To what extent can cooperative procedures (leniency, commitment and settlement procedures) before the French Competition Authority limit the risks associated with a competition law infringement?

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Preliminary thoughts

The purpose of this article is to discuss the advantages and disadvantages that cooperative procedures (i.e. leniency, commitment and settlement procedures) may represent for companies that are or may be under investigation by the French Competition Authority in terms of more effective management of the risks arising from a potential infringement of competition law.[684] *Each procedure offers certain opportunities to candidate companies but they also have their limits, all of which must be thoroughly assessed prior to making an application.*

The French Competition Authority (hereafter the "**FCA**") has the power to impose fines on companies that infringe Articles L. 420-1 and L. 420-2 of the French Commercial Code (i.e. the French equivalent of Articles 101 and 102 TFEU). Since the implementation of the New Economic Regulations Law of 15 May 2001, the maximum amount of the fine is 10% of the consolidated worldwide turnover of the group to which the addressee of the statement of objections belongs.[685] Fines have recently reached unprecedented levels in France.[686]

A company suspected to have infringed competition law can choose to cooperate with the FCA and abstain from challenging its findings. It generally does so in the hope of receiving some benefit or reward.[687] Accordingly, the company may try to apply for one or more of the cooperative procedures available before the FCA, namely leniency, commitment or settlement.[688]

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[684] This paper will not discuss alternative enforcement techniques available before the European Commission or other NCAs. For a detailed analysis of these procedures see in particular: Wouter P.J Wils, *The use of settlements in public antitrust enforcement: objectives and principles*, available at: www.http//papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087 and Denis Waelbroeck, *Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions) : que va-t-il rester aux juges?*, GCLC Working Paper, 01/08.

[685] Article L. 464-2, I, para. 4, of the French Commercial Code. Under the previous system, the maximum fine that could be imposed on a company was 5% of the turnover generated in France by the company to which the statement of objections was addressed.

[686] The highest fines imposed by the FCA are as follows: 1. €534 million in case 05-D-65 (mobile telephony cartel), 2. €384.9 million in case 10-D-28 (interbank fees), 3. €174.5 million in case 00-D-28 (property loans to private individuals), 4. €94.4 million in case 09-D-05 (temporary employment sector), etc.

[687] Wouter P.J Wils, The use of settlements in public antitrust enforcement: objectives and principles, p. 4.

[688] For an in depth study of these cooperative procedures see in particular: FCA, annual report 2005, pp. 134-178, Arnaud Vialfont, *Le droit de la concurrence et les procédures négociées*, 2007-2, p. 157-184, available at www.cairn.info/revue-internationale-de-droit-economique-2007-2.htm , and Lucie Carswell-Parmentier, *Recent developments in French competition law – commitments, leniency and settlement procedures – the French approach*, ECLR, 2006, pp. 616-630.

In France, where until recently Article L. 464-2 of the French Commercial Code[689] provided the only body of rules to be used by the FCA to set the amount of fines, it is widely agreed among competition law practitioners that there is a lack of predictability of antitrust risks and more precisely antitrust fines, especially in times of crisis.[690] In this context, cooperative procedures represent a very important tool to control, to a certain extent, the risks arising from a possible infringement of competition law.

In fact, parties targeted by a FCA inspection have little idea of the likely level of the fine based on the content of statement of objections or of the report[691] and can only estimate the amount based on past FCA decisions.

The FCA is well aware of this lack of predictability and recently chose to follow the path of a number of other competition authorities,[692] starting with the United States and echoed by the European Commission, by setting out its methodology in the recent Notice on the method relating to the setting of financial penalties (hereafter the "**Fining Guidelines**"),[693] the purpose of which is to enhance transparency and enable stakeholders "to better understand how financial penalties are set".[694] The calculation method shown in the Fining Guidelines is, to a large extent, similar to that used by a number of other NCAs: the calculation sets a basic amount relating to the nature of the particular infringement that can then be adjusted to reflect various factors such as the duration of the infringement, aggravating or mitigating circumstances, recidivism, the damage caused to the economy and the need to set a deterrent fine in each case. One of the main goals of the Fining Guidelines was also to give parties more guidance as to the elements taken into account for the calculation of the fine.[695]

However, the recent release of the Fining Guidelines has not completely changed the situation since the FCA is still entitled, in certain circumstances, to depart from its method[696] and enjoys, at every step of this method, considerable latitude as to its implementation. The FCA considers that maintaining a certain amount of discretion in

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[689] Article L. 464-2, I, para. 3, of the French Commercial Code: "The financial penalties are proportionate to the seriousness of the charges brought, to the scale of the damage caused to the economy, to the financial situation of the body or company penalised or to the group to which the latter belongs, and to the likelihood of any repetition of practices prohibited by the present Part. They are individually determined for each company or body penalised, with reasons given for each penalty."

[690] See in particular the report on the assessment of the financial penalties for anticompetitive practices requested by the French minister of the economy, p. 6, available at: www2.economie.gouv.fr/services/rap10/100920rap-concurrence.pdf .

[691] Contrary to the EU procedure, the French fully adversarial procedure is based on two different stages: (i) a statement of objections is sent to the parties, which have two months to submit their comments and (ii) a report, in which the case handler assesses and replies to the parties' comments, is sent to them. Here again the parties have two months to submit any comments. Then a hearing is scheduled and a final decision is ultimately adopted by the *collège* of the FCA.

[692] It should be noted that other NCAs recently adopted fining guidelines, namely Spain (2009), Germany (2006) and the UK (2004).

[693] FCA, Notice of 16 May 2011 on the method relating to the setting of financial penalties, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=260&id_article=1601 .

[694] Fining Guidelines, para. 14.

[695] Fining Guidelines, para. 14.

