

# Agenda

## Advancing economics in business

### The ‘damage to the economy’ test under French competition law: opportunity or burden?

**The French competition authority, Autorité de la Concurrence, has published a study (‘the Study’) about a requirement in French competition law for the effects of an anticompetitive practice to be taken into account in the determination of fines. This legal provision differs from European competition law, as it promotes an effects-based approach to fines. The requirement could be a useful tool for ensuring that punishments are proportionate, but is the Authority making the most of it?**

The specific provision that the Authority’s study focuses on is that of the ‘damage to the economy’.<sup>1</sup> In essence, this refers to the provision under the French Commercial Code that the damage to the economy arising from anticompetitive practices (i.e. the *effect* of such practices) should be considered when determining the appropriate level of fines.

Such a provision is included in the national law of only three other European countries,<sup>2</sup> and is expressly not part of EU competition law. However, the provision, and the Authority’s treatment of it, is highly relevant to the ongoing debate about the use of object versus effects infringements under EU law. In essence, this debate concerns whether competition authorities are prosecuting too many cases as ‘object’ infringements—i.e. those which are harmful *by their very nature* (e.g. cartels)—and whether they should instead be conducting an ‘effects’ assessment, which involves determining whether the practice in question is likely to have had harmful effects on the relevant consumers.

In broad terms, the Study discusses the legal and economic framework for the assessment of the damage to the economy and the Authority’s practice in recent years. It thus sets out the key elements considered in the assessment and the principles established in case law.

So, what is the legal framework for the assessment of fines and the damage to the economy, and how does the Authority interpret this framework? Has the Authority’s approach evolved in recent years?

#### The legal framework

The Commercial Code requires the Authority to consider four general criteria when determining the penalty imposed on a

company that is found to have infringed competition law. In particular, it specifies that the financial penalties need to be proportionate to:<sup>3</sup>

- the seriousness of the alleged breaches;<sup>4</sup>
- the scale of the damage caused to the economy;
- the financial situation of the firm being penalised or the group to which it belongs;
- the repetition of the prohibited behaviour.

The first two criteria refer to the prohibited behaviour itself and are therefore common to all the firms involved, while the other two relate to each individual firm.

Indeed, all of the criteria except the damage to the economy are also considered in the determination of fines under EU competition law. In particular, the basic level of fines that can be imposed on companies involved in anticompetitive practice is up to 30% of the value of the sales that relate to the infringement.<sup>5</sup> In determining the percentage to apply in a specific case, the European Commission takes account of the gravity and duration of the practice, the level of involvement, and whether the firm has previously behaved in a similar way. Consideration is also given to the financial situation of the relevant firm (for example, whether it is able to pay fines). However, the actual impact of the practice is not considered.

This article focuses on the first two criteria. ‘Seriousness’ is assessed with regard to the *object* of the practice and its intrinsic characteristics that are independent of the specific market. For example, a price-fixing cartel is normally seen

as a serious infringement. The assessment of the 'damage' considers the *effect* of the practice on the market in which it took place, and potentially any wider impact on the French economy.

The object and effect approaches need not lead to the same conclusion. Indeed, there might be no or limited damage to the economy, even if the practice is considered to be particularly serious (e.g. in the case of an agreement between competitors to raise prices that the firms could not implement effectively).

Similarly, the damage caused to the economy might be significant despite the practice being deemed less serious (e.g. where information exchange about past prices has enabled effective coordination). The Commercial Code (unlike EU competition law) stipulates that the fine must be determined on the basis of both the object and the effect of the relevant practices.

Indeed, case law suggests that the Authority must always consider the effect on the market, regardless of the seriousness of the alleged practice. For example, the French Supreme Court, the Cour de cassation, ruled in 2010 that the existence of a damage to the economy cannot be presumed:

In view of article L. 464-2 of the Commercial code;

Given that it follows from this text that the level of the sanction of a practice, which has as object or might have had as effect to prevent, restrict or distort competition, should be proportionate to the scale of the damage caused by this practice to the economy; that **this damage shall not be presumed**,<sup>6</sup>  
[Emphasis added]

The Authority's approach appears to contradict this. It considers a detailed analysis of the damage to the economy to be superfluous, especially in the case of an infringement of competition law by object. In the Study, the Authority states that:

It would be paradoxical if, at the stage of the determination of the fines, the Authority found itself obliged to conduct an in-depth analysis of the effect of anticompetitive practices which, in several cases, are infringements by object, by virtue of their very nature. (The Study, p. 62. Translation by Oxera.)

