

EU COMPETITION LAW UPDATE

European Commission Adopts Legislative Package on Settlement Procedure in Cartel Cases

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On June 30, 2008, the European Commission (the “Commission”) published its previously announced legislative package introducing a “settlement procedure” in cartel cases. The legislative package consists of a Commission Notice (the “Notice”)¹ and a Commission Regulation (the “Regulation”).² Drafts of the Notice and Regulation had previously been published for public comment in October 2007. The final versions of the documents depart from the drafts in only modest respects.³

The settlement procedure will apply in cases where the parties subject to a Commission cartel investigation are prepared to acknowledge their participation in the infringement, waive certain rights of defense, and accept liability in exchange for a 10% fine reduction. The Commission intends that the settlement procedure will simplify the administrative proceedings and could reduce litigation in cartel cases, thereby allowing it to handle more cases with the same resources and “*fostering the public interest in the Commission’s delivery of effective and timely punishment, while increasing overall deterrence.*”⁴

The Commission continues to emphasise that, unlike the U.S. plea bargaining system, the settlement procedure is not a negotiation. According to the Commission, the settlement procedure will not give companies the ability to negotiate with the Commission as to the existence of an infringement of Community law or the appropriate sanction.⁵ The process seems intended primarily to reward firms that do not contest the Commission’s view of the facts and application of the law. However, the process does allow for an exchange of views, and the Commission acknowledges that parties will

¹ 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, OJ C 167/1, July 2, 2008.

² 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, OJ L 171/3, July 1, 2008.

³ See our EU Competition Law Update of November 6, 2007.

⁴ Notice, para. 1.

⁵ Notice, para. 2.

“have the opportunity to influence the Commission’s objections through argument,”⁶ regardless of how such discussions are labelled.

INTRODUCTION

The Notice sets out the framework for “rewarding cooperation in the conduct of Commission proceedings commenced in view of the application of Article 81 of the EC Treaty to cartel cases”.⁷ In a nutshell, the Notice provides for the granting of a 10% fine reduction to any undertaking involved in a Commission cartel investigation that agrees to have its case treated under the settlement procedure rather than under the general procedure. The Notice clarifies that cooperation in settlement is different from that covered by the Leniency Notice, and that provided that an undertaking’s cooperation qualifies under both Notices, the rewards would be cumulative.⁸

In essence, the Commission envisages a settlement procedure consisting of the following principal steps:

1. Companies subject to a cartel investigation indicate their interest in exploring with the Commission the possibility of settlement.
2. In its discretion, the Commission decides whether the case is appropriate for settlement and, in the affirmative, invites all involved undertakings to enter into bilateral settlement discussions in which the Commission and undertakings would discuss potential objections, liability, and the range of fines on the basis of disclosure by the Commission of (at least some of) the evidence on which its preliminary views are based. Interested companies would indicate in writing their desire to pursue settlement discussions.
3. If these settlement discussions are productive, each settling company submits a formal settlement submission that acknowledges its participation in an infringement of Article 81 and indicates the maximum amount of the fine it would be prepared to accept.
4. The Commission issues a streamlined statement of objections in line with the acknowledgements made by the settling firm(s) in their settlement

⁶ Commission Q&A accompanying the legislative package, MEMO/08/458.

⁷ Notice, para. 1.

⁸ Notice, para. 1.

submissions, to which the firms reply simply by confirming that the SO reflects the settlement submission.

5. Finally, the Commission issues a streamlined final decision in line with the acknowledgements made by the settling companies in their settlement submissions and replies to the statement of objections.

The envisioned process is explained in greater detail below.

I. INITIATION OF PROCEEDINGS AND EXPLORATORY STEPS

Undertakings involved in a Commission cartel investigation are free to express to the Commission at any time during the proceeding their interest to enter into settlement discussions. However, the Notice makes clear that undertakings will not have a right to settle their case with the Commission. The Commission will retain broad discretion to determine which cases may be suitable for a settlement, as well as to decide whether to engage in settlement discussions, discontinue such discussions, and/or finally settle a case. These decisions would be based principally on the procedural efficiencies that the Commission deems likely to be achievable through settling the case.⁹

When the Commission considers it appropriate to explore the parties' expressed interest in engaging in settlement discussions (normally after the completion of the information-gathering stage of the investigation but before issuance of a statement of objections), it will: (i) initiate proceedings pursuant to Article 11(6) of Regulation 1/2003;¹⁰ and (ii) set a minimum time limit of two weeks within which parties to the proceedings should declare in writing whether they envisage engaging in settlement discussions.¹¹ In practical terms, if offered the opportunity, there seems little reason why a leniency applicant, having already admitted its participation in an infringement, would not want to indicate its willingness to explore the possibility of settlement. Even for other firms subject to investigation, exploring the possibility of settlement may be of interest, since settlement discussions could give insight at an earlier stage into the Commission's evidence and thinking, and indicating a willingness to discuss settlement does not bind the undertaking to any particular course or imply an admission of having participated in an infringement.¹²

⁹ Notice, para. 5.

