



The authority adopts a new procedural notice on fines, marginally modified following public consultation

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***Resume:** On July 30, 2021, the French Competition Authority adopted and made public the new procedural notice on the method for determining sanctions¹. It replaces the initial procedural notice of May 16, 2011². The new notice was the subject of a public consultation opened on June. It is adjusted to the new applicable legislative provisions resulting from the Order n° 2021-649 of 26 May 2021³ transposing the ECN+ Directive⁴. The directive aims at a greater harmonization of sanctions imposed by national competition authorities. The latter must now take into account the duration and the seriousness of the infringements. In addition, this procedural notice makes a number of adjustments based on the practice of the ADLC over the ten years since the previous press release, the case law of the supervisory courts and the practice of the European Commission. Thus, this new notice is a further step towards the harmonization of the applicable competition rules by promoting a homogeneous application of sanctions between the Authority and the European Commission. However, the changes made remain superficial on the whole.*

I - SOURCES OF INSPIRATION FOR THE PROCEDURAL NOTICE:

The procedural notice on fines of July 30, 2021 updates the release of May 16, 2011 (B).

The purpose of this new notice is to harmonize sanction regimes at the national and European levels (A)

A - Harmonization of sanction regimes at the national and European levels:

As we have seen, Order 2021-649 of May 26, 2021⁵, which transposes the ECN+ Directive, establishes a common legal framework allowing for greater harmonization of competition law rules within the European Union. In the same logic, the release of July 30, 2021 ensures that the sanction regime is similar at the French level and at the Commission level.

¹ French competition authority, Press release of the Competition Authority on the method for determining financial penalties, 30 July 2021

² French competition authority, Press release of the Competition Authority on the method for determining financial penalties, 16 May 2011

³ Ordonnance n°2021-649 du 26 May 2021 :

⁴ European union, directive 2019-1 :

⁵ Op cit, ordonnance n°2021-649 du 26 May 2021

Moreover, it follows the footsteps of Regulation 1/2003⁶, which aimed at an "integrated" and decentralized application of European law, whether by national competition authorities or the Commission.

Finally, the new notice is in line with the European legislator's desire to harmonize the sanctioning powers of national competition authorities by requiring that these sanctions can actually be imposed and that they be based on unified criteria and ceiling rules.

B - An update of the procedural notice:

The new procedural notice on fines repeals and replaces the previous release dated May 16, 2011⁷.

In addition, this procedural notice updates the sanction regime in light of the Authority's decision-making practice and the case law of its supervisory courts over the past ten years.

In addition, the new notice takes into account both the transposition of the ECN+ Directive into domestic law and Law No. 2020-1508 of December 3, 2020 (DDADUE)⁸.

In this procedural notice, the Authority specifies the manner in which the penalties incurred in the event of an anticompetitive

practice are determined: objectives of the penalties / procedural details on the calculation method / details of the method used in practice by the Authority to proportion the penalties on a case-by-case basis / etc.

Thus, the Authority reiterates the repressive nature of financial penalties and its desire to dissuade companies from infringing competition law. The penalties are thus aimed at preserving economic public policy.

II - THE MAIN NOVELTIES OF THE PROCEDURAL NOTICE ON FINES :

The present notice adapts the notion of seriousness of the practices (A), specifies the criteria for individualizing and repeating the sanction (B) and renews the sanction regime for associations of undertakings (C).

A - The concept of seriousness of the practices:

Taking its cue from the European Commission, the Authority is adapting the concept of the seriousness of practices.

⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

⁷Op cit, Press release of the Competition Authority on the method for determining financial penalties, 16 May 2011

⁸ Law n° 2020-1508 of December 3, 2020 (ddadue)

The method used to determine the financial penalties the Authority first determines the basic amount of the financial penalty by taking into account the seriousness of the facts and the duration of the practices concerning the infringements in question. This amount is then adjusted to take into account the specific conduct and individual circumstances of each entity concerned, with the exception of repeat offences, which the law makes an independent criterion. The amount thus obtained is compared to the legal maximum before being reduced to take account of leniency and then adjusted where appropriate in light of the entity's ability to pay. (Point 19).

