ALL SETTLED: WHERE ARE THE EUROPEAN COMMISSION'S SETTLEMENT PROPOSALS POST CONSULTATION?

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In January 2008, the Commission published the responses to its consultation on the proposed settlements process for cartel cases.[2] The results were at best mixed. Almost all of the 48 published responses welcomed settlement in principle. However, nearly as many raised fundamental concerns about the Commission's proposed implementation of the concept.

The Commission is expected to publish finalised proposals during summer 2008. In the meantime, it is reflecting on the issues raised. This article summarises the key concerns, looks at the costs and benefits of settlement and asks whether the Commission can do enough to ensure that it becomes a useful option in a significant number of cases.

INCENTIVES TO SETTLE

The Commission's examination of settlement was launched in a speech by Commissioner Kroes in 2005.[3] The Commissioner took a 'comparative glance' at US enforcement and concluded that the EU might need to look at 'some form of plea bargaining'. Her reasons were stated with admirable clarity: the Commission 'risks becoming the victim of its own cartel-busting success'. In other words, the success of leniency has generated more cases than the Commission can effectively handle.

Since Commissioner Kroes's candid reflections in 2005, the language has become more circumspect. The Commission has sought to distinguish its version of settlement from both

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2 Draft Commission Notice on the conduct of settlement proceedings in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (2007) OJ C 255/51 (the Draft Notice), and Proposal for a Commission Regulation amending Regulation (EC) 773/2004, as regards the conduct of settlement procedures in cartel cases (2007) OJ C 255/48 (the Draft Regulation); available at: http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html.

3 *The First Hundred Days*, Speech/05/2005, 7 April 2005; available at: http://ec.europa.eu/comm/competition/speeches/index_2005.html.

US plea bargaining and its own leniency programme. Settlement is a process leading to a formal infringement decision in which some or all of the addressees are granted reduced fines in return for an admission of liability and a waiver of certain procedural rights. The Commission emphasises that, in contrast to both US plea bargaining and leniency, it is not about evidence gathering: it will only settle those cases where it already has enough evidence to establish the infringement. The goal of settlement is procedural efficiency.

The Commission's new position, although politically understandable, should not be taken too literally. It is impossible to grasp the dynamics of settlement without clearly understanding two things. First, the process *is* about gathering (or at least generating) new evidence. Admissions made in the course of settlement will be the first evidence cited in the decision (and on appeal) not only against the parties making them, but also against alleged cartelists that do not settle.[4]

Secondly, settlement *is* ultimately a bargain (and one about guilty pleas). Both the Commission and the parties must have sufficient incentives to accept settlement. If the deal on offer is not good enough, settlement will not occur.

The Commission's incentives

For the Commission, settlement offers:

- substantial time and resource savings in relation to infringement decisions;
- the ability (as a result) to increase the number of infringement decisions taken; and
- potentially, the ability to resolve weaker or more difficult cases that might otherwise have to be abandoned.

The time and resource savings for the Commission are significant. Procedural waivers from settling parties offer the ability (i) to shorten the statement of objections (SO) and decision and to avoid (ii) translations into multiple languages (iii) preparation of the file for access and (iv) adversarial responses to the SO and oral hearings. With the average case file numbering tens of thousands of pages and translations capable of taking 6 months to prepare, these are substantial savings. The suggestion appears to be that the time needed to resolve cases might come down from the current average of around 4½ years to something less than half of that time. Importantly, however, these savings will only be fully achieved if all parties in a case settle. If even one holds out, a full SO and decision will need to be drafted, an oral hearing organised,

4 In fact, settlement effectively establishes a second 'prisoner's dilemma' (after leniency) for parties, who may all be better off if none settle and the case collapses for lack of evidence but will each fear admissions by the others that implicate them.

translation may be necessary and, perhaps most significantly, the huge task of preparing the file for access (requiring negotiations as to confidentiality with all parties) will need to be completed.

The biggest benefit, though, may be the ability to take more infringement decisions. Between 19 February 2002 and 31 December 2006 – that is between the introduction of full immunity for 'first in' leniency applicants and the last date for which published figures are available – the Commission received 104 'first in' immunity applications.[5] By the end of the period, 91 of these applications had been processed and immunity granted in 56 new cases. This means that, on average, the Commission received almost 21 immunity applications each year, of which between 12 and 13 were likely to be successful.

