21 December 2007

COMMENTS BY THE EUROPEAN COMPETITION LAWYERS FORUM ON THE EUROPEAN COMMISSION'S PROPOSED NEW CARTEL SETTLEMENT PROCEDURE[1]

1. Overview

The ECLF welcomes the prospect of companies being able to settle EU cartel cases. A well-designed settlement process should give credit to (or "reward") companies that are prepared to acknowledge past infringements, avoid unnecessary costs, and get more quickly out from under the cloud of legal uncertainty raised by pending proceedings. However, the ECLF considers that the draft legislative package proposed by the Commission on 26 October, 2007 raises legal and practical issues that risk undermining the effectiveness of the envisaged settlement process. If the settlement route is to prove attractive to companies, several amendments to the draft proposal will likely be needed.

The ECLF makes a number of specific recommendations in the comments below. These recommendations centre primarily on the following themes:

- **Avoid Excessive Procedural Rigidity.** An appropriate settlement regime offers potential benefits to the Commission, settling companies, and the European taxpayer. But cartel cases differ significantly and may call for different settlement approaches. In particular, the Commission should maintain flexibility with respect to settling cases against firms that indicate a desire to pursue settlement discussions, even if other defendants in the same case choose not to. It should also not be excluded that the Commission could settle a case with some companies even after the issuance of a full Statement of Objections. There are still significant savings for all concerned parties from settling, even late in the process, if this reduces the likelihood of an appeal to the CFI/ECJ. Eliminating the possibility of post-SO settlement also raises questions of fairness, for example since parent companies may not be made aware of their involvement in a matter until receipt of the SO.

- **Ensure Sufficient Initial Disclosure.** Sufficient initial disclosure by the Commission of its case against a company during bilateral settlement discussions will be essential to the success of the process. It will be impossible for companies to offer up their "bottom line" in terms of acceptable fines and the scope of the infringement unless they first have a clear picture as to the Commission's case against them, including the nature and scope of the cartel, the company's involvement, aggravating or attenuating circumstances, and the envisioned fine range (including the basis for its calculation). Settlement discussions will only be productive if they are conducted in an open environment in which companies can

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[1] The law firms represented in the ECLF are listed in Annex 1. All members of the ECLF have had an opportunity to comment on this document. However, the comments made do not reflect the views of each member.

assess their position in full view of the allegations against them, together with supporting evidence.

- **Engage in Meaningful Settlement Discussions.** If settlement is to be a realistic course, the process will have to allow for settling parties to influence the Commission's objections, including the scope of the infringement and the fine level, through dialogue and argument. The reward for settlement could in principle come either in the form of an agreed percentage reduction or through agreed limitations on the scope of the infringement. The ECLF understands that the Commission does not intend to engage in "plea bargaining," but leaving room for meaningful bilateral discussion in moving toward the envisioned "common understanding" regarding both the scope of potential objections and the likely fine is essential if the settlement process is to prove attractive for companies.

- **Avoid Adverse Spillover Effects.** The requirement to provide a written admission of guilt in its settlement submission threatens the attractiveness of the settlement procedure because of the enormous risk of creating potentially incriminating documents that could be discoverable in civil litigation in the United States, certain Member States, or elsewhere. The Commission has recognised the powerful disincentives that can be created by the threat of disclosure of leniency submissions, and has an established policy of accepting oral statements in the leniency context. The ECLF submits that the same considerations apply in respect of settlement submissions, which means that companies should not be required to make written admissions of liability. The importance of this has been recognised by those Member States that have adopted settlement procedures, which are based on oral submissions.

2. Experiences in Other Jurisdictions

In designing a settlement procedure, the ECLF suggests first that the Commission would be well-advised to draw on the lessons learned by those EU Member States in which similar procedures have been followed, as well as experiences in the United States. Annex 2 presents overviews of the cartel settlement procedures that have been followed in France, Germany, the Netherlands, and the United Kingdom; Annex 3 summarises the position in the United States. In the ECLF's experience, the following features of the settlement processes in these experienced jurisdictions have proven to be mutually beneficial for regulators and settling firms and are important to the development of a workable settlement process.

