

The FCO publishes note on settlements in antitrust proceedings in Germany

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On December 23, 2013, the Federal Cartel Office ("FCO") published an explanatory note on settlement proceedings in antitrust cases on its website. Since 2007, the FCO has increasingly terminated cases through settlements, so the note came rather late. Unlike the European Commission, the FCO has entered into settlement agreements without a specific regulatory basis and without any official notice. While the FCO created some degree of transparency on its settlement practice in its annual report 2007/2008 and through publishing summaries of individual cases on its website, it did not publish any official guidelines prior to this explanatory note.

Those who expect the note to provide an exhaustive and comprehensive elaboration on settlements may be disappointed. The note is rather short (two pages), and is mainly limited to confirming the cornerstones of the FCO's settlement procedure. The FCO may have been afraid to offer more details, because the note qualifies as administrative guidelines and has a binding effect on the FCO. The note certainly leaves sufficient room for flexibility, which may benefit both sides in an individual case. And it does not risk functioning like a "straightjacket", as the Commission Settlement Notice may be perceived in some cases. However, it is regrettable that the FCO did not use the chance to provide further guidance on some open issues, e.g., on the possible settlement reduction in vertical infringement proceedings, of which quite a few are pending. This adds to the current level of uncertainty in the FCO's fining policy, which the new FCO's fining guidelines and recent practice have created (see my previous blogpost of December 12, 2013).

The FCO settlement note clarifies that settlements are possible in all types of antitrust proceedings - unlike at EU-level, they are not limited to horizontal cartel cases. If the FCO is interested in settling, it will be open for settlement talks with all parties concerned. However, the note explains that hybrid settlements are possible, i.e., settlements with only some parties, while normal proceedings continue with others. The note acknowledges that there is no specific regulatory basis for settlement proceedings in antitrust cases, and refers to the principles that the German Constitutional Court set out for settlements in criminal investigations.

In substance, the note sets out that a settlement requires a confession from the parties concerned, which under German law are typically both individuals as well as companies. The confession includes a description of the infringement and of other aspects relevant for setting the fine. The parties need to submit the confession as a formal settlement declaration, in which they accept the facts as described by the FCO as accurate, as well as the maximum amount of the possible fine as envisaged by the FCO. While the note does not explicitly say so, the confession does not entail an admission of guilt or of the infringement, unlike the settlement declaration in Commission proceedings.

Typically the parties waive the right to a full access to file. In practice, this depends on the stage of the proceedings - there have been settlements after a normal statement of objections and a full access to file. The note also provides that proceedings will be terminated through a short instead of a fully reasoned decision. In practice, this is a clear benefit for the settling parties, which is particularly relevant when third parties request access to the decision in order to prepare follow-on damages claims.

The FCO will take the settlement into account as a mitigating circumstance when setting the fine. In horizontal cartel cases, the note stipulates that the settlement reduction may amount to a maximum of 10%. The FCO grants the settlement reduction in addition to a possible leniency discount. However, the note clarifies that the FCO will only apply the settlement reduction to the fine after a possible leniency discount has been subtracted. This is another difference to settlements at EU-level, in which the Commission applies leniency discount and settlement reduction cumulatively, which *de facto* leads to a higher settlement reduction than in Germany. It is hard to see a reason for this difference, and the FCO note does not provide any. The note does also not mention other possible "soft benefits": the settlement may lead to the FCO dropping parts of the or limiting the time period covered. These factors may have a bigger impact on the overall fine amount than the formal 10%-settlement reduction.

There is no timeline for opening settlement proceedings. The note mentions that once the FCO has sifted through the evidence and has acquired a sufficient level of information both sides can suggest settlement talks. In particular, settlement discussions do not require that the FCO has issued a comprehensive statement of objections. If the parties are generally interested in exploring a settlement, the FCO sets out the allegations, either in writing or orally, envisages the maximum fine amount in case of a settlement and allows the parties to comment. The note does not provide a fixed timetable in this respect - unlike the Commission Settlement Notice, pursuant to which the Commission will only disclose the fine amount in the final meeting (of typically three). The FCO note does not provide for a fixed number of meetings, and indeed in practice the number of meetings varies. However, the FCO always provides the envisaged fine amount in the first presentation of the settlement offer. This is an advantage, as the fine is typically the most interesting piece of information for the parties.

If the settlement discussion proceed, the FCO will submit a draft settlement declaration including a summary of the results of the investigation and will set the parties a deadline for accepting it. The parties can submit the settlement declaration either written or orally. The note clarifies that the settlement negotiations will form part of the FCO's file. The latter indicates that the parties may suggest changes to the draft settlement declaration and may indeed negotiate to a certain degree. In practice the FCO also often provides the draft short decision for comment.

A settlement does not entail waiving the right to appeal against the FCO's decision. However, the note clarifies that if a party appeals the decision despite a settlement, the FCO will withdraw the short and issue a fully-reasoned decision. This seems to remove any incentive in practice to appeal a decision after having entered into a settlement.