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# Advocacy Against the Retroactive Application of Quasi-Criminal Sanctions in Competition Law

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The principle that more severe criminal or quasi-criminal sanctions may not be applied retroactively is inherent in the rule of law. In France, this is a principle of constitutional value guaranteed by Article 8 of the 1789 Declaration of the Rights of Man and of the Citizen: "The law shall prescribe only penalties that are strictly and obviously necessary, and no one shall be punished except under a law established and promulgated prior to the offence and lawfully applied." This principle is also enshrined in Article 7(1) of the European Convention on Human Rights, applicable in 46 States: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed." Article 49(1) of the Charter of Fundamental Rights of the European Union guarantees it in the same terms.

The French Competition Authority nevertheless does not consider itself bound by this fundamental principle of the rule of law with regard to its Sanctions Notice of 30 July 2021[1], which defines the method it applies in determining the amount of the fines it imposes, taking the view that it may adopt that method in the name of the "needs of the effective application of competition rules."[2]

It now frequently applies to conduct predating its Notice[3] the new method for determining sanctions laid down therein, even though that method is much more severe than the one resulting from its previous 2011 Notice[4]. The new Notice results in particular in a mechanical arithmetic increase in the basic amount of fines through a duration coefficient doubled from the end of the first year of infringement onwards, together with other aggravating mechanisms[5].

The question whether the retroactive application by the Competition Authority of its 2021 Sanctions Notice is unlawful has not yet been decided by the Paris Court of Appeal, but has been raised in a number of appeals pending before that court[6].

It illustrates the recurring conflict in competition law between the fundamental guarantees inherent in a rule-of-law State and the claim of greater efficiency in the enforcement of competition law advanced

[1] French Competition Authority, Notice on the Method for Determining Financial Penalties of 30 July 2021; E. Claudel, Notice of the French Competition Authority on the Method for Determining Financial Penalties of 30 July 2021: Toward Harsher Sanctions Imposed by the Authority?, RTD Com., 2021, 3, pp. 583; V. Coursière-Pluntz, Regarding the New Notice of the French Competition Authority on the Method for Determining Financial Penalties of 30 July 2021, as amended on 15 November 2021, JCP Ed. E, 2022, 1036; A. Appel, Reflections on the Authority's New Sanctions Notice: Between the Desire to Increase Fines and the Reality of Having to Adapt Them, Rev. Lamy Concurrence, No. 116, 1 May 2022.

[2] See in particular Decision No. 23-D-08 of 7 September 2023 relating to practices implemented in the sector of engineering, maintenance, dismantling and waste treatment services for nuclear sites, para. 520.

[3] See in particular Decision No. 24-D-06 of 21 May 2024 relating to practices implemented in the prefabricated concrete products sector; Decision No. 23-D-15 of 29 Dec. 2023 relating to practices in the sector of manufacturing and sale of foodstuffs in contact with materials that may contain or may have contained bisphenol A, para. 1615 et seq.; Decision No. 23-D-03 of 20 March 2023 relating to practices implemented in the sector of securing tobacco outlets in the Hauts-de-France and Île-de-France regions; Decision No. 23-D-04 of 12 April 2023 relating to practices implemented in the sale of subscriptions to business intelligence and company information products, where the parties had either entered into settlements or benefited from leniency proceedings; Decision No. 24-D-11 of 19 Dec. 2024 relating to practices implemented in the manufacturing and distribution of household electrical appliances; Decision No. 24-D-09 of 29 Oct. 2024 relating to practices implemented in the low-voltage electrical equipment sector.

[4] Notice of 16 May 2011 on the method for determining financial penalties.

[5] Namely the appearance of a deterrent entry fee for certain infringements corresponding to an amount between 15% and 25% of the value of sales (para. 30) and a deterrent increase based on illicit profits linked to the infringement where such profits exceed the financial penalty that may be imposed (para. 42).