(i) **Flexible Process.** For the most part, the experienced jurisdictions have opted to follow procedures that are less formal and structured than that envisioned by the Commission, emphasising instead the importance of allowing for flexible and pragmatic solutions to be applied to different circumstances. The regulator needs flexible instruments to be able to react appropriately to different types of cartel, to cases involving different numbers of cartelists (including different numbers of parties interested in settlement), and at different stages in the administrative process (both before and after the Statement of Objections). Experience indicates that this can be done without compromising fundamental principles of law and legal certainty.

(ii) **Process Based on Oral Submissions.** All of the jurisdictions in which the ECLF is aware that cartel cases have been settled have followed processes

based principally on oral, rather than written, settlement submissions from the undertakings concerned. This approach recognises the grave practical risk created by the production of potentially incriminating written materials, which might need to be turned over to hostile third parties under national disclosure rules. It has been possible for these jurisdictions to obtain the desired results (procedural efficiencies, reduced scope for appeals) without requiring written admissions of liability, at least until the settlement is finalised.

(iii) **Meaningful Reward for Settlement.** The experienced jurisdictions appear to have opted for a process that enables the regulator to use the prospect of settlement rewards flexibly to increase the efficiency of the investigatory process. In recent cases where a settlement process has been followed, discounts have been significant (reportedly up to 35% or more), and have varied depending on the case to allow for differentiation between different circumstances.

(iv) **"Partial" Settlements Possible.** Regulators in the experienced jurisdictions have recognised that there are efficiencies to be obtained from settling cases even if not all firms under investigation participate in settlement discussions. They have accordingly been willing to proceed on this basis and settle cases with all firms expressing a willingness to do so while proceeding in the normal course against the others. Although undertakings that prefer not to opt into a settlement process have naturally not been eligible for settlement rewards, neither have they effectively been coerced into settling or punished for declining to settle.

(v) **Sensible Approach to Public Statements.** In certain cases, the regulator in an experienced jurisdiction has recognised how significant public statements about the settlement are to firms. Agreement on the nature and extent of such statements by either side has been built into the settlement procedure, accepting that firms which must announce settlement may need, for commercial reasons, to give some explanation as well.

3. Comments on the Commission's Proposed Settlement Process

Major Issues

3.1. **Relation to Fining Guidelines.** As an initial matter, the ECLF emphasises that the settlement process cannot be considered in isolation from the Commission's broader fining policy. If there is no common understanding as to the appropriate fundamental premises according to which the Commission calculates fines, there will be no practical way for companies and the Commission to agree appropriate fines in settling cases. There are significant issues relating to the Commission's new Fining Guidelines that have not yet been considered by the European Courts, pending the resolution of which, the views of companies and the Commission as to appropriate fine levels will likely often diverge so widely as to eliminate the possibility of settlement.

For the settlements regime to gain the level of acceptance among affected parties that would render it viable, the appropriate balance of positive and negative incentives has to be struck. The procedure must make it "attractive" for

undertakings to settle rather than to contest. In this respect, the Commission cannot dissociate the exercise of implementing a new settlement procedure from the uncertainty that surrounds its new Fining Guidelines, which have yet to be tested in Court. The then-President of the Court of First Instance, Judge Vesterdorf, has publicly expressed concern that the scale of fines has been increased to such levels that it might be proper in the future for the Courts to take a more active role in the assessment of appropriate fine levels. The problem is that we will not see the new Fining Guidelines tested in the Court of First Instance for several years. The threat of hugely increased fines should not be relied upon to condition the acceptance by the antitrust community of a regime for settling cartel cases that is not attractive on an objective assessment.

The settlement procedure will need to be sufficiently attractive for undertakings to be willing to surrender the chances of successful appeal, in view of the clear possibility that fines under new Fining Guidelines may subsequently be deemed excessive. The Draft Notice does not specify the "discount rate" or amount of fine reduction that settling parties will receive. However, statistics tell cartel participants that the average reduction granted by the Court of First Instance in successful appeals is higher than what the ECLF understands that the Commission may be willing to offer. According to one economic study, in the cases between 1998 and 2007 where fines of imposed in cartel decisions were successfully challenged in the European Courts, the average reduction was 19.3% – and this even before the sharp recent increases in fines, let alone the new Fining Guidelines.[2] So long as the legality of the new fining policy has not been tested and settled, the level of the settlement discount will need to factor this element into the equation.

