BAKER & MCKENZIE

RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON THE CONDUCT OF SETTLEMENT PROCEEDINGS IN CARTEL CASES

Baker & McKenzie welcomes the Commission's decision to develop a mechanism for settling cartel cases and is grateful for the opportunity to comment on the Commission's package of legislative proposals.

1. INTRODUCTION

1.1 Baker & McKenzie believes that, in order for any settlement mechanism to be attractive and workable for companies, there must be clarity of both procedure and substance as well as a Commission commitment to good faith discussions. Only then will there be a sufficient degree of predictability of outcome to obtain the trust of companies and their advisers.

1.2 This view informs the more specific comments below.

2. COMMENTS

Lack of certainty over level of fine

2.1 One of the key concerns for companies is up-front clarity in respect of the over the level of fine to be imposed.

2.2 Point 15 and footnote 10 of the draft Notice refer to discussions on the level of a "potential fine". Footnote 10 suggests that this discussion will take into consideration the Fines Guidelines and the Leniency Notice where applicable.

2.3 The draft Notice subsequently states in point 20 that the settling party will be required to indicate the maximum amount of the fine it expects to see imposed by the Commission in its written settlements submission.

2.4 When read with the FAQs which state that the Commission and the settling party will discuss the potential maximum fine "net of any other reduction", the draft Notice seems to give a high degree of certainty over the level fine.

2.5 However, points 16-17 of the draft Notice state that discussions between the parties and the Commission should lead to a common understanding regarding a "range of likely fines".

2.6 Overall, it is unclear how transparent the Commission will be when discussing fines. In our view, the Commission should provide a maximum amount of transparency. This should involve revealing a figure as well as explaining how the fine was calculated (i.e an explanation of the various building blocks, e.g. aggravating factors; deterrence multiplier etc).

2.7 There does not seem to us to be any reason why the Commission could not be this specific – based on its then understanding if the case. In our view, this is essential as any Commission reluctance to be entirely transparent on the fine is likely to make it difficult to obtain the trust of companies. Clarity on the various elements of the fine will also help to avoid misunderstandings at the time the company comes to draft its written settlement submission.

In our view, the Commission should be able to provide a precise fine figure on the basis of the case as understood by the Commission at that time (rather than a range of likely fines) and this should be explained by reference to the Fines Guidelines, Leniency Notice.

Appropriate level of settlement reduction

2.8 The settlement discount will need to be substantial as settling parties will be waiving their right to important procedural safeguards.

2.9 In our view the draft Notice should provide that a reduction of 25% should be available. This will not undermine the effectiveness of leniency since there is no right to a settlement (making reliance on settlement instead of a leniency application a very risky strategy); and reductions for leniency and settlement are cumulative.

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Broad Commission discretion

2.10 The Commission exercises a very wide degree of discretion throughout the process, including on:

- whether a case is suitable for settlement discussions;
- whether to engage in or discontinue those discussions, taking into account the cartel's features; the number of parties involved; the extent to which the facts are contested; and, somewhat cryptically, whether "procedural efficiencies" may be obtained;
- the timing of the disclosure of the evidence supporting the objections;
- whether to provide access to other information on the Commission's file relating to other aspects of the cartel (i.e. other than the evidence supporting the Commission's objections) since this will only be provided to the extent that it does not jeopardize "procedural efficiencies";
- whether to adopt an SO which corresponds to the settlement; and
- whether to adopt a final decision which corresponds to the settlement.

2.11 One of the main risks for the draft settlement procedure is that the broad discretion enjoyed by the Commission may mean that companies are very reluctant in practice to take part in settlement discussion. Settlement may find itself confined to cases where there is "smoking gun" evidence - where presumably the administrative burden involved under the default procedure would less onerous for the Commission anyway.

2.12 It seems to us that settlement has a much larger role to play. In order to address this concern, we believe the Commission should publish specific criteria explaining how the Commission would exercise its "broad margin of discretion".

