

Commission Issues Cartel Settlement Legislation

On 1 and 2 July 2008, the European Commission published its final legislative package on cartel settlements. The package supplements an existing Commission Regulation on procedural rules related to antitrust investigations and also includes a Notice providing additional detailed guidance on how the settlement procedure will operate.

This legislation closely follows the original draft proposal discussed in our prior *Dechert OnPoint* on cartel settlements.¹ It now clearly specifies that settlement participants will receive a 10% fine reduction in exchange for agreeing to settle in cartel cases. In addition, it also improves protection against discovery of settlement submissions as it allows companies to make their settlement "guilty plea" orally to the Commission.

Cartel Prosecution is a Top Priority for the Commission

Cartels are a priority item in the Commission's current enforcement agenda. The Commission's commitment to strict cartel enforcement is evidenced by the increasingly high level of fines imposed on cartel offenders, its dedication to an effective leniency program and its support for private damage actions² as a corollary to public cartel enforcement. This latest settlement

procedural option will add another tool to the Commission's cartel enforcement arsenal.

Plea Bargaining or Fast-Track Proceedings?

The settlement package does not introduce US-style plea-bargaining. The ability to settle a case is available to companies "by invitation only" from the Commission, which has wide discretion to decide when cases are suitable for settlement. The companies engaged in settlement discussions are not able to negotiate with the Commission concerning the existence of the alleged cartel infringement, the evidence supporting it or the level of fines.

Cartel Settlements – Some Key Points:

- New expedited route through EU cartel investigations
- Good complement to leniency applications
- Settlement by invitation of the Commission only
- Onus is on the defendant to submit a realistic settlement package with acceptance of liability and the maximum amount of fines it deems appropriate
- Settlement submissions can be made orally as a protection against discovery

¹ "European Commission Proposes Framework for Cartel Settlement," *Dechert OnPoint*, Issue 25 (November 2007), available at http://www.dechert.com/library/Antitrust_25_11-07_European_Commission.pdf

² "EC Issues White Paper on Private Damages for Cartel Infringement," *Dechert OnPoint* (April 2008), available at http://www.dechert.com/library/Antitrust_04-08_SA_EC_Issues_White_Paper_on_Private_Damages.pdf.

Pros and Cons	
Advantages	Disadvantages
Lower fines: 10% fine reduction	Difficult strategic decision about the amount of money to “put on the table” as part of the settlement package
Expedited, less-onerous procedure	No US-style plea-bargaining with the Commission and the Commission can withdraw from the discussions at will
Protection against discovery: settlement submissions can be made orally	Admission of liability will be indicated in the Commission decision
Companies can understand evidence and the level of fines at an early stage of the procedure	Diluted defence rights (no full access to the file, no oral hearing, no right to challenge the Statement of Objections)

The European settlement process is best described as a simplified “fast-track” cartel enforcement proceeding, providing a speedy alternative to those unwilling to fight their case all the way through the normal, lengthy cartel procedure, which can last in practice at least 2-3 years.

Narrow Timeframe for Settlements

There is a narrow window in which to conclude a settlement with the Commission. Settlement discussions may only be initiated by the Commission once it has completed its cartel investigation and the settlement procedure has to be completed prior to the issuance of a “Statement of Objections”. The Commission may, at its discretion, withdraw from the settlement discussions at any time during the proceedings.

Reduced Fines and Time Efficiency vs. Admission of Liability and Diluted Rights of Defence

In settlement proceedings, the Commission will offer a reduction in fines and procedural/time savings in

exchange for admission of liability and diluted rights of defence.

All companies agreeing to settle will receive a uniform 10% reduction of their fines, which will be cumulative with any reduction received under the Leniency Notice. A company under investigation by the Commission may find this procedure attractive as it will achieve a resolution more quickly and at a moderately reduced cost, and the likely amount of fines will be made available to the company at an early stage in the proceedings before the Commission issues its formal “Statement of Objections”.

These rewards, however, come at a price. Companies who intend to settle their case with the Commission are required to plead guilty to the cartel infringement and waive certain fundamental rights of defence. In exchange for settling, they have to give up their right to access all of the evidence on file with the Commission as well as their right to a formal oral hearing. They are only entitled to receive a “streamlined” version of the Commission’s “Statement of Objections” and of the final decision, focusing solely on the essential elements of the case.

Although an appeal against the Commission’s decision is formally possible, it is hard to see how companies could in practice challenge a decision to which they have consented in the settlement proceedings.

Safeguards against Discovery

In order to reduce defendants’ concerns related to potential discovery orders, third parties are not allowed to access settlement submissions. The Commission also permits companies to make their settlement submissions orally. An oral submission is certainly a desirable option for the settling company but it may well make defence by the company that decides not to settle much more difficult as it will make it much more cumbersome to access evidence.

If a company has cooperated under the settlement proceedings, this will be mentioned in the Commission’s final decision. The Commission decision can then be used in private damages actions as evidence of the company’s admission of liability.

When is the Settlement Route a Useful Option?

The settlement procedure does not offer a new alternative between going down the leniency route or contesting the Commission's allegations. It should rather be viewed as a complement to the leniency program. Indeed, the settlement route should be particularly appealing for leniency applicants since they do not usually contest their liability. By participating in settlement proceedings, leniency applicants can now benefit from an expedited, less

onerous procedure and gain an additional fine reduction; however, because the Commission requires the settling party to state the amount that it is willing to pay to resolve the case, difficult decisions will have to be made about how much to offer.

For others who are not willing to cooperate with the Commission's investigation, the low reduction in fine (only 10%) coupled with the risk of private damage claims and the dilution of defence rights makes this a less attractive alternative.

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.

Jeffrey W. Brennan

Washington, D.C.
+1 202 261 3326
jeffrey.brennan@dechert.com

Stephen D. Brown

Philadelphia
+1 215 994 2240
stephen.brown@dechert.com

Peter R. Crockford

London
+44 20 7775 7506
peter.crockford@dechert.com

Paul T. Denis

Washington, D.C.
+1 202 261 3430
paul.denis@dechert.com

Rebecca P. Dick

Washington, D.C.
+1 202 261 3432
rebecca.dick@dechert.com

H. Joseph Escher III

San Francisco
+1 415 262 4545
h.joseph.escher@dechert.com

Michael D. Farber

Washington, D.C.
+1 202 261 3438
michael.farber@dechert.com

Carolyn H. Feeney

Philadelphia
+1 215 994 2247
carolyn.feeney@dechert.com

James A. Fishkin

Washington, D.C.
+1 202 261 3421
james.fishkin@dechert.com

Paul H. Friedman

Washington, D.C.
+1 202 261 3398
paul.friedman@dechert.com

George G. Gordon

Philadelphia
+1 215 994 2382
george.gordon@dechert.com

Robert C. Heim

Philadelphia
+1 215 994 2570
robert.heim@dechert.com

Kevin T. Kerns

Philadelphia
+1 215 994 2729
kevin.kerns@dechert.com

Edward L. Kling

London
+44 20 7184 7612
edward.kling@dechert.com

Christine C. Levin

Philadelphia
+1 215 994 2421
christine.levin@dechert.com

Pierre-Manuel Louis

Brussels
+32 2 535 5479
pierre.louis@dechert.com

Isabelle M. Rahman

Brussels
+32 2 535 5445
isabelle.rahman@dechert.com

Will Sachse

Philadelphia
+1 215 994 2496
will.sachse@dechert.com

Stephen A. Stack, Jr.

Philadelphia
+1 215 994 2660
stephen.stack@dechert.com

Joseph A. Tate

Philadelphia
+1 215 994 2350
joseph.tate@dechert.com

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