

Heller Ehrman (Europe) LLP

**Comments on the Commission's draft legislative package
to introduce settlement procedure for cartels**

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1. We welcome the publication of the Commission's proposed settlement procedure for cartels. The proposal has potential to bring substantial efficiencies and cost savings not only to the Commission but also to private parties. However, several issues need to be addressed to ensure that the settlement procedure remains attractive to parties and that envisaged efficiencies are not lost. We discuss this below.

Fine reduction and Settlement submission

2. By way of general remark, businesses have an incentive to settle a cartel investigation if it is likely to result in lower costs than what would follow from a full blown investigation and subsequent appeals to the European courts. If those savings are not obvious, businesses may prefer to fight it out with the Commission in a full investigation and subsequent appeals to the Court of First Instance ("CFI") and the European Court of Justice ("ECJ"). In such scenario, of course, the cost savings envisaged in the proposal would be lost.
3. We have two key issues with the proposal. First, we are concerned that the size of the carrot - the fine reduction - will not be attractive enough to achieve what the Commission is aiming for. Given the CFI's practice of reducing the Commission's fines, it is essential that the Commission sets the reduction at a level which includes, but is not limited to, the discount typically awarded by CFI on cartel fines. Only if parties are convinced that that they are better off settling than they would be following an appeal will the system be a success.
4. Second, the introduction of a Written Settlement Submission ("WSS") increases the parties' exposure to private follow-on litigation. The potential downside of having the WSS produced in such litigation cannot be emphasised enough. Claimants may use this in support of damages actions seeking awards substantially higher than the fine imposed by the Commission. Thus any increase in a company's risk of having private damages awarded against it carries substantial cost.

5. To address this concern, the Commission, we respectfully submit, should consider dropping the WSS in favour of an oral procedure, similar to the practice in leniency applications. This would eliminate the risk of unwanted third party discovery.
6. Separately, it is essential that the WSS – should the Commission decide to introduce this – or any oral statement by the parties are not used against the parties should the Commission adopt a statement of objections which does not endorse the settlement or otherwise reject the settlement. Thus we welcome the statement in the draft Notice that in such circumstances “[t]he acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used against any of the parties to the proceedings”. It is important that the same principle applies if the settlement does not result in a final decision for any other reason and we would welcome such clarification.

Same level of discount for all settling parties

7. The Commission will give each party settling with the Commission the same fine reduction.
8. An alternative approach would be for the Commission to give higher discounts to parties settling early on in the procedure and lower to those holding out, the theory being that parties would be incentivised to settle early on. For a couple of reasons, however, we don’t believe such system would benefit the process:
 - (i) It is important that the settlement procedure is transparent and that parties know what to expect from the Commission. Only if parties can identify the benefits of settling in a clear fashion will the Commission maximise the potential of the settlement procedure. A system with equal discounts is inherently clearer than one where the Commission has discretion to set the discount, or a system where the Commission has a sliding scale of discounts depending on timing of the settlement submission and, due to confidentiality, no one knows where they are on the scale. Thus a common discount increases transparency and for that reason makes the procedure attractive.
 - (ii) Parties holding out will have a low incentive to settle if they know the reduction will be small. And note: they may have perfectly legitimate reasons

for not initiating settlement discussions early on. In particular, the Commission might not have produced conclusive evidence in support of the party's involvement in the alleged cartel. If not all parties settle some of the Commission's efficiencies will be lost. For example, the Commission will have to produce a full statement of objections and give full access to the file. Hence it seems important that the Commission maximises the chances of party-wide settlement by giving parties a substantial discount even if they settle late.

Transparency

9. The Commission intends to increase transparency by giving parties "*the likely range of fines*" prior to the decision. This is a major improvement to the current system, assuming the range is not too wide. Achieving clarity on the likely level of fine is always of great importance to parties and an increase in such transparency would be welcome.
10. It is also essential that DGCOMP keeps an open dialogue with parties on other elements of the WSS – or oral submission, should the Commission opt for this alternative - so that when the WSS is filed, it is effectively a done deal, subject to approval by the college of commissioners.

Commission discretion in settlement "discussions"

11. It takes two willing parties to reach a settlement. It is therefore not surprising that the Commission retains a right – in the same way as parties have a right - to refuse entering into settlement discussions.
12. However, the proposal for conducting settlement discussions seems overly rigid and formalistic. In particular, no negotiations are supposed to take place: "*[t]he procedure will not give companies the ability to negotiate with the Commission as to the existence of an infringement of Community law or the appropriate sanction*".¹

¹ Commission press release *Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels – frequently asked questions*, MEMO/07/433, 26.10.2007.

13. We query whether this is how the system will work in practice. Indeed, the Commission recognises that parties will “*have the opportunity to influence the Commission’s objections through argument*”.² This bears the hallmark of negotiation and it seems to us that flexibility and transparency would increase if the Commission agreed and recognised that negotiations will take place.
14. Negotiation is also the way in which private parties reach settlement agreements and we do not see any fundamental reason why the Commission should adopt a different approach.

Reduced rights of complainants

15. The Commission proposes limitations to the right of complainants in Regulation 1/2003 investigations. Complainants will no longer have an absolute right to receive a non-confidential version of the statement of objections (SO). Rather, the Commission “may” provide complainants with a copy of the SO.
16. It appears that this proposed restriction is of general applicability to Regulation 1/2003 investigations and is not limited to cartel investigations. In fact, a general limitation of third party rights would be of more relevance to antitrust and abuse of dominance investigations where complainants play a more important role than in cartel investigations.
17. It is of course unfortunate when the Commission has to backtrack on legislation only three years old, but we believe a reversal to the old system would be beneficial and we would welcome such development. Now, it is not clear how the Commission would interpret “may”. As we understand the old regime, complainants had to “earn” the right to receive an SO. And the way to earn it was to participate actively in the Commission’s investigation by filing well reasoned and substantiated submissions expressing opinions on various matters being investigated by the Commission. Although this gave wide discretion to the Commission, our view is that the system worked rather well.

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² *Id.*

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