EUROPEAN COMMISSION PROPOSAL ON THE CONDUCT OF SETTLEMENT PROCEEDINGS IN CARTEL CASES

21 December 2007

1. INTRODUCTION

1.1 We are grateful for the opportunity to comment on the Commission's draft Regulation and notice on the conduct of settlement proceedings in cartel cases. We regularly advise undertakings in the context of cartel investigations in a variety of jurisdictions. As a result we are well placed to respond on the various substantive and procedural issues raised by the Commission's proposals.

1.2 As a general observation, we welcome the Commission's initiative and the introduction of the possibility of settlement in cartel cases. Our comments address the following main areas:

- Determination of appropriate cases for settlement and the initiation of settlement discussions.
- Timing and access to evidence.
- The obligation to supply a written settlement statement
- The inter-relationship of leniency and settlement.
- Implications for non-settling parties.
- Consequences of settlement admissions.

1.3 Each of the above areas is considered in turn below. It is apparent from our analysis that a number of potential problems and complexities arise from the relatively formalistic process set down in the Commission's proposal and the fact that the Commission envisages a written admission of liability and a commitment to the settlement procedure at an early stage of the investigation.

1.4 As an overriding concern, the settlement procedure can only be effective if it includes satisfactory disclosure of the Commission's case including the evidence relied upon and the penalties envisaged. As set out in this note, we advocate a flexible approach under which those parties that do not wish to agree an early settlement may be given the opportunity to settle the case after the delivery of the Commission's Statement of Objections ("SO"). The difference in any efficiency savings achieved by the timing of settlement could be reflected in a ratcheting down of the settlement reward with reference to the stage of the process in which it is achieved.

2. **DETERMINATION OF APPROPRIATE CASES FOR SETTLEMENT AND THE INITIATION OF SETTLEMENT DISCUSSIONS**

2.1 As currently envisaged, the Commission will determine whether a particular case is a suitable candidate for settlement and it will have the sole discretion to initiate matters by inviting parties to engage in settlement discussions. It is not clear why this should be the case. While the Commission stated in its "frequently asked questions" press release of 26 October 2007 that any undertaking may indicate its willingness to explore settlement, it would be preferable if there was a formal process through which a request for settlement could be initiated by the undertaking.

2.2 The exact nature of the cases in which the settlement discussion will be considered appropriate is left open in the Commission's proposal. The Commission states that account will be taken of the likelihood of reaching a common understanding of the scope of the objections or the prospect of achieving procedural efficiencies. Here the difference between the leniency process and the settlement process is clear. The former rewards parties who provide evidence that assists the Commission in uncovering and prosecuting cartel behaviour. The latter rewards parties who facilitate administrative efficiencies. Whereas leniency is conceivably open to participants in all cartels, settlement may be reserved for straightforward cases or instances where prosecution of a large number of cartel participants creates practical difficulties. It would be helpful to have further clarity on the various factors that may be taken into account by the Commission in deciding whether a case is a suitable candidate for settlement. For example, would recidivism be a relevant factor in deciding whether or not to offer settlement to a party?

2.3 The emphasis upon administrative convenience as the motivation for settlement should be treated with great care. It would be an unfortunate result if parties were to feel pressure to compromise their rights of defence simply in the interests of efficiency. To this end, the Commission should not allow even the suggestion of a negative inference if a party were to decline a settlement opportunity. Parties should always be entitled to put the Commission to proof and to avail themselves of the full rights of defence.

2.4 Rather than realising efficiencies, we are concerned that aspects of the Commission's proposed reforms may introduce additional procedural complexity. For example, the following points arise under the Commission's proposed procedure:

2.4.1 Since some parties may pursue a settlement and others may not it seems inevitable that in these circumstance there will be, at very least, two forms of SO (one addressed to the settling parties and one addressed to the non-settling parties, though there may have to be one SO addressed to each settling party) as against the usual single SO in cartel cases addressed to all the parties. This would seem to imply more, rather than less, work for the Commission.

