

Kluwer Competition Law Blog

Towards greater convergence on the calculation of fines

Eric Barbier de la Serre (Jones Day) · Monday, September 27th, 2010

It is not uncommon for the law to progress as a consequence of significant discrepancies and disagreements arising between courts and enforcers. This is exactly what may currently be happening to the French rules governing the calculation of fines. One can expect that, once the dust has settled, the calculation methodology applied by the French Competition Authority will be further aligned with that used by the European Commission, as well as the UK, German and Spanish Competition Authorities.

The French Competition Authority does not currently apply any Fining Guidelines. It relies rather on the French Commercial Code, which merely provides that “[t]he 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 company penalised or to the group to which the latter belongs, and to the likelihood of any repetition of [anticompetitive] practices”. An additional condition is that the fine must remain under the 10% cap based on the undertaking’s global turnover, but the Authority otherwise enjoys a wide margin of discretion. This has led the Authority to issue decisions containing little detail on how it calculates fines, in particular on how the various criteria set out in the French Commercial Code weigh against each other.

The Paris Court of Appeals had not previously expressed any real disagreement with this approach. But a radical change took place in January 2010: In a [famous judgment](#) concerning a cartel among steel traders, the Paris Court of appeals decreased by over 85% the fines imposed by the Authority on these traders. In the Court’s view, the Competition Authority should have taken into account the impact of the economic crisis on the sanctioned companies. More importantly, the Paris Court of appeals applied a calculation method that significantly diverged from the one used by the Authority: the Court held that the 10% cap must be used as a starting point for the calculation of the fine, i.e., not just as a ceiling that may apply once the fine has been calculated.

This important discrepancy has led the French Minister for the Economy to commission a report on the Authority’s fining methodology. The three mandated experts have now officially presented [their conclusions](#), which contain a number of interesting recommendations, including:

— The adoption of Fining Guidelines by the French Competition Authority, which in the experts' view should mirror those applied by the Commission. The experts therefore reject the idea of using the 10% cap as a starting point. They also recommend that (i) the basic amount be adjusted depending on the average profit margin in the relevant sector; (ii) duration be taken into account using a sliding scale of multipliers, like in Spain (e.g., from 1 for the first year to 0,1 for the 10th year and beyond); and (iii) mitigating circumstances include the existence of state-of-the-art compliance programs and compensations paid to victims. According to the experts, the notion of “*damage caused to the economy*”, to which the French Commercial Code explicitly refers, should be applied only as an aggravating or attenuating factor and when identifiable.

— Improving opportunities for the investigated parties to present their observations on the amount of the fine (i.e., in their reply to the final report presented to the Authority).

— Finding the parent company liable only if it was aware of the infringement or was directly involved therein.

— Transferring the power to calculate fines to a dedicated body within the Authority, which would therefore add up to the Authority's College (which is in charge of adopting decisions and is already separate from the Authority's investigation services).

— The possibility of granting suspension with probation, but only for first-time infringers and not for cartels.

The experts also recommend the adoption of sanctions imposed on individuals, whether criminal or in the form of a prohibition to perform certain executive functions.

Interestingly, on the very same day the report was presented, the French Competition Authority issued a [decision](#) which for the first time seems to apply a precise calculation methodology based on the Commission's Guidelines. That may be the Authority's first reaction to the report. But more is coming soon: according to press reports, the Authority is already in the process of drafting its own Fining Guidelines. Stay tuned.

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This entry was posted on Monday, September 27th, 2010 at 11:15 am and is filed under

France

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