

Legal Updates & News

Legal Updates

European Commission Adopts Cartel Settlement Procedure

July 2008

by [Peter J. Edlind](#), [Rony P. Gerrits](#)

Related Practices:

- [Antitrust & Competition Law](#)
- [Litigation](#)
- [Securities Litigation, Enforcement and White-Collar Defense](#)

On June 30, 2008, the European Commission (the “Commission”) adopted a settlement procedure for cartel cases.^[1] Under the settlement procedure, a defendant acknowledging its participation in a cartel will receive a 10% reduction in its fine.

A copy of the settlement guidelines can be found at <http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html>.

10% Reduction of the Fine

The settlement guidelines provide that the fine imposed on a defendant acknowledging its participation in a cartel will be reduced by 10%. The 10% reduction can be combined with any reductions in fines received in connection with an application for leniency or with cooperation in general under the 2006 Fining Guidelines.

The decision to offer settlement discussions lies with the Commission in its sole discretion (although, of course, there is nothing to prevent a party from indicating to the Commission that it would welcome such discussions). If it enters into settlement discussions, the Commission will contact all the defendants and request a written statement from each of them indicating whether it would envisage engaging in settlement discussions. The Commission must give the defendants at least two weeks to respond to such a request. A defendant is under no obligation to enter into settlement discussions with the Commission.

Following this initial phase, the Commission has the full discretion to determine the appropriateness of the bilateral settlement discussions with each company. The defendant will be informed about any objections that the Commission intends to raise, as well as the likely size of the fine to be imposed. It is important to note that, unlike in the U.S. plea bargaining proceedings, the settlement procedure does not allow the parties to negotiate with the Commission concerning the existence of the infringement or the size of the fine.

Acknowledgement of Liability

To obtain a fine reduction, the Commission requires a formal submission from the investigated party, either orally or in writing, primarily containing the following information:^[2]

- An acknowledgment of liability, “in clear and unequivocal terms”, of the facts described by the Commission;
- An indication of the maximum amount of the fine that is foreseen to be imposed by the Commission and what would be accepted by the defendant within the framework of the settlement proceedings;
- Confirmation that the defendant has received the Commission’s objections in a satisfactory manner and been provided with sufficient opportunity to make its views known to the

- Commission; and
- Confirmation that the defendant does not envisage requesting access to the file or a formal oral hearing.

Restricted Access to Settlement Submissions

In a bid to protect settlement submissions against discovery orders, primarily from the U.S., access to the file will not be granted following the issuance of a statement of objections pursuant to a settlement, where all parties to a cartel agree to settle with the Commission. In cases where not all parties in a cartel settle with the Commission, the parties choosing not to settle will be granted access to the file for their defense only at Commission premises and are not permitted to make or retain mechanical or electronic copies of settlement submissions.

Comment

It is questionable whether a reduction of 10% of the fine is going to be anywhere near sufficient to motivate offenders to acknowledge their participation in a cartel. Specifically in the case of global cartels, with the potential of several millions of dollars of treble damages in the U.S., it would appear unlikely for any defendant to acknowledge in “clear and unequivocal terms” its participation in a cartel arrangement.

The settlement procedure appears to be tilted in favor of the Commission; whereas, the Commission has the right to change its mind at any time throughout the proceedings, even after a defendant's formal settlement submission, defendants have little margin to maneuver and, absent a significant discrepancy between the formal submission and the statement of objections, do not have the ability to withdraw a settlement request.

As a result, it is doubtful whether the settlement guidelines in their current form will achieve their stated aim of reducing the Commission's workload and speeding up cartel investigations. The only situation where defendants may be inclined to consider settling their case appear to be limited to local, European only, cartels with little or no risk of follow-on damages litigation.

Footnotes

[1] The settlement procedure is established through a Commission Regulation that amends certain provisions of Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. Commission Regulations come into effect through their publication in the EU Official Journal. The Commission Regulation is supplemented by a Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) 1/2003 in cartel cases.

[2] For a full list of the requirements, see paragraph 20 of the Commission Notice.