3.2. **"Negotiation" of and "Reward" for Settlements.** The process set forth in the Draft Notice does not include an element of negotiating the amount of the fine, the amount of the settlement discount, or the scope of the infringement. Indeed, the Draft Notice (para. 2) states expressly that the Commission will not negotiate with the parties the existence of an infringement or the appropriate sanction. It is not clear whether the envisioned settlement discussions leading up to the submission of a formal settlement submission will in fact involve "bargaining" over these issues – however such discussions are labelled – but in the absence of some scope for such discussion the ECLF expects that the process will be largely unattractive to companies. Given the wide discretion enjoyed by the Commission with respect to key issues such as the attribution of liability to parent companies and the definition of "affected" products or markets, determining a relevant fine level is extremely difficult; companies will often be unable to present their "bottom line" unilaterally to the Commission in the form that seems to be envisioned. In practical terms, if settlement is to be a realistic course for most firms, the process will have to allow for settling parties to influence the Commission's objections, including the scope of the infringement and the fine level, through argument.

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[2] C. Veljanovski, *European Commission Cartel Prosecutions and Fines, 1998-2007 – A Statistical Analysis* (2007).

A closely related issue is the amount of the "reward" for settlement, on which the Draft Notice does not express a position. If the process is to be taken up, the settlement discount will need to compensate for the critical rights of defence that the settling undertaking would legally or in practice agree to waive. Perhaps most important, settlement applicants will apparently receive only limited access to evidence – in particular, exculpatory evidence – in the Commission's case file. In addition, the admissions that would be required (whether in the form of a settlement submission or acknowledgement of the SO) will in practice curtail important appeal rights since an undertaking that admits liability as part of settlement discussions is unlikely to find appeal an attractive proposition. If the settlement procedure is to be taken up, the reward will need to be significant enough to outweigh foregoing such important rights of defence.

The reward for settlement could in principle come either in the form of an agreed percentage reduction – although, as noted above, a percentage reduction will probably in many cases not be sufficiently attractive to companies absent some common understanding as to the basis for calculating underlying fine amount – or through agreed limitations on the scope of the infringement. A recent speech by Commissioner Kroes confirms that bilateral discussions would "*allow companies to influence even the contents of the statement of objections and, thereby, of the decision itself*,"[3] which we interpret as confirmation that the Commission foresees that parties to settlement discussions would have an opportunity to influence the scope of the Commission's objections through argument. The ECLF believes that leaving room for such discussion in moving toward the envisioned "common understanding" regarding both the scope of potential objections and the likely fine, is essential if the settlement process is to prove attractive for companies. We accordingly welcome the Commissioner's clarification on this issue.

Finally on the issue of the settlement reward, the ECLF considers that the Commission's proposal of awarding all settling firms in a given case the same percentage discount for settlement is appropriate, but suggests (which may be what the Commission also has in mind) that the settlement discount need not be the same in all cases. The discount in a given case should reflect the amount of procedural savings or other economies created by the agreed settlement. The potential settlement discount should not be capped, thereby leaving flexibility for the Commission to reward settling firms appropriately if particular circumstances dictate a high discount (such as in the recent *Independent Schools* and *Dairy Products* settlements in the United Kingdom[4]). There should, however, be a minimum percentage reduction for settlement in all cases (for example, 20%), which is in the ECLF's view essential to generate interest from companies in settling.

3.3. **The "Hold-out" Problem.** The ECLF understands that in cases where some but not all of the firms under investigation indicate a willingness to settle, fewer

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3 N. Kroes, *Assessment of and perspectives for competition policy in Europe*, Speech/07/722, 19 November 2007.

4 See Annex 2. The ECLF notes that the OFT has awarded as much as 35% discount for early settlement even post-SO.

procedural efficiencies would be gained by settling with only some firms, as the Commission would still need to prepare its case file for full access by other parties, present at an oral hearing, issue a statement of objections that was not directly supported by settlement submissions, *etc.* The Commission has indicated informally that it is not likely to pursue settlement in such cases.