[6] Our firm represents certain undertakings in the context of these appeals and has argued in favor of the principle of non-retroactivity of the sanctions notice.

by the Authority. It is in the name of that same efficiency that attorney-client privilege in advisory matters is undermined, as are the very limited rights granted to companies in competition investigations[7].

Can the rule of law be sacrificed to competition policy? In our view, the non-retroactivity of the French Competition Authority's 2021 Sanctions Notice is required because more severe criminal or quasi-criminal sanctions are inapplicable to prior conduct, even where they stem from guidelines (I); and the questioning of the fundamental principle of non-retroactivity of harsher penalties would not be justified in the absence of any demonstration of a greater need for effectiveness, especially in light of broader developments in competition law (II).

## I. The Incompatibility of Harsher Sanctions with the Principle of Non-Retroactivity

### 1. Recognition of the Prohibition on the Retroactive Application of Harsher Guidelines

The criminal or quasi-criminal nature of the sanctions imposed by the French Competition Authority is no longer disputed today. Despite their administrative character, they are indeed penalties with a punitive purpose and of particular seriousness, according to the three criteria applied by the case law of the ECtHR and the CJEU[8].

The French Competition Authority generally seeks to justify the retroactive application of its 2021 Sanctions Notice by relying on its alleged lack of normative effect, which would exempt it from the principle of non-retroactivity applicable, by definition, only to normative rules, while invoking case law rendered in relation to previous notices.

If one defines a norm as the meaning of a prescriptive statement intended to render a certain conduct for others mandatory, prohibited, permitted or authorized[9], the 2021 Sanctions Notice satisfies that definition. The French Competition Authority is bound by its Notice, which has the legal status of guidelines. Guidelines are documents adopted by administrative authorities to guide their own conduct or that of their subordinates: they lay down a reference model, "rules of conduct"[10], from which it is possible to depart either on grounds of general interest or because of the particular situation to which they apply. They therefore have binding force for the French Competition Authority, unless it can justify, subject to judicial review, that the case at hand falls within an exception allowing it to depart from them. The Conseil d'État has also recalled that a person entitled to claim a benefit provided for in guidelines may rely on them before the administrative courts once they have been published[11].

Consistent case law from the Court of Justice of the European Union, the General Court of the European Union, the Court of Cassation and the Paris Court of Appeal holds that competition authorities' sanctions notices are subject to the general principle of non-retroactivity of harsher criminal law[12]. As the Court of Justice recalled in its leading judgment in Dansk Rørindustri of 28 June 2005, the concept of law "includes both legislative and judicially created law," and the principle of legality of offences and penalties may "preclude the retroactive application of a new interpretation of a rule establishing an offence." According to the Court, that is the case "where it concerns a judicial interpretation the result of which was not reasonably foreseeable at the time when the infringement was committed, particularly in light of the interpretation accepted at that time in the case law relating to the legal provision in question." The solution adopted by the Paris Court of Appeal regarding the French Competition Authority's 2011 Sanctions Notice may be transposed mutatis mutandis to the 2021 Notice: "the adoption of guidelines such as those contained in the provisions of the sanctions notice, which are liable to alter the Authority's general policy on fines, may, in general, fall within the scope of the principle of non-retroactivity".[13]

### 2. Absence, in the Case of the 2021 Sanctions Notice, of the Cumulative Conditions Justifying Retroactive Application

The French Competition Authority attempts to justify its position by invoking case law that accepted, subject to conditions, the retroactive application of the Commission's previous 2006 guidelines or of the Authority's 2011 Sanctions Notice. However, the 2021 Sanctions Notice differs fundamentally from the 2011 Notice and from the Commission's 2006 guidelines. Those two texts were held not to result in harsher sanctions only because they complied with three cumulative conditions: the

