



**Notice of 16 May 2011  
on the Method Relating to the Setting of Financial Penalties**

**I. The legal provisions applicable to the setting of financial penalties**

1. Pursuant to Section I of Article L. 464-2 of the Code of commerce and to Article 5 of Council Regulation (EC) N. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 of the Treaty on the functioning of the European Union, hereafter the “TFEU”), the *Autorité de la concurrence* (the French Competition Authority, hereafter the “*Autorité*”) is empowered to impose financial penalties on undertakings and entities that have engaged in anticompetitive practices prohibited by Articles L. 420-1, L. 420-2 and L. 420-5 of the French Code of commerce, as well as by Articles 101 and 102 of the TFEU.
  
2. This power to impose financial penalties is one of the means conferred on the *Autorité* to carry out the mandate with which it is entrusted by Article L. 461-1 of the Code of commerce, that consists in enforcing competition rules. This mandate aims at ensuring that the freedom enjoyed by market players in order to innovate, to produce and to market quality goods and services at the best price does not give rise to agreements and abuses that hinder the competition-based operation of the economy, that harm other undertakings and consumers, and, ultimately, that affect economic growth as well as the welfare of citizens in general. It requires the *Autorité* not only to pursue a policy of proactive market monitoring, but also to drive market players towards compliance with competition rules, as well as to prevent<sup>1</sup>, detect, remedy and sanction infringements to those rules.

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<sup>1</sup> The *Autorité* encourages undertakings to set up antitrust compliance programs. It will soon provide guidance on its general approach to compliance, in order to assist business on this matter. In parallel, the conditions in which it may take into account proposals of commitments to set up antitrust compliance programs, in the context of the settlement procedure provided by Section III of Article L. 464-2 of the Code of commerce, by granting a reduction of the financial penalty if it deems those programs to be relevant, trustworthy and efficient, will be explained in a forthcoming procedural notice relating to this procedure.

3. The third paragraph of Section I of Article L. 464-2 of the Code of commerce sets out the legal criteria according to which financial penalties must be set. It provides that:

*“Financial penalties are proportionate to the seriousness of the facts, to the importance of the harm done to the economy, to the situation of the sanctioned entity or undertaking or of the group to which the undertaking belongs, and to the possible reiteration of practices prohibited by [Title VI of Book IV of the Code of commerce]. Penalties are set individually for each sanctioned undertaking or entity and reasoned individually.”*

4. The fourth paragraph of the same Section sets out the maximum amount of financial penalties. It provides that:

*“Where the infringer is not an undertaking, the maximum amount of the penalty is € 3 million. Where the infringer is an undertaking, the maximum amount is 10 % of the highest worldwide pre-tax turnover achieved during one of the accounting years closed since the accounting year prior to that in which the practices have taken place. Where financial statements have been consolidated or combined pursuant to the provisions applying to the corporate form of the undertaking, the turnover that is taken into account is the one indicated in the consolidated or combined statements of the consolidating or combining undertaking.”*

5. These provisions have been last amended by Article 73 of the Law N. 2001-420 of 15 May 2001 on New Economic Regulations with the aim, recalled in the Preamble to this act, of *“reinforcing the deterrent effect”* of financial penalties. To that effect, the Government and Parliament have, first, added reiteration to the legal criteria according to which financial penalties must be set. They have also called for financial penalties to be *“better fitted to anticompetitive practices undertaken by group[s]”*, by taking into account *“the turnover of the group to which [the undertaking] belongs”*. They have in addition enabled the *Autorité* to *“take as a reference the worldwide turnover of one of the accounting years closed since the accounting year prior to that in which the practices have taken place”*, and no longer the turnover achieved in France during the last accounting year, with the aim of *“defeating evasion schemes”* that had been witnessed in the past. Finally, they have decided that *“the ceiling of the penalties [would be] increased”* to 10 % of the worldwide turnover, in accordance with the law of the European Union as well as of many of its other Member States.

