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European Commission Adopts EC Settlement Procedure for Cartel Investigations

The European Commission (“the Commission”) has adopted a legislative package introducing a settlement procedure aimed at speeding up cartel investigations and reducing litigation. The package includes a Commission Notice¹ (the “Notice”) and a Commission Regulation² (the “Regulation”), which were published in draft form for public consultation in October 2007. The EC settlement procedure, which applies to all cartel investigations pending as of July 2, 2008, allows the Commission to follow simplified proceedings in those cases where one or more companies are ready, in return for a 10% fine reduction, to acknowledge their participation in the infringement and their liability, as well as to waive certain rights of defense. The 10% reward is cumulative to any reduction under the EC Leniency Notice.

The Settlement Procedure’s Key Steps

The settlement procedure’s goal is to make cartel enforcement more efficient by freeing up the Commission’s resources that can be used to handle more cases. As EC cartel investigations may often last up to five years and most decisions are challenged before the European Courts, questions of liability and fines risk may remain unsettled for ten years or more.

The procedure consists of the following key steps:

- *Exploratory phase.* When it considers a cartel case suitable for settlement and has gathered sufficient evidence to raise objections, the Commission, before issuing a Statement of Objections (“SO”), invites all parties to the investigation to express their interest in engaging in bilateral settlement discussions. The Commission sets a deadline to reply of no less than two weeks, which is also a last call for parties to apply for leniency.
- *Bilateral settlement discussions.* Where some defendants respond affirmatively, the Commission has discretion in deciding to engage in bilateral discussions with all or some of these parties, as well as in determining the order and sequence of these contacts and the timing for disclosing evidence. The discussions cover the essential elements of the case, including the alleged facts and their legal qualification, the infringement’s gravity and duration, which corporate entity is to be held liable (which can be crucial to the fine level), the range of likely fine to be imposed, and the evidence on which the Commission relies. The parties are not entitled, without the Commission’s prior consent, to disclose the contents of the discussions (and/or documents to which they have access) to any other defendants or third parties. Disclosure would be treated as an aggravating circumstance in setting the fine under the EC Fining Guidelines.
- *Parties’ settlement submissions.* Where the settlement discussions lead to a common understanding of the infringement scope and the range of likely fine, the settling company submits a formal settlement request within the time limit set by the Commission, which can be made either

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in writing or orally. In its submission, the party is required to: (i) acknowledge, in clear and unequivocal terms, its participation in the cartel and its liability regarding the infringement's essential elements; (ii) indicate the maximum fine that it would be ready to accept, reflecting the outcome of the settlement discussions; (iii) confirm that it was sufficiently informed of the Commission's objections and had sufficient opportunity to make its view known; (iv) confirm that it renounces its right to request access to the file or an oral hearing; and (v) agree to receive the SO and the final decision in a given EU official language.

- *Simplified SO and reply.* The Commission issues a simplified SO, reflecting the acknowledgments made in the settlement submissions, and sets a deadline to reply of no less than two weeks. Defendants get no further access to the file, in particular to the settlement submissions of other parties. Each party should limit its reply to simply confirming that the SO reflects the settlement submission and that it remains committed to follow the settlement procedure. The Commission has discretion to issue an SO departing from the common understanding as reflected in the defendants' settlement submissions, and, thus, revert to the standard procedure. In this case, a defendant will no longer be bound by its admissions and its settlement submissions may not be used as evidence against any of the parties to the proceedings.
- *Simplified decision and settlement reward.* The Commission adopts a streamlined final decision reflecting the acknowledgments in the replies to the SO and granting a 10% reduction on the fine to be imposed, which is cumulative to any leniency discount and equal for all settling defendants. Also, where applicable, the Commission will limit any increase for deterrence to 100%. Even at this late stage, the Commission may decide to abandon its preliminary position as expressed in the "settlement SO" and revert to the standard procedure. In this case, it will inform the parties and notify a new SO.

The final versions of the Notice and the Regulation now clarify some key elements of the settlement procedure, including that: (i) the fine reduction for settling amounts to 10% (no figure was provided in the proposal); (ii) settlement submissions can be made orally (read into a tape recorder at Commission premises), similar to the procedure for oral corporate leniency statements, to avoid discovery issues e.g. in related civil litigation and U.S. plea agreements; and (iii) a written submission requesting settlement discussions does not amount to an admission of participation in the infringement or liability for it.

