

LIDC – Turin 2014

Question A

“The consistency and compatibility of transactional resolutions of antitrust proceedings with the due process and fundamental rights of the parties”

*French report*¹

Introduction

Ending a case by an agreement is a very old idea in France. The French civil code states since 1804 that “Anyone can compromise as regards rights over which they have an unrestricted power of disposition” (art. 2059, civil code). This agreement is called “transaction”.

Criminal law. Transactional resolutions of disputes are not unusual under French Law, for instance, under criminal law². The French *Code de procédure pénal* (Criminal Procedure Code) states that the public criminal proceeding can “terminate by a transaction where the law expressly states or by the execution of a criminal composition” (art. 6§3).

Transactional procedures are quite rare in the French criminal law, but one can mention the criminal “composition”. The criminal composition (art. 41-2, Criminal procedure code) is based on an agreement between the offender and public prosecutor that has to be validated by a judge. In the end, there is no judgement but a transaction that ends the case.

Competition law. In France, as regards to Competition law, one distinguishes between two sets of rules : 1) the so called “restrictive practices” (“pratiques restrictives”, Commercial code, 4th book, title IV), which are treated by the judicial judge; 2) “anticompetitive practices” or “antitrust” (“pratiques anticoncurrentielles”, Commercial code, 4th book, title II), ie agreements and abuses of dominant position rules.

As regards to the “restrictive practices”, a criminal settlement is available: “For offenses under Title IV of this book for which imprisonment is not incurred and for offenses laid down in this book, the administrative authority responsible for competition and consumer law, as the public action has not been implemented, to settle, with the agreement of the State prosecutor, in the manner prescribed by decree in Conseil d'Etat”³. A comparable procedure exists in environmental law⁴.

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² See J.-B. Perrier, *La transaction en matière pénale*, LGDJ 2014.

³ Commercial code, art. L 470-4-1: « Pour les délits prévus au titre IV du présent livre pour lesquels une peine d'emprisonnement n'est pas encourue et pour les contraventions prévues au présent livre, l'autorité administrative chargée de la concurrence et de la consommation a droit, tant que l'action publique n'a pas été mise en mouvement, de transiger, après accord du procureur de la République, selon les modalités fixées par décret en Conseil d'Etat. ».

⁴ Environmental Code, Article L 173-12-1.

As regards to the antitrust (or “anticompetitive practices”) rules enforcement, there are several transactional institutions in the French commercial code, related to *antitrust* proceedings.

The first one to be mentioned is prescribed in article L. 464-9 of the French commercial code⁵. Pursuant to this text, the French minister for Economy can settle an antitrust case. But the scope of this procedure is narrow. The practices at stake must only affect a market of a “local dimension”, the practices do not concern matters under Articles 101 and 102 of the TFEU, and the undertakings concerned have a turnover made in France that does not exceed € 50 million (their combined turnover does not exceed EUR 200 million).

The three main “transactional procedures” in France are, as regards to the antitrust enforcement before the French Authority:

- the leniency program (“le programme de clémence”⁶)
- the commitment procedure (“la procédure d’engagements”⁷)
- the settlement procedure (“la procédure de non-contestation des griefs”⁸)

In antitrust cases, recent years have seen renewed interest for these “negotiated” procedures: 4 settlement procedures in 2012, 3 applications for leniency programs and 5 commitments procedures these last 2 years.

In 2008, 18 applications for a leniency program, 7 commitments offers⁹.

⁵ Art. L. 464-9: “Le ministre chargé de l’économie peut enjoindre aux entreprises de mettre un terme aux pratiques visées aux [articles L. 420-1, L. 420-2, L. 420-2-1 et L. 420-5](#) ou contraires aux mesures prises en application de [l’article L. 410-3](#) dont elles sont les auteurs lorsque ces pratiques affectent un marché de dimension locale, ne concernent pas des faits relevant des articles 81 et 82 du traité instituant la Communauté européenne et sous réserve que le chiffre d’affaires que chacune d’entre elles a réalisé en France lors du dernier exercice clos ne dépasse pas 50 millions d’euros et que leurs chiffres d’affaires cumulés ne dépassent pas 200 millions d’euros.

Le ministre chargé de l’économie peut également, dans les mêmes conditions, leur proposer de transiger. Le montant de la transaction ne peut excéder 150 000 € ou 5 % du dernier chiffre d’affaires connu en France si cette valeur est plus faible. Les modalités de la transaction sont fixées par décret en Conseil d’Etat. L’exécution dans les délais impartis des obligations résultant de l’injonction et de l’acceptation de la transaction éteint toute action devant l’Autorité de la concurrence pour les mêmes faits. Le ministre chargé de l’économie informe l’Autorité de la concurrence des transactions conclues.

Il ne peut proposer de transaction ni imposer d’injonction lorsque les mêmes faits ont, au préalable, fait l’objet d’une saisine de l’Autorité de la concurrence par une entreprise ou un organisme visé au deuxième alinéa de l’article [L. 462-1](#).

En cas de refus de transiger, le ministre chargé de l’économie saisit l’Autorité de la concurrence. Il saisit également l’Autorité de la concurrence en cas d’inexécution des injonctions prévues au premier alinéa ou des obligations résultant de l’acceptation de la transaction.

Les sommes issues de la transaction sont versées au Trésor public et recouvrées comme les créances étrangères à l’impôt et au domaine”.