## **II. The content of the present notice**

6. The present notice explains the method followed in practice by the *Autorité* when setting financial penalties imposed on a case-by-case basis pursuant to Section I of

Article L. 464-2 of the Code of commerce<sup>2</sup>. It also synthesizes the main features of the practice developed on the merits by the *Autorité* under the judicial review of the Court of Appeal of Paris, which is itself subject to the judicial review of the *Cour de Cassation* (French Supreme Court).

7. The notice commits the *Autorité*, which must set the financial penalties that it imposes in a consistent way. It is therefore opposable to it, to the extent that the *Autorité* does not set forth, in the reasoning of its decision, the specific circumstances or the motives of general interest that lead it to depart from it in a given case.
8. The notice may be updated or modified, in consideration of further developments in the *Autorité*'s practice and in the case-law of the *Cour de Cassation* and of the Court of Appeal of Paris, as well as of Constitutional Court, the *Conseil d'État* (French Administrative Supreme Court), the Court of Justice of the European Union and the European Court of Human Rights.
9. The following Sections cover: the aims of the present notice (III); the method followed by the *Autorité* when setting the financial penalties imposed on the authors of anticompetitive practices (IV); the aspects of this method that are adapted in the case of some anticompetitive practices relating to calls for tenders (V).

### **III. The aims of the *Autorité*: increasing transparency and enriching the discussion with the parties**

10. The law vests the *Autorité* with a wide margin of appraisal allowing it to set on a case-by-case basis, in accordance with the legal requirement of individualization as well as with the principle of proportionality, the financial penalties that it imposes pursuant to the criteria provided by Section I of Article L. 464-2 of the Code of commerce.
11. It follows from the case-law of the Court of Appeal of Paris<sup>3</sup> that these financial penalties aim at punishing the authors of infringements to the competition rules as well as at deterring market players from engaging into such practices. Their setting on a case-by-case basis, in accordance with the criteria provided by the Code of commerce as well as with general legal principles, is therefore informed by a two-fold objective of punishment and of deterrence, the latter being aimed both towards the individual undertaking or entity that is being fined and towards other market players in general.

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<sup>2</sup> The notice does not deal, therefore, with financial penalties that the *Autorité* can impose by virtue of other legal provisions, such as Section V of Article L. 464-2, Article L. 464-3 and Article L. 430-8 of the Code of commerce.

<sup>3</sup> Court of Appeal of Paris, 9 April 2002, *Géodis Overseas France*.

12. The *Autorité* is empowered to enforce Articles 101 and 102 TFEU, in parallel to Articles L. 420-1 and L. 420-2 of the Code of commerce, in the event that an anticompetitive practice is liable to affect trade between the Member States of the Union. The Court of Justice has ruled in that regard that “[the] effectiveness of the penalties imposed by the national competition authorities or those of the [Union] on the basis of Article [103(2)(a) TFUE] is a condition for the consistent implementation of Articles [101 and 102 TFUE]”<sup>4</sup>. Given these requirements, the *Autorité* takes into account, in the method that it follows in order to exercise in practice its power of appraisal within the legal framework provided by Section I of Article L. 464-2 of the Code of commerce, of the Principles for convergence drawn by the whole of European competition authorities with a view to ensuring the effectiveness and consistency of the approaches followed in relation to financial penalties<sup>5</sup>.
13. The implementation of Article L. 464-2 of the Code of commerce leads the *Autorité* to set out, in the decisions in which it imposes financial penalties on undertakings or entities that have infringed competition rules, the main factors taken into consideration when setting these penalties. The reasoning of these decisions, which has significantly developed in recent years, along with the reasoning of the rulings of review courts, contributes to achieving transparency in relation to the way in which the power of appraisal conferred on the *Autorité* is exercised on a case-by-case basis. However, this reasoning necessarily reflects the specific facts and background of each case. Moreover, it does not prejudge the way in which the *Autorité* may set financial penalties in other cases.
14. In this context, the publication of the present notice, which is foreseen by the law<sup>6</sup> insofar as the *Autorité* considers it to be a “guideline” in the sense of the case-law of the administrative courts<sup>7</sup>, aims at enhancing transparency by providing upfront guidance on the way according to which the *Autorité* exercises its power of appraisal in practice when setting financial penalties within the legal framework provided by Section I of Article L. 464-2 of the Code of commerce. This publication enables stakeholders to better understand how financial penalties are set, and allows review courts to check this process more readily.
15. The *Autorité* herein indicates the method that it applies to that effect. The different steps of this method frame the way in which the *Autorité* exercises its power of appraisal, without substituting themselves to the individualized assessment which is carried out by

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<sup>4</sup> Court of Justice, 11 June 2009, X BV (Case C-429/07), point 37.