Settlement v. Negotiation : Commission's Wide Discretion

In contrast to the U.S. plea bargaining process, the EC settlement procedure does not involve negotiation. The Notice makes it clear that the Commission will not bargain about its objections or the appropriate fine level. More generally, parties have no right or obligation to settle their case. They may informally express their interest to enter into settlement discussions but it is the Commission that enjoys an exclusive right to formally initiate the procedure when it considers, in its broad discretion and on a case-by-case basis, that a case lends itself to settlement. In determining which cases may be appropriate for settlement, the Commission takes account of: (i) the probability of reaching a timely common understanding on the scope of its objections, in view of number of defendants, foreseeable conflicts on liability attribution and extent of fact contestation; (ii) the prospect of achieving procedural efficiencies through the settlement process; and (iii) the possible precedential value of the case. If, after engaging in settlement discussions, the Commission considers that procedural efficiencies are unlikely to be achieved, it has discretion to discontinue such contacts, altogether or with one or more parties, and revert to the standard procedure at any stage up to the adoption of a final decision.

Settlement v. Leniency : Separate Programs

In the EC system, unlike in the U.S. plea agreements, the settlement procedure and leniency system are separate programs and have different scope and goals. The settlement system simply aims at rewarding companies for speeding up proceedings, granting all settling parties an equal fine reduction of 10%. The leniency program is intended to incentivise companies to disclose voluntarily the existence and evidence of a cartel, granting fine discounts that widely vary depending on the timing of the application and the

added value of the information provided. A settlement reduction is available regardless of whether a defendant is also a leniency applicant and is cumulative with any leniency reduction. However, there is no additional bonus for cooperating under both the leniency and settlement programs. Defendants who have not yet applied for leniency at the time when the Commission explores possible settlement discussions can still do so within the limited timeframe set by the Commission (no less than two weeks). The Commission reserves the right to disregard any immunity or leniency applications submitted after that deadline. As the Commission put it, “leniency window closes when settlement window opens.”

Incentives and Potential Drawbacks for Companies to Enter a Settlement

Settling may be an attractive option for defendants in some cases, as it should reduce fines and costs of a full investigation and shorten the period of uncertainty between the launch of proceedings and the adoption of a final decision. However, the procedure still raises some legal and practical issues that risk making it not sufficiently attractive to companies to induce a large number of settlements and, thus, threaten its effectiveness.

A 10% reduction might be insufficient. The 10% reward for settling is small compared to the reduction levels that the legal community had recommended during public consultation and is unlikely to be generally considered as an adequate incentive to settle. A settlement reduction needs to compensate for the costs of accelerating liability for the fine (by shortening the administrative proceedings and limiting the defendant’s ability to appeal, a settled fine is to be paid sooner), for an increased potential exposure to civil damage actions and for waiving rights of defense limiting the defendant’s ability to appeal.

Legal uncertainty, equal treatment and fairness concerns. The Commission’s unlimited discretion to decide whether and how to conduct settlement discussions and eventually settle, and more generally the lack of transparency as to how the procedure will work in practice, raise questions of legal certainty, fairness and equal treatment. The Commission’s discretion makes unpredictable for a defendant to assess its position and the outcome of its settlement request. This is particularly true in the case of “partial settlements”, where only some of the defendants are willing to settle. Although the Notice allows for a settlement procedure to run in parallel with standard proceedings for non-settling parties, in practice, it is unlikely that the Commission would follow that route. If the Notice’s goal is to shorten the process and make it more efficient, it is doubtful whether the Commission would make proceedings even more burdensome by handling two parallel procedures. The Commission would still need to prepare its case file for full access by other parties, issue an extended SO not directly supported by the settlement submissions, organize an oral hearing and required translations in various languages. Also, as in such parallel proceedings a final “settlement decision” would likely be adopted earlier than the final decision under the standard procedure, settling defendants would expose themselves to earlier damage claims than non-settling parties. One would think that, in the majority of cases, the Commission would be prepared to settle only where all defendants would be ready to do so.

Moreover, the Commission’s discretion in deciding the scope of bilateral settlement discussions might raise an issue of equal treatment among the various defendants, *e.g.* the order and sequence of these contacts might favor one party over another. Also, where the Commission finally decides not to settle, a party’s acknowledgements are deemed withdrawn but no new case team is allocated. As a result, it is unavoidable that these confidential admissions would influence somehow the outcome of the investigation, raising fairness issues. A change of team and a sort of Chinese wall arrangements would have been appropriate in the circumstances.

Waiving of rights of defense. In settling, defendants severely restrict important rights of defense, renouncing to the right to full access to the file and to be heard orally and severely limiting their right of appeal. During the settlement discussions, the Commission grants access to limited and selected evidence, so that a settling defendant might restrict itself from accessing exculpatory evidence crucial to support its case. Although the Notice specifies that a final decision can be appealed to the EU courts, it is clear that if a defendant unequivocally acknowledges its liability concerning the main facts, legal qualification and duration of the infringement, judicial recourse will be limited to very few grounds of appeal.

Conclusion

Given the many open issues and uncertainty as to how the procedure will work in practice, it will be interesting to see how the Commission will run the first settlements. Before opting for a settlement, companies should carefully balance the benefits from an accelerated procedure against the downsides of waiving such important rights of defense.

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 C167 of July 2, 2008, at p.1.

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 of July 1, 2008, at p.3.

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