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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **Working Party No. 2 on Competition and Regulation**

### **Assessing the Impact of Competition Authorities' Activities – Note by France**

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## *France*

1. The role of the *Autorité de la concurrence* ("the *Autorité*") is to guarantee effective competition and ensure the competitive functioning of the markets at national and European level for the benefit of intermediate and end consumers. The *Autorité* must evaluate its actions to ensure that it carries out its missions properly and intervenes effectively.

2. For the *Autorité*, this assessment involves identifying the effects achieved in concrete terms as a result of its interventions and attributable to them. These effects are generally case-specific. This *ex-post* assessment measures the effectiveness of the actions undertaken. While an *ex-post* assessment examines the impact of a given decision, its main purpose is to enable the *Autorité* to draw lessons from its intervention *a posteriori*, in order to inform its future actions. In particular, this involves testing out the economic theories and assumptions on which its interventions are based. In this way, *ex-post* assessment contributes to a reflection on the effectiveness of the actions undertaken. However, its implementation is more arduous, requiring a time lag between the actions and the results as well as a certain hindsight to analyse the facts. It involves a thorough process of information gathering and in-depth analysis. As part of its work, the *Autorité* periodically carries out *ex-post* assessments on specific subjects, such as the opinion on the land passenger transport sector in 2023<sup>1</sup>, in which, for the first time, it took a systematic look at the implementation and effects of its past recommendations concerning a sector. Another example is the opinion currently being investigated on the impact on competition of the 2015 Law for Growth and Activity<sup>2</sup>, which notably entrusted the *Autorité* with a major role in facilitating access to the practice of certain regulated legal professions<sup>3</sup>.

3. Due to the challenges involved in carrying out *ex-post* assessments, and in order to offer a more comprehensive view of the overall impact of its activities, the *Autorité* favours an *ex-ante* approach to evaluating the direct benefits to customers of its decisions, using the customer savings approach. The decisions adopted by the *Autorité* to combat anticompetitive practices put an end to the litigious behaviour of sanctioned companies, which, in the absence of this intervention, might have continued and led to higher prices for consumers or lower quality in the products or services concerned. It is therefore necessary to take into account the expected avoided overcharge, which corresponds to savings for customers, in order to better reflect the overall impact of the *Autorité's* actions. The *ex-ante* assessment of the expected direct customer savings, based on information available at the time the decisions were made, therefore supplements the information on the fines imposed by the *Autorité* on companies that have infringed competition rules, providing a more comprehensive view of the impact of the *Autorité's* actions.

4. Alongside other qualitative and quantitative elements, this assessment of the overall economic impact contributes to greater transparency and better information for public decision-makers and the general public regarding the *Autorité's* actions. Thus, on its own

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<sup>1</sup> Opinion 23-A-18 of 29 November 2023 concerning the land passenger transport sector

<sup>2</sup> For more information, consult the press release on these *ex-officio* proceedings: <https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-starts-inquiries-ex-officio-assess-reforms-conditions>

<sup>3</sup> In support of the modernisation of certain regulated legal professions - notaries, commissioners of justice, commercial court registrars, court-appointed administrators, court-appointed liquidators and lawyers to the courts - the *Autorité* is entrusted with the responsibility of issuing opinions to the government on the establishment of new offices for these professionals in France, as well as on pricing issues.

initiative, the *Autorité* conducts an annual assessment of the overall economic impact of its actions, which has been published in the technical appendix of its annual activity report since 2018<sup>4</sup>. This assessment provides an approximate order of magnitude of the expected consequences of the *Autorité's* actions. It also allows for simpler communication, especially with a non-specialist audience, and can thus help reinforce the legitimacy of its work.

5. To carry out this assessment, the *Autorité* draws on the assumptions formulated by the OECD in its Guide to help competition authorities assess the expected impact of their activities<sup>5</sup> (I.). While this assessment aims to provide a more comprehensive view of the effect of the *Autorité's* actions, it does not reflect the overall impact of all the institution's activities (II.). Lastly, the *Autorité* draws attention to the importance of ensuring the credibility of this assessment to preserve its usefulness (III.).

