General Overview of the EU Cartel Settlement Procedure

Jean-François Bellis (Partner, Van Bael & Bellis, Brussels)

In the framework of its ongoing efforts to improve and streamline the procedure for fighting cartels, and against the backdrop of a large increase in cartel decisions, the European Commission adopted, on 30 June 2008, a formal settlement procedure, which comprises a Settlement Regulation[1] and a Notice on Settlements[2]. A general overview of the settlement procedure and its application to date is presented below.

1. THE SETTLEMENT PROCEDURE VERSUS THE ORDINARY INFRINGEMENT PROCEDURE

In the last fifteen years, the Commission has focused its enforcement of Article 101 of the Treaty on the Functioning of the European Union[3] on the fight against cartels. In the "ordinary" infringement procedure, the European Commission spends considerable time and resources on the (adversarial) administrative stage starting from the adoption of a Statement of Objections (*i.e.*, a formal step in which the Commission informs the parties concerned in writing of the objections raised against them), written responses and oral hearings, to the adoption of a full reasoned infringement decision. The Commission then often devotes its energy defending the legality of its decisions before the EU Courts.

In the settlement procedure, the parties acknowledge their participation, and their liability, in the cartel. In exchange, not only do the parties save on litigation costs by avoiding lengthy proceedings but they also benefit from a 10% fine reduction. In addition, the settlement procedure allows the parties to engage in constructive discussions with the case team on the determination of the scope of the infringement which will have a significant impact on how the fine will be computed. The streamlining of the procedure makes it possible for the Commission to handle more cases with the same resources, which increases overall deterrence.

One drawback of the expedited nature of the settlement proceedings is that it entails that the parties have to conditionally waive certain procedural rights which they would otherwise have under the ordinary infringement procedure. Such waiver includes limited access to the Commission's file and restricted possibility to be heard in oral hearings. This drawback, however, is not significant as the settlement procedure is generally used in cases where the infringement is not contested, such as those involving mostly leniency applicants. In any event, if the settlement discussions are discontinued, the parties will have access to the full range of the rights of defence pursuant to the ordinary infringement procedure.

2. DISCRETION OF THE COMMISSION TO ALLOW THE SETTLEMENT PROCEDURE

The settlement procedure brings benefits to both the Commission and the parties provided they are committed to the process. However, the parties' willingness to settle, while necessary, is not sufficient given that the Commission retains a wide margin of discretion to enter into or discontinue settlement discussions if it considers that procedural efficiencies are not likely to be achieved. Certain factors such as, *inter alia*, the probability of reaching a common understanding regarding the scope of the objections within a reasonable timeframe, are taken into account.

Unlike the plea bargaining procedure applicable in the United States, the settlement procedure is not an investigation tool. Discussions to settle in the EU may only occur once the Commission has carried out a full investigation of the facts (*i.e.*, resulting from on-the-spot inspections, requests for information, information from leniency applicants, etc.) and has taken a decision to initiate proceedings. Once the Commission makes the determination that the settlement procedure is justified, it will set a time-limit of at least two weeks (subject to possible extension) within which the parties have to declare in writing whether they decide to take part in the settlement discussions.

3. BILATERAL ROUNDS OF SETTLEMENT DISCUSSIONS

In practice, the Commission will lead three bilateral rounds of discussions for the purpose of finding a "common understanding" with each party. These discussions intend to (i) present to the parties the Commission's assessment of the case as well as the key factual evidence; (ii) discuss the scope of infringement (*i.e.*, duration and gravity) as well as the value of sales on which the fine will be calculated; and (iii) disclose an estimation of the range of fines to be imposed.

The content of the discussions between the Commission and the parties are to be treated confidentially. For the parties, this means that they may not disclose to any third party in any jurisdiction the content of the discussions or of the documents which they have had access to in view of settlement unless given explicit approval by the Commission. Any breach in this regard may lead the Commission to terminate the settlement proceedings. For the Commission, such confidentiality obligation entails that the information submitted during these discussions by one party may not be used as evidence against other parties.