In contrast, over the period 2003–2007, the Commission took an average of only six cartel decisions per year. The disparity between the annual rate at which new immunity cases are coming in (12–13) and decisions are being taken (six) is striking and suggests a major backlog.[6] Indeed, at the end of 2006, the Commission reported that it had granted conditional leniency in 51 cases that had not yet resulted in a Commission decision and had a further 13 applications still to process. At current rates of decision taking, that would suggest a backlog of almost 10 years worth of work.

Doubtless that overestimates the scale of the problem. The Commission is clearly imposing tougher requirements on leniency applicants and appears to be granting immunity less frequently as a result. In 2006, it seems that as few as five immunity applications may have been granted (although, again, 13 applications had yet to be processed). In addition, not all cases must be resolved by Commission decision, some may be referred to national authorities. However, the number dealt with in this way appears to be small, there were only six instances between 2002 and the end of 2005.[7]

Overall, it seems likely that the backlog is significant and the Commission's incentive to begin settling cases strong.

The incentives of parties under investigation

For the parties under investigation, the principle incentives to settle will be:

5 Commission staff working document – Annex to the Report from the Commission – Report on Competition Policy 2006 (COM(2007) 358 final), para 21, at p 12.

6 It is even more striking if account is taken of the fact that a number of the decisions taken are own initiative cases rather than cases resulting from immunity applications. Of the 10 most recent published decisions, two – ie 20% – were own initiative cases.

7 Commission press release, *The Leniency Notice – frequently asked questions*, Memo/06/357 (29 September 2006); available at: http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html.

- lower fines;
- reduced costs in terms of management distraction and advisor fees; and
- the opportunity to make a clean break with a past infringement and move on.

As far as lowering fines is concerned, it is important to remember that in most settlement contexts (although, as discussed below, perhaps not this one) this may be achieved not just as a direct result of the formal reductions on offer, but also as a result of negotiating limits on the scope of the infringement finding at the margins, for example, in terms of duration. This may also have an impact on exposure to subsequent private damages litigation. Reduced costs are a direct result of reducing the length and complexity of the process. Given the scale of current EU fines, reduced advisor fees are unlikely to be a significant incentive, but reduced management distraction may well be. Much more important may be the ability to make a clean break with the infringement. If well handled, this may allow companies to take control of the media agenda. This may be of particular importance in consumer businesses or other areas where brand and reputation are key. In the UK, BA was able to assert unchallenged that its fixing of fuel surcharges with Virgin had not led to customer price increases, while in the USA the Department of Justice was expressly asserting consumer harm.

WHAT MUST THE COMMISSION ACHIEVE TO BE SUCCESSFUL

Since there are potential benefits to both sides, there is clearly scope for a bargain to be struck on settlement, but success is not guaranteed. For parties under investigation, settlement involves costs as well as benefits: they give up the potential advantages of fighting the case. To work effectively, the deal on offer must be sufficiently attractive and the process by which the deal is agreed must work. In other words, two tests should be applied to the Commission's settlement proposals:

- does the process offer clear, quantifiable benefits with a sufficient degree of certainty; and
- does the deal offer benefits that outweigh the costs.

THE PROCESS

Before assessing whether the proposed process is workable, it is necessary to understand what it is. This is not easy. However, since the publication of the Draft Notice and the Draft Regulation last October, further light has been shed on the issue by a speech delivered by

Commissioner Kroes in November 2007,[8] and subsequently by various presentations by Commission officials. Taking all of this material together, four stages to the process emerge: (i) initiation (ii) discussion (iii) the written settlement submission and (iv) completion – issuing the SO and decision.

Initiation

Not every case will be eligible for settlement. The possibility is expressly confined to cartel cases, but even within this group, the Commission has a 'broad discretion'. Factors the Commission will consider include:

- the probability of reaching a common understanding with the parties;
- the prospect of achieving procedural efficiencies; and
- (possibly) whether a precedent might be set.[9]

Potential resource savings seem certain to be the key issue. As mentioned, these may not be achieved unless all, or at least most, parties settle.

If it decides a case is suitable for settlement, the Commission will contact the parties under investigation. Parties must then confirm their interest within a deadline set by the Commission which may be as little as 2 weeks. Although the Commission will formally initiate the process, officials have indicated that it may be receptive to parties approaching it to suggest that a case is suitable for settlement.