<sup>5</sup> See the document published by the ECA (Association of European Competition Authorities) in May 2008, “*Pecuniary sanctions imposed on undertakings for infringements of antitrust law: Principles for convergence*”. This document is available on the website of the *Autorité*.

<sup>6</sup> Article 7 of the Law N. 78-753 of 17 July 1978 dealing with various measure improving the relations between the administration and the general public as well as with various administrative, social and tax provisions.

<sup>7</sup> *Conseil d’Etat*, 11 December 1970, *Crédit foncier de France*.

the *Autorité* in each case, in view of its specific circumstances. Neither does the present notice set out in detail all of the factors that are liable to be taken into account in this context.

16. Indeed, the setting of financial penalties may lead the *Autorité* to take into consideration, in accordance with the legal requirement to individualize them, a wide range of factors, the nature and importance of which may differ from one case to another. It is therefore neither feasible, nor desirable, both from the point of view of the *Autorité* and in the best interest of the undertakings and entities at stake, to set out, beyond the method that is followed when setting financial penalties, a mechanical scale that would make it possible to know their exact amount in advance. This amount can only be fully understood in view of the reasoning of the decision at stake and in light of its specific context.
17. The *Services d’instruction* (Investigation Services) of the *Autorité* point out to the concerned undertaking or entity the essential points of law and of fact contained in the case-file that are liable to have an influence, from their point of view, on the setting of the financial penalty by the *Collège* (Board) of the *Autorité*, in order to put this undertaking or entity in a position to make observations in that respect.
18. This communication takes place in the report notified pursuant to Article L. 463-2 of the Code of commerce, which can refer, if need be, to the factors previously brought to the knowledge of the interested parties, notably in the statement of objections. Where no report is drafted, pursuant to Article L. 463-3 or to Section III of Article L. 464-2 of the same code, this communication takes place at the latest in a note supplementing the statement of objections.
19. The appraisal that can be made of the factors referred to in point 17 above and the setting, in accordance with the method described in the present notice, of the financial penalty that follows from this appraisal, are of the sole competence of the *Collège*, whose decision recalls the main steps of the reasoning followed in order to set the financial penalty.

#### **IV. The method followed when setting financial penalties**

20. The Code of commerce provides that financial penalties are to be set in accordance with four criteria:
  - the seriousness of the facts;
  - the importance of the harm done to the economy;
  - the situation of the sanctioned entity or undertaking or of the group to which the undertaking belongs;

– the reiteration, if any, of anticompetitive practices.

21. The method followed in practice by the *Autorité* in order to implement these criteria on a case-by-case basis, in the order contemplated by the Code of commerce, is the following. To start with, the *Autorité* sets the basic amount of the financial penalty for each undertaking or entity at stake, in view of the seriousness of the facts and of the importance of the harm done to the economy, criteria which both relate to the infringement or infringements at stake (A). This basic amount is then adjusted to take into account factors relating to the specific behavior and the individual situation of each undertaking or entity at stake, leaving aside the issue of reiteration which is treated as a distinct criterion by the law (B). Next, the amount is increased, for each concerned undertaking or entity, in case of reiteration (C). The amount reached is then checked against the legal maximum, before being decreased to take into account a reduction awarded due to leniency or to a settlement, if applicable, and adjusted in view of the undertaking's or entity's ability to pay the fine, to the extent that such an adjustment is requested and warranted (D).

#### *A. The basic amount*

22. The basic amount is set for each undertaking or entity in view of the appraisal made by the *Autorité* of the seriousness of the facts and of the importance of the harm done to the economy, on the basis of the factors that are relevant in the case at stake. The issue of duration, which has a bearing both on the seriousness of the facts and on the harm done to the economy, is taken into consideration separately, under these two angles (1).

