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Dutch Authority for Consumers and Markets (ACM) publishes guidelines to clarify simplified settlement procedure

Mariska van de Sanden (Bird & Bird, The Netherlands) · Monday, January 14th, 2019

On 21 December 2018, the Dutch Authority for Consumers & Markets (“ACM”) published [guidelines on its simplified settlement procedure](#) (“Settlement Guidelines”).^[1] Such a procedure can be followed if the ACM intends to impose a fine and the undertaking or person involved is prepared to admit the allegations and to accept the fine. The ACM can then simplify the procedure and take an abridged decision which saves time and costs. Parties who cooperate in settling the case in this manner are eligible for a 10% reduction of the fine. The Settlement Guidelines seek to clarify when and how the ACM applies the simplified settlement procedure.

The simplified settlement procedure was first applied by the ACM in 2015.^[2] Based on the experience gained then and with subsequent cases, the ACM now formulated several rules of play for such procedures. For example, the Settlement Guidelines clarify that only cases in which (i) the allegations are acknowledged and the fine is accepted by the undertaking(s) concerned, (ii) the infringement has ended and (iii) sufficient efficiency benefits are expected for the ACM, are suitable for a simplified settlement procedure. The latter condition (iii) implies that a simplified settlement procedure is less likely to be applied if ACM’s investigation is already at an advanced stage. Moreover, the Settlement Guidelines hold that such a procedure will in principle only be initiated if “all” parties are prepared to acknowledge the allegations and to accept the fine. Hybrid settlements will, therefore, in principle not be allowed, because of the likely lack of efficiency benefits for the ACM.

As regards the procedure, the Settlement Guidelines state that simplified settlement procedures will in principle be initiated on initiative of the ACM, but parties can also submit a request for such a procedure. A confidentiality agreement must be signed before the conversations between the ACM and the undertaking(s) start. The conversations take place on an undertaking-by-undertaking basis. During the conversations, the ACM will share its views on the allegations and the amount of the fine that it intends to impose.

The Guidelines explicitly hold that the ACM does not negotiate with the parties about either the allegations or the amount of the fine. However, parties can submit their views during the conversations which might change the ACM’s views.

If all goes well, the undertaking needs to sign a statement which contains amongst others a description of the violation, the acknowledgment hereof and a confirmation that the undertaking has been given sufficient access to the file and the right to be heard has been respected. Third

parties will not be provided access to this statement – especially not in damage claims proceedings, unless the law requires the ACM to do so.

If the statement has been signed by the undertaking and accepted by the ACM, the ACM will write a short decision with a description of the violation, the gravity and duration. This decision will be published.

The Settlement Guidelines stress that there is no right to a simplified settlement procedure. The ACM can, for example, stop the procedure at any point in time – even after the statement of an undertaking has been accepted by the ACM. This could for instance be the case if one of the other parties decides not to proceed with the simplified settlement procedure and/or the ACM does not accept such other parties' statement. However, in the situation the ACM terminates the procedure, the undertaking will no longer be bound by the statement already submitted to the ACM. Neither will the information and arguments raised during the conversations with the ACM be used against the undertaking.

There is no timing constraint. Once the simplified settlement procedure is commenced, the statutory time limits that apply to the regular procedure will be suspended until the simplified settlement procedure has been completed.

The Settlement Guidelines are accompanied by a Q&A which can be viewed [here](#) (in Dutch).

Interestingly, just a couple of days after the ACM published its guidelines for simplified settlement procedures, [the *Autorité de la concurrence* published comparable guidelines](#) on settlement procedures. In contrast to the ACM Settlement Guidelines, the French guidelines hold that 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 concerned. This is generally beneficial for the undertaking(s) concerned, especially with a view to civil damages claims. Also, the amount of the penalty reduction attached to the implementation of the French settlement procedure is not predetermined (no maximum reduction) but depends on the circumstances of each case. In this regard, the French guidelines not only differ from the Dutch but also from [the European Commission's notice on the conduct of settlement procedures](#). The European Commission's notice also holds that a 10% reduction will be applied. One of the other notable differences is that the European Commission's notice only applies to cartels,^[3] the guidelines of the *Autorité de la concurrence* apply to all infringements of competition rules (thus both cartels, abuse of dominance and, for example, gun-jumping cases), while the guidelines of the ACM apply to all penalty cases, not only relating to violations of competition law, but also to violations of consumer law and regulatory laws under the ACM's supervision (energy, telecom, post, railway etc.).

In any event, the publication of these settlement guidelines is a good step forward in providing more clarity and makes the settlement procedures more predictable. Parties that receive a statement of objections should also be aware of the possibility to request such a procedure – although they should also ensure themselves of being sufficiently informed about the disadvantages of settling a case. The disadvantages do not seem to have gained a prominent place in the settlement guidelines.

[1] ACM, *Guidelines Simplified Settlement of enforcement cases ACM* ('Richtsnoeren vereenvoudigde afdoening van boetezaken ACM'), 21 December 2018, see (in Dutch): <

<https://www.acm.nl/sites/default/files/documents/richtsnoeren-vereenvoudigde-afdoening-van-boet ezaken-acm-380605.pdf>.

[2] ACM, case nr. 14.0705.27, 25 June 2015 (*natural vinegar cartel*); case nrs. 13.0698.31 and 15.0327.31, 22 December 2015 (*refrigerators and freezers cartel*), ACM, case nr. 15.1118.52, 26 May 2016 (*excessive roaming costs*), and; ACM, case nr. 7615, 30 June 2017 (*traction batteries cartel*).

[3] Although the European Commission has applied similar procedures to Article 102 TFEU-cases based on the Commission's 2006 fining guidelines. See for example, European Commission, case SA.39759, 20 September 2016, *ARA* and the accompanying press release: <http://europa.eu/rapid/press-release_IP-16-3116_en.htm>.

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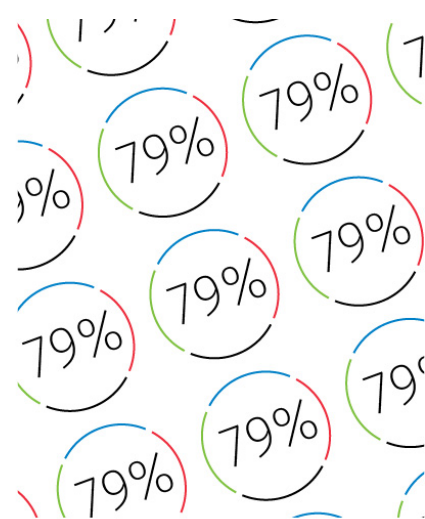
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