## 1. The methodology used by the *Autorité* to assess the overall impact of its activities

6. The *Autorité* assesses the expected overall impact of its actions as the sum of the impacts of the decisions taken each year. More specifically, the *Autorité's* assessment covers:

- litigation decisions resulting in a financial penalty or commitments proposed and accepted;
- mergers either authorised with commitments or prohibited, and those withdrawn by the parties due to competition concerns identified in the course of the investigation<sup>6</sup>.

7. In all these cases, there is at least one concern regarding the presence of anti-competitive effects, which the decisions made by the *Autorité* aim to put an end to or obviate. It is therefore only natural that the overall impact assessment should focus on these decisions.

8. To calculate the economic impact, the *Autorité* takes into account the amount of the penalties imposed on companies that have infringed competition rules, as well as an estimate of the avoided overcharge as a result of the decisions that ended the anti-competitive behaviour of the companies concerned. Had the *Autorité* not intervened, the anti-competitive behaviour could have continued for several years, resulting in additional costs to the economy, and in particular to the customers of the companies involved. Likewise, by requiring remedies prior to a merger, the *Autorité* prevents any harm to competition that would result in higher prices or lower quality, which would harm consumer welfare.

9. The amount of the penalties is taken directly from the decisions themselves. For practical reasons (the information was not available at the time the assessment was carried out), and because the aim of the exercise is to assess the impact of the *Autorité's* actions based on its decisions alone, the *Autorité* does not take into account any reviews by the review courts, including the amount of the penalty.

10. The *Autorité* calculates the expected customer savings for each of the practices sanctioned by each decision issued during the past year by multiplying the expected overcharge that the decision prevents by putting an end to the practice in question, the

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<sup>4</sup> The *Autorité de la concurrence's* annual reports and appendices are available at <https://www.autoritedelaconcurrence.fr/en/publications/80>

<sup>5</sup> <https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/evaluation-of-competition-interventions/Guide-competition-impact-assessmentENG.pdf>.

<sup>6</sup> Merger control notifications withdrawn for other reasons are not included in the assessment.

affected turnover, and the expected duration of the anti-competitive practice if the *Autorité* had not intervened:

**Expected customer savings of a sanctioned practice =  
Avoided overcharge x Affected turnover x Expected duration that the practice would have lasted**

11. The total direct customer savings by a decision are calculated as the sum of the expected customer saving for each of the practices sanctioned by the *Autorité* in that decision.

12. To estimate these benefits, the *Autorité* uses a number of assumptions, some of which correspond to those formulated by the OECD<sup>7</sup>.

13. As regards the avoided overcharge, the *Autorité* prefers to use estimates of overcharge caused by a practice when such information is available in the case file in question. In the absence of case-specific information, the *Autorité* uses the following assumptions to estimate the expected overcharge, depending on the nature of the practices and the assessment of the damage caused to the economy set out in the decision<sup>8</sup>:

- for horizontal agreements: in line with OECD recommendations, an avoided overcharge of 10% is used, except where the decision identifies limited economic damage, in which case the avoided overcharge is assumed to be 2%;
- for vertical agreements: in line with OECD recommendations, an avoided overcharge of 2.5% is used, except where the decision identifies limited economic damage, in which case the avoided overcharge is assumed to be 1%;
- for abuses of a dominant position: in line with OECD recommendations, an avoided overcharge of 5% is used, except where the decision identifies limited economic damage, in which case the additional price avoided is assumed to be 1%;
- for contentious cases resulting in commitments: an avoided overcharge of 1% is assumed;
- for mergers authorised with commitments, prohibited or withdrawn by the notifying parties due to identified competition concerns: in line with OECD recommendations, an avoided overcharge of 3% is assumed.

14. By relying on an assumption of lower magnitude for the avoided overcharge when a decision finds limited economic damage, the *Autorité* aims to obtain an assessment of the direct impact of its action that better reflects the extent of the disruption to competition caused by the practices in question, as revealed by the evidence in the case file. This adjustment applies in particular to assessments of decisions issued before 2021, when damage to the economy was a legal criterion for determining penalties<sup>9</sup>.

