Comments on the Commission's draft legislative package introducing a settlement procedure for cartel cases[*]

Competition Law Research Centre (Hungary)

Versenyjogi Kutatóközpont, H-1088 Budapest, Szentkirályi u. 28., Hungary
E-mail: info@versenyjog.com

Working group of the Competition Law Research Centre on settlements.

Headed by: dr. HORÁNYI Márton

1. Introduction

The Hungarian Competition Law Research Centre welcomes the Commission's initiative to create a procedure for settling cartel cases, and appreciates the opportunity to submit comments on the Commission's draft legislative package.

We are convinced that the introduction of a settlement procedure in European antitrust law is appropriate. A well designed procedure could significantly enhance the efficiency of antitrust enforcement, thereby leading to a higher level of competition compliance. To realize its benefits, the procedure must, however, offer sufficient and well balanced incentives to the targets of the investigations (also in connection with the interfaces to leniency and private enforcement), and must ensure utmost transparency.

2. The SO should be issued before the submission of the written settlement statement

The current design of the settlement procedure establishes a front-loaded system in which the settlement negotiations start early on in the administrative proceeding, leading to the submission of the WSS before the notification of the SO. This design is inadequate for several reasons discussed below, and a system where the SO precedes the WSS is preferred.

The Draft Notice itself refers to the importance and the indispensability of the SO, as its function is "*to give undertakings … all the information necessary to enable them to defend themselves properly, before the Commission adopts a final decision*"[†] However, under the current design of the settlement procedure, the SO cannot serve this function: parties are already bound by their WSS, in which they have acknowledged – besides the facts of the infringement and their liability for it – having been sufficiently informed of the Commission's objections, and having been granted the possibility to exercise their right of being heard. In the current framework proposed by the Commission, the SO is thus treated as a mere formal pre-condition for adopting the final decision.

Nevertheless, in the procedure proposed by the Commission, it is not the issuing of the SO, which is decisive as to the conformity of the settlement procedure with the protection of fundamental rights. It will have to be assessed rather, whether during settlement discussions

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[*] The comments and views expressed in the documents are those of the working group of the Competition Law Research Centre. The views expressed do not necessarily reflect the views of all participants in the working group. The views expressed do not in any way reflect the views of all the members of Competition Law Research Centre, nor the views of the members' employers. Contact address: info@versenyjog.com

[†] Point 23 and FN 16 of the Draft citing settled EC case law.

parties are in fact informed of the Commission's objections to the requisite standard, and that they can effectively exercise their rights of defence, including the right of being heard.

Moreover, it is surprising that the Commission is not obliged to summarize the outcome of the investigation and the settlement discussions by putting its objections into writing, and that it is rather up to the parties to draft a written settlement statement being the first written document in the procedure setting out the Commission's case. It seems likely that in more complex cases - unless the Commission informally drafts the guilty plea of the undertakings - the WSS of the parties will diverge significantly as it will reflect each parties' understanding of the bilateral discussions, making it thereby difficult to reconcile the submissions into a single SO.

Swapping the place of the SO and the WSS offers several advantages. The SO – WSS – Decision procedure:

- creates a more simple procedure by reducing the number of procedural steps (currently: WSS – SO – Acknowledgement – Decision);
- increases transparency by obliging the Commission to set out its objections formally in writing before having the parties agree to the objections;
- resolves concerns relating to the protection of fundamental rights and the possibility to effectively exercise rights of defence;
- reduces to some extent the procedural asymmetry resulting from the parties being bound to the WSS, while the Commission is allowed to withdraw from the settlement both at the point of the SO and anytime later on;
- ensures that a settlement can be reached also in complex cases, as otherwise the WSS drafted by the parties independently - solely on the basis of bilateral negotiations - are likely to depart from each other significantly;
- is compatible with the policy background of the settlement procedure, which is aimed to realize resource savings *after* the investigative phase of the procedure has been concluded (in particular by avoiding litigation);
- prevents any undue interference by the parties on the outcome of the procedure (e.g. bargaining away charges, distortion of the legal analysis) by ensuring that settlement discussions start only when the Commission is in the position to formulate well-founded objections;
- is compatible with the legal tradition of the Member States, where administrative proceedings are predominantly written procedures.

The SO – WSS – Decision procedure implies that if the Commission considers the case suitable for settling, the Commission issues a short form SO, and annexed to it a WSS template containing the necessary acknowledgements. If parties do not sign and submit the WSS within a given timeframe (during which settlement discussions may take place to clarify the objections, and when parties can exercise their rights of defence), the Commission would fall back to the standard procedure and proceed to a full SO.

3. The amount of the fine and the reduction

It is welcomed that the Commission intends to grant the same percentage of reduction for all parties who wish to settle, and also that the Commission has not retained the discretion of not settling with some parties. We are of the opinion, however, that there must be greater transparency in connection to the maximum amount of the final fine, which should be set out in the course of the settlement procedure (preferably in a short-form SO preceding the WSS) as a precise figure constituting a maximum threshold. The figure should take account of all factors relevant to the calculation of the fine and thereby include any reductions granted under leniency and the settlement procedure. Providing a precise figure cannot be construed to

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prejudge the outcome of the case, as the figure provided would reflect only a calculation based on the Commission's provisional findings, from which a departure is possible only downwards, in favour of the undertaking.

As regards the amount of the reduction, we consider that a 20 % reduction creates sufficient incentives to settle without interfering with the incentives to apply for leniency.

4. <u>Not limiting settlements to cartels</u>

Undisputedly it is the settlement of cartel cases that brings the highest added value for the Commission, as these cases may otherwise trigger numerous parallel appeals, and usually do not involve many disputed points of law. Nevertheless, the settlement procedure should not be precluded *per se* for vertical / abuse of dominance cases, where - in the absence of leniency - the settlement route may be the only tool available for companies to get an infringement quickly behind.

Hungarian Competition Law Research Centre

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Competition Law Research Centre (Hungary)
1088 Budapest, Szentkirályi u. 28., Hungary www.versenyjog.com
E-mail: info@versenyjog.com