HumanRights and Public LibertiesReview
(H.R.P.L.R)

Vol° 8 - N° : 02
p.p :01 - 23

Antitrust Settlement: The Why and the How!

Toufik MOKEDDEM*

Faculty of Law and Pilitical Science, Djillali Liabes University-Sidi Bel Abbes, Algeria

t.mokeddem@gmail.com

toufik.mokeddem@univ-sba.dz

Received: 06/12/2023 Accepted: 19/01/2024 Published:.30/01/2024

Abstract:

Through this document, an attempt will be made to assess the settlement in competition law, addressing questions such as how can one negotiate even when in violation? How and, above all, why can one debate the sanctions? Is it for the benefit of the competition authority or the implicated company?

From the outset, in the context of such a settlement, a company involved in anticompetitive practices cooperates in the administrative procedure before the competition authority in exchange for a reduction in sanctions. Indeed, the company may, depending on the circumstances, either choose not to contest the allegations or facts against it, or admit its responsibility.

**Corresponding author.*

This study focuses on the uniqueness of this alternative and will be divided into two legal aspects: Why opt for such a settlement under the provisions of competition law, and How to proceed with it under the provisions of competition law.

Keywords: Settlement, competition law, negotiation, sanctions, competition authority.

Introduction

A fortiori, the peculiarity of competition law has led competition authorities to offer leniency in various forms in exchange for cooperative behavior[1].

By giving rise to the adoption of certain alternatives to sanctions, we continually highlight the more or less conciliatory role of the competition authority with respect to the implicated companies. It is no longer just a matter of defending against accusations but rather negotiating the best treatment for them, often at the expense of complainants and co-participants.

In this context, the competition authority appears as an economic magistracy[2] distinguished by its quasi-judicial and

[1] J.-C. RODA, La clémence en droit de la concurrence. Etude comparative en droit américain et européen, pref. C. PRIETO, Presses Universitaires d'Aix-Marseille, 2008, § 103.

[2] See in this regard C. CHAMPAUD, The idea of economic magistracy (Assessment of two decades), Justices No. 1 January/June 2005, p.74.

conciliatory means. On one hand, the power to impose sanctions gives it a certain "magistracy" character, and on the other hand, this magistracy creates norms constituting a genuine negotiated law that forms the basis of competition regulation.

Undoubtedly, this independent authority has long been confined to a role of a sanctioning authority, primarily intervening ex post. Although it could act on economic structures through its power of injunction and its advisory function. However, within the framework of regulation, the competition authority already had a special competence through its college and specialized rapporteurs, able to make prompt decisions through the procedure of interim measures.

This regulatory function particularly requires flexible tools and more flexible interventions, such as recommendations, opinions, dispute resolution, and the development of catalogs of best practices. It involves more market actors, favors discussion, mediation, and negotiated compromises.

Gradually, competition authorities are equipped with these flexible tools, involving companies more in their decision-making processes. This undoubtedly impacts their internal functioning, moving them away from the functioning of courts and the associated procedural constraints.

Through this study, an attempt will be made to examine the transaction in competition law, addressing questions such as how one can negotiate even when found to be in violation, how

and, above all, why one can debate their sanction. Whose interest does it serve? Is it in the interest of the competition authority or the implicated company?

In the context of such a transaction, a company participating in anticompetitive practices cooperates in the administrative procedure before the competition authority in exchange for a reduction in sanctions. The goal is not to detect or provide evidence of new anticompetitive practices but to reduce the costs of investigating a case.

There are various mechanisms, ranging from simply not contesting the allegations without admitting responsibility, notably in French law[3], to admitting responsibility in community law[4]. This study is based on the uniqueness of this alternative and will be divided into two legal points: why opt for such a transaction and how to proceed under competition law provisions.

I. The Attractiveness of the Settlement: The Why!

It is pertinent to highlight the attractiveness of this famous transaction from two perspectives: its interest (1) and the negotiation it entails (2).

[3] D. BOSCO, « Précisions sur la fixation des amendes dans les procédures négociées », Contracts Conc. Cons., 2008, No. 7, p. 29.

[4] C. LEMAIRE, « Analyse juridique », in La transaction, Séminaire DGTPE-Concurrence, 20 décembre 2007, Revue Lamy droit de la concurrence, 2008 , No. 15, p. 180 and especially p. 181 and following.

1. The Interest of a Settlement

Concerning the interest of a transaction, it manifests from two viewpoints: that of the competition authorities and that of the offending company.

