

The French Competition Authority amends its method for determining fines

The French Competition Authority published on July 30, 2021 a notice on the method for determining fines [1] in relation to anticompetitive practices, which repeals and replaces the previous notice dated May 16, 2011.

This new notice, based on case law and the decisions rendered by the French Competition Authority in the last ten years, draws the consequences of the transposition of the ECN+ Directive [2] aimed at increasing the effectiveness of competition rules within the European Union.

The legal background

The notice takes into account the recent legislative developments related to the transposition into French law of Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal (commonly referred to as the ECN+ Directive).

This transposition was made effective by Law No. 2020-1508 of December 3, 2020 on various proposals to adapt to European Union law in economic and financial matters [3], as well as by Ordinance No. 2021-649 of May 26, 2021 on the transposition of the ECN+ Directive. [4].

These new texts reflect the will of the European legislator to reinforce the harmonization of competition law within the Union and to increase the efficiency of the action of national authorities in this area.

In this context, ensuring the effectiveness of penalties is essential.

The ECN+ Directive, which harmonizes the criteria for determining the amount of financial penalties, provides that fines must be *“effective, proportionate and dissuasive”*.

The objectives

With this notice, the French Competition Authority wishes to present, in a clear and transparent manner, its method for determining fines in relation to anticompetitive practices. It reaffirms the importance of the repressive and dissuasive nature of fines.

The main changes in the notice

Article L464-2 §5 of the French Commercial Code stipulates that the financial penalties are assessed according to the following criteria: The seriousness of the facts - the duration of the practices - the existence of an association of companies - the possible repetition of the offense.

In its notice, the French Competition Authority discusses each of these criteria.

- **Assessment of the seriousness and duration of the anticompetitive practices**

The notice clarifies the method for calculating the basic amount of the fine which is primarily based on the value of sales. Specific situations are addressed, such as two-sided or multi-sided markets, which are often found in the digital economy industry.

The list of factors taken into account in assessing the seriousness of the practices is expanded and now refers to diversity of supply, quality, innovation and environment.

For the most serious horizontal agreements and abuses of dominant positions, the amount of the fine may be increased by 15% and 25% of the value of sales.

The French Competition Authority aligns its criteria for assessing the duration of infringements with those of the European Commission, and specifies in particular that this duration will be calculated on a *pro rata temporis* basis for infringements with a duration of less than one year.

- **The criteria for individualizing the penalties**

The French Competition Authority reiterates the importance in its method of a case-by-case assessment of infringements and penalties in accordance with the principles of necessity and proportionality, excluding any automaticity in the determination of penalties.

Several mitigating circumstances may thus be taken into account, such as the discontinuation of the relevant practices as soon as the French Competition Authority intervenes or effective cooperation.

Conversely, the French Competition Authority now provides that the financial penalty may be increased if the illicit gains generated by the anticompetitive practice exceed the amount of the basic fine.

- **The regime applicable to associations of companies**



The French Competition Authority introduces new calculation criteria and new ceilings for penalties imposed on associations of companies: An association of companies may now be fined up to 10% of its turnover or 10% of the sum of the total worldwide turnover of each active member.

- **Assessment of repetition**

To assess the existence of a repeated offence, the French Competition Authority will take into account previous French decisions that established the existence of an infringement, but also any decision taken in other Member States or by the European Commission, which is a notable illustration of the enhanced European cooperation between national authorities promoted by the ECN+ Directive.

A repetition of offences may result in a 15% to 50% increase of the basis amount of the fine.

The full notice is available on the French Competition Authority's website.

[1] https://www.autoritedelaconurrence.fr/sites/default/files/Communique_sanction.pdf (in French)

[2] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0001&from=FR>

[3] <https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000041566073/> (in French)

[4] <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043534820> (in French)

SoulieR Avocats is an independent full-service law firm that offers key players in the economic, industrial and financial world comprehensive legal services.

We advise and defend our French and foreign clients on any and all legal and tax issues that may arise in connection with their day-to-day operations, specific transactions and strategic decisions.

Our clients, whatever their size, nationality and business sector, benefit from customized services that are tailored to their specific needs.

For more information, please visit us at www.soulieR-avocats.com.

This material has been prepared for informational purposes only and is not intended to be, and should not be construed as, legal advice. The addressee is solely liable for any use of the information contained herein.