⁶ Commercial code, Article L. 464-2 IV, see also the Communiqué de procédure de l’Autorité de la concurrence du mars 2009 relatif au programme de clémence français. An English version of these guidelines is provided on the Autorité’s website.

⁷ Commercial code, Articles L. 464-2 and R. 464-2 ; see also the Communiqué de procédure de l’Autorité de la concurrence du 2 mars 2009, relatif aux engagements en matière de concurrence.

⁸ Commercial code, Article L. 464, III ; see also Communiqué de procédure de l’Autorité de la concurrence du 10 février 2012.

⁹ Rapport d’activité de l’Autorité de la concurrence de 2012.

The term “transaction” is quite inappropriate in France, because these procedures are not “contracts” but rather “decisions” from an administrative body. Second, these procedures do not prevent the State prosecutor to bring an action before the criminal judge.

Merger control. As regards to merger control, the French Conseil d’Etat states that: “when deciding on a concentration which has been notified, the Competition Authority, which does not impose a penalty, ruling on an application submitted to it and, although it decides on the basis of rules of law and following an organized process, does not settle a dispute over the rights and obligations of a civil nature, but has a police power; therefore the decision is not within the scope of the provisions of Article 6.1 of the ECHR”¹⁰.

In that case, the principle of impartiality was at stake. It’s very important to underline the link between the fundamental rights and the imposition of a fine. As regards to antitrust proceedings, when no fine is imposed (for instance, the commitment procedure), the fundamental rights will not be granted to the undertaking.

1. Overview of the French “transactional” procedures

1.1. Leniency program (*Procédure de clémence*)¹¹

The French *code de commerce* states that :

“A total or partial exemption from financial penalties may be granted to a company or a body which, along with others, has implemented a practice prohibited by the provisions of Article L. 420-1, if it has helped to establish the existence of the prohibited practice and to identify its perpetrators, by providing information which the Authority or the administration did not have access to beforehand. To that end, subsequent to the initiative taken by that company or body, the Competition Authority, at the request of the general rapporteur or the Minister for Economic Affairs, adopts a leniency opinion which specifies the conditions the envisaged exemption is subject to after the government representative and the company or body concerned have submitted their observations; the opinion is conveyed to the company or the body and the minister, and is not published. When a decision is taken pursuant to I of the present article, the Authority may, if the conditions specified by the leniency opinion have been complied with, grant an exemption from the financial penalties proportionate to the contribution made to establishing the infringement.”
(Art. L. 464-2 IV)¹²

¹⁰ Conseil d’Etat, Ass., 21 décembre 2012, n° 362347.

¹¹ Commercial code, Article L. 464-2 IV, see also the Communiqué de procédure de l’Autorité de la concurrence du mars 2009 relatif au programme de clémence français. An English version of these guidelines is provided on the Autorité’s website.

¹² « Une exonération totale ou partielle des sanctions pécuniaires peut être accordée à une entreprise ou à un organisme qui a, avec d’autres, mis en œuvre une pratique prohibée par les dispositions de l’article L. 420-1 s’il a contribué à établir la réalité de la pratique prohibée et à identifier ses auteurs, en apportant des éléments d’information dont l’Autorité ou l’administration ne disposaient pas antérieurement. A la suite de la démarche de l’entreprise ou de l’organisme, l’Autorité de la concurrence, à la demande du rapporteur général ou du ministre chargé de l’économie, adopte à cette fin un avis de clémence, qui précise les conditions auxquelles est subordonnée l’exonération envisagée, après que le commissaire du Gouvernement et l’entreprise ou l’organisme concerné ont présenté leurs observations ; cet avis est transmis à l’entreprise ou à l’organisme et au ministre, et

The *Autorité* has issued a *Communiqué*: Procedural notice relating to the French Leniency Programme issued on March 2nd, 2009¹³, and that will soon be adapted.

The French leniency program is inspired by and has been adopted in compliance with the Model leniency program of the European Competition Program¹⁴.

Scope

The french leniency program can only be implemented in art. L. 420-1 of the commercial code cases or art. 101 TFEU cases. In practice, cartels cases are exclusively concerned.

The *Communiqué* states that: “In principle, the agreements concerned are cartels between undertakings consisting in the fixing of prices, the allocation of production or sales quotas or the sharing of markets, including bid-rigging, or any other similar anticompetitive behaviour between competitors”.

Implementation

The French leniency program creates an incentive to end the participation of the undertaking in the illegal behaviour and to denounce it to the agency. Indeed, the undertaking won't fear to have to pay a high fine, if it fully cooperates with the agency.

There is no “right to leniency”. A set of conditions must be met. In accordance with the principle of an equal treatment, in the case of a plurality of applications, the importance of the exemption is determined by the place in which companies have issued their request.

- The agency grants a full immunity from the fine incurred to any undertaking who is the first to apply for leniency and fulfils these conditions:

CASE WHERE THE AGENCY HAS NO INFORMATION ON THE AGREEMENT

- o The Authority did not previously have sufficient information and pieces of evidence to be able to carry out or to have carried out targeted inspections, on their own initiative, and
- o the information and pieces of evidence submitted by the undertaking applying for leniency are sufficient, in the Authority's point of view, to have such measures carried out. These informations, provided orally or in writing, are the name and address of the legal entity applying for full immunity ; the name and address of the other members to the alleged agreement; a detailed description of the alleged agreement, including the nature and the use of the products involved, the territories on which the practices concerned may have an impact, the nature of these practices and an estimate of the duration of their implementation; and information about any leniency application relating to the alleged agreement which it has transmitted or intends to transmit to other competition authorities; and pieces of evidence (documentary or of any other nature) in its possession or that can be available at the time of the application. These elements may consist in information helping to identify locations, dates

n'est pas publié. Lors de la décision prise en application du I du présent article, l'Autorité peut, si les conditions précisées dans l'avis de clémence ont été respectées, accorder une exonération de sanctions pécuniaires proportionnée à la contribution apportée à l'établissement de l'infraction. »

¹³ English version available at http://www.autoritedelaconurrence.fr/doc/cpro_clemence_uk_2_mars_2009.pdf.

