CCC seeks input on Settlement, other, Guidelines

20 October 2021

The Agency is seeking stakeholder comments with a deadline of Nov. 12th, 2021. The (draft) Settlement Guidelines are modeled expressly after European and Zambian precedent (as opposed to U.S.-American law, which is not mentioned as a source), and include key provisions that lay out the procedure envisioned by COMESA.

In this article, we discuss the *Settlement Guidelines* draft, which has been published (in addition to Hearing Procedure and Fines Guidelines). Key elements for a respondent party entering into the Settlement procedure outlined in the draft include:

- Settlement (negotiations) may occur "**before or after** having sight of the Commission's case." (Section 3.7);
- that any settlement, other than in Article 20 proceedings, must include an **admission of liability** (Section 4);
- settlements are to achieve "procedural **efficiency**" and the "possibility of **setting a precedent**." (Ibid.);
- a rather **onerous 4-factor list** of requirements demanded of parties opting for a settlement procedure, including (a) liability acknowledgement, (b) commitment to pay CCC's fines or other remedies imposed pursuant to the Regulations (with an understanding that the party has been made aware of the maximum fine amount previously), (c) acknowledgement of procedural transparency, and (d) agreement not to seek additional access to the file or request further hearings on the matter. (Section 6);

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- both the CCC as well as the affected party may **withdraw** from the procedure, with notice (Ibid., points 3-6);
- submissions made during the settlement procedure are **not publicly available** (nor to complainants), instead they are only made available for viewing (not copying) to other addressees of the investigation who are not settling (Ibid., point 7);
- COMESA member state competition authorities **(NCAs) will be sent copies** of the settlement submissions, under the same safeguard rules (Ibid., point 8);

Section 8 covers CCC investigations pursuant to all Articles *other than* Art. 20, i.e., Arts. 18, 21, and 22 investigations brought by the Commission. It lays out a time frame and procedure akin to what AAT perceives as a **"quasi-leniency regime",** as it requires similarly onerous commitments: admission of liability, full disclosure of evidence related to the conduct at issue and its "implementation", as well as a commitment to cease and desist from engaging in the conduct. The respondent party is subject to strict gag orders of non-disclosure of materials obtained during the investigation and settlement procedure, and it may propose "undertakings" to the CCC, which the Commission is not obligated to accept (point 7).

The draft Settlement Guidelines highlight "efficiency, **absence of subsequent litigation**, and savings on resources" as three incentives for settlement (Section 12), although it is unclear to us how the CCC envisions to achieve legal certainty as to the second factor, namely protecting the settling respondent(s) from future follow-on litigation in other jurisdictions outside COMESA. Clarity in this regard will be required, as this promise appears to be unenforceable as an extraterritorial application of the COMESA Regulations and Guidelines.

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