[696] Fining Guidelines, para. 7: "The notice commits the Autorité, which must set the financial penalties that it imposes in a consistent way. It is therefore opposable to it, to the extent that the Autorité does not set forth, in the reasoning of decision, the specific circumstances or the motives of general interest that lead it to depart from it in a given case."

penalty setting is crucial to ensure that the level of penalty imposed reflects the particular circumstances of the case and the individual party, thereby ensuring that it is proportionate to the infringement.[697] This approach is shared by most NCAs and particularly the OFT, for which "[a]n excessively rigid approach to penalty setting (for example through detailed ex ante specification of the appropriate amount of penalties) could lead to fining decisions that are incompatible with the principle of proportionality."[698]

Moreover, a prescriptive approach (i.e. for a competition authority to commit to following an automatic or arithmetical calculation method) may have unintended consequences on deterrence. Companies considering the possibility of committing an infringement could then carry out a cost-benefit analysis of the situation by calculating the anticipated amount of the potential penalty and weighing this against the anticipated benefit of the infringement, taking into account the probability of detection.[699] Along the same lines, the General Court held that "to avoid excessive prescriptive rigidity and to enable a rule of law to be adapted to the circumstances, a certain degree of unforeseeability as to the penalty which may be imposed for a given offence must be permitted".[700]

Under these conditions, cooperative procedures are emblematic of the current trend followed by many competition authorities of maintaining an effective level of deterrence while providing incentives for cooperation. They can, depending on the circumstances of the case and on the stage of the proceedings, be a useful way of ensuring a higher level of predictability as to the risks arising from an infringement of competition law rules either by providing an immunity from fines (**section I**) or by lowering the level of uncertainty as to the amount of the fine (**section II**).

1. COMMITMENT PROCEDURE AND FIRST RANK LENIENCY: HOW TO ACHIEVE PERFECT CERTAINTY THROUGH IMMUNITY FROM FINES

The underlying idea of these two procedural tools is that they are available at a very early stage of the proceedings, namely well before the statement of objections is issued. The candidate companies can expect perfect certainty since they know that, when these procedures are applicable, they will not incur a fine.

1.1 Commitments procedure: the way to avoid a finding of guilt and the imposition of a fine

This procedure,[701] which was introduced in 2004, is set out in Articles L. 464-2, I, paragraph 1, and R. 464-2, paragraph 1, of the French Commercial Code and has proven

[697] Fining Guidelines, para. 16, and OFT, *Communication on draft notice for determining antitrust fines*, 11 March 2011, p. 2.
[698] OFT, *Communication on draft notice for determining antitrust fines*, 11 March 2011, p. 2.
[699] Fining Guidelines, para. 16, OFT, *Communication on draft notice for determining antitrust fines*, 11 March 2011, p. 2 and ECA Working group on sanctions, *Pecuniary sanctions imposed on undertakings for infringements of antitrust law - Principles for convergence*, p. 2.
[700] General Court, 27 September 2006, case T-43/02, *Jungbunzlauer AG v. Commission*, para. 84.
[701] For a detailed analysis of this procedure see in particular Bruno Lasserre, *La politique des engagements en matière de pratiques anticoncurrentielles : premier pas d'un bilan en France*, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=218 .

very successful.[702] The purpose of this procedure, which has been explained by the FCA in a procedural notice (hereafter the "**Notice on Competition Commitments**"[703]), was to implement into French law the commitments procedure introduced in Regulation 1/2003.[704]

1.1.1 Field of application: abuse of dominant position and vertical restraints

Neither the French Commercial Code nor the Notice on Competition Commitments, contrary to the OFT enforcement guideline,[705] defines the circumstances (i.e. the kind of anticompetitive practices) in which it may be appropriate to accept commitments.[706] However, it is possible, on the basis of past FCA decisions, to identify situations in which this procedure is particularly appropriate.

The commitments procedure seems particularly suited to practices that may be qualified as an abuse of dominant position or to vertical restraints.[707]

1.1.2 Timing of the commitments procedure: prior to the statement of objections

Article R. 464-2 of the French Commercial Code provides that commitments are given pursuant to a "preliminary assessment of the practices in question" made by the case handlers and which is sent to the party(ies) prior to any statement of objections. It follows that commitments can no longer be submitted once the statement of objections has been issued.[708]

It should also be noted that once a company becomes aware that a complaint has been lodged with the FCA in relation to its practices (generally when it is invited by a case

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[702] It has been applied in 38 cases since its introduction and in 7 cases in 2010.

[703] Notice on Competition Commitments, 2 March 2009, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=309 .

[704] Articles 5 and 9 of Regulation 1/2003. For a detailed analysis of this procedure see: Heike Schweitzer, *EUI working papers – Commitment decisions under Art. 9 of Regulation 1/2003: The developing EC practice and case law*, accessible at http://ssrn.com/abstract =1306245 , Wouter P.J. Wils, *Settlements of EU antitrust investigations: commitment decisions under article 9 of Regulation 1/2003*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900801 and John Temple Lang, *Commitment decisions under regulation 1/2003*, pp. 121-146, in Alternative enforcement techniques in EC competition law – settlements, commitments and other novel instruments, edited by Charles Gheur and Nicolas Petit, Bruylant, 2009.

[705] OFT, Enforcement guideline, para. 4.3: "The decision whether to accept binding commitments is at the discretion of the OFT. The OFT is likely to consider it appropriate to accept binding commitments only in cases where: (i) the competition concerns are readily identifiable, (ii) the competition concerns are fully addressed by the commitments offered, and (iii) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time" and para. 4.4 : "The OFT will not accept, other than in very exceptional circumstances, binding commitments in cases involving secret cartels between competitors which include: (i) price-fixing, (ii) bid-rigging (collusive tendering), (iii) establishing output restrictions or quotas, (iv) sharing markets, and/or (v) dividing markets. Nor will the OFT accept binding commitments in cases involving serious abuse of a dominant position."

[706] It should be noted that Regulation 1/2003 indicates, at recital 13, that "Commitment decisions are not appropriate in cases where the Commission intends to impose a fine." This might be construed as excluding cartels and horizontal agreements from the field of application of this procedure.

