments under French law and practices vary.

Since these methodological differences are a real source of uncertainty about sanctions for undertakings, I felt it was critical to engage concerted discussions on this topic, so that the various stakeholders in competition regulation might reach some shared conclusions that could lead to some binding or non-binding rules accepted by everyone.

Therefore, I have decided to set up a working group with three prominent members to lead this discussion on the assessment of sanctions for infringements of competition law and I would like you to take part. The group will work in conjunction with the various stakeholders (regulatory authority, judiciary, businesses, advisers, Ministry for the Economy staff).

I have also asked Alexander Schaub, former Director General from the European Commission and currently a member of the Brussels Bar, and Christian Raysseguier, First Advocate General of the Court of Cassation.

In order to conduct the discussion successfully, you may find it helpful to rely on the staff of the Ministry for the Economy, Industry and Employment for the performance of tasks, with the full involvement of the Competition Authority.

Please be so kind as to submit your conclusions to me by 15 May 2010.

Yours sincerely,

Christine Lagarde

## **B. List of witnesses**

Association of competition law practitioners: Olivier Freget, Claude Lazarus, Philippe Rincazaux, Robert Saint-Esteben, Didier Théophile, Mélanie Thill-Tayara

Spanish Competition Council: Pilar Sánchez, Vice-President of the Council, Inmaculada Gutiérrez, Member of the Council, Juan Delgado, Chief Economist, Eduardo Pérez, Deputy Chief Economist

François Brunet, Lawyer

Benoît Coeuré, Deputy Director General of the Treasury, Chief Economist to the Minister, Ministry for the Economy, Industry and Employment (MINEIE)

Emmanuel Combe, Professor of Economics, Université Paris I and Member of the Board of the Competition Authority

Lorraine Donnedieu de Vabres-Tranié, Lawyer

Bernard Field, General Secretary, Saint Gobain

Thierry Fossier, Presiding Judge of the Economic Regulation Chamber of the Paris Court of Appeal

Nathalie Homobono, Director General for Competition Policy, Consumer Affairs and Fraud Control (MINEIE)

Alexander Italianer, Director General for Competition, European Commission

Frédéric Jenny, Special Counsel to the Court of Cassation

Bruno Lasserre, President, Competition Authority

Jean-Bernard Lévy, Chairman of the Executive Board, Vivendi

Gaëlle Patetta, Director of Legal Affairs, UFC-Que Choisir

Patrick Rey, Professor of Economics, Université Toulouse-I

Luc Rousseau, Director General for Competitiveness, Industry and Services, MINEIE

Joachim Schwerin, Head of the Competition Team, Directorate General for Enterprise and Industry, European Commission

Joelle Simon, Director of Legal Affairs, MEDEF

David Spector, Economist

Laurent Vallée, Director of Civil Affairs, Ministry of Justice

## **Written submissions**

Office of Fair Trading

Dominique Hagelsteen, Member of the Conseil d'État

Louis Vogel, Lawyer and President, Université Paris II

Jacques Biancarelli, Member of the Conseil d'État, former justice of the European Court of Justice

### C. Commercial Code provisions on sanctions

The full version of Article L. 464-2 is worded as follows:

*“I. - The Competition Authority may order the undertakings or bodies concerned to cease their non-competitive practices within a specified period or may impose special conditions. It may also accept commitments proposed by undertakings or bodies that will end its competition concerns about likely infringements mentioned in Articles L. 420-1, L. 420-2 and L. 420-5.*

*It may impose a fine that is either applicable immediately or in the event of non-compliance with the conditions imposed or the commitments accepted.*

*The financial penalties are proportionate to the seriousness of the charges brought, to the scale of the damage caused to the economy, to the financial situation of the body or undertaking penalised or to the group to which the undertaking belongs, and to the likelihood of any repetition of practices prohibited under this Title. They are individually determined for each undertaking or body penalised, with reasons given for each penalty.*

*If the offender is not a company, the maximum amount of the penalty is 3 million euros. The maximum amount of the penalty for an undertaking is 10% of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented. If the financial statements of the company concerned have been consolidated or combined by virtue of the texts applicable to its legal form, the turnover taken into account is that shown in the consolidated or combined financial statements of the consolidating or combining company.*

*The Competition Authority may order that its decision, or an abstract thereof, be posted in the manner which it stipulates. It may also order that its decision, or the abstract thereof, be inserted in the management report for the financial year by the undertaking’s executives, board of directors or executive board. The costs are borne by the party concerned.*

*II. - The Competition Council may impose coercive fines on the parties concerned of not more than 5% of the average daily turnover, per day of delay, with effect from the date it determines, to compel them to:*

*a) Comply with a decision that enjoined them to cease the non-competitive practices or imposed special conditions, or to implement a decision making a commitment compulsory by virtue of I;*

*b) Comply with the measures imposed pursuant to Article L. 464-1.*

*The turnover taken into account is calculated on the basis of the undertaking’s financial statements for the last financial year ended as of the date of the decision. The amount of the coercive fine is definitively set by the Competition Authority.*

*III. - When a body or an undertaking does not contest the truth of the allegations made against it, the general rapporteur may recommend that the Competition Authority, which hears the parties and the government representative without a report being drawn up in*

*advance, impose the financial penalty referred to in I and take into account the fact that no challenge was raised. In such cases, the maximum amount of the penalty incurred is reduced by half. Where the undertaking or body also makes a commitment to change its conduct in the future, the general rapporteur may suggest that the Competition Authority should also take this commitment into account when determining the amount of the sanction.*

*IV. - A total or partial exemption from financial penalties may be granted to an undertaking or a body which, along with others, has implemented a practice prohibited by the provisions of Article L. 420-1, if it has helped to establish the existence of the prohibited practice and to identify its perpetrators by providing information which the Authority or the administration did not have access to beforehand. To that end, subsequent to the initiative taken by that undertaking or body, the Competition Authority, at the request of the general rapporteur or the Minister for the Economy, adopts a leniency notice, which stipulates the conditions the envisaged exemption is subject to after the government representative and the undertaking or body concerned have submitted their observations; the decision is conveyed to the undertaking or the body and the minister, and is not published. When a decision is taken pursuant to I of this article, the Authority may, if the conditions stipulated in the leniency notice have been complied with, grant an exemption from the financial penalties proportionate to the contribution made to proving the existence of the infringement.*

*V. – When an undertaking or body does not appear when summoned or fails to respond by the deadline given for information or for submission of documents requested by one of the agents mentioned in I of Article L. 450-1 under the powers invested in him by Titles V and VI of Book IV, the Authority may, at the request of the general rapporteur, issue an injunction backed up by a coercive fine against the delinquent party, up to the limit set out in II.*

*If an undertaking impedes the investigation, by such means as providing incomplete or inaccurate information, or by submitting incomplete or distorted documents, the Authority, acting at the request of the general rapporteur, and after hearing the undertaking in question and the Government Commissioner, may decide to impose a fine on it. The maximum amount of the fine is 1% of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented.”*