2.13 For example, point 5 of the draft Notice states that the Commission has the discretion to determine if a case is “suitable” for settlement and whether a particular settlement submission should be endorsed. In our view, these matters need to be explained and clarified with clear criteria.

2.14 We also note that under point 27 of the draft Notice, the Commission may adopt an SO which does not endorse the parties' settlement submissions.

2.15 In our view, this is an area where the Commission could easily show greater good faith commitment. After all, by the time the written settlement submission is provided, the settling party will have made a number of major concessions and would have developed expectations as to a potentially acceptable submission. It is difficult to see why the Commission needs to maintain a unilateral ability to withdraw from the settlement procedure. If any power of withdrawal were needed, the draft Notice should explain that the only reason to adopt a non-confirming SO would be if the proposed fine is not in line with the outcome of the settlement discussions or if the Commission had been misled etc. The default position should be that the SO endorses the settlement discussions. It is understood that the Commission cannot prejudge the outcome of deliberations with the College of Commissioners and/or the Advisory Committee. But scope for their disapproval is already built in to the process given that the decision can deviate from the SO.

In summary, the draft Notice should confirm that the SO will endorse a settlement submission which reflects the substance of settlement discussions unless the Commission has been misled.

Access to the file and the standard of proof

2.16 Full access to the Commission's file and judicial recourse offers sufficient safeguards in the current system. It is important that the draft Notice does not result in short-cuts which will prejudice these rights of defence.

2.17 Paragraphs 16 and 17 of the draft Notice explain that the parties will be informed of the "essential elements" of the infringement and envisage broader access to the Commission's file in so far as the Commission deems this justified.

2.18 In our view, there is risk that such limited access to the Commission's file will prejudice the rights of defence. In order to address this, we believe the Commission should confirm that, in addition to the various elements listed in paragraph 16, the Commission will make available a summary of the charges, including dates of the meetings attended and the contents of those meetings. Footnote 13 should also be amended to clarify that the list of all accessible documents will be available at the same time as the early disclosure outlined in paragraph 16 since companies should not have to make a settlement offer without first having a clear understanding of the Commission's case.

"Early disclosure" as envisaged by paragraph 16 of the draft Notice should include, in addition to the elements listed in that paragraph, a summary of the charges (with dates of meetings and summaries of what was discussed). The list of documents referred to in footnote 13 of the draft Notice should also be provided at this preliminary stage.

Number of parties needed to settle

2.19 The Notice does not explicitly state that the Commission is prepared to conduct settlement discussions even if not all of the exposed parties are interested in settling. This should be clarified in the Notice or the FAQ's. We perceive there to be major benefits for both the Commission and the parties in settling even when some companies refuse to do so (e.g. avoided appeals etc.). This view is obviously shared by the OFT as recent developments in the UK dairy investigation illustrates.

2.20 We also note that the Commission will retain a degree of discretion as to whether or not to settle if it is not the case all parties opt in. In our view, parties wishing in good faith to settle should not be disadvantaged disproportionately by matters beyond their control.

Anyone should be able to settle. The Commission should therefore adopt criteria which would enable the parties to evaluate the types of cases in which settlement may not ultimately be possible as far as the Commission is concerned because not all the exposed companies have come forward.

The Commission's final decision

2.21 Point 29 of the draft Notice states that the Commission may adopt a final decision which departs from its preliminary position as expressed in the SO (e.g. due to consultation with the Advisory Committee etc). Where this is the case, the parties will be informed of this and a new SO will be issued etc.

2.22 However, footnote 26 suggests that there will be some flexibility such that the decision can, to a degree, still differ from the SO without the parties being eligible to receive a new SO and launch a full defence.

2.23 In our view, this flexibility is not appropriate in the context of settlements. In contrast to normal Regulation 1/2003 procedure, there is no scope for new information to come to the Commission' attention in between the SO and the decision since the Commission's discussions with parties are all 'front-loaded', occurring before the SO.

In our view, footnote 26 should be removed: the decision should simply reflect the wording of the SO. Any diversion from this must give rise to a new SO and the reinstatement of full rights of defence.