2.4.2 The question also arises as to the effect on the settling parties of arguments made by non-settling parties in response to the SO. The latter will presumably receive a full SO, setting out the entirety of the Commission's case in relation

to that party, which will of necessity include significant amounts of the Commission's evidence against the settling parties. Upon issuance of the SO the non-settling parties will obtain access to the Commission's file, again including significant amounts of the evidence against the settling parties as well as exculpatory evidence, which may or may not have been disclosed to the settling parties.

2.4.3 Armed with all this evidence, the non-settling parties may make a response, which requires the Commission to modify its case against them. In the absence of any settlement, the Commission might well have had to modify its case against the settling parties as well. The question arises: will it be required to do so under the proposed procedure? On the one hand it has "in the bag", in relation to each settling party, a written settlement submission ("WSS") containing significant admissions in relation to the infringement. On the other hand, the arguments made by the non-settling parties may logically apply also to the settling parties and equity would dictate that the case against them should be modified.

2.4.4 We also note that the Commission's proposed procedure for binding the settling party to statements contained in the SO, may give rise to some difficulties. As it stands, it is proposed that if the Commission "endorses" the WSS of a party in the SO then that party is bound in to the settlement. On the other hand the party can revoke its WSS if the SO does not endorse it. The meaning of "endorse" is unclear. Is any variation between the WSS and the SO allowed? If so, what degree of variation? Must the SO specifically say that the WSS is endorsed? There seems scope for disagreement over these matters. As explained below, it would be preferable not to require a WSS at all.

2.5 The Commission's proposal is also likely to give rise to additional work and complexity as regards the final decision(s) to be issued by the Commission. We note the following points:

2.5.1 The draft Notice and changes to Regulation 773/2004 envisage that the settlement procedure will normally end with the Commission issuing a decision which endorses each party's WSS, though it retains the right to do otherwise. Again the meaning of "endorse" is unclear. If it does issue such a decision then it would seem that, as with the SO, there will be at least two versions where some parties do not settle: a decision covering the settling parties (and possibly separate decisions for each party) and another covering the non-settling parties.

2.5.2 This proliferation of decisions in relation to a single cartel proceeding will be something new in EC procedure. It would seem to involve additional work for the Commission, as the separate decisions will need to cover the particular requirements relating to each party ie a decision endorsing the WSS of each settling party and a separate, no doubt much fuller, decision relating to the

non-settling parties. The latter will no doubt have to refer to the admissions made by, and the fines imposed on, the non-settling parties, so that the totality of the case can be seen and the fines imposed against each party set in context and perspective. If this is not done there must be good chance that the Commission will not fulfil its duty of equal treatment as between the parties to the cartel. The drafting of the various decisions - as opposed to a single decision - would also seem to imply considerable additional work for the Commission.

2.6 The additional complexity of cases where some parties settle and others do not raises the question whether there should not be a greater settlement reward where all parties settle. Indeed, since procedural efficiency is the prime motivation for the settlement procedure, perhaps there should be a sliding scale of settlement reward, with a higher reward offered in cases where the savings are greatest (e.g. where all the parties in a multi-party, multi-language case settle) and reduced where they are less (e.g. some parties settle and some do not, in a procedurally simple case). One the other hand a sliding scale would lead to uncertainly as to the scale of the reward on offer at the outset and offer scope for additional disagreements between the Commission and the parties.

3. TIMING AND ACCESS TO EVIDENCE

3.1 It is clear that in agreeing to a settlement, an undertaking will be compromising its rights of defence. As described below, there will also be other material consequences that flow from its decision. It follows that an undertaking will only be in a position to agree a settlement when it is able to make a properly informed decision. This will usually require that the undertaking is well informed as to the nature of the case against it, the evidence held by the Commission as well as the level and composition of any fines in contemplation.

3.2 We are concerned by the current proposal under which the Commission will initiate matters by setting a time limit of not less than two weeks within which the parties may declare in writing whether they envisage engaging in settlement discussions. This date will precede the issuing of an SO and, in our view, may often be too early for a party to form an opinion on whether settlement is the correct course of action. We also consider that the minimum time limit of two weeks is far too short.

