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European Commission
Competition Directorate – General Unit G5 – Cartels V
Settlements package
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Our reference
AMB

Your reference
Settlements package

Dear Sirs

Settlement procedure for cartels
Draft legislative package

We have set out below our response on certain issues arising out of the Commission's public consultation on a draft legislative package to introduce a settlement procedure for cartels. For the avoidance of doubt, the views expressed below are those of Taylor Wessing's competition group, and not necessarily those of any of its clients.

1. Introduction

We welcome and support the principle of a voluntary settlement regime. Procedural efficiency is clearly a guiding principle in the draft legislative package. As the Commission has noted in the press release accompanying the package, a settlement procedure for cartels is an important means of releasing Commission resources to investigate further cartels and so increase the Commission's detection rate.

If implemented in an effective manner, a settlement procedure should offer benefits which are at least as attractive to the participants in a cartel as they are to the Commission. In a business environment, it may often be important for companies to be able to draw a line under their participation in a cartel and achieve clarity in relation to their expected punishment, than to retain the right to contest the Commission at each stage of proceedings. The prospect of settlement therefore offers benefits for the Commission and companies alike.

2. Discretion exercised by the Commission

The Commission proposes to grant itself an unduly wide discretion throughout the settlement procedure by the draft legislative package. The Commission retains the

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ability *inter alia* to determine which cases are suitable for settlement, with whom to engage in such discussions, the pace of settlement discussions, and the timing of any disclosures of information.

However, the corollary of granting such latitude to the Commission is to place companies in a highly uncertain position both before and during the discussions.

We would therefore propose that companies should have the right to engage in settlement discussions with the Commission and that the onus should be on the Commission to explain to the required standard why settlement is not appropriate on the facts of any particular case. In Article 10(2)(a) of Commission Regulation 773/2004 the Commission should be required to inform parties willing to introduce settlement submissions of the specified information and to provide a limited right of access to the file to enhance transparency and ensure equality of arms.

A further consideration is that since written settlement submissions, including any admission of fact or law, will be discoverable in private enforcement actions, especially in the USA, companies will require a high level of assurance that their submission will be accepted by the Commission. Furthermore, it must be clear that any settlement is without prejudice to a company's right to defend itself in any private enforcement actions.

3. Proportion of parties required for commencement of settlement discussions

The draft legislative package lacks clarity about what action the Commission would take in a situation where some, but not all, of the parties to proceedings wish to engage in settlement discussions.

This lack of clarity introduces a further element of arbitrariness and uncertainty into the settlement framework. Especially because it is effectively offering to waive important rights of defence, a company should be entitled to have its interest in settlement considered on its own merits, and not by reference to the independent actions of third parties.

If the draft Regulation is intended to mean, or the Commission in practice applies it, so that all parties to a cartel are required to express an interest in settlement prior to commencing discussions, this can be expected to have a substantial chilling effect on the ability of companies to seek settlement. It may be rational for each company to refrain from or delay expressing an interest in settlement, either in the hope of gaining an advantage in subsequent settlement discussions with the intention of denying other parties the opportunity to settle or negotiating a lower share of any damages. If so, this would have the overall effect of potentially reducing the benefits of the settlement procedure by creating a systemic reluctance to declare an interest in settlement.

The Commission should therefore clearly state its position on this matter within the legislative package, by affirming that there is no minimum number or proportion of companies required to express an interest in settlement. This would remove any bargaining strength which a party may arbitrarily derive from a decision to delay or refrain from expressing an interest in settlement, and it would ensure procedural fairness by treating each party's expression of interest on its own merits.

4. Timing of expressions of interest in settlement

The draft legislative package currently states that if the Commission considers it suitable to explore the parties' interest to engage in settlement discussions, it will set a time limit of no less than two weeks within which parties to the proceedings should declare in writing whether they envisage engaging in discussions with a view to making settlement submissions.

The current proposal of a minimum two weeks is too short. The issues facing a company in gauging the merits of settlement discussions are inherently far reaching: it must review the information and evidence currently in its possession; assess its strength in the context of cartel proceedings; and carry out some form of cost-benefit analysis to weigh up the relative advantages and disadvantages of settlement discussions. Such an assessment is made additionally complex because the Commission and the company occupy asymmetric positions in relation to the information in their possession. Once an initial review and assessment has been carried out, the company must then consider the issues at board level in light of the directors' duties towards the best interests of the company. This process will take substantially longer than two weeks for a company to undertake. It is difficult to imagine a company being able to properly assess its position in any shorter a period than one month, and we therefore propose that one month should be the minimum time period specified in the draft legislative package.

5. Acceptance of a written settlement submission

For a settlement procedure to offer tangible benefits for both parties, it should ensure that a company can achieve certainty in relation to its settlement submission as early as possible. The draft legislative package currently states that a company will submit a written settlement submission once the settlement discussions have led to a 'common understanding' regarding the scope of potential objections and the estimation of a likely range of fines. The written settlement submission will then enable the Commission to "take [a company's] views into account" when drafting the statement of objections. The Commission may either endorse or reject the settlement submission when adopting the statement of objections.

We do not believe that the draft legislative package offers sufficient certainty for a company in relation to its settlement submission. Save for the somewhat nebulous notion of a 'common understanding', a company will have little reassurance that it will be able to draw a line under its involvement in the proceedings following its settlement submission. If a company must wait until the adoption of a statement of objections to discover whether its settlement submission has been endorsed, then it will not be able to scale down its involvement in the proceedings. This will detract substantially from the appeal of a settlement procedure to a company and from the efficiency gains of the procedure itself.

We propose therefore that either the legislative package incorporates a mechanism for the Commission to endorse settlement submissions prior to the adoption of the statement of objections, or that further content is given in the package to the notion of a 'common understanding', such that a company will have a legitimate expectation that its submission is likely to be endorsed in the statement of objections.

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6. Rebalancing

The package must be rebalanced to ensure that the interests of companies are fairly and objectively considered during the settlement procedure.

We consider the Commission's proposal fails to strike the right balance between the benefits of a settlement for the Commission and the parties. Firstly, the possibility of a settlement will only be explored shortly before the statement of objections will be issued. This is generally a long way down the road in the proceedings where much of the work has been done on the parties' and the Commission's side. Thus, it is questionable whether the initiation of the settlement procedure at this late stage is an effective means of releasing resources.

Secondly, there is a risk that the willingness of the Commission to enter into a settlement agreement will be driven by the strength or weakness of the Commission's case. The same is true for the incentives of the participants who can be expected to try to get an extra rebate in cases which seem to be "hopeless" even on appeal. We see an inherent risk of arbitrariness in this selective approach even though the Commission pledges to contact all parties in cases it regards as suitable. This is reinforced by the Commission underlining that it does not intend to enter into negotiations about settlement rebates but will merely inform the parties of the fine that the Commission considers is appropriate. Transparency and balance would be increased by a right of access to the Commission's file.

If participants are to give up their right to contest the facts and law before the Commission and the European Courts and thereby expose themselves not only to a fine but also damages claims then a substantial reduction in the level of fine will be required. To place this into a proper perspective the average reduction in fines as a result of appeals to the CFI is in the order of 18%.[1] Any reduction in fine as a result of the proposed settlement procedure will need to substantially exceed this level.

Finally, it is incumbent on the Commission to state clearly the nature and extent of the factors it will take into account in reaching settlements.

We trust that these observations will be of assistance.

Yours faithfully

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[1] Cento Veljanoviski 2006 (9) ECLR 910.