¹⁰ Article 2(1) of Regulation 773/2004, as amended.

¹¹ Article 10(a) and Article 17(3) of Regulation 773/2004, as amended.

¹² Notice, para. 11.

Both Article 10(a) of Regulation 773/2004, as amended, and the Notice provide that all parties to the proceedings which belong to the same undertaking who wish to enter into settlement discussions with the Commission should appoint a joint representative duly empowered to act on their behalf. The Notice emphasises that joint representation will not prejudice the finding of joint and several liability or the attribution of liability amongst members of the same undertaking or group.¹³

II. SETTLEMENT DISCUSSIONS

If one or more of the parties to a cartel proceeding so request, the Commission may, in its discretion, decide to pursue settlement discussions by way of bilateral contacts. The Commission retains discretion to decide on the order and sequence of any such discussions and the timing of the disclosure of evidence in the Commission's file on which the envisaged objections and the potential fine are based.¹⁴

Through such disclosure, the party would be informed of the essential elements of the objections that could be raised against it, including the facts alleged, their legal qualification, the gravity and duration of the alleged infringement, the attribution of liability among the various companies of the same group, and an estimate of the range of likely fines, as well as of the evidence used to establish the potential objections.¹⁵ The Commission could also grant the party access to non-confidential versions of any accessible document listed in the case file, insofar as it considers this justified for the purpose of enabling the party to ascertain its position regarding certain aspects of the cartel and provided that the relevant procedural efficiencies are not jeopardised.¹⁶

After the disclosure is completed, the Commission would set a time limit within which the party would have to present a formal settlement submission if it wants to proceed with settlement discussions.¹⁷

The Notice provides that the parties to the settlement proceedings and their legal representatives may not disclose to any third party in any jurisdiction the contents of the discussions and/or of the documents to which they have had access under the settlement procedure without explicit prior authorisation from the Commission. Any breach of this

¹³ Notice, para 12.

¹⁴ Article 10(a) of Regulation 773/2004, as amended, and Notice, paras. 15-16.

¹⁵ Article 10(a) and Article 15(1a) of Regulation 773/2004, as amended.

¹⁶ Para. 18 of the Notice provides that the parties may call upon the Hearing Officer at any time during the settlement procedure in relation to issues that arise relating to due process, although the practical value of this right for parties remains unclear.

¹⁷ Articles 10a(2) and Article 17(3) of Regulation 773/2004, as amended.

confidentiality obligation may lead the Commission to disregard the undertaking's request to follow the settlement procedure, as well as constitute an aggravating circumstance within the meaning of the 2006 Fining Guidelines and a lack of cooperation within the meaning of the Leniency Notice.¹⁸

III. SETTLEMENT SUBMISSIONS

Following settlement discussions, parties opting for a settlement procedure must introduce a formal request to settle in the form of a settlement submission. Interestingly, unlike the draft version, the final Regulation does not specify that parties' settlement submissions must be written. This leaves open the possibility that companies may make oral settlement submissions,¹⁹ using the accepted procedure under the Commission's leniency program, to avoid discovery issues associated with accompanying civil litigation.

A settlement submission must contain the following elements:

- an acknowledgement in unequivocal terms of the party's liability for the infringement, summarily describing its object, its possible implementation, the main facts, their legal qualification (including the party's role), and the duration of the party's participation in the infringement, in accordance with the results of the settlement discussions;
- an indication of the maximum fine that the party foresees the Commission will impose and which the party would accept in the context of a settlement, reflecting the outcome of settlement discussions;
- a confirmation by the party that it has been sufficiently informed of the objections the Commission envisages raising against it and has been given sufficient opportunity to make its views known to the Commission;
- a confirmation by the party that, in view of the above, it does not envisage requesting access to the file or requesting to be heard in an oral hearing, unless the Commission does not endorse its settlement submission; and

¹⁸ Notice, para. 7. The reference to lack of cooperation under the Leniency Notice was added to the final version of the Notice.

¹⁹ Notice, para. 38.

- an agreement by the party to receive the statement of objections and the final decision in a given official language of the European Community.²⁰

These acknowledgements and confirmations are conditional upon the Commission meeting the settlement request, including as to the anticipated maximum amount of the fine. Once submitted, a party cannot unilaterally revoke a settlement submission unless the Commission departs from the proposed terms of settlement in the statement of objections and/or in its final decision.

IV. STATEMENT OF OBJECTIONS AND REPLY

Article 10(1) of Regulation 773/2004 requires the notification of a written statement of objections to each of the parties against whom objections are raised prior to adopting any final decision. Thus, the Commission will issue a statement of objections also in settlement procedures.²¹ The statement of objections is likely to draw heavily on the contents of the settlement submissions.

