



The European Commission's proposals for settlement proceedings in cartel cases

COMMISSION PUBLISHES DRAFT POLICY FOR CONSULTATION, WITH A VIEW TO INTRODUCTION IN 2008

The European Commission has published a draft notice and regulation containing its proposals for settlements in appropriate cartel cases. Such settlements should result in lower fines being imposed on parties who agree to settle, in exchange for an admission of liability and agreement to waive some procedural rights.

The Commission has invited comments on its proposals by 21 December 2007.

Introduction

The European Commission (the Commission) has published for consultation a draft notice and regulation setting out its proposals for settling appropriate cartel cases with parties who agree to the settlement procedure. Some national competition authorities have already used settlements for selected antitrust investigations.

The reasons for introducing such settlement procedures are clear. The Commission has publicly acknowledged the need to hasten investigations and to free up resources to investigate more cases. It hopes that the proposed settlement procedure will allow it to handle selected cartel cases more quickly, and lead to a reduction in the number of infringement decisions appealed to the Court of First Instance.

What are the Commission's proposals?

The proposed settlement procedure contained in the draft notice is as follows:

- the decision to accept a settlement in a particular investigation will be at the Commission's discretion, with investigated parties having no entitlement (or obligation) to settle. However, if a party is interested in exploring settlement, it will be able to indicate this interest to the Commission at any point after becoming aware of the investigation but prior to the statement of objections;
- where the Commission believes a case may be appropriate for settlement, it will write to all parties

and indicate a time limit for expressions of interest in settlement proceedings. The Commission's draft notice sets a minimum time limit of two weeks;

- the Commission envisages the settlement proceedings taking the form of 'discussion rounds' addressing the alleged facts, the evidence gathered, the attribution of liability and the range of likely fines. The Commission recognises that it will need to make available certain evidence on its file to facilitate the discussions;
- a party interested in settling will need to provide the Commission with a 'written settlement submission' containing: (i) an acknowledgement of liability; (ii) an indication of the maximum amount of the fine it foresees to be imposed by the Commission and would accept; (iii) confirmation that it has been informed of the Commission's objections in a satisfactory manner and been given sufficient opportunity to be heard; (iv) confirmation that it will request neither access to the file nor a formal oral hearing; and (v) agreement to receive the statement of objections and final decision of the Commission in a given language of the European Community;
- parties to the settlement proceedings belonging to the same group of undertakings must appoint a joint representative;
- once a party has made a written settlement submission, it is committed to settlement provided the Commission endorses the written settlement submission in its statement of objections and does not impose a higher fine;

- once the Commission has produced a statement of objections, it will request each party to confirm that the statement of objections corresponds to the contents of its submission and that it remains committed to the settlement procedure. The Commission's draft notice sets a minimum time limit of one week;
- in taking its decision, the Commission may not depart from the 'settled' objections without informing the parties concerned and adopting a new statement of objections. This should occur only exceptionally, if the benefits of the settlement procedure are to be preserved;
- if the Commission does not endorse a party's submission in the statement of objections, the acknowledgements provided are deemed to have been withdrawn and cannot be used against the party making them;
- the settlement reduction can be combined with a leniency reduction, in which case the settlement reduction will be applied after the leniency reduction;
- unlike the leniency process, all parties participating in the settlement procedure will receive an equivalent reduction in fine;
- although the Commission cannot require settling parties to waive their rights of appeal, the expectation is that settlements will lead to a reduction in the number of appeals of cartel cases, and therefore to a saving of Commission resources; and
- parties to the proceedings and their legal advisers are not permitted to disclose the content of the settlement discussions or of the documents to which they have had access. Breach of this rule may be an aggravating factor in setting a fine.

not. The Commission intends to retain complete discretion over whether to accept any settlements in such cases.

Implications for businesses under investigation

The Commission's proposals raise important strategic issues for businesses facing a cartel investigation. Assuming that the proposals enter into force in 2008 as intended, such businesses will have to assess their strategic options carefully and consider whether leniency and/or settlement might be appropriate in their case.

We believe that many businesses will welcome the introduction of a settlement procedure as this should reduce fines, reduce the overall time period of the investigation (and therefore its cost and administrative burden) and shorten the period of uncertainty between the opening of an investigation and the adoption of a formal Commission decision.

Offering to settle an investigation will not be appropriate in every case. Whether it is or not will depend on a range of factors including the terms on offer, what other alleged parties to the infringement are expected to do, the strength of the party's defence case, and the tension between obtaining early resolution of the case at the expense of accelerating liability for fines and any third party damages.

Freshfields Bruckhaus Deringer will be responding to the Commission's consultation. If you have any views on the Commission's proposals and their implications for your business, we would be happy to discuss these with you.

Open questions

The draft proposals leave a number of important points to be clarified. In particular:

- the draft notice does not specify the size of the fine reduction available. The Commission has indicated that the level of potential reduction will be established following public consultation; and
- the draft notice does not address how the Commission will deal with cases where some of the implicated parties wish to settle and others do

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