Discussion

The next stage will be parallel bilateral discussions between the Commission and each of the parties. The Commission will come to these discussions with a template of its intended decision – effectively a skeleton SO. It seems that parties will effectively be asked to accept the case set out in the template. Certainly, the Commission has made it very clear that these discussions will not be negotiations: it 'will not bargain about evidence or objections'.[10]

Assuming discussion progress in a satisfactory fashion, each party will be informed of the Commission's case against it and provided with the documentary evidence relied on in the

8 *Assessment of and perspectives for competition policy in Europe*, Speech/07/722, 19 November 2007; available at: http://ec.europa.eu/comm/competition/speeches/index_2007.html.
9 Draft Notice, op cit n 2, above, at para 5.
10 Commission press release, *Frequently asked questions*, Memo/07/433 (26 October 2007), at p 3; available at: http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html.

template.[11] Each party will also be given 'an estimation of the range of likely fines' it will face.[12] Parties may have access to other documents in the case file on request, where this is justified and the administrative costs involved do not threaten the overall resource savings.

Written settlement submissions

If a 'common understanding' is reached as a result of the bilateral discussions the Commission will set a short deadline for parties to submit offers of settlement. Parties must submit a written settlement submission (WSS) that includes:

- an admission of liability in line with the common understanding reached;
- an indication of the maximum fine acceptable to the party;
- confirmation that the party has been adequately informed of the Commission's case against it and does not require either access to file or an oral hearing;
- agreement that a single language version of the SO can be issued to all parties; and
- confirmation that a single legal representative will be appointed for all members of the group to which the party belongs.[13]

The need to confirm the common understanding means that the WSS will be detailed as to the facts and scope of the infringement.

Completion of the process

Receipt of a party's WSS does not bind the Commission to settlement. Even at this stage, the Commission may decide not to pursue settlement.[14] If settlement is pursued, the Commission will issue an SO that endorses the WSSs submitted. The SO will be 'streamlined' in the sense that, although it will set out all the evidence supporting the Commission's findings, it will not interpret that evidence in detail or deal with all exculpatory arguments. Parties will be given a deadline of as little as 2 weeks to respond to the SO accepting its contents.

If the parties accept the SO, the case will then pass to the College of Commissioners who must take the final, formal decision. Since officials of DG Competition have no power to bind the College, it has absolute discretion to refuse to issue a decision based on the proposed settlement.

11 Draft Notice, op cit n 2, above, at para 15.
12 Ibid, at para 16.
13 Ibid, at para 20.
14 Ibid, at para 27.

If the Commission decides to abandon the proposed settlement at any point following submission of the WSSs, the proposed position is that:

> 'The acknowledgements provided by the parties in the [WSS] would be deemed to be withdrawn and could not be used against any of the parties to the proceedings . . . [The parties] would be granted a time-limit allowing them to present their defence anew.'[15]

In other words, the parties would obtain no benefit from their efforts to settle the case, the Commission would suffer no penalty and the case could proceed as if settlement discussions had never taken place.

PROBLEMS WITH THE PROCESS

At least three fundamental concerns arise in relation to the process outlined above (as well as a range of more minor ones). They are:

- the requirement that settlement submissions be in writing;
- the limited clarity offered in relation to the fines to be imposed; and
- the uncertainty created by the lack of guidance on the treatment of so-called 'hybrid' cases – cases where some parties settle but others do not – and the Commission's broad discretion to walk away from settlement at any stage.

The requirement of written submissions

A WSS will constitute an admission of infringement and contain details of the facts admitted. It is potentially discoverable in damages actions in the USA and, even if the Commission may avoid disgorging it, the party submitting the WSS will find it difficult to do so. A WSS therefore has the potential to increase substantially a party's exposure to treble damages. Moreover, the sequencing of the process means a WSS will be created even if the Commission subsequently decides not to pursue settlement. Parties therefore have no certainty of obtaining anything in return for their increased exposure to liability. Nor does this seem to be necessary. The Commission's leniency programme operates effectively on the basis of oral submissions and there appears to be no reason why settlement could not do the same.

Limited clarity on fines

Parties will be given only an 'estimation' of the likely 'range of fines' by the Commission and will not be well placed to calculate a reliable estimate for themselves. The Commission's

[15] Ibid.

current fining policy was introduced only in 2006 and, to date, there is only one published case applying it.[16] Moreover, even once more case-law emerges, the Commission will retain sufficient discretion in setting fines that parties will find it hard to calculate accurate figures. Without more concrete information from the Commission, parties will have no clear or quantifiable understanding of the benefits of settlement.