¹⁴ http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=418&id_article=2008.

and the object of contacts or meetings between participants in the alleged agreement¹⁵.

CASE WHERE THE AGENCY ALREADY HAS INFORMATIONS ON THE AGREEMENT

- the undertaking is the first to submit pieces of evidence which, in the Autorité's view, are sufficient to establish the existence of an infringement of article L. 420-1 of the code de commerce and, where applicable, to article 81 of the EC Treaty defining the existence of an agreement;
 - at the time of the application, the Autorité did not have sufficient evidence to establish the existence of an infringement to article L. 420-1 of the code de commerce and, where applicable, of article 81 of the EC Treaty defining the existence of an agreement, and
 - no undertaking has obtained a conditional opinion granting a type 1 A full immunity for the alleged agreement¹⁶.
- The agency grants also a partial immunity from fine to any undertaking under these conditions:
- The undertaking must provide the agency with pieces of evidence of the existence of the alleged agreement which represent significant added value with respect to the evidence already in its possession.
The concept of added value refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the ability of the Authority to prove the existence of the alleged agreement.
 - In order to assess the level of the reduction of the fine from which an undertaking may benefit, the Autorité will take into account the ranking of the application, the time when the evidence was submitted, as well as the extent to which the elements submitted by the undertaking bring significant added value to the case.
 - The partial immunity granted to an applicant shall not in principle exceed 50 % of the fine which would have otherwise been imposed, had it not been granted leniency¹⁷.

In addition, these cumulative conditions must be met:

- 1) the undertaking must end its involvement in the agreement without delay (at the latest as from the notification of the leniency opinion).
- 2) It must genuinely and fully co-operate on a continuous basis and expeditiously with the agency: providing information and pieces, remaining at the disposal of the agency, abstaining from destroying, falsifying or concealing information or evidences, abstaining from disclosing the existence or the content of the leniency program.

Procedure

The first step is from the applicant who approaches the General Rapporteur of the Authority. Anonymous contacts are accepted. A letter is sent by the undertaking or the application can be made orally "in which case the General Rapporteur takes notice on a written document of the

¹⁵ *Communiqué*, pts 14.

¹⁶ *Communiqué*, §15.

¹⁷ *Communiqué*, §16 s.

time and date of the statement”¹⁸. The letter mentions the main information about the agreement and “marks” the application for the leniency program in the queue. The *Rapporteur général* grants the undertaking a period of time, during which the application's rank in the queue is maintained, so the undertaking can collect the information and pieces of evidence relating to the agreement. A written or oral statement is taken from the undertaking's representative.

Then, the Authority examines the leniency application on the basis of the information and pieces of evidence supplied by the applicant. The Case officer drafts a report in which he verifies that the conditions set by the Authority to obtain the conditional benefit for full or partial immunity are fulfilled. Then, the applicant is called to attend a hearing before the Authority. Following the hearing, the Authority adopts an “opinion”. The opinion indicates whether the Authority grants the undertaking full or partial immunity from fines as well as, in the latter case, the rate of reduction and specifies the conditions attached thereto.

When the Authority considers that the conditions are not satisfied and issues a negative opinion, “the information and pieces of evidence are returned to the undertaking on its request”¹⁹.

Something very specific about the French leniency program is the very tight link between the Instructions services and the decision making body.

Fundamental and procedural rights of the parties

The leniency applicant has the same fundamental and procedural rights that any party to a proceeding before the Authority.

About ***confidentiality***, the Authority keeps the identity of the applicant confidential for the duration of the proceedings until the statement of objections is issued to the parties. The applicant's cooperation will be mentioned in the decision.

As regards the relationships between the national agency within the framework for the ECN, the European rules include principles relating to the protection of applicants for leniency²⁰: “information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 of the Council Regulation with the consent of the applicant”. The Communiqué states that “The Autorité committed itself to respect these rules. Besides, oral statements made under the present programme will only be transmitted by the Autorité to other competition authorities, pursuant to article 12 of Regulation No 1/2003, if the conditions set out in the Notice relating to cooperation are met and provided that the confidentiality guaranteed by the receiving competition authority is equivalent to the one guaranteed by the Autorité”.

Third parties

Third parties may participate in the proceedings if they are the source of referral to the Authority. However, they can not directly intervene in the leniency program. As an illustration, the reports prepared by the rapporteur for and during the session on the review of the leniency opinion do not have to be disclosed to the undertakings involved²¹.

¹⁸ Communiqué, §26.

¹⁹ Communiqué, §37.

²⁰ *Commission Notice on cooperation within the Network of Competition Authorities*, OJ C 101, 27/04/2004, p. 43, §40.

²¹ Conseil de la Concurrence, décis. n° 06-D-09, 11 avril 2006.

