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Cartel settlement procedure in Greece: the new rules introduced by the Hellenic Competition Commission

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I. Introduction

On July 18, 2016, the Hellenic Competition Commission (“HCC”) issued its Decision No. 628/2016 (the “Decision”) establishing within Greece the legal framework regulating the settlement procedure in cases of horizontal cartel collusions¹. In EU competition law and within the European competition policy, the settlement procedure is a relatively new mechanism relating to fines, and it is often called an alternative enforcement procedure².

The HCC’s decision sets out the terms, the conditions and the procedure for the settlement of disputes in case of

horizontal cartel collusions in breach of Article 1 of Law 3959/2011 (“Greek Competition Law”) and/or Article 101 of the TFEU.

Firstly, the settlement procedure concerns situations where undertakings or associations of undertakings admit, voluntarily and without reservation, their participation in horizontal collusions in breach of the aforementioned articles of Greek and EU legislation, aiming at facilitating the progress of the ascertainment of infringements by the HCC. In these cases, a reduction of the fine by 15% is granted under certain conditions which shall be analyzed below.

¹ The decision has been published in the Hellenic Government Gazette, Issue No. 2356 B, 29.07.2016. On 21.07.2016 the HCC issued a press release and a relevant brief note (both available at <https://www.epant.gr>).

² For the settlement procedure in EU law see *Commission Regulation* (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 1.7.2008, p. 3. See also the *Commission Notice* on the

conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2.7.2008, p. 1 and the *Communication* of the Commission – Amendments to the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) 1/2003 in cartel cases, OJ, C 256, 05.08.2015, p.1.

Contrary to other bargaining procedures such the leniency program and the provision of commitments, in which the goal of gaining administrative efficiencies is ancillary, this is the main target of the settlement procedure. This explains the applicable streamlined administrative proceedings and the expedited adoption of decisions for infringements of Article 1 of Greek Competition Law or/and of Article 101 of the TFEU. Additionally, the settlement procedure aims at reducing the number of the appeals against HCC's decisions before the competent Administrative Court of Appeal.

Last but not least, in a separate chapter below some issues that arise in a situation of hybrid settlements will be addressed, as hybrid settlements may be more complex than global settlements.

II. Cases subjected to the settlement procedure

As happens in case of commitments and leniency process, the HCC has, in general, wide discretion when it decides which cases of horizontal cartel collusions will be subjected to the settlement procedure. The Decision sets out the relevant parameters and criteria.

III. The Settlement Procedure

a. The initiative for/and the opening of the settlement procedure

The initiative to request for a settlement procedure is of the undertakings concerned. The undertakings may express their interest during the stage of investigation of the case by the General Directorate of Competition of the HCC, which precedes the notification of the Statement of Objections. If the Statement of Objections has already been notified to the parties, the undertakings concerned can express in writing their interest to hold settlement

discussions 35 days at the latest, prior to the date of the first hearing of the case before the HCC.

The decision for the initiation of the settlement procedure falls within the exclusive competence of the HCC, at any time. At the beginning of the procedure, the HCC prioritizes the case and assigns it (if is not already assigned) to a Rapporteur, according to the process provided by the law, who is authorized to conduct bilateral meetings with the parties.

b. The bilateral meetings

In bilateral meetings, each undertaking participating in the settlement procedure is informed about the most crucial elements of the case. These elements are: a) the investigated facts and their legal classification during the process of the ascertainment of the infringement, b) the gravity and the duration of the cartel under investigation, c) the participation and the attribution of liabilities to the specific undertaking, d) the main supporting evidence on which the existence of the alleged infringement is based and e) the calculation of the range of the potential fine.

In bilateral meetings, the HCC and the undertakings concerned explore the possibility of a common perception with regard to the infringement, in order to achieve procedural efficiencies. Nevertheless, the HCC does not negotiate the matter of the existence of the alleged infringement and the imposition of the appropriate sanctions (fines) with the undertakings concerned.

The HCC once again enjoys a wide discretion to decide on the adequacy and the pace on which the bilateral meetings will be carried out with each undertaking. For the effective exercise of defense rights of the undertakings, the

HCC can disclose to the undertakings significant evidence of the case file (in a non-confidential version) and it can provide partial access to the case file.

In case that the Statement of Objections has already been notified to the undertakings and the HCC decides to initiate the settlement procedure, the bilateral meetings procedure is maintained and can lead to formal proposals for settlement by the interested undertakings. At this stage, the bilateral meetings are scheduled to take place within a few days, in order for any issues to be clarified during the second scheduled meeting at the latest.

c. Settlement Proposals

When the Rapporteur finds out that there is successful progress during the bilateral meetings, he then briefly informs the undertakings concerned as regards the results of these meetings, and invites them in writing to submit (within a time limit) a formal proposal for the settlement of the case.

