SVENSKT NÄRINGSLIV
CONFEDERATION OF SWEDISH ENTERPRISE

European Commission
Competition Directorate-General
Unit G5 – Cartels V
Settlements package
B-1049 Brussels
Belgium

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Proposed Settlements Package

The Confederation of Swedish Enterprise would like to offer the following comments on the Draft Commission Regulation and Guidelines.

Basic position

In our view, a settlement mechanism could have significant attractions for companies, and rationalise the decision making process in (some) antitrust cases. We are therefore in favour of the introduction of such an instrument - in principle. However, for the scheme to work effectively it needs to provide substantial and certain benefits for the companies involved, the absence of indirect negative effects included. We have some strong doubts as to whether the proposal meets the necessary requirements of transparency, predictability and overall legal certainty.

Comments

The fundamental problem with the proposed package is the Commission's extremely wide-ranging discretion and the ensuing lack of predictability and legal certainty. In a compressed way one can say “great idea, bad design”.

- The Commission seems to have overlooked the most basic feature of any settlement scheme, namely that it is by nature voluntary and therefore has to be clearly advantageous to those to whom it is addressed.

- It is a fundamental requirement that the settlement procedure is capable of closing the case within a significantly shorter timeframe than the usual one. Also, the reduction of fines needs to be substantial and verifiable, i.e. companies must be able to establish that they actually did get a worthwhile discount as compared to what had otherwise been the case. In other words, you need to be certain it pays off to go down this fast track, and that it really "puts the lid on". The

proposal opens itself to serious questioning on both these decisive points. The documents are silent on the envisaged timeframe, and the reduction of fines is yet to be laid down. However, the Commission says (see Q & A) the expected reduction will be more significant under the leniency programme, than under the settlement procedure. The lowest leniency bracket is up to 20 %; does that mean settlement rebates will be significantly below 20 %, and if so, would that create the necessary incentive?

- The fact that the Commission reserves full discretion at virtually every stage is a major dent in the whole system. The Commission is free to accept or reject any request for settlement, but not only that; it decides quite freely on the modalities of the proceedings (bilateral, sequence and contents of meetings etc) and, in particular, what and how much of the relevant evidence will be disclosed to a company concerned - and when. Parties may be given access to certain documents "upon reasoned request", but again the Commission can deny that without further ado.

  This forces companies to play poker with an open hand, while they have no right at all to make the Commission lay its cards on the table. Moreover, before there is any settlement, companies have to give up their rights of access to file. This seems to render it very difficult to verify and elucidate the outcome of the exercise, even afterwards. (Question is, what happens if a party decides to appeal; will that open the file, or is one supposed to appeal without knowledge of the evidence?).

- Further, companies are not only to acknowledge their liability for the infringement, they are also requested to describe their illegal actions themselves. There is nothing in the documents on possible follow-on effects, but if self-incriminating statements are allowed to form part of the basis for private actions for damages, then this will have to be taken into account and will necessarily be a disincentive.

  Hence one need to know precisely what the Commission's policy is intended to be in terms of protecting or publishing - directly or indirectly - information and documents on the settlement. An option could be to allow for oral statements as under the leniency programme. At any rate, it is not acceptable that parties to a settlement be put in an adverse position in terms civil litigation and media exposure, than if they had not cooperated with the Commission. They should rather enjoy enhanced protection.

- The Commission seems adamant it will not "negotiate", but will nonetheless hold discussion rounds. We understand the determination not to enter into a pure bargaining where guilty pleas are swapped for reduced or dropped charges. However, the Commission goes on to say the "appropriate sanction" is not negotiable, while the "potential maximum fee" is permissible as a topic for discussion. It is difficult to comprehend how a system of settlement could be operational in practice without an element of give and take. It seems the discussions on fines would serve the purpose of establishing a target amount in

accordance with the fining guidelines (which in themselves give the Commission a lot of latitude).
Companies are then to file a formal request for settlement (WSS) in which they must indicate the estimated potential fine. If we understand it correctly, the Commission will then decide to endorse this or not, and *may* reduce the fine. At the same time the companies are bound by the WSS, and cannot one-sidedly withdraw from it, despite the fact they did not have full knowledge of the final outcome when the WSS was filed. If they are discontent when informed of what they have settled for, they can only appeal (which really runs counter to the settlement idea).

A risky gamble

- All this taken together seems to add up to a rather risky gamble for companies. The scheme is opaque. Given the Commission's overall discretion and the general degree of uncertainty it will, at least in some cases, be difficult for companies to convincingly verify that they actually got a substantial reduction, as compared to what would otherwise have been the outcome. Worse, it makes it even more difficult, to say the least, to assess beforehand what the likely result will be. That does not seem like a viable proposition.

- If, at the end of the day, there is no settlement, then whatever has transpired cannot be used against the companies. Fine, but Commission officials will still have the knowledge, and be able to take advantage of it in terms of emphasis, tactics etc when pursuing the case, unless, of course, there are internal Chinese walls.

- The Commission does not explain how the proposed scheme gets round recital 13 of Regulation 1/2003. There is a clear need for the Commission to clarify its reasoning on this point.

Summing up

To sum up, the proposal needs to be revised with a view to substantially increase the transparency, the predictability and the overall legal certainty. Rules must be clear on rights and obligations, consequences and benefits.

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Anders Stenlund