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Draft Legislative Package on Settlement Procedure in Cartel Cases – Comments by Gianni, Origoni, Grippo & Partners

The European Commission published on 26 October 2007 a draft legislative package aimed at introducing a "settlement procedure" in cartel cases. The legislative package includes a draft Proposal for a Commission regulation amending the Commission regulation n. 773/2004, and a draft Notice setting out the procedure to be followed in settling cartel cases. Simultaneously the Commission has opened a public consultation on this package which will be closed on December 21, 2007. The Commission intends to adopt this legislative package in 2008.

This new settlement procedure will give companies the possibility to obtain a reduction of the amount of the fine that the Commission would impose on them for their involvement in a cartel, in exchange for an admission of their liability in the terms envisaged by the Commission and a waiver of some procedural rights of the defence. The percentage of the reduction to be applied has not yet been determined. The Commission will decide on this issue following the conclusion of the public consultation.

In our view the Commission's above mentioned proposal is to welcome. It is expected that the introduction of a settlement procedure will have positive effects not only for the Commission in

terms of procedural savings, but also for the private companies which will have the chance to have reduced fines and lower administrative and legal costs.

That said, in our view, there are some aspects of the Commission's proposal that may be further improved: a) the form of the WSS; b) the level of protection of the interests of the parties involved; c) the amount of the reduction of the fine; d) the lack of incentives for a more effective cooperation in favour of the parties willing to settle.

Inspiration for some amendments should be drawn from the US plea-bargaining system.

Sub a) while the US system does not require written submission by a party acknowledging liability before the plea agreement is concluded, the proposed European legislation requires a written WSS. We believe that there are no reasonable explanations for the fact that the parties are not allowed to make oral settlement submissions instead of written ones.

Oral submissions are indeed provided under the Leniency Programme. This oral procedure has been introduced in order to protect applicants from the operation of discovery rules which apply in damage proceedings in some jurisdictions such as in US. The same concerns may arise with respect to the WSS.

Sub b) it seems that under the proposed Settlement procedure the Commission enjoys a wide discretion as to which evidence to disclose and finally as to whether to settle or not.
More specific rules as to the level of information that the parties are entitled to receive before deciding to settle would certainly render the settlement procedure more appealing for the companies involved in a cartel.
Of even major concern is the fact that the Commission can until the very end of the procedure refuse to settle. The position of the Commission and the one of the parties are extremely unbalanced, since the parties are bound after they submit the WSS, while the Commission can always "change his mind" and depart from the settlement submission of the parties until the very end of the procedure, that is, until the issue of the final Decision.
In this respect the Commission's proposed system will offer less guarantees to the companies than the US System does. Indeed, a US plea agreement is binding on the US Antitrust Authority once a court approves it.
This uncertainty will discourage many companies from applying for the settlement procedure, all the more where a cartel involves many companies and there is therefore a high probability that some companies involved in the cartel will not settle, and that consequently the Commission will find not convenient to settle with only some of the companies involved in the cartel.
From all above we believe that the proposal should better clarify what would be the normal outcome of settlement discussions when only some companies involved in a cartel submit a WSS.

Sub c) the Commission should take in due account that the success of the settlement procedure depends on whether the defendant companies have sufficient incentives to enter into settlements, and therefore the reduction of the fine should be substantial. As a matter of fact a 10% reduction would not induce to settle companies which may expect to be condemned to huge fines. In addition it should be considered that the willingness of a company to settle the case will depend on the level of information that the Commission is willing to give to the parties as to the fine that it intends to charge. Therefore the procedure should provide for a kind of obligation of the Commission to quantify the fine and the relative reduction before the company signs the WSS.

Sub d) the proposed settlement procedure will not allow for any differentiation of the reduction of the fines between the parties of the same cartel, while under the US plea bargaining system the cartel members may be rewarded if they provide valuable information about the cartel to the US

antitrust authority. Through this mechanism US authorities are able to induce companies to cooperate more effectively.

The European settlement procedure would indeed be more effective if it rewarded the applicants differently depending on the degree of cooperation that they provide within the context of the Commission's investigations.

The Commission justifies the above choice alleging that a company can combine the benefits from the leniency program and those from the settlement procedure, and that the settlement procedure does not constitute an investigative tool.

However, we believe that the Commission should not endorse such a rigid approach in designing the settlement procedure, and that to reward a company for its cooperation could be useful also within the context of a settlement procedure.