3.3 More generally, we query whether any time limit is needed. An alternative way to proceed, which reduces the negative consequences of a time squeeze, would be to allow for the possibility of settlement throughout the investigation period but provide for the ratcheting down of the settlement reward depending upon the stage at which settlement is achieved. This model is successfully applied by the UK Financial Services Authority ("FSA") in connection with its regime for the settlement of infringement proceedings. Any party may initiate the FSA's flexible settlement procedure at any stage although the FSA will not usually engage in settlement discussions until it has a sufficient understanding of the details of the case. It also

leaves open the possibility for settlement to be achieved late in the enforcement process, including after the FSA has issued a warning notice (similar for these purposes to the issuance of an SO). The system encourages early settlement by offering fixed penalty deductions for settlement at certain stages in the process (ranging from 30-10%).

3.4 As regards access to evidence, the proposal seems to contemplate that the Commission will "drip-feed" evidence to the parties seeking settlement in an unsatisfactory manner. Thus the proposed change to Regulation 773/2004 provides in new Article 10a (2) that the Commission "*may* inform the parties willing to introduce settlement submissions of "(a) the objections it envisages to raise against them; (b) the evidence supporting them; and (c) the potential fines." (emphasis added).

3.5 This is reinforced by the draft Notice which provides in para 15 that the Commission retains discretion over the pace of the discussions, in particular discretion to determine the "timing of disclosure of information, including the evidence in the Commission file used to establish the envisaged objections and the potential fine. Information will be disclosed in a timely manner as settlement discussions progress."

3.6 It is claimed in para 16 of the draft Notice that this will allow the parties to be informed "of the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections." However there is nothing in the proposed changes to Regulation 773/2004 that *obliges* the Commission to make such a full disclosure. Instead, the proposal is that the parties can request disclosure of the information specified in 3.4 above, and the Commission cannot issue a time-limit for the parties to make written settlement submissions until that information has been disclosed either following a request or otherwise. There is also a divergence between the proposed Article 10a and the draft Notice in this regard. The former provides that all the information specified in 3.4 must be disclosed while para 16 of the draft Notice speaks of "the *essential elements* taken into consideration so far…"

3.7 Para 17 of the draft Notice states that upon a reasoned request by a party the Commission will grant it access to "non-confidential versions of any accessible document listed in the case file at that point in time, in so far as they consider it justified for the purpose of enabling the party to ascertain its position regarding any other aspect of the cartel and provided that the procedural inefficiencies referred to in point 5 are not jeopardised." This highlights the problems of disclosure that arise in relation to the proposed procedure. How can a party make a reasoned request in relation to a document that it may not know exists? Whose confidentiality is it that is being protected?

3.8 The problem with disclosure is compounded by the WSS, which the parties seeking settlement have to make. This requires each party, inter alia, to confirm that "they have been sufficiently informed of the objections the Commission envisages raising against

them and have been given sufficient opportunity to make their views known to the Commission..." It would be difficult for a party to say that it has been "sufficiently informed" when it has no knowledge of the full extent of the Commission's file.

3.9 We consider it essential, if the settlement discussions are to progress at a sensible pace, and if the parties are to trust the process, that the Commission be required to make a full disclosure of their case at the earliest opportunity. If information is "drip-fed" then the parties will assume that the Commission is only disclosing its best evidence and that any evidence that may assist the defence is not being disclosed. At the stage when access to the file is required to be given - the issue of an SO - the Commission is required to disclose all the documents it has that are relevant to the case, including exculpatory evidence, with certain limited exceptions such as internal documents. However, if the parties settle following the proposed procedure there will be no access to the file, as they are required to give up this right if the SO endorses their written settlement submissions. Unless the obligations on the Commission as to disclosure are tightened there will be a real risk either that the Commission will fail to make full disclosure in an attempt to secure a settlement at a higher than justifiable level or that parties will fear that the Commission will seek to do this, and so will not enter the process at all.