23. In order to translate its appraisal of the seriousness of the facts and of the importance of the harm done to the economy into a figure, the *Autorité* defines the basic amount of the penalty as a proportion of the value of the sales, made by each undertaking or entity at stake, of the products or services to which the infringement or, where relevant, the infringements relate (2). The value of these sales constitutes an appropriate and objective reference, insofar as it makes it possible to proportion, on a case-by-case basis, the base of the financial penalty to the economic scale of the infringement(s) at stake, on the one hand, and to the relative weight, on the sector(s) or market(s) concerned, of each undertaking or entity participating in the infringement(s), on the other hand. It is therefore used as a base by the *Autorité*, along with other European competition authorities, rather than the overall turnover of each undertaking or entity at stake, that may not be in relation to the scale of the infringement(s) and to the relative weight of each participant in the sector(s) or market(s) concerned.

24. If the value of these sales is therefore taken as a reference, in a first step, in order to set the basic amount of the financial penalty depending on the seriousness of the facts and on the importance of the harm done to the economy, it should however not be given a disproportionate role in comparison with other factors to be taken into account when setting the penalty. Among these factors features, in particular, the overall turnover of

the entity or undertaking at stake, which is indicative of its size, of its economic power and of its global resources, without prejudice to the existence of possible difficulties affecting its ability to pay. This is the reason why the *Autorité* notably takes into account this factor, as well as, possibly, the overall turnover of the group to which the undertaking belongs, when adapting, in a second step, the basic amount in consideration of the other criteria provided by the Code of commerce (see Sections B, C and D below).

1. The assessment of the seriousness of the facts and of the importance of the harm done to the economy

a. The seriousness of the facts

25. The *Autorité* makes an objective and concrete appraisal of the seriousness of the facts, in view of all the relevant factors of the case at stake. Where several undertakings or entities have engaged in the infringement or, where relevant, in the infringements, the *Autorité* makes an overall assessment of the seriousness of the facts, without prejudice to the factors relating to the specific behavior and individual situation of each of them, which are taken into consideration at a later stage.
26. In order to assess the seriousness of the facts, the *Autorité* takes into account the following factors, among others, depending on their relevance:
- the nature of the infringement(s) at stake and of the facts taken into consideration in order to find them (anticompetitive agreement between competitors, that may vary in seriousness depending on whether it is, for instance, a hardcore cartel or a simple exchange of information; anticompetitive agreement between two players in a given vertical relation, such as retail price maintenance imposed by a manufacturer on its retailers; abuse of a dominant position, that may be exclusionary or exploitative), as well as the nature of the parameter(s) of competition to which they relate (price, client base, output, etc.) and, where relevant, their combination; these factors play a central role in the case of anticompetitive practices expressly listed by Articles L. 420-1 and L. 420-2 of the Code of commerce and by Articles 101 and 102 TFUE in view of their intrinsic seriousness;
  - the nature of the activities, sectors or markets at stake (public utilities, public procurement, sectors recently open to competition, etc.) and, where relevant, their combination;
  - the nature of the persons liable to be affected (small and medium businesses [SMEs], weak consumers, etc.), and
  - the objective features of the infringement(s) (secrecy, degree of refinement, existence of police mechanisms or retaliatory schemes, misuse of a regulation, etc.).

