MEMO/07/433

Brussels, 26th October 2007

Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels – frequently asked questions

(see also IP/07/1608)

Why is the Commission proposing to introduce a settlement procedure?

Where the parties to a cartel case agree with the Commission findings the Commission wants to be able to use an instrument to speed up the adoption of a Decision.

This should free resources to deal with other cases, increasing the detection rate and overall efficiency of the Commission's antitrust enforcement.

When parties are convinced of the strength of the Commission's case in view of the evidence gathered during the investigation, they may be ready to acknowledge their participation to an infringement and accept their liability for it, in order to shorten the procedure and obtain a reduction of the fine. A settlement procedure therefore provides scope for reducing the length of the administrative procedure given the acceptance by parties of the Commission's case.

Does the settlement procedure imply negotiations?

No. The procedure will not give companies the ability to negotiate with the Commission as to the existence of an infringement of Community law or the appropriate sanction. It can, however, reward the cooperation of companies by speeding the proceedings in cartel cases and reducing the fine.

The Commission will not bargain about evidence or its objections, however, parties will also be heard effectively in the framework of the settlement procedure and parties will therefore have the opportunity to influence the Commission's objections through argument.

Why is the proposed settlements procedure limited to cartel cases?

In the anti-cartel field, the practical ability of the Commission to enforce the EC Treaty's rules on restrictive business practices (Article 81) hinges on the extent and probative value of the evidence gathered during the investigation. Experience shows that litigation mainly relates to circumstances having a bearing on the amount of the fine, procedural issues and liability of parent companies for actions undertaken by their subsidiaries.

Moreover, amongst antitrust cases, cartel investigations are comparatively more frequent and often entail a heavier procedure in view, among other things., of the multiplicity of parties involved and the jurisdictional issues they raise (e.g. discovery).

Will the settlements procedure apply to all cartel cases?

Not every cartel case will be suitable for settlement. The Commission will have a broad margin of discretion to determine which cartel cases are suitable. Account will be taken of the likelihood of reaching a common understanding on the scope of the objections or the prospect of achieving procedural efficiencies. This issue is addressed in point 5 of the Draft Notice.

On the other hand, companies are not obliged to enter settlement discussions or to ultimately settle and the Commission may only apply the settlement procedure upon parties' written request.

What are the main differences between the current Commission's leniency programme and the proposed settlements procedure?

The Commission leniency programme is an investigation tool (see IP/06/1705). It aims at discovering cartel cases and collecting evidence to discharge the Commission's burden of proof. The "Leniency Notice" rewards companies who voluntarily disclose to the Commission the existence of a cartel and bring evidence to prove the infringement. The reduction of the fine varies widely depending on the timing and significant added value of the information and evidence provided.

In contrast, settlement aims at simplifying and expediting the procedure leading to the adoption of a formal decision, thereby allowing for procedural savings and the redeployment of enforcement resources. The "Settlements Notice" will reward concrete contributions to procedural efficiency. All parties settling in the same case will receive equivalent reductions of the fine, because their contribution to procedural savings will be equivalent.

Will settlement reduction have a negative impact on the leniency programme?

Even with a settlement procedure, the incentive for companies to ask for leniency will remain strong.

First of all, the expected reduction of fine under the leniency programme will be more significant than under the settlement procedure. Secondly, companies will not be able to ask for leniency once the settlement procedure is formally open.

To the extent that companies have an interest to get the maximum reduction of fine, they will therefore have a strong interest to favour leniency. However, as the reductions of fine are cumulative, companies will always have an incentive to ask for both.

When would a company be able request the initiation of settlement discussions?

Any company which becomes aware of the existence of an investigation (e.g. a leniency applicant, the addressee of a measure of investigation in general or the addressee of a decision of inspection in particular) may already at that stage indicate to the Commission its interest in exploring settlements.. Should the Commission consider a case suitable for settlement, it will initiate proceedings once the "core" investigation (leniency, inspections) takes it to the stage of drafting a statement of objections. It will then explore the interest in settlement discussions of all parties' to the proceedings by letter setting a final time-limit to express their interest in writing.

Why does the Commission require parties to the procedure belonging to the same group of undertakings to appoint a joint representative?

This is necessary to have fruitful and efficient discussions with each of the undertakings concerned. In this regard, joint representation will not prejudge the finding of joint and several liability amongst parties of the same undertaking or group.

When and how will settlements discussion take place?

Upon parties' written request in settlements discussions, the Commission may decide to open discussions rounds to be held between the initiation of proceedings and the adoption of the statement of objections.

As settlement discussions progress, they will tackle the alleged facts, their classification, the gravity and the duration of the infringement and on the liability for the individual involvement in the cartel. This includes discussing the potential maximum fine net of any other reduction. During the discussions the Commission services may disclose in a timely manner the evidence supporting the envisaged objections. Accessible versions of other documents listed in the case file may be disclosed upon reasoned request when it is justified to enable a company to ascertain its position on a given time period or issue, and where this disclosure does not jeopardise the overall efficiency sought with the settlement procedure. This issue is raised in article 15 of the proposed notice.

