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I. INTRODUCTION

On May 20, 2015, the General Court of the European Union ("General Court") dismissed the appeal brought by Timab Industries ("Timab") and its parent company Cie Financière et de Participations Roullier ("CFPR")[2] against the European Commission's ("Commission") decision fining them for their participation in the animal feed phosphates cartel. This cartel involved the allocation of sales quotas and customers, as well as the coordination of conditions of sale, among six European producers between 1969 and 2004.[3]

The investigations were initially triggered by several leniency applications, including one filed by Timab and CFPR.[4] Based on these leniency applications, the Commission opened infringement proceedings and invited cartel participants to engage in bilateral settlement discussions. Timab took part in these discussions and, in that context, was notified of the range of likely fines envisaged by the Commission. However, unlike the five other cartel participants,[5] Timab ultimately decided not to take part in the settlement proposed by the Commission.

It is the first time that the General Court had to rule on such a hybrid cartel case, where both the standard enforcement procedure and the settlement procedure run in parallel. Under the standard procedure, the undertakings concerned receive a fully-fledged statement of objections ("SO") and enjoy their full rights of defense.[6] The settlement procedure allows them to enter into settlement discussions, waive their rights of defense, and admit their participation in—and liability for—the cartel, in exchange for "a 10% reduction in the amount of the fine which would have been imposed upon them under the standard procedure."[7]

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[2] Case T-456/10 *Timab Industries and CFPR v Commission*, ECLI:EU:T:2015:296 ("judgment"); on appeal: Case C-411/15 P *Timab Industries and CFPR v Commission* (pending).

[3] Decision C(2010) 5001 final of 20 July 2010 relating to a proceeding under Article 101 of the [TFEU] and Article 53 of the EEA Agreement (Case COMP/38866— *Animal feed phosphates*) ("Contested Decision").

[4] Both Timab and CFPR were fined and both appealed the decision. These two companies nevertheless belong to the same "undertaking" within the meaning of EU competition law. For the sake of simplicity, the remainder of this article will thus only refer to Timab.

[5] Namely the Kemira group (Yara Phosphates Oy, Yara Suomi Oy, and Kemira Oy), Tessenderlo Chemie, the Ercros group (Ercros SA and Ercros Industrial SA), the FMC group (FMC Foret SA, FMC Netherlands BV, and FMC Corporation) and Quimitécnica.com-Comércia e Indústria Química and its parent company José de Mello SGPS. For the sake of clarity, these five undertakings will be collectively referred to below as the "settling parties."

[6] Right access to the Commission's file, right to be heard through the written response to the SO and an oral hearing.

[7] Judgment, *supra* note 2 at ¶¶ 61-62.

Hybrid cases arise when the undertakings concerned do not all agree to settle. In such cases, both the settlement procedure and the standard procedure run in parallel and the Commission ultimately adopts, on the one hand, a settled decision addressed to the settling parties and, on the other hand, a standard decision addressed to the other undertakings. This case was also hybrid in the sense that another form of cooperation—the EU leniency program—was involved.

The case therefore illustrates the interplay among the standard procedure, the settlement procedure, and the leniency program. The case also illustrates how such interplay can backfire on the undertakings involved. The fine ultimately imposed on Timab (EUR 59,850,000)—the only undertaking that exercised its full rights of defense—represented 79 percent of the total fines imposed on all cartel participants (EUR 75,647,000) and an increase of 36 percent compared to the higher end of the range of fines initially notified during the bilateral settlement discussions (EUR 44,000,000).

Such an increase seems all the more "paradoxical"[8] as, in exercising its rights of defense, Timab successfully shortened the duration of its participation in the infringement: The Commission only managed to establish its liability from September 16, 1993 to February 10, 2004, instead of December 31, 1978 to February 10, 2004. However, the Commission also re-assessed the added value of Timab's cooperation and corresponding fine reductions. While the settling parties obtained significant fine reductions in exchange for their recognition of liability,[9] the Commission's re-evaluation of Timab's cooperation led to "the non-application of the 35% reduction due to mitigating circumstances, the lesser reduction granted under the leniency notice (5% instead of 17%) and the non-application of the 10% reduction required by the settlements notice [thus leading to] a higher fine than that proposed during the settlement procedure."[10]

The General Court entirely approved that approach, holding that the Commission "correctly" decided not to apply the 35 percent reduction for mitigating circumstances[11] and did not manifestly exceed the limits of its discretion in re-assessing Timab's cooperation under the leniency program.[12] This judgment sends potential settlers a strong message: Way beyond the 10 percent settlement reduction, deciding to drop out of a settlement may sometimes "spill over" on the standard procedure (II), or the leniency program itself (III). Such spillover effects should be carefully factored in deciding about whether or not to settle (IV).

