Appealing a settlement: can you have your cake and eat it?

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Introduction

The recent General Court judgment in *Printeos*(1) illustrates that an appeal to the courts on fine calculation methodology can be successful, notwithstanding the admissions of liability made during the settlement process. It makes no reference to the possibility of losing the 10% settlement reduction if an appeal is made, and it confirms that the rights of defence still apply in settlement cases.

The judgment also raises some broader questions on the predictability of the application of the Fining Guidelines.

Grounds of appeal

The judgment follows an appeal by Printeos and Tompla of a European Commission decision against a number of parties – including the applicants – for coordinating sales prices, allocating customers and exchanging competitively sensitive information in relation to stock and catalogue envelopes and special printed envelopes of all shapes, colours and sizes. The commission adopted the decision under the settlement procedure(2) and imposed a fine of approximately €4.7 million. The fine took into account a reduction under the leniency notice,(3) as well as a reduction under the settlement notice.

The applicants appealed after settling the case (ie, after making their own settlement submissions (which included an admission of liability and a confirmation of the fine range) and confirming that the statement of objections corresponded to their settlement submissions). Although the applicants did not dispute their involvement in the infringement or the legal characterisation of the facts, their appeal disputed the commission's approach to the calculation of fines.

In particular, the applicants claimed a breach of the commission's duty to state reasons relating to the downward adjustment of the basic amount of the fine relevant to each undertaking, claiming that in doing so the commission misused its powers. The applicants also claimed a breach by the commission of the principle of equal treatment concerning the relevant adjustments.

Obligation to state reasons

The crux of the main appeal points was the commission's use of its discretion to reduce the basic amount of the fine imposed on the parties by reference to different rates of reduction per party (ranging from 85% to 98%) without sufficiently justifying this approach. The commission applied a reduction factor to each party after it had:

- calculated each party's value of relevant sales;

- applied the gravity percentage (15% to all parties);
- multiplied this by the period of involvement in the infringement;
- applied the additional entry fee (again 15% to all parties); and
- taken into consideration any aggravating or mitigating circumstances.

This was justified by the commission in its decision in order to ensure that the "fines will be set at a level that is proportionate to the infringement and achieves a sufficiently deterrent effect".(4)

The applicants alleged that the recitals of the decision did not specify to the requisite legal standard the reasons which led the commission to adjust the basic amount of the fines and to apply different rates of reduction to each party.

The judgment confirms that the obligation to state reasons as laid down in Article 296(2) of the Treaty on the Functioning of the European Union applies *mutatis mutandis* to a decision imposing fines adopted under the settlement notice,(5) and must be "complied with all the more rigorously" where the commission decides to depart from the general methodology for setting fines and decides to use its "broad discretion", as envisaged in the Fining Guidelines.(6) The General Court agreed with the applicants that the commission did not adequately explain why different reduction rates were applied to each party.

The General Court did not engage in any meaningful way with the application of the equal treatment principle, since it considered that it was not possible to assess whether the parties were in comparable or different situations on the basis of the limited reasons given in the decision. In addition, given that it annulled the imposition of the fine, the court took the view that it did not need to rule on the remaining claims.

Comment

The judgment raises a number of points in relation to the settlement procedure and the application of the Fining Guidelines:

- The judgment confirms for the first time that an appeal of a settlement decision is not necessarily counterintuitive, and could still lead to an annulment of a commission decision, even if the parties have admitted to having breached competition law and agreed with the commission's view of the infringement and to a particular fine range. Out of 22 commission settlement decisions adopted to date, only two have been appealed and the applicants' appeal is the first to be ruled on by the Luxembourg courts. Unlike the first appeal of a settlement decision (following the decision in *Euro Interest Rate Derivatives*),(7) in this case the commission disputed the arguments brought by the applicants and the General Court was called to rule on the claims made by the applicants.
- In contrast to the position in the United Kingdom, for example, where the settlement discount is lost if the settling party appeals the infringement decision to the Competition Appeal Tribunal,(8) the General Court did not address the possible implication of an appeal on the awarded settlement discount. The settlement notice makes no reference to the possibility of losing the settlement discount on appeal. This is interesting given that the discount is provided by the commission in an effort to incentivise companies to settle, thereby speeding up the adoption of a decision while requiring fewer resources, generating procedural efficiencies and reducing the likelihood of an appeal. Arguably, one of the objectives of a settlement is undermined if the commission becomes involved in an appeal process.
- None of the appeals of settlement decisions launched to date related to the parameters of the infringement, and instead only disputed the commission's calculation of the fine. The judgment illustrates the fact that an appeal to the courts on fine calculation methodology can be successful, even though the parties admitted liability and accepted the fine range. It is as yet untested before the courts whether an appeal on liability itself would have significant prospects of success.
- The judgment also emphasises that rights of defence still apply in a settlement case, and the commission must still comply with key legal principles (eg, the duty to state adequate reasons and to apply equal treatment). A settlement decision must still satisfy these principles, even though the parties in a settlement process will likely have had better insight into the commission's views on the case than they would obtain during a contested process; the parties

will also have had the chance to make a settlement submission, to comment on the statement of objections and agree to the fine range. The General Court also explicitly stated that failure to satisfy these principles in the decision cannot be remedied by providing the information during the appeal process.

The importance placed by the General Court on the commission meeting the relevant legal standards when explaining why it has taken a particular approach to calculating fines is significant. In settlement decisions to date, the commission has frequently departed from the standard approach set out in the Fining Guidelines. For instance, under the guidelines, the commission "will normally take the sales made by the undertaking during the last full business year of its participation in the infringement".(9) Regarding settlement decisions published since 2015, the commission has departed from this starting position in all but one of 12 cases.

Settlement decisions tend to be significantly shorter than contested decisions (which for the most part is helpful for both the commission and the parties). This is in line with the objectives sought by the settlement procedure – to reach decisions faster while using fewer resources and streamlining the process. In many instances shorter decisions with fewer details for potential damages claimants might make settlement more appealing for the parties. This judgment emphasises that notwithstanding the above, the commission must still set out its reasons for key elements of its findings – and particularly the fine methodology – with sufficient clarity in the abbreviated settlement decision, especially where it will apply any form of differential treatment between the settling parties and where it departs from the Fining Guidelines, so that the parties can ascertain from the decision whether the commission has observed legal principles and has grounds for appeal.

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Endnotes

(1) Case T-95/15, *Printeos SA v the European Commission.*

(2) Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of EU Council Regulation 1/2003 in Cartel Cases (OJ 2008 C 167, page 1).

(3) Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases (OJ 2006 C 298, page 17).

(4) Paragraph 91 of the decision.

(5) Paragraphs 44 to 47 of the judgment.

(6) Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of EU Regulation 1/2003 (OJ 2006 C 210, page 2).

(7) *Euro Interest Rate Derivatives* (Case T-98/14).

(8) See paragraph 14.26 of the Guidance on the UK Competition and Markets Authority's Investigation Procedures in the Competition Act 1998 Cases, March 2014, CMA8.

(9) Paragraph 13 of the Fining Guidelines.