Competition Law Association
British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)
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By Email and Post
European Commission
Competition Directorate-General
Unit G5 - Cartels V
Settlements Package
B-1049 Brussels
Belgium

Submission in relation to the proposal for a Commission Regulation amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (the "Amending Regulation") and the draft Commission Notice on the same (the "Notice") (collectively the "Proposed Amendments")

1. Introduction

1.1 These comments are submitted on behalf of the UK Competition Law Association ("CLA") which is affiliated to the Ligue International du Droit de la Concurrence ("LIDC")[1]. The CLA welcomes the Proposed Amendments and the opportunity to make a contribution to this debate.

1.2 The CLA does not seek to address every aspect of the Proposed Amendments but confines its comments to particular matters that we wish to highlight.

[1] The membership of the CLA includes barristers, solicitors, and in-house lawyers, academics and other professionals including economists, patent agents and trade mark agents. The main object of the CLA is to promote freedom of competition and to combat unfair competition.

2. General Observations

2.1 The CLA welcomes the Commission's Proposed Amendments and supports the overall objective of increasing efficiency in cartel proceedings and thereby releasing resources to allow the Commission to detect and pursue a greater number of cases. Such an increase in efficiency would be timely given the Commission's determination to fulfil its remit to identify and punish cartels on the one hand and, on the other, the fact that a relatively low number of cartel decisions are issued by the Commission each year. It appears clear that the success of the Commission's leniency programme, while it has increased the detection rate, has also created an additional backlog of cases.

2.2 While generally supportive of the aims behind the Proposed Amendments the CLA has a number of comments, in particular in relation to the protection of the parties' rights of defence and the effective operation of the Proposed Amendments if adopted.

3. Level of the Reduction

3.1 The level of the reduction of the fine will be critical to the success of the settlement procedure. The Notice does not specify the level of the reduction in the current draft of paragraph 32 although it seems clear that there will be one figure and that it will apply to all parties and in all cases. Given the increasing possibility of damages actions in the national courts it is likely that potential settlement parties will need a substantial reward for admitting liability. In our view the reduction would need to be set at between 15 and 25 per cent if the procedure is to be widely used and the Commission is to realise significant procedural efficiencies.

3.2 There may be some merit in considering whether the level of the reduction should be flexible so as to vary in accordance with the degree to which a settling party can reach a common understanding with the Commission. A flexible approach may allow more parties to settle as the Commission would be able to reward different levels of agreement other than the very high level of agreement that would presumably be required under the Proposed Amendments. However, on balance it seems likely that a flexible reduction level would require and encourage more extensive discussions between the Commission and the settling parties which would reduce procedural efficiency.

4. Efficiencies

Relationship between Procedural Efficiencies and the Level of the Reduction

4.1 If the reduction for settlement is to be expressed as a fixed percentage of the final fine imposed it will not be possible to correlate the amount of the reduction to the actual level of procedural efficiencies gained. For example, where the reduction is applied in relation to a cartel with seven or eight participants the procedural efficiencies accruing from each extra party agreeing to settle may be relatively similar, however, the total reduction in fines would be considerably greater for those parties with a larger total turnover. It follows that efficiencies gleaned per euro of fine reduction would be greater for parties with lower turnovers than parties with higher turnovers. Therefore, it will be important for the Commission to ensure that there is no perception that it favours settlements by smaller parties.

Procedural Efficiencies and Partial Take-up

4.2 Point 14 of the Notice makes it clear that the Commission may enter into settlement discussions with only some of the parties to the proceedings and not necessarily all of the parties. It must be correct that the settlement procedure is only available to suitable candidates in each set of proceedings and not dependent on all the parties in one set of proceedings wishing to use the procedure and the Commission also acceding to such requests. However, to the extent that one or more parties do not settle the Commission will still need to go through a full procedure albeit for a more limited number of parties. The efficiencies accruing in these cases may be significantly less than cases in which all parties choose to settle. Indeed, the extra burden of conducting settlement discussions alongside the formal cartel procedure may potentially prove more burdensome than the current system. As noted in section 7 below there may be a particular problem in relation to immunity applicants who may have little incentive to make use of the settlement procedure.

4.3 An allied point to that above is the question of whether the Commission intends to address all settlement parties together. As further discussed at paragraph 5.5 below point 7 of the Notice states that parties entering into settlement discussions may not confer with other parties to the proceedings or third parties without the Commission's consent. In our view the Commission may wish to use standardized procedures and communications in the context of settlement discussions and may also want to hold discussions with the parties together. Such an approach could enhance efficiency and would promote transparency such that the Commission would be seen to be dealing even-handedly with each party considering settlement.

Translations

4.4 Point 20(e) of the Notice provides that in a written submission a settlement party must agree to receive the statement of objections and final decision in a given language of the European Community. The drafting of this provision suggests that efficiencies would be gained by reducing the number of translations needed and also increasing the available pool of case handlers. We can see the merit in this point from an internal organisational point of view, however, unless all parties to a proceeding use the settlement procedure the Commission may still need to produce documents in a number of different languages in any event.

5. Procedure and Rights of Defence

Settlement Discussions - Reaching a "common understanding"

5.1 If the reduction for settling is to be a fixed percentage which is applicable in all cases and to all parties it follows that the Commission must only determine whether the procedure can be applied or not. However, although the Commission cannot negotiate it is understood that it will listen to the settlement parties' views as to fine levels. The settlement procedure as set out in the Notice envisages that some form of "*common understanding*" between the settlement party and the Commission is necessary before proceeding to a formal written submission in which the parties must provide, among other things, an indication of the maximum amount of the fine they foresee being imposed and which they accept.

5.2 While there can be no negotiation between the settlement parties and the Commission there will be a dialogue preceding the submission of the written settlement submission including the party's expectation as to the maximum level of the fine. For a potential settlement party this part of the procedure will be critical as thereafter, if the procedure operates successfully as described in the Proposed Amendments, all issues will have been determined and the statement of objections, reply and final decision will essentially record the common understanding reached. Therefore, it can be anticipated that parties will deploy a considerable amount of resource to persuade the Commission during this stage of the process. In our view the Commission should provide greater detail of the parameters for the settlement discussions and some indication of what will amount to a "*common understanding*" under the Notice. Without some parameters to this dialogue it is likely that the Commission will be drawn into protracted discussions which may cut into the procedural efficiencies. It may for example be useful if the Commission re-issued its

opinion on the issues set out at point 16 of the Notice[2] so that settlement parties could be clear as to whether or not the Commission had altered its position during the dialogue.

5.3 In relation to the issues set out at point 16 of the Notice we note also that, in our view, the parties should obtain some indication from the Commission of their level of fault as compared to the other participants in the alleged cartel. In relation to immunity applicants the provision of this information may be determinative as to whether they settle as if they are found to have taken steps to coerce others they would, in accordance with point 13 of the Leniency Notice[3], not be able to obtain immunity.

Applicants not Proceeding to a Written Submission

5.4 One significant concern for parties using the settlement procedure will be the risk that, having entered into settlement discussions, the Commission may decide that the case is not suitable for settlement. In our view, the position of an unsuccessful applicant should be clarified in the Notice.

5.5 The Notice does provide a significant degree of confidentiality to a party considering settling and indeed to the Commission to allow it to effectively enter into discussions. At point 7 the Notice states that parties entering into settlement discussions may not disclose the contents of their discussions with the Commission to any other party or third party. Point 35 of the Notice provides that the Commission will not publicly disclose "*documents and written or recorded statements received in the context of this Notice*". According to point 25 of the Notice if the parties submit a written settlement submission the Commission may draw on that document in its statement of objections. However, as provided for at point 27 of the Notice if the Commission does not endorse the written submission in the statement of objections the acknowledgements provided by the relevant parties are deemed to have been withdrawn and cannot be used against the parties.