II. SPILLOVER FROM SETTLEMENTS TO THE STANDARD PROCEDURE

In holding that "the Commission correctly decided not to apply the reduction initially planned for mitigating circumstances, that is to say, the 35% reduction "outside the leniency

[8] *Id.* at ¶ 81.

[9] Decision C(2010) 5004 final of 20 July 2010 relating to a proceeding under Article 101 of the [TFEU] and Article 53 of the EEA Agreement (Case COMP/38.866 — *Animal feed phosphates*) ("Settlement Decision").

[10] Judgment, *supra* note 2 at ¶ 87.

[11] *Id.* at ¶ 95.

[12] *See, id.* at ¶¶ 95, 177, and 195.

programme" on the basis of point 29 of the 2006 Guidelines,"[13] the General Court confirmed that the decision to drop out of a settlement could spill over on the standard procedure itself.

A. Equal Treatment Between Settling and Non-settling Parties?

Interestingly, the General Court chose to open its analysis of the appeal with the principle of equal treatment:[14]

> even in [hybrid cases], at issue are participants in one and the same cartel, so that the principle of equal treatment must be observed. [T]hat principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[15]

Viewing hybrid cases through the lenses of equal treatment presents certain advantages. First, the legal value of that principle is far clearer than that of the various notices and guidelines which govern fine calculations: the Guidelines on Fines, Leniency Notice, and Settlement Notice all merely lay down rules of conduct from which the Commission should not depart without giving reasons compatible with the principles of legitimate expectations and equal treatment. Unlike these soft law instruments, the equal treatment principle binds all EU institutions, across the board,[16] is enshrined in primary law,[17] and has the status of a fundamental right.[18] In the EU competition law area, the recent case law[19] tends to confirm that principle as a relatively reliable limit on the Commission's discretion with respect to fines.

Second, the element of comparison that that principle introduces makes it particularly fit to handle the intricacies of hybrid cases and the interplay between the standard procedure and the settlement procedure. If, by definition, the settlement procedure is an "alternative" to the standard procedure, the choice about whether or not to settle involves an important element of comparison, which the principle of equal treatment helps make more objective. In other words, the principle of equal treatment makes up for the disparities in terms of legal instruments, legal regimes, and procedures that impact the amount of the fine.

Turning to the parameters of comparison between the two procedures, the General Court held that although the settlement procedure is distinct from the standard procedure and presents certain special features, such as an advance statement of objections and the notification of a likely range of fines,[20] "there cannot be any discrimination between the participants in the same cartel

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[13] *Id.* at ¶ 95

[14] A rather surprising initiative, because none of Timab's pleas in law specifically challenged the increase of the fine in light of that principle.

[15] Judgment, *supra* note 2, at ¶ 72, references omitted.

[16] For an interesting perspective on the structuring role of equal treatment in the EU: *see* e.g. R. Hernu, La non-discrimination: principe d'ordonnancement des politiques de l'Union européenne, in V. Michel (dir.), *Le droit, les institutions et les politiques de l'Union européenne face à l'impératif de cohérence*, Presses Universitaires de Strasbourg (2009) 373-387.

[17] TFEU, Articles 10, 18, 19, 37(1), 40(2), second indent, and 45(2), etc.

[18] Charter of Fundamental Rights, Articles 20 and 21.

[19] *See* Case C-580/12 P *Guardian Industries and Guardian Europe v Commission*, EU:C:2014:2363.

[20] Judgment, *supra* note 2 at ¶ 73.

with respect to the information and calculation methods."[21] Settling and non-settling parties are thus in comparable situations when it comes to the information on fines and their calculation methods.

Unfortunately however, the General Court's application of the equal treatment principle slightly diverges from its statement of that principle. Instead of comparing Timab's treatment with that of the settling parties, the General Court compares the calculation method used to arrive at the range of Timab's likely fines with the one used to reach the amount of Timab's fine.[22] In so doing, the General Court did not really compare Timab's situation with that of the settling parties, but rather Timab's situation before and after it dropped out of the settlement procedure.

B. The Range of "Likely" Fines

The remainder of its analysis is less focused on equal treatment than on whether the Commission "penalized"[23] Timab's withdrawal from the settlement procedure and whether the Commission was bound by the range of fines that it had notified during the settlement procedure.[24] The exact link among these foregoing questions, the principle of equal treatment, and the specific pleas in law raised in the appeal, is not very clear in the judgment.

Such a lack of clarity is all the more problematic given that there seems to be a neat contradiction between the idea that "there cannot be any discrimination between the participants in the same cartel with respect to the information"[25] on the one hand, and the statement that the range of fines notified during the settlement discussions is "irrelevant"[26] on the other hand. If words ever mean anything, how can the notification of the range of likely fines not be viewed as a form of "information"?