This position ignores the important savings to the Commission and the public purse from avoiding possible appeals. It also threatens to undermine the entire settlement process, as it will create incentives for firms to try to be "last" to agree to enter the settlement process. Firms whose acceptance of the settlement has a "marginal" value and may "tip the balance," causing the Commission to decide to finalise settlement discussions, will in practice have a special leverage. Since the reduction of the fine will be the same for all companies accepting the settlement, such additional leverage would probably translate into a stronger impact for arguments that such "marginal" firms would submit as regards the duration of their infringement, their degree of involvement, or any other circumstance that could affect the basic level of the fine. The situation is akin to the "prisoner's dilemma" studied in game theory and could result in a Pareto-suboptimal outcome in which all parties would rationally choose not to cooperate until they realise that a settlement is very likely to be reached at favourable conditions. Evidently, such a situation would threaten the viability of the entire settlement process.

To reduce this risk, the Commission should maintain flexibility with respect to settling cases against firms that indicate a desire to pursue settlement discussions even if other defendants in the same case choose not to. It should also not be excluded that the Commission could settle a case with some companies even after the issuance of a full Statement of Objections.[5] There are still significant savings for the Commission (and to the European taxpayer) as well as the parties from settling, even late in the process, if this reduces the likelihood of an appeal to the CFI/ECJ. In such circumstances, it might be appropriate for undertakings that settled post-SO to receive a smaller settlement reward than undertakings that settled pre-SO. The Commission's process should retain enough flexibility to allow for a pragmatic approach to such issues.

Practical and Procedural Issues

3.4. **Initial Disclosure by the Commission.** The Commission's recent publications do not make clear the extent to which the Commission envisions disclosing details about its case and its projected fine calculation before requiring firms to make formal settlement submissions. According to Paragraph 16 of the Draft Notice, at the bilateral discussion stage the Commission would inform parties of "*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.*" The ECLF interprets this language to indicate that the Commission intends to set out the fundamentals of

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5 For example, the UK Office of Fair Trading pursued such a course in *Independent Schools* and the recent *Dairy Products* case, summarised in Annex 2.

its case in a sort of "mini-SO" before requiring companies to decide whether to make formal settlement submissions. The scope of such disclosure by the Commission during settlement discussions will be critical. The ECLF believes that it will be impossible for companies to offer up their "bottom line" in terms of acceptable fines and the scope of the infringement unless they first have a clear picture as to the Commission's case against them, including the basis and parameters of the anticipated "range of likely fines." Companies cannot reasonably be expected to make any settlement offer without first having a clear understanding of the Commission's view as to the nature and scope of the cartel, the company's involvement, aggravating or attenuating circumstances, and the envisioned fine range (including the basis for its calculation). On the basis of recent informal discussions with Commission representatives, it seems that this sort of initial disclosure by the Commission, in the form of a "settlement template," may in fact be what the Commission has in mind. If so, the ECLF would welcome clarification from the Commission on this critical issue.

3.5. **Settlement Submissions.** According to the proposed settlement procedure, firms seeking to settle cases will be required to provide to the Commission a written settlement submission (WSS) containing "*an acknowledgement in unequivocal terms of the parties' liability for the infringement summarily described as regards the main facts, their legal qualification and the duration of their participation in the infringement*" (para. 20).

In the ECLF's view, it should be sufficient for the Commission's purposes if settling companies agree not to contest the allegations being raised against them, without acknowledging liability in writing. As explained above and in Annex 2, such an approach has been successful in Member States. In addition, the requirement that companies acknowledge liability in a WSS raises at least two further issues that could make the envisioned process prohibitive for companies, even if they are inclined toward settlement.

(i) Written admission

First, the requirement to provide a *written* admission of guilt in the WSS threatens the attractiveness of the settlement procedure. The Draft Notice is silent on the issue of how to protect the WSS from private litigants – indeed paragraph 35 of the Notice even seems to contemplate the possibility of public disclosure of the WSS ("*normally* public disclosure…would undermine certain public or private interests"). Potentially incriminating documents could be discoverable in civil litigation in the United States, certain Member States, or elsewhere. This prospect creates enormous risk, which many companies will be unwilling to assume. In recognition of this, as explained above and in Annex 2, in several Member States and the United States, settlement discussions are exclusively oral until the final agreement is reached. The Commission has recognised the powerful disincentives that can be created by the threat of disclosure of leniency submissions and has in place an established policy of accepting oral statements in the leniency context. The ECLF submits that the same considerations apply in respect of settlement submissions, which means that companies should not be required to make written admissions of liability. If the Commission requires affirmations from companies as part of the settlement process, for example regarding settlement submissions or acknowledging the content of a Statement of

Objections, such statements could be given orally, with the Commission's transcript of the oral statement endorsed by the company.

