THE EUROPEAN COMMISSION FINES COROOS AND GROUPE CECAB FOR PARTICIPATING IN A CANNED VEGETABLE CARTEL: A BRIEF REMINDER ABOUT LENIENCY AND SETTLEMENT PROCEDURES

Written by ***Pauline Heingle***

Advanced Master's Degree Student, HEC Paris and Paris 1 Panthéon-Sorbonne University

ABSTRACT

On September 27, 2019, the European Commission (hereinafter « the Commission ») fined the Dutch food-processing company Coroos and the French agricultural cooperative Groupe CECAB (now called Groupe d'Aucy) a total of €31.6 million for participating, for more than 13 years, in a canned vegetables cartel. The French vegetable processor Bonduelle has escaped a €250 million fine, as it revealed the cartel to the Commission. All three companies admitted their involvement in the cartel and agreed to settle the case.

Fighting against cartel has become one of the top priorities of every competition authority. The European Commission enjoys an effective and dissuasive array of tools to detect and sanction companies involved in a cartel. Pecuniary sanctions have been supplemented by two major mechanisms, the leniency programs and the settlement procedure.

The decision at stake is an opportunity to remind oneself what are the respective content and purposes of the leniency programs and the settlement procedure. Even though leniency and settlement are two different mechanisms, they appear to be complementary.

On September 27, 2019, the European Commission (hereinafter « the Commission ») fined the Dutch food-processing company Coroos and the French agricultural cooperative Groupe CECAB (now called Groupe d'Aucy) a total of €31.6 million for participating, for more than 13 years, in a canned vegetables cartel.

The fine will be allocated as follows: €18 million on Groupe CECAB and €13.6 million on Coroos.

The French vegetable processor Bonduelle has escaped a €250 million fine, as it revealed the cartel to the Commission. All three companies admitted their involvement in the cartel and agreed to settle the case, which enabled Groupe CECAB and Coroos to reduce their initial fine. The decision at stake constitutes the 32nd settlement decision since the introduction of this procedure for cartels in 2008.

The Commission's investigation started with unannounced inspections in October 2013, following Bonduelle's application under the Commission's 2006 Leniency Notice. As part of the same investigation, Conserve Italia, a fourth company not covered by this settlement decision, is still under scrutiny.

The Commission found the three aforementioned companies intended to preserve or strengthen their position on the market, to maintain or increase selling prices, to reduce uncertainty regarding their future commercial conduct and to formulate and control marketing and trading conditions to their advantage. To achieve this aim, the companies set prices, agreed on market shares and volume quotas, allocated customers and markets, coordinated their replies to tenders, and exchanges commercially sensitive information.

The Commission's investigation revealed the existence of a single infringement composed of three separate agreements:

- an agreement covering private label sales of canned vegetables such as green beans, peas, peas-and-carrots mix, vegetable macedoine to retailers in the EEA;

- an agreement covering private label sales of canned sweetcorn to retailers in the EEA; and

- an agreement covering both own brands and private label sales (sold under retailers' brands) of canned vegetables to retailers and to the food service industry specifically in France.

Coroos participated only in the first agreement, while Bonduelle and Groupe CECAB participated in all three[i].

In 2014[ii] and 2016[iii], the Commission was already imposing a €37.2 million fine in relation to a canned foodstuff cartel – the canned mushrooms cartel, on fourth companies: Bonduelle, Lutèce, Prochamp (first decision) and Riberebro (second decision).

Fighting against cartels is one of the top priorities of every competition authority. The Commission enjoys an effective and dissuasive array of tools to detect and sanction companies involved in a cartel. Pecuniary sanctions have been supplemented by two major mechanisms, the leniency programs and the settlement procedure.

A Brief Reminder About Leniency Programs

Leniency programs, introduced in 1996 by the Commission[iv], have become the most effective instrument towards the detection of cartels. In exchange of reporting their illegal conduct and providing useful information, cartel members are offered the possibility to obtain full immunity or a reduction of fines. Even if no requirement to adopt a leniency program was established at the European Union level, most National Competition Authorities (hereinafter "NCAs") have built and shaped their own system in accordance to the ECN Model Leniency Programme[v] (hereinafter "MLP") but differences still remain in terms of enforcement and interpretation.

Companies which do not qualify for immunity may benefit from a substantial reduction of fines, by providing evidence bringing "significant added value" to condemn the cartel. That way, the first company meeting this requirement is granted a 30 to 50% reduction, the second a 20 to 30% reduction and consecutive companies a reduction up to 20%.