3.10 There is also a substantive objection to the Commission's proposals regarding the piecemeal disclosure of evidence outlined in 3.4 and 3.5 above. The Commission claims, in particular, in para 16 of the draft Notice that the disclosures will allow the parties to be informed "of the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections."

3.11 However, this is at a stage before the Commission has fully thought through and organised its case and issued an SO and before it has received a response from the parties. Unless the Commission regards the process of writing a SO and considering the response of the parties as pure formalities this must mean that the Commission's case prior to the issue of an SO is at a formative, tentative stage. Accordingly, the Commission's views on, for example, the facts, the gravity and duration of the cartel, the attribution of liability, and the likely fines, must be formative and tentative. This reinforces the view that parties should be allowed to settle at a later stage in the process when the Commission's case is more developed (and may, perhaps, be less "bullish").

3.12 To ensure the credibility of the settlement regime, it is important that parties are provided with a reliable estimate of the level and composition of the fines in contemplation. In agreeing a level of fine the parties are likely to compromise their ability to later challenge that fine. It follows that parties must be provided with adequate disclosure to enable them to make a proper and informed decision. In this regard, we refer the Commission to the US system under which transparency is a key factor in the US Department of Justice's success in securing the cooperation of cartelists. In particular, fines are calculated according to a specific and detailed

formula set out in the United States Sentencing Guidelines and applied in line with Department of Justice published guidelines.

4. THE OBLIGATION TO SUPPLY A WSS

4.1 In our view, the proposed requirement that parties admit liability and supply a WSS by way of a formal request for settlement is unnecessary. It will make the settlement process less attractive and therefore hamper its effectiveness. To the extent that a party is willing to admit liability at all, it will be especially reluctant to do so in writing and before it can be assured that there is a confirmed settlement agreement. Indeed, as discussed in section 7 below, it may be unwise for a party to take such steps in the absence of any assurance that third parties (regulators or private litigants) will not gain access to the admission.

4.2 We also do not understand why parties should be required to acknowledge in writing as a threshold issue that they have been sufficiently informed of the Commission's objections. It should be sufficient for the party to make this acknowledgement at the point at which the settlement is actually achieved. In addition, we do not consider it appropriate that parties should be required to agree as a pre-condition that the SO and final decision should be provided in a particular language where the language in question is not the native language of the party.

4.3 Overall, we consider that the Commission, rather than the parties, should provide the written statement formally initiating the substantive settlement process. This would not only avoid the serious concerns related to the written admission of liability but it would also make more practical sense since the Commission would be able to use the document as a vehicle to set down the nature of the allegation, the level of the anticipated fine (which it is best placed to calculate) and the roadmap to the achievement of the settlement.

4.4 Some precedent for the above approach may be found in the process for settlement of enforcement action instituted by the UK FSA in 2005. Notably, the FSA process does not require parties to provide a WSS, instead the FSA acts as the formal initiator through the provision of a "stage one" letter setting out in broad terms the basis of the allegation, its view on the penalty and the period within which it expects settlement to be concluded in order to achieve the maximum discount.

5. THE INTERRELATIONSHIP OF LENIENCY AND SETTLEMENT

5.1 We query the rationale for linking settlement with the leniency process. The draft Notice provides in para 13 that the Commission may disregard any application for immunity from fines or reduction of fines under the Leniency Notice on the ground that it has been submitted after the expiry of the time-limit within which the parties must say whether they envisage engaging in settlement discussions. That is the time limit of not less than two weeks referred to above.

5.2 Two points arise on this. First, does it refer to a leniency application from any party, whether or not they indicate their willingness to engage in settlement discussions? The statement is unclear and could mean this. If so, this seems grossly unfair on those parties who wish to have nothing to do with the settlement discussions. At present there are no time-limits on when an application for immunity or reduction in fines can be made, although clearly an earlier application will stand a greater chance of success and a higher reduction than a later one. However, the fact that some parties wish to pursue settlement discussions should not prejudice those who do not.

