

Step toe & Johnson LLP
 Avenue Louise 240, Box 5
 B-1050 Brussels
 Belgium
 Tel: +32 2 626 0500
 Fax: +32 2 626 0510

1330 Connecticut Avenue, NW
 Washington, DC 20036
 Tel: 202.429.3000
 Fax: 202.429.3902

750 Seventh Avenue
 New York, NY 10019
 Tel: 212.506.3900
 Fax: 212.506.3950

115 South LaSalle Street
 Suite 3100
 Chicago, IL 60603
 Tel: 312.577.1300
 Fax: 312.577.1370

Collier Center
 201 East Washington Street,
 16th Floor
 Phoenix, AZ 85004
 Tel: 602.257.5200
 Fax: 602.257.5299

633 West Fifth Street
 Suite 700
 Los Angeles, CA 90071
 Tel: 213.439.9400
 Fax: 213.439.9599

2121 Avenue of the Stars
 Suite 2800
 Los Angeles, CA 90067
 Tel: 310.734.3200
 Fax: 310.734.3300

Step toe & Johnson
 99 Gresham Street
 London, EC2V 7NG
 England
 Tel: +44 20 7367 8000
 Fax: +44 20 7367 8001

EU Competition Briefing - July 2008

A Periodic Report from Steptoe & Johnson LLP

Cartel Settlement Package Adopted: At the Low End of Expectations
By Yves Botteman and Laura Atlee of Steptoe's EU Competition Practice

Introduction

On 30 June 2008, the European Commission adopted the legislative package on Cartel Settlement. The package consists of a Commission regulation and a notice, and its aim is to speed up cartel proceedings in the European Union. The Commission seeks to free up administrative resources to prosecute more cartels, reduce the backlog of pending investigations and curb the number of appeals lodged by the parties before the Court of First Instance.

Undertakings under investigation will receive a 10% rebate on their fines as compensation for formal acknowledgement of their participation in an infringement of Article 81 of the EC Treaty before the Commission begins drafting its Statement of Objections ("SO").

This briefing provides an overview of the new procedures envisaged by the Cartel Settlement package and explains what these procedures will mean for businesses and stakeholders in the future.

Background on cartel settlement

On 26 October 2007, the Commission adopted a draft legislative package on the conduct of cartel settlement proceedings. A public consultation on the proposed package was held ending on 21 December 2007.

The public consultation showed strong support for the introduction of a settlement mechanism in EC cartel cases. However, concerns arose that the package did not adequately respect the rights of defendants. Under the proposed legislation, the Commission had what appeared to be unfettered discretion throughout the settlement procedure, including the power to depart from the settlement after the settling company had sent an irrevocable commitment to abide by the terms of the settlement. Criticism also arose in relation to the fact that the package did not provide for adequate checks and balances (unlike US settlement, no judge is involved in the process).

Some commentators indicated that transparency on the likely fine (both in terms of calculation method used and the maximum amount to be imposed) and early and full disclosure of the facts and evidence to establish the alleged infringement were necessary at the initiation of settlement discussions if the proposed mechanism were to deliver on the intended procedural efficiencies.

Other points of debate were the extent to which settlement discussions should be protected under rules on privilege and whether the formal acknowledgement of cartel involvement could be protected against discovery by third parties.

Summary of the package

1. Cartel settlement: what for?

The Commission has deliberately resisted introducing plea bargaining à l'américaine. It intends neither to negotiate the existence of an infringement, nor the amount of any fine. The name "settlement procedure" is thus somewhat misleading. It should rather be thought of as a "fast-track procedure."

The fundamental purpose of the Cartel Settlement package is to generate procedural economies and increase the speed of cartel investigations. On average, cartel proceedings before the Commission last between two to three years, from the time of the inspection to the final Commission decision. The Commission's aim is to shorten this period to about 18 months to two years. A settlement should also represent an incentive to the settling undertakings not to appeal the final decision before the European Courts.

Undertakings should understand that cooperation under the settlement procedure is different from cooperation under leniency and immunity. Leniency and immunity are investigative tools which allow the Commission's Competition Directorate (DGCOMP) to uncover and prosecute cartels more effectively. By contrast, settlement is simply a time and resource saving tool. The settlement procedure will not be used by DGCOMP to "bluff" undertakings regarding the amount of incriminating evidence that it already has in its possession.