Hybrid cases and discretion

The Commission has made no formal statement of how it will deal with hybrid cases. However, the indications are that the ability to achieve procedural savings will be key in its decision-making – and these may not be achieved unless all parties settle, suggesting that settlement discussions may be abandoned where the Commission cannot settle with all parties. This is a potentially serious concern since:

- hybrid cases seem likely to be the norm; and
- there appear to be no limits on the Commission's discretion to abandon discussions.

There are a number of reasons why hybrid cases are likely to arise. First, parties are unlikely to share a single version of events. Documentary evidence will typically be limited and human sources are fallible: memories fade, staff leave or retire and, sometimes, people lie (even to their lawyers!). Secondly, parties may have very different incentives. Those against whom there is strong evidence may be much keener to settle than others. Recipients of conditional immunity have no incentive to settle and some incentives not to.[17] And the Commission's chances of reaching a common understanding with all seem further reduced by its apparent unwillingness to negotiate with parties in order to achieve consensus.

This is a problem for the whole process. Parties impose a cost on themselves when they admit an infringement. Even if the admission is not relied on by the Commission, the reality of the investigation will have changed. If parties know that the Commission may walk away from settlement unless all parties settle, then each of them will have a reduced incentive to make a settlement submission (whether or not in writing) and impose that cost on themselves. In particular, parties that might have held out anyway are more likely to do so, secure in the knowledge that their action may scupper settlement altogether.

[16] Commission Decision of 20 November 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.432, *Professional Videotape*), unofficial version available at: http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38432/en.pdf.

[17] The Commission could amend its leniency notice to require immunity applicants to settle. However, this would involve further administrative effort and would reduce the incentives apply for leniency by increasing the cost of doing so.

Other issues

Other less fundamental issues with the process include the Commission's inflexible attitude to negotiation during bilateral discussions, the very short deadlines that may be set throughout the process, the lack of clarity as to the documentation to which parties will be given access and the risk that accepting joint representation of group members will act as an effective admission of joint liability.

PROBLEMS WITH THE DEAL ON OFFER

The reward on offer for settling parties comprises:

- a flat rate percentage reduction in fine; and
- a cap (of two) on any deterrence multiplier.

The Commission has given no figure for the proposed percentage reduction, but Commissioner Kroes has made clear that it will be less than the reductions available under the leniency programme. This suggests figure in the range 10–20%.[18]

Such a figure would be relatively ungenerous by international standards. Recent settlements in the UK have involved 35% reductions in fines.[19] In the USA, settling parties obtain reductions of 30–50% from the bottom of the sentencing guidelines. And in France, settling parties have obtained reductions of up to 90%.[20] The Netherlands offers the closest comparison, where reductions of only 15% were offered to parties to the construction industry settlements, although even this is above the lowest figure being discussed in the Commission.

A more important measure, however, is the comparison between the reduction in fine and the costs of settlement.[21] The costs include:

- the increased likelihood of a finding of infringement;
- the effective loss of the opportunity to appeal; and
- increased exposure in other jurisdictions.

18 Cf. Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006) OJ C 298/17, at para 26.

19 Dairy Products settlement, see OFT press release 170/07 (7 December 2007); available at: http://www.oft.gov.uk/news/press/2007/170-07; and ORR decision dated 17 November 2006 (*English Welsh and Scottish Railway Ltd*); available at: http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/EWSrail.pdf.

20 Competition Council Decision No 04-D-65 of 30 November 2004, *La Poste*.

21 A focus on the percentage reduction seems legitimate notwithstanding the deterrence cap, since the latter will be irrelevant to many parties and difficult to quantify for the rest.

Increased likelihood of an infringement finding

It might be thought that, since innocent parties – and even those with a strong defence – are unlikely to settle, the increased likelihood of an infringement decision is unlikely to be a significant cost. However, since the Commission is struggling even to prosecute cases where it has whistleblower evidence from a leniency applicant, this cost should not be underestimated. Making your case stand out as a soft target (in a pool of up to 50 unresolved cases) by offering an admission of liability and procedural waivers *is* likely to increase your risk of an infringement finding – and even an increased risk of as little as 5–10% could off-set half the fine reduction on offer.

Lost opportunity to appeal

Parties are not technically required to waive their right to appeal as part of settlement. This should not disguise the fact that the ability to launch an effective appeal is likely to be lost in practice. In addition to admitting the infringement, parties will indicate the maximum fine they are prepared to accept, effectively acknowledging the appropriateness of the amount. In the circumstances, finding productive arguments on appeal is likely to be difficult.

