SEPTEMBER 2008, RELEASE TWO

GCP
THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

The 2008 Settlement Notice: Will the Commission Make it Work?

Peter D. Camesasca, Kristian Hugmark & Ief Daems

Howrey LLP

WWW.GLOBALCOMPETITIONPOLICY.ORG

The 2008 Settlement Notice: Will the Commission Make it Work?

Peter Camesasca, Kristian Hugmark, and Ief Daems [*]

In the European Commission ("Commission")'s mind, the 2008 Settlement Notice (new Notice) is an attempt to create significant procedural efficiencies and avoid resource absorbing access-to-file and other costly procedures before the Luxembourg Courts. As the EC settlement system is nowhere near the negotiated plea bargains one knows from the US, but rather an extension of the mechanical application of the 2006 EC Fine Guidelines ("Guidelines"), the authors argue that the Commission will have to be flexible and provide the incentives to make the system work. In the meantime, parties must carefully consider their strategic options and balance their approaches in order not to jeopardize their strategy for a response to a full Statement of Objections ("SO") if settlements go wrong.

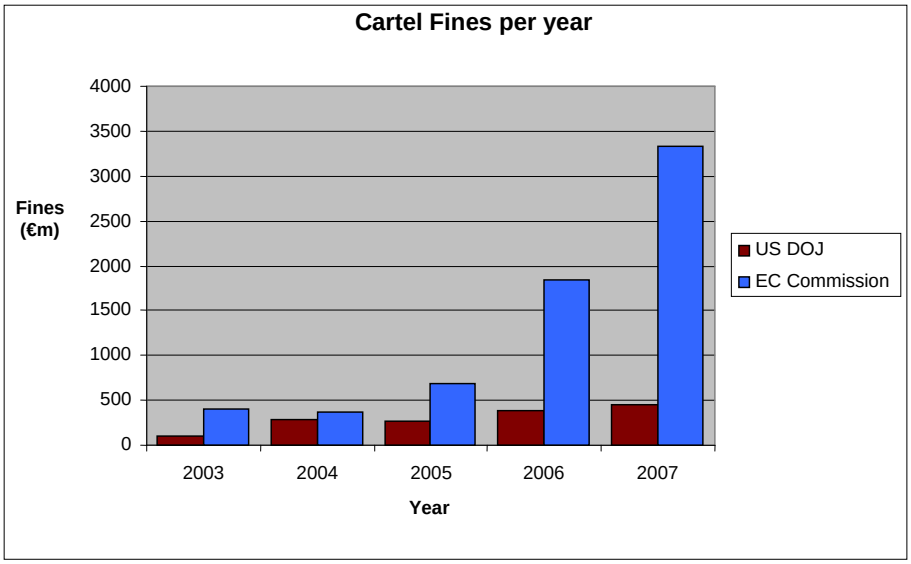
I. BACKGROUND—SETTLEMENT INTRODUCED

Over the last two years, the European Commission has issued increasingly high fines. It imposed four cartel fines of about half a billion Euros, one of them even closely approaching one billion.[1] Although these cases still have to stand scrutiny in Court, they

[*] Peter D. Camesasca is a partner, Kristian Hugmark a senior associate and Ief Daems an associate at Howrey LLP. Peter is also an Asst. Prof. at the Rotterdam Institute of Law and Economics ("RILE"). All opinions expressed represent our own, not those of Howrey LLP, RILE, or our clients.

[1] Case COMP/F/38.638, *Synthetic Rubber*, [2008] C 7/11, imposing a total fine of €519million; Case COMP/38.899, *Gas Insulated Switchgea*, [2008] C 5/7, imposing a total fine of around €750million; Case COMP/E-1/38.823, *PO/Elevators and Escalators*, [2008] OJ C 75/19, imposing a fine of €992million; and Case COMP/39.165, *Flatt Glass*, [2008] C 127/9, imposing a fine of €486million.

show how the Commission has developed as a confident cartel enforcer, adopting a high fining policy and strict leniency program. A comparison between the corporate fines imposed by the US Department of Justice ("DOJ") and fines imposed by the European Commission over the last five years clearly highlights the increasing exposure in Europe.[2]



A. 2006 Fine Guidelines and Leniency Notice— the threat of extraordinary fines

The trend towards increasing exposure in Europe is supported by the new rules in relation to the Commission's fining and leniency policy.

The Guidelines[3] substantially increase exposure. The wide discretion granted to the Commission allows it to set extraordinary fine amounts, in particular for large

[2]Source: http://www.usdoj.gov/atr/public/231424.htm#img2. Note however that exposure in the US often includes high amounts of civil damages as well as criminal sanctions imposed on individuals (including jail terms).