b. The importance of the harm done to the economy

27. Given the punitive and deterrent (but in no way compensatory) nature of the financial penalties imposed on the authors of infringements to competition rules, with the aim of restoring and preserving the economic public order, the harm done to the economy is distinct from the possible prejudice suffered by the victims of the anticompetitive practices at stake. In addition, the harm done to the economy is not limited to the illegal profits that competition law infringers may have expected to earn thanks to the anticompetitive practices at stake, since it encompasses all the disturbances that these practices are liable to cause to the competitive operation of the activities, sectors or markets directly or indirectly concerned, as well as to the economy in general. It incorporates not only the transfer and loss of welfare that the infringement is liable to cause to intermediary or end-consumers and to the citizens as a whole, but also, notably, its adverse impact on the incentives of other market players, for instance in terms of innovation. It is therefore not limited to a precisely measurable loss.
28. The harm done to the economy cannot be presumed. The *Autorité* assesses its importance in an objective manner, in view of all the relevant factors of the case at stake, without having to quantify it as if it were a prejudice suffered by individual victims. The *Autorité*'s assessment is generally based on qualitative factors, but may also include quantitative factors when such factors are available and reliable.
29. In the event that the parties submit, within the applicable time, economic studies aiming at evaluating some aspects of the harm that may have been done, in their view, to the economy, the *Autorité* will make an assessment of these studies and will set out the results of this assessment in its decision. These studies must be adapted to the actual specificities of the practice(s) and of the sector(s) or market(s) at stake. Moreover, in order to allow the *Autorité* to assess their relevance, reliability and robustness, they must describe, in particular, all the data they make use of, all the parameters and hypotheses they are based on, and all the methods they apply. They must also present, in concise, understandable and objective terms, the results that they reach and the consequences that may, according to their authors, be drawn from them with regard to the case at stake. Finally, they must be accompanied by all the data and programs used in the course of their production, so as to allow the *Autorité* to draw the consequences from this situation in its assessment.
30. In the event that the *Autorité* assesses quantitative data, whether on its own initiative or where the parties have submitted economic studies, it does not perform an exact counterfactual analysis, that would necessarily be hypothetical.
31. Where several undertakings or entities have engaged in the infringement or, where relevant, in the infringements, the *Autorité* makes an overall assessment of the importance of the harm done to the economy, without prejudice to the factors relating to

the specific behavior and individual situation of each of them, which are taken into consideration at a later stage.

32. In order to assess the importance of the harm done to the economy, the *Autorité* takes into account the following elements, among others, depending on their relevance and insofar as they are available:
- the scale of the infringement(s) (geographical coverage, number, significance and combined market shares of the undertakings at stake, etc.);
  - the economic characteristics of the activities, sectors or markets at stake (barriers to entry, degree of concentration, price-elasticity, margins, etc.);
  - the short- and medium-term consequences of the infringement(s) (expected overcharge, obstacle to a foreseeable price decrease, indirect impact on connected, upstream or downstream sectors or markets, etc.);
  - the longer-term consequences of the infringement(s) (creation of barriers to entry, exclusionary, taming or discouraging effects on competitors, decline in product or service quality or innovation, hindrance to technical progress, impact on the competitiveness of the sector at stake or of other sectors, etc.), and
  - their broader impact on the economy, on upstream market players, on downstream users and on final consumers.

## 2. The setting of the basic amount

### a. The value of sales

33. The reference base used by the *Autorité* in order to translate into a figure its appraisal of the seriousness of the facts and of the harm done to the economy is the total value of the categories of products or services to which the infringement(s) relate(s), sold by the undertaking or the entity at stake during its ultimate full accounting year of participation in the infringement(s), without prejudice to point 37 below. The legal characterization of the infringement(s) made by the *Autorité*, in view of their anticompetitive object or effects, defines those categories of products or services.
34. The sales at stake are all those made in France.
35. Their value corresponds to the turnover made by the undertaking or entity at stake with the products or services defined in accordance with point 33 above.
36. The undertaking or entity at stake provides the value of these sales to the *Autorité*, together with all the data required in order to check its accuracy. Whenever the data is not communicated by the undertaking or the entity at stake, or whenever the data

communicated appears incomplete or insufficiently reliable, the *Autorité* is not in a position to usefully refer to the value of sales. In such a case, it is led to base itself on the data that is available to it, such as the total turnover, even if such data is less directly related to the infringement(s) that have been committed and is therefore less favorable to the undertaking or the entity at stake.

