

STUDIO LEGALE

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COMMENTS OF *GRIMALDI E ASSOCIATI*

ON THE

EC DRAFT LEGISLATIVE PACKAGE TO INTRODUCE SETTLEMENT PROCEDURE FOR CARTELS

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1. Introduction

Grimaldi e Associati is honoured to express its comments on the legislation package consisting of a draft Commission Notice and a draft Commission Regulation amending Regulation (EC) No. 773/2004¹ (hereinafter, the “Draft legislation”), aimed at introducing a settlement procedure for cartel cases.

The legislation package has been published on 26th October 2007, in occasion of the launch of the EC Commission (hereinafter, the “Commission”) public consultation on the Draft legislation².

As pointed out by the Commission in publishing the initiative, the EC settlement procedure deals with cartel cases where the parties not only acknowledge their involvement in the cartel and their liability for it, but also agree to cooperate and engage in settlement discussions with the Commission, in order to enjoy the benefit of a faster and simplified procedure.

The introduction of settlements is therefore undoubtedly to be welcomed, insofar as it aims at simplifying the administrative proceedings and could reduce litigation before the EC Court of First Instance arising from cartel cases. Moreover, according to the Draft legislation, the procedure would allow the Commission to impose a lower fine on parties who agreed to the settlement procedure.

In consideration of the remarkable purposes of the initiative, in what follows *Grimaldi e Associati* deems useful to share its views on some selected critical aspects emerging from the analysis of the Draft legislation.

2. Remarks on the Draft legislation

2.1. *EC Commission discretion and the parties’ right of defence*

The wilfulness of the parties to accede to a settlement procedure (and therefore the very success of the Draft legislation) may be hampered by the uncertainty on some

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27 April 2004, p. 18–24.

² The documents are available on the website of DG Comp, at the following address: <http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html>.

key elements, the definition of which seems to depend too much on the discretion of the Commission.

In this respect, reference could be made, for instance, to the amount of the reward for settlement. Indeed, such amount is not provided for by the Draft legislation. As far as this element is concerned, we argue that the Commission discretion should be limited, in order to grant a more effective and precise reward to the parties.

Another critical issue (perhaps even more important) appears to be the lack of guidance on the definition of the cases which could benefit of the settlement procedure. Also on this point, we consider that the discretion of the Commission should be guided by expressed general criteria. We suggest therefore to introduce in the Draft legislation some basic criteria to be applied by the Commission, when selecting the cases considered to be eligible for a settlement procedure.

To conclude on this point, we believe that a better definition of the “starting point” (*ie.* the selection of eligible cases) and the “final point” (*ie.* the reward for settlement) may contribute to ensure the success of the new procedure, as well as the right of the parties to a fair application of the procedure.

2.2. *EC settlement and leniency programme*

The Draft legislation clarifies that cooperation in settlement is different from that covered by the Leniency Notice, and that provided that an undertaking’s cooperation qualifies under both Notices, the rewards could be cumulative.

However, such a vague definition of the relation between settlement and leniency appears to be problematic. Particularly, it introduces uncertainty on the reward to be granted to the parties under each different regime. In other words, the lack of clarity on the rewards could make it difficult, for the parties, to understand whether the weakening of procedural rights and guarantees characterizing settlements is actually balanced by the saving of time (and possibly money) which should be granted by the said procedure.

Furthermore, in order to avoid the risk of a general distrust towards EC settlement procedure, we consider that it could be useful to expressly underline, in the Draft legislation, the additional benefits that the settlement procedure could attribute also to those parties that (for different reasons) are not eligible for leniency programmes.

In fact, only a better clarification of the “added value” of settlements, in comparison with the leniency programme, could generate the perception that the EC

settlement procedure, while freeing Commission's resources to deal with a bigger number of cases, is an additional clear-cut and practicable tool to the benefit of private parties involved in cartel cases.

2.3. EC settlement and private enforcement

The Draft legislation does not seem to assess another issue which could reveal to be decisive for the practical success of the EC settlement procedure. The issue at stake is the relation between settlement and private enforcement.

In fact, when evaluating the opportunity to enter into a settlement, the parties should be aware that when having admitted their liability for an infringement of Article 81 of the EC Treaty, they would not be able to deny the consequent responsibility in follow-on action for damages cases.

In this respect, on the other hand, it should be noted that settlement procedure's decisions are likely to have a minor impact as far as the causation of damages and their amount are concerned, since those decisions would offer less probation elements on these issues.

This could represent quite a fair balance between the interest of the undertakings not to face excessive follow-on litigation, and the right of consumers to gain compensation for damages for breach of competition law.

In any case, due to the importance of the issue at stake, a better clarification on this point by the Commission appears to be necessary, in order to avoid more uncertainty on the implications to be faced by the parties.

3. Conclusion

Grimaldi e Associati warmly welcomes the EC Commission initiative on settlements, since it aims at simplifying the administrative procedure and potentially reduces the burdens to be faced by private parties involved in such cases.

Nonetheless, in order not to frustrate such remarkable aim, we deem necessary to introduce some clarifications in the Draft legislation, aiming at reducing the discretion of the EC Commission on some key elements of the procedure.

As mentioned above, the introduction of a few simple guiding criteria may better guarantee the fundamental right of the parties to a fair procedure, while avoiding excessive litigation before the European courts.

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