4. SETTLEMENT SUBMISSIONS LOCK PARTIES IN

Following these bilateral meetings, the Commission will grant the parties a time-limit of at least 15 working days (subject to possible extension) to introduce a final settlement submission which must include a number of provisions, including (i) an acknowledgment in clear and unequivocal terms of their liability for the infringement; (ii) an indication of the maximum amount of the fine foreseen; and (iii) that they have been provided sufficient opportunity to make their views known to the Commission. The settlement submissions constitute the parties' expression of their commitment to cooperate and, as a result, they may not unilaterally revoke their settlement submission unless the Commission fails to reflect the parties' settlement submissions first, in the Statement of Objections, and ultimately, in the final decision.

5. THE “SETTLED” STATEMENT OF OBJECTIONS AND INFRINGEMENT DECISION

The Commission then notifies to each party in writing a Statement of Objections which contains the information necessary for the parties to corroborate that it reflects their settlement submission. Unlike in the ordinary infringement procedure where the Statement of Objections usually contains hundreds of pages of detailed factual and legal analysis of the infringement, the Statement of Objections in the context of settlement proceedings is streamlined and much shorter. Should the “settled” Statement of Objections accurately reflect the settlement submissions, the parties must address a written confirmation to the Commission which will then proceed with the adoption of a streamlined formal settlement decision.

Even at this late stage, the Commission retains the right to adopt a final decision which departs from its preliminary position expressed in the settlement submission or in the Statement of Objections. If this path is chosen, the Commission must inform the parties and notify to them a new Statement of Objections in order to allow for the exercise of their rights of defence (*i.e.*, access to the file, oral hearings, reply to the Statement of Objections, etc.). In addition, the acknowledgment of the parties in their settlement submissions are considered withdrawn and cannot be used against them in the ordinary proceedings.

Formally, settled infringement decisions have the same legal effect as ordinary infringement decisions and therefore are subject to judicial review. Whereas a challenge on the facts and on the legal assessment of the infringement is unlikely given that the parties explicitly acknowledged their liability for the infringement, it cannot be excluded that, as settlement decisions are individual decisions and are the result of bilateral confidential discussions, parties may dispute the settled infringement decision based on a violation of fundamental principles of law (*e.g.*, the principles of non-discrimination and equal treatment).

6. THE COMMISSION’S TRACK RECORD

To this date, the Commission’s settlement programme has had its fair share of success as shown by the adoption since 2010 of 17 settlement decisions, totalling fines over € 4 billion.

Other than the obvious 10% fine reduction (which may amount to millions of euros), the settling undertakings will be financially incentivized to enter into settlement discussions because, to this date, the Commission has never increased the fine for aggravating circumstances. The settling parties will also benefit from (generally) shorter proceedings.

The duration of the settlement procedure, from the opening of the proceedings to the settled decision, has ranged from 11 to 18 months, whereas a full cartel procedure, including Court review, may last several years.[4]

The system is however not flawless, notably in the events of “hybrid” settlements, failed settlements or appeals before the European Courts. As seen below, the objective of procedural efficiencies sought by the Commission is, as a result, partly thwarted.

6.1 Issues with respect to hybrid settlements

In five instances, the Commission was not able to reach a settlement decision with all the parties which led to the adoption of “hybrid” settlement decisions.[5] Such situation occurs when one or more parties refuse to enter into settlement discussions or opt-out during the settlement procedure. In hybrid settlements, the Commission fails to achieve the expected procedural efficiencies as it remains necessary to conduct the ordinary infringement procedure against non-settling parties (e.g., oral hearing, full access to the file, full-length decision).

While the Commission aims at discouraging the number of hold-outs leading to hybrid decisions, it nevertheless is constrained in its ability to sanction hold-outs by the principle of equal treatment (*i.e*., other than not providing a 10% discount, the Commission may not treat hold-outs differently than parties agreeing to a settlement), as well as by the duties of impartiality, objectivity and independence (*i.e*., companies holding out must be granted their full rights of defence before the Commission determines whether they have infringed competition law).