37. In the cases where the *Autorité* deems the ultimate full accounting year of participation in the infringement(s) to be manifestly not a representative reference, it opts for an accounting year that it considers more appropriate, or for an average of accounting years. It sets out the reasons for its choice.
38. Where the infringement has been committed by a grouping of undertakings, the value of the sales that is taken into consideration is the aggregate value of the sales made by all the undertakings that belong to the grouping.
39. The method described above may be adapted in particular cases where the *Autorité* considers that the reference to the value of sales or the conditions according to which it is taken into account would lead to a result that would manifestly not reflect adequately the economic scale of the infringement(s) or the relative weight of each participating undertaking or entity. This may for instance be the case where:
  - the infringement consists in colluding on trading commissions by which undertakings remunerate themselves when selling certain products or services, in which case the *Autorité* may take these trading commissions as a reference base;
  - the infringement consists, for an undertaking, in colluding with others in order to refrain from making sales in France, in which case the *Autorité* may take into account sales made elsewhere in the European Economic Area (EEA).
- b. The proportion of the value of sales taken into account in view of the seriousness of the facts and of the importance of the harm done to the economy
40. The proportion of the value of sales made during the full accounting year of reference as defined in point 33 above, that the *Autorité* sets on a case-by-case basis in view of the seriousness of the facts and of the importance of the harm done to the economy, ranges between 0 and 30 %.
41. Without prejudice to point 7 above, this proportion ranges between 15 and 30 % in the case of horizontal agreements between competitors aimed at fixing prices, sharing markets, allocating customers or limiting output, depending on the importance of the harm that they do to the economy. This is because such practices are directly aimed at manipulating the key parameters of competition and are among the most difficult infringements to detect due to their secrecy, reasons for which they feature, by their very nature, among the most harmful infringements to competition rules and are

characterized as “*unbearable*” by the OECD<sup>8</sup>. A similar proportion may be set for other anticompetitive practices of a particular seriousness.

42. In the case of infringements that lasted more than one year, their duration is then taken into account as follows. The proportion set by the *Autorité* is applied, for the first full year of participation of each undertaking or entity at stake in the infringement, to the value of the sales made during the full accounting year of reference, and, for each of the following years, to half of this value. Beyond the last full year of participation in the infringement, the remaining duration is taken into account by the month, insofar as the elements in the case-file make it possible to do so.

### *B. Individualization*

43. The *Autorité* then adjusts the basic amount in order to take into account mitigating or aggravating circumstances, if relevant (1), as well as other relevant factors relating to the individual situation of each undertaking or entity (2).

#### 1. Mitigating and aggravating circumstances

44. The *Autorité* may take into consideration the existence of aggravating or mitigating circumstances, on the basis of an assessment of all the relevant circumstances of the case at stake.

45. The mitigating circumstances in view of which the *Autorité* may decrease the basic amount of the financial penalty, for an undertaking or an entity, may include among others the fact that:

- the undertaking or entity provides evidence that it has adopted, on a lasting basis, a competitive conduct, for a significant portion of the products or services at stake, to the point of having disrupted, as a maverick, the very operation of the practice at stake;
- the undertaking or entity provides evidence that it was coerced to participate in the infringement;
- the infringement has been authorized or encouraged by public authorities.

46. The aggravating circumstances in view of which the *Autorité* may increase the basic amount of the financial penalty, for an undertaking or an entity, may include among others the fact that:

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<sup>8</sup> Recommendation N. C(98)35/Final of the Council of the OECD of 25 March 1998 concerning Effective Action Against Hard Core Cartels.

- the undertaking or entity has played a role of leader in, or instigator of, the infringement, or has had a specific role in designing or in operating the infringement;
- the undertaking or entity has taken any step to coerce other undertakings or entities to participate in the infringement or has taken any retaliatory measure against other undertakings or entities with a view to enforcing it;
- the undertaking or entity enjoys a specific capacity of influence or moral authority, notably because it is entrusted with a public service mission.

## 2. Other factors of individualization

47. In order to guarantee that the financial penalty is both deterrent and proportionate, the *Autorité* may then decrease or increase the basic amount in consideration of other objective factors relating to the situation of the undertaking or entity at stake.