[707] Notice on Competition Commitments, para. 12.

[708] Notice on Competition Commitments, para. 13. It should however be noted that the relevant provision of the French Commercial Code remains silent as to the timing of applications for the commitments procedure.

handler to attend an interview or to reply to a request for information), it can approach the Investigation Services to explore the possibility of submitting commitments.[709]

1.1.3 Advantages of the commitments procedure

The commitments procedure brings the case to an end with no statement of objections or charges issued. Accordingly, the investigation is closed with no fine for the investigated company.[710]

In addition to ruling out financial penalties, the commitments procedure allows companies to avoid a decision assessing the legality of its practices in light of competition law rules as the decision making commitments binding is adopted based on "competition concerns". As a result, it does not constitute an infringement decision since it does not take a position on the liability of the company and therefore cannot be used as the first term of the reiteration of the facts.[711] This can prove very interesting in the context of potential follow-on actions since it will be very difficult for alleged victims of such practices to rely upon the FCA's decision to establish an infringement of competition law and therefore a fault giving rise to an award of damages.[712]

It is also important to note that voluntarily submitting of commitments can be a means for a company to ensure the legality of its commercial and price policy and therefore to limit the risk of potential enforcement actions in the future. A company whose commitments have been rendered binding by the FCA can legitimately expect its commercial practices to be fully compliant with competition law.

1.1.4 Disadvantages of the commitments procedure

Companies cannot benefit from the commitments procedure before the FCA has opened an investigation. This means that a company willing to submit, on its own initiative, commitments to the FCA in order to ensure the legality of part of its commercial practices cannot approach the FCA before an investigation has been opened.

Although the commitments procedure can allow companies to control antitrust risk by avoiding an infringement decision and therefore a potential fine, it can also lead to the submission and adoption of commitments that are disproportionate and that exceed the measures necessary to remedy the competition concerns identified by the FCA.[713] This risk is particularly high since companies have not yet been given full access to the file[714] when they apply for the commitments procedure and cannot fully determine whether

[709] Notice on Competition Commitments, para. 15.
[710] Notice on Competition Commitments, para. 7.
[711] Notice on Competition Commitments, para. 43.
[712] For an in-depth study of actions for damages in France following an infringement of competition law see National report for France prepared by Chantal Momège and Nicolas Bessot, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/study.html .
[713] In this regard, it should be noted that, in her opinion delivered in case C-441/07 P, *Commission v. Alrosa Company Ltd*, advocate general Kokott considered, at para. 43, that "If commitments offered by one or more undertakings prove to be disproportionate having regard to the Commission's aim of ensuring that competition is not distorted, it must not make those commitments binding. Instead, it must point out to the undertaking(s) that the commitments are disproportionate and, if necessary, suggest changes. If a package of commitments is divisible, there is also nothing to prevent the Commission making the commitments binding only in part" (emphasis added).
[714] Article R. 464-2 of the French Commercial Code and Notice on Competition Commitments, para. 13.

their proposed commitments are appropriate and proportionate in terms of addressing the FCA's competition concerns.

Moreover, once the commitments have been rendered binding by the FCA, the company in question must comply with them. Pursuant to Article L. 464-3 of the French Commercial Code, any failure to comply with the commitments can lead to a fine of up to 10% of the company's worldwide consolidated turnover.[715]

Companies willing to submit commitments cannot rule out the risk that the FCA will consider their proposed commitments insufficient to address the competitive concerns that have been identified and will therefore choose to return to the fully adversarial procedure, which can ultimately lead to a fine and/or injunctions.

1.2 First rank leniency: how to avoid a fine

The French leniency procedure was introduced in 2001 and is set out in Articles L. 464-2 and R. 464-2 of the French Commercial Code.[716] In 2009, the FCA adopted a new version of its procedural notice relating to the French leniency programme[717] (hereafter the "**Leniency Notice**"). Since its introduction, fifty leniency applications (including first and subsequent ranks) have been submitted to the FCA.[718]

1.2.1 Field of application: cartels and horizontal agreements

The French Commercial Code expressly provides that the leniency procedure is only applicable to "anticompetitive practices falling within the ambit of article L. 420-1" (i.e. the French equivalent of Article 101 TFEU). It should also be noted that, at EU level, the Commission Notice on immunity from fines and reduction of fines in cartel cases (the "**EU Leniency Notice**") indicates that it "sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community" (emphasis added).[719] This means for

[715] FCA, case 10-D-21 of 20 June 2010: in this case, two companies were fined EUR 100,000 for failing to comply with the commitments they had submitted in the context of a settlement procedure. It seems that the FCA is also entitled to fine a company for not complying with commitments submitted in the context of a commitments procedure. In this respect it should be noted that in this decision the FCA considered that "As is the case for non-compliance with injunctions, failing to comply with commitments constitutes a serious infringement. This situation is all the more serious given that commitments are made on the initiative of the infringing parties, who propose them, and that in exchange for making commitments, they can benefit from significant fine reductions", French translation from the French, paras. 103 and 104).

[716] François Mélin, *Les programmes de clémence en droit de la concurrence: Droit français et droit communautair*e, Editions Joly, 2010, Chantal Momège, *Le programme de clémence français, Concurrences 2-2006*, pp. 144-146 and Véronique Sélinsky & Sylvie Chole, *Invoquer la clémence : un avantage stratégique pour les entreprises, Revue Lamy droit des affaires*, June 2006, no. 6, pp. 55-63.

[717] FCA, Leniency Notice, 2 March 2009, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=292&id_article=713 .

[718] FCA, overview of the annual report for 2010, p. 18. It should nonetheless be indicated that, to date, only four infringement decisions have been adopted by the FCA following a leniency application: cases 06-D-09, 07-D-48, 08-D-12 and 08-D-32. No infringement decisions following a leniency application were adopted in 2010.