As regards to this issue, one has to distinguish between the procedure prescribed by the leniency program's rules, and the procedure after the statement of objections has been sent. In this last situation, the third parties have the rights granted by the general procedural rules of the commercial code.

The Authority also guarantees the undertakings that reveal the existence of agreements that the documents disclosed to it for that purpose will not be disclosed to third parties to the proceedings who request it²².

The decisions of the Authority related to the leniency program are notified only "to persons addressee of the statement of objections or of the report and to undertakings and bodies that have made commitments and to the Minister for the Economy"²³.

Only the applicant and the Minister for the Economy can challenge the regularity of the leniency procedure²⁴.

Risks for the parties

The French leniency program does not immunize from the risk of being brought before a civil or a criminal judge. But, as regards the civil consequences for the applicant, the French commercial code, since 2012, (art. L. 462-3²⁵) states that:

“The Competition Authority may transmit any information it holds concerning the anticompetitive practices concerned, ***excluding evidences produced or collected under IV of Article L. 464-2*** (i.e. leniency program), to any court consulting it or asking it to produce documents that are not already available to a party to the proceeding”.

As regards the criminal consequences, article L. 462-6 states that: “When the facts appear to (the Authority) to justify the application of Article L. 420-6, it sends the file to the State prosecutor”, and pursuant to article L. 420-6, three cumulative conditions must be met: the individual must have fraudulently played a personal and decisive role in the creation, organisation or implementation of the practices referred to in article L. 420-1 (about agreements).

The *communiqué* states that “The Authority considers that leniency is one of the legitimate reasons which justifies not to pass on to the State Prosecutor a case file in which individuals, belonging to the undertaking which has been granted leniency, would be liable to such proceedings”.

1.2. Commitment procedure (Procédure d'engagements)

Since 2005, the Competition Authority (and, previously, the Competition Counsel) has adopted 49 commitments decisions²⁶ (and 132 infringement decisions meanwhile). Most of the abuse of dominance and vertical restraints cases are treated today following this procedure.

²² Loi n° 2011-525, 17 mai 2011, J.O. 18 mai, de simplification et d'amélioration de la qualité du droit, article 50, modifiant l'article 6, I de la loi n°78-753, 17 juill. 1978

²³ Article R. 464-8 4° du Code de commerce

²⁴ Paris Court of appeal, 24 avril 2007, RLDA 2007/18, n° 1104, obs. Anadon C.

²⁵ « L'Autorité de la concurrence peut transmettre tout élément qu'elle détient concernant les pratiques anticoncurrentielles concernées, à l'exclusion des pièces élaborées ou recueillies au titre du IV de l'article L. 464-2, à toute juridiction qui la consulte ou lui demande de produire des pièces qui ne sont pas déjà à la disposition d'une partie à l'instance. Elle peut le faire dans les mêmes limites lorsqu'elle produit des observations de sa propre initiative devant une juridiction ».

²⁶ 2005: 5 ; 2006: 7 ; 2007: 8 ; 2008: 7 ; 2009: 3 ; 2010: 6 ; 2011: 4 ; 2012: 6 ; 2013: 3.

This procedure is often implemented in France (except in cartel cases) because it brings the case to a close before any charges are brought. The decision accepting commitments makes them binding without any acknowledgment of liability.

The French *code de commerce* states that :

The Authority has the power “to accept commitments proposed by undertakings or bodies liable to put an end to its competition concerns that may constitute practices prohibited by articles L. 420-1, L. 420-2 and L. 420-5.”
(Article L. 464-2)²⁷

“When the Competition Authority intends to apply Part I under article L. 464-2 for the purpose of accepting commitments proposed by undertakings, the Rapporteur shall inform the undertakings or bodies involved of his preliminary assessment of the practices in question. The assessment findings may be notified by mail, in a report, or, when the Authority is acting on an application for interim measures, by the presentation of an oral report during a hearing. A copy of the assessment shall be sent to the applicant and to the Government Official, except when it is presented orally at a hearing with the parties in attendance.

The time limit for the undertakings or bodies to put their commitments in writing after the preliminary assessment is determined either by the Rapporteur, if the assessment findings are notified by mail or in a report, or by the Competition Authority, if the assessment findings are presented orally during a hearing. The length of time may not be less than one month, unless agreed to by the undertakings or bodies concerned.

Once the commitments given by the undertakings or bodies involved have been received before the deadline referred to in the second paragraph above, the Rapporteur général shall notify the applicant, as well as the Government Official, of their content. He shall also issue a summary of the case and the commitments by all means in order to give any interested parties an opportunity to provide comments. He shall also set the deadline within which the parties, the Government Official and any interested third parties must provide their comments and the deadline may not be less than one month after the notification and public issue of the content of the commitments. These comments are put on the record.

The parties and the Government Official shall be invited to the hearing by a letter of invitation sent by the Rapporteur général along with the proposed commitments no less than three weeks before the scheduled hearing. They may make oral observations during the hearing.”

(Article R. 464-2)²⁸

²⁷ « L'Autorité de la concurrence peut (...) peut aussi accepter des engagements proposés par les entreprises ou organismes et de nature à mettre un terme à ses préoccupations de concurrence susceptibles de constituer des pratiques prohibées visées aux articles L. 420-1, L. 420-2, L. 420-2-1 et L. 420-5 ou contraires aux mesures prises en application de l'article L. 410-3 ».