48. In particular, it may adjust it downwards to take into consideration the fact that:

- the undertaking at stake carries out most of its activities in the sector or market to which the infringement relates (“single-product” undertaking);
- the undertaking or entity at stake faces specific financial difficulties that affect its ability to pay; this adjustment takes place at the stage and in the way described in Section D.3 below.

49. Likewise, it may also adjust it upwards to take into consideration the fact that:

- the undertaking at stake has a size, an economic power or overall resources that is or are important, notably in comparison with the other infringers;
- the group to which the undertaking belongs itself has a size, an economic power or overall resources that is or are important, this factor being taken into consideration, in particular, where the undertaking that controls the undertaking at stake within the group is also liable for the infringement.

### *C. Reiteration*

50. Reiteration is an aggravating circumstance that must, according to the law, be taken into consideration on a standalone basis given its particular significance, in order to enable the *Autorité* to address in a proportionate way, in terms of punishment and deterrence, the propensity of the concerned undertaking or entity to break free from competition rules. Indeed, the very existence of a repeated infringement attests that the previous finding of infringement and the financial penalty that may have been attached to it have not proved sufficient to drive the undertaking towards compliance with competition rules.

51. In order to assess reiteration, the *Autorité* considers four cumulative factors:
- a previous infringement to competition law must have been found before the termination of the practice at stake; this prior finding of infringement, which may or may not have resulted in a financial penalty, cannot stem from a decision granting interim measures pursuant to Article L. 464-1 of the Code of commerce, nor from a decision making commitments legally binding pursuant to Section I of Article L. 464-2 of the Code of commerce;
  - the practice at stake must be identical or similar, in view of its object or effects, to the one that has given rise to the prior finding of infringement;
  - this prior finding of infringement must have become definitive by the day the *Autorité* takes its decision on the practice at stake;
  - the period of time running from the prior finding of infringement to the starting point of the practice at stake is taken into account in order to address, in a proportionate way, the propensity of the concerned undertaking or entity to break free from competition rules; the *Autorité* does not intend to oppose reiteration to an undertaking or entity when this period of time exceeds 15 years.
52. In case of reiteration, the interim amount of the financial penalty, as it results from the individualization of the basic amount pursuant to the method described in Section B above, may be increased by 15 to 50 % depending, in particular, on the period of time running from the starting point of the practice at stake to the prior finding of infringement, as well as on the nature of these different infringements.

#### *D. Final adjustments*

53. The final amount of the financial penalty is checked against the legal maximum (1). It is then adjusted, if applicable, in consideration of the total or partial immunity granted on account of leniency and of the reduction granted on account of a settlement (2). Finally, it is adjusted, where relevant, with regard to the concerned undertaking's or entity's ability to pay (3).
54. The individual adjustments referred to in Section 2 below are made after the final amount of the financial penalty has been checked against the legal maximum in order to make sure that the concerned undertakings or entities effectively benefit, in any event, from the immunity or from the reduction granted on account of leniency or of a settlement. The adjustments referred to in Section 3 below are made afterwards in order to guarantee that a diminished ability to pay, on the date where the *Autorité* decides the case, is effectively taken into account.

## 1. Comparison with the legal maximum

55. The *Autorité* checks that the final amount of the financial penalty, as it results from the individualization of the basic amount pursuant to the method described in Section B above or, if applicable, from the taking into account of reiteration pursuant to the method described in Section C above, does not exceed the legal maximum.
56. In accordance with Section I of Article L. 464-2 of the Code of commerce, where the infringer is an undertaking, the maximum amount of the financial penalty is 10 % of the highest worldwide pre-tax turnover achieved during one of the accounting years closed since the accounting year prior to that in which the practices have taken place. Where financial statements have been consolidated or combined pursuant to the provisions applying to the corporate form of the undertaking, the turnover that is taken into account is the one indicated in the consolidated or combined statements of the consolidating or combining undertaking.
57. Where the infringer is not an undertaking, the maximum amount of the financial penalty is € 3 million.
58. In either case, in the event that Section III of Article L. 464-2 of the Code of commerce is applied, this maximum amount is halved.
59. Where the *Autorité* applies the simplified procedure provided for by Article L. 463-3 of the Code of commerce, the maximum amount is € 750,000, including in cases where the *Autorité* applies the settlement procedure referred to in the previous point.
60. If the final amount of the financial penalty exceeds the applicable legal maximum, it is lowered to this maximum amount.