The cost associated with the lost opportunity to appeal is potentially substantial. At present virtually all Commission decisions in cartel cases are appealed and the statistics make it clear why. A recent review of all Court of First Instance (CFI) judgments on appeals in the period 1998–2007 found that the average reduction in fine achieved was 19.3%.[22]

This figure is likely to overstate the value of appeals going forward for at least two reasons. First, under the Commission's 2006 Guidelines,[23] fines have the potential to hit the statutory maximum under Regulation 1/2003[24] of 10% of the undertakings worldwide turnover on a reasonably regular basis.[25] Where this occurs, marginal errors by the Commission in assessing duration, scope or aggravating/mitigating factors, which would previously have led to fine reductions on appeal, may no longer do so if they would not bring the fine calculated under the

22 C Veljanovski, 'European Commission cartel prosecutions and fines 1998–2007 – a statistical analysis' (2007) Social Science Research Network. The 19.3% figure includes the Euro 100 million in fines set aside by the CFI in the German Bank Charges case when the Commission failed to file its defence to the appeal within the deadline. However, even if this case is excluded, the average reduction was still almost 14%.

23 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006) OJ C 210/2 (2006 Guidelines).

24 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L1/1 (Modernisation Regulation).

25 Indeed, for a single product company involved in a worldwide cartel, the basic amount of the fine may be up to 30% of total worldwide turnover per year of the infringement *plus* an 'entry fee' of 15–20% of total world wide turnover, 2006 Guidelines, op cit n 23, above, at paras 19–26.

Guidelines below the statutory cap. Of course, the statutory cap will not bite in every case. None of the fines imposed in the first published case under the 2006 Guidelines hit the statutory cap.[26]

Secondly, the CFI recently made a point of *increasing* the fine on a party bringing an appeal in *BASF AG v Commission*.[27] This was the first time this had happened and was all the more striking since the court acted on its own motion (the Commission had not sought an increase in fine). The court's action may have been a warning to parties considering marginal appeals. If so, the message was somewhat blurred by the treatment of the other party in the case, UCB, which received a 90% reduction in its fine.

Overall, it seems likely that the value of appeals (and therefore the cost of giving them up) will remain significant, even if not almost 20% of the amount of the fine. Of course, a cost of between a quarter and a half of that amount (5–10%) could off-set half the fine reduction on offer for settlement.

Increased exposure in other jurisdictions

The risk of increased exposure in other jurisdictions includes potential treble damages in the USA and the possible exposure of key staff to criminal liability and imprisonment in the USA and UK. These risks will be highly fact specific and the potential cost will vary enormously from case to case, but in some cases they may represent a real disincentive to settlement.

Overall costs and benefits

Calculation of the overall costs and benefits of settlement must clearly be undertaken on a case by case basis. However, as the discussion above indicates, the costs can easily outweigh the benefits. Indeed, if the Commission does set the reduction for settlement at 10%, the bottom end of the suggested range, there may be very few cases in which settlement is an attractive option unless the informal benefits of settlement – such as reduced management distraction and the ability to control the public relations agenda – are sufficient to make it so.

CONCLUSIONS

The current proposals from the Commission on settlement set out a flawed process and an ungenerous bargain. If these issues are not addressed, they may undermine the value of the settlement option, both to the Commission and to parties.

[26] Op cit n 16, above.
[27] (Joined Cases T-101/05 and T-111/05) [2008] 4 CMLR 347, CFI.

However, things are probably not as bad as they look. The procedural issues should be fixable or at least manageable. On the issue of written submissions, the Commission is already indicating informally that oral submissions will be allowed. Similarly, on hybrid cases and discretion, it is acknowledging that its first cases are almost certain to be hybrid cases and that, at least initially while establishing its reputation, it will have to honour the bargains made with those parties that do settle and pursue cases even where the procedural savings are limited. For the last of the three fundamental problems, clarity on fines, the solution will probably lie in day to day implementation. It may be hoped that case teams will understand the need to give real clarity to parties even if formally they are not required to do so.

The generosity of the rewards on offer is likely to be a more intractable issue. It seems unlikely that a reduction of more than 20% will be offered, and there appear to be voices in the Commission arguing strongly for a figure well below that. If too low a figure is set, the Commission may come to regret it.

Finally, it should be noted that, parties offered settlement are offered an early opportunity to understand the likely case against them and to see the Commission's evidence. If for no other reason than this, parties are likely to at least engage in settlement discussions, even if nothing ultimately comes of them.