[A quantitative assessment of the damage] could amount to conducting a detailed assessment of the real effects of the practices while, in cases of horizontal agreements, these practices have been considered [infringements] by object due to their very nature. (The Study, p. 93. Translation by Oxera.)

This approach therefore reflects that of EU competition law, where the effect of the infringement is not taken into account when setting fines. What does this mean for the assessment of cases in practice?

## Towards a formalistic assessment?

The Authority's approach to the assessment of damage to the economy can therefore in theory include both qualitative and quantitative assessments of the practice and market in question.

### The qualitative approach

In its notice on penalties from 2011, the Authority sets out a broad set of (aggravating or mitigating) factors that are relevant to a qualitative assessment. It distinguishes five main categories:<sup>7</sup>

- the scale of the infringement(s) (e.g. geographical coverage, and the number and combined market shares of the undertakings involved);
- the economic characteristics of the activities, sectors or markets involved (e.g. barriers to entry, degree of concentration, price elasticity and margins);
- the short- and medium-term consequences of the infringement(s) (e.g. obstacles to a foreseeable price decrease, and an indirect impact on connected, upstream or downstream sectors or markets);
- the longer-term consequences of the infringement(s) (e.g. the creation of barriers to entry; exclusionary, dampening or discouraging effects on competitors; a decline in product or service quality or innovation; hindrance to technical progress; and impacts on the competitiveness of the sector involved or other sectors);
- their broader impact on the economy, and on final consumers.

These factors are in line with case law and include those considered relevant by the court of appeal and the Cour de cassation, although the case law also allows for other elements to be considered.

Indeed, in its recent decisions, the Authority appears to have limited itself to verifying whether the market is characterised by the specific factors listed above, and has generally taken a highly formalistic approach to the damage assessment.

For instance, to estimate the scale of the damage to the economy caused by a dairy products cartel, the Authority considered as relevant aggravating factors the extent of the cartel's geographic coverage, the existence of barriers to entry and overcapacity, and its weak demand elasticity.<sup>8</sup>

At the same time, the Authority recognised that retailers had countervailing buyer power, and considered that this was likely, in certain circumstances, to mitigate the impact on the economy. Nonetheless, it concluded that 'the practices caused a substantial damage to the economy'.<sup>9</sup> In doing so, the Authority does not appear to have included this relevant

factor in its analysis, and thus could not explain how the practices had affected the market as a whole.

This formalistic approach is also put forward in the Study:

Given the wording of the case law of the Paris court of appeal and the *Cour de cassation*, **such a quantification is, however, not required** from the *Autorité de la concurrence*, and in several cases the assessment of the damage to the economy relies primarily on parameters of a qualitative nature. Indeed, combined with the duration of the practices and with the size of the affected market, the coverage of the practices in terms of products, distribution channels and geographical markets, the cumulated market share of the participants, consumers' price sensitivity, and the existence of barriers to entry or countervailing buyer power make it possible, in several cases, to assess with sufficient precision the significance of the damage to the economy caused by the sanctioned practices. (The Study, p. 93. Translation by Oxera.) [Emphasis added]

The Authority therefore appears to consider a qualitative assessment of such factors to be sufficient for a reliable analysis of the extent of the damage caused to the economy.

However, such a formalistic approach to the qualitative assessment brings with it the risk that the evaluation of the damage will no longer be case-specific. For example:

- the Authority does not take into account actual or likely effects, but instead considers all *potential* effects, which may, in fact, be implausible. The damage is therefore presumed rather than demonstrated;
- the approach does not allow the Authority to account for the actual ability of the participants in the infringement to affect prices or other parameters in the market. It considers only elements of market structure (concentration, demand–price elasticity, barriers to entry), and excludes other factors relevant to competition such as the price level and product availability.

## The quantitative approach

The Authority has tended to sidestep the quantitative approach to the issue.

The quantitative approach aims to directly measure the impact of the practice in question on the market equilibrium, and the price level in particular. The Study is critical of this type of assessment due to:

- its presumed lack of relevance in the context of the overall estimation of the damage to the economy;
- its technical limitations, which mean that it is difficult for the Authority (and the courts) to use and interpret.

The Study (p. 63) argues that damage to the economy cannot be limited to a simple economic indicator, such as the existence of an overcharge, and that it is not limited to customer harm.

Although these general principles are correct, this does not mean that quantitative analysis has no value. Estimating the overcharge, for example, allows the scale of the harm caused in the relevant market—and thus the magnitude of the impact on the broader economy—to be measured. As the Study notes (pp. 63, 90 and 92), the overcharge can be considered as a 'lower bound' to the overall damage resulting from the practice.