²⁸ « Lorsque l'Autorité de la concurrence envisage de faire application du I de l'article L. 464-2 relatif à l'acceptation d'engagements proposés par les entreprises, le rapporteur fait connaître aux entreprises ou organismes concernés son évaluation préliminaire des pratiques en cause. Cette évaluation peut être faite par courrier, par procès-verbal ou, lorsque l'Autorité est saisie d'une demande de mesures conservatoires, par la présentation d'un rapport oral en séance. Une copie de l'évaluation est adressée à l'auteur de la saisine et au commissaire du Gouvernement, sauf lorsqu'elle est présentée oralement lors d'une séance en présence des parties.

Le délai imparti aux entreprises ou organismes pour formaliser leurs engagements à l'issue de l'évaluation préliminaire est fixé, soit par le rapporteur dans le cas où l'évaluation a été faite par courrier ou par procès-verbal, soit par l'Autorité de la concurrence dans le cas où cette évaluation a été présentée oralement en séance. Ce délai ne peut, sauf accord des entreprises ou organismes concernés, être inférieur à un mois.

The Authority has also adopted a *Notice on Competition Commitments* on March 2nd, 2009²⁹.

Scope

Generally, the Authority does not use this procedure in cases where, “harm to economic public order calls for the imposition of a fine, which precludes *a priori* particularly serious forms of collusion such as cartels and certain types of abuse of dominant position having already caused significant damage to the economy”³⁰.

It is important to emphasize that cartels won't be dealt with this procedure.

Implementation

The preliminary steps of the procedure are quite informal. The initiative to implement the procedure comes from the undertakings. At the time of an interview or in reply to requests for information from investigation services, the undertaking may contact the rapporteur to explore the possibility of proposing commitments. These commitments must be given prior to any statement of objections, and pursuant to a “preliminary assessment of the practices in question”³¹. The French system is different from the European Union's one where that kind of procedure is also available after the statement of objections has been sent.

The rapporteur is free to refuse to address a “preliminary assessment” (and prefer to prepare a statement of objections) if he considers that a commitment procedure is not appropriate to treat the case. The parties have no “right to negotiate” the case. But he can also undertake a preliminary assessment if he considers that the undertaking shows a serious motivation. “At its sole discretion, the *Autorité* determines the appropriateness of allowing the procedure”³²

The French *Cour de cassation* has ruled that the “preliminary assessment” is not “an indictment within the meaning of article 6.1 ECHR”, because it isn't meant to prove the reality and accountability for breaches of competition law to punish it, but to identify competition concerns that may constitute a prohibited practice”³³. As a consequence of the

A réception des engagements proposés par les entreprises ou organismes concernés à l'issue du délai mentionné au deuxième alinéa, le rapporteur général communique leur contenu à l'auteur ou aux auteurs de la saisine ainsi qu'au commissaire du Gouvernement. Il publie également, par tout moyen, un résumé de l'affaire et des engagements pour permettre aux tiers intéressés de présenter leurs observations. Il fixe un délai, qui ne peut être inférieur à un mois à compter de la date de communication ou de publication du contenu des engagements, pour la production des observations des parties, du commissaire du Gouvernement et, le cas échéant, des tiers intéressés. Ces observations sont versées au dossier.

Les parties et le commissaire du Gouvernement sont convoqués à la séance par l'envoi d'une lettre du rapporteur général accompagnée de la proposition d'engagements trois semaines au moins avant le jour de la séance. Ils peuvent présenter des observations orales lors de la séance ».

²⁹ http://www.autoritedelaconurrence.fr/doc/cpro_enga_2mars09_uk.pdf

³⁰ Notice on Competition commitments, pt 11.

³¹ Art. R. 464-2 préc.

³² Notice on Competition commitments, pt 20.

³³ C. cass., com., 4 nov. 2008, case n° 07-21275, *Canal 9* : « Mais attendu qu'après avoir relevé que l'évaluation préliminaire à laquelle procède le rapporteur, qui n'a pas pour objet de prouver la réalité et l'imputabilité d'infractions au droit de la concurrence en vue de les sanctionner, mais d'identifier des préoccupations de concurrence, susceptibles de constituer une pratique prohibée, afin qu'il y soit, le cas échéant, remédié, l'arrêt renvoie à juste titre que cette évaluation ne constitue pas un acte d'accusation au sens de l'article 6 § 1 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, et que le fait pour le Conseil, d'avoir, avant d'apprécier la pertinence des engagements pris par le GIE et de leur donner force exécutoire, pris une part active aux discussions ayant eu lieu après l'évaluation préliminaire dans les conditions de l'article R.

negotiated nature of the commitments procedure, the principle of impartiality doesn't preclude the Authority to take an active role in the discussions of the commitments that take place after the preliminary assessment, before the Authority assess their relevance and make them enforceable".

Procedure, negotiation process

Within the Competition Authority, the functions of prosecution and judgement are separated. That is why the negotiation process is a two-tier system.

1) First, the undertaking negotiates the commitment offer with the Investigation Services of the Competition Authority (namely the "Rapporteur" of the case).

The commitments must be able to address the competition concerns identified in the preliminary assessment. The rapporteur evaluates whether they are "relevant, credible and checkable"³⁴. He must receive the commitments offer before the deadline he has determined in the preliminary assessment (the length of time may not be less than one month³⁵). Practically speaking, the commitments are negotiated with the Rapporteur within this period. Once the commitments offer has been received and notify to the persons referred to in article R. 464-2, the Rapporteur will issue, on the Competition Authority website³⁶, a market test containing a summary of the case and the commitments offer, so any interested parties may provide comments.

