

## General Court Rules on Relationship Between “Standard” and Settlement Cartel Procedures for First Time

***General Court confirms Commission could impose higher fine during standard procedure than range proposed during settlement discussions.***

### Summary

On 20 May 2015 the General Court (GC) dismissed the Roullier group’s (Roullier) appeal against the Commission’s decision in the animal feed phosphates cartel.<sup>1</sup> Roullier argued that the Commission, by imposing a higher fine in its infringement decision against the group than that initially proposed during settlement procedures, effectively penalised Roullier for deciding to abandon settlement discussions. In rejecting Roullier’s argument, the GC found that the Commission was entitled to depart from the (lower) fine range proposed during settlement discussions when adopting its decision following the “standard” procedure.

The judgment, the first in which the GC has ruled on the relationship between the “standard” and settlement cartel procedures, highlights the possibility of increased fine exposure for companies that decide to reject a settlement proposal by the Commission.

### Background

#### The Commission’s Settlement Procedure

The settlement procedure was established in 2008<sup>2</sup> with the aim of simplifying cartel investigations and bringing them to a swifter conclusion. Where the Commission believes that a case is appropriate for settlement, it can initiate bilateral discussions with the undertakings involved in a cartel investigation. During these preliminary discussions, the Commission informs the relevant undertakings of the case against them, gives access to a limited set of documents from the Commission’s file and provides a “range” of likely fines. If the undertakings opt to proceed with the settlement procedure they will have to concede their liability with respect to the infringement, accept the range of fines and agree to waive procedural defence rights such as full access to file. In return, the Commission will grant a 10 percent reduction in the fine ultimately imposed. If an undertaking decides against entering into a settlement, the “standard” process will be followed (i.e. a full statement of objections, access to file, response contesting the statement of objections and oral hearing).

## Animal Feed Phosphate Cartel

In 2004, the Commission conducted inspections in France and Belgium at the premises of undertakings active in animal feed phosphates. Some years later, in 2008, Roullier filed a leniency application with the Commission. In 2009, the Commission began engaging in settlement discussions with each of the parties involved in the investigation. It was during these discussions that the Commission informed Roullier of the fine range it would face if it agreed to a settlement. While all other undertakings under investigation agreed to the Commission's settlement proposal, Roullier did not because it decided its interests would be better served by disputing the existence of a single and continuous infringement. The cartel investigation therefore became a "hybrid" because the Commission followed the "standard" administrative procedure for Roullier and the settlement procedure for the remaining undertakings involved.

In 2010, the Commission adopted a decision against Roullier for its participation in the animal feed phosphate cartel, imposing a fine of €60 million on the group, which was significantly higher than the fine range proposed by the Commission during settlement discussions. Roullier appealed the Commission's decision — the appeal raised issues of particular interest in relation to the implications of Roullier's withdrawal from the settlement procedure for the eventual fine imposed.

## Issues of Interest in Judgment

In its leniency application, Roullier provided evidence of its participation in the cartel from 1978. During the settlement procedure, the Commission (in addition to the 10 percent settlement reduction) "credited" Roullier with a 17 percent reduction in the overall fine under the leniency notice and with a 35 percent reduction for mitigating circumstances (granted for allowing the Commission to extend the duration of Roullier's own participation in the cartel). The Commission therefore indicated that Roullier would be liable for a fine between €41 and €44 million if it accepted the settlement.

In its response to the Commission's statement of objections, Roullier contested the existence of a single and continuous infringement since 1978. The Commission, in its final decision reduced the duration of the cartel by 15 years, finding that a single and continuous infringement only existed from 1993 to 2004. Paradoxically, however, despite the reduction in duration, the Commission (correctly, according to the GC) concluded that Roullier was liable for a higher fine than that previously considered under the settlement procedure, even adjusting for the 10 percent settlement discount that Roullier would have obtained. This was mainly because Roullier could only benefit from a much smaller fine reduction for leniency (5 percent), given that most of the added value it had provided related to the pre-1993 period, which the Commission did not take into account in its final decision. Similarly, Roullier could not benefit from the 35 percent reduction for cooperation outside the leniency notice, because this also related to cartel activities prior to 1993.

In its judgment, the GC reached three conclusions, each of which may be important for future cases.

- First, the GC held that the Commission applied the methodology in its Fining Guidelines consistently and it had *not* penalised Roullier for withdrawing from the settlement procedure.
- Second, the GC found that once the Commission conducts a "standard" administrative process and refines its analysis as a result of reviewing the file in more detail and receiving a detailed response to the statement of objections, the Commission has to be able to adjust the fine on the basis of its new conclusions.
- Third, and perhaps most importantly, the GC held that the Commission was *not* bound by the range of fines which it had communicated to Roullier during the settlement procedure. The GC held in this regard that the calculation of a range of fines is only available during settlement discussions and not

as part of the “standard” procedure and that the two procedures are completely independent of each other.

## **Practical Implications**

The GC judgment highlights the complications associated with deciding not to pursue a settlement of a cartel case in a case where the company has cooperated with the Commission during the administrative proceedings and has the expectation — but not the certainty — of a reduction in the fine. More specifically, the judgment shows how “standard” cartel strategies can backfire: in this case, while Roullier attempted to attack the Commission’s findings of a single and continuous infringement in the hope of reducing its fine, the Commission used this argument to limit the impact of Roullier’s leniency application. The complex balance of interests between applying for leniency, agreeing to a settlement or contesting a statement of objections needs to be considered carefully in light of all the facts and the specific situation of the company in question before deciding on the best strategy in any given case.

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**Endnotes**

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<sup>1</sup> Case T-456/10 – Timab Industries and Cie financière et de participations Roullier v. European Commission

<sup>2</sup> Commission Regulation (EC) No 662/2008 of 30 June 2008 amending Regulation No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ 2008 L171, p.3)