If the statement of objections reflects a party's settlement submission, in order to continue the settlement procedure the party concerned should limit its reply to simply confirming that the statement of objections corresponds to the contents of its settlement submission and that it remains committed to follow the settlement procedure.

The Commission is not bound to adopt a statement of objections that reflects the parties' settlement submissions. In such a case, the general procedure would apply and the acknowledgements provided by the parties in their settlement submissions would be deemed to be withdrawn and could not be used in evidence against any parties to the proceedings. Hence, the parties concerned would no longer be bound by their settlement submissions and would be granted a period of time allowing them to present their defense afresh, including the possibility to request full access to the file and an oral hearing.

V. COMMISSION DECISION AND SETTLEMENT REWARD

Upon the parties' replies to the statement of objections confirming their commitment to settle, the Commission can proceed directly to adopting a final decision addressed to the parties choosing the settlement procedure. The final decision should reflect the contents of the settlement submissions in relation to the findings of infringement and the maximum fine.

²⁰ Notice, para. 20.

²¹ Article 10(2) of Regulation 773/2004.

The Commission may adopt a final decision that departs from its preliminary position expressed in a statement of objections endorsing the parties' written settlement submissions. However, should the Commission intend to do so, it would be obliged to inform the parties of this and notify to them a new statement of objections in order to allow for their defense in accordance with the general procedure. The parties would then be entitled to request full access to the file, request an oral hearing, and reply to the statement of objections, and the acknowledgments provided in the settlement submissions would be deemed to have been withdrawn and could not be used against any of the parties to the proceedings.

Should the Commission decide to reward a party for reaching a settlement, it will reduce by 10% the fine that would otherwise have been imposed (*i.e.*, after application of the 10% cap under the 2006 Fining Guidelines and any leniency discount). Moreover, any increase of the fine for deterrence to be imposed on the settling party would not exceed a multiplication by two.²² All parties settling in the same case will receive the same 10% reduction of their fines, since each settling party's contribution to procedural economies in the case would be deemed equivalent.

VII. CONCLUDING REMARKS

The introduction of a settlement procedure in Commission cartel cases may improve the Commission's enforcement of Article 81 EC as well as rewarding companies seeking to acknowledge past infringements and rid themselves more quickly of the cloud of legal uncertainty raised by pending proceedings. However, the legislative package raises some legal and practical issues that could threaten its effectiveness.

First, the 10% reward for settlement is modest, and less than the 15-20% reward that had been widely anticipated by the legal community. The settlement discount needs to compensate not only for the time value of money (since the fine will presumably need to be paid sooner in a settled case), but also for the rights of defense that the settling undertaking agrees to forego as well as the creation or acceleration of potential exposure to civil damages actions. Even in view of the enormous cartel fines being issued by the Commission, in all but the clearest-cut cases companies may view a 10% discount as insufficient reward for giving up defense rights and, in practice, curtailing grounds for appeal. Higher settlement rewards are being offered in several Member States, making the Commission process look comparatively unattractive. It remains to be seen whether companies decide to take up Commission settlement offers, but in practice, it seems likely that firms will need to perceive an additional benefit to settling (*e.g.*, that in settlement discussions the Commission is focusing on a narrower scope or duration of

²² Notice, para. 32.

infringement than it might otherwise have tried to establish through the regular procedure) if the settlement procedure is to be sufficiently attractive.

Second, the almost unfettered discretion granted to the Commission in deciding whether and how to conduct settlement negotiations raises questions of fairness and equal treatment. The procedure could, in principle, enable the Commission to pressure companies to settle cases in which its evidence may be weak, for example by implicitly threatening to impose even more severe sanctions against companies that decline to settle. Other problems could arise in cases where some but not all of the firms under investigation indicate a willingness to settle. In such circumstance, the procedural efficiencies created by settling with some firms would not be evident, as the Commission would still need to prepare its case file for full access by other parties, issue a statement of objections that was not directly supported by written settlement submissions, present at an oral hearing, *etc.* If the Commission were to decide that the limited procedural advantages available in such a case meant that it was not worth exploring settlement with any firms, the interests of a firm that offered to participate in the settlement process would have been compromised by other firms' (likely their competitors') decisions not to settle. Some objective guidelines around the Commission's approach to these issues would have been welcome.

Third, the Notice emphasises that parties benefiting from the settlement procedure may appeal the final Commission decision to the European Courts. The grounds of appeal in case the Commission's final decision departs from the content of a party's settlement submission would seem clear, but that circumstance should not arise if the settlement procedure is followed. Even if the Commission's final decision adopts the content of a party's settlement submission, however, some reasonable grounds for appeal can be envisioned. For example, a fine may appear discriminatory as compared with fines levied against other firms in the same matter. Alternatively, if other companies in the same case were to challenge the Commission's allegations of infringement, a settling party may have strong reasons to appeal its fine. The rules governing appeals in such circumstances are not clear and may only emerge with practice.

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