



European Commission adopts settlement procedure for cartel cases

Those involved in European Commission cartel investigations may have the possibility of settling early with a 10 per cent discount on their fines now that the Commission has adopted its notice and regulation providing for settlements in appropriate cartel cases. Parties opting for settlement should benefit not only from lower fines, but also from a quicker and less burdensome administrative procedure – although whether a company should opt for settlement in a given case is likely to be a finely balanced decision.

Introduction

Those involved in European Commission cartel investigations may have the possibility of settling early with a 10 per cent discount on their fines now that the Commission has adopted its notice and regulation providing for settlements in appropriate cartel cases. The new procedure is intended to speed up investigations and to free up Commission resources to investigate more cases, thereby enabling the Commission 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.

Parties opting for settlement should benefit from lower fines and a quicker and less burdensome administrative procedure. However, some uncertainty remains over how the new procedure will work, and as to the impact of the likely acceleration of potential damages claims. This means that the decision as to whether to settle is likely to be a finely balanced one in most cases.

Key features

The notice and regulation largely follow the proposal on which the Commission has been consulting. In broad terms the procedure looks like this:

- if the Commission considers a cartel case appropriate for settlement, it will invite all parties to express interest in settlement before issuing the statement of objections;
- parties who agree to discuss settlement will hold discussions with the Commission about facts,

evidence, liability and the range of likely fines and the Commission will make available certain evidence from its file;

- parties wanting to settle must make a ‘settlement submission’, acknowledging liability and indicating the maximum fine they would accept;
- the Commission will produce a short statement of objections for each settling party to confirm. Unless a party objects, a final fining decision is then taken; and
- any leniency reduction will be additional to any settlement reduction.

Clarification of details of the procedure

The notice and regulation have clarified some of the details of the settlement procedure. The most important points to note are:

- the fine reduction will be of 10 per cent (the draft did not specify a figure). Although many had argued for a higher reduction, this lower figure is not unexpected in the light of the Commission’s crucial concern that its leniency programme, with its higher possible reductions, remains attractive and is not undermined;
- settlement submissions do not have to be made in writing, but may be made orally. This may provide better protection from disclosure in damages litigation arising from the Commission’s proceedings (this change had been requested by many of those who responded to the Commission’s proposals);
- it is made clear that agreement to discuss settlement does not constitute admission either

of an infringement or of liability. Similarly, the appointment of a joint representative for companies in the same group in settlement discussions does not prejudice the attribution of liability;

- the notice includes new wording setting out the rules on access to, and disclosure of, settlement decisions. Access will be given only to non-settling parties and under strict conditions and limitations on the use to which it can be put;
- an ‘overview’ has been added to the end of the notice, setting out the order of events in a settlement procedure; and
- the overview states that a ‘settlement decision’ will be taken at the end of the settlement procedure, presumably meaning that any decision concerning non-settling parties will be made at a later date.

To settle or not to settle

The main importance of this new procedure is that its availability will influence key strategic decisions that need to be taken at an early stage in the Commission investigation by any business facing a cartel investigation. This applies both to any current case that is still at an early stage and to future cases.

Any company may informally indicate that it is interested in settlement and the Commission, if it considers the case suitable for settlement, will invite all the parties concerned to express interest in the settlement procedure. In many cases this will be an attractive option because it should reduce fines, reduce the investigation’s overall time period (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.

However, settlement may not be to a party’s advantage in every case. Whether it is will depend on a range of factors including the terms on offer, what other alleged parties to the cartel 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.

There remains uncertainty over how the procedure will work in practice, especially when there are a number of alleged cartelists and some, but not all, are prepared to settle. The notice provides that a settlement decision will

be taken – from this it can be inferred that a decision concerning non-settling parties could be produced at a later date. However, the Commission has not specified that the settlement decision should not be made public until that later date. This means that early settlers will be exposed to damages claims and, in the light of joint and several liability rules, could find themselves exposed to earlier claims for damages than those who do not settle. All of this may well mean that, in practice, almost all settlements will have to involve all cartelists (it is in any event not clear what number or proportion of the cartelists must express interest in settlement for the Commission to pursue the settlement procedure).

Given that parties are prohibited from disclosing the content of their settlement discussions with the Commission, it may take some time for companies and their advisers to become familiar with this new procedure. Both the processes leading to the first settlements, insofar as they are made public, and the terms of those settlements will be watched with interest.

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