[719] Commission Notice on Immunity from fines and reduction of fines in cartel cases, 8 December 2006, para. 1.

instance that abuses of dominant position do not qualify for the leniency procedure.[720] In practice, leniency is mostly applicable and applied in cartel cases.[721]

1.2.2 Timing of the leniency application: before inspections or immediately after them

The role played by first rank leniency is twofold: (i) to enable the FCA to carry out targeted and surprise inspections ("Type 1 A Leniency") or (ii) to enable the FCA to establish the existence of an infringement ("Type 1 B Leniency"). Although the benefits for the candidate company are identical for both types of leniency, namely full immunity from fines, the former is only available before the FCA has conducted its inspection. Once the inspection has taken place, Type 1 B Leniency is the only remaining option.

1.2.3 Conditions to be met for a successful first rank leniency application

To be a successful first rank leniency applicant and thus to benefit from a fine immunity, a given company must be the first (i) to file a leniency application before the FCA,[722] (ii) to meet certain eligibility conditions and (iii) to meet certain substantive conditions.

As far as eligibility conditions are concerned,[723] leniency applicants must provide the FCA with sufficient evidence of anticompetitive practices so as to either allow it to conduct targeted inspections (Type 1 A Leniency) or to establish the existence of an infringement of competition law (Type 1 B Leniency). These conditions are equivalent to those set out in the EU Leniency Notice.[724] Applicants not capable of fulfilling the eligibility conditions for first rank leniency may nonetheless be eligible for subsequent ranks and therefore for a reduction of fine of up to 50 per cent.
As far as substantive conditions are concerned,[725] first rank leniency applicants must (i) end their involvement in the alleged cartel immediately and at the latest as from the notification of the FCA's leniency opinion [*avis de clémence*], which sets out the conditions under which leniency will be granted; (ii) fully and genuinely cooperate with the FCA throughout the proceedings; (iii) refrain from destroying or concealing relevant information;[726] and (iv) refrain from disclosing the existence or content of their leniency application before the FCA has issued a statement of objections.

[720] François Mélin, *Les programmes de clémence en droit de la concurrence: Droit français et droit communautaire*, para. 225, p. 139.
[721] Leniency Notice, 2 March 2009, para. 9: "[…] In principle, the agreements concerned are cartels between undertakings consisting in the fixing of prices, the allocation of production or sales quotas or the sharing of markets, including bid-rigging, or any other similar anticompetitive behaviour between competitors. These infringements are all covered by provisions of article L. 420-1 of the code de commerce and, where applicable, of article 81 of the EC Treaty."
[722] FCA, Leniency Notice, para. 25.
[723] FCA, Leniency Notice, paras. 12-19.
[724] EU Leniency Notice, para. 8(a) and (b).
[725] FCA, Leniency Notice, paras. 20-21.
[726] The FCA recently rejected a leniency application on the grounds that the applicant (Shell/Butugaz) had falsified certain pieces of evidence and therefore breached its obligation of full and honest cooperation with the FCA: case 10-D-36 of 17 December 2010, para. 22.

1.2.4 Advantages of first rank leniency

The first company to come forward and provide the requisite information relating to the alleged cartel will be granted full immunity from fines. Accordingly, it could be argued that, under this system, a company can break the law, profit from the illegal activity, cause harm to customers, competitors and the wider market and then not be fined for this behaviour.[727]

Moreover, the employees of the successful leniency applicant who were personally involved in the cartel will not theoretically incur any criminal penalties.[728]

It therefore appears that first rank leniency, when available, is the most secure and appropriate way to cease anticompetitive practices revealed, for instance, by due diligence carried out prior to an acquisition[729] or through the implementation of a compliance programme or a whistle-blowing system.

1.2.5 Disadvantages of first rank leniency

Apart from the risks of retaliatory measures that a leniency applicant may suffer from its unhappy competitors or of procedural fines imposed by the FCA for submitting misleading or false information,730 it seems that the main disadvantages of first rank leniency are the risk of private enforcement claims and the risk of criminal penalties for employees involved.

The risk of private enforcement actions

It may be argued that a system that simultaneously promotes leniency programmes and private enforcement claims is a contradiction in terms.731 The Leniency Notice indicates that obtaining full or partial immunity from fines does not protect the leniency applicant from any civil law consequences that may result from its participation in a cartel.732 Leniency only relates to administrative proceedings before the FCA and to a possible fine reduction or immunity and not to any awards for damages over which the FCA does not have jurisdiction. Since a leniency application constitutes an admission of

[727] David Anderson & Rachel Cuff, *Cartels in the EU: procedural fairness for defendants and claimants*, p. 8, Fordham Competition Law Institute, 37th Annual Conference on International Antitrust Law and Policy.
[728] FCA, Leniency Notice, para. 48.
[729] Pierre Desbrosse, *Les programmes de clémence à l'épreuve de la globalisation des marchés*, Revue Internationale de Droit Économique, 2010, p. 228.
[730] Article L. 464-2, V of the French Commercial Code entitles the FCA to impose a fine of up to 1% of the worldwide turnover of a company for submitting misleading or false information to the FCA. It should be noted that the FCA may use this power for the first time against the leniency applicant in case 10-D-36 (see para. 23 of the decision).
[731] This contradiction is evident in France, where the FCA is endeavouring to promote its leniency programme to detect the most serious and secret infringements of competition law and, at the same time, encouraging potential victims to sue cartelists for damages through its press releases following the adoption of infringement decisions. It can also be seen at European level, where the European Commission has issued substantive works and consultations on how to further develop private enforcement claims within the Member States.
[732] Leniency Notice, para. 47. This position is also expressed in the EU Leniency Notice, according to which: "The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil consequences of its participation in an infringement of Article 81 EC" (para. 39).

guilt, it is possible that the courts may award damages against a company on the basis of the FCA's decision irrespective of the fact that the company was fully exempted from fines as a result of a successful leniency application.