2) Second, the negotiation process continues before the "decision making" body of the Authority: the Authority's board (*le college*), although the *college* works closely with the rapporteur since the very beginning of the negotiation process. Legally speaking, the results of the negotiation between the undertaking and the Rapporteur are not binding upon the *collège*. But, in practice, this issue does not arise because of the involvement of the college at an early stage of the process.

After the market test, the parties are invited to attend a hearing before the Authority's board. The proposal negotiated with the rapporteur is accepted by the Authority's board "as a basis for discussion" at the hearing³⁷. The board examines the relevance, the credibility and the checkable nature of the commitments and makes sure that they are proportionate to bring the competition concerns to an end³⁸. During the hearing, the negotiation may still be on going: the board can require amendments of the offer, especially by taking into account the results of the market test. The negotiation process may be adjourned if needed.

The undertaking always has the possibility to interrupt the negotiation process. The commitment offer and the observations of the interest parties are removed from the case file.

If the proposed commitments address the competition concerns, the Authority issues a decision making the commitments binding.

Effects

The commitments are binding on the undertaking (not on third parties because of the relative effect of the decision).

When the commitments exceed the "competition concerns" expressed by the preliminary assessment, the Authority "acknowledges" (*donne acte*) these voluntary commitments. The

464-2 du code de commerce, tient au caractère négocié de cette phase de la procédure et ne caractérise pas une immixtion du Conseil dans l'instruction de l'affaire » (available on www.legifrance.gouv.fr).

³⁴ Notice on Competition commitments, pt 21.

³⁵ Art. R. 464-2.

³⁶ www.autoritedelaconurrence.fr

³⁷ Notice on Competition commitments, pts 31.

³⁸ The Authority does not accept commitments that go beyond the resolution of its competition concerns.

Communiqué explains that “The Autorité does not accept binding commitments going beyond the resolution of competition concerns even though it can, when necessary, acknowledge additional remedies proposed by the undertaking concerned, for example, in order to facilitate the implementation of commitments that have been accepted”³⁹.

The decision issued by the Authority does not take any position on the liability of the undertaking. The decision only concludes that there is no longer grounds for action, because of the commitments undertaken by the undertaking. As a consequence, the decision cannot be used as the first term of the reiteration of the facts or as regards the principle *ne bis in idem*.

The legal nature of the agreement is to be a unilateral “decision” adopted by the agency. This decision makes the commitments binding on the undertaking concerned. The final decision’s motivation refers to the offer of the undertaking.

The final decision imposes a modification of the future conduct of the firm (in practice, behavioural remedies). In the case of non-compliance with the commitments made, the undertaking is subject to administrative penalties (art. L. 464-3 Commercial code, which refers to art. L. 464-2). This non-compliance is considered to be a very serious infringement⁴⁰.

The Authority’s *communiqué* states that: “(The Decision) may not be used to prevent one of the parties to the procedure from bringing action in a court of law”⁴¹. In France, a follow on action before the civil judge is not unusual. For instance, in the *Ma liste de courses* case, the claimant asked for damages after the Authority’s commitment decision⁴². In that case, the french judge of the *Tribunal de commerce de Paris*, stated that he is « not bound by an administrative decision adopted by the *Autorité de la concurrence* »⁴³.

Fundamental and procedural rights of the parties

The Paris Court of Appeal of Paris has recently stated that "the rights of defence of the parties concerned shall be fully insured in the course of the commitments procedure"⁴⁴. However, the exercise of rights of defence of the parties depends on the specificities of this procedure, which is characterized by its non-incriminating and negotiated character. Thus, the Hearing Officer of the Competition Authority, involved in "business leading to a statement of objections," is not required to exercise his functions under the commitment procedure.

Access to the case file

This issue had been controversial in France. Today, the undertaking concerned has access to the documents used by the Rapporteur to establish the preliminary assessment and to those

³⁹ About the scope of these commitments: Décision n° 13-D-07 du 28 février 2013 relative à une saisine de la société E-kanopi.

⁴⁰ For instance: décis. n° 11-D-10 du 6 juillet 2011 relative au respect, par la ville de Marseille, des engagements pris dans la décision du Conseil de la concurrence n° 08-D-34 du 22 décembre 2008.

⁴¹ Pt 43.

⁴² See Paris Court of appeal, 20.11.2013, https://groupes.renater.fr/sympa/d_read/creda-concurrence/CaP/20nov2013/Malistedecourses.PDF

⁴³ Le juge « n'est pas lié par une décision administrative prise par l'Autorité de la concurrence » : T. com. Paris, 15e ch., 24 août 2011, RG 2011014911, *SAS Ma liste de courses c/ Sté Highco 3.0, Sté Highco data, Sté Sogec Gestion, Sté Sogec Marketing* : JurisData n° 2011-018245.

⁴⁴ CA Paris, 19 décembre 2013 *Cogent communications*.

used by the *Autorité* to decide on the commitments⁴⁵. This includes the preliminary assessment and the third parties' comments resulting from the market test. The *Cour de cassation* has decided that the "Court of appeal, asked by a party to request the annulment of a decision [of commitments], whenever that party has not had access to the integrality of the file, to check if the lack of communication of certain elements has not hindered its interests"⁴⁶. The Authority's *communiqué* also states that the "access is provided subject to the undertakings' legitimate interests in their business secrets not being disclosed. The various communications may therefore, if appropriate, give rise to action to protect business secrets as provided for under articles L. 463-4 and R. 463-13 of the code de commerce"⁴⁷.