The proposals made by any undertaking should include: i) an acknowledgement without reservations of the participation of the undertaking in the infringement of Article 1 of L. 3959/2011 or/and Article 101 of the TFEU and of its liability, ii) an acceptance of the maximum fine that may be imposed by the HCC, according to the result of the bilateral meetings, iii) a confirmation by the undertaking that it has been sufficiently informed about the infringement and that it has been provided with the opportunity to communicate its factual and legal arguments and its relevant opinions, iv) a waiver of the right to be given further or full access to the administrative file and of the right to an oral hearing of the case before the HCC, v) a waiver of the undertaking from disputing the competence of the HCC and/or the

validity of the procedure which is followed by the HCC in order to impose a fine during the settlement procedure.

Given that the proposals for the settlement reflect the results of the bilateral meetings, the Rapporteur drafts and delivers to the parties the settlement proposal. Subsequently, the undertakings are invited to confirm via the settlement statement that the settlement proposal reflects their proposals and thus their commitment to be subjected to the settlement procedure which is in force permanently, without reservation and with clarity.

d. Protection of settlement proposals and access to documents

The statements for the expression of interest for the settlement procedure, the technical submissions of the undertakings submitted during the bilateral meetings, the minutes of the bilateral meetings, the summon of the Rapporteur, the settlement proposals and the minutes of the bilateral meetings before the HCC are considered restricted information which may not be disclosed to third parties, including individuals or legal entities who have submitted a complaint under Article 36 of L. 3959/2011.

Access to the aforementioned documents is provided only to undertakings involved which have not been subjected to the settlement procedure, but under strict conditions. In case of violation of the restrictions relating to access and or use, sanctions are provided for in the legislation (par analogy to what is provided for in the Directive 2014/104/EE on civil actions for damages).

The complainants, following their request, may be informed as regards the nature and the object of the settlement

procedure and can submit in writing their views within a specific time limit. The complainants do not receive a non-confidential version of the settlement proposal and do not have the right to an oral hearing before the HCC, while access to non-confidential information of the case file is given upon notification of the settlement decision to the undertakings concerned.

e. Interruption of settlement discussions

The discussions for a settlement are interrupted if, cumulatively or alternatively: i) factors arise that render the procedure inexpedient, ii) the interest of the parties to participate in settlement discussions is expressed in a dilatory manner, iii) objective evidence exists showing that the parties involved act in a manner aiming at counterfeiting or destroying any evidence relating to the infringement of competition rules or to the calculation of the fine, iv) the parties involved breached the confidentiality obligation and revealed to any third party the content of the meetings with the HCC or the documents for which access has been given to the parties. In case that the settlement procedure is interrupted for any reason, the HCC can continue the investigation process in order to ascertain the infringement (if any), i so as to issue an infringement decision.

f. The decision for the settlement

In case that the HCC and the undertakings concerned reach a settlement, the HCC issues a decision under the simplified procedure. With this decision, the HCC certifies the existence of the infringement and the settlement, and then the imposition of the respective sanctions.

The decision of the HCC for the settlement which ascertains the

infringement, provides for an imposition of a fine reduced by 15% due to the reason that the case was subjected to the settlement procedure. The reduction of the fine by 15% is calculated on the basis that the fine would have been adjusted according to the provision of Article 25 of L. 3959/2011 and the HCC's Notice on fines dated 12.05.2006.

Although the implementation of the new procedure is expected to limit the number of appeals before the Administrative Court of Appeal of Athens, the settlement decision which is issued according to the simplified procedure cannot be excluded from the ordinary judicial control, according to the relevant legislative provisions.

IV. Settlement, leniency and commitments

The contribution of an undertaking during the leniency program procedure according to the HCC's decision No. 526/V/2011 by voluntarily providing evidence for the initiation or the progress of the investigations conducted by the HCC for the existence of an infringement, and the contribution provided during the settlement procedure in facilitating the procedural efficiencies, could co-exist in a supplementary manner, and, in this case, the cumulative granting of the benefits provided by the law is justified. As it is often said, leniency and settlements are complementary in nature.

Conversely, the settlement procedure cannot be cumulatively implemented with the procedure for the undertaking of commitments, since these two procedures are totally distinguished. The basic difference between these two procedures is that, in case of settlement, the infringement is ascertained and (reduced) fines are imposed in significant competition infringements,

while in case of commitments there is no ascertainment of the infringement, since the infringement is considered probable. In the case of commitments, the undertakings undertake structural measures without an infringement being ascertained, and fines are not imposed. Moreover, the commitments are suitable in the case that there are no hardcore restrictions to competition.

V. Hybrid Settlements

As in EU competition law, the decision of the HCC allows for hybrid settlements, too. This means that some undertakings settle the case with the HCC according to the settlement procedure and some other do not. In case of a hybrid settlement, the HCC issues a settlement decision for the undertakings that have been subjected to the settlement procedure and for the other undertakings, the investigation for the existence of the infringement is continued, and, if it is ascertained, the HCC issues an infringement decision.

Much debate could take place concerning hybrid settlements. The process of hybrid settlements is itself obviously a complex one. The EU Commission, the HCC or the National Competition Authorities have to issue two separate and distinct decisions for the same cartel case, one settling the case and one ascertaining the infringement. This results in more administrative work for the competition authority and less procedural efficiency. Nonetheless, as the HCC notes, the (hybrid) settlement procedure would normally reduce the number of appeals to be brought against the HCC before the Administrative Court of Appeal.

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