This risk could be extremely high if the witness or corporate statements or any other incriminating materials submitted in support of the leniency application are disclosed to potential victims. This is a particularly sensitive issue in France given that, particularly in the context of private enforcement claims, the court may order the production of all documents held by third parties (such as the FCA) pursuant to Article 11 of the French Civil Procedure Code,[733] unless there is a legitimate reason preventing documents from being disclosed.

However, the FCA has taken the view that, should it be ordered by a court to disclose information submitted voluntarily by a successful leniency applicant, it would refuse on the grounds that doing so could damage the effectiveness and implementation of its leniency programme.[734] It is also worth noting that the FCA allows statements to be made orally.[735] As a result, the leniency applicant does not retain a written statement for its records and therefore cannot be asked to produce a statement in the event of a discovery order.

Companies considering the possibility of applying for leniency should however remain aware of the fact that private enforcement risks are particularly high. Indeed, through its application, the leniency applicant necessarily acknowledges its participation in anticompetitive practices. By doing so, it may make it easier for potential victims of the cartel to prove their case, in relying upon the FCA's decision to bring a claim for damages.[736] Indeed, even if victims will not, in principle, have access to corporate statements and incriminating materials submitted by the leniency applicant, the final decision of the FCA – which is public[737] – will contain sufficient information to demonstrate its involvement in a cartel and therefore its wrongdoing.

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[733] English version of Article 11 of the French Civil Procedure Code: "Where a party holds evidence material, the judge may, upon the petition of the other party, order him to produce it, where necessary under a periodic penalty payment. He may, upon the petition by one of the parties, request or order, where necessary under the same penalty, the production of all documents held by third parties where there is no legitimate impediment to doing so." (source: www.legifrance.gouv.fr)

[734] FCA, annual report for 2005, p. 175 and FCA, Opinion of 21 September 2006 relating to the introduction of a group action in relation with anticompetitive practices, para. 73.

[735] Article R. 464-5 of the French Commercial Code and Leniency Notice, para. 26. This possibility was first introduced before the European Commission (para. 32 of the EU Leniency Notice).

[736] François Mélin, *Les programmes de clémence en droit de la concurrence: Droit français et droit communautaire*, Editions Joly, 2010, para. 297, p. 171. For an in depth assessment of interaction between leniency programmes and private enforcement see *Final report on making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, 21 December 2007, pp. 492-532 accessible at http://ec.europa.eu/competition/antitrust/actionsdamages/index.html .

[737] Article D. 464-8-1 of the French Commercial Code.

The risk of criminal penalties[738]

This question is highly controversial since Article L. 420-6 of the French Commercial Code provides that individuals who personally and decisively take part in designing, organising or implementing anticompetitive practices with fraudulent intent can receive a prison sentence of up to four years and a fine of EUR 75,000. Under Article L. 462-6, paragraph 2, of the French Commercial Code, the FCA has the option of referring these matters for prosecution to the State Prosecutor [*Procureur de la République*].

However, the FCA has undertaken not to make referrals concerning the employees of a company that has been granted leniency.[739] The Leniency Notice states that where a company has been granted leniency, the FCA will not pass on the case to the State Prosecutor for criminal proceedings.[740] This statement may nonetheless appear weak when weighed against the risk of criminal prosecution and penalties.[741] This is particularly true in comparison to the situation in the UK, where the OFT grants immunity from prosecution (so called "no-action letters") to individuals who inform it of cartels and who then cooperate in full, the difference being related to the fact that, in France, the FCA is not in charge of criminal proceedings. As some legal commentators have rightly pointed out, the FCA's position does not guarantee employees involved in the conception and implementation of a cartel that they will not face prosecution, especially since cases can be brought by other procedural means than an FCA referral of the case to the State Prosecutor (i.e. claimants can lodge a complaint before a criminal court on their own initiative) and before or by foreign courts in the case of worldwide cartels.[742]

The difficulties arising from the interaction between leniency and criminal proceedings should not be overestimated since precedents of criminal penalties being applied in France are, given the very restrictive conditions set by Article L. 420-6 of the French Commercial Code, very rare.[743] However, although criminal penalties and fines against individuals for competition law infringements are at present relatively rare under French law, this situation could change in the near future.

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[738] For a detailed analysis of this question see in particular: Éric David, *Les poursuites pénales contre les auteurs de pratiques anticoncurrentielles : L'exemple de la France depuis l'ordonnance du 1er décembre 1986*, Concurrences 2-2006, pp. 175-182 and *La sanction des pratiques anticoncurrentielles par recours à l'article L. 420-6 du Code de commerce*, Concurrences 1-2008.

[739] FCA, annual report for 2010: it should be noted that the FCA did not refer a single case to the State Prosecutor in 2010.

[740] Leniency Notice, para. 48: "The [FCA] considers that leniency is one of the legitimate reasons which justifies not to pass on to the State Prosecutor a case file in which individuals, belonging to the undertaking which has been granted leniency, would be liable to such proceedings."

[741] OFT, Cartel offence: guidance on the issue of no-action letters for individuals, para. 3.6, available at: www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft513.pdf .

[742] François Mélin, *Les programmes de clémence en droit de la concurrence: droit français et droit communautaire*, *ibid.*, para. 310, p. 180.

[743] Cases in which the courts have imposed criminal penalties have chiefly concerned illegal cartels between companies involved in the bid rigging of public or private tender offers and which also involved other types of corruption or fraud.

2. SETTLEMENT PROCEDURE AND SUBSEQUENT RANKS OF LENIENCY: LIMITED CERTAINTY ON FINE AMOUNTS

These two procedural options are only available when the FCA investigation is well-advanced and the statement of objections has been sent. At this stage of the proceedings, the FCA is only willing to grant a potential fine reduction. Since this reduction is expressed as a percentage, it is very difficult for the parties to predict the amount of the fine reduction from which they will benefit and the final amount of the fine. This can raise serious issues in terms of legal certainty.

