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The Simmons & Simmons EU Competition & Regulatory Group[1] welcomes the opportunity to respond to the Commission's proposals to introduce a settlement procedure for cartels.

General Comments

Simmons & Simmons welcomes the Commission's proposals. In principle, and provided that a workable system is developed which meets the Commission's objectives in terms of timely settlement of cases but which does not unduly compromise defendants' legitimate rights, we would be in favour of a similar settlement process being available in other appropriate circumstances. For instance, such a process could have advantages in some Article 82 cases.

We do, however, have concerns with elements of the package as currently drafted, in particular relating to:

- the elements of uncertainty introduced by the Commission's wide discretion both in deciding whether a case is suitable for settlement and in its ability to abandon the settlement procedure once initiated, as well as by the ultimate capacity of the Advisory Committee and College of Commissioners to undermine the agreed settlement.
- how the Commission proposes to ensure that if settlement fails, acknowledgements – and indeed more broadly, information provided in the course of settlement discussions - cannot be used against the alleged infringers (see the section on uncertainty below).
- a number of practical issues relating to rights of defence, such as the timing of disclosure of the case against settlement candidates (see the sections on timescales and the rights of defence below).
- lack of an express oral procedure (see our comments on paragraph 35 of the draft Settlement Notice below).

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Specific Comments

1 Draft Amending Regulation

1.1 Complainants' Rights

We note the inclusion of a general amendment to complainants' rights (Preamble, paragraph 5, and Article 2). The proposed amendment changes the provision of a copy of the non-confidential version of the Statement of Objections to the complainant from mandatory to discretionary, although the Commission must inform the complainant of the nature and subject matter of the procedure. The preamble suggests that this is necessary to encourage the parties to co-operate. Whilst this may well be the case in relation specifically to settlement of cartel cases (where the Commission would clearly not wish to encourage complainants to challenge the Statement of Objections) the shift is one which will apply to all infringement cases and all statements of objections. In cases other than settlement cases, it would in our view be helpful for the Commission to be aware of all views on the Statement of Objections, including that of the complainant, so as to come to an optimally informed decision. We would therefore welcome some explanation of when the Commission would envision exercising its discretion in this matter.

Article 10a(1) requires two or more parties within the same undertaking to be represented jointly before the Commission. In the light of the UK experience in the outcome of the Independent Schools investigation[2], it may be helpful for the Commission to acknowledge the possibility of an umbrella organisation representing more than one settlement candidate, if groups of defendants choose to proceed on this basis. Also in the Dutch construction cases, companies that made use of a settlement procedure were represented by a single representative. These precedents may be helpful to the Commission both in administrative terms, and also in terms of reaching a common position with multiple defendants. We would not, however, be in favour of the Commission requiring defendants to appoint such a representative or organisation to act for them.

1.2 Timescales

Although we note that Article 17 specifies that the time limits for parties to decide whether to enter into settlement agreements, and to prepare and submit written settlement submissions, will be "at least" two weeks (at least one week to confirm

[2] Schools: exchange of information on future fees, Case CE/2890-03

that the Statement of Objections corresponds to the parties' written submissions), we think it more realistic to increase these timeframes. We are aware of the imperative for the Commission to shorten the duration of procedures, but think that even with the qualification of "at least", these timeframes are perilously short. They are consequently likely to deter settlement as they do not allow defendants sufficient time to assess the impact of any proposed settlement package.

2. Draft Settlement Notice

2.1 Uncertainty

There appear to be substantial elements of uncertainty in the procedure from the perspective of the potential candidate. First, the Commission has a broad margin of discretion to enter into discussions in cases that it considers may be "suitable" for settlement. Paragraph 5 of the draft Settlement Notice indicates a number of factors that may influence its thinking in this respect. The identification of the extent to which the facts are likely to be contested is one that causes us some concern. For instance, would the Commission only be prepared to entertain settlement in circumstances where it considered that all elements of its case would be agreed, irrespective of the strength of its evidence? If so, the number of cases likely to settle would be few, as a party's admissions of fact have an impact on follow-on claims. We would prefer a more measured and workable approach whereby the Commission took account of the strength of its evidence in determining those elements of its case which it would require the candidate to agree. The Commission should then invite settlement on the basis of a realistic and defensible case rather than requiring the candidates to assent to claims which are of a more speculative nature.

Secondly, whilst we appreciate that it should be for the Commission to consider whether a case is appropriate for settlement, we believe that defendants should also be entitled to approach the Commission in the first instance to invite it to assess whether or not settlement might be available in a particular case, rather than the onus being on the Commission to be pro-active in identifying potential cases. This would not have an adverse effect on the Commission's consideration of the case, simply enable a party to approach the Commission first.