(ii) "Deemed withdrawal"

The Commission proposes that WSSs would be made "without prejudice," such that if settlement discussions break down the WSS and the admissions contained therein would be withdrawn. However, the practical functioning of this "deemed withdrawal" in terms of disclosure in potential private damages claims is questionable. This prospect creates enormous risk, which many companies will be unwilling to assume. Again, one possibility to overcome this issue would be allowing companies to make oral submissions to the Commission, as in the leniency context and in Member States' settlement procedures.

3.6. **Concerns about Possible Discrimination.** The almost unfettered discretion granted to the Commission by the Draft Notice in deciding whether and how to conduct settlement negotiations might raise legitimate questions of fairness and equal treatment. This could be a particular concern in cases where some but not all of the firms under investigation indicate a willingness to settle. If the Commission were to decide either that the more limited procedural advantages available in such a case meant that it was not worth exploring settlement with any firms or that the smaller efficiency benefit conferred by settlement should translate into a lesser reward for the settling firms, then the interests of a firm that offered to participate in the settlement process would have been compromised by other firms' (likely their competitors') decisions not to settle. Moreover, settlement should not become *de facto* obligatory in any given case: it should be made expressly clear (even if it is perhaps impossible to verify in practice) that a decision by a company not to settle will not be regarded as an aggravating circumstance and should not translate, even indirectly, into a higher fine for non-cooperation.

Some objective guidelines around these issues would be welcome. In addition, the ECLF suggests that the Hearing Officer could play a valuable role in the settlement process, for example by verifying the fairness of settlement discussions, "validating" the results, and serving as a point of contact for firms that believe they have been unfairly disadvantaged as a result of Commission decisions not to take up settlement proposals.

3.7. **Relation of Settlement Procedure to Criminal Laws.** The relationship between the settlement process and national criminal laws (U.S., United Kingdom, and elsewhere) is an important issue that is beyond the scope of ECLF's comments, but should be considered in detail.

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ANNEX 1

LAW FIRMS REPRESENTED IN THE ECLF

The ECLF aims to be the principal interface between specialist competition lawyers and the European Commission's Directorate General for Competition. It provides a forum through which members may express views on a range of policy and practice issues. Its current active membership includes competition specialists from the following firms:

A&L Goodbody
Addleshaw Goddard
Allen & Overy
Andreas Neocleous & Co
Ashurst
Baker & McKenzie
Beachcroft LLP
Berwin Leighton Paisner LLP
Bird & Bird
Bonelli Erede Pappalardo Studio Legale
Brick Court Chambers
Bredin Prat
Camilleri Preziosi
Čechová & Partners
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance
Coutrelis & Associés
Covington & Burling LLP
De Brauw Blackstone Westbroek
Dechert LLP
DLA Piper
Dr. Georg Legat
Foley & Lardner LLP
Freshfields Bruckhaus Deringer
Gleiss Lutz
Gorrissen Federspiel Kierkegaard
Hengeler Mueller
Herbert Smith
Howrey LLP
Jones Day
Kemmler Rapp Böhlke
Kreis, Kubac, Svoboda & Kirchweger
Kromann Reumert
Latham & Watkins LLP
Linklaters
Lovells
Luostarinen, Mettälä Räikkönen
Mannheimer Swartling
McCann FitzGerald
McDermott Will & Emery/Stanbrook LLP
Monckton Chambers

Morrison & Foerster LLP
NautaDutilh
Norton Rose
Olswang
O'Melveny & Myers LLP
Panagopoulos, Vainanidis, Schina Economou
Plesner Svane Grønborg
PLMJ
Procopé & Hornborg
Richards Butler LLP
RoschierRaidla
Salans
Schulte Riesenkampff
Shearman & Sterling LLP
Sidley Austin LLP
Simmons & Simmons
SJ Berwin LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Slaughter and May
Stibbe
Sullivan & Cromwell
Thommessen Krefting Greve Lund AS
Thompson Hine LLP
Uría Menéndez
Van Bael & Bellis
Vieira de Almeida & Associados
Vinge
Wardyński & Partners
White & Case LLP
Wilmer Cutler Pickering Hale & Dorr LLP

ANNEX 2

CