

European Commission Proposes Framework for Cartel Settlement

A proposed framework for a cartel settlement procedure would allow companies to admit involvement in a cartel, settle liability, and receive potentially reduced fines in bilateral discussions with the European Commission, rather than having to submit to a time-consuming and onerous full cartel investigation. The new procedure, announced on October 26, 2007, would be akin to plea bargaining, which is the manner by which most cartel investigations are resolved in the United States.

The Commission has published a draft Notice on the settlement proceedings and a proposed Regulation, which would form the legislative basis for cartel settlement under European law. The publication of these documents marks the beginning of a public comment period. The Commission has requested comments on its proposals by December 21, 2007. It is anticipated that the proposals will be adopted in a revised form during 2008. The following comments reflect Dechert's extensive experience defending cartel proceedings under both the U.S. and European systems and analyze the proposed European settlement procedure.

Settlements Offer Defendants a New Route Through EU Cartel Investigations

At present, defendants have two basic options in dealing with a Commission cartel investigation:

- cooperate with the Commission under the well-established EU leniency program in return for lower fines or full immunity on a first-come, first-served basis; or

- contest the investigation every step of the way.

In either case, all defendants in cartel cases are required to participate in a lengthy process that involves, inter alia, responding to the Commission's questions, presenting evidence, and preparing a series of written and oral submissions in response to the Commission's

Advantages of Proposed Settlement Procedure

- Opportunity to understand likely extent of liability and fines at an early stage of the proceedings
- Expedited, less-onerous procedure
- Potentially reduced financial penalties
- Greater transparency in the process: companies will be able to quantify the likely financial penalties before the Commission's final decision

Disadvantages of Proposed Settlement procedure

- No guarantee that settlement process will be available
- No ability to "bargain" with the Commission
- Commission may pull the plug on settlement at any time
- Pressure to present an attractive settlement package means defendants may accept more liability than the Commission would have assigned to them after a full investigation
- Inability ultimately to quantify the benefit of engaging in the process
- Dilutes certain fundamental rights of defence such as full access to the evidence on file

charges. Cartel proceedings regularly take a number of years to complete in the EU, leaving a defendant in limbo as to its liability and the financial penalty it will face.

The proposed settlement procedure would offer defendants a third, swifter option: accept liability and attempt to settle the matter as quickly as possible.

It is difficult to defend against cartel charges under the European system. Allegations are often made on the basis of second-and third-hand evidence, and no right to confront and cross-examine accusers is afforded. Fines on the order of hundreds of millions of Euros may be imposed on a party that is provided only one or two hours to argue the evidence orally. The Commission currently refuses to discuss the charges or the evidence with a party outside the oral hearing unless that party is involved in the leniency program. If the Commission adopts a credible option in which a substantive evaluation of the evidence occurs and a meaningful reduction in the fine may be awarded, it could be attractive to defendants.

Settlement “By Invitation of the Commission” Only

Settlement would not be an option available to all companies accused of participating in cartels, but “by invitation” only. The proposed Regulation would grant the Commission wide discretion to decide when cases are suitable for settlement. If the Commission decides to pursue this option, it will write to all parties, asking them to respond by a certain deadline, stating whether they are interested in entering into settlement discussions.

Discussion Not Negotiation

The Commission would carry out bilateral discussions with each party interested in coming to a settlement. These would be strictly confidential, and a company that discloses their contents would risk an increase in the fine imposed in the Commission’s final decision. During the course of these discussions, the Commission would disclose the evidence on which it bases its allegations of cartel involvement and discuss with the company the facts of the alleged breach, the gravity and duration of the cartel, attribution of liability, and an estimation of likely fines. The Commission has made it clear in its proposals that these discussions would not be a forum for negotiation. Nevertheless, the company would be expected to put forward its interpretation of the events. It is intended that, by the end of the discussions, the Commission and the com-

pany would be able to come to a common understanding on these key points.

The Onus Is on the Defendant to Submit a Realistic Settlement Package

Once a common understanding is reached, the Commission would set a deadline for the company to complete a written settlement submission. This document, which is key to the settlement process, would set out the extent of liability and fines that the company is willing to accept. The proposed Regulation would require the submission to contain the following:

- the main facts of the company’s cartel involvement;
- an unequivocal acceptance of liability;
- the maximum fine the company considers acceptable; and
- confirmation that the company relinquishes certain rights of defense, as set out below.

The settlement submission would be binding and, provided the Commission accepts the company’s caps on liability and fines, irrevocable on the defendant’s behalf. If the Commission subsequently departs from the agreed levels of liability or fines, or interprets the facts of the cartel involvement differently than the company, the company would be able to renounce the contents of the settlement document and mount a full defense.

One element critical to the success of any proposal adopted by the Commission would be its ability to ensure confidentiality, particularly of failed settlement discussions. Increasingly in the U. S., class action plaintiffs are attempting to take discovery of cartel activities in Europe on the theory that even if the European cartel did not affect U.S. commerce, it has some bearing on alleged cartel activities in the U.S. Any company would have to be reticent to participate in European settlement discussions if the proceedings, whether successful or not, will subsequently become public.

The Cost of Cooperation: Limited Access to the File, No Right to Challenge the Statement of Objections, and No Oral Hearing

The proposed settlement process would require participating companies to accept that their usual rights

of defense would be diluted. Companies accused of cartel behavior in the EU are granted unrestricted access to the Commission's file. This contains all of the evidence gathered by the Commission from all defendants during the course of an investigation. Cartel defendants may usually view any document in the file, provided it does not contain confidential information or business secrets. The ability to review and evaluate evidence submitted by other defendants sets the European system apart from the U.S. grand jury, whose proceedings are shrouded in secrecy. Companies use this access to construct their defense and gauge their liability. Under the new proposals, companies participating in the settlement program would abandon this right and would only see those documents that the Commission considered key in proving their cartel involvement. A company may request to view other documents, but it would have no right to access these, and the Commission would be able to withhold them if it does not consider them of use to the company or if granting access to the documents might jeopardize the time-saving goal of the settlement process. Companies wishing to settle would also have to forgo the right to challenge the Commission's allegations contained in its "Statement of Objections" in written or oral submissions.

Forfeiting these fundamental rights could be viewed as a major drawback to companies wishing to settle cartel cases. Documents produced by other companies can be a treasure trove of exculpatory evidence and, given the lack of any opportunity to confront witnesses, the ability to review such evidence is a valuable right. A company will have to decide whether to forfeit the right without knowing how valuable it is (i.e., without knowing whether competitors have any exculpatory documents). If the Commission, however, attempts to impose liability or fines above the levels accepted in the settlement submission, these rights would be immediately reinstated, which means a cartel defendant would only relinquish rights of defense in relation to the level of liability it would be willing to accept. Additional safeguards would be available to protect the interests of the companies settling cartel cases:

- throughout the process, they would have the right to ask the Commission's Hearing Officer to review any points of alleged procedural irregularity; and
- they would retain the protection of being able to appeal the Commission's final decision to the European courts.

The Settlement Plug Can Be Pulled at Any Time by the Commission

The Commission would not be bound by the outcome of the settlement discussions or the settlement submission. It would have free discretion to accept the settlement submission or to abandon the settlement process at any time. A company would not know that its settlement package has been accepted until it receives the Commission's final decision, endorsing its settlement submission. Up until this point, the Commission could abandon the process by issuing a fresh set of charges in a new "Statement of Objections," requiring the company to defend the case.

Rewards for Settlement – Lower Fines

The settlement procedure is intended to reward companies for expediting the cartel investigation process. It is proposed that the fine imposed after a company has settled with the Commission would be lower than the fine that would have been imposed had the investigation run its full course. All the members of the same cartel that settle with the Commission would receive the same reduction in fine because they will be considered to have contributed equally to expediting the proceedings. The proposals do not indicate the likely size of reductions (these will be decided following public consultation), but the Commission has stated that they would not be as large as the reductions to fines which are currently applied under its leniency program. It is intended that companies that settle with the Commission and which also actively cooperate under the leniency program would have both reductions applied to their fines, although it should be noted that companies would be unable to qualify for the leniency program once the settlement process has begun.

Rewards – Expedited Process

Companies that settle with the Commission would receive an additional benefit. Settlement should offer a fast-track procedure for dealing with cartel cases. Currently, companies have no option but to become involved in the full-blown cartel investigation. The Commission intends that the new procedures would allow it to handle more cases with the same resources; and companies that agree to settle should be able to make similar savings in time and costs. These savings, however, will not be guaranteed. The Commission's wide discretion to abandon the settlement process, even after all discussions have been completed and the dust has apparently settled, means that, in some cases, companies would have to bear

the costs of a full cartel investigation, as well as the costs of an abortive settlement process. In addition, given that the European system does not afford the full trial that is available in the U.S., it is not clear that time savings would be significant.

Impact of the Settlement Proposals

The proposals are primarily a new tool for the Commission, designed to allow it to expedite proceedings in order to focus its resources more effectively. The proposals are heavily weighted in favor of the Commission:

- companies would only be able to enter into settlement discussions at the invitation of the Commission;
- the Commission would have a wide discretion as to which cases are suitable for the settlement process;
- the Commission would be able to abandon settlement discussions at any point; and
- it would not be bound by the terms of settlement proposals until it publishes its final decision.

Companies will only benefit from the proposals where it suits the Commission to cooperate; and the Commission's wide discretion to refuse a settlement offer means that settlement candidates must come to the table willing to make concessions and offer an "attractive" settlement package.

On the other hand, companies that participate in the proposed settlement process would have the opportunity to understand the charges and the supporting evidence the Commission has against them at an early stage of the proceedings. They would also be able to assess the range of likely fines and decide whether to pursue the settlement option by issuing a settlement submission, which, if accepted, could result in a relatively swift close to an otherwise lengthy cartel investigation.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/antitrust.

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