

# ARTICLE

## THE FRENCH COMPETITION AUTHORITY PUBLISHES ITS PROCEDURAL NOTICE ON SETTLEMENT

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**Two and a half years after the creation of the settlement procedure, the French Competition Authority (hereinafter the "Authority") published on 27 December 2018 its procedural notice on the conditions for implementing the settlement procedure (the "Notice")<sup>[1]</sup>.**

The settlement procedure, which resulted from the "loi Macron" of 6 August 2015<sup>[2]</sup>, replaced the "no contest of objections" procedure, which allowed the Authority to reduce the penalty, at its discretion, in return for the waiver of the right to contest the notified objections. Thanks to the transaction, the company that waives the right to contest the objections can now "bargain" the amount of its penalty: this company will obtain a financial penalty within a range proposed by the General Rapporteur and agreed by the parties.

After twelve settlement decisions issued since the introduction of this procedure, the Authority felt it was time to share its feedback and provide useful clarifications to companies and practitioners.

### What is the scope of the settlement procedure?

On a matter of time, the settlement applies to objections notified after 7 August 2015. On the material aspects, the Notice specifies that only anti-competitive practices (anti-competitive agreements, abuse of dominance) and abusively low prices can be the subject of a transaction. Infringements of the merger control provisions are therefore excluded from the transaction, which may be surprising given that in 2016, Altice Luxembourg and SFR had benefited from a settlement procedure<sup>[3]</sup> in their infringement proceedings for having carried out two notified merger transactions in advance.

The Notice specifies that it is possible to combine the settlement procedure with the leniency procedure: the company that has revealed an anti-competitive practice may, in addition to the reduction in the penalty inherent in that disclosure, benefit from an additional reduction if it waives its right to contest the objections. However, in practice, none of the companies benefiting from leniency proceedings had so far contested the notified objections. In fact, obtaining a double reduction or an increased reduction is uncertain because the Notice specifies that such a reduction is left to the discretion of the case handler.

### How is the transaction procedure implemented?

The Authority recommends to sought for the benefit of the transaction before the communication of the statement of objections. In practice, this may turn out complicated for companies that have only been marginally affected by the investigation and do not have a detailed knowledge of the Authority timetable or for those that are simply not informed of an investigation by which they are implicated.

The case handler has a wide discretion to decide whether to use this procedure and is not obliged to accept the submitted requests.

In this regard, the Notice states that if objections are charged to more than one company and some decide to contest the objections, a settlement is more than uncertain for those who wish to waive the objection.

The settlement report, which contains the range of sanctions, must be signed within two months of receipt of the statement of objections. The transaction request may be made with commitments from the company.

The company must undertake, "in clear, complete, unambiguous and unconditional terms", not to contest the reality of the practices shall concern their material nature, their legal qualification as it results from the statement of objections nor their imputability.

In other words, the only possible field of dispute for the company is the assessment of the amount of the penalty. The company may submit comments on the factors that may be taken into consideration by the College of the Authority in determining the amount of the financial penalty that may be imposed within the range.

The settlement report are then submitted to the College of the Authority, which, if it considers that the conditions for the imposition of a sanction are met, pronounces a sanction within the range indicated in the settlement report.

### How is the range of the sanction set in the settlement procedure?





This is the point that raised the highest expectations and the least we can say is that the suspense remains.

The Notice states that the determination of the range of the penalty may be made with reference to the notice of 16 April 2011 on the method of determining financial penalties<sup>[4]</sup>, but it does not provide any practical details.

The asymmetry of information between the Authority and companies persists.

It should also be pointed out that, like the press release on the determination of the sanction, the Authority is bound to the press release, unless there are special circumstances or reasons in the general interest that lead it to depart from it.

In other words, the legal security of companies thanks to the Notice is not complete.

Finally, the sensitive subject of follow-on actions is discussed in the Notice.

The latter recalls that the implementation of the settlement procedure does not constitute an admission of responsibility. However, before the judge, the difference between a waiver of the right to contest the objections and an admission of responsibility can be very slight.

The use of the transaction must therefore be weighed against the indemnification risk.

[1] [http://www.autoritedelaconurrence.fr/user/standard.php?id\\_rub=683&id\\_article=3316&lang=en](http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=683&id_article=3316&lang=en)

[2] Law 2015-990 of 6 August 2015 for Growth, Activity and Equal Economic Opportunities

[3] Decision No. 16-D-24 of 8 November 2016 on the situation of the Altice group with regard to II of Article L. 430-8 of the French *code de commerce*

[4] [http://www.autoritedelaconurrence.fr/doc/communiqu\\_sanctions\\_competition\\_16mai2011\\_en.pdf](http://www.autoritedelaconurrence.fr/doc/communiqu_sanctions_competition_16mai2011_en.pdf)

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