Settlements in Competition Law

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Introduction

Good afternoon ladies and gentlemen. Allow me first to thank the Croatian Competition Agency and the Croatian Competition Law Association for the kind invitation to participate in this webinar. We are of course delighted to share the AdC's experience on settlements and contribute to the debate.

I thought of structuring this initial presentation by (i) starting with a quick overview of the main (procedural) characteristics of the settlement procedure in Portugal, followed by (ii) a reminder of its underlying policy advantages, including (iii) some remarks on our approach as to which cases merit this fast track procedure; (iv) I will also touch upon the issue of so-called "hybrid settlements" and (v) conclude with some insights or key lessons drawn from our experience on how to create proper incentives for companies to resort to this key procedural tool.

Overview of the main procedural characteristics of the settlement procedure

Though the settlement procedure was introduced in the Portuguese Competition Act in 2012, it was tested in practice sometime before. In 2007 the AdC decided a landmark cartel case concerning bid-rigging in hospital tenders, whereby it rewarded, with a fine reduction of 50%, the cooperation of one of the participants who then opted not to appeal, and despite the lack of a specific provision in the Competition Act on the matter.

Autoridade da Concorrência

Thus far, since 2012, we have settled with 20 firms within 12 different investigations, accounting for approximately 17% of our cases.

Pursuant to the law in Portugal, settlements are not limited to cartels. They may potentially cover any type of investigation leading to the imposition of penalties, so both in the antitrust and merger control forefronts (therefore including for ex. gun-jumping cases).

Definition: Settlements essentially consist of a fast-track procedure for clear-cut infringements. They require an undertaking's acknowledgment of its participation in a competition infringement and its responsibility for that infringement. This means that once the parties settle, they waive their right of appeal as to the facts that they have admitted to, and, in return, they are rewarded with a fine reduction.

Initiating conversations: Either the AdC or the undertakings concerned may initiate settlement talks. However, we hold the power to unilaterally decide, at any time, to put an end to settlement discussions, with respect to one or more of the parties, if it we consider that the discussions are not generating sufficient procedural gains. This decision is final and may not be challenged.

Timing: Settlements can occur at different stages of an investigation, either before or after the statement of objections has been issued.

In the latter case, a settlement proposal must be filed within the deadline for the reply to a statement of objections (SO).

In case settlement talks are initiated before the SO, the AdC shall issue a "very preliminary" SO, which will contain the main facts and evidence and the range of potential fines.

From this point onwards, the parties may either agree to settle, by filing a written settlement submission or disagree. In the first scenario, we will notify the companies with a draft settlement decision, which must then be confirmed in writing together with the payment of the fine.

Should the parties disagree with the preliminary SO, fail to accept the draft settlement decision or pay the fine, the case will proceed under the normal track. The previous settlement submission is then considered ineffective and may not be used as evidence against any of the parties in the settlement proceedings.

Level of fine reduction: As regards the award for settling, there is no pre-established level of fine reduction, neither in the legislation nor in our fining guidelines. We have been following a case-by-case approach.

One obvious concern here is to strike a right balance between settlements and leniency, since they are complementary tools and can be used together in the same case. Whilst leniency is used to detect cartels and collect relevant evidence, settlements are meant to achieve procedural savings and internal efficiencies. In case a firm applies for both, the reduction granted for leniency will be added to the one applied under the settlement procedure. We have tried to ensure that the fine reduction granted through settlements does not have a "chilling effect" on leniency applications. In most cases, in practice, the fine reduction has been of 10%.

Policy advantages

The advantages of settlements are quite straightforward and important to recall here:

From an enforcement or public policy standpoint, they reduce administrative and litigation costs, given that the length of investigations is significantly shortened.

To give you an idea, under the standard procedure, our investigations have lasted between 9 months and 5 and a half years (the longest cartel investigation so far), whereas our quickest settlement case just took us 5 months to close. We settled 5 cases in the last couple of years, all of which took btw 5 and 10 months to close. So we have managed to streamline the procedure.

Of course, these procedural savings allow us to reallocate the resources spared to other additional investigations, thereby improving the effectiveness of our enforcement record.

From the firms' perspective, there are important benefits as well:

First, the fine reduction;

Second, savings in time and resources which would otherwise be allocated to the defense and litigation of the case.

Third and perhaps more importantly, mitigating reputational effects: a lengthy antitrust investigation is likely to bring up more times in the media the names of the firms under investigation than a fast track settlement procedure. Indeed, we have come to find that one of the main incentives for companies to come forward,

possibly even more than the fine reduction, is being able to better control these other collateral damages.

In this respect it is noteworthy that we often also impose fines on individuals. Board members, directors, managers may be deemed personally liable either when they actually perpetrate the infringement (for ex. by participating in cartel meetings) or if they knew or ought to know of the existence of the infringement in their organization and fail to take any measures to terminate it immediately. We have consistently been using this tool: we sanctioned a total of 36 individuals in recent times and our experience has taught us that once we send charge sheets to individuals, companies tend to volunteer much more quickly to settlement talks in order to mitigate fines and offset reputational effects.