However, if it is shown that the overcharge is limited, the general disruptions to the economy are also likely to be restricted.

The role of the price level in determining the incentives of the different market participants should not be underestimated. The price level is a factor in key decisions in terms of (for example) investment, capacity and volume, and diversification, and is therefore critical in the assessment of the damage.

Avoiding such quantitative analysis—as the Authority appears to have done in recent cases and recommends in the Study—means dismissing a crucial element in the assessment of the appropriate fines. While quantitative approaches such as econometric analysis have their technical limitations (as highlighted in the Study, pp. 84–93), these are well known to practitioners and academics, and sophisticated methods have been developed to address many of them.

In any event, the limitations set out in the Study do not justify disregarding econometric methods altogether. Such methods are widely accepted and used in a range of contexts, from clinical trials to expert evidence in major litigation and arbitration cases. While such quantitative methods are more commonly used in US courts, their use is rapidly increasing in Europe, for example to assess the damage to competitors and consumers. As stated by Judge Frédéric Jenny of the French Supreme Court:

[O]n the one hand judges cannot... become fully knowledgeable about economic methodology... on the other hand, having some notions of basic scientific methodologies can help them understand what the experts are saying and help them assess the general 'quality' of the expertise with which they are presented.<sup>10</sup>

## Conclusion

The obligation to assess the damage to the economy resulting from anticompetitive practices is an important feature of French competition law. It aims to ensure that punishments are proportionate to the impact of the behaviour

in question, and thereby differs from the approach to fines taken by the European Commission and most EU countries.

However, the Authority appears to consider this legal requirement as more of a burden than an opportunity to reach better decisions, and appears to be looking to reduce its requirements, even in object cases. This approach is similar to the increasing trend among competition authorities across Europe, including the European Commission, of adopting formalistic approaches and 'object' infringements.

Recent case law (in particular, the *Cartes Bancaires* judgment<sup>11</sup>) has reiterated the need for caution when using 'by object' approaches, but whether this will influence the approach adopted by the Authority remains to be seen.

Even if such an in-depth assessment were to increase the burden on the Authority, carrying out a high-quality quantitative analysis would allow it to make evidence-based decisions and thereby maintain its reputation as one of the world's leading competition authorities.<sup>12</sup>

<sup>1</sup> Autorité de la Concurrence (2015), 'Étude thématique : le dommage à l'économie', 1 April ('the Study').

<sup>2</sup> Spain, Hungary and Poland. See the Study, p. 63.

<sup>3</sup> French government (2013), 'Commercial code', 1 July, article L 464-2 I. English version of the text available at: <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>.

<sup>4</sup> In order to assess the seriousness of the infringement, the Authority may take into account, for example, the nature of the infringements at stake; the nature of the activities, sectors or market at stake; the nature of the persons liable to be affected (small and medium-sized enterprises, vulnerable consumers, etc.); or the objective features of the infringements (secrecy, degree of refinement, existence of policy mechanisms or retaliatory schemes).

<sup>5</sup> European Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003', (2006/C 210/02), [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006XC0901\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006XC0901(01)&from=EN).

<sup>6</sup> Cour de cassation, Chambre commerciale, financière et économique, Ruling no. 430 of 7 April 2010.

<sup>7</sup> Autorité de la Concurrence (2011), 'Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties', para. 32. English version of the text available at: [http://www.autoritedelaconcurrence.fr/doc/notice\\_antitrust\\_penalties\\_16may2011\\_en.pdf](http://www.autoritedelaconcurrence.fr/doc/notice_antitrust_penalties_16may2011_en.pdf).

<sup>8</sup> Autorité de la Concurrence, *Décision n°15-D-03 du 11 mars 2015 relative à des pratiques mises en œuvre dans le secteur des produits laitiers frais*. Oxera advised one of the defendants in this case.

<sup>9</sup> Autorité de la Concurrence, *Décision n°15-D-03*, pp. 58–9.

<sup>10</sup> Jenny, F. (2010), 'A judge's perspective on the role of economic analysis in damages actions', *Agenda*, April, <http://www.oxera.com/Latest-Thinking/Agenda/2010/A-judge%E2%80%99s-perspective-on-the-role-of-economic-anal.aspx>.

<sup>11</sup> Case C-67/13, *Groupement des cartes bancaires (CB) v EC Commission*, judgment of 11 September 2014.

<sup>12</sup> See Global Competition Review, 'Rating enforcement 2015: star ratings', <http://globalcompetitionreview.com/surveys/article/38900/star-ratings>.