1.1. From the Perspective of Competition Authorities

Reduction of the burden of proof[5]:

The European transaction is based on an acknowledgment of guilt, simplifying the burden of proof without excluding it entirely. The commission has the duty to demonstrate to companies that it has sufficiently substantial elements to proceed with condemnation[6], far from fulfilling an investigative tool function[7].

[5] For a recent study of detection tools, their shortcomings, and ways to improve them, see L. Idot, W. E. Kovacic, C. Fonteijn, Detection of anticompetitive practices: Should existing tools be reformed or new tools introduced? Clemency, market observation, financial rewards... (New Frontiers of Antitrust, February 21, 2014, Paris), May 2014, Concurrences No. 2-2014, Art. No. 66158.

[6] See the presentation of the procedure on the Europa website: "A settlement is not the same as a plea bargain. The commission has to show the parties that it has sufficient evidence to bring a final decision and must send a Statement of Objections."

[7] Emmanuelle Claudel, , « Procedures négociées accessoires ou alternatives à la sanction en droit de la concurrence : raison garder ! », November 2015, Concurrences Review No. 04-2015, Art. No. 75896, pp. 61-83.

Acceleration of case processing times:

The European transaction procedure exacerbates these traits as companies waive any defense[8]. It is stated that "the loss of punitive utility (limited to 10% of the fine amount) is offset by an administrative utility gain,"[9] and this gain is significant. Costs such as translation, access to the file, hearings, etc., are indeed saved. The 2012 domestic detergents case is a good illustration: the Commission took "only 10 months from the first meeting to reach a transaction and the adoption of the decision," imposing a fine of 315.2 million euros on detergent manufacturers[10]. The stated objective of this procedure is to reduce the duration of case processing.

1.2. From the Perspective of Offending Companies

[8] The Commission thus presents the settlement procedure on its website: "The Commission benefits from a shorter, quicker administrative process, allowing for more efficient use of staff in the cartel department and a reduced number of appeals to the court." It adds: "(...) settlement is a tool that aims to simplify, speed up, and shorten the procedure leading to the adoption of a formal decision, thus saving human resources in the cartel department."

[9] See D. M. B. Gérard, Negotiated procedures in competition law in The flexibility of sanctions, XXI Jean Dabin Legal Days, Bruylant 2013, pp. 559-579, especially p. 573.

[10] Working document of the Commission services dated May 30, 2012, accompanying the Commission's report on competition policy 2011 DTS(2012) 141 final, p. 15.

The expected benefit of the European transaction procedure is more modest, as companies using it uniformly receive a 10% fine reduction[11].

Given that the practices under examination are cartels and the potential fines amount to several hundred million euros, such a reduction can nevertheless be incentivizing in absolute value. It should also be kept in mind that the transaction procedure was designed as an instrument accompanying a leniency approach[12]: pecuniary benefits thus accumulate.

Community law aims to achieve procedural gain since the procedure is simplified and accelerated, freeing up resources for other more complex cases and promoting a culture of competition law compliance among the concerned companies. It is evident that the transaction procedure is introduced to complement the leniency procedure for companies that did not benefit from leniency or received second-tier leniency and admit to the facts.

[11] This tariff "is explained by the desire to maintain an incentive for companies to resort to the leniency procedure, especially second rank, preferably to the transaction, one not being exclusive of the other," C. Grynfogel, Sanctions of community competition law, Juris-Classeur, Comm. fasc. 287, no. 53.

[12] To our knowledge, there is only one case of a "dry" transaction, i.e., not accompanying a leniency approach (decision of March 5, 2014, Electricity Exchanges).

2. The Interaction Between Transaction and Negotiation

It is clear that the term "transaction" reflects the negotiation that leads to a contract established after negotiation. Legally speaking, the term "transaction" in Algerian common law refers to an arrangement between two or more parties in equal positions, obligated to "have the capacity to dispose for consideration of the rights subject to the transaction.[13]" This transaction is "a contract by which the parties settle a dispute that has arisen or prevent a future dispute through reciprocal concessions.[14]"

In this regard, it is evident that the concept of transaction in Algerian common law differs from that of the commission, as one cannot claim that the regulator and the wrongdoer are on an equal footing. Logic dictates that the competition authority should always be in a position of strength; therefore, the concept of Algerian common law is inherently excluded from any definition related to this so-called negotiated procedure.

However, it is worth noting that the term "transaction" is actually just an incorrect translation of the English term "direct settlement." The more appropriate translation, according to some legal scholars, would be "direct settlement[15]."

[13] Article 460 of the Algerian Civil Code.