## 2. Adjustment in case of leniency and settlement

61. If applicable, the *Autorité* adjusts the amount of the financial penalty in order to take into account the total or partial immunity granted on account of leniency pursuant to Section IV of Article L. 464-2 of the Code of commerce, and the reduction granted on account of a settlement pursuant to Section III of the same article. This adjustment is performed in the way described in the applicable procedural notices of the *Autorité*<sup>9</sup>.

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<sup>9</sup> See the procedural notice of the *Autorité de la concurrence* of 2 March 2009 relating to the French leniency program. This document is available on the website of the *Autorité*.

### 3. Ability to pay

62. Whereas the possible general difficulties of the sector concerned by the infringements do not feature among the legal criteria provided for by Article L. 464-2 of the Code of commerce, the individual difficulties encountered by undertakings or entities may be taken into consideration when setting their financial penalty, if these undertakings or entities provide evidence, on an individual basis, of the impact of those difficulties on their ability to pay.
63. Where an undertaking or entity intends to claim that specific financial difficulties affect its ability to pay, this claim must be made in writing to the *Autorité*, that will assess the request as follows.
64. In order to enable the *Autorité* to take into consideration such difficulties, the concerned undertaking or entity should, first of all, put them forward in its reply to the report provided by the second paragraph of Article L. 463-2 of the Code of commerce or, in the event that Article L. 463-3 or Section III of Article L. 464-2 of the same code is applied, at the latest one month before the hearing. In the event that such difficulties arise at a later stage, they must be put forward as soon as they arise, and in any event during the hearing provided by Article L. 463-7 of this code.
65. Second, the concerned undertaking or entity must evidence the existence of specific financial difficulties as well as their impact on its ability to pay, by reference to the elements listed in the questionnaire available on the *Autorité*'s website<sup>10</sup> and, if relevant, to other documents. A reduction of the final amount of the financial penalty can only be granted if the elements put forward provide reliable, comprehensive and objective evidence of the existence of actual and real difficulties preventing the concerned undertaking from paying, in whole or in part, the financial penalty that may be imposed on it. The situation of the undertaking or entity is assessed on the day the *Autorité* adjudicates the case at stake, with regard to all the relevant accounting years.
66. Besides, the *Autorité* may impose a symbolic financial penalty in certain particular cases, such as the one of a one person limited liability undertaking or of a non-profit organization governed by the Law of 1901 that only has the ability to raise limited resources. In this latter case, the *Autorité* will check that the non-profit organization does not have the ability, beyond its immediately available resources, to call upon its members in order to raise the necessary funds to pay the financial penalty.

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<sup>10</sup> Questionnaire on the ability to pay of undertakings and entities. This document is available on the website of the *Autorité*.

## **V. The adaptation of the method followed when setting financial penalties for some anticompetitive practices relating to calls for tenders**

67. The method described in Section IV.A.2 above will be adapted in the case of anticompetitive practices relating to one or more one-time call(s) for tenders that do not pertain to a single and continuous infringement. This is because the value of sales is not an appropriate indicator of the economic scale of these practices, that are instantaneous in nature, nor of the relative weight of each undertaking or entity taking part in these infringement(s), notably when their participation consists in submitting cover bids or in refraining from making a bid.
  
68. In such cases, the basic amount of the financial penalty will result from the application of a proportion, that will be set in view of the seriousness of the facts and of the importance of the harm done to the economy, to the total turnover achieved in France by the entity or undertaking at stake, or by the group to which the undertaking belongs. This turnover will in principle be the one achieved during the full accounting year during which the infringement has taken place, or the last full accounting year if there are several. The proportion will be set in consideration of the fact that these anticompetitive practices, that aim at misleading adjudicating bodies with regard to the very effectiveness of the tendering process, feature, by their very nature, among the most harmful infringements to competition rules and are among the most difficult to detect due to their secrecy.