2.1 Subsequent ranks of leniency: how to reduce fine exposure following an inspection

2.1.1 Field of application and timing

As explained earlier in this paper, companies that are not the first to come forward to the FCA are not eligible for full immunity. However, a company that is second (or later) to apply for leniency may be eligible for a fine reduction if it can provide the FCA with evidence of the alleged cartel that represents "significant added value" and meets the four cumulative substantive conditions mentioned earlier.[744]

2.1.2 Conditions for a successful application for a subsequent rank of leniency

Any company providing evidence of "significant added value" with respect to the evidence already in the possession of the FCA and which meets the four cumulative substantive conditions mentioned above may benefit from a fine reduction of up to 50%, irrespective of the time at which it decides to cooperate with the FCA.

Under the French leniency programme, the concept of the "significant added value" contributed by a party's evidence is essential. This concept is defined as "the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the ability of the FCA to prove the existence of the alleged infringement".[745] Nevertheless, it can be difficult, in practice, for parties to assess exactly what will be required in order to meet this standard. What evidence constitutes "significant added value" remains extremely case-specific.

The FCA takes the view that written evidence contemporaneous with the alleged agreement has greater value than any evidence that may be subsequently established, incriminating evidence directly relevant to the facts at stake has greater value than evidence of indirect relevance and compelling evidence has greater value than evidence that requires corroboration if challenged (e.g. witness statements).[746]

[744] See para. 27 of this paper.
[745] FCA, Leniency Notice, para. 17.
[746] FCA, Leniency Notice, para. 17.

2.1.3 Advantages of subsequent ranks of leniency

The most evident advantage lies in the fact that the successful applicant will benefit from a fine reduction of up to 50%.[747] In this respect, it should be noted that the French leniency programme differs from the EU programme, which sets a sliding scale of fine reductions of 20 to 50% depending on the order of application.[748]

It is also important to note that, following the European Commission's example,[749] the FCA is now willing to grant fine reductions pursuant to leniency (second or subsequent ranks[750]), on the one hand, and pursuant to settlement, on the other, to a single company in the same case.[751] In its Fining Guidelines, the FCA seems to suggest that the two procedures can be combined to benefit the same company.[752] To date, this possibility remains theoretical as it has never been applied by the FCA.

2.1.4 Disadvantages of subsequent ranks of leniency

One of the main disadvantages of obtaining a subsequent rank of leniency lies in the fact that the applicant, from the date of its application to the date of the final infringement decision of the FCA, is not in position to determine (i) whether it could submit any additional information not already in the FCA's possession or (ii) the fine reduction it can expect in return for its cooperation. This uncertainty remains at every stage of the proceedings:

- when considering whether it would be opportune to apply for second or subsequent rank leniency, companies can hardly determine whether the information they have gathered represents "significant added value" within the meaning of the Leniency Notice;
- once the application has been submitted, companies cannot determine the fine reduction (expressed in percentage) that the case handler will propose;
- even when the case handler has proposed a certain percentage fine reduction, there is no guarantee that the *collège* of the FCA will follow the case handler's recommendations as to the advisability of granting second or

[747] FCA, Leniency Notice, para. 20: "The partial immunity granted to an applicant having provided a significant added value shall not in principle exceed 50 % of the fine which would have otherwise been imposed, had it not been granted leniency" (emphasis added).
[748] EU Leniency Notice, para. 26.
[749] 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, 2 July 2008, para. 33: "When settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward." For recent examples, see Commission decisions, 19 May 2010, *DRAMs*, (COMP/38.511) and 20 July 2010, *Animal feed phosphates*, (COMP/38.866).
[750] The possibility of combining fine reductions pursuant to leniency and pursuant to a settlement can only be worthwhile for a second or subsequent rank leniency applicant, in so far as the first leniency applicant, when successful, is already exempt from any fine.
[751] On this issue, see in particular AFEC (p. 21) and Herbert Smith LLP (para. 36, p. 8) comments on the draft fining guidelines of the FCA, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=402&id_article=1595 .
[752] FCA, Notice on the Method Relating to the Setting of Financial Penalties, 16 May 2011, para. 61: "If applicable, the [FCA] adjusts the amount of the financial penalty in order to take into account the total or partial immunity granted on account of leniency pursuant to Section IV of Article L. 464-2 of the Code of commerce, **and** the reduction granted on account of a settlement pursuant to Section III of the same article." (emphasis added).

subsequent rank leniency to the applicant or the appropriate percentage of fine reduction to be granted.

Moreover, as indicated earlier in this paper, a leniency application, irrespective of its rank, does not guard the leniency applicant against any civil law consequences that may arise as a result of its participation in a cartel.[753]

2.2 Settlement procedure: the last procedural option available to reduce the fine amount once a statement of objections has been issued

The French settlement procedure[754] is defined in Article L. 464-2, III of the French Commercial Code.[755] The FCA recently released its draft procedural notice in relation with this procedure and launched a public consultation[756]. The final version of the procedural notice should be published in the beginning of 2012. Under the settlement procedure, when a company acknowledges its participation in an infringement, the theoretical maximum amount of the fine incurred may be reduced by half, i.e. 5% of the consolidated worldwide turnover instead of 10%. Companies can also benefit from an additional fine reduction when suitable commitments are submitted. This procedure has proven to be very successful in France where approximately one out of five infringement cases is closed by way of a settlement.

2.2.1 Field of application: all anticompetitive practices

At first glance, the field of application of the settlement procedure seems to be particularly broad. In fact, in so far as Article L. 464-2, III, of the French Commercial Code does not restrict this procedure to any specific type of conduct, all anticompetitive practices are theoretically eligible. This is not the case for leniency applications[757] or commitments,[758] which are, as previously mentioned, much narrower in scope.

