

## French Competition Authority publishes guidelines on settlements in antitrust proceedings

On 10 February 2012, the French Competition Authority (FCA) published a procedural notice concerning the settlement procedure (the Notice). The Notice aims at setting out the approach followed by the FCA regarding the settlement procedure in order to enhance transparency for the benefit of companies.

The settlement procedure, contained in article L.464-2, III of the Commercial Code, enables companies subject to infringement proceedings to waive their right to challenge the charges notified by the FCA in exchange for a fine reduction between 10 and 25%.

### 1. Scope and conditions

- **Scope of the settlement procedure and eligibility conditions**
  - The settlement procedure is available to companies which are subject to proceedings before the FCA for infringements of competition law, in particular anticompetitive agreements and abuses of a dominant position.
  - In order to benefit from the settlement procedure the company must waive its right to challenge (i) the entirety of the practices in question, (ii) the legal assessment of these facts, and (iii) their imputability. In addition, the company must not challenge the procedure having led to the notification of the Statement of Objections, nor the FCA's jurisdiction.
- **Combination with leniency**
  - The combined application of the settlement and leniency procedures (and thus a double fine reduction) is possible if the FCA considers that this would simplify and speed up the proceedings.
- **Structural or behavioural commitments at the option of the company**
  - A company deciding not to challenge the Statement of Objections may at the same time propose structural or behavioural commitments which can lead to a further reduction of the fine.
  - The company can, in particular, propose setting up or improving a competition law compliance programme and thus benefit from a specific fine reduction of up to 10%. The FCA's approach to competition law compliance programmes is set out in a dedicated framework document (see the separate *e-bulletin* "The French Competition Authority publishes best practices on competition law compliance programmes").

### 2. Impact of settlement on other parties to the proceedings

- The chief investigator (*rapporteur général*) of the FCA can, within the deadline

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for responding to the Statement of Objections, inform the other parties to the proceedings of the settlement application in order to allow them to decide whether they also wish to enter into a settlement procedure. Otherwise, all parties are notified of the settlement application at least three weeks prior to the hearing before the College.

- A settlement produces legal effects for the other parties to the proceedings which have chosen not to settle their case. Thus, a settlement eases the burden of proof on the Authority vis-à-vis the parties disputing the Statement of Objections: the FCA only needs to prove their participation in the infringement, not however the practices themselves or their legal assessment which are deemed established.

### 3. Fine reduction for settlement

- **The settlement of a case is *per se* rewarded by a fine reduction of 10%**
  - Companies choosing only not to contest the objections benefit in principle from a fixed fine reduction of 10%.
  - In addition, the maximum amount of the fine is reduced to half of the normally applicable amount (5% of worldwide consolidated turnover rather than 10%).
- **Commitments are rewarded by an additional fine reduction of up to 15%**
  - Putting in place or improving a competition law compliance programme can be rewarded by an additional fine reduction of up to 10%
  - Also, by taking further structural or behavioural commitments, the company can benefit from an additional fine reduction of up to 5%.
  - As a result, companies which opt for a settlement and present commitments can qualify for a fine reduction of up to 25%.

### 4. The settlement procedure

- **The application for settlement**
  - A company wishing to opt for a settlement must submit a settlement application to the chief investigator of the FCA within the two months deadline for responding to the Statement of Objections.
  - The chief investigator is not obliged to accept this request. A decision is taken on a case-by-case basis, taking into account the context, the simplification and speeding up of the proceedings due to the settlement.
- **Proposal of fine reduction by the chief investigator**
  - If the chief investigator deems the conditions for a settlement met and agrees to the proposed commitments, he will notify the company in question of his intention to propose a fine reduction to the college of the FCA.
  - The agreement between the company and the chief investigator is recorded in minutes containing (i) the company's waiver of the right to contest the Statement of Objections, (ii) if applicable, the commitments taken by the company, and (iii) the proposal with the fine reduction which the investigator intends to submit to the college of the Authority.
- **Decision by the college of the Authority**
  - The college is not bound by the fine reduction proposed by the chief investigator. Nonetheless, it commits itself to referring the case back to the case-team if it envisages departing from his proposal to the disadvantage of the company.
  - The college of the Authority verifies that the chief investigator applied the settlement procedure correctly and made no errors in its assessment of the proposed commitments.

**For companies and their advisers, the Notice certainly constitutes a progress,**

enhancing the predictability of the settlement procedure and in particular the percentage of the fine reduction. The possible combination with the leniency procedure in line with EU law is also to be welcomed. The predictability of the fine remains, however, insufficient; it is particularly regrettable that the Notice does not envisage the possibility for the chief investigator to propose a maximum amount of the fine or a range of the fine in absolute terms.

In addition, preventing the company applying for settlement from contesting the validity of the proceedings or the FCA's jurisdiction seems questionable from a legal point of view given that these aspects are unrelated to the substance of the case. Finally, not being able to challenge the imputability of the practices may diminish the procedure's appeal for groups of companies. This will particularly be the case in situations where the parent company is being pursued for infringements committed by a subsidiary due to the presumption based on ownership of the share capital and without any direct involvement of the parent company in the practices in question.

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