Finally, companies also try to limit exposure to damage claims, because a final decision in a settlement case is likely to be much less detailed and more concise than a decision carried out under the regular track.

Which cases should follow this fast track procedure

In order to ensure a successful tool, it is important to bear in mind which cases are eligible for settlements, namely clear-cut infringements that merit a penalty.

Though this is not encapsulated in the law, we will not pursue settlement talks unless we are completely persuaded of the merits of a case, that we have found an infringement to the required standard, i.e. that we hold sufficient evidence to proceed under the standard track at any moment if the parties fail to cooperate.

In other words, we will not initiate settlement talks with a week hand, so to say; besides, companies would know if we would do this.

Thus, if we feel the need to test a novel theory of harm because, for ex. the behavior in question is causing a negative effect on consumer welfare, this is probably the type of case that should go to court – so that this novel issue is duly tested and confirmed or solved through a commitment decision with no fines.

In short: our experience has shown that it is important to have a flexible, but also firm approach when it comes to settlements. Hence, we also do not welcome settlement talks targeted at bargaining with the AdC the merits of the case, the scope of the objections raised or the sufficiency of the evidence. If parties wish to challenge the case, they should follow the standard track. The point is that the settlement procedure is not a plea-bargaining exercise and we do not welcome

protracted discussions which disrupt the procedural efficiencies that are the point of having settlements. We are nonetheless open to draft more concise settlement decisions which contain no more than the essential elements for finding the infringement.

Finally, settlements are more likely to be successful in cases involving a fewer number of undertakings; thus far we have initiated or accepted settlement talks in cases with a maximum of 5 firms.

Hybrid settlements

And this takes me to the question of Hybrid settlements.

Both pure settlement and hybrid cases are admissible under the law. Hybrid cases are dual track procedures, whereby some companies decide to settle while others do not, thus giving rise to a succession of fining decisions within the same investigation.

We are not fans of this dual track procedure because it entails obvious disadvantages: (a) it is a challenge for the case teams that have to combine different timings and draft more decisions; (b) it can render the procedure more complex and investigations more time consuming, sometimes even lengthier overall than a standard track procedure.

However, like other unpleasant things in life, one needs to learn how to live with them. So up until now we have not ended settlement discussions because they have become hybrid. So we do still see some value in them because:

. They reduce litigation costs in relation to settling firms. This alleviates part of the administrative burden of the investigation.
. On the substantive side, having even one firm admitting to cartel participation can make a case more robust and persuasive for the appeal court.
. Even though a decision to end settlement talks is not subject to appeal, if we would object to settlements because not all the companies are on board, it could be perceived as unfair for a single or a couple of non-settling firms to hold the others as “hostages” of their strategy.

In hybrid cases, we need to be mindful not to risk undermining the rights of defense or the presumption of innocence of non-settling firms.

We have been adopting a conservative approach in this respect. we have endeavored as far as possible for the procedures to run in parallel, for example: by notifying SO's simultaneously to non-setting firms and to firms that have signaled a willingness to settle; or by opting to suspend the deadlines to reply to a SO, while settlement proposals are under discussion, thus benefiting non-settling firms with a longer period to prepare their defenses and, also, in order to encourage them to settle as they are confronted with the fact that others are probably going to.

But when we do adopt an autonomous settlement decision, we draft it so that it is not understood as a final decision in relation to non-settling firms. Actually, our decisions clearly state they are only final to the settling firms.

Anyway, we have not refrained from mentioning therein non-settling firms when we describe the facts, because a distinction should be drawn between describing the facts and their legal assessment, as the GC acknowledges in the Pometon ruling.1

We have also not refrained from issuing press releases on settlement decisions in hybrid cases as we normally do with all our final decisions, by stating that the investigation is still ongoing in relation to a number of companies.

This approach has allowed us to signal deterrence to the marketplace so as to bring cartel infringements to an end, while preserving the advantages of a fast-track procedure in the interests of the effectiveness of competition policy.

In short, we have mixed feelings on hybrid cases, but I believe we should look at the glass half full, particular after the Pometon ruling, and continue to accept hybrid cases if we envisage the possibility for procedural gains.

Of course we will also firmly put an end to settlement talks if we notice that undertakings are simply gaming the system, by deliberately prolonging an investigation.

[1] As confirmed by Court of Justice in March 2021, in the decision terminating the settlement procedure, the Commission may refer to certain facts and behaviour concerning participants in the alleged cartel which are subject to the standard procedure, whilst ensuring that the presumption of innocence of the undertakings which have refused to enter into a settlement – such as Pometon – is preserved. Furthermore, the Court added that this assessment should be made in a case-by-case basis according to the particular circumstances in which the decision has been adopted.

Creating incentives for firms to resort to this key procedural tool

I will conclude with some of the main insights or key lessons drawn from our experience on settlements, notably as to how to create incentives for companies to resort to this key procedural tool:

First, it is important to have guidelines on setting fines and be consistent in one's decisional practice with regard to fines.

Regardless of the specific methodology one may use – by taking into consideration as basis of the fine the total worldwide turnover or just the turnover of the affected products –, I think it is fairly consensual that it is good to have a method.

On the one hand, in order to be encouraged to settle (or apply for leniency for that matter) companies need to know what they are up against. Sure, they are getting a fine reduction, but a reduction from what?

On the other hand, guidelines are helpful in setting the main parameters around which the discussions are supposed to evolve. By making it easier for the addressees to understand the level of a fine to be applied, guidelines reduce the perception of unfair special treatment, which is all the more relevant in cartel cases. So being consistent in one's fining policy encourages and facilitates the settlement process.

Second, we find that the possibility to impose administrative sanctions on individuals or a ban from public procurement in case of bid-rigging investigations renders our competition law toolbox more complete, in that it provides additional deterrence, while creating further incentives for companies to resort to settlements. A ban from public tenders is yet another tool we have in our arsenal that we have recently used in practice and will continue to do so whenever appropriate. We do have discretion to impose these sanctions or not and we may decide not to do so in the context of settlement talks which should encourage firms to address settlements more seriously.

Third, it is pointless to have vigorous enforcement if companies do not actually feel the pain by paying fines: in other words, it is crucial to have your cases upheld in courts to ensure the credibility and effectiveness of competition policy as a whole. Therefore, a sound judicial track record enhances the incentives for companies to settle.

Let me add that at the AdC we do not compromise when it comes to due process. I usually say that for us, it is like breathing – it is naturally embedded in our DNA. I

believe that our success rate in court – one of our key performance indicators, which has significantly increased in recent years – is a strong testament to that. For ex. in 2020, the AdC's overall judicial success rate was of 92%, meaning that of a total of 85 judicial rulings rendered last year, 78 upheld our decisions, 6 were partially favorable to the AdC, and only 1 decision got annulled on procedural grounds. Furthermore, our decisions were fully upheld on the merits, i.e. a 100% success rate there.

Fourth, it is key to ensure a proper interplay between public and private enforcement. As private enforcement gains traction across Europe, it becomes all the more important to create the right incentives not to undermine the attractiveness of settlements or leniency for fear of exposure to damages. Portugal is no exception, not least because we do have a very favorable private enforcement regime, which includes opt-out class actions and a specialized competition court.

Some examples of adjustments we have made in law and practice in order to achieve this goal, include:

- Absolute protection of settlement submissions: further to the implementation of the Damages Directive, we have specifically made clear in the law that the submissions filed during settlement talks that for some reason fail and thus become ineffective, though remaining in the file, are absolutely protected from disclosure to third parties, including to those seeking redress. [2]
- Moreover, in hybrid cases, in order to protect settling firms from being overexposed to damages or more exposed than non-settling firms, we are only releasing non-confidential versions of settlement decisions once the

[2] As you are probably aware, according to the Directive "withdrawn" settlement submissions are not protected from disclosure once an investigation is concluded. However, ineffective submissions are not "withdrawn", within the meaning of the Damages Directive. [In effect, the Competition Act does not allow for a settlement submission to be withdrawn by its applicant]. Those submissions may become ineffective in case of unsuccessful settlement talks and, therefore, remain in the file, while possibly entailing an admission of wrongdoing. Because the Competition Act might be said to be ambiguous in this regard, since doubts could be raised regarding the distinction between "ineffective" and "withdrawn" settlement submissions and the corresponding scope of protection, these amendments were deemed necessary to avoid discouraging businesses to resort to this strategic procedural tool.

standard track procedure is concluded. Therefore, we do not facilitate those documents while the investigation is ongoing, in order not to jeopardize the position of settling companies.

. Finally, according to the draft reform implementing the ECN+ Directive, which is currently under discussion in Parliament, settlements will be rendered more flexible, by including the possibility to settle even after the reply to the SO, and by allowing undertakings merely to accept not to challenge the facts and their participation in an infringement (and not necessarily to positively acknowledge or confess those same facts), which can be relevant from a reputational standpoint. This was a request brought to us by stakeholders, in the context of the preparatory works of the draft legislation implementing the ECN+ Directive which we coordinated, so as to make this tool more attractive. The legal consequence in any event shall be the similar, i.e. the parties will not be allowed to challenge on appeal the facts or their legal qualification.

In conclusion:

The effectiveness of our enforcement record and of competition policy as a whole relies to a large extent on the degree to which we are able to reduce the length of our investigations, increase procedural flexibility and efficiency, while not compromising on due process. In our view, settlements are a critical tool to achieve these goals.

Thank you for your attention.

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