5.3 We also question whether it is right to restrict the right to apply for immunity/reduction in fines of those who do pursue settlement discussions. Since the benefits obtained under the two procedures are cumulative, it is not clear why parties who engage in settlement discussions are restricted from making an application for leniency after those discussions commence. Further, as it stands, the prohibition seems to apply even if no settlement results, which would be inappropriate and disproportionate.

6. IMPLICATIONS FOR NON-SETTLING PARTIES

6.1 The draft Notice envisages that only some of the parties to a case may wish to settle and others may not. Para 14 of the draft begins: "Should *some* of the parties to the proceedings request settlement discussions..." (emphasis added). Further, para 7 provides that the parties to the proceedings (by which it presumably means the parties to the settlement proceedings) may not disclose to any other undertaking or third party "the content of the discussions or of the documents which they have had access to in view of settlement", and the primary purpose of this is presumably to prevent those parties who are involved in the settlement discussions making disclosures to those who are not.

6.2 This raises the question: what is the effect of the settlement discussions on any parties who do not join in the discussions? Clearly by not joining in they are foregoing the benefits of settling, in particular the reduction in the fine. However, it must also be clarified in the documents that they should not be prejudiced by the settlement. In other words, it must be clear that the effect of the settlement is not to "shift" blame onto non-settling parties or to result in fines proportionately greater for the latter.

6.3 There should not be any prejudice in relation to leniency either, as discussed in the preceding section.

7. CONSEQUENCES OF SETTLEMENT ADMISSIONS

7.1 The amount of the settlement reward is left blank in the draft documents issued by the Commission. This must be large enough to attract parties to the procedure, without being so large that the deterrent effect of fines is compromised. It must also be borne in mind that the settlement reward is given on top of any leniency reduction. In our view anything less than a 15-20% reduction will not be sufficiently attractive, particularly in view of the risks involved for companies of entering the process, particularly the potential risks of admitting liability and accelerating third party claims

referred to below, and the fact that (as presently stated) entering the process prevents a party from applying for leniency later.

7.2 A problem arises with the reward to parties who already have been promised full immunity. On the face of it there would appear to be no incentive for such a party to enter into the settlement process. If they do not enter it, however, they would then appear to be excluded from the discussions and information disclosures made to the settling parties, and would face a full SO. If they do enter the procedure they may save some time but will be required to make admissions and will run the risks attached thereto, as well as the risk of accelerated third party claims (see below) without any concomitant reward.

7.3 In its WSS each party has to admit liability for its infringement. If a settlement does not result then the WSS, including this admission, is withdrawn. The admission of liability by a party, especially at an early stage, could have serious consequences.

7.4 If a settlement results then presumably the fact that the party admitted liability will be disclosed in the decision addressed to that party, but not disclosed by the Commission before then. At present, decisions of the Commission are admissible in an English court as evidence of the correctness of the conclusions they contain (*Iberian BPB industries*[1]) and under Article 16 of Regulation 1/2003 a national court cannot make a decision which runs counter to a Commission decision relating to a particular agreement. Even so, an explicit admission of liability is likely to simplify the task of a party seeking damages in respect of an infringement, and is likely to have an impact in countries where the stated rules do not apply. Further, if a Commission decision endorsing a WSS is issued more quickly than a decision that does not - which is presumably a primary aim of the settlement procedure and was confirmed in the Commissioner's speech referred to above - then the risk of third party actions arising will also be accelerated in time. This will also be a risk considered by parties before entering into settlement discussions.

7.5 An admission of liability may also have consequences for parties in terms of any possible national criminal prosecution. This will undoubtedly increase the risk for parties considering entering into settlement discussions and thus compromise the effectiveness of the settlement proposal. In this regard, it may be worth considering whether "no-action" assurances could be obtained from competent national authorities as part of the settlement process.

7.6 In addition, the settlement option could also be made more attractive by providing that a settled case would be disregarded for the purposes of assessing recidivism in any future infringement proceedings.