[14] Article 459 of the Algerian Civil Code.

[15] G. Jazottes, «La Commission se dote d'une procédure simplifiée pour l'application de l'interdiction des ententes : la procédure dite de transaction », RTD Com., 2009, p. 230.

Regardless, negotiation is almost absent in this so-called negotiated procedure, so the term "transaction" is likely not the most suitable since there is no negotiation on the part of the commission. This perspective is evident through Regulation point 2, which states that the commission "does not negotiate the question of the existence of an infringement of community legislation or the sanction to be applied."

Furthermore, the transaction in question is not the contractual technique referred to in civil law, involving bilateral obligations or reciprocal concessions. There is no negotiation in this sense between the offending company and the commission since the commission is already in a position of strength, allowing it to impose its own rules.

Indeed, the commission can issue a statement of objections based on the evidence in its possession, while the offending company only needs to acknowledge its involvement and accept the application of the procedure[16].

[16] M. L. Tierno Centella and E. Cuziat, « La procédure de transaction communautaire » in les procedures négociées en droit de la concurrence : Engagements et transaction. Droit français-Droit communautaire, Conference of April 3, 2008, Paris, Concurrences, 2-2008 .

Regarding the implementation of the procedure, the commission does not negotiate sanctions or the use of evidence[17].

However, it commits to reorganizing, according to its own assessment, a form of cooperation from the offending company in speeding up the procedure by granting a reduction in the fine amount of up to 10%.

II. The Essential Conditions for a Settlement: The How!

Although it finds its origin in the French no-contest procedure, the European Commission has more or less been able to theoretically impose it independently.

1. Scope and Procedure

1.1. Scope

Undoubtedly inspired by the no-contest or French transaction, the transaction considered by the European Commission dates back to the publication of a draft communication for the adoption of decisions under Articles 7 and 27 of Council Regulation No. 1/2003[18] in cartel cases.

[17] Frederic Marty and Patrice Reis, « Perspectives juridiques et économiques sur les procédures négociées en droit de la concurrence », in Les procédures négociées en droit de la concurrence, les dossiers de la RIDE , file no. 4, Deboeck, Brussels, 2011, p. 24.

[18] Regulation (EC) No 1/2003 of the Council of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty. OJ L1 of 4 January 2003.

The formal introduction of the transaction procedure was through the regulation of June 30, 2008[19], followed by the communication of July 2, 2008[20], providing a detailed description of the applicable procedure. The transaction is characterized as an admission and occurs at the request of the company before any notification of grievances, within the context of a leniency procedure. The request entails the absolute recognition of the offense by the concerned company, including the main facts, their legal qualification, and the duration of participation in the offense.

However, the procedure is in written form and is only of interest if all parties agree to negotiate and/or transact. It is worth noting that a significant reservation highlighted by legal scholars concerned the somewhat neglected rights of defense in the project. Articles such as Article 6-1 of the ECHR and the principle of separation of investigation and judgment functions were somewhat disregarded, as only the commission had

[19] Regulation (EC) No 622/2008 of the Commission of 30 June 2008 amending Regulation (EC) No 733/2004 with regard to settlement procedures in cartel cases, OJ L173/3 of 1 July 2008.

[20] Commission communication of 2 July 2008 on settlement procedures for decisions under Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167/1 of 2 July 2008. Available at http://www.concurrence.public.lu/legislation/europeenne/concurrence/communication_167_01.pdf.

control over the procedure, excluding any recourse to the judiciary.

The project was slightly modified, and the texts related to the procedure consisted of Regulation No. 662/2008 of June 30, 2008, amending Regulation No. 773/2004 regarding transaction procedures in cartel cases, and a communication of July 2, 2008, concerning transaction procedures for the adoption of decisions under Articles 7 and 23 of Council Regulation No. 1/2003 in cartel cases. These texts came into effect on July 2, 2008[21]. It is important to note that the transaction procedure in its community version applies only to anticompetitive agreements.

1.2. Procedure

Initiation of the Procedure:

Identifying companies potentially subject to a fine is the initial phase. The commission already possesses substantial elements to incriminate these companies, giving it the initiative to send a letter proposing the opening of discussions for a transactional settlement of the case.

The procedure can be initiated at any time, but the deadline is the date of the notification of grievances. Following the

[21] E. Barbier De la Serre, « Le dispositif communautaire en matière de transaction. », RLC No. 17/2008, p. 95. ,P. Arhel, « La Commission européenne se dote d'un système de transaction», JCP E2008, p.352.

commission's decision, parties are given a minimum of two weeks to declare in writing their intention to participate in discussions leading to a potential transaction and to subsequently present transaction proposals. A common representative is designated in the presence of a group of companies, demonstrating that authorities consider the group as a single entity[22].

