



18 December 2007

ANTITRUST

Settlement proceedings for cartels – draft legislative package

1. INTRODUCTION

BUSINESSEUROPE supports more efficient and effective antitrust enforcement in Europe and is strongly in favour of a settlement procedure for cartels provided it would offer substantial, real, and assured benefits for companies and resolve long delays in reaching final decisions in competition cases.

Unfortunately, however, BUSINESSEUROPE has doubts whether the proposed procedure for settlements would lead to more effective decision-making in the antitrust area. As with leniency, a settlements system will only be effective if there are clear and binding conditions for fine reductions which allow companies to determine correctly what their position is. In many instances, the draft proposals are not sufficiently clear to allow for such an accurate evaluation.

The proposals in fact grant the Commission a very broad margin of discretion, whether related to determining suitable cases, whether related to the reduction of the fine, or whether related to the disclosure of evidence. This discretion, and the uncertainty it entails, may discourage companies from using the procedure.

BUSINESSEUROPE will elaborate further on this and other issues below.

2. DRAFT COMMISSION NOTICE

Procedure and disclosure of evidence

The Commission proposes in the draft Notice that it should retain a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. The Commission also proposes to retain discretion to determine throughout the procedure the appropriateness and the pace of the bilateral settlement discussions with each undertaking and to exercise its discretion as to the timing of the disclosure of the evidentiary basis in the file supporting the envisaged objections to parties who envisage introducing settlement submissions after the initiation of proceedings.

BUSINESSEUROPE has a question as regards the proposal that full discretion is reserved at virtually every stage of the procedure; this is a disadvantage.



There should be clear criteria which set out when the Commission can accept or reject any request for settlement and which govern the modalities of proceedings and, in particular, on what and how much of the relevant evidence will be disclosed – and, moreover, *when* this will be the case.

It should also be clearer how the parties can convince the Commission through argument about the merits of their case in the framework of the procedure.

Overall, BUSINESSEUROPE is worried that the broad Commission discretion regarding the admissibility and progress of settlements, the extent and timing of evidence disclosure, and the unclear opportunities to discuss and influence objections could discourage companies from using the procedure.

Reduction in fine

There is also uncertainty regarding the reduction in fine which companies can expect. Reference is made to the potential maximum fine under the Guidelines on fines but these in themselves are imprecise allowing the Commission wide-ranging powers to impose very high fines. BUSINESSEUROPE believes that this uncertainty would negatively affect the ability of companies to make a proper assessment of whether to settle or not.

Additionally, BUSINESSEUROPE is worried that uncertainty regarding the potential maximum fine in combination with a settlement procedure could lead to a situation where companies might feel compelled to admit an infringement and accept liability under the threat of substantially much higher fines, especially if these companies at the same time cannot review the evidence against them or discuss any objections that might be raised.

Follow-on effects

It is proposed that parties who want to settle have to submit a written submission in which they not only have to acknowledge their liability for the infringement but also have to describe their illegal activities as well as their duration.

BUSINESSEUROPE has a question regarding the fact that the effectiveness of a settlement system could be undermined if self-incriminating statements could be used in subsequent private damages actions before national courts. BUSINESSEUROPE thus proposes that the Commission ensures the confidentiality of settlement information and specifically allows parties to submit oral statements such as in the case of leniency.

Regarding the Commission's proposal to use settlement information in case there is no settlement, BUSINESSEUROPE has doubts whether there are sufficient safeguards to avoid this information being used against the relevant parties. If the same officials are continuing the investigation and prosecution of the infringement,



they have knowledge of the incriminating information which, one way or another, will allow them to take advantage of it in terms of emphasis and tactics.

Commitments

Recital 13 of Regulation 1/2003 states that commitment decisions are not appropriate in cases where the Commission intends to impose a fine. Considering the similarities between a settlement decision and a commitment decision, BUSINESSEUROPE suggests that the Commission elaborates further on the relationship between the draft legislative package and Regulation 1/2003.