Without calling into question the non-binding nature of the range of fines in relation to those undertakings that ultimately drop out of the settlement discussions, the General Court could have applied the equal treatment principle to that "information" on fines.[27] Absent such an analysis, it is difficult to see how the General Court reconciles the irrelevance of the range of likely fines with the bold principle that there cannot be any discrimination with respect to the information on the fine.

In sum, the General Court missed an opportunity of actually applying the equal treatment principle. This is all the more regrettable given that both the equal treatment principle and the decision about whether or not to settle involve an element of comparison between the settlement

[21] *Id*. at ¶ 74.
[22] *Id*. at ¶ 82.
[23] *Id*. at ¶ 88.
[24] *Id.*
[25] *Id*. at ¶ 74.
[26] *Id*. at ¶ 105.
[27] And the outcome would not necessarily have differed: in relation to settling parties, the Commission acted in line with the range of fines whereas in relation to Timab, it significantly departed from it (difference in treatment). However, as already arises from ¶¶ 83-87 and 170-196, the Commission had to re-evaluate the case file and the added value of Timab's cooperation (objective justification). In the alternative, the General Court could have taken a narrower approach, ruling that Timab was provided with the same degree of information on the likely range of fines, at the same stage in proceedings, and was thus not treated differently in relation to the information on fines.

procedure and the standard procedure. For any rational economic operator, deciding about whether or not to settle naturally involves comparing the two options and the notification of the range of likely fines constitutes a crucial moment in this respect. In the present case, one cannot exclude that Timab made its decision in view of that notification.

Holding that such communication is "irrelevant" ultimately boils down to presenting undertakings with the choice between the "known" and the "unknown." Not the ideal way of making sure that rational economic operators "decide, in full knowledge of the facts, whether to settle or not."[28] The issue is further complicated by the spillover effects that may arise between settlements and leniency.

III. SPILLOVER FROM SETTLEMENTS TO LENIENCY

As the judgment confirms, Timab's decision not to settle (and instead challenge the legal characterization of the evidence it had brought) also spilled over on the assessment of its cooperation under the leniency program: The initial leniency reduction of 17 percent retrospectively dropped down to 5 percent when the Commission, faced with Timab's legal arguments concerning the scope of its liability, re-assessed the added value of its cooperation. This illustrates that despite their differences, leniency and settlements in fact largely overlap.

A. Differences Between Leniency and Settlements

There are key differences between leniency and settlement in terms of purpose, stage, and type of cooperation:

1. "While the purpose of the leniency policy is to reveal the existence of cartels and to facilitate the Commission's work in that regard, the purpose of the settlement policy is to serve the effectiveness of the procedure in dealing with cartels" by following a simplified procedure.[29]
2. While an application for leniency intervenes at the stage of the investigation, settlement discussions and submissions intervene at the later stage of the infringement proceedings.
3. While an application for leniency involves the provision of factual evidence and statements, the settlement procedure in contrast involves a different type of cooperation, whereby the undertakings concerned "explicitly concede their liability with respect to the infringement,"[30] the scope, gravity, and duration of which they also explicitly recognize.[31]

In other words, while leniency essentially involves the provision of factual input, concluding a settlement requires the undertaking to explicitly recognize the legal characterization of that input.

That is the point where Timab's willingness to cooperate stopped. In its initial leniency application, Timab submitted factual evidence about its participation in anticompetitive practices between 1978 and 2004.[32] Timab was then invited to discuss—and expand on—that factual input

[28] Judgment, *supra* note 2 at ¶ 102.
[29] *Id*. at ¶ 65.
[30] *Id*. at ¶ 68.
[31] *Id*. at ¶ 67.
[32] *Id*. at ¶¶ 74, 77-78; *see also* Contested Decision, Recital 318.

during the bilateral rounds of settlement discussions. Importantly, Timab's leniency application did not take a definitive position on the legal characterization of its conduct as a single and continuous infringement and its cooperation indeed stopped right at this stage of the reasoning. While initially recognizing it had taken part in certain forms of anticompetitive practices, Timab then denied that its conduct could be considered as part of a single and continuous infringement between December 31, 1978 to February 10, 2004, within the meaning of the case law.

Unfortunately for Timab, what followed was that its unwillingness to concede the legal characterization of its factual input (in settlement) meant that the factual input in question lost its "added value" on the basis of which a significant fine reduction would have been awarded (under leniency and the standard procedure). So the above-described differences between leniency and settlement interacted in a somewhat surprising way that may not have been clearly set out in EU legislation. Timab's decision not to settle spilled over on the leniency reduction because the applicable legal frameworks overlap.