15. With regard to the affected turnover, the *Autorité* usually takes the value of the sales of the companies involved. In contentious cases, such a scope is conservative, insofar as

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<sup>7</sup> <https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/evaluation-of-competition-interventions/Guide-competition-impact-assessmentENG.pdf>

<sup>8</sup> Until 2021, the *Autorité* was required by law to assess the economic damage caused by a practice as one of the considerations for determining the amount of the penalty that can be imposed on firms for infringement.

<sup>9</sup> Ordinance 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 (the ECN+ Directive) abolished this notion of "damage to the economy", with the aim of bringing the criteria for determining the amount of penalties into line with those practised by the European Commission.

these practices are generally unlikely to influence the prices charged by third-party companies. Furthermore, this information is generally more readily available and collected by case team. For merger control cases, the market turnover in the affected market is used when this information is available. In mergers, the effects on prices are unlikely to be limited solely to the companies that are parties to the transaction, thus justifying the use of market turnover.

16. The different assumptions of avoided overcharge are then applied to the affected turnover over a three-year period, using a discount rate of 3.2% for decisions adopted from 2022<sup>10</sup>.

17. With regard to the expected duration taken into account in this assessment, in line with OECD recommendations, it is assumed that a practice could have continued for three years in the absence of intervention by the *Autorité* with regard to abuse of dominance or cartels cases. In merger control, a period of two years is used as an assumption.

18. Based on these estimates, the *Autorité* calculates and presents every year the average annual economic impact of its activity for the period from 2011 (the year in which it adopted its first procedural notice on the calculation of penalties<sup>11</sup>) to the latest year available. The extent of the impact of the *Autorité's* action varies greatly from one year to the next, depending on the extent of the turnover affected by the behaviour brought to an end by the *Autorité's* action, and on the time required to process contentious cases, which can extend over several years. This justifies analysing this impact over a longer period.

19. The average annual impact of the *Autorité's* action over the period 2011-2023, the most recent year for which data is available, amounted to approximately 1.57 billion euros. Of this, 0.94 billion (i.e. around 60%) resulted from direct customer savings, with the remainder coming from the sanctions imposed. Over the period 2011-2023, the total impact amounted to approximately 20.4 billion euros, of which 12.2 billion euros was due to direct customer savings. For this latest assessment, the overall impact was calculated based on 210 decisions, representing approximately 81% of the sanction, commitment or merger with commitment decisions issued by the *Autorité* during this period<sup>12</sup>.

## 2. However, measuring overall impact only imperfectly reflects the expected impact of all the *Autorité's* activities

20. Although the assessment aims to provide a more comprehensive view of the impact of the *Autorité's* actions, it does not reflect the overall impact of all the institution's activities. This assessment does not take into account the *Autorité's* consultative activities (a.) or the indirect effects, which can be significant (b.).

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<sup>10</sup> This rate of 3.2% corresponds to the one proposed in France Stratégie's Guide for socioeconomic evaluation of public investments in France as of 21 October 2021. It revises the previous discounting rate used, stemming from the Quinet Commission (2013). It comprises a risk-free discount rate of 1.2% and a risk premium of 2%. In previous assessments produced by the *Autorité*, this rate was 4.5%, and corresponded to the rate adopted by the Quinet Commission (on behalf of the French General Commission for Strategy and Foresight [Commissariat général à la stratégie et à la prospective]) in 2013 for France. Estimates of economic impact are not sensitive to the rate used.

<sup>11</sup> Guidelines of 16 May 2011 on the method for determining financial penalties [https://www.concurrences.com/IMG/pdf/adlc\\_-\\_notice\\_antitrust\\_penalties\\_16may2011\\_en.pdf](https://www.concurrences.com/IMG/pdf/adlc_-_notice_antitrust_penalties_16may2011_en.pdf)

<sup>12</sup> The assessment of direct customer savings may not have been carried out for decisions for which certain necessary data was not available.

