Submission in relation to the Commission's proposed adoption of a settlement procedure in cartel cases

Introduction

1. This note is submitted by Dundas & Wilson LLP as a brief response to the Commission's request for comments on a proposed settlement procedure. These comments should not be taken to represent the views of any of D&W's clients.

2. Whilst welcoming the proposals for a settlement procedure, Dundas & Wilson LLP has a number of concerns regarding the proposed arrangements. Essentially they relate to the lack of flexibility of the proposed arrangements and the risk that the lack of information available to a party considering a settlement will induce it to settle on terms less advantageous than those that it might have secured following fuller disclosure of the case against it.

Lack of flexibility

3. One of the emerging features of the settlement procedure of the OFT and UK regulators is its flexibility. The cases in which the OFT and regulators have accepted settlements have all made use of the procedure in different ways – nominal fine and payment into a charitable fund in *Independent Schools*, 35% reduction in penalty in return for not contesting the ORR's findings in *English Welsh & Scottish Railway*, public offer of a reduced penalty in exchange for admission of infringement in *Construction bid-rigging*, announcement of a reduced penalty in return for an admission of the facts in *British Airways – passenger fuel surcharges*, and similar early resolution in *Supermarkets – dairy products*. This flexibility has allowed case-handlers and parties to craft the settlements more effectively to address the particular circumstances of each case. In contrast, the Commission's proposals appear unnecessarily rigid, with strict timetables and procedures, and there is a risk that this complexity and lack of flexibility will make the procedure less attractive. Whereas flexibility is less important in the context of a conventional contentious procedure, we believe that settlements rely on a greater degree of trust between the alleged infringer and the competition authority, and therefore require a greater degree of flexibility.

4. We also see no reason to restrict the settlement procedure to cartel cases. There is no reason why it should not also be available in other Article 81 cases, and in Article 82 cases. The *EWS* case mentioned above related to a finding of an abuse of dominance, and there is no indication that the case was any less deserving of, or suitable for, settlement than any cartel case.

Lack of transparency

5. We note that the Commission proposes that once settlement discussions have been started, parties will be entitled to see only selected items from the Commission's file, and only in so far as the Commission considers it justified (paragraph 17 of the draft Notice). There appears to be no general right of access to the Commission's file.

6. We support the Commission's objective of securing quicker resolution of often protracted cartel cases. We understand the need, in order to do so, to streamline the process of issuing a detailed statement of objections and preparing the Commission's file for access. However, we believe that the grant of only partial access to the file gives rise to two key issues. Firstly, as a legal matter, we question whether – even if the parties expressly give what is in effect a waiver, as contemplated at paragraph 20(d) of the draft Notice – the European Court will accept that the rights of the defence have been properly observed.

7. Secondly, and this is our most significant concern in relation to the proposed procedure, there is a risk that lack of transparency at this stage will lead to parties offering settlements on terms that do not accurately reflect the level of their involvement. In many cartel cases, there will be debate as to the scope of each party's involvement. Even where an undertaking accepts that in principle it has taken part in a cartel, it will not always know the exact scope and duration of its participation. Whereas it appears that the Commission will identify key evidence and presumably key inculpatory documents so that the undertaking can assess the strength of the case against it (paragraphs 16 and 17 of the draft Notice), access to exculpatory documents is equally important in order to test the strength of the Commission's case and its interpretation of genuinely equivocal documents. We do not believe that this undermines the essentially consensual nature of the settlement process. Instead, it ensures accurate self-assessment of liability, making settlements fairer, and equally important in view of the Commission's enforcement objectives, more likely to be accepted and to remain accepted. Against the objection that parties will be given a list of the accessible documents on the file and therefore can request exculpatory documents if they wish, we simply point out that it is often not clear that a document contains important exculpatory evidence until after it has been individually reviewed, and that the Commission is rarely best-placed to appreciate the value of such evidence (and indeed for understandable reasons does not always have an incentive to highlight it to the parties).

8. In summary, therefore, we believe that it is essential that settlement negotiations should provide a facility for full access to the file if requested by parties. In many

cases they will be fully aware of the scope of their involvement and will not need to take up the facility in order to come to an accurate assessment of a fair penalty. In others, however, parties will wish to be able to satisfy themselves that there are grounds for them to offer a settlement at a particular level of penalty, and will need to review the evidence in order to do so. Directors of companies will have a duty to shareholders and others not to accept a settlement without proper justification and analysis. We do not believe that this is inconsistent with the objective of the settlement procedure, and in fact we believe that it is more likely to lead to consensus, robust settlements and greater acceptance of the procedure.

Conclusions

4. The introduction of a settlement procedure is a welcome development, but the procedure needs to offer flexibility and comfort to undertakings that propose to enter into settlement negotiations. The Commission's proposals are a very strong step in the right direction, but greater flexibility and above all better access to the Commission's file are necessary refinements.

Dundas & Wilson LLP

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