In recent cases, the conflict between discouraging hold-outs and ensuring the undertaking’s full rights of defence has raised a number of issues. For instance, in the *Euro Rate Derivatives*[6] and the *Yen Rate Derivatives*[7] cases, the undertakings electing not to settle complained to the European Ombudsman that the Commission had not acted impartially and objectively. It remains to be seen whether the Ombudsman will find that the Commission violated its duties of impartiality and the rights of defence of the complainants.

In the *Animal Feed Phosphate* case[8], Timab, an undertaking taking the decision to opt out from the settlement procedure, appealed the decision of the Commission arguing that it was punished for refusing to settle and for withdrawing its settlement submission in breach of fundamental principles of law, including the principle of equal treatment. Timab considered that the level of fine ultimately imposed by the Commission decision should have been 10% higher than the fine range discussed in the settlement process, but instead, it was 25%. The case is currently under appeal before the General Court.[9]

6.2 Failed settlements

In other instances, the Commission may decide to revert to the ordinary infringement procedure following the breakdown of the settlement discussions with all the undertakings. In the *Smart Card Chips* case[10], the undertakings lost the benefit of the settlement process because they were refusing to acknowledge their liability.

6.3 Appeals of settlement decisions

Finally, the fact that an undertaking admits its liability in an infringement following settlement discussions does not mean it forgoes its right to appeal. While the right to appeal will be limited, given that the undertaking explicitly admitted its liability, it nevertheless may challenge the settlement decision on the basis of violation of fundamental principles of law (*e.g.*, the principles of non-discrimination and equal treatment).

In the in the *Euro Rate Derivatives* case[11], Société Générale became the first settling party to appeal a Commission settling decision alleging an error in the assessment of its fine.[12] Specifically, Société Générale argued, *inter alia*, that the Commission made a manifest error of assessment in determining the value of sales to which the infringement directly or indirectly relates (in the Commission methodology for the calculation of fines, the value of sales serves as a basis for determining the final amount of the fine). Such appeal occurred despite the fact that Société Générale likely included in its settlement submission an indication of the maximum amount of the fine it would accept in the framework of the settlement procedure.

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[1] Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ 2008 L171/3.

[2] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008 C167/1

[3] Article 101 TFEU states that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited.

[4] While an extreme case, *Graphite Electrodes*, nine years elapsed between the Commission's decision to open an investigation in 1997 and the final judgment of the Court of Justice in 2006.

[5] *Animal feed phosphates*, Case 38.866, Decision on Commission website (summary also available at OJ 2011 C111/19); *Euro Interest Rate Derivatives (EIRD)*, Case 39.914 (Decision not yet available); *Yen interest rate derivatives (YIRD)*, Case 39.861 (Decision not yet available); *Steel abrasives*, Case 39.792, OJ 2014 C362/8 (summary only); *Canned Mushrooms*, Case 39.965 (Decision not yet available).

[6] *Euro Interest Rate Derivatives*, Case 39.914, 965 (Decision not yet available); See the Commission's press release *Antitrust: Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry*, IP(13)1208 of 4 December 2013. Before the Ombudsman, see Case 0121/2014/CK opened on 31 July 2014.

[7] *Yen Interest Rate Derivatives*, Case 39.861 965 (Decision not yet available); See the Commission's press release *Antitrust: Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry*, IP(13)1208 of 4 December 2013.

[8] *Animal Feed Phosphate*, Case 38.866, Decision on the Commission's website (summary also available at OJ 2011 C111/19).

[9] Case T-456/10, *Timab Industries and CFPR v Commission*, not yet decided.

[10] *Smart Card Chips*, Case 39.574 965 (Decision not yet available); See Commission press release IP/14/960 of 3 September 2014.

[11] *Euro Interest Rate Derivatives*, fn. 7.

[12] Case T-98/14, *Société Générale v Commission*, action brought on 14 February 2014.