AMCHAM EU
AMERICAN CHAMBER OF COMMERCE
TO THE EUROPEAN UNION

Avenue des Arts/Kunstlaan 53, B- 1000 Brussels, Belgium
Telephone 32-2-513 68 92 Fax 32-2-513 79 28
E-mail: amchameu@amchameu.be

January 14th 2008

Position Paper on Commission Proposals on the conduct of settlement procedures in cartel cases

Introduction

The American Chamber of Commerce to the European Union (AmCham EU) is the voice of companies of American parentage committed to Europe towards the institutions and governments of the European Union. It aims to ensure a growth-oriented business and investment climate in Europe. AmCham EU facilitates the resolution of EU – US issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Total US investment in Europe amounts to €702 billion, and currently supports over 4.1 million jobs.

AmCham EU agrees that, in certain circumstances, parties may be prepared to acknowledge their participation in a cartel and agree to follow a streamlined settlement procedure if they can agree with the Commission on the characterisation of the evidence and related findings and on the level of an eventual fine.

We query the wisdom of tying too closely the availability of a settlements discount with procedural efficiencies in each specific case. Certainly the Commission stands to save considerable costs and time in cutting out access to file, translations, the drafting of a full Statement of Objections and the organisation of a hearing. But there are real questions as to whether the rights of defence are duly respected in the absence of all of these stages.

Companies will be inclined to settle if the financial incentive is sufficiently attractive to outweigh the effective renunciation of certain important rights of defense (e.g., access to file, right to an oral hearing) and provided there is sufficient transparency and respect for due process in the procedure. With respect, the current proposals do not strike the right balance.

The Incentives to Settle

During settlement discussions, the Commission will provide an estimation of the range of likely fines (para. 16). It will reduce the amount of the final fine by an unspecified percentage reduction after the 10% maximum cap has been applied, and any specific increase for deterrence will not exceed a multiplier of two as a reward for settlement (para. 32).

The Commission is urged to ensure that any settlement reduction is sufficient to persuade companies to give up important rights of defense and, importantly, curtail the possibility of appeals. AmCham EU envisions that settlement reductions would need to be in the range of at least 20-30% if the process is to prove attractive to companies. It is submitted that this is not such as to undermine the attractiveness of leniency. It still incentivises parties to qualify as the immunity applicant or the first or second leniency applicant since the reductions available will be cumulative.

AmCham EU refers to the OFT early resolution agreements in the UK dairy cartel of December 7th 2007 in which significant reductions of 35% were reportedly granted to six out of nine defendants and in which the OFT recognised the procedural efficiencies generated by the swift resolution of part of the case, and this at a stage after a full Statement of Objections was issued. The French competition authority has also found it advantageous to offer companies substantial rewards for agreeing to settle cartel investigations, usually in the range of 25-50% and in some cases even higher. In addition, the French authority reduces the maximum fine ceiling from 10% to 5% of turnover in settlement cases. The incentives the Commission is contemplating, namely a (low?) reduction and a limit to the deterrence uplift at a maximum multiplier of 2, seem significantly less attractive.

AmCham EU would urge the Commission to apply a single, generous settlement reduction across all cases to avoid allegations of discriminatory or arbitrary practice. The Notice should make this explicit.

In its written settlement submissions (WSS), a settling party will be required to indicate the maximum amount of the fine it expects to receive after discussions as to a likely range with the Commission. This gives rise to interesting financial disclosure issues for publicly quoted companies which will sit awkwardly with the duty to keep settlement discussions strictly confidential on pain of an increased fine. We would encourage the Commission to reflect on how best to reconcile this conflict.

The need for transparency in the settlement process is also critical. In the final version of the Notice, the Commission should make it clear that during settlement discussions they will specify how the calculation has been carried out in terms of quantifying the basic amount, the entry fee and any uplift for aggravating circumstances or deterrence as well as any mitigating factors. Although several decisions under the new fining Guidelines are likely to be available by the time the settlement process is introduced, the fact remains that the Guidelines confer such a margin of discretion on the Commission that a few early cases will not necessarily confer any level of certainty on the extent of potential exposures in other cases.

A major obstacle to successful settlements is the Commission's practice of holding parents responsible for the past conduct of newly acquired subsidiaries. AmCham EU

also has serious concerns as to the Commission's requirement that parties belonging to the same undertaking appoint a joint representative (para. 12 of the draft Notice). The 2006 Fining Guidelines, with their dramatic uplift in potential penalties, will mean that such issues will almost inevitably cause problems. We would encourage the Commission to consider solutions to these issues in a way that will ensure that more companies are inclined to settle.

Access to File and the Standard of Proof

It is recalled that the appropriate standard of proof in cartel cases is "beyond any doubt" and, to this end, the Commission must provide "precise and consistent evidence". "Doubts" are established as soon as there could be another plausible explanation for conduct / events deemed anti-competitive by the Commission (see *Coats*, paras. 69-71).

There have been a number of recent cartel cases in which parties have questioned whether the Commission has discharged this evidential burden. Full access to the file and judicial recourse offer safeguards in the current system, but there are serious concerns that the short-cuts that are inevitable in any proposed settlement procedure will prejudice the rights of defence. The risks are compounded by the Commission's insistence that the parties and their legal advisers keep strictly confidential the content of settlement discussions or documents to which access have been given. Whilst we accept that settlement discussions should not be publicised in the press by parties (or indeed by the Commission), to treat discrete discussions amongst counsel as to the nature of the case as "aggravating circumstances" capable of increasing a fine is unwarranted (para 7 of the draft Notice). AmCham EU therefore invites the Commission to relax its proposed approach to confidentiality in recognition of the parties' rights of defence.

