SETTLEMENT PROCEDURE IN CARTEL CASES

CBI RESPONSE TO COMMISSION CONSULTATION

20 December 2007

The CBI appreciates the opportunity to respond to the Commission's consultation and would like to offer the following comments on its proposals:

OBJECTIVES OF THE SETTLEMENT PROCEDURE

For a settlement procedure to be effective, the CBI believes it must provide advantages not only to the Commission, in the faster disposal of cases and freeing of resources, but also to the applicant undertaking. There needs therefore to be an adequate balance between the interests of the Commission and the interests of the applicant.

From a business viewpoint, the interest of the applicant is to be able to avoid protracted litigation, to achieve certainty and save costs. Management will wish to draw a line under the undertaking's previous involvement in a cartel and move forward. Since many cartels come to light as a result of due diligence during an acquisition, a new management team will have a particular interest in dealing with a legacy problem and quantifying liabilities following a take-over.

For an undertaking to proceed down the settlement route, management will have to be satisfied that the financial and other advantages outweigh the downside risks.

PROVIDING ADEQUATE INCENTIVES FOR SETTLEMENT

We suggest that the principal incentive for an applicant will be the assurance of an adequate financial benefit. This is likely to be calculated in terms of the reduction in fines and the saving of litigation costs, both in respect of the defence of the Commission's claim itself and any ensuing civil litigation.

Unfortunately, as the Commission's proposal stands, the applicant will not be able to make this calculation with any confidence. The two unknowns are, firstly, the maximum fine which the Commission could impose due to the uncertainties of how the fining guidelines operate in practice. The second unknown is the amount of reduction, which the Commission could agree as part of the settlement.

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Engaging in the settlement process is likely to bring forward and, potentially, prejudice the defence of any ensuing civil litigation. This would result in an earlier and increased cash cost for companies which management would need to be taken into account in considering the merits of pursuing a settlement option.

We regard it as vital therefore that the fine reduction needs to be both quantifiable and significant to provide a sufficient incentive for companies to engage in the settlement process. This means that the Commission should be prepared to reach a very specific "common understanding" as to the actual fine, not a broad range of likely fines. In paragraph 32 of the draft Notice, the percentage discount has therefore to be set at a figure that provides an adequate incentive. We propose that this should not be less than 25%.

Apart from the quantification of the financial benefit, we believe that the applicant will also wish to have confidence that the benefit is achievable. This means that if the applicant goes down the settlement path, the outcome should be predictable with the maximum certainty.

In this respect, the ability of the Commission to withdraw from the settlement procedure at its discretion is not helpful in creating certainty. The Commission would be entering the settlement process in good faith and this would be reinforced if it could indicate under what circumstances it reserved the right to withdraw from the process.

As a further incentive to applicants, we propose it should be made clear that, in principle, settlement would be made available to any defendant even if not all the participants in a particular cartel are prepared to settle.

MINIMISING THE DOWNSIDE RISKS

Directors of a company will not wish to put themselves as individuals, their staff or their company in a more hazardous position by engaging in a process of direct settlement with the Commission.

We suggest the first of the key risks they would identify was that of criminal prosecution in some Member States, notably the UK, or indeed elsewhere such as in the US. The draft procedure does not at present address these risks.

We would propose that, within the EU, this risk be dealt with by the Commission obtaining undertakings from the prosecuting authorities in the relevant Member States that there would be no criminal prosecutions following a settlement with the Commission. These undertakings would be passed on to the applicant as part of the settlement agreement.

In respect of the risk outside the EU, we would propose that the same procedures should be adopted as in the case of leniency applications, where oral statements are made by external counsel to avoid document production.

The second major risk is that of follow-on actions from private litigants. The settlement agreement cannot eliminate the risk but it can avoid increasing it. We consider it extremely important that the settlement should be without any written admission of liability. This is the standard form of settlement of any litigation and we do not see why it should not operate in the case of cartel settlements.

Unless this condition is met, the applicant undertaking will be creating a file record which can potentially be used against it to establish liability in follow-on private litigation. From a business point of view this risk presents probably the most significant objection to the present draft procedure.

