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*Procedural notice of 21 December 2018
on the settlement procedure*

Introduction: objectives of the settlement procedure

The settlement procedure makes it possible for the company or body (both henceforth referred to as “company”) involved to conclude the procedure more quickly, to gain procedural advantages, and have a better notion of the fine incurred. The company in question uses the settlement procedure for its own reasons which it is not obligated to divulge. However, by requesting to have the benefit of the settlement procedure, the company in question may, where appropriate, highlight its constructive attitude and move more quickly towards bringing its practices in compliance with competition law.

From the point of view of the *Autorité de la concurrence*, the use of the settlement procedure can enable it to obtain a procedural gain in terms of use of all its resources. In addition, the settlement is likely to facilitate the adoption of decisions in a shorter time frame than the ordinary law procedure, and saves on resources consumed by any contentious appeals.

I- Legal framework

1. Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities amended the provisions of III of Article L. 464-2 of the French Code of commercial law (*Code de commerce*) by creating a new settlement procedure that replaced the previous no contest of objections procedure.
2. Article L. 464-2, III, now provides: “where a body or company does not dispute the reality of the objections notified to it, the General Rapporteur may submit to it a settlement proposal setting out the minimum and maximum amount of the financial penalty envisaged. When the company or body commits to change its behaviour, the General Rapporteur may take this into account in their proposed settlement. If, within a time limit set by the General Rapporteur, the body or company agrees to the proposed settlement, the General Rapporteur shall propose to the *Autorité de la concurrence*, which shall hear the company or body and the representative of the Minister of the Economy without first drawing up a report, to impose the financial penalty provided for in I within the limits set by the settlement.”

3. The new settlement procedure is applicable to proceedings in which objections were notified after 7 August 2015, pursuant to the entry into force of the provisions of Article 218 of Law 2015-990 of 6 August 2015.
4. As stated in the notice of 19 October 2017 on the settlement procedure and compliance programmes, the entry into force of these new legislative provisions, which repeal the previous provisions of the no contest of objections procedure, rendered null and void the procedural notice of 10 February 2012 relating to no contest of objections.
5. The purpose of this notice is to specify the conditions for implementing the new settlement procedure. Taking into account decision-making practice and relevant case law, it explains the practical arrangements followed by the *Autorité* when implementing this procedure.
6. This notice has the nature of a guideline as defined in administrative case law. The *Autorité* is bound to it unless there are special circumstances or reasons in the general interest leading it to depart from it.

II- Scope of application

7. It follows from the provisions of Article L. 464-2 of the French Code of commercial law that the cases that may give rise, where applicable, to the implementation of the settlement procedure provided for in III of that Article are those relating to infringements of the competition rules provided for in Articles L. 410-3, L. 420-1 to L. 420-2-2 and L. 420-5 of the French Code of commercial law and Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter the "TFEU") and in which objections have been notified to one or more companies.
8. The settlement procedure may be implemented in conjunction with the leniency procedure provided for in IV of Article L. 464-2 of the *Code de commerce*. If the General Rapporteur considers it appropriate, in particular with regard to the conduct of the company that has obtained the conditional benefit of the leniency procedure and the objective of simplifying and speeding up procedures, he may propose implementation of the settlement procedure to a company benefiting from the leniency programme. As part of the implementation of the settlement procedure, the company requesting the settlement shall retain the benefit of the leniency notice.
9. While these two procedures are part of a cooperative approach on the part of the companies concerned, they do not contribute to the same extent to establishing facts and processing cases. While the implementation of the leniency procedure makes it possible to reveal the existence of a practice to the *Autorité*, establish its existence and identify the perpetrators, the settlement procedure takes place after the Investigation Services have notified the companies concerned of objections on the basis of the investigation they have carried out. For these reasons, the benefit to a company resulting from the implementation of a settlement procedure cannot be equivalent to the benefit of a total or partial exemption from the fine imposed that takes leniency into account.

III- Request to implement the settlement procedure

10. It is the responsibility of the company receiving a statement of objections to determine whether it wishes to waive its right to contest the objections and to request the General Rapporteur to implement the settlement procedure, and this without having to explain the reasons for such an action. Prior information on the conduct of the procedure may be provided for this purpose, at the initiative of the General Rapporteur, including before the statement of objections is sent. The company in question may, for its part, and even before the statement of objections is sent, contact the *Autorité's* Investigation Services in order to explore the possibility of using the procedure.
11. A company wishing to benefit from the settlement procedure must make a request to the General Rapporteur as soon as possible so that a settlement report can be signed within two months of receipt of the statement of objections. The *Autorité* does not intend to take into consideration applications that have not been completed by the end of this period, except in exceptional circumstances.
12. If the company wishes to propose commitments, its request for a settlement must state this fact and be accompanied by the necessary information to enable the General Rapporteur to assess the substantial, credible and verifiable nature of these proposals.

