

**JOINT WORKING PARTY OF THE BARS AND
LAW SOCIETIES OF THE UNITED KINGDOM (“JWP”)¹**

COMMENTS ON THE COMMISSION'S DRAFT SETTLEMENT PACKAGE

1 Introduction

On 26 October 2007 the Commission announced a package of proposals designed to allow for the settlement of cartel cases. The proposals envisage the adoption of a faster, simplified procedure in such cases, thereby freeing up Commission resources to pursue more cases. The proposals consist of a draft Commission Notice and a draft Regulation amending Regulation 773/2004. The proposals were published in the Official Journal on 27 October 2007². The JWP welcomes the opportunity to comment on the Draft Package.

2 General Observations

- 2.1 The JWP supports the proposal to introduce a settlement process recognising that, in appropriate cases, such a process could provide a valuable mechanism for efficient administration and the reduction of costs.
- 2.2 The JWP has a number of comments, concerns and reservations on aspects of the Draft Package. They are set out below, starting with the settlement reduction percentage which will be central to the success of the proposals. Many of the other comments are aimed at improving the clarity of the Draft Package as the JWP is concerned that uncertainties in the current draft could materially reduce the attraction of settlements. The JWP is also concerned about implications for the Commission's leniency programme; time limits; fairness where no settlement follows a good faith offer to settle; and the impact on follow on litigation.

Reward/discount

- 2.3 A key aspect of the Draft Package is the settlement reduction percentage.
- 2.4 The JWP recognises the need to ensure that the settlement package should not harm the Commission's leniency policy. Nevertheless the JWP believes that given the complex interaction with accelerated (and possibly increased) litigation exposure, the discount for settlement will need to be significant. The JWP can see that a common discount in any individual case will ensure non-discrimination. A common discount for all cases will also provide a degree of legal certainty. The JWP believes that an appropriate figure would be either 25 or 30 per cent. The reduction should be applied (as proposed) before taking into account any reduction for leniency so that it is cumulative with any leniency reduction.
- 2.5 The JWP supports the proposed limit on the deterrence multiplier in settlement cases.

¹ The members of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law comprises barristers, advocates and solicitors from all three UK jurisdictions; the membership includes both those in private practice and in-house. Its secretary is Louise Speke of the Law Society, 113 Chancery Lane, London WC2A 1PL (telephone: 020 7242 1222).

² OJ, 27 October 2007, C255/51.

- 2.6 Commission staff have invited comment on whether the discount should apply to the total fine (a “headline approach”) or to particular components of the fine. The JWP considers that applying the discount to the final amount sends a clearer, simpler message. Applying it to the basic amount may -- or may not -- lead to a lower fine (other things being equal). That said, the uncertainties about the application of the fining guidelines and its evolution are such that the JWP is reluctant to put too much weight on this and so would endorse use of the simpler, headline approach.

Lack of clarity

- 2.7 Following publication of the Draft Package, Commission officials have provided useful guidance on how they envisage the proposals working in practice, both by comments that they have made about the proposals in public and also by discussions with members of the legal community, including members of the JWP.
- 2.8 The JWP accepts that it may not be appropriate to include in the Notice full details of the procedures that the Commission expects to use, since the Commission needs flexibility to refine and adapt its processes in the light of experience. However, the desire for flexibility needs to be balanced against the need to ensure that the procedures are explained with sufficient clarity. The JWP considers that the current version of the Draft Package fails to achieve that objective; and that the Commission should be more transparent about the processes and procedures that it intends to use, either in the final draft of the Notice or in some indicative but non-binding Statement of Intended Practice.

3 Initiation of the Process

- 3.1 The proposed revisions to Article 2.1 of Commission Regulation 733/2004 suggest that it is for the Commission to initiate the settlement process. This is reflected in para 6 of the Draft Commission Notice. Yet in discussions with Commission staff it has also become clear that, in some cases (e.g. one involving leniency applications) they expect that parties might “signal” a willingness to settle. Similarly discussions with Commission officials have clarified their expectation that the process would be iterative and move from an informal to a formal stage. These points are entirely understandable. The JWP recommends that they should be reflected more clearly in the Notice in order to ensure common expectations.
- 3.2 ***Leniency*** : Commission staff have suggested that they expect leniency applicants to signal a willingness to settle. The JWP has a number of comment on this:
- there may well be situations where leniency applicants are willing to settle and indicate that to the Commission;
 - however the potential discoverability/disclosure of settlement related documents (particularly in light of the suggested requirements of acknowledgements of liability and for these to extend to parent companies)) may mean that for entirely valid reasons a company will want to distinguish its position on leniency from its position on settlement;
 - consequently it ought to be clear (and explicit) that a leniency applicant should not be expected or required (whether in the context of the duty of ongoing

cooperation or otherwise) to participate in settlement; indeed such a requirement may well make leniency less attractive.