[3]Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation N° 1/2003 [2006] OJ C 210/2; hereafter "the 2006 Fine Guidelines".

companies involved in long term cartel infringements.[4] For example, in terms of duration exposure has increased 90 percent per year of infringement, currently applying a multiplying factor rather than a 10 percentage uplift. While only one of the four half-a-billion-Euro cases of the past two years has been imposed under the Guidelines[5], more and even higher fines are expected to follow.

The Commission's policy of increased exposure is further supported by the 2006 Leniency Notice[6] and its practice of adopting increasingly high standards for granting either immunity or leniency discounts. Note for example the language of the new Leniency Notice stating that leniency applications will have to provide added value to strengthen the Commission's ability "to prove the alleged cartel"[7] rather than just "the facts in question"[8] as per the old Leniency Notice. Although just a few words of difference, they symbolize the current policy trend. The Commission demands parties to provide increasingly detailed and large amounts of information, both in relation to facts as well as other elements of the alleged cartel. This trend fits the Commission's goal to use all of its available tools to impose cartel enforcement as effectively as possible. The higher the number of corroborating statements, the stronger the Commission's case and

[4]Also in terms of gravity, the Commission may apply a percentage of up to 30 percent of the value of sales of the last year of the infringement, and add another 25 percent as entry fee. Further uplifts for aggravating circumstances or deterrence remain possible as well.

[5]Case COMP/39.165, *Flatt Glass*, [2008] C 127/9.

[6]Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C 298/17; hereafter the "2006 Leniency Notice".

[7] 2006 Leniency Notice, para 25.

[8]Commission Notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C 45/3, para 22; hereafter "the 2002 Leniency Notice".

the lower the risk of loosing arguments on disputed facts or its legal qualification before the Courts in Luxembourg.[9]

B. 2008 Settlement Notice—the need for procedural efficiencies

Deterrence through a policy imposing significantly increased fines is not the only factor used to create effective cartel enforcement; making the adopted process more efficient also plays an important role. Fines may be high, but cartel cases in Europe have required a huge amount of resources before producing any results. Commissioner Kroes described the Commission at the beginning of her tenure as becoming "the victim of its own cartel-busting success"[10]; in the past the Commission has indeed been overwhelmed with cases, facing expanding amounts of documentary evidence and increasingly complex facts and legal issues. Investigations often took up three or four years, while another year or more was needed for a final decision. The Commission therefore decided to act and has proposed a new Settlement Notice ("new Notice") in an attempt to create significant procedural efficiencies and avoid resource absorbing access-to-file and other costly procedures before the Luxembourg Courts.[11]

---

[9]Also in relation to the marker system the Commission introduced. As far as we can ascertain, the Commission has in practise not been very lenient in providing such markers. Only if there are good reasons why further time for internal investigation is needed will such delays be granted. See Commission notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17, point 15: "*The Commission services may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. […] Where a market is granted, the Commission services determine the period within which the applicant has to perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity*."

[10]Neelie Kroes, *The First Hundred Days*, 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law (April 7, 2005).

[11]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) N° 1/2003 in cartel cases; hereafter "the Settlement Notice".

In essence, a 10 percent reduction will be granted in return for accepting several items: the facts, their legal qualification as a violation, the main elements determining the fine (such as gravity or duration), and the final amount of the fine. Settlement will also result in waiving the rights to full access to files and a hearing, virtually ruling out an appeal to the European Courts.

Although an effective settlement system can provide multiple benefits, it is not clear whether all such benefits will easily be accomplished under the current version of the Settlement Notice — at least not if the Commission intends to apply a strict interpretation of the articles included in the Notice While some obvious benefits can certainly not be ignored, the system quickly shows its downsides when reading between the lines. For example, the large discretion of the Commission decreases legal certainty—a 10 percent reduction does not appear to be very convincing to make parties "roll over" completely and there are no guarantees if all goes wrong. The following section argues that the Commission will, therefore, have to be flexible and provide the incentives to make the system work. In the meantime, parties must carefully consider their strategic options and balance their approaches in order not to jeopardize their strategy for a response to a full SO if settlements go wrong.

II. THE 2008 SETTLEMENT NOTICE—HOW TO MAKE IT WORK?

More than three years ago, when Commissioner Kroes unexpectedly revealed to the public the Commission's intention to introduce direct settlements, she referred to the new system as "some form of plea bargaining procedure."[12] The European settlement

[12]Neelie Kroes, *The First Hundred Days*, 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law (7 April 2005).

system however turned out to be in principle a "no negotiation" procedure and thus significantly different from the "plea bargaining system" adopted in the US.

Opting not to "negotiate" makes sense to the extent that the settlement system seems to mechanically apply the Guidelines. The Commission will first conduct its internal investigation; if it then considers the case to be suitable for settlement[13] and the parties respond positively to an invitation to settle, the Commission will engage in settlement discussions. During these discussions, it will set out its case based on a template SO outlining all the main elements of the case. The Commission will follow the Guidelines and evaluate the different elements constituting the fine. Negotiation can thus be avoided. However, such a strict application of the new Notice ignores the fact that a settlement is by nature a "common understanding" between the Commission and the parties involved—and the latter will not be willing to engage themselves if they do not have the incentives to do so.