Right to be heard

According to the *Communiqué*, "After the market test, the parties to the procedure⁴⁸ and the Government Official are invited to attend a hearing during which they will be given another opportunity to present observations on the proposed commitments which the Rapporteur notified them of at least three weeks before the hearing".

Presumption of innocence

The decision issued by the Authority does not take any position on the liability of the undertaking.

Right to an impartial judge

Within the Competition Authority, the functions of prosecution and judgement are separated (see above).

Ne bis in idem

The commitment decision cannot be used as the first term of the reiteration of the facts or as regards the principle *ne bis in idem* (See above).

Third parties

The applicant has access to the case file under the same conditions as the undertaking concerned, and the right to present observations on the commitments proposed after the market test⁴⁹.

Other third parties can express their views by answering to the market test. But the market test is not mandatory for the Authority. They don't have access to case file.

The applicant can challenge the commitment decision : art. R-464-8 commercial code⁵⁰.

Risks for the parties

⁴⁵ *Communiqué* pt 27. See *Cour de cassation, com.*, 4.11.2008, n° 07-21275 : « la procédure d'engagements est mise en œuvre, les parties à la procédure doivent, sous réserve des dispositions de l'article L. 463-4 du code de commerce, avoir accès à l'intégralité des documents sur lesquels s'est fondé le rapporteur pour établir l'évaluation préliminaire et à l'intégralité de ceux soumis au Conseil pour statuer sur les engagements ».

⁴⁶ C. Cass., com., 4.11.2008, préc. See for example about the refusal to communicate an investigations' administrative report : Cass., com., 2.2.2010, n° 08-70449, 08-70450, 08-70451.

⁴⁷ Pt 29.

⁴⁸ That is to say the applicant and the undertaking concerned.

⁴⁹ *Communiqué*, pt 27.

⁵⁰ See *Cour de cassation, com.*, 4.11.2008, n° 07-21275.

The main risk for the parties is to “negotiate” the case and offer commitments in situations where the Authority does not “have a case”. At that stage of the procedure, the analysis of the preliminary assessment is superficial. The access to the file is a way to overcome this first problem. Further more, if the parties and the agency cannot reach an agreement, the prohibition procedure will be resumed from that point on.

Another problem is that the agency has a large discretion to accept or not the commitments offered. So this procedure has an uncertain result.

Another risk is where the problem identified by the preliminary assessment raises new problems on which one doesn't have any earlier cases. The undertaking may offer commitments while the existence of a real infringement is uncertain.

1.3. Settlement procedure (Procédure de non-contestation des griefs)

The French *code de commerce* states that :

“When a body or an undertaking does not contest the reality of the objections notified to it, the Rapporteur général may recommend that the Competition Authority, which hears the parties and the Government official without a report being drawn up in advance, impose the financial penalty referred to in Paragraphe I above taking into account the absence of challenge. In this case, the maximum amount of the penalty incurred is reduced by half. Besides, when the undertaking or the body undertakes to alter its conduct in the future, the Rapporteur général may recommend that the Competition Authority takes it into account also when setting the amount of the penalty”.

(Article L. 464-2 III)⁵¹.

The Authority has issued a notice on this procedure⁵²

With the settlement procedure, the undertaking involved in a prohibition procedure before the Authority obtains a reduction of the fine in exchange for a waiver to contest the objections which have been notified by the agency. As to the Authority, the settlement procedure allows it to obtain a resolution of the case faster and easier; the rapporteur doesn't have to write the report. Optionally, the undertaking can get an additional discount if it proposes commitments. The rules applied to these commitments are comparable to those applied as to the commitment procedure mentioned above.

Scope

All anti-competitive practices are concerned by this procedure, whether vertical or horizontal agreements or abuse of dominant position and this procedure is applicable even when the Treaty on the Functioning of the European Union is applied.

⁵¹ « Lorsqu'un organisme ou une entreprise ne conteste pas la réalité des griefs qui lui sont notifiés, le rapporteur général peut proposer à l'Autorité de la concurrence, qui entend les parties et le commissaire du Gouvernement sans établissement préalable d'un rapport, de prononcer la sanction pécuniaire prévue au I en tenant compte de l'absence de contestation. Dans ce cas, le montant maximum de la sanction encourue est réduit de moitié. Lorsque l'entreprise ou l'organisme s'engage en outre à modifier son comportement pour l'avenir, le rapporteur général peut proposer à l'Autorité de la concurrence d'en tenir compte également dans la fixation du montant de la sanction ».

⁵² *Communiqué de procédure du 10 février 2012 relatif à la non-contestation des griefs*, thereafter, the « communiqué ».

Implementation

The undertaking has not a right to a settlement⁵³ but it can ask for the initiation of the procedure. The request shall be made within two months after the statement of objections has been issued. The *rapporteur* makes the decision to launch the procedure, and his appraisal is controlled by the *collège*, checking that there is no manifest error of assessment. The parties to it (that is to say the investigations services and the undertaking) are free to end the negotiation at any time. The documents will be removed from the case file. But if the negotiation is successful, a report (“*procès-verbal*”) is signed by the parties, containing the waiver, the commitments proposed and the proposition of reduction of the fine of the *rapporteur general*.