[7] See L. and J. Vogel, Competition Investigations in France: A Worrying Drift, Pratiques, Concurrences, No. 3-2025, www.concurrence.com.
[8] For an overview of the case law, see C. Margaine, Application of the Principle of Retroactivity of the More Lenient Criminal Law to a Sanction Classified as Administrative by National Law, Le Quotidien, Lexbase, October 2025.
[9] See for example: H. Kelsen, Pure Theory of Law, French translation of the 2nd edition by C. Eisenmann, 1962, Bruylant-LGDJ, La pensée juridique, 1999, p. 13, p. 23 et seq.; See also, by the same author: General Theory of Norms, 1979, translated from German by O. Beaud and F. Malkani, PUF, 1996, pp. 1–2.
[10] R. Odent, Administrative Litigation, vol. 2, Dalloz, 2007, p. 527.
[11] Conseil d'État, 4 Feb. 2015, Nos. 383267 and 383268.
[12] ECJ, 28 June 2005, Dansk Rørindustri, Case C-189/02 P; General Court, 27 Sept. 2006, Archer Daniels Midland, Case T-59/02, paras. 42 and 44; Paris, 4 July 2019, No. 16/23609; Cass. Com., 17 March 2015, Appeals Nos. G 13.26.003, V 13-26.083 and F 13-26.185.
[13] Paris, 4 July 2019, cited above.

requirement of an interpretation at constant law, the absence of automatic aggravation of the sanction, and the foreseeability of the aggravation. None of those cumulative conditions is met in relation to the French Competition Authority's 2021 Notice.

a) Absence of Interpretation at Constant Law

The condition of interpretation at constant law was stated very clearly by the Court of Cassation's Royal Canin judgment of 17 March 2015[14]: "the French Competition Authority's notice of 16 May 2011 … falls within the existing legal framework, which it does not alter, and merely explains, at constant law, the method followed by the Authority." Yet the 2021 Notice does not fall within the existing legal framework at constant law.

It followed the substantial amendment of Article L. 464-2 of the French Commercial Code by Ordinance No. 2021-649 of 26 May 2021[15]. Before the entry into force of that ordinance on 28 May 2021, the text provided that "financial penalties shall be proportionate to the seriousness of the facts alleged, the extent of the harm caused to the economy, and the situation of the organization or undertaking." The new provision removed the reference to harm to the economy and added the criterion of the duration of the infringement: "Financial penalties shall be assessed having regard to the seriousness and duration of the infringement, the situation …" (the remainder being unchanged).

The express inclusion of the duration of the infringement was reflected in the 2021 Sanctions Notice by doubling the duration coefficient beyond the first year of infringement, which leads to a mechanical arithmetic increase in the basic amount of the fine. That element alone makes it impossible to apply retroactively a sanctions notice that results in a harsher penalty.

The 2021 Sanctions Notice moreover expressly states that it "takes into account … the legislative amendments that have occurred." The same is true of the Authority's decisions, which mention that "on 30 July 2021, the Authority, required to take into account the legislative amendments introduced by Law No. 2020-1508 of 3 December 2020 and by Ordinance No. 2021-659 of 26 May 2021, adopted a new notice,"^(16) which repeals and replaces the previous one.

To justify its position, the Competition Authority's decisions often state that the legal framework was not modified, on the ground that the cap on the fine — 10% of the group's turnover — was not changed. However, that ceiling almost never corresponds to the sanction actually imposed. One is not condemned to a ceiling, but to a fine determined according to criteria, the amount of which may not exceed the ceiling. It is the rules for setting the fine that were changed and made more severe compared with the previous law.

b) Automatic Aggravation of the Sanction

Automatic aggravation of the sanction is the second condition set out by the Royal Canin judgment of 17 March 2015: the 2011 Notice "does not permit the assumption that an increase in sanctions follows automatically from its implementation."

Yet the 2021 Notice does indeed trigger an automatic increase in sanctions. It raises the duration coefficient from 0.5 for the years following the first year of infringement to a coefficient of 1, which mechanically increases the sanction. Commentators on the 2021 Notice have moreover noted that mechanical effect: "there can be no doubt as to the arithmetic increase in the basic amount of the fines"[17].

c) Absence of Foreseeability of the Aggravation of Sanctions

In its Saint-Gobain judgment of 27 March 2014, the General Court of the European Union held that, in order to be applied retroactively, interpretative changes had to be "reasonably foreseeable at the time when the infringements were committed."