If the parties are convinced of the case the Commission may set a time-limit for them to send to the Commission a formal request ("written settlement submission" or "WSS") to settle the case. The WSS would be formulated according to a specified template and drafted along with the results of the settlement discussions. The conditional settlements submission will contain in particular the acknowledgement of their participation to the infringement, their commitment to follow the settlement procedure and an estimate of the potential fine, in anticipation of the formal objections.

What are the main conditions to obtain a settlement decision for a company?

According to article 20 of the proposed notice, the parties who want to settle a case with the Commission have to declare their interest in settlement discussions, appoint a representative per undertaking and submit a written settlement submission in the terms discussed with the Commission and containing:

- an acknowledgement of the parties' liability for the infringement;
- an indication of the maximum amount of the fines the parties foresee to be imposed by the Commission;
- the parties' confirmation that they have been informed of the Commission's objections in a satisfactory manner and that they have been given the opportunity to be heard;
- the parties' confirmation that they will request neither access to the file nor a formal oral hearing;
- the parties' agreement to receive the statement of objections and the final decision of the Commission in a given language of the European Community.

By sending a WSS, the parties commit to follow the settlement procedure subject to the condition that the Commission Decision ultimately endorses the WSS and does not impose a fine higher that the maximum fine indicated in it.

Can the parties to the proceedings disclose to any other third party the content of those discussions?

The parties to the proceedings and their legal representatives are not allowed to disclose to any third party the content of their discussions with the Commission's services or of the documents which they have had access to. A breach of this rule may constitute an aggravating circumstance to be taken into account in setting the fine.

What will happen if the statement of objections or the final decision does not endorse the conditional settlements submission?

If the Commission does not endorse the written settlements submission of the parties in a statement of objections or in a final decision, the acknowledgments provided by the relevant parties are deemed to have been withdrawn and they cannot be used against them. Moreover, the relevant parties would be able to challenge the Commission findings within the administrative proceedings and the ordinary procedure would apply, including the possibility to request full access to the file and an oral hearing.

Are the companies' rights of defence restricted under the proposed settlements procedure compared to those under the ordinary procedure?

Parties' rights of defence under the settlement procedure remain the same as in the ordinary procedure. They are simply exercised in the framework of bilateral discussions both orally and by means of a written submission, in anticipation of the formal notification of objections.

By introducing a settlement phase, the Commission increases companies' options to be informed earlier of potential objections and of the evidence supporting them. It is a unique opportunity to be informed of the likely range of fines prior to the adoption of the final decision. On the basis of these facts and documents, the parties have the opportunity to express their views to the Commission, in line with the case-law of the Court of Justice as mentioned in particular in article 16 of the Commission's notice. This enables companies to influence even the contents of the statement of objections and, thereby, of the decision itself. Full access to file remains available after the SO for those who do not settle, as it is the case today, and parties the parties may decide at any moment to stop the settlements discussions or not to send a WSS.

Finally, any settlement Decision is open to appeal.

May the parties call upon the Hearing Officer during the settlements procedure?

The parties may call upon the Hearing Officer at any time during the settlements procedure in relation to issues that might arise relating to due process. This constitutes an additional guarantee for the respect of the rights of defence.

How will the reduction of fine under the proposed settlements procedure be determined?

Pursuant to article 32 of the Commission notice, the settlement reduction will be deducted from the fine that a company would normally have to pay according to the provisions of the current Commission's guidelines on fines. When applicable, the reduction of fine given under the settlements procedure will be cumulative with the reduction of fine under the leniency program. The Commission will establish the amount of the settlement reductions after public consultation.

Will the settlement reduction be the same for all parties settling?

The reduction of the fine rewarding companies for having settled a case with the Commission will be equivalent for each party having settled.

Is the Commission bound by the settlement agreement that was previously concluded between companies and the Commission's services?

The respect of the principle of collegiality of Commission Decisions and the benefit of having Advisory Committee meetings mean that the College of Commissioners may legitimately depart from the parties' submissions or the results of their discussions with the Commission's services up until the final Decision. However, as the draft notice specifies, the Commission may not adopt a decision departing from the "settled" objections without informing the parties concerned and adopting a new statement of objections subject to the ordinary rules of procedure and which cannot be based on acknowledgements provided by the parties in view of settlement. However, this should occur only exceptionally if the usefulness of the settlement instrument is to be preserved.

Does a settlement decision imply that a company who accepted to acknowledge her participation to an infringement of Community law will not make an appeal to the Court of first instance?

No. A company who has received a decision after a settlement with the Commission can appeal the Commission decision to the Court of First Instance.