## 2.1. The importance of consultative activities for the Autorité

21. As part of its consultative role, the *Autorité* can be requested by policymakers to draw up an analysis and make recommendations when drafting laws or decrees, or when preparing reforms. The *Autorité* also conducts sector-specific inquiries on its own initiative, during which it assesses the competitive situation, identifies any malfunctions in the markets concerned and, where appropriate, makes recommendations for remedying them. This work can help to improve or preserve the competitive workings of the markets. By way of example, the opinion issued at the end of its sector-specific inquiry into the competitive functioning of the interregional coach transport market in 2014<sup>13</sup> inspired the reform introduced by the 2015 so-called "Macron Law", which led to the liberalisation of this transport market<sup>14</sup>. Similarly, the various opinions issued to the government in which the *Autorité* recommended improving access to the regulated legal professions through the establishment of new offices have led to greater competition in the markets concerned.

22. The advisory function is an important part of the *Autorité's* mission. From 2011 to 2023, the *Autorité* issued a total of 220 opinions (including sector-specific inquiries), which is comparable in scale to the 259 decisions on sanctions, commitments or mergers with commitments issued over the same period.

23. Currently, the *Autorité* does not take this advisory activity<sup>15</sup> into account in its impact assessment due to a number of difficulties. Firstly, it is difficult to isolate the impact of the *Autorité's* actions from those of other institutions. Secondly, the opinions do not necessarily identify competition malfunctions and, even when they do, the government does not systematically implement the recommendations, or implements them late or incompletely. Thirdly, the opinions cover a wide range of subjects and sectors, and are highly varied in nature. For instance, the courts can also request the *Autorité* to issue an opinion on anticompetitive practices identified in cases referred to them, and the resulting opinion thus concerns a very specific issue - as was the case for Opinion 23-A-11<sup>16</sup> issued in response to a request from the Paris Court of Appeal to define relevant markets and the existence of a dominant position on the part of a company in a private dispute in the online press sector. An opinion can also be issued on its own initiative of the *Autorité* to launch a large-scale sector-specific inquiry, as in the case of its opinion on cloud computing services<sup>17</sup>. The expected impact of these different types of opinion, if any, are therefore likely to be highly heterogeneous.

24. Should it be deemed desirable to include these activities as part of the impact assessment, a credible assessment should take into account the following considerations:

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<sup>13</sup> *Autorité de la concurrence* Opinion 14-A-05 of 27 February 2014 concerning the competitive functioning of the market for scheduled interregional transport by coach.

<sup>14</sup> *Autorité de la concurrence* Opinion 23-A-18 of 29 November 2023 concerning the land passenger transport sector.

<sup>15</sup> However, the *Autorité* may carry out an *ex-post* assessment of some of these initiatives. For example, the *Autorité* carried out an *ex-post* assessment of the liberalisation of the intercity coach transport market in 2023, without, however, seeking to isolate the impact of its action from that of other institutions.

<sup>16</sup> *Autorité de la concurrence* Opinion 23-A-11 of 12 July 2023 issued to the Paris Court of Appeal concerning a dispute between LeKiosque.fr and L'Equipe.

<sup>17</sup> *Autorité de la concurrence* Opinion 23-A-08 of 29 June 2023 concerning the competitive functioning of cloud computing.

- objective and transparent criteria to identify opinions likely to have beneficial effects for consumers, depending on their subject matter, and those which the *Autorité* considers likely to have a certain influence on public or private players;
- assumptions on the expected benefits of these opinions, reflecting their diverse nature and based on credible, independent and robust studies and estimates.

## 2.2. Indirect effects of the *Autorité*'s decisions

25. The current assessment only takes into account the direct and static effects of the *Autorité*'s action on consumers and markets that are directly affected. However, the *Autorité*'s intervention can have many indirect effects.

26. Firstly, it may have an impact on adjacent or related markets indirectly, such as downstream markets when the *Autorité* intervenes in an intermediate market.

27. More importantly, the *Autorité*'s decisions can have a wider deterrent effect, as the penalties imposed may discourage third-party companies from engaging in anti-competitive behaviour, or encourage those engaging in such conduct to put an end to it more rapidly. Competition law enforcement is all the more effective when the deterrent effect is strong.

