

## TRANSPPOSITION OF THE ECN DIRECTIVE INCREASES THE FRENCH COMPETITION AUTHORITY POWERS

Competition - Consumer - Distribution | 28/05/21 | Renaud Christol Marc-Antoine Picquier



On May 26, 2021, the Council of Ministers adopted Ordinance No. 2021-649 of May 26, 2021 on the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018, which aims to provide the competition authorities of the Member States with the means to implement competition rules more effectively and to ensure the proper functioning of the internal market (ECN + Directive) (hereinafter the "Ordinance")[1]. The Ordinance was published in the Official Journal on May 27, 2021.

The major, and expected[2], change in the Ordinance is the modification of the maximum amount of penalties for professional associations.

This amount is increased from 3 million euros to 10% of the highest worldwide turnover (excluding taxes) achieved during one of the fiscal years preceding the one in which the practices were implemented.

The Ordinance specifies that when the infringement of a professional association relates to the activities of its members, the maximum amount of the financial penalty is no longer the worldwide pre-tax turnover of the professional association, but is equal to 10% of the sum of the total worldwide turnover achieved by each member active in the market affected by the association's infringement.

However, the financial liability of the professional association members is limited with respect to the payment of the penalty.

The amount required from each member of the professional association may not exceed the maximum amount applicable to each personally, i.e., the threshold of 10% of the highest worldwide turnover (excluding tax) achieved during one of the financial years before the financial year preceding the practices, or, if appropriate, of the consolidated or combined accounts turnover of the consolidating or combining undertaking.

The Ordinance also establishes financial liability for professional association members:

- when a financial penalty is imposed on an professional association taking into account the turnover of its members and when the association is not solvent, the French Competition Authority (hereinafter the "Authority") may order the association to call for contributions from its members to cover the amount of the financial penalty;
- when these contributions are not fully paid to the professional association within a time limit set by the Authority, the latter may directly require the payment of the financial penalty by any undertaking whose representatives were members of the the association decision-making bodies;
- when it is necessary to ensure that the fine is fully paid, after having required payment by these undertakings, the Authority may also require full payment of the fine by any member of the association that was active on the market where the infringement was committed. However, such payment is not required from undertakings that demonstrate that they did not implement the disputed decision of the association and were unaware of its existence or have actively disassociated themselves from it before the initiation of the procedure.

Also regarding the sanction, the Ordinance removes from the criteria to set the sanction the notion of "damage to the economy", which was a source of endless questions and debates, and includes in the text the importance of the duration of the infringement (which was in fact already taken into account by the guidelines on determining the penalty).

Finally, the Authority acquires the power to impose structural remedies to offenders of competition law, a power that should a priori be limited to cases of abuse of dominant position.

On the procedural level, the Authority has been given the power to decide whether to prosecute. Until now, the Authority was - in theory - forced to accept all referrals, even if it meant leaving the less well-founded ones in drawers for years.

From now on, it will be able to reject a referral by a motivated decision if it considers that it is not a priority. This power is limited to referrals from companies.

In addition to its power of self-referral in normal proceedings, the Authority has been given the possibility to self-refer in the context of conservatory measures proceedings.

In addition, mainly :

- the Minister of Economy or the General Rapporteur of the Authority may now appeal against the decisions of the liberties and detention judge regarding the authorization of dawn raids or their conduct. For example, when the judge refuses to authorize a dawn raid, the Minister of Economy or the Authority may appeal against this refusal order;
- the investigators of the Authority and the DGCCRF can access information accessible to the persons and companies questioned that may be stored on digital media (emails, instant messaging) regardless of the storage location (cloud and servers) (this was already the case in practice);

- 
- the parties' right of disclosure in the context of proceedings before the Authority is clarified. For example, the Ordinance provides for limitations to the use of information relating to leniency and settlement proceedings;
  - concealed recordings are now admissible evidence before the Authority. It is now accepted that practices can be established by any means of evidence.

Finally, and as expected, the Ordinance establishes immunity for private individuals in the context of a leniency application. This measure concerns directors, managers and other staff members of the company or association of companies who have taken a personal and decisive part in the conception, organization or implementation of anticompetitive agreements.

In the event of leniency and in case the personal involvement of the companies' employees involved justifies the transmission of the file to the public prosecutor, the Authority is obliged to indicate to the latter the individuals who should not be criminally prosecuted.

The entry into force of the Ordinance is subject to the adoption of the ratification bill, which must be introduced before Parliament within 3 months from May 26, 2021, i.e. by August 27, 2021 at the latest.

[1] <https://www.legifrance.gouv.fr/download/pdf?id=tnDkLomDEXzUnDetotFJNWKprXcSf2MrYdYfS2fg9qk=>

[2] See in this respect our flash "Professional bodies: the French Competition Authority publishes its thematic study".

---