4 Process following initiation

- 4.1 **Time limits:** The JWP considers that the periods proposed under Article 10a(1) and 10a(3) are unduly short and risk being seen as having a coercive effect. It is not clear to the JWP (especially in light of this potential concern) why the minimum period in the Draft Notice referred to in Article 10a(1) and 10a(3) should be as short as 2 weeks and 1 week respectively. Given the likely need for consideration at Board level the JWP suggests that 4 weeks should be the minimum for Article 10a(1); and that the minimum period under Article 10a(3) should be 3 weeks. Similarly, it is suggested that a period of four weeks should be the minimum under Article 10a(2), again, given the likely need for consideration at Board level. In any event the Commission should be transparent that it would normally allow significantly longer periods.
- 4.2 **Bilateral discussions:** The JWP welcomes the acknowledgement by Commission staff that the Commission would be prepared to listen to representations made in the settlement context about the validity or interpretation of the Commission's evidence. The JWP believes there is a line between (1) reaching proper understandings on the facts, nature, duration of infringement and issues relevant to the determination of the fine (which are inherent in the process) and (2) "negotiation", which the Commission objects to. The JWP considers that the Notice should be clearer about this distinction.
- 4.3 **Disclosure by the Commission:** The JWP believes more transparency is required about the extent of disclosure by the Commission. The JWP accepts that settlement must deliver efficiency advantages for the Commission, but it is concerned that the proposals may not deliver sufficient access to essential evidence for the parties. Whilst paragraph 16 of the Notice is helpful the JWP believes it should be more explicit that disclosure will (and must) include the evidence in the file in relation to liability and all matters relevant to the determination of the fine. This should include exculpatory material or evidence going to mitigation. The JWP understands from Commission staff that this is the intention -- and considers that the Notice should be clear about this. The JWP is also concerned about an (apparent) intention to "drip feed" disclosure of evidence relevant to the issue of "liability" and only subsequently to disclose evidence relevant to the level of fines. It is believed that a fuller disclosure of all evidence at an early stage is more likely to result in a willingness to settle.
- 4.4 **Disclosure by the parties:** The draft Notice refers to the Commission's discretion as to the timing and sequence of discussions. It also requires the parties not to disclose the content of discussion (or documents). It is not clear whether this is intended to cover the "fact" of the discussions as well. Yet the Commission will end the process with a uniform/non-discriminatory outcome among settling parties. The JWP considers that parties should be free to discuss at least the fact that they are in discussions. Indeed this may lead to greater participation in settlement discussions.
- 4.5 **Fairness between parties:** The JWP is concerned about the issue of fairness in the treatment of cases. To illustrate the concern, assume the Commission wants to encourage settlement offers in a case, the question then arises of the position of the

company ("A") which indicates its willingness to settle (and therefore its recognition that at least part of the Commission's case against it will be difficult to rebut):

- if other parties to the alleged cartel do the same and the Commission accepts the case for settlement, A gets a reduction;
- if other parties do the same but the Commission does *not* accept the case for settlement, all the parties have disclosed their hand (at least in part): why should they not get a reduction?
- if other parties do not enter settlement discussions and the Commission does not accept the case for settlement, there is nevertheless nothing more A could have done -- is it right that A should be deprived of all or any reduction for settlement as a result of factors outside its control?

4.6 If A would not obtain a reduced fine in the second and third cases, then -- given particularly the prohibition on parties discussing the detail of settlement processes with each other -- there may be a disincentive to participate in settlement offers.

4.7 This argument applies to any party that expresses a good faith intention to settle. It seems particularly compelling once the Commission has started the process under Article 10a(1). However, if that process will in practice only be triggered after extensive informal discussions the argument may be valid at an earlier stage.

4.8 The Commission should consider amending the Notice to reflect a policy that good faith intention to settle will lead to a discount (if not the full settlement discount), even if the case is ultimately not settled.

5 Other issues with hybrid cases³

5.1 **Publicity and litigation:** It is unclear what the Commission intends by way of publicity generally and particularly in hybrid cases. Given the parties' exposure to private litigation there seems no good policy reason why settlement parties should be exposed to a higher risk of litigation -- or a risk of earlier litigation -- than non-settling parties. This would suggest no publicity and no formal decision until the final decision was reached. To avoid undue uncertainty the settling parties would nevertheless want comfort that their offer is or will be accepted. Alternatively, the decision could be taken at the end of the settlement discussion, but neither published nor announced until that stage is reached for the non-settling parties.

6 The WSS

6.1 **Litigation:** The interaction of the settlement process and private litigation exposure arises very starkly in relation to the proposed requirements for the WSS. The Commission wants written acknowledgements of liability. These or at least some of the documents leading to their creation will likely be discoverable. The risk that the Commission might ultimately decide not to proceed to a settlement decision even after a WSS has been given further compounds the risks for companies in this context. This could be a particular concern for a party with the benefit of a conditional immunity decision (of 100%), because the settlement process cannot offer it any benefit in terms

³ "Hybrid cases" are those where the Commission achieves a settlement with some parties but not with others.

of a reduced fine and its primary concern will therefore be to minimise its exposure to private litigation. To avoid potentially serious damage to the Commission's leniency regime, the JWP believes that the Commission should consider using procedures similar to those used in oral procedures in immunity/leniency applications. The JWP understands that the Commission is considering the use of a standardised, short-form WSS, prepared by the Commission on the basis of discussions with the party concerned which, after agreement with the party, would be signed by the party and kept at DGCompetition. The JWP supports this proposal. The JWP would also urge the Commission to consider confining the WSS to an acceptance of facts rather than of liability. If it does not, settlement could become unattractive in cases where there is a material private litigation risk, especially where the case may be a hybrid one.

- 6.2 The JWP understands that one of the Commission's concerns in this regard is to ensure that there is an acceptance of liability by parent companies, or companies that have acquired a business. The JWP believes that alternative formulations short of acceptance of liability would achieve the same end (e.g. acceptance of the elements that would lead to parental liability if there were an underlying substantive infringement).

7 Statement of Objections

- 7.1 The JWP hopes that this is only a matter of semantics but a potential issue arises in relation to the nature of the relationship between the scope of the WSS and the S/O. It should be explicit that if the WSS discloses an acceptance of facts [or liability] for

- cartel in product A for 2004-5

and the S/O alleges

- cartel in product A for 2003-2006; or
- cartel in product A for 2004-5 and in product B

then that is not an "endorsement" of the WSS.

8 Decision and Process

- 8.1 The mechanics for withdrawal and non reliance on a WSS in the event of a full procedure is not clear.

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