Paras. 16 and 17 of the draft Notice indicate the kinds of information that will be presented to settling parties during bilateral discussions with the Commission. In a first stage, parties will be informed of the following "essential elements": the facts alleged; the classification of those facts; the gravity and duration of the cartel; the attribution of liability; an estimate of the range of likely fines; and the evidence used to establish the potential range of likely fines.

Companies cannot reasonably be expected to rely on Commission assurances that all potentially exculpatory evidence in the case file has been shared prior to entering into a settlement agreement; a mechanism is needed to ensure sufficient disclosure during settlement discussions. Limited file access may work in straightforward cases where the evidence is incontrovertible (e.g. bid-rigging over a two year period), but there are a myriad of more complex cases (for example those in which the Commission alleges that various conduct amounts to a long-term "single, complex and continuous infringement") where there are real concerns about whether limited file access provides enough security.

Para. 17 envisages the provision of broader access to the Commission's file where the requesting party submits a reasoned request and insofar as the Commission deems further access justified for the purpose of enabling the party to ascertain its position, and provided the procedural efficiencies equated with settlement are not jeopardised. In this context, the Commission will provide the requesting party with a list of all accessible documents in the case file. Footnote 13 should be amended to clarify that the list of all accessible documents will be available upfront at the same time as the early disclosure outlined in para. 16. We would encourage the Commission to recognise that in more complex cases, in particular, broad access rights will be necessary. Enhanced access to the file should not be limited to situations in which, for example, a company asserts that its corporate records do not allow it to reconstitute the facts alleged against it.

In this context, we would urge the Commission to make settlement available even after the issuance of a full Statement of Objections with expanded access to the file, and recognise that even in such circumstances it stands to benefit from savings in the form of reduced translation costs, waiver of a hearing and fewer appeals. This is in line with existing practices in those Member States that engage in settlements.

The Commission's Discretion

The proposal confers on the Commission a significant margin of discretion at various key points in the process. Para. 5 of the draft Notice states that the question of whether to make settlement an option will be decided by the Commission on a case-by-case basis depending on a range of circumstances including the probability of reaching a common understanding, the number of parties involved, the foreseeability of conflicting positions on the attribution of liability and the likely extent of contestation of the facts.

There are considerable efficiencies associated even with a partial settlement with a minority of defendants. Therefore, AmCham EU would appeal to the Commission to err on the side of favouring settlement in the vast majority of cases where companies indicate a desire to proceed in this way, even if there will be obstacles to all sides settling. Conversely, the Commission should explicitly recognise that a party's decision not to settle will in no way have any direct or indirect impact on the level of an eventual fine.

At para. 15 of the draft Notice, the Commission reserves to itself the further discretion to determine the appropriateness, pace, order and sequence of bilateral settlement discussions, including the timing of the disclosure of information, including the evidence in the Commission's file, that it is prepared to disclose (see also Article 15(1a) of the proposed amendment to Regulation 773/2004). This is subject only to the qualification that information will be disclosed in a timely manner as settlement discussions progress. Whilst there may be some cases in which the Commission seeks to clarify the willingness of some parties to settle, the Commission should provide some assurances so that the system will not be used to reach early agreement with a key

proportion of parties in order to bring undue pressure on companies considered less amenable to settlement on pain of punitive fines that may be higher than would otherwise be merited.

An additional issue arising from the tie with procedural efficiencies is that the availability of a potentially significant discount hangs on factors outside any one party's control such as the number of defendants, the complexity of a case, the shareholding structure of particular defendants, the number of languages involved. At the very least, the Commission should leave open the possibility of settlement, especially in complex cases, at the stage after the issuance of a full Statement of Objections against some or all parties.

Consequences of Renouncing Settlement and the Statement of Objections

Paragraph 22 of the draft Notice provides that the WSS cannot be revoked unilaterally by the parties who have provided them unless the Commission fails to subsequently endorse them. This implies that revocation of a WSS because, for instance, new information has come into a party's possession that has changed its view of its alleged role in a cartel, is either not possible in the first place or will entail a punitive uplift in any eventual fine. The Commission is urged to state publicly that a party that engages in settlement discussions but that withdraws at any stage of the process will not be open to the risk of punitive fines for jeopardising the procedural efficiencies of a global settlement.

The Statement of Objections should contain information enabling the parties to corroborate that the Commission's case adequately reflects the WSS. Today, the Commission issues one global Statement of Objections in which it sets out the case against all parties. Query whether it will continue to do so or whether parties will receive an individualised short-form Statement of Objections that focuses mainly on their individual respective role in the conspiracy in question? The Commission has indicated informally that the Statement of Objections and the WSS will essentially be parallel documents, such that the operative language of the Statement of Objections will be exactly the same as the WSS. An individualised Statement of Objections creates potential issues concerning a party's ability to compare its alleged role in the cartel with its co-defendants before the final decision is issued and the ability to obtain assurance that the principles of fairness and non-discrimination are respected.

According to para. 27, should the Commission fail to endorse the parties' WSS, the latter is deemed to be withdrawn and could not be used against any party. Parties at this stage would be given a time limit to "present their defence anew" based on a Statement of Objections. More clarity on the circumstances in which the Commission might disagree and fail to endorse the WSS is required. At the very least, the Commission should clarify that a new case-team will be allocated in such cases.