28. Lastly, another important indirect impact is linked to the favourable effects of competition on company productivity. Anti-competitive behaviour can reduce incentives to invest and to innovate, maintaining inefficient production structures, reducing an economy's productivity and, ultimately, its wealth. These effects are also important for economic progress.

29. The dissuasive and dynamic effects of competition law enforcement are generally accepted to be significant, especially when compared with the direct and static effects. Excluding them leads to a conservative assessment of the expected overall economic impact. However, it is notoriously difficult to quantify such effects objectively, even when considerable resources are mobilised. Estimating the deterrent effects involves identifying practices that are not actually observed, as they were not implemented but could have been if competition law enforcement had been less effective. Under these conditions, identifying and estimating a relevant counterfactual scenario, i.e. the volume of anti-competitive activity that would have occurred if competition law had not been enforced, is extremely challenging. With regard to the effects on company productivity, it should be noted that this is influenced by many factors, and these effects materialise over a longer time horizon. This makes it particularly challenging to isolate the impact of competition law enforcement from the other economic factors influencing productivity.

30. Another potential solution could be to survey a representative sample of firms and ask them about the impact of competition law interventions on their behaviour. However, this method would rely on the firms' self-reported statements rather than their actual behaviour. Designing and implementing the survey can also present difficulties compared with a more standard survey, given the many potential biases in the responses formulated. For example, when it comes to deterrent effects, firms surveyed may find it difficult to answer in a way that suggests that they intend to contravene the law, even in a hypothetical situation. If this approach were to be taken, particular care would need to be taken in the design and administration of the survey.

### 3. The importance of assessment credibility

31. It is essential that the impact assessment of the *Autorité's* action be based on a sound methodology with credible estimates of gains. Otherwise, this effort could be counterproductive. If there is any doubt as to whether this effort to quantify the expected overall impact has been successful, the lack of credibility surrounding this approach could have more harmful repercussions, as it may damage the institution's reputation and even the effectiveness of its missions. In these circumstances, it would be better to use a very conservative and cautious estimate of the overall impact, rather than one that considers more closely the actions carried out, but is based on less reliable methodology or information.

32. Consequently, the *Autorité* considers that any effort to strengthen the credibility of the assumptions used in the current methodology to be welcome. In this respect, it would be interesting to consider recent developments in economic literature, as well as feedback from decision-making practice, in order to evaluate and, if necessary, update the assumptions on overcharges suggested in the OECD recommendations. With this in mind, it is important to critically review the studies that are retained for this purpose, to inform on the assumptions will ultimately be recommended in a fully transparent manner. Such an approach would reinforce the credibility of any competition authority's assessment based on these assumptions.

33. A revision of the overcharge assumptions by the OCDE in its guidelines could affect the temporal consistency of the *Autorité's* overall impact assessments. As the impact has been estimated as an average since 2011, the *Autorité* would then need to revise all its previous assessments to ensure comparability over time and the temporal consistency of its assessment. The extra computational work involved in updating the assessment would be reasonable if it only required a few parameters to be modified. However, a communication effort may also be needed to explain these changes. It would also be useful to publish the old and new series together for a period of time to ensure transparency regarding the impact of this revision and preserve confidence in this work.

34. Likewise, similar considerations should apply when one seeks to include advisory activity or indirect effects into the overall impact assessment. A cautious approach is particularly important, given that it is not absolutely necessary to include these impacts in the overall assessment on an annual basis as long as their existence and significance can be justified apart from the overall impact assessment and assessed on an *ad hoc* basis. To this end, a rigorous study attesting to the existence of such impact could be put forward alongside with the overall impact assessment, and this could provide some indications over the order of magnitude for the extent of undervaluation of the overall impact assessment carried out. As the impact related to certain advisory activities, of the deterrent effects or of the dynamic effects is likely to be observed over a relatively long period, this approach could be sufficient and be more relevant than a systematic annual quantification based on questionable foundations.

35. If one seeks to extend the impact assessment to include the effects related to advisory activities, the effect of deterrence or dynamic effects, methodological recommendations from the OECD based on broad consensus among the academia and the community of competition law practitioners, would be useful here. These recommendations could guide and reinforce the credibility of the work of competition authorities who wish to consider these effects in their assessment.