The amended settlement procedure of the French Competition Authority

Increased predictability for users but the most sensitive issues have hardly been addressed

After several months of implementation in ongoing cases, the French Competition Authority ("FCA") has just released its draft guidelines explaining the changes made to the settlement procedure by the Macron law of 6 August 2015[1].

Settlements in competition cases

Numerous competition authorities have the ability to offer a reduced fine in return for companies choosing not to contest the findings of investigations. For these authorities, the procedural gains achieved on that basis justify such a reduction. The level of reduction is in principle less than that which can be achieved under a leniency procedure - when companies voluntarily offer information and evidence that contributes to the establishment of a cartel and the fining of the various companies concerned. The leniency and settlement procedures can be combined in most of these regimes.

Settlement mechanisms are by nature difficult to integrate into the French procedural environment, which is strictly regulated by rights of defense, in particular where the functions of investigating and decision-making are exercised by different bodies as in the FCA. In the FCA, Investigation Services investigate cases and notify the statement of objections to the companies concerned, laying the facts and propositions to uphold infringements, while the decision establishing an infringement and imposing a penalty is adopted by the College. A difficulty lies in the fact that a settlement is considered at the stage when the procedure is handled by the Investigation Services, while the College will only establish an infringement and determine fines later.

The French Competition Authority has long been empowered to settle cases. The 2015 Law was designed to increase the attractiveness of the settlement procedure, by allowing companies to settle on the basis of a reduced fine.

The main features of the new procedure, as described by the draft guidelines, are as follows:

- The procedure is broadly applicable to all competition cases
- The procedure can start after the statement of objections is issued
- The FCA's investigation services (the "Investigation Services") have wide discretion to decide whether to settle, and to determine the basis for the settlement
- The settlement is based on a waiver of the right to challenge the FCA's allegations and, where relevant, on commitments to restore competition
- The financial value of the settlement is calculated within a range established by the Investigation Services
- Companies agreeing to settle may only comment in the procedure on the setting of the fine within the said range
- The final fine is set by the FCA college of members (the "College"), within the limits of the range established by the FCA

The new procedure is easier to work through and offers increased predictability for users. However, it also raises a number of sensitive questions that the draft guidelines have hardly addressed, including: the conditions in which the Investigation Services determine the fine range; the ability of the College to continue exercising its power of decision in such a constrained framework; or the consequences attached to a decision adopted on the basis of a settlement.

1 French Competition Authority, Draft guidelines of 5th March 2018 concerning the settlement procedure, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=22&id_article=3138&lang=fr.

The first settlement regime (« *non contestation des griefs* »)

The first settlement regime of the FCA was introduced in 2001. It was based on a company's waiver of the right to challenge the objections notified, and led to a reduction in sanctions, which was based on two parallel reduction factors. Firstly, the limit on the maximum level of a fine was automatically reduced (from 10 to 5% of the total worldwide group turnover); Secondly, the fine itself was reduced by between 10 to 25%, depending on whether the company concerned only waived its right to challenge the statement of objections, or also accepted to take compliance or other commitments. If the available reduction ranges were known, the exact reduction would only be determined in the College's final decision.

The double adjustment of the fine lead to very different results where the calculation of the fine was close to the reduction cap of 10% (when the cap adjustment could result in a fine almost divided by two); or to the contrary was far below 5% (when the cap adjustment would hardly have any impact). Moreover, expressing the effective reduction in percentage terms could lead to a figure which was disconnected from the added value of the waiver and commitments. In some cases, the Investigation Services had already proposed to depart from this approach, and instead agree on a maximum fine amount in value, which would be much more attractive to the company concerned[2].

More broadly, companies had to opt for a settlement at a time in the procedure where they did not have a clear indication of the level of the fine they would otherwise incur, and therefore on the corresponding reduction in fine that they were likely to obtain.

A feature of this regime that was particularly appreciated – and noted abroad – was the possibility to submit compliance commitments to the FCA. The FCA developed a proactive policy to promote competition compliance programs on that basis.

Notably, it offered companies submitting a commitment to introduce or reinforce a compliance program an additional reduction in fine of up to 10%[3].

A total of about 50 settlement decisions were adopted under this regime.

The new settlement regime (« *transaction* »)

The Macron law dated 6 August 2015 has simplified the mechanism and increased predictability for the companies concerned.