The French Competition Authority argues in the pending litigation that it should always and at all times be foreseeable that sanctions might be made more severe.

Yet the change in the duration coefficient was never mentioned or contemplated during the governmental work that led to the amendment of Article L. 464-2 of the French Commercial Code; on the contrary, the Report to the President of the Republic relating to Ordinance No. 2021-649 highlights the substantive amendments in-

[14] Cass. Com., 17 March 2015, cited above.
[15] Ordinance No. 2021-649 of 26 May 2021 on the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers of competition rules and to ensure the proper functioning of the internal market.
[16] See in particular Decision No. 23-D-08 of 7 Sept. 2023 relating to practices implemented in the sector of engineering, maintenance, dismantling and waste treatment services for nuclear sites.
[17] See A. Appel, cited above, para. 25. The author shows, on the basis of a concrete example, how the fine automatically increases from EUR 196 million to EUR 395 million solely because of the change in the duration coefficient and the application of the entry fee. To the same effect: V. Coursière-Pluntz, cited above, para. 3 in fine.
[18] See the Report to the President of the Republic relating to Ordinance No. 2021-649 of 26 May 2021 on the transposition of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers of competition rules and to ensure the proper functioning of the internal market: "The provisions of the ordinance introducing new measures and substantial amendments are as follows: … 4° As regards the criteria for determining the sanction: the criterion of the duration of the infringement, which currently appears in the French Competition Authority's notice on the determination of sanctions and which is taken into account in setting the sanction, is henceforth written into the law." The change in the duration coefficient is not mentioned.

troduced into the definition of the sanction criteria[18].

The lack of foreseeability of the increase in the sanction also follows from the choice made by the French Competition Authority in the 2011 Notice of a duration coefficient of 0.5, deliberately departing from the Commission's 2006 guidelines, which had opted for a coefficient of 1. That choice of moderation, made on the basis of the procedural autonomy of Member States, had been clearly endorsed by the President of the Competition Authority at the time in public statements, in the name of pragmatism and a preference for a more moderate degressive system, in order to take account of the specific features of French sanctions law[19]. Legal writers likewise observed that: "the Authority previously relied on 'a softer policy than the European policy, thereby creating legitimate expectations that such policy would be maintained'"[20].

The Authority argues that undertakings could have consulted well-informed counsel who might have warned them of the possibility of harsher sanctions. But if the aggravation was unforeseeable for undertakings, it was equally unforeseeable for their counsel.

Lastly, in the pending litigation, the Authority argues that undertakings could not have relied on the certainty that the ordinary-law regime of the Notice, providing for multiplication of a basic amount by a coefficient limited to 0.5 beyond the first year of infringement, would apply, and that it would have been possible to apply a lump-sum amount to them under the exceptions provided for by the Notice. It is curious that this argument is invoked in cases where the basic amount of the fine was calculated on the basis of the ordinary regime under the 2021 Notice, automatically shifting from 0.5 to 1[21]. Moreover, an undertaking naturally expects to be judged under the ordinary-law regime rather than under an exceptional regime: the existence of an exceptional regime does not make the evolution of the ordinary regime foreseeable.

The non-retroactivity of the 2021 Sanctions Notice therefore follows very clearly from the conditions laid down by the case law concerning the non-retroactivity of sanctions harsher than those in force at the time of the facts, even where such sanctions result from guidelines.

## II. The Justification for the Principle of Non-Retroactivity

### 1. No Necessity for Removing a Fundamental Guarantee of the Rule of Law

Can the retroactivity of sanctions more severe than those in force at the time of the facts be justified by the specific needs of competition law in order to ensure greater effectiveness in terms of prevention, deterrence and punishment of infringements? Obviously not.

