

Settlements in cartel cases

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Outline

- Definitions and purposes of leniency and settlement procedures;
- The revised settlement procedure in France: a work in progress.

Horizontal agreements

- Horizontal agreements between competitors:
- Most detrimental agreements include price fixing, market sharing, limitation of output
 - Generally covert, secret agreements (cartels), hard to detect.

Purpose of the leniency program

Hurdles faced in cartels investigations:

- Cartels are hard to detect;
- Collection of evidence is hindered;
- High standard of proof.

Leniency aims at facilitating investigations:

- Detecting cartels;
- Giving incentives for voluntary submissions of evidence;
- Facilitating dawn-raids.

Purpose of the settlement procedure

- Simplify and fast-track antitrust proceedings before the French Competition Authority;
- No counter-evidence presented against the case handler's findings;
- Sole elements discussed are factors used in determining the level of the fine.

Investigations under the French Leniency Program

- Legal basis and scope:
 - Article L.464-2 (IV) of the French Commercial Code;
 - 2009 Revised Procedural Notice on Leniency;
 - Scope: mainly cartels.
- Impact of leniency program on the investigative process:
 - Content and investigation of leniency applications;
 - Increased cooperation expected from leniency applicants during the case investigation

Investigations under the French settlement procedure (1)

- Legal basis and scope:
 - Article L.464-2 (III) of the French Commercial Code;
 - 2012 Procedural Notice on the Non-Contest Procedure;
 - Scope: all antitrust infringements.
- Impact of the settlement procedure on the investigative process:
 - Defendants abstain from contesting facts and findings relating to the infringement;
 - The impact on investigative efforts is less significant than leniency applications because the procedure is used after case handlers gather enough evidence to demonstrate an infringement (after the S.O.);
 - Procedural value-added: no counter-evidence submitted against case handlers' factual findings and legal qualification.

⇒ **Real success with 45 settlement decisions to date.**

Investigations under the French settlement procedure (2)

- Settlement must be reached after the SO has been issued;
- All aspects of the settlement are negotiated between the defendants and the Authority's General Rapporteur;
- The General Rapporteur then makes recommendations to the Authority's board;
- Board reaches final decision:
 - The Authority's Board is not bound by the General Rapporteur's recommendations
 - If the Board contemplates ruling unfavorably for defendants, the case goes back to investigations

Requirements for settling antitrust proceedings (1)

- After receipt of Statement of Objections (S.O.) companies that wish to settle must:
 - Formally declare that they will not contest the SO's factual findings, their legal qualification and their imputation to the relevant company;
 - All counter-evidence or argument made later in the procedure result in loss of all settlement benefits;
 - However, companies can submit evidence pertaining to factors used in determining the level of the fine.

Requirements for settling antitrust proceedings (2)

- Companies may also submit commitments to improve competition in the relevant market:
 - Commitments are not mandatory but are rewarded by an additional reduction of the fine;
 - Commitments must be substantial, credible and verifiable;
 - Commitments may be structural (sale of assets) or behavioral (most of the cases: drafting of a new or added value compliance program).

Benefits of the settlement procedure

- For defendants:
 - Legal maximum level of fine is halved: from 10 to 5% of defendant's worldwide turnover;
 - Non-contest: 10% reduction of the fine;
 - Commitments (optional): additional 5 to 15% of fine reduction;
 - An applicant of the leniency program can benefit from the settlement procedure.
- For the Authority:
 - Procedural gain: cases moves directly from the S.O. to the hearing and the final decision (no case handler's report);
 - Evidentiary gain:
 - No-counter evidence on the merits;
 - The fact that a number of defendants do not contest the case

The revised settlement procedure: a work in progress (1)

- As effective competition enforcers, the Authority should place constant effort in developing pragmatic and imaginative solutions to restore competition while guaranteeing procedural fairness to all parties;
 - The revised settlement procedure recently introduced by the so-called “Macron bill” is another example of such effort;
 - Now: settlement possible on the amount of the fine.
- ⇒ **Now, the offer to settle made by the General Rapporteur will set the range of the fine incurred, adding much increased certainty for the undertakings concerned.**

The revised settlement procedure: a work in progress (2)

Benefits of the new procedure:

- For the Authority: Greater procedural economy with a *de facto* suppression of the risk of ensuing litigation, whereas the current settlement procedure enables parties to dispute the elements of the fine (albeit not the infringement itself);
- For the defendants: shortened proceedings, early predictability of the fine, while incurring no lessening of the financial gain compared with the current settlement procedure.

⇒ **Greater consistency with the settlement procedure in place before the European Commission.**

Thank you for your attention !