5.6 Clarification would be welcome on whether all relevant documentation will be removed from the Commission's file in the event that the Commission does not endorse the written submission. In our view the Notice could also be improved by clarifying whether or not, in the event that a settlement applicant does not get to the stage of submitting a written submission either because they decide not to proceed or because the Commission will not allow them to proceed, the documentation relating to the discussions will remain on the Commission's file.

[2] "… the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections."

[3] Commission Notice on immunity from fines and reduction of fines in cartel cases OJ C298/17

5.7 It is submitted that the settlement procedure would be more effective if parties could correspond with the Commission safe in the knowledge that documents submitted prior to any settlement submission could be withdrawn from the file.

5.8 Point 35 of the Notice sets out the position as regards public disclosure of documents on the Commission file but does not expressly cover the position as regards access to the file by other parties to the proceedings. It is noted that, given the need to respect the other parties' rights of defence, it may be difficult for the Commission to effectively exclude settlement documents from the file, or restrict access to them, if they contain inculpatory or exculpatory evidence.

5.9 If all documents related to the settlement discussions are to be kept on the Commission file it seems likely that parties may prefer to communicate orally with the Commission which could lead to further resources being used to record and transcribe such communications.

5.10 A further point that will concern parties considering using the settlement procedure is whether the settlement discussions and written settlement submissions that are not endorsed by the Commission in its statement of objections will be available to the European courts in the event of an appeal.

Access to the Commission's File

5.11 Article 7 of the Amending Regulation amends Article 15 of Regulation 773/2004 by adding a new 1a which provides that:

> *"After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003, the Commission shall disclose, where appropriate, the evidence supporting the envisaged objections to parties willing to introduce settlement submissions in order to enable them to do so. In view thereof, when introducing their settlement submissions the parties shall confirm to the Commission that they will only require access to the file after the receipt of the statement of objections, if the statement of objections does not endorse the contents of their written settlement submissions."*

5.12 It follows from the above that the Commission will select the evidence it believes supports the objections. The Commission appears to place itself under no duty to identify exculpatory evidence. Point 17 of the Notice does provide for a truncated access to the file procedure for a settlement applicant, however, this is at the Commission's discretion. In its written submission a settlement applicant must, according to point 20(d) of the Notice confirm that "*they do not envisage requesting access to the file or requesting to be heard in an oral hearing, unless the Commission does not endorse their settlement submission*".

On the basis of a shortened procedure conducted at the discretion of the Commission settlement applicants then give up their rights to access to the file and to be heard. In our opinion it is questionable whether it is possible for parties to give up these rights and especially in the event that the exercise of these rights becomes critical if further exculpatory evidence arises after a written settlement submission has been provided to the Commission.

Role of the Hearing Officer

5.13 Point 18 of the Notice states that the parties may call upon the Hearing Officer to discharge his role in ensuring the effective exercise of their rights of defence but gives little detail as to the issues the Commission envisages being dealt with in this way. Given that the parties will have access to the file at the Commission's discretion it seems likely that the Hearing Officer's workload could be increased significantly by the Proposed Amendments.

6. Damages Claims

6.1 As noted above the likelihood of follow on damages actions may well dissuade parties from using the settlement procedure. The chances of the parties using the settlement procedure may be increased if the Commission were to provide enhanced protection for information provided to it in the context of settlement proceedings.

6.2 It is clear from point 35 of the Notice that the Commission will not publicly disclose "*documents and written or recorded statements*" received during the settlement process even if, as set out above, the position in relation to access to the file is uncertain. However, it seems likely that written settlement submissions would be discoverable under the procedural rules of some jurisdictions such as the United States. In the context of a global cartel which may be the subject of actions in a number of jurisdictions around the world and in particular the US the fact that written submissions may be discoverable could be a significant impediment to the success of the Proposed Amendments.