Another interesting point to note regarding the field of application of the settlement procedure is that it can apply in "hybrid cases", namely where at least one of the parties

[753] FCA, Leniency Notice, para. 47. See paras 32 to 35 of this paper.

[754] To date, the FCA has not released any procedural notices in relation to the settlement procedure ("*procédure de non-contestation des griefs*") but is expected to do so by the end of 2011. For a detailed analysis of this procedure, see Dominique Brault & Romain Maulin, *La procédure de non-contestation des griefs: un succès non contestable*, Concurrences, no.2-2011, pp. 80-92; Bruno Lasserre, *La non-contestation des griefs en droit français de la concurrence : bilan et perspectives d'un outil pionnier*, Concurrences, no.2-2008, pp. 93-100; and Fabien Zivy, *La procédure de non-contestation des griefs en droit français de la concurrence : chronique d'un retour en force*, Revue juridique de l'économie publique, March 2008, pp. 3-10.

[755] English version of Article L. 464-2, III of the French Commercial Code: "When a body or a company does not contest the truth of the allegations made against it, the general rapporteur may recommend that the Competition Authority, which hears the parties and the government representative without a report being drawn up in advance, impose the financial penalty referred to in I and take into account the fact that no challenge was raised. In such cases, the maximum amount of the penalty incurred is reduced by half. When the body or the company commit in addition to alter its behaviour for the future, the general rapporteur may recommend that the Competition Authority take that fact into account when setting the amount of the fine." (source: www.legifrance.gouv.fr)

[756] The draft procedural notice relating to the settlement procedure (only available in French) is available at the following address: http://www.autoritedelaconcurrence.fr/doc/projet_communique_ncg_oct11.pdf .

[757] See para. 23 of this paper.

[758] See paras 11 to 12 of this paper.

involved in the proceedings chooses to contest the objections.[759] This is very important since, especially in cartel proceedings, it is very rare and unlikely that all parties will choose to enter into a settlement procedure.

2.2.2 Timing of the settlement application: after the statement of objections and before the report

Like the commitments procedure, settlement applications cannot be submitted before a complaint has been filed with the FCA or before the FCA has decided to open *ex officio* an investigation. Once the statement of objections has been issued, candidate companies can file a settlement application at any time within two months of receiving the statement.

Accordingly, once a company has received the statement of objections, reaching a settlement with the FCA is the very last procedural option available to it to obtain a reduced fine.

2.2.3 Conditions to be met in order to benefit from the settlement procedure: a clear, complete and unambiguous acknowledgment of the offence

In so far as Article L. 464-2, III, of the French Commercial Code no longer requires that candidate companies submit commitments, the only remaining condition applicable is that companies must abstain from contesting the statement of objections.

To establish that a company does not contest the objections, the FCA requires it to acknowledge the practices described in the statement of objections, their assessment in connection with the relevant provisions of the French Commercial Code and the liability for these practices attributed to the legal entity applying for settlement.[760]

2.2.4 Advantages for the company

The advantages for the settling company are twofold since it can expect in certain circumstances,[761] to speed up the proceedings and in any case, a fine reduction.[762] It may also be worthwhile for a company initially wishing to apply for second or a subsequent rank of leniency but whose information did not qualify as "added value information" to apply for a settlement.

In any case, the company will benefit from a 50% reduction of the theoretical maximum amount of the fine. This is particularly significant given that, as indicated earlier in this

[759] An analysis of past FCA decisions shows that at the time of writing, i.e. 1 August 2011, 16 of the 31 cases in which the settlement procedure has been applied were hybrid cases.
[760] FCA, case 04-D-42, para. 15.
[761] When all parties concerned agree to settle - which is not common in practice - the case handler does not issue a report following the parties' observations in response to the statement of objections, i.e. the proceedings can be shortened by 6 to 12 months.
[762] The wording of Article L. 464-2, III of the French Commercial Code makes it clear that, once the case handler has agreed to enter into a settlement procedure with a candidate company, the maximum amount of the penalty incurred is reduced by half and that an additional reduction may be granted on the basis of the commitments submitted.

paper, this theoretical maximum amount is set by Article L. 464-2, I, of the French Commercial Code at 10% of the worldwide turnover of the company.[763]

The FCA also considers that companies declining their right to contest the objections are entitled to a further fine reduction of 10%, although this is not foreseen by the relevant provisions of the French Commercial Code.[764] The purpose of this additional reduction is to reward the company's cooperation with the FCA, which facilitates the work of case handlers[765] and, in certain circumstances,[766] may shorten the proceedings.

Companies offering to submit commitments may also be entitled to an additional fine reduction. Since submitting commitments is now entirely voluntary, the FCA chairman has made it clear that the "extra" advantage represented by commitments should be rewarded by a further reduction.[767] Recent cases show that a fine reduction of more than 10% can be obtained with suitable commitments. In *Signalisation routière verticale*, those companies not challenging the objections and also proposing commitments received fine reductions ranging from 15 to 25%, depending on the quality of their commitments.[768]

By the same token, although the company's agreement not to contest the objections must be clear, complete and unambiguous, it still has the possibility of discussing the FCA's assessment of the factors taken into account to set the amount of the fine, namely the seriousness of the infringement, the damage caused to the economy, the duration of the practices, the company's ability to pay and when applicable, duration of the infringement. This is particularly important since by retaining the possibility of discussing these elements, the company can try, through its observations in response to the report, to limit the amount of the fine.

Lastly, as indicated earlier in this paper,[769] the settlement procedure can be combined with second or a subsequent rank of leniency by the same company.[770]

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[763] English version of Article L. 464-2, I, of the French Commercial Code: "If the offender is not a company, the maximum amount of the penalty is 3 million euros. The maximum amount of the penalty for a company is 10% of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented. If the accounts of the company concerned have been consolidated or combined by virtue of the texts applicable to its legal form, the turnover taken into account is that shown in the consolidated or combined accounts of the consolidating or combining company." (source: www.legifrance.gouv.fr).