Procedure

Pursuant to the *communiqué*⁵⁴, the waiver must take the form of “a statement from the body or the undertaking concerned”. This statement “states in clear, comprehensive terms, void of any ambiguity and unconditional”, that the body or undertaking concerned “does not deny the reality of all the practices in question or the legal qualification given to them by the Investigations Services under the relevant provisions of the Commercial Code and the TFEU or their accountability”.

The waiver to challenge the reality of the practices in question must be on both the facts constituting these practices, their object and their anticompetitive effects, their characteristics, their duration and modalities of participation of the body or the undertaking concerned by these practices.

However, despite the waiver, the undertaking still has the right to discuss the elements determining the penalty, that is to say, the seriousness of the importance of the damage to the economy, the individual situation of the undertaking in question or the group to which the company belongs (including its ability to pay) and the existence of repeated infringements (“recidive”).

Effects

This procedure has several effects on the final amount of the fine. The code states that the maximum amount of the penalty incurred is reduced by half, and the Authority takes into account the absence of challenge when determining the amount of the fine. The mere absence of challenge, in practice, has the consequence of a reduction of 10% of the fine. An additional reduction can be obtained, from 5 to 15% of the amount of the fine, if the undertaking makes commitments.

The settlement procedure is a sufficient basis to prove the violation of the law⁵⁵.

The Court of Paris has ruled that this procedure is an integral part of the proceedings before the competition authority and constitutes neither a confession nor an admission of liability⁵⁶.

⁵³ CA Paris, 23 février 2012, n° 2010/20555. The implementation of the settlement procedure is at the discretion of the Rapporteur. See *Communiqué* §27.

⁵⁴ Communiqué préc. §15.

⁵⁵ See Cass., ch. com., 29 mars 2011, n°s 10-12913 et 10-13686, See also Aut. conc., décision n° 12-D-25 du 18 décembre 2012 relative à des pratiques mises en œuvre dans le secteur du transport ferroviaire de marchandises, pt 143 : « le fait que l'entreprise à laquelle les griefs ont été notifiées ne les conteste pas suffit, conformément à la jurisprudence [...] à fonder un constat d'infraction dans tous ses aspects (constatation des faits, qualification juridique de ces faits au regard du droit interne et de l'Union, et responsabilité de l'entreprise en cause) ».

⁵⁶ CA Paris, 29 janvier 2008, *Le Goff Confort SA*, reviewing *Conseil de la concurrence's* decision n° 06-D-03.

The Supreme Court subsequently confirmed this solution⁵⁷. This solution is important with regards to civil actions.

Third parties

In the *Manpower* case⁵⁸, the Court finds that the settlement procedure is sufficient to prove the agreement in respect of those who do not challenge the objections, but also against other parties to the proceedings. This approach raises serious concerns for third parties all the more so the fact that the *Rapporteur* is not obliged to inform third parties of the implementation of a settlement procedure for another party.

Fundamental rights

The *communiqué* states that “the body or the undertaking that wishes to move towards a settlement procedure has, to that end, a framework to ensure a full respect of its rights”⁵⁹.

- Pursuant articles L.463-1 et seq of the Commercial Code, the adversarial principle is provided throughout the investigation procedure and at the hearing before the College
- Access to the file is granted in the manner prescribed by the general rules applicable to the procedure before the Authority
- The right to an impartial judge is guaranteed by the separation of the functions of investigations conducted under the authority of the *rapporteur général*, on the one hand, and the decision making by the College, on the other hand, as well as when the Authority imposes a financial penalty on a body or an undertaking who has not renounced to challenge the objections notified.

Risks for the parties

The separation of the functions of investigations (conducted by the services of the *rapporteur général*) has its disadvantages: the reduction of the fine is negotiated by the undertaking with the Investigation Services but the final setting of the fine fall within the remit of the *collège*. The proposition of a reduction of the *Rapporteur* is not binding for the *college*⁶⁰. This implies a lack of predictability of the final reduction granted in the end to the undertaking.

2. Combination of procedures

Different transactional procedures are complementary or alternative because they take place at different steps of the procedure:

- Leniency program: launched before any procedure (even before investigations)
- Commitment procedure: before the statement of objections
- Settlement procedure: after the statement of objections

⁵⁷ Cass., ch. com., 29 mars 2011, n° 10-12.913, *Manpower France e.a.* Dans cette affaire, la Cour juge cependant que la non-contestation des griefs suffit pour prouver l’entente à l’égard de celui qui ne conteste pas, mais aussi à l’égard des autres parties à la procédure.

⁵⁸ Cass., ch. com., 29 mars 2011 (cf above). For an example: Aut. conc., décision n° 12-D-09 du 14 mars 2012.

⁵⁹ §7.

⁶⁰ Cass., ch. com., 22 novembre 2005, n° 04-19102.

The *Autorité* admit that one can implement the leniency program and the settlement procedure⁶¹. The Authority nevertheless admits such cumulation only in the case of "*procedural gains (...) sufficient*", especially in the event that "*the scope of the objections notified to the body or undertaking concerned differs in one or more major point of the agreement as described by the applicant in its application for leniency, given all the information and evidence available to him*".

⁶¹ Autorité de la concurrence, décision n° 13-D-12 du 29 mai 2013, relative à des pratiques mises en œuvre dans le secteur de la commercialisation de commodités chimiques, §1039-1055. See also: Autorité, communiqué de procédure, 10 février 2012, relatif à la non-contestation des griefs, §6.