6.3 One possible solution to the discoverability of settlement submissions would be to use a procedure similar to that introduced by the Commission's leniency notice in 2006[4] whereby oral corporate statements may be recorded and transcribed at the Commission's premises. This approach would provide some additional security for parties submitting settlement submissions. However, the use of an oral procedure in the context of settlement submissions could cause the Commission to incur significant costs which may run counter to the underlying objective of increasing procedural efficiencies. Nevertheless, it seems

[4] Point 32, Commission Notice on immunity from fines and reduction of fines in cartel cases OJ C298/17

likely that the Commission will come under pressure to use a similar procedure if the Proposed Amendments are adopted.

6.4 A Commission decision in a settlement procedure must necessarily record the settlement parties' agreement with the Commission's findings, however, it may be beneficial to limit the amount of information that is placed in the decision to a strict minimum. In any event the Proposed Amendments could, in the our view, be improved by providing more detail and clarity in relation to the extent of information that will be placed in the Commission's final decision.

7. Interaction with the Leniency Notice

7.1 It is clear at point 33 of the Notice that any reduction for leniency will be summed with the reduction for settlement. It seems likely that this will, depending on the level set for the reduction for settlement, create a powerful incentive for parties to use both procedures. However, some clarification may be useful in relation to total immunity from fines. Presumably an immunity applicant that was confident of success would not have any further incentive to apply for settlement or, alternatively, is the Commission expecting that immunity applicants would apply for settlement under the cooperation obligation contained in point 12(a) of the leniency notice? It seems apparent that there could be no obligation on the immunity applicant to use the settlement procedure especially if written submissions are discoverable in litigation. Clarification on this point would be useful.

7.2 As noted above if it is only possible to provide the Commission with oral statements in relation to leniency and not settlement then, when contemplating potential damages actions, it may be that an immunity applicant who admits participation in the cartel would prefer not to create additional detailed documents setting out its involvement and views on the fine level (which may involve considering material upon which damages could be calculated). It is also of course the case that while an immunity applicant may admit its participation in a cartel it may still disagree with the Commission as to the exact extent of its involvement.

8. Drafting Points

Definition of "Cartel"

8.1 The amendments set out in the recitals to the Amending Regulation use the term "*cartel*" which is not found in the current text of Regulation 773/2004 or indeed Regulation 1/2003. It is clear from the Proposed Amendments that this settlement procedure is only available for cartels, however, it may be worth considering inserting a definition of "*cartel*". Such a

definition should, in our view, be the same as, or at least consistent with, the definition employed in point 1 of the Commission's leniency notice[5]:

> *"Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC".*

8.2 Given that cartels are a sub-set of the greater set of activities covered by Article 81 EC and that there may be a number of borderline cases where classification of an activity as a cartel would require the Commission to exercise its discretion it may be prudent to use the term "*cartel*" only in the Notice and not the Amending Regulation. The Amending Regulation could, for example, instead refer to *"serious infringements of competition law in relation to which the Commission is considering imposing a fine"*.

New Article 6(1)

8.3 Article 1(2) of the Amending Regulation provides an amendment to Article 6(1) of Regulation 773/2004 which in its second sentence provides that: "*[T]he Commission may also provide the complainant with a copy of the non-confidential version of the statement of objections*". The current wording of Article 6(1) provides that the Commission "*shall provide the complainant with a copy of the non-confidential version of the statement of objections*". As stated at point 3 of the Notice the settlement procedure is for cartels and it is understood that it is in this context that the Proposed Amendments are to modify Regulation 773/2004. However, is seems that this amendment to Article 6(1) will apply both to procedures under Article 81 EC and Article 82 EC. Clarification of the exact scope of this amendment would be welcomed.

The CLA would be happy to discuss any of the above in more detail if this would be of assistance to DG Competition. Please initially contact James Dilley at james.dilley@martjohn.com or call on +44 (0) 870 763 1208.

Competition Law Association
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[5] Commission Notice on immunity from fines and reduction of fines in cartel cases OJ C298/17