[764] FCA, case 07-D-26, para. 150.

[765] In this regard, it should be noted that in a recent ruling the French Supreme Court held that when a company opts not to challenge the objections and the way in which the FCA assessed the practices described in the statement of objections in connection with the relevant provisions of French or European competition law, the only thing that needs to be established concerning those companies that have chosen to challenge the objections is their participation in the infringement. It may be argued that this ruling seems to introduce a presumption of guilt for these companies. For a more detailed analysis of this ruling, see Dominique Brault & Romain Maulin, *La procédure de non-contestation des griefs: un succès non contestable*, Concurrences, no.2-2011, para. 45, p. 86.

[766] When all parties agree not to contest the facts or when the only party concerned by the investigation (in the event of an abuse of dominant position) agrees to enter into a settlement procedure.

[767] Bruno Lasserre, *La non-contestation des griefs en droit français de la concurrence: bilan et perspectives d'un outil pionnier*, Concurrences, no. 2-2008, pp. 93-100.

[768] FCA, case 10-D-39.

[769] See para. 45 of this paper.

[770] FCA, Fining Guidelines, para. 61: "If applicable, the [FCA] adjusts the amount of the financial penalty in order to take into account the total or partial immunity granted on account of leniency pursuant to

2.2.5 Disadvantages of the settlement procedure

The settlement procedure does not bring the case to an end. The company will already have received a statement of objections and have been summoned to a hearing before the FCA. A decision on its guilt will be handed down and a fine may be imposed.[771] This can have prejudicial consequences in practice when it comes to potential claims for damages.

The principal disadvantage of the settlement procedure lies in the fact that companies have no means of predicting the level of fine reduction they can expect to obtain when considering whether or not to apply for a settlement. This is due to the organisational structure of the FCA: the settlement agreement and the proposed fine reduction are "negotiated" by the company with the chief deputy case handler [*rapporteur général*] whereas the actual fine reduction and fine amount are ultimately set by the *collège* of the FCA.

The FCA has made it clear that it does not intend to place companies in a position whereby they can determine, before the final decision is adopted, how large a fine reduction they could obtain in reward of applying for a settlement.[772] Accordingly, in the majority of cases, the reduction is expressed as an uncertain percentage of an unknown fine amount. The chief deputy case handler has only proposed a maximum amount of the fine that should not be exceeded by the *collège* in three cases.[773]

Under these conditions, the settling company is not able to determine the scale of the reduction that it can expect to receive from the *collège* of the FCA or the final amount of the fine that will be imposed.

As regards the risk of criminal penalties following a settlement decision, it is widely agreed that the referral for prosecution of a case in which a company agreed to settle and not to contest the facts would run counter to the goals of the settlement procedure.[774] In light of this point, the FCA has taken the view that a situation in which a company has opted not to contest the objections is not sufficient, in and of itself, to bring criminal charges against that company's employees.[775] However, and rather surprisingly, the FCA has already referred one case to the State Prosecutor for potential criminal charges and penalties even though the two companies involved had agreed to settle.[776] Evidently, the FCA will need to clarify its position in order to preserve the incentive for companies to enter into settlement, possibly in its forthcoming notice on the settlement procedure, as regards the interaction between this procedure and criminal proceedings.

Section IV of Article L. 464-2 of the Code of commerce, and the reduction granted on account of a settlement pursuant to Section III of the same article."

[771] Dominique Brault & Romain Maulin, *La procédure de non-contestation des griefs: un succès non contestable*, Concurrences, no.2-2011, para. 48, p. 86.

[772] OECD, Policy roundtables, Experience with direct settlements in cartel cases, 2008, p. 47.

[773] FCA, cases 07-D-33, 09-D-06 and 09-D-24.

[774] M. Koehler de Montblanc, K. Biancone, *La procédure de transaction devant le Conseil de la concurrence*, JCPE, no. 36, 1 September 2005, para. 32, p. 1378

[775] FCA, 2005 annual report, p. 138.

[776] FCA, case 08-D-29.

As far as the risk of private enforcement is concerned, the FCA considers that the fact that a company does not challenge the objections contained in the SO does not amount to an admission [*aveu*] or an acknowledgment of liability [*reconnaissance de culpabilité*].[777] This position has been confirmed by the French courts.[778] As a result, potential victims of the anticompetitive practices implemented by the settling company cannot, in principle, rely upon the fact that it entered into a settlement with the FCA or upon the FCA's decision to establish the existence of an infringement. However, it may be argued that the inculpatory elements contained in the FCA decision will be sufficient for the claimant to establish the wrongdoing giving rise to an award of damages.[779] The claimant will nonetheless be faced with the difficulty of establishing both the causal relationship and the exact amount of damage suffered as a result of the infringement.[780]

3. CONCLUDING THOUGHTS

To a certain extent, the different procedural options described in this paper allow companies better control over their exposure to fines when anticompetitive practices have been committed. They show the delicate balance that the FCA, and more generally competition authorities, must seek between deterrence and providing incentives to cooperate. These procedural options nonetheless remain useful tools for companies and their counsel, under certain conditions and depending on the stage of the proceedings.

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[777] FCA, annual report for 2005, p. 138.
[778] Paris Court of Appeal, 29 January 2008, *Le Goff Confort SA*, (appeal against FCA decision 06-D-03).
[779] Muriel Chagny, *L'articulation entre actions privées et actions publiques*, Revue Lamy de la concurrence, 2009, no. 18, no. 1321, p. 118. See also Dominique Brault & Romain Maulin, *La procédure de non-contestation des griefs: un succès non contestable*, Concurrences, no.2-2011, paras 91 and 93.
[780] Robert-Saint Esteben, Pour ou contre les dommages et intérêts punitifs, LPA, 25 January 2005, p. 55, and *Competition damage evaluation: a short state of play*, Concurrences, no. 3-2010.