IV- Conditions of eligibility for the settlement procedure

13. The company that requests to benefit from the settlement procedure must refrain from contesting the objections of which it has been notified. The waiver of the right, which is recorded in the report described in point 29, takes the form of a declaration by which its author indicates, in clear, complete, unambiguous and unconditional terms, that they do not contest the reality of all the practices in question, nor their legal qualification, as it results from the statement of objections, nor their imputability. The waiver of the right to challenge the reality of the practices shall concern their material nature, their duration, their geographical scope and the participation of the party concerned in the practices. The waiver of the right to challenge the legal characterisation of the facts shall concern all the constituent elements of the offence and, in particular, the anti-competitive purpose or effect of the practice.
14. The waiver of the right to contest objections necessarily implies that the company in question shall not contest the regularity or validity of the statement of objections. If the concerned party, who has voluntarily chosen not to contest the objections, subsequently submits arguments challenging, directly or indirectly, the validity, both in substance and in form, of the statement of objections, the Board of the *Autorité* shall consider that the party concerned renounces the benefit of the settlement as it results from the report signed with the General Rapporteur.
15. The company nevertheless retains the right to submit observations on information that may be taken into consideration by the Board in determining the amount of the financial penalty that could be imposed within the range adopted by the settlement report, provided that these observations are in accordance with the principles set out in the previous point.

16. The fact of waiving the right to contest the objections does not, in itself, constitute either an admission or an acknowledgement of responsibility on the part of the party concerned¹.

V- Conduct of proceedings before the Investigation Services

a- Assessment of appropriateness of using the settlement procedure

17. The General Rapporteur is not required to respond favourably to a request to implement the settlement procedure. In accordance with the provisions of III of Article L. 464-2 of the French Code of commercial law, the General Rapporteur has broad discretionary powers to assess the appropriateness of using this procedure in a specific case and the relevance of each request submitted by a company. The existence of exchanges between the General Rapporteur and the company that requested the benefit of the settlement procedure does not in any way prejudice the outcome of the procedure.
18. The General Rapporteur's discretion is exercised on a case-by-case basis with regard to the specific details of each case and each request to implement the settlement procedure. These details also stem from the contribution that may result from the implementation of the settlement procedure, in particular in terms of speeding up and simplifying the processing of the case.
19. In the case where the objections are attributed to more than one company, the number of parties involved wishing to benefit from the settlement procedure is also a relevant factor. Indeed, the advantages linked to the implementation of such a procedure in respect of one or more parties are generally more limited when, in the same case, one or more other parties contest the notified objections. The *Autorité* therefore intends, in general, to give priority to the implementation of the settlement procedure in cases where all parties waive their right to contest objections and request the use of such a procedure.

b- Preparatory discussions

20. When the General Rapporteur considers that a case is suitable for the implementation of the settlement procedure and receives requests to this effect from one or more parties, they may enter into discussions with each of the parties concerned, in particular on the reduction in fines likely to result from implementation of the settlement procedure. The General Rapporteur may inform the other recipients of the statement of objections of the existence of ongoing discussions with one or more companies involved, with a view to signing a settlement record. The General Rapporteur remains free to terminate these discussions at any time, just as the companies concerned have the possibility to waive the right to continue the procedure.

¹ In this respect, see the judgement of the Paris Court of Appeal of 29 January 2008, 2006/07820, *Le Goff Confort SAS et a.* on the no contest of objections procedure.

21. In this context, it is the responsibility of the General Rapporteur to ensure that the waiver of the right to contest objections by each company concerned is clear, complete, unambiguous and unconditional. Failing this, the General Rapporteur may terminate the settlement procedure.
22. As regards determining the range of fines, the principles for determining financial penalties on which the *Autorité's* notice of 16 May 2011 is based may constitute a relevant point of reference when the discussion is initiated between the General Rapporteur and the companies concerned.
23. In the event that the company in question has also offered commitments, the General Rapporteur shall assess whether it is relevant to take them into account given the particular circumstances of the case and, in particular, the nature of the objections raised. If this is the case, the General Rapporteur then ensures that the proposed commitments are substantial, credible and verifiable.
24. No document or paper transmitted by the parties relating to the implementation of the settlement procedure will be included in the investigation file. The same shall apply where the implemented procedure has not resulted in the signing of a settlement report. In addition, the settlement report signed by a company cannot be disclosed to the other parties to the procedure or to third parties².