In this context, we would point out that there is an informal procedure that currently exists in non-cartel cases where the Commission is prepared to agree a settlement without an admission of guilt. We believe that this principle should be adopted in the procedure for cartel settlements and would be most concerned if a new cartel procedure prejudiced the existing procedure for other settlements.

APPLYING DUE PROCESS

There are a number of points affecting due process which we believe require further review by the Commission:

Time limits

We believe that the initial time limit set by the Commission under Article 10a should provide an adequate opportunity for the undertaking to fully consider its options. The time limit should accommodate not only those primarily involved in the cartel, who are already appraised of the risks, but also those undertakings who are minor players or whose activities ceased some time previously. We suggest that this initial time limit should be not less than 20 working days.

The second time limit is that given to the undertaking to submit a final written settlement submission (WSS). Again we believe that adequate time should be allowed for a company to prepare a binding WSS which will involve consultation with outside advisers, particularly if it is a listed company, and internal discussions with top management, who may be based outside the EU. We propose that a minimum period should be allowed of 20 working days and the Commission should be prepared to extend this on request by a further 10 working days.

The third time limit is that proposed for a reply to the Commission's response and we firmly consider that the minimum of just one week is not long enough for an undertaking to fully review its position. Similar arguments apply to the second time limit and it will be necessary for a company's top management to be involved, with discussions and meetings frequently taking place across several time zones. We again propose that a time limit of 20 working days should be allowed, with a further extension of 10 working days be allowed on request.

We note that there are no time limits applying to the Commission and we anticipate that companies may wish to put a time limit on the duration of their settlement offers. This may be a point that could be covered in a clarification note in the Notice.

Disclosure of the case against the undertaking

It is a generally accepted principle of natural justice that a person charged with an offence should know what the case is against him. The Commission may be reluctant to reveal the full strength of its case but we believe it is essential that the undertaking charged should receive sufficient detail so that a proper risk assessment can be carried out.

We note in paragraph 17 of the draft Notice that a party may make a reasoned request for access to a non-confidential document listed on the case file, but access is reserved at the Commission's discretion. Although there is a right for a party to call upon the Hearing Officer we believe the Commission's practice should be to allow access, other than in exceptional circumstances.

Reserving the rights of defence

Paragraph 20 of the draft Notice makes clear that the Commission may decline to accept a party's WSS and proceed with a statement of objections. In this case acknowledgements made by the parties are deemed to be withdrawn and cannot be used against any of the parties to the proceedings. We regard this as a fundamental point and support this statement in the Notice. It should be beyond doubt that the settlement process is on a "without prejudice" basis.

The fact that the Commission reserves the right to close the settlement process and proceed with a statement of objections raises the issue of how the Commission will handle the settlement process internally. Because those involved in the settlement process will have acquired information prejudicial to the defence, it suggests that there should be a separate team handling the settlement. We would welcome further clarification from the Commission on this point.

Confidentiality

We believe the Notice should make clear that the settlement negotiations will be completely confidential. This would mean that both the Commission and the party concerned would make no comment on whether settlement discussions were taking place.

REDRESS AS A COMPONENT OF A SETTLEMENT OFFER

The draft settlement process envisages a reduction in fines as the sole outcome of the process. However there is a growing acceptance of the principle of restorative justice under which redress is provided to the victims of unlawful conduct. We propose that it should be open to a party to include in its WSS a proposal for providing redress to those affected by its conduct. The party will be best placed to identify the persons affected and calculate the appropriate redress.

We believe such an offer should be considered positively by the Commission and taken into account in reducing the level of fines. It would have the effect of identifying the Commission's actions with the redress and would minimise costly follow-on litigation. This would achieve another policy objective of reducing litigation and adopting an ADR mechanism.

CONCLUSION

The CBI supports this move by the Commission to provide a means for the early settlement of cartel cases, which in principle is welcomed by business. The draft Notice and Regulation provides a starting point but we believe there should be further consideration of the incentives and risks to provide a more balanced package and thereby achieve the objectives.

CBI