If the DGCOMP's case is sufficiently solid and convincing, undertakings will be invited to acknowledge this in exchange for a shorter procedure and a lower fine. The settlement should lead to a much shorter SO, limited access to evidence for those undertakings opting for the settlement path, avoidance of a hearing and a shorter final decision.

2. How will the cartel settlement process work?

An undertaking does not have a right to settle: rather, the Commission may exercise its discretion to engage in settlement talks with undertakings which have expressed interest in settling their case. The Commission will adopt a practical (case-by-case) approach to settlement. Procedurally, the settlement will work as follows:

- Once a cartel investigation has reached a stage where the Commission has gained a preliminary view on the scope, gravity and duration of an infringement, officials may decide to engage in bilateral discussions with the parties.

- The process begins with the Commission initiating formal proceedings. The Commission will send a letter indicating its intention to prosecute a number of undertakings for their involvement in a cartel. The letter will invite all of the undertakings to indicate within at least two weeks from receipt whether they are interested in engaging in settlement talks with the Commission and, if so, to appoint a legal representative for that purpose. The Commission will close the window for submitting immunity/leniency applications when it opens the formal settlement proceedings.
- The Commission will begin separate bilateral talks with each undertaking that responds positively to an invitation to settle. During these bilateral talks, the Commission will disclose the potential objections — summarizing its assessment of the undertaking’s involvement (duration, gravity, etc.) in the alleged cartel — along with the incriminating evidence that it intends to produce against the undertaking concerned. The Commission will not provide full access to the file. In principle, it will not disclose exculpatory documents or other accessible materials, unless a party requests disclosure for the purpose of ascertaining its position in relation to any aspect of the cartel.
- At the end of the bilateral talks, the parties intending to settle and the Commission will agree on the content of a “Settlement submission” which may be made either in writing or orally. The Settlement submission will be given the same level of protection as corporate statements made in the context of the Leniency Notice. It must, however, be given according to a pre-defined template. In particular, the undertaking will need to clearly acknowledge its liability for the infringement as described in the main facts. There will be an indication of the maximum amount of the potential fine that the parties foresee being imposed. The submission will also indicate that the undertaking has been sufficiently informed about the objections raised against it and that it has been given the opportunity to express its views to the Commission.
- In most instances, the subsequent SO would ‘endorse’ the Settlement submission. If it substantially reproduces the statements made in the Settlement submission, the settling undertaking will not be invited to participate in an oral hearing and there will be no further access to the file. The undertakings concerned will have to formally agree on the content of the settled SO in their replies. If they fail to do so, the parties return to the normal cartel investigation process. Post-reply, there will be no hearing and the case team will immediately start drafting the final decision (with a settlement award). The case team investigating the case will remain in charge of handling the settlement

process. In the Commission’s view, building trust with officials is essential to the success of the settlement procedure. If discussions fail, the normal procedure will restart. The question is, however, whether the failed settlement talks will negatively taint the resumption of the normal process with the case team.

3. Benefits to the settling parties

The settlement system provides a number of benefits to both the Commission and an undertaking. As the list below indicates, however, the Commission enjoys significantly greater and weightier benefits than an undertaking. These should be seriously considered when deciding whether or not to engage in settlement discussions.

The Undertaking

- receives early information about the potential objections and supporting evidence;
- is subject to an expedited procedure; and
- receives an early indication of the maximum exposure to fines.

The Commission

- has discretion to determine in which cases it will explore the possibility of settlement;
- may decide to discontinue settlement discussions;
- decides when to disclose the evidence in the file used to establish the envisaged objections and potential fine;
- may later decide not to accept the settlement (either in the SO or in the Decision); and
- receives a written or oral statement

4. Amount of settlement award, ‘hybrid’ cases and impact on leniency

The settlement award will be the same for all settling parties in the proceedings. It basically rewards companies for procedural efficiency.

The Commission expects that cases will arise where some parties decide to settle while others do not. It is anticipated that such a ‘hybrid’ case will not bring much efficiency to the system in terms of timing of the final decision and resources, since this will result in the Commission creating a settled SO drafted in parallel with a non-settled SO. Presumably, all parties would be permitted to attend the oral hearing in this case, including the settling parties.

The main concern is whether and how non-settling parties may affect the case of the settling parties. For instance, suppose a non-settling party brings fresh evidence at the hearing that extends the duration of a settling party’s participation in the infringement. What will DGCOMP do? On this issue, once the settled

part of the SO reproduces substantially the Settlement submission of the settling parties, the Commission should not be able to renege on the settlement terms agreed. Non-settlers should not be given the opportunity to “pollute” the settlement process.