As regards the calculation of the basic amount of the fine, the Commission specifies the data on which it can base its calculation of the value of sales (point 22). It has also expanded the list of cases in which it may adapt this method. The reference taken by the Authority is the value of all the categories of products or services directly or indirectly related to the infringement, or where appropriate to the infringements, sold by the undertaking or association of undertakings concerned during its last full accounting period of participation in the infringement(s), except where it considers that the last full accounting year of participation in the infringement is clearly not a representative reference, the Authority will use a year which

it considers more appropriate, or an average of years, giving reasons for its choice.

In addition, the Authority is updating the list of factors that it may take into account in assessing the seriousness of the practices. In assessing the seriousness of the facts, the Authority may take into account, in particular, the following elements, depending on their relevance (paragraph 28):

- "- the nature of the infringement(s) in question and of the facts used to characterize it or them, as well as the nature of the parameter(s) of competition concerned (price, volume, diversity, quality, cost, innovation, production, environment, etc.);
- the nature of the activities, sectors or markets in question (public service activity, health, public market, sector recently opened to competition, innovative market, etc.);
- the nature of the persons likely to be affected (small and medium-sized enterprises, vulnerable consumers, captive buyers, etc.);
- the objective characteristics of the infringement(s) (secret or not, degree of sophistication, knowledge of the infringing nature of the practice in question, existence of policing mechanisms or retaliatory measures, misuse of legislation, geographical scope, etc.)".

The Authority therefore adds two competition parameters to be taken into account in assessing the seriousness of the

facts: the harm to the diversity of supply and the harm to the health sector.

In point 30 concerning the proportion of the value of sales achieved that will be applied by the Authority in relation to the most serious infringements, the Authority replaces the ambiguous notion of "top of the scale" with a numerical reference to a rate of between 15 and 30%.

In addition, the Authority reiterates that it intends to severely punish the most serious horizontal cartels and abuses of dominance. In order to dissuade companies from participating in such practices, the authority provides for the possibility of adding to the basic amount a sum of between 15% and 25% of the value of sales. (point 31).

Following the example of the ECN+ Directive and the transposition order of May 26, 2016, the authority enshrines duration as a parameter for determining penalties (points 32 to 34).

To this end, the authority has aligned the coefficient for taking duration into account with that provided for in the European Commission's guidelines since 2006, so that each full year of infringement duration is now taken into account. When an infringement lasts less than one year, the authority calculates the duration of the infringement of the undertaking or association of

undertakings in proportion to the time of their participation in it.

In this way, the authority wishes to preserve the deterrent and repressive effect of the sanctions it imposes.

B - Criteria for individualizing and repeating the sanction :

New mitigating circumstances have been integrated when the company or an association of companies puts an end to the infringement as soon as the Authority intervenes, but also when it cooperates with the Authority by exceeding its obligations. (point 37).

In addition, the Authority now provides for the possibility of increasing the penalty where it appears from the evidence at its disposal that the estimated illicit gains made by the undertaking or association of undertakings concerned as a result of the infringement or infringements in question exceed the amount of the financial penalty that it could impose. (point 42).

Finally, the Authority will take into account the penalties imposed by the other competition authorities in the Union and by the European Courts in assessing repetition. (point 44).

C - A renewed sanction regime for associations of undertakings:

The procedural notice on fines incorporates the replacement of the notion of organization by the notion of association of undertakings.

An association of undertakings may now be fined up to 10% of its turnover or 10% of the sum of the total worldwide turnover of each member active on the market affected by the association's infringement, where the association's infringement relates to the activities of its members.

It should be noted that where a fine is imposed not only on the association of undertakings but also on its members, the turnover of the members on whom a fine is imposed is not taken into account when calculating the fine imposed on the association of undertakings.

Finally, the new procedural notice also incorporates the mechanism of financial solidarity between the members of an association of undertakings in the event that the association is fined for an infringement relating to the activities of its members, as

provided for in the ECN+ Directive and transposed into domestic law by the Order.

Conclusion:

It should be recalled that the Authority takes into account the different elements of the case and adjusts the coefficients on a case-by-case basis, in compliance with the principles of necessity and proportionality of the sanction. While the press release is a good guide for understanding the methodology used by the Authority, it should not be understood as an automatic calculation method.

What should we think of these new features? As Alain Ronzano points out, « to be honest, with two or three exceptions, the changes made are relatively cosmetic »⁹. It is true that the new release is more of an update than a revolution.

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⁹Op cit. Alain Ronzano, competition news - the newsletter on competition law