A. 10 percent of what?

Unfortunately, the Commission opted to grant as a settlement discount a mere 10 percent reduction, similar for all cases and all parties involved.[14] However, there are several elements in the current system which makes a 10 percent discount totally insignificant. The Commission's wide discretion allows it to unilaterally end settlement discussions and return to a full SO procedure at any point in time. Parties engaged in

[13]Settlement Notice, para 5. The Commission will consider the likelihood of reaching a "common understanding" regarding the scope of the potential objections, as well as the number of parties involved, or the likelihood of conflicting positions on liability or contesting facts.

[14]See also Howrey's comments in response to the Draft Settlement Notice as published in the framework of the Commission's consultation process, available at: http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html.

settlement therefore have no guarantees about the Commission's engagement to settle until the very end of the procedure. Moreover, they run a great risk of giving up an effective strategy to fight a full SO when they engage in settlement discussions. In addition, parties will not settle if the Guidelines are applied in such a severe way that a 10 percent reduction will not make a difference—board members will prefer trying their luck at the European Courts rather than settling for an amount which may be higher than what they could possibly achieve by fighting the Commission's case. Especially as the Guidelines have not been tested in Court, parties will not take the risk to waive their rights if they are not convinced about the precise benefits of settlement.

The 10 percent discount in itself will therefore not make parties tumble into a settlement procedure and give up their rights to try to obtain further fine reductions in Court. The Commission will therefore have to be very clear on the different elements of the fine calculation during the settlement procedure, and, where necessary, use other tools to give the parties the incentives to settle. The Guidelines play, in that respect, an important role.

When the Commission introduced the Guidelines, it paved the way for the application of an effective settlement system by increasing its power to "threaten" cartel participants with very high fines. At the same time, these Guidelines are the main tool through which the Commission can create incentives for its settlement system to succeed. On the one hand, by indicating in a transparent manner during settlement discussions the different values of the elements constituting the fine, the Guidelines allow companies to

make a precise estimation of their exposure. On the other hand, the Guidelines will also allow the Commission to create additional incentives by adopting a more reasonable application of the Guidelines when setting the value of these different elements of the fine calculation. The Commission will thus be able to show the potential large exposure of a full SO procedure, as well as the clear benefits it provides in case of a successful settlement procedure.

Providing such additional incentives through a "more reasonable" application of the Guidelines will be necessary for the success of the new Notice. As for the reasons indicated above, the relevant question is not what the 10 percent settlement discount will be, but rather "10 percent of what?" This is particularly important in relation to the following issues below:

First of all, the Commission will have to aim to settle with all parties, as maximum procedural benefits are only available if all parties to a cartel settle. As soon as one party does not see the benefit of settling, the Commission will have to issue a full SO and open the possibility for access to file, an oral hearing, or even a Court appeal. Being flexible on those elements of the fine calculation which are specific to each company can thus provide the Commission with the tool to create additional incentives for those specific parties to settle, without having to "negotiate" on the core elements of the case common to all parties involved.

Secondly, allowing for a "more reasonable" application of the Guidelines could also create the incentives to settle more complex cases. Although Commission officials

have indicated that the settlement procedure only fits the more straightforward cases (thus limiting the settlement system to a pure case closure device for simple cases), there is no reason why settlement could not work for more complex cases. It is, in fact, in these cases that the procedural efficiencies would be highest, as they often include huge amounts of documentary evidence, complex facts, and legal issues, creating incentives for multiple appeals to the European Courts. Also, a "more reasonable" application does not mean that the Commission will have to "soften" its cartel enforcement policy. In fact, the Commission—and importantly the European tax-payer—will gain significantly from shortened procedures requiring less resources and money.

Finally, a "more reasonable" application of the Guidelines also allows the Commission to avoid "negotiation" on the core elements of the case.[15] Mechanically applying the Guidelines during the settlement procedure has the advantage that negotiations on final amounts do not make sense if they are not based on the elements underlying the fine calculation. Providing incentives through a "more reasonable" application of the Guidelines also further limits the need for negotiation, as incentives can be directly provided by the Commission. Parties will be able to determine the gain they retrieve from the settlement by comparing the fine under settlement to the potential exposure they face if these elements were applied more severely. If the incentives are

[15]Note that the notion of "negotiation" is not completely clear. Although the Commission indicates that it will not want to engage in back and forth negotiations, it recognizes that the parties can respond to the allegations and "*therefore have the opportunity to influence the Commission's objections through argument*" (Commission MEMO/08/458 27 June 2008, *Antitrust: Commission introduces settlement procedures for cartels – frequently asked questions*). Note also the Settlement Notice, indicating as follows: *For the parties' rights of defence to be exercised effectively, the Commission should hear their views on the objections against them and supporting evidence before adopting a final decision and take them into account by amending its preliminary analysis, where appropriate* (para 24 of the Settlement Notice)

large enough, there would be no reason why parties would want to engage in hard core negotiations or otherwise refuse any settlement agreement at all.