Settlement privilege

2.24 Companies need to be sure that, if the settlement discussions break down for some reason, they will not be in a worse position than those companies which decided not to enter into settlement discussions. With this in mind, there are a number of aspects of the draft Notice which could be improved.

2.25 First, recognising that even engaging in settlement discussions implies a confession, the draft Notice should confirm that the Commission will keep the very existence of settlement discussions confidential unless and until a final decision based on a settlement is adopted.

2.26 Secondly, although point 27 of the draft Notice states that where a written settlement submission is not endorsed by the Commission in its SO, acknowledgements provided by the parties would be deemed to be withdrawn and could not be used against any of the parties, this is inadequate protection. To properly protect a company, the Commission should confirm that any acknowledgments would be privileged. Further, documents supplied by the companies should be returned and not used to the detriment of the party.

The Notice should confirm that any acknowledgments provided in the context of the settlement discussions will be privileged; and that documents supplied by the companies will be returned and not used to the detriment of the party if discussions break down for any reason. In some cases, it would be necessary to establish a new case team to protect the integrity of the settlement process.

Risk of discoverability

2.27 Point 35 of the draft Notice states that public disclosure of written statements would "normally" undermine a certain public or private interest. The Notice therefore fails to

guarantee that written statements will not be discovered in the context of private anti-trust litigation in Europe and elsewhere. In our view, the Commission should take the same approach to these submissions as that taken in respect of corporate statements in the context of leniency.

2.28 Suggestions that the settling party can avoid risk by ensuring that only the Commission keeps a copy of the WSS on its file are unhelpful. For example, under UK disclosure rules, companies also need to describe documents which exist but which are no longer in the party's control and why that is the case.

The Notice should enable settlement submissions to be made orally to avoid giving rise to further exposure of damages actions.

Settlement outside the scope of the Notice

2.29 Finally, in our view, the settlement procedure should not preclude the ability to settle in other cases e.g. Norwegian Gas where settlement was post-statement of objections with no admission of liability.

Time limits

Time limit for indicating interest in settling

2.30 Point 11 of the draft Notice proposes that companies will be given at least two weeks to indicate whether they will engage in settlement discussions. This will be too short for many companies - especially those that have not applied for leniency (or have even not been dawn-raided). Further, this decision will need to be taken at a high level. It may also need to be discussed with advisors in other jurisdictions. Overall, 20 working days would be a better minimum base line.

Time limit for submission of WSS

2.31 Point 17 of the draft Notice deals with the final time limit which the Commission will give the company to submit a final WSS.

2.32 Again, it will be necessary to agree this with senior personnel in the company and sometimes with other group members and their advisers. Companies with listed securities will also need to involve their securities disclosure advisors in all relevant jurisdictions and plan any appropriate disclosures. Two months should be a minimum.

Time for a reply to the SO

2.33 Point 26 of the draft Notice gives the parties a week to reply to the SO if it endorses their WSS.

2.34 In our view, this is likely to be too short. Although there will have been discussion of the objections at the earlier stage, consideration of the formal SO will still be a vital step for the defence. One month should be the minimum period.

Time limits when there is a need to revert to the default procedure

2.35 Point 27 of the draft Notice explains that standard time limits will apply if the SO does not endorse the WSS to enable the company to "present their defence anew", and have access to

file and an Oral Hearing. It is crucial that companies are given sufficient time to research and prepare their defence. It would be a major disincentive if the time given were not sufficient as this would mean that a settling company would also need to prepare a full defence at the same time as the WSS in case the SO did not ultimately endorse the WSS.

2.36 Three months should be given to the companies in order to make these preparations etc.

It is key that the Commission gives companies adequate time to take decisions in the context of settling - both at the outset and during the actual procedure. Failure to give companies an adequate amount of time to take such important decisions will act as a major disincentive to settle. The current proposed time limits are too short and fail to acknowledge that the decision to settle will need to be taken at a senior level within the company and will often involve group companies and raise issues across a number of jurisdictions.

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(FC/GM)