Further, the Commission retains the ability to discontinue settlement discussions. It may also issue a Statement of Objections that does not reflect the common understanding reached in discussions. Even if it does so, it may adopt a final position which is different from that in the Statement of Objections following input

from the Advisory Committee and College of Commissioners in their supervisory role. The Commission has indicated that in circumstances in which it does not endorse a settlement, either at the statement of objection or at decision stage, the candidate's acknowledgements in the written submissions would be deemed to be withdrawn, and would not be used against any of the parties to the proceedings. We would welcome reassurance on how the Commission proposes to ensure that in such circumstances acknowledgements – and indeed more broadly, information provided in the course of settlement discussions – cannot be used directly or indirectly against the alleged infringers. We would likewise welcome reassurance that where the candidate, not the Commission, withdraws from the procedure, as it is entitled to do by not providing written submissions, any representations made during the settlement procedure would not be used against them.

2.2 Cases involving multiple defendants

The Commission has indicated that it will provide a uniform reduction to all settling parties in any particular case. The reduction must be substantial enough to encourage settlement, given that earlier settlements are likely to give rise to earlier follow-on damages claims based on the facts agreed between the Commission and the party. There has been speculation as to whether the Regulation will specify a percentage reduction applicable in all cases, or a range of reductions within which the Commission will determine the appropriate discount in a given case. Paragraph 32 of the Notice appears to suggest a single percentage reduction. The Q & As, in contrast, by suggesting that "the settlement reduction will be equivalent for each party having settled", appear to indicate that there will be a range of possible reductions, within which the Commission will identify a figure applicable to all candidates. If the latter, this would raise issues such as whether the ultimate reduction ought to reflect potential differences between the defendants such as the quality of evidence against a particular party. For example, where the Commission's case is stronger against one defendant than against another, arguably there is a difference between the rights that the two parties are giving up, which it would be discriminatory not to reflect in the ultimate discount.

It is also unclear to us whether the Commission is proposing that candidates agree the headline fine for their participation in a cartel, or the headline plus any reductions, including any reduction for settling the case. If the latter, and if the Commission continues with its proposal to grant a uniform reduction to all candidates in a particular case, the Commission must give clear guidance to each candidate on the

level of reductions that it is prepared to accept. This is because such an approach would effectively require candidates not only to assess the level of reduction that they are prepared to accept for relinquishing their rights of defence, but also accurately to judge other defendants' appetites for settlement. We believe that the Commission would be able to indicate the reduction levels that it is likely to accept across the board without breaching the confidentiality of individual settlement processes.

2.3 Bilateral discussions

Paragraph 14 of the draft Notice suggests that the Commission will be prepared to take settlement discussions forward with individual candidates whether or not all potential infringers are willing to settle. However, a number of commentators have queried the possibility, so it seems to us that it would be helpful to underscore this important principle more clearly.

2.4 Rights of defence

Under the Article 10a(2) of the proposed amended Implementing Regulation, the Commission has discretion to reveal to the settlement candidates the objections that it envisages raising with the parties, the evidence in support of those objections, and the potential fines. Paragraph 15 of the Notice makes clear that the Commission has overall control of the timing of the disclosure of information, including the evidence in the Commission file used to establish the envisaged objections and the potential fine. The Commission is to disclose this information "in a timely manner". Paragraph 16 explains that early disclosure will allow the parties to be informed of the essential elements on which the case is based, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimate of the likely fines, and evidence used to establish the potential objections.

Yet paragraph 17 foresees a situation in which the settlement candidate may have reached a common understanding with the Commission on the scope of the objections and the likely fine, without having had disclosed to it the information from paragraph 16. Under the current proposal, the candidate is entitled to the information only at the stage before the Commission sets its final time scale for written settlement submissions - and only on request, at that. The sequencing seems to us to be wrong. It cannot be the case that the parties should be expected to reach a common understanding, or a decision to settle, without having had access to the information set out in paragraph 16. The Notice should therefore be amended to bring forward the entitlement (as opposed to the Commission's discretion to disclose) so that

reaching a common understanding is contingent upon the settlement candidate having been properly informed of the case against it.

2.5. Confidentiality and the protection of documents

Paragraph 35 refers to "written *or recorded* statements received in the context of" the Notice, public disclosure of which, the paragraphs indicates, the Commission "normally" considers would undermine certain public or private interests. There are three points here.

First, it would be helpful if the paragraph went on to specify what consequences the Commission draws from this particular consideration.

Second, one of our major concerns with the draft package is that there does not appear to be protection from disclosure in other jurisdictions (particularly those with criminal sanctions) of statements put forward in the context of settlement discussions. We would urge that an oral procedure at the least mirroring that set out in the leniency Notice be formally incorporated into the Settlement Notice.

Third, we would welcome some clarification of what "normally" means in this context, specifically, what circumstances the Commission envisages would take statements outside the category of "normally" falling within the Article 4 exception in Regulation (EC) No 1049/2001. Our preference would be for the word "normally" to be excised.

We are also strongly of the view that not only all documents on the file, but also the fact that any settlement discussions are being, or have been engaged in, should remain strictly confidential. This is particularly the case given the degree of discretion that the Commission has to withdraw from the settlement procedure.

Simmons & Simmons
21 December 2007