7.7 Where no settlement results the question arises as to the status and discoverability of the admission of liability. It is stated to be withdrawn for the purposes of the settlement

[1] [1996] 2 CMLR 601

procedure and that it cannot be used against any of the parties to the proceedings. We suggest that further protections are introduced to ensure that the settlement process is wholly without prejudice. In particular, those engaged in the settlement process must be separate from the Commission decision maker. Such protections might also include, for example, the operation of a separate and confidential settlement file.

7.8 Separately, we are concerned about the extent to which any admission of liability in a withdrawn settlement proposal could be disclosed to another regulator investigating the same or an associated cartel. Could it be discoverable by a third party seeking damages? These are important issues that appear not to be answered. On the issue of discovery, we note that the UK Office of Fair Trading in its recent recommendations on changes to facilitate private antitrust actions[2] specifically stated that leniency documents should not be discoverable so as to avoid undermining the leniency programme. Similar concerns would arise if settlement documents were to be discoverable. These concerns would be addressed if the requirement of making an admission as to liability were to be removed - at least before a settlement arrangement is confirmed.

7.9 As a practical matter, we also suggest that the Notice should include an express commitment by the Commission not to disclose publicly the fact of settlement discussions until an appropriate juncture after the settlement has been achieved.

8. A REVISED PROPOSAL

8.1 As outlined above, a number of complications arise from the fact that the envisaged settlement procedure would only be initiated before an SO has been issued, at a time when the parties are not aware of the full case against them, and the Commission's case may not yet have been fully thought through, and then proceeds down a track which, if some parties decide not to settle, results in separate SOs and separate decisions.

8.2 While we understand that there may be advantages from the Commission's perspective in initiating the settlement procedure prior to the issuance of the SO, this will not be attractive to all parties. As suggested above, there may be sense in introducing a ratcheted system of settlement reductions reflecting the levels of efficiency savings available to the Commission. Such an approach would increase the efficacy of the settlement regime by including those parties who would prefer to receive an SO prior to agreeing a settlement. In such instances, the process might work as follows:

8.2.1 The Commission proceeds to issue an SO in the normal way addressed to all relevant parties, followed by access to the file;

8.2.2 The parties can then either reply to the SO and seek a hearing, as now, or indicate that they are prepared to enter into settlement discussions;

[2] Private actions in competition law: effective redress for consumers and businesses. Recommendations from the Office of Fair Trading - November 2007, para 9.1.

8.2.3 If they enter into settlement discussions they will receive an indication of the likely fine, and as part of the settlement would have to accept the SO as issued;

8.2.4 If they settle they would waive their rights to reply to the SO in writing and to an oral hearing and in return receive a settlement reward of, say, 15%;

8.2.5 The Commission could then either proceed directly to a decision against the settling parties, or incorporate sections relating to them in the overall decision issued later; in either case if the decision does not contain a fine in the expected range, then the settlement is off and the party concerned can reply to the SO and seek an oral hearing.

8.3 The above procedure may result in some settlement discussions occurring at a later stage than envisaged by the Commission, but they are likely to be simpler and more straightforward discussions, and the reward could be kept correspondingly lower. It builds on the approach under the 1996 leniency notice, whereby the non-contesting of the SO was a way of obtaining a reduction in the fine. Here the position would be clear: if you do not contest the SO and are happy with the indicated fine, then there is a 15% reward for not contesting the case further. A considerable amount of the Commission's effort is concerned with the period between the issue of the SO and the decision[3], all of which would be considerably lessened under the proposed procedure. A further advantage is that there would be no explicit admission of liability by the settling parties, merely a non-contesting of the SO.

8.4 We trust that our response is of assistance to the Commission. Please let us know if it would be helpful for us to elaborate upon any views expressed in this document.

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[3] In the *Plasterboard* case, for example there was an interval of 19 months between the issue of the SO and the decision, in *Sorbates* the interval was 10 months and in *Vitamins* it was 16 months.