The new Article L 464-2, III of the Commerce Code now provides that "*where an undertaking is not challenging the reality of the objections notified, the head rapporteur may propose a settlement to that undertaking on the basis of a range between a minimum and maximum amount of contemplated fine. Where the undertaking commits to amend its behavior, the head rapporteur may take it into account in this proposed settlement. If, in the time limit ascribed by the head rapporteur, the undertaking agrees on the proposed settlement, the head rapporteur proposes to the Competition Authority, after hearing the undertaking and the State representative without a final report being prepared, to impose a fine* (...) *within the limits set by the settlement*".

In practice, the amendment enables the Investigation Services to agree with each company a range in value of a potential fine, ahead of the decision of the College, which will continue deciding the final fine. However, the change is significant, and, depending on the breadth of ranges proposed by the Investigation Services, the decision-making power of the College may be considerably constrained by the upstream negotiation. The only other option would indeed be for the College to refer the case back to the investigation stage in order to restart the procedure on a modified basis, which is a burdensome process.

2 French Competition Authority, decision n°07-D-33 of 15 October 2007 concerning practices implemented by France Telecom in the broadband Internet access sector.

3 French Competition Authority, Framework document of 10 February 2012 on compliance programs.

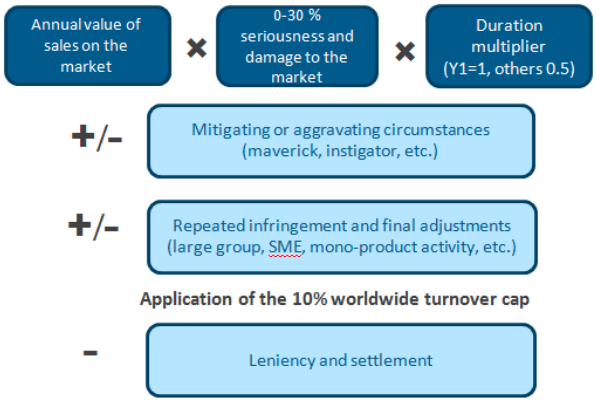
First signals provided by the French Competition Authority

The new regime was applied in ongoing cases from the summer of 2015, and the first signals of the way that the new regime would operate were provided in the settlement discussions organized by the Investigation Services. In several cases, they conducted discussions on the basis of a theoretical fine based on the methodology for calculating the fines, as the College[4] would do, before applying a reduction to take into account the settlement. In practice, the discussed ranges provided by the Investigation Services have generally been rather narrow, with about 25 to 30% difference between the minimum and the maximum amounts.

The second signals were given by the College itself, in the first decisions adopted. As of the end of 2017, nine cases were decided on the basis of the new settlement procedure: mostly in small cases (vertical agreements, exclusivity issues in the overseas territories, etc.) and abuse cases; until the FCA issued an important cartel decision[5] and fully confirmed its new policy.

First, decisions no longer detail the grounds to determine the level of fines: "*the particular circumstances resulting from the application, in this case, of the settlement procedure (...) justify that the penalties imposed are not motivated by reference to the methodology for calculating financial penalties set out in the Guidelines dated 16 May 2011*". As in previous cases, the decision is totally silent on the ratios applied, the mitigating and/or aggravating circumstances retained, and the reduction rates granted on the basis of the leniency and settlement procedures as well as on the value of sales - making it impossible to recalculate the fines. As a result, a number of decisions every year will no longer be determined with reference to the 2011 Guidelines, which constitute a guarantee of transparency and fairness, and which will be less and less applied.

Methodology to calculate fines



The decision gives another important signal with respect to compliance programs by ruling out the possibility of considering the proposed establishment or improvement of compliance programs in relation to the value of a financial penalty. This refusal is motivated by reference to the fact that "*the adoption and implementation of compliance programs are part of the day-to-day management of companies, especially when the latter are of a substantial size*" and that compliance commitments are, therefore, not likely to justify a reduction in fine: notably for particularly serious infringements such as in the case concerned.

The day after this decision, the FCA issued a press release withdrawing the Framework Document dated 10th February 2012 on compliance programs, thus fully confirming such a policy change[6].