B. Transparency is key

As shown above, parties will need incentives to engage and remain engaged in settlement discussions. While the extent of the incentives is important (i.e. 10 percent or "10 percent of what"), parties will obviously have to be able to identify the incentive. The different elements of the fine calculation—including for obvious reason the application of the leniency notice and the final leniency discount—therefore have to be crystal clear. If not, parties will remain in the dark and have no reason to take the risk of losing a possibly effective strategy of fighting a full SO.

Transparency is not only key in relation to the fines or the leniency reduction, but also in relation to the settlement process itself. The Settlement Notice has granted a large discretion to the Commission to decide on the settlement process itself. The Commission can decide which cases it finds suitable for settlement; it can decide in which order to engage in discussions; and it can unilaterally end settlement discussions or even ignore final settlement submissions. However, if the Commission is determined to make the settlement system work, it cannot risk abusing its discretionary power, as it will result not only in a failure of the Settlement Notice — it will also endanger its leniency program and eventually further contest the Guidelines.

Bringing settlement discussions to an end successfully for those parties engaged (even if some parties would drop out) is particularly important as the current Notice does

not provide sufficient guarantees that information shared during settlement discussions (or even in a settlement submission) will fully be ignored in case settlement discussions go wrong. The new Notice sets out that "acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used in evidence against any of the parties to the proceedings."[16] However, it is still unclear who will conduct the settlement discussions in the end (an earlier suggestion of a Unit completely separate from the case team conducting the discussions does not seem to have been formalized yet) and parties may end up making concessions in a settlement procedure in front of the same members of a team against which it will have to fight if the settlement procedure is broken off.

C. Implications for parties involved

Parties will thus carefully have to balance their strategy when considering settlement discussions.

First of all, parties must constantly keep in mind that the settlement procedure may break off, and that the normal SO procedure is put back in place. They will thus have to ensure that their strategy for settlement is fully aligned with the strategy for a full SO. Although the Commission will strongly work to avoid such situations, parties cannot risk jeopardizing their chances for success if settlement discussions are ended or a settlement submission is ignored (possibly even for reasons that are not specific to itself as other parties may always decide to back track the procedure).

[16]Settlement Notice, para 27.

Secondly, parties will have to balance the possible traps and pitfalls against the possible benefits of settling. While the major disadvantages refer to the obvious loss of an effective appeal or the less obvious pitfalls discussed above[17], a number of additional benefits—beyond the 10% settlement reduction—may be available:

- As indicated above, although the Commission will likely not want to engage in 'pure negotiations', it will have to provide the incentives for parties to settle by imposing a more reasonable application of the Guidelines. In practice, parties may not be able to "negotiate" on the core elements of the case, as these will have to be similar for all parties involved. However, parties may be able to influence the Commission on the fringes through arguments—thus providing the incentives for parties to settle;
- Legal and other administrative cost savings could be achieved;
- Companies will also have more certainty about the amount of the fine at an earlier stage of the procedure for financial and business planning purposes– thus limiting long-term uncertainty for investments and future projects;
- Reputational damage is contained to a (much) shorter period of time;
- Although the Commission will (rightly) want to prevent this practice, parties may want to engage in settlement discussions—at least in the early stages—to obtain further information about the Commission's possible allegations.

[17]In addition to these disadvantages, especially those parties involved in international / transatlantic investigations will also have to consider the possible effects of settlement discussions and submissions on other litigation cases or investigations in other jurisdictions. In particular in relation to discovery and action for damages, it is still unclear what the exact effects of settlement submissions will be. On the one hand, information about the cartel infringement will become available much earlier than under a full SO procedure. On the other hand, the information that will become public is expected to be much less detailed than under a normal SO procedure.

III. CONCLUSION

The settlement system certainly has the potential to create the procedural benefits the Commission is aiming for. However, the Commission should not consider these benefits as a given. It will have to ensure that it provides the incentives to make the system work as for some cases or a number of parties, the proposed 10% settlement reduction will simply not be sufficient. However, if the Commission is willing to apply its Guidelines in more flexible way to create additional incentives where needed, it will be able to engage those parties it would otherwise lose during settlement discussions.

As the success of the settlement system will largely depend on the Commission's approach, parties will have to remain extremely vigilant at every step in the procedure, and maintain its strategic options for both a response to a full SO as well as a settlement fully intact—at least until the Commission has further clarified the functioning of the system as a whole.