Discussions:

After the formalization of a request to initiate the transaction procedure by the concerned parties, the commission may decide to continue the procedure through bilateral contacts. However, the commission imposes its dominance during these presumed discussions, particularly in the timing of the communication of information and/or evidence.

The communication of this information allows parties to be informed of essential elements such as the alleged facts, their qualification, the gravity and duration of the alleged agreement, assignment of responsibilities, an estimate of probable fine ranges, and the evidence used to support potential grievances. Parties can then weigh the pros and cons and decide whether to conclude a transaction.

[22] L. Arcelin, Le droit de la concurrence Les pratiques anticoncurrentielles en droit interne et communautaire, , PUR, 2009, p. 170.

In the meantime, concerned companies still have the right to access non-confidential documents in the file. In any case, they have a minimum of 15 working days to present a transaction proposal.

A transaction proposal must include:

A clear and unequivocal acknowledgment by the parties of their responsibility for the offense, formalized by a summary covering the nature of the offense, its possible implementation, key facts, and their legal qualification, the role of each party, and the duration of their participation.

An indication of the maximum amount of fines that the parties agree to accept from the Commission within the framework of a transaction procedure.

Confirmation by the parties of their information about the grievances considered by the commission and that they have expressed their point of view to the commission.

Confirmation by the parties that they do not intend to request access to the file or to be heard again at an oral hearing unless the communication of grievances does not reflect their transaction proposal.

Agreement by the parties to receive the communication of grievances and the final decision made under Articles 7 and 23 of Regulation No. 1/2003 in an agreed official language of the European Community.

The consideration of transaction proposals by the commission occurs during the communication of grievances, where a fine

amount is set that does not exceed the maximum indicated in the proposals. The communication of grievances must be in writing if it reflects the parties' proposals. In turn, the parties must respond within a time frame set by the commission of at least 2 weeks, confirming their intention to continue the transaction procedure. However, if the communication neglects the content of the transaction proposal, the admissions and elements acknowledged by the parties in the proposal will be considered withdrawn and will no longer be held against them by the commission.

As a result, the concerned parties will no longer be bound by their transaction proposals; they can request a deadline to prepare their defense again, including the opportunity to access the file and request a hearing.

Commission Decision:

After the parties confirm their commitment to reaching a transaction, the commission adopts a final decision after consultation with the advisory committee. However, the commission retains the right to adopt a final position that deviates from its initial position expressed during the communication of grievances endorsing transaction proposals. This can be influenced by the opinion rendered by the advisory committee or other relevant considerations related to the commission's decision-making autonomy in this matter.

Thus, a new notification to the parties is required so that they can exercise their right to defense in accordance with the

general rules of applicable procedures. The reward is a 10% reduction in the fine amount to be imposed after applying the 10% cap.

In summary, this procedure can be understood in three phases: the preparatory phase, where the commission assesses the compatibility of the case with the transaction procedure while gauging the interest of the concerned parties. Then comes the opening of the procedure with a request for expressions of interest. The discussion phase follows through formal and technical meetings with the communication of key evidence and a common position formalized in a transaction proposal from the concerned company. Finally, the formalization phase is characterized by the communication of grievances, incorporating the proposal and confirmation by the parties, and a simplified formal decision adopting the 10% flat reduction.

2. The Specificity of the Settlement in Algerian and French Law

2.1. The Case of Algerian Law: An Atypical Transaction!

The Algerian legislator, through its sole article, namely Article 60 of the Competition Law, clearly states that if the implicated companies "acknowledge the offenses attributed to them, collaborate in expediting the process, and commit to no longer committing offenses," they will be rewarded with either a reduction in the incurred fine or a total exemption from it.

At first glance, one is almost reminded of the transaction procedure in its community version. Besides collaboration and commitments made by the offenders, the provisions of this article involve the acknowledgment of offenses. However, one cannot deviate from qualifying this acknowledgment; it is indeed an admission of guilt. This reflects a certain adoption of the community transaction procedure.

Nevertheless, it is essential to note some differences regarding the implementation of the procedure. Unlike its European counterpart, the Algerian legislator addresses the investigatory and even the contentious phase, while the community transaction procedure manifests itself in the pre-contentious phase, as the proposal in the latter occurs before the communication of grievances.