Draft guidelines clarifying the conditions in which the new regime will apply

On 5 March 2018, draft guidelines relating to the settlement procedure were made public. They are fully aligned to the first signals.

No right to settle

There is no change to be reported concerning the assessment of the appropriateness of the use of the settlement procedure: this decision belongs to the

4 French Competition Authority, Guidelines of 16 May 2011 concerning the methodology for calculating the fines.

5 French Competition Authority, decision n° 17-D-20 of 18 October 2017 concerning practices implemented in the resin flooring sector.

6 French Competition Authority, Draft guidelines of 19 October 2017 on settlement procedure and compliance programs.

head rapporteur, who enjoys a wide margin of discretion regarding the opportunity to settle at the case level and for each request received in that case.

The Investigation Services do not consider a settlement to be justified in all circumstances. The draft guidelines bring a clarification in that respect, by indicating that the FCA intends to give priority to the implementation of this procedure in cases in which all the parties waive their right to challenge the statement of objections (point 19). The procedural gain for the Investigation Services are indeed less clear in so-called hybrid cases, where only some companies settle. The Investigation Services make it very clear in ongoing cases that they intend to strictly limit the number of hybrid cases.

Timing and scope of the settlement discussions

The timing of settlement discussions also remains unchanged: the initiation of the process follows the statement of objections (point 11), even if the Investigation Services will probably continue to inform companies a few days before the receipt of the statement of objections that they are open on a settlement, so that companies can immediately start to consider their interest for settlement discussions. These discussions must in fact come up to a settlement or not within the two months period to answer the statement of objections, which may be extended (point 12).

Despite the greater flexibility of the new framework, the objective for the Investigating Services is not to discuss the scope of the accusations, in order to reach a common view on the infringement, as is the case for example in the European settlement procedure. The decision to depart from the European model on this point is conscious and assumed.

A major disadvantage is that companies have no other choice than to accept or reject the objections notified in full, whereas the substance of some of them could be debated by the addressees. Even where this is not the case, it is not uncommon for companies to disagree with the Investigation Services on the duration of the infringement, or its scope of implementation (products covered, territory concerned, etc.) and for the College to limit the scope accordingly. On all these topics, which directly affect the calculation of the fine, no discussion will be possible with the Investigation Services, which would have been a positive evolution compared to the prior regime.

Legal consequences attached to the waiver to challenge the objections

Waiving the right to challenge the objections will continue to prevent a company from questioning the facts as detailed in the statement of objections (which cover the materiality, duration and geographical scope of the objections, the participation of the company concerned, the legal classification of the infringement and the regularity of the statement of objections, points 14 and seq.). The company concerned can only discuss issues related to the setting of the amount of the fine. However, comments must now focus on variations within the agreed range of the potential value of the fine (points 16 and 34), which will in practice limit the scope and impact of any comments.

In these circumstances, it would be difficult to consider that a waiver of the right to challenge accusations that could not be discussed would constitute an admission of the infringement, and the draft guidelines do not claim this would be the case. Just like the Investigation Services, an enterprise may well decide to settle in consideration of the saving of potential procedural costs, in which case it cannot be considered as having accepted guilt in the precise terms to be developed in a decision which is not yet adopted, and will in any event be adopted at the end of a procedure in which the company has not been granted an opportunity to be heard.

The draft guidelines do not deal with this issue but it will undoubtedly be questioned, as Article L.481-2 of the French Commercial Code implementing the European Directive on damages actions now provides that an anti-competitive practice is "*presumed to be irrefutably established*" where its existence and the subsequent liabilities are established by a final decision. Is it possible to consider that an infringement is established when the company concerned was not afforded the possibility to discuss its existence and its own liability, but could only accept as a whole the objections stated by the Investigation services? The issue is likely to be debated before courts, as was the case for commitments decisions.

A maintained opportunity to propose commitments

If, save for exceptional circumstances, the FCA no longer intends to mitigate potential penalties in exchange for the adoption or the strengthening of compliance programs, the draft guidelines still allow for the possibility to propose commitments that are substantial, credible and verifiable (point 13). In the previous regime, examples of commitments unrelated to compliance programs were not numerous. Nevertheless, for example, in the 2015 poultry case the FCA accepted a commitment to create a structure of discussions between various levels in the industry chain to promote entering into long term contracts, in compliance with competition rules[7].