c- Signing of report

25. If the General Rapporteur considers that the settlement can be implemented, they shall submit to the company concerned a proposal for a settlement setting out the minimum and maximum amount of the financial penalty envisaged. The amount of the penalty reduction attached to the implementation of the settlement procedure is not predetermined. It depends on the circumstances of each case.
26. Where the company has obtained the conditional benefit of the leniency procedure, the General Rapporteur shall take due account of the leniency notice and the contribution of the leniency applicant to the investigation when preparing their settlement proposal.
27. When the General Rapporteur considers it appropriate to propose to the *Autorité* that the commitments submitted by the company be made binding, they also take them into account in their proposed settlement.
28. If, within a time limit set by the General Rapporteur, the company in question agrees to the proposed settlement, the General Rapporteur shall inform it that they will propose to the *Autorité* to impose a financial penalty within the limits set by the settlement.
29. The agreement between the company in question and the General Rapporteur shall be recorded in a settlement report. This report contains the no contest of objections statement referred to in point 13 above. Where applicable, it shall also contain the text of the latest statement of commitments proposed by the company concerned. Finally, it indicates the proposal of a minimum and maximum fine that the General Rapporteur will present to the Board. The report must be signed by the party concerned and the General Rapporteur,

² Judgement of the Paris Court of Appeal of 6 July 2017, 2017/07296, *Direct Energie*.

except in exceptional circumstances, within two months of the statement of the objections, as provided for in point 11.

30. The General Rapporteur may inform the other parties involved of the signature of a report, where they have not requested the implementation of III of Article L. 464-2 of the French Code of commercial law in order to enable them to determine whether they wish to submit a request to this end within the time limit provided for in point 11 above.
31. In accordance with the provisions of Article R. 464-4 of the French code of commercial law, the General Rapporteur shall inform all parties and the representative of the Minister of the Economy at least three weeks before the meeting that he will propose to the *Autorité* to apply Article L. 464-2 of the same code.

VI- The Board's decision

32. When hearing a case in which the settlement procedure has been applied, the Board shall examine the facts and notified objections, as well as the settlement report. If it considers that the conditions for imposing a fine are met, it shall impose a fine within the range set by the settlement report. In determining this amount, it shall, where appropriate, take into account compliance with the conditions laid down in the leniency notice and the contribution of the leniency applicant to the investigation.
33. If, in light of both the deeds and notified objections and the settlement report, the Board considers that the conditions for imposing a fine within the range indicated in the settlement report are not met or that the objection or objections are unfounded, it may decide to refer the matter back for investigation in accordance with ordinary law procedure. This referral for investigation then invalidates the previously signed settlement report.
34. Before deciding, the *Autorité* shall verify that the statement by which the party concerned waives the right to contest the objections fulfils all the conditions described in points 13 and 14 above. Failure to comply with one of these conditions prevents the implementation of the settlement procedure and results in a return to the ordinary law procedure provided for in Articles L. 463-1 et seq. of the French Code of commercial law.
35. When the settlement procedure involves several companies, the Board may decide to organise the meeting in two stages. In this context, the first part of the Board session may include all the companies involved. It covers the notified objections as well as the facts and qualification of the practices.

During a second part of the session, each of the companies that signed a settlement report shall be heard by the Board, in the presence of the representative of the Minister of the Economy, and without the presence of the other parties involved. The company may then submit its observations on setting the amount of the fine within the limits laid down in the settlement report without its observations calling into question in any way the facts and qualifications contained in the statement of objections.
36. In cases where a complainant is present at the proceedings, and although the provisions of the French code of commercial law do not provide for this, the *Autorité* may, if it deems it appropriate, authorise the complainant to attend the first part of the meeting and to submit observations. For this purpose, the Board may forward to the complainant the text of the

commitments proposed by the company concerned. The complainant shall not attend the second part of the session devoted to examining the amount of the fine of each company.

37. For each company benefiting from the settlement procedure, the *Autorité* shall determine the amount of the financial penalty by applying the legal criteria and ceiling set out in I of Article L. 464-2 of the French Code of commercial law. While the principles for determining financial penalties on which the *Autorité's* notice of 16 May 2011 is based may constitute a relevant point of reference when the discussion between the General Rapporteur and the companies is initiated with a view to signing the settlement report, the method for determining fines described in this notice is not intended to be implemented in the Board's decision, which imposes a fine within the range set by the settlement report.
38. Where the General Rapporteur has also offered to take into account commitments entered into by the party concerned, the Board shall verify that these commitments are substantial, credible and verifiable. If the Board considers during the meeting that the commitments are not acceptable as they stand, but that the company proposes amendments to make them acceptable, the Board may make the improved commitments binding and impose a financial penalty taking into account the minimum and maximum amounts set out in the settlement report.