

Kluwer Competition Law Blog

Timab litigates settlement all the way to the CJEU

Patrick Harrison (Sidley Austin LLP) · Monday, September 21st, 2015

Co-authored by Patrick Harrison and Lara Kaplan, Sidley Austin LLP.

The European Commission (“Commission”) introduced its settlement procedure for cartel cases back in 2008.^[1] Commission Regulation (EC) No 662/2008 of 30 June 2008 amending Regulation No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ 2008 L171) (“the Settlements Notice”). The main aims? To make life easier for the Commission and to keep cartel cases out of the overburdened EU Courts. But Timab – a party to the Commission’s 2010 *Animal Feed Phosphates* cartel case (only the second settlement case concluded by the Commission) – clearly has other ideas: by an appeal lodged on 27 July 2015 it is taking its challenge to the Commission’s approach to settlement all the way to the Court of Justice of the European Union (“CJEU”). In addition to using up scarce Commission resource, Timab’s appeal (of a General Court judgement dated 20 May 2015^[2] Case T-456/10, *Timab Industries and CFPR v European Commission*, ECLI:EU:T:2015:296.) is set to yield interesting insights on the dynamics of fine calculation in hybrid cases (where some parties settle but others do not). In this blog, the authors explore some of the more noteworthy aspects of the General Court’s judgement and discuss the likely consequences for settlements in cartel cases going forward.

Procedure before the Commission

The Commission’s settlement procedure can only be initiated by the Commission itself. In order for a settlement to be agreed, parties must acknowledge liability for their involvement, waive their rights of defence in the administrative procedure and accept the Commission’s range of fines. In return, they receive a 10% reduction of the fine that would otherwise have been imposed.

In the *Animal Feed Phosphates* case, the Commission had entered into settlement discussions in 2009, so just a year after it had introduced its settlement procedure. The Commission held settlement discussions with Timab but, after three meetings, Timab decided to withdraw from the procedure as it disputed elements of the Commission’s case against it. When Timab withdrew, the Commission reverted to the standard procedure, sending Timab a Statement of Objections and allowing Timab the opportunity to make representations at an Oral Hearing.

The net result? After having been offered a likely fine through the settlement procedure of between €41 million and €44 million, Timab was fined €59.8 million; way in excess of the €45 million to €49 million (*i.e.*, 10% more than the settlement figure) that it might have thought a worst case scenario.

Appeal to the General Court

Timab appealed, arguing that the increased fine was beyond the scope indicated during settlement discussions and that it represented, in effect, a penalty for not settling. The Commission disputed Timab's arguments, claiming that it had arrived at the fine of €59.8 million merely by following the requirements of its standard procedure.

The General Court sided unequivocally with the Commission, concluding that the Commission's approach in calculating the fine was consistent as between the settlement procedure range of €41 million to €44 million and the eventual, much higher, final figure of €59.8 million. How so? Well, it's far from straightforward, but the General Court clearly thought it made sense.

In essence, in the context of the settlement procedure, Timab had provided information suggesting that the cartel had started earlier than the Commission would otherwise have been able to prove. In exchange for the provision of such information in the context of the settlement procedure, Timab stood to benefit from: (i) the Commission calculating its fine on the basis of lower average annual sales figures (as the average would have included the early years of the cartel, stretching back as far as 1978); (ii) a 10% reduction for settling; (iii) a 17% reduction for leniency; and (iv) a 35% reduction for cooperation outside of the terms of the Leniency Notice for the provision of the information stretching back to 1978.

Under the standard procedure, Timab disputed its participation in the cartel for the period 1978 to 1993. The Commission responded by shortening the duration from 26 years (1978 to 2004) to 11 years (1993 to 2004). The result for Timab? The average annual sales amount was increased and Timab lost those of its reductions that related to the period from 1978 to 1993. This meant a much higher fine of €59.8 million. The General Court conceded that the reduction in duration and resultant increase in fine were "paradoxical",^[3] Case T?456/10, ECLI:EU:T:2015:296, paragraph 121. but it considered the Commission's approach logical and consistent.

Appeal to the CJEU

Timab has appealed the General Court judgement to the CJEU. At the time of writing, its grounds of appeal were not public. The authors confess that they do not see any evident flaws in the Commission's approach, or in the General Court's reasoning, so it will be interesting to see how Timab frames its grounds of appeal. More generally, it will also be interesting to see what the CJEU says about the settlement process as a whole. Certainly, settlement cases going all the way to the CJEU will be rare beasts.

Discussion

On its face, the case seems somewhat fact-specific. But it does serve to demonstrate that the choice of whether or not to settle involves complexities that cannot always be anticipated.

Certainly, it seems Timab was not fully aware of how the fine would be calculated under the standard procedure – had Timab known what would happen, it would, most likely, have settled. Arguably, this lack of awareness as to how the fine would be calculated under the standard procedure calls into question Timab's ability to make an "informed decision" on whether to settle, as required under the Commission's Settlement Notice.^[4]

In addition, regardless of the legalities of the Commission's approach to fixing Timab's fine under the standard procedure, the fixing of such a higher fine may still be perceived as penalising Timab's decision not to settle and could thus deter other companies from exiting the settlement procedure in future cases, thereby weakening their bargaining positions with the Commission.

The General Court also clarified that Timab did not have a "legitimate expectation" that, if it reverted to the standard procedure, its fine would be between €45m and €49m. So the Commission is not bound by the fine ranges that it provides in the course of settlement discussions.^[5] Case T-456/10, ECLI:EU:T:2015:296, paragraph 105.

Finally, the case raises issues regarding the principle of equal treatment. The General Court held that there must not be discrimination as between addressees of decisions in the same cartel investigation "with respect to the information and calculation methods (for fines)." ^[6] Case T-456/10, ECLI:EU:T:2015:296, paragraph 74. This is perhaps something of a redeeming feature of the Timab case for non-settling parties, as it demonstrates that the principle of equal treatment is at least still applicable as between settling parties and non-settling parties.

Patrick Harrison is a partner and Lara Kaplan is a trainee at Sidley Austin LLP in London. The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP or its partners. This article has been prepared for informational purposes only and does not constitute legal advice.

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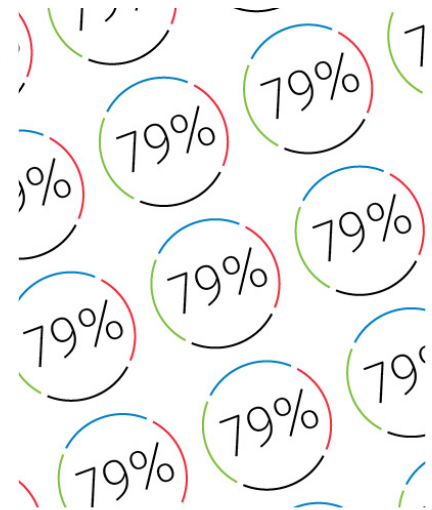
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