First, Western States have always considered that the effectiveness of their model is compatible with respect for the fundamental guarantees of the rule of law and democracy, of which the non-retroactivity of harsher sanctions is a cornerstone. Otherwise, one might justify the need to establish an authoritarian system by removing or limiting all the guarantees of the rule of law.

Second, the argument based on efficiency is not even made out in this case. Prevention and deterrence are beside the point. Since the increase in sanctions was not foreseeable, it could not have had the effect of preventing or deterring any infringement.

As regards the argument of stronger punishment, it also appears mistaken. Sanctions for infringements of competition law have already been significantly strengthened compared with the 2011 situation. Undertakings now face both administrative sanctions and civil sanctions, the award of which has been made much easier by the Damages Directive as transposed into French law, and by increasingly claimant-friendly case law in actions for damages following anticompetitive practices[22]. Competition authorities also have at their disposal considerable powers, exceptional under ordinary law, to enforce competition law in the most effective manner possible through extensive ordinary or full-scale investigative powers, leniency procedures encouraging the denunciation of cartels, settlement procedures encouraging non-contestation of objections, and investigative procedures that place the authorities in a very favorable position compared with the undertakings under prosecution.

It is therefore neither justified nor necessary to sacrifice a fundamental guarantee of the rule of law on the altar of the alleged efficiency of competition law.

### 2. The Incompatibility of the Retroactivity of Criminal Sanctions with the Non-Retroactivity of Civil Sanctions

It is established by the case law of the CJEU, the Court of Cassation and the Paris Court of Appeal that the rules relating to damages ac-

[19] See Bruno Lasserre, Presentation of 30 March 2011, Determination of Sanctions — Toward Greater Predictability, available on the French Competition Authority's YouTube channel.
[20] E. Claudel, cited above.
[21] See for example Decision No. 23-D-08 of 7 Sept. 2023 relating to practices implemented in the sector of engineering, maintenance, dismantling and waste treatment services for nuclear sites, para. 500.
[22] The judgment delivered on 25 September 2025 in the Plavix® case (Paris, 24 Sept. 2025, Case No. 19/19969) illustrates the rise of private enforcement. As in other cases, the amount of damages awarded (more than EUR 150 million) largely exceeds the amount of the fine imposed by the Authority (around EUR 40 million).

tions for anticompetitive practices are not retroactive[23]. It would be at the very least contradictory for the rules relating to fines to be retroactive, whereas public enforcement and private enforcement must be applied coherently and the case law seeks to preserve that coherence.

The arguments of those in favor of retroactive application of the rules on damages actions are the same as those advanced in favor of the retroactivity of administrative sanctions: in both cases, it is argued that harsher sanctions not in force at the time of the facts should be applied on the pretext of greater efficiency of competition law and that the law in force at the time of the facts should be interpreted in the light of current law. Yet the case law has rejected those arguments in the clearest possible terms with regard to the retroactivity of the new rules on compensation for damage resulting from anticompetitive practices. The Court of Justice of the European Union has thus held that the principles of legal certainty and non-retroactivity preclude aggravating the liability of those who committed an infringement under the guise of interpretation[24].

The courts therefore reject the efficiency or interpretation argument for two reasons: there can be no violation, under the guise of efficiency or interpretation, of an essential principle of law; and legal certainty and non-retroactivity are among the essential principles of law.

[23] CJEU, 28 March 2019, Case C-637/17, Cogeco; 22 June 2022, Case C-267/20, Volvo Trucks; Com., 19 Oct. 2022, No. 21-19.197, Carrefour; Paris, 24 Nov. 2021, No. 20/04265, Cora/Lactalis; Paris, 5 Jan. 2022, No. 19/22293, Vania.
[24] CJEU, 24 June 2019, Powszechny Zakład Ubezpieczeń na Życie (PZU Życie), Case C-573/17, para. 74 et seq.

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