B. Overlaps Between Leniency and Settlements

In this case, the range of fines initially notified included an indication of the leniency reduction and related to the whole of the two periods (between 1978 and 2004). Because of Timab's successful legal arguments, the Commission had "abandoned" the first period (1978-1993) and considered that it was no longer possible to reward self-incrimination for that period.[33] The General Court accepted the idea that "the abandonment of the first period also has an impact on the 17% reduction under the leniency notice."[34] It then reviewed the Commission's assessment of that impact under the judicial standard of marginal review, and found that the Commission did not manifestly exceed the limits of its discretion in re-assessing the quality and usefulness of Timab's cooperation under the leniency program.[35]

From a strict leniency point of view, it is difficult to find fault with that approach:

1. In order to qualify for a fine reduction under the leniency program, the applicant must cooperate genuinely, fully, on a continuous basis, and expeditiously from the time it submits its application throughout the Commission's administrative procedure.[36] Independently of the settlement procedure, Timab's revised strategy might have been seen as a break in that cooperation.

2. The applicant's cooperation must represent "significant added value" compared to the evidence already in the Commission's possession,[37] something that can evolve as the administrative procedure goes and as the Commission evaluates the respective contributions, the interplay between them, etc.

[33] *Id*. at ¶ 91.
[34] *Id*. at ¶ 95.
[35] *Id*. at ¶¶ 177, 195.
[36] Leniency Notice, points (12) (a) and (24).
[37] *Id*., points (24)-(25).

3. The Leniency Notice makes it clear that the level of reduction is only determined in the Commission's final decision adopted at the end of the administrative procedure.[38]

4. Finally, the Commission does enjoy a margin of discretion in relation to fines,[39] which tends to confirm the standard of limited review applied by the General Court.

Nevertheless, one cannot but remain with the impression that the mere dropping out from the settlement cost Timab more than the 10 percent settlement reduction itself. That impression is due to the fact that Timab saw the detailed fine calculation, including the leniency reduction, in the specific context of the settlement discussions. Outside the settlement procedure, the Commission has no obligation to communicate on the level of leniency reduction (or any other fine reduction). This is something that the parties do not discover until the decision. By way of contrast, "the range notified during the settlement procedure […] is an instrument specific to that procedure."[40]

This is another key aspect on which leniency and settlements overlap: Through the settlement procedure, the Commission can use the notification of the range of likely fines to communicate on other fine reductions. Showing these other fine reductions to the parties gives the Commission an opportunity to raise the stakes and increase their incentives to settle. The mechanism works for both the leniency reduction and the reduction for cooperation outside leniency. As a result of the judgment, the spillover effects between the procedures work both ways: The Commission's communication on the fine reductions other than the settlement reduction increases the undertakings' incentives to settle; all the more so now that they know their decision not to settle might deprive them of these other fine reductions.

IV. "ALL OR NOTHING," THE "LOCK-IN" EFFECT OF COOPERATION

In conclusion, the first lesson to be learned is that potential settlers should now carefully think through the (adverse) consequences of raising legal arguments, even if these arguments prove successful vis-à-vis the Commission. Way beyond the mere 10 percent settlement reduction, deciding not to settle may backfire on other possible fine reductions, whether under or outside the leniency program. Unfortunately for the potential settlers, rationally comparing the options is not really possible, or it boils down to choosing between a (more or less favorable) predictable outcome and an unpredictable one.

The key to addressing informational issues—and that will be the second lesson—is to make the most profitable use of the bilateral settlement discussions, which aim is to reach a "common understanding."[41] In Timab's case, it seems these discussions failed over a misunderstanding. Until Timab replied to the SO, the Commission believed it could prove Timab's liability for the whole period.[42] And until the Contested Decision, Timab did not expect that its victory on the liability point would cost it 57 percent of various fine reductions, including

[38] *Id*., point (26).
[39] *See supra* page 4 and note 19.
[40] Judgment, *supra* note 2 at ¶ 102.
[41] *Id*. at ¶ 64, 117.
[42] *Id*. at ¶¶ 78, 94, 117.

the leniency reduction. Such a misunderstanding might perhaps not have occurred if Timab had raised its legal argument during the settlement discussions.

Because of the interactions between settlements and leniency, leniency applicants as well should anticipate, long in advance, the possibility that a settlement may be offered and the consequences of not taking it. It is also important that they carefully factor all the legal aspects of the factual input and evidence they submit to the Commission.

All in all, the interdependence between the different forms of cooperation unavoidably raises the stakes for the parties and ultimately locks them in an "all or nothing" logic. It will remain to be seen whether, in the long run, such a logic still tilts the balance in favor of cooperation.