By definition, an immunity applicant has no monetary interest in settling the case since it is by definition immune from fines. However, it may have an interest in concluding the proceedings more quickly. By contrast, leniency applicants may cumulate the two rewards.

The Commission will not make settlement part of an undertaking’s leniency/immunity obligation to cooperate. As indicated above, the settled SO will contain an acknowledgement of liability on the part of the settling undertaking. To protect settling parties against disclosure of their admission, the Notice provides that Settlement submissions may only be consulted by the non-settling addressees of an SO at DGCOMP’s premises and will not be made available to complainants. The latter may not even have access to the non-confidential version of a settled SO. In addition, the question of whether the acknowledgement ought to be written or oral is left to the settling party to decide.

5. Outstanding procedural issues

From a practical standpoint, it is not clear how the Commission plans to conduct hybrid settlement proceedings. In particular, in hybrid cases, will the Commission send out as many SOs as there are non-settling and settling parties? Are the timelines going to be different?

If, instead, only one SO applies to all parties (both settling and non-settling), would settling parties lose the benefit of a truly expedited procedure? Would settling parties have access to the other settled SOs and the non-settled chapters of the SO? These questions may become important in terms of identifying potential grounds of appeal. Settling parties may indeed find that they have been discriminated against not only among themselves but also vis-à-vis non-settling parties (e.g., similar set of facts).

Since the settlement system rests upon a prerequisite of admission of liability, it is arguably irrelevant whether the settling party makes such an admission orally or in writing. If the Commission requires this acknowledgement of liability in order for the settling party to actually gain the benefit of the settlement (the reduction of its fine), then settlement constitutes admission of guilt. Such a requirement, rather than a mere “no challenge” of the facts, is in no way related to the stated purpose of the settlement procedure, i.e., to free up administrative resources. Importantly, this acknowledgement would presumably be reflected in the final decision and, hence, significantly facilitate follow-up damage actions by complainants at the national level.

What does this mean for business?

Initial attempts in reaching settlement with cartel participants will tell the Commission whether the 10% rebate provides enough incentives to engage in the settlement process. Arguably, the rebate is too small compared to the benefits that the Commission derives from the package. Practice with the new package will also shed light and provide useful guidance on the above procedural issues.

For those engaging in settlement, bilateral talks should enable them to learn more quickly about details of the cartel investigation and what their maximum exposure is likely to be. They will also have the opportunity to make known their views much earlier than in the standard cartel process (namely, before an SO is issued).

In the immediate aftermath of a dawn raid, companies and external lawyers will not only need to assess whether to apply for leniency but also to start preparing their defense if they choose to explore the possibility of settling. In particular, the undertaking contemplating a settlement will have to:

- collect exculpatory evidence at the same time as collecting incriminatory information for leniency purposes;
- assess the scope of the company's involvement in the infringement (duration, conduct involved, markets concerned) through interviews with company executives, managers and employees; and
- define the relevant market and associated affected turnover (in order to quickly reach informed views on the maximum amount of the fine).

As a result, rather than waiting more than two years after inspections to put forward their defense in reply to an SO, companies should prepare themselves for the possibility of settling the matter with the Commission from day one.

If you have any questions concerning this briefing, please contact Kees Jan Kuilwijk (kkuilwijk@steptoe.com) or Yves Botteman (ybotteman@steptoe.com). For more information about our EU Competition Practice please [click here](#).

To subscribe, send the message "subscribe EU Cartel Briefing" to information@steptoe.com. To unsubscribe, send the message "Unsubscribe EU Cartel Briefing" to information@steptoe.com.

© Copyright 2008 Steptoe & Johnson LLP. All Rights Reserved. No distribution or reproduction of this issue or any portion thereof is allowed without our written permission except by the recipient for internal use only within the recipient's own organisation. The opinions expressed in this Briefing are for the purpose of fostering productive discussions of legal issues and do not constitute the rendering of legal advice or other professional services. No attorney-client relationship is created, nor is there any offer to provide legal services, by the publication and distribution of this Briefing. Neither this Briefing, nor the information it contains, constitutes legal, counseling, accounting or other professional services. If legal advice or other professional assistance is sought, the services of a competent professional person in the relevant field should be obtained.