The recently adopted ECN+ Directive[vi] provides here a very welcome measure by transposing the main principles of the MLP into law. Common conditions for immunity and leniency statements, together with a harmonized process, will certainly encourage companies and their members to apply for this program. Applicants throughout the European Union will benefit, inter alia, from the same level of protection as in proceedings before the Commission, from the possibility to be initially granted a place in the queue for leniency where they so request to a

specific NCA, from the ability to submit written or oral applications and to submit summary applications to NCAs when they have applied to the Commission for leniency. Yet, the Directive misses the opportunity to build a complete and fully coherent leniency program, as it falls short of providing protection for applicants outside of secret cartels, extending the harmonization of immunity and fine reductions to dominance and vertical cases and establishing the highly requested one-stop-shop.

A Brief Reminder About the Settlement Procedure

On June 30, 2008, the Commission adopted a formal settlement procedure[vii] to achieve procedural efficiencies and complement the leniency policy.

While leniency programs aim at detecting cartel, preventing companies from entering in such conduct and facilitating ex-ante investigation, a settlement procedure may only start after the Commission has carried out a full investigation of the case and has formally decided to initiate proceedings. Settlement therefore serves to achieve procedural efficiencies once an investigation has started.

In a settlement, parties acknowledge their participation in a cartel and their liability to it. The Commission can therefore apply a simplified and shorter procedure, conceding at the same time a 10% reduction in fines – much lower than the reduction granted through leniency.

It is worth noticing that only the Commission can decide which cartel cases are suitable for settlement, after the parties explicitly requested it.

The first settlement decision was adopted in 2010[viii] and since then, about half of the cartel-related decisions have been concluded following the settlement procedure[ix]. From 2015 to 2017, only 3 cases over a total of 18 were closed with a standard decision : others were either settlement decisions (7 cases), decisions against a non-settling party that followed a previous settlement decision (6 cases), or amended or re-adopted decision after a previous annulment by the European Court of Justice (2 cases)[x].

As the OECD stressed in its 2018 Note[xi], leniency and settlement are not mutually exclusive but rather appear to be complementary: “while leniency is an investigative tool to obtain

information and evidence to establish an infringement, settlement, in turn, will allow an authority to reach efficiencies in its procedures and thus free up resources". The Commission's cartel case law shows that parties often agree to co-operate under leniency and later settle to receive an additional reduction in fines. From 2015 to 2017, parties have used both leniency and settlements reductions in 7 cases[xii]; whereas only 3 cases have involved solely leniency[xiii]. One may consequently think that both procedures are reinforcing each other, especially because companies hope that reductions in fines will be added together.

REFERENCES

[i] See press release of the European Commission – 27 September 2019: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_5911

[ii] Case AT. 39965 – Mushrooms, 25 June 2014: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39965/39965_1431_7.pdf
[iii] Case AT. 39965 – Mushrooms, 6 June 2016: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39965/39965_1823_5.pdf
[iv] Commission Notice on the non-imposition or reduction of fines in cartel cases – 1996: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996Y0718(01)
[v] ECN Model Leniency Programme, as revised in November 2012: https://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf
[vi] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L0001

[vii] Comprising a Settlement Regulation (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: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:171:0003:0005:EN:PDF) and a Notice on Settlements (Commission Notice on the conduct of settlement procedures in view of the adoption of Decision pursuant to Article 7 and Article 23 of Council Regulations (EC) No 1/2003 in cartel cases: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0702%2801%29).
[viii] Case COMP/38511 DRAMs, 10 May 2010: https://ec.europa.eu/competition/antitrust/cases/dec_docs/38511/38511_1813_8.pdf
[ix] https://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html
[x] EU Cartel Settlement procedure: an assessment of its result 10 years later, Jerónimo Maillo (page 13):

http://www.idee.ceu.es/Portals/0/Publicaciones/EU%20Cartel%20Settlement%20procedure_WPCPC_Final.pdf

[xi] Working Party No 3. On Co-operation and Enforcement : Challenges and Co-ordination of Leniency programmes – Background Note by the Secretariat (OECD, 1 June 2018): https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf
[xii] EU Cartel Settlement procedure: an assessment of its result 10 years later, Jerónimo Maillo (page 17): Blocktrains, Parking Heaters, Rechargeable Batteries, Trucks, Car parts producers, Car Lighting systems, and Thermal systems cases. Available at http://www.idee.ceu.es/Portals/0/Publicaciones/EU%20Cartel%20Settlement%20procedure_WPCPC_Final.pdf

[xiii] EU Cartel Settlement procedure: an assessment of its result 10 years later, Jerónimo Maillo (page 17): Optical Disc Drives, retail Food Packaging, and Cartel battery recycling cases. Available at http://www.idee.ceu.es/Portals/0/Publicaciones/EU%20Cartel%20Settlement%20procedure_WPCPC_Final.pdf