Preparation of settlement minutes

In practice, discussions start once a company expresses an interest in discussing a potential settlement: if it is accepted by the head rapporteur and its expression of interest falls within the value range of a financial penalty set out by the Investigation Services. The draft guidelines provide that the Guidelines setting out principles to determine financial penalties "*may constitute a relevant point of reference when the discussion starts between the head rapporteur and the undertakings*" (point 35). If this is indeed the approach adopted by the Investigation Services in the first cases, the wording remains vague on the exact relationship between the ranges of potential fines discussed and the Guidelines. This allows the level of a potential fine to be varied during the discussion without having to systematically link changes to an adjustment of a given ratio in the calculation. But it means that the Investigation Services will now largely set the general level of fines, with a limited ability of the College, under the draft guidelines, to change the approach, as detailed below.

Once these discussions are over, the settlement minutes record the agreement between the company and the head rapporteur (point 28). More precisely, the minutes record the company's waiver to challenge the objections, in the form of a statement by which the author indicates in clear and unconditional terms that it does not object to the reality of the alleged practices or to their legal classification, including the allocation of liabilities. Where commitments are accepted, the minutes also include the text of the latest proposed commitments (point 28). On this basis, the minutes indicate the proposed minimum and maximum amount of the fine that the head rapporteur will present to the College, taking into account all the possible reduction factors (points 25 and 28). The details of the calculation of the fine do not appear in these minutes.

Final decision of the College

The College adopts its decision after a two part hearing: first, the statement of objections, the facts and their legal qualification are discussed in the presence of all the parties, before each company agreeing to settle is heard separately on the setting of the amount of its penalty (points 32 and seq.).

On this basis, the College "*may impose a fine taking into account the minimum and maximum amounts shown in the settlement minutes*" (point 31). It seems obvious that the college of members is bound by the agreed maximum amount. In the same way as for the objections, any willingness of the College to go further than the proposals set out by the Investigation Services is conditional upon giving first the companies concerned an ability to be heard. This is done by sending the case back to the Investigation Services so that the procedure, and where relevant, the settlement, can integrate the new developments.

The fact that the College should now take into account the minimum fine in the range raises more questions, as it cannot be bound by the objections notified by the Investigation Services. The College may well decide not to retain an objection, or to retain it only for a shorter period or more limited scope, and these decisions necessarily impact the amount of the fine. Indeed, the scope of the infringements retained and the setting of the fine are directly linked, because a fine can be considered justified only if it is proportionate to the seriousness of the facts, the extent of the damage caused to the economy and the situation of the undertaking.

7 French Competition Authority, decision n°15-D-08 of 5 May 2015 on practices in the poultry meat marketing sector.

This is probably the reason the draft guidelines provide that the methodology for calculating fines summarized above is not intended to apply to the decision itself (point 35), in order to disconnect the objections and the quantum of the fine. However, it is not certain that this will be sufficient to preserve the decision process and the justification of the fine: either the College retains a real power to review the objections stated, with this power also applying to the subsequent fines, or the College would only record the agreement between the Investigation Services and the company, which would hardly comply with French institutional principles and would raise real difficulties as to the legality of the fine and of the decision as a whole.

For the Investigation Services, the advantage of a lower limit is obviously to secure acceptance by the company of a fine level that corresponds to the Investigation Services' views of the seriousness of the infringement, and of the damage done to the economy. A range therefore ensures, better than a cap, the fact that companies accepting to settle present comments that do not call into question the overall assessment of the seriousness of the infringement, but the mechanism proposed raises issues that are much more crucial in nature.

By not tackling these issues, the draft guidelines leave it to practice and eventually to the courts to decide. In the end, predictability is certainly reinforced to the benefit of companies accepting to settle, but legal certainty may not be completely ensured.

Comments on the draft guidelines are expected until 30 April 2018, with a view to have the final guidelines published by the summer.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

Nathalie Jalabert Doury
Partner, Paris
njalabertdoury@mayerbrown.com
T +33 1 53 53 43 43

Jean-Maxime Blutel
Associate, Paris
jblutel@mayerbrown.com
T +33 1 53 53 18 63

Estelle Leclerc
Associate, Paris
eleclerc@mayerbrown.com
T +33 1 53 53 36 21