Furthermore, the scope of this community procedure is cartels, whereas Algerian law does not specify, leaving the door wide open to all offenses that undermine competition. Moreover, the obligation of concurrent commitments further differentiates the Algerian procedure. However, the reward under Algerian law can extend to total exemption, whereas in community law, it is limited to a reduction. Additionally, the community procedure mainly concerns cartels, while Algerian law covers all types of offenses that violate competition rules.

In this regard, the evident perplexity regarding the adoption of the transaction procedure by Algerian law arises due to the opacity of the aforementioned Article 60. Therefore, it is essential to detail and/or explain the provisions of this article

through regulatory means, especially in the absence of the exercise of the Algerian competition council.

However, enumerating the points in common and the points of difference between the two procedures, namely community law and Algerian law, clearly leads to moderating any presumed idea of the adoption of Algerian law of a proper transaction procedure.

2.2. The Case of French Law: De facto, The Exclusion of the Community Procedure

Although they now share the same name, the Macron law did not unify the two community and French transactions into a single procedure. In this context, it should be noted that French law does not believe in this procedure, even if some mistakenly find a certain resemblance between this procedure and the French no-contest procedure. The mandatory link between the non-contestation of grievances and commitments allowed, before 2008, to distinguish the French no-contest procedure from the community transaction procedure, as the community procedure does not imply concurrent commitments.

However, the two procedures can be differentiated, particularly by the fact that the transaction only targets cartels, while non-contestation of grievances covers both cartels and abuses of dominant position. Moreover, the transaction can be initiated even before the notification of grievances, which sets it apart from a non-contestation of grievances procedure.

Certainly, the somewhat late introduction of this procedure in community law made it subject to observation by some EU

member states, notably France. Either this procedure did not truly establish itself, presenting little appeal to companies, thus alleviating any pressure on the French legislator.

In this regard, it can be noted that perhaps the lower reduction rate of the transaction (maximum 10%) highlights the commission's intention to avoid any competition with the leniency procedure[23].

Nevertheless, there is still a certain substitution of the transaction procedure for the non-contestation of grievances procedure, which was motivated by the desire to address the flaws of the latter, particularly, on the part of the implicated companies, the absence of any "precise knowledge of the amount of sanctions incurred in case of non-contestation of grievances before the Competition Authority," an amount that will be partially known by referring to the "sanction range" proposed by the rapporteur general. On the part of the Competition Authority, there is still the "risk of appeals against its decision."

Moreover, the Paris Court of Appeal had ruled in its Direct Energie judgment that, in the context of the procedure provided for in Article L. 464-2 III C. com., "the company in question agrees not to contest the grievances, as well as the amount of

[23] F. Party and P. Reis, "Perspectives juridiques et économiques sur les procédures négociées en droit de la concurrence", Les Dossiers de la RIDE, Editions De Boeck University, Brussels, 2011, p. 32.

the sanction itself, which amounts to a waiver of its rights to defense and its right to appeal on these points."[24]

Conclusion:

Through this study, it seemed necessary to discuss the concept of negotiation, focusing primarily on the transaction in the field of competition law, as it represents a more or less contractual agreement between two parties: on one hand, the competition authority endowed with sanctioning power, and on the other hand, the implicated company, which should be both interesting and interested. Indeed, interesting in terms of its behavior and interested in its willingness to negotiate and/or collaborate willingly.

The power imbalance between the two parties inherently implies the recognition of a certain form of consent, to which the offending company is subject, having only the option to either agree or not.

In summary, it is still necessary to point out that a transaction in the context of competition law is not without shortcomings, notably by confining the guarantees of a fair trial before competition authorities, referring to the regulation ensured by these independent administrative authorities. This is coupled

[24] Paris Court of Appeals, July 6, 2017, RG 2017/07296, p. 7.

with the quasi-exclusion of judicial control by referencing the prior negotiation between these authorities and the offenders, resulting in collaboration and leading to the adoption of such an alternative. Additionally, there is an impediment to the redress of competitive damages before the courts by limiting access to evidence and sanctifying supporting information provided within the framework of this alternative, making victims of anticompetitive practices also victims of these alternative tools.

In seeking absolute efficiency, particularly in a procedure, there has been a kind of overlap between what falls under public enforcement and what falls under private enforcement, favoring objective interests at the expense of subjective interests. In this regard, the coexistence of subjective and objective competition litigation undoubtedly demonstrates the independence and interdependence of judges and competition authorities. It is, therefore, necessary to ensure a peaceful coexistence between these two litigations, especially by adjusting the rules to ensure regulated access to disclosed information.

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