European Competition and Consumer Day Conference

Panel on Cartel Settlements and Policy Enforcement across the EU

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Check against delivery

Overview of the main characteristics of the settlement procedure in Portugal

Good afternoon Ladies and Gentlemen.

Let me start by thanking the Romanian Competition Council for inviting the AdC to participate in this event and for being such wonderful hosts. Congratulations for the excellent organization of this Competition and Consumer Day Conference.

General remarks

Though the settlement procedure was introduced in our Competition Law in 2012, it actually started before, "avant la lettre" in 2007, in a landmark cartel case whereby the AdC rewarded, with a fine reduction of 50%, the cooperation of one of the participants who then opted not to appeal.

Thus far, we have issued settlement decisions in 8 cases, 6 in cartel cases and 2 in gun-jumping cases (for failure to notify a merger).

Nature

Settlements qualify as 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 and, in return, they are rewarded a fine reduction.

Scope

Settlements are not limited to cartels. The procedure may potentially cover any type of investigation leading to the imposition of a penalty, both in the merger control and antitrust forefronts.

Procedural aspects

Both pure settlement and hybrid cases are admissible and have indeed taken place. Settlements can occur at different stages of an investigation, either before or after the statement of objections has been issued. In this case, a settlement proposal must be filed within the deadline for the reply to a SO.

Regardless of the phase, it is important to bear in mind that settlements are meant for clear cut infringements. The decision to enter into settlement talks is grounded on the premise that the AdC has established the existence of an infringement to the requisite standard, so that it holds sufficient evidence to proceed with the case under the standard procedure at any time.

Both the AdC and the defendants hold the power of initiative to begin settlement talks. The AdC may also decide, at any time, to put an end to settlement discussions, with respect to one or more of the parties, if it considers that the discussions are not generating sufficient procedural gains. This decision is final and may not be challenged.

In the context of the implementation of the ECN+ Diretive and since we are assisting the Government in preparing a draft legislation for the purposes of implementation to be approved by Parliament, we are contemplating whether to render settlements more flexible, notably by including (or not) the possibility to settle after the reply to the SO or 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).

Main procedural steps

If the procedure is initiated before the SO, prior to starting settlement discussions the AdC must issue a “very preliminary” SO, by informing each party about of the objections raised, the main evidence used to support those objections and the range of the potential fines.

Once the discussions are closed, the parties file a written settlement submission. In case the AdC accepts the settlement submission, it will draft a settlement notice, which must be confirmed in writing by the parties together with the payment of the fine.

Should the party fails to confirm its agreement or pay the fine, the case then proceeds under the normal track and the previous settlement submission is 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 reduction, neither in the legislation nor in our fining guidelines. We have been favoring a case-by-case approach, allowing to take into consideration the specificities of each case.

One obvious concern is to strike a right balance between settlements and leniency, since they are complementary tools and can, therefore, be used together in the same case. Leniency is used with the purpose of detecting cartels and collecting evidence, whereas settlements aim at obtaining procedural savings and internal efficiencies. If a firm has applied for both, the reduction granted for leniency will be added to the one applied under the settlement procedure.

Hence, we have tried to ensure that the fine reduction granted through settlements doesn't have a "chilling effect" on leniency applications.

A final aspect which I find noteworthy in the context of settlements is the importance of having guidelines to set fines. Regardless of the specific methodology one may use, I think it is fairly consensual that it is good to have a method.

Because 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?

Guidelines are, therefore, helpful in setting the main parameters around which the discussion is supposed to evolve. By making it easier for the addressees to understand the level of a fine to be applied, they reduce the perception of unfair special treatment, which is all the more relevant in cartel cases. So having guidelines to a certain extent can facilitate the settlement process.

The effectiveness of the settlement procedure

The settlement procedure has become increasingly popular in Portugal, in particular in cartel cases. From 2012 onwards, 35% of our cartel cases have been settled and I am convinced that the numbers will still improve.

I will provide a number of qualitative and quantitative reasons why this is happening.

From the market perspective, our experience shows that one of the major incentives for companies to come forward is not so much the fine reduction – although depending on the size of the firm that can also play a role – but mostly to be able to control other collateral damages.

First, 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.

Second, we also impose pecuniary sanctions against 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 did not take any measures to terminate it immediately.

So once individuals are sent a charge sheet, we have found that this may create incentives for companies to volunteer for settlement talks, in order to reduce fines and mitigate reputational effects.

Third, firms also endeavor to reduce exposure to damage claims because a final decision in a settlement case will be likely less detailed, when compared to a decision taken under the standard track. And all decisions will sooner or later become public.

Finally, settlements allow for relevant savings in time and resources which would otherwise be allocated to the defense of the case.

From a public policy perspective, there are also clear-cut advantages. Settlements reduce administrative and litigation costs, given that the length of investigations is significantly shortened.

Under the standard procedure, cartel investigations have lasted between 5.5 years and 9 months.

Our first settlement case took 4.5 years to close, while the most recent cartel cases, decided in 2018, lasted around 1.5 years1 because we are streamlining the procedure.

The average duration of a cartel case under standard procedure has been 1041 days, whereas under the settlement procedure it is currently 862 days, without counting all the savings in terms of litigation costs.

These procedural efficiencies of course benefit society as whole, since they allow us to reallocate the resources thus saved to other investigations, thereby increasing the efficiency and the effectiveness of our enforcement record.

In Portugal, there is a very substantial litigation tradition: up until now, nearly 75% of the AdC's antitrust fining decisions have been challenged on appeal, which I think suffices to show that

[1] Antalis: opening of procedure: 12.09.2011, settlement decision: 29.03.2016;
Sacyr Neopul: opening of procedure: 13.10.2016, settlement decision: 04.12.2018;
Fidelidade/Multicare: opening of procedure: 08.06.2017, settlement decision: 28.12.2018.

there is a great potential for additional efficiency gains, by avoiding these litigation costs (65% as of 2012).

Let me explain that this litigation habit is also prompted by the fact that, in Portugal, the statute of limitations to impose a fine may elapse while an AdC's decision is under appeal, meaning that one of the major incentives for companies to challenge a case has not only been necessarily to exercise their rights of defense, but also the hope to see their case time-barred while under appeal.

Of course, this state of play will change soon, on account of the implementation of the ECN+ Directive which will allow for a revamping of our Competition Act, making it more in line with the EU judicial system with regard to the statute of limitations. And this constitutes an additional reason why I think settlements will become even more attractive for firms in years to come.

As to the concerns that have been voiced on the point that by increasingly resorting to settlements or commitment decisions to close antitrust investigations, agencies would be by-passing the role of the judiciary in shaping competition enforcement, let me just assure you that those concerns are unwarranted, at least with regard to Portugal.

Courts play a key role in our competition ecosystem. For example, companies often judicially challenge our procedural decisions throughout the lifecycle of an investigation (not only final decisions). And we regard this as helpful in that it avoids that an investigation becomes flawed for reasons of due process. So, judicial scrutiny is of paramount importance for us – we often deliberately seek it to obtain legal clarity.

Besides, our system of judicial review is not purely administrative or based on a control of legality. In Portugal, when it comes to impose sanctions, courts hold powers of full jurisdiction and apply rules and principles of criminal law, so the standards of proof and judicial review are very demanding to the point that all the evidence can be re-heard before the appeal court in a trial hearing if it so chooses (much like in a criminal trial).

In short, our experience has shown that it is important to have a flexible, but also firm approach to settlement discussions. We will not follow the settlement track unless we are fully convinced of the merits of a case, that we have proven it to the required standard, so that we may proceed under the standard procedure at any time should the parties fail to cooperate.

In particular, we 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 want to challenge the case, they should follow the standard track. The point is that the

settlement procedure is not a plea-bargain exercise and we do not welcome protracted discussions which disrupt the procedural efficiencies we are aiming at.

We are convinced that the experience on the ongoing and up-coming cases will allow to make the settlement procedure an increasingly useful tool, from both a public policy and a market perspective.

Hybrid settlements

We dislike hybrid settlement cases, to say the least. But I guess that like other unpleasant things in life, one needs to learn how to live with them. Up until now we have not ended settlement discussions because they have become hybrid. So we do still see some value in hybrid cases because:

- They still reduce litigation costs in relation to settling firms. This alleviates part of the administrative burden of the investigation, which is all the more relevant in cartel cases where multiple parties are involved, also considering the fact we have been increasingly also charging individuals.
- On the substantive side, having even one firm admitting to cartel participation makes our cases more robust and persuasive for the appeal judge, because after all, it takes at least two to tango.
- Even though a decision to end settlement talks is not subject to appeal, 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.

There are also obvious disadvantages to this dual track procedure, however:

- It is a challenge for the case teams that have to combine different timings and draft more decisions.
- It can render the procedure more complex and investigations more time consuming, sometimes even lengthier overall than a standard track procedure.

I suppose that this is because we have been adopting a conservative approach in order not to risk undermining the rights of defense or the presumption of innocence of non-settling firms.

This brings us to the ICAP and Pometon rulings[2]. As I mentioned before, our enforcement system is not merely administrative in nature, but quasi-criminal. Rules and principles of

[2] ICAP (T-180/15; C-39/18 pending) and Pomenton (T-433/16).

criminal procedure are actually applicable within antitrust investigations rendering the system quite comprehensive in terms of due process guarantees.

We were never confronted with the procedural hurdles faced by the EC in those cases because 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 an 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.

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

The AdC is strongly committed to enhance the effectiveness of its enforcement record. This depends significantly on the extent to which we can reduce the duration of our investigations, increase procedural flexibility and efficiency. Settlements are an extremely important tool to achieve those goals.

At the same time, we do not compromise when it comes to due process. For us, it is like breathing; it is naturally embedded in our DNA. And hybrid settlement cases are no exception.

I think that the success rate of the AdC's decisions in court – one of our key performance indicators, which has significantly increased in recent years – is a strong testament to that. For ex. in 2017, it was of 89% overall and 100% on the merits.

So, for us effective enforcement also means due process or procedural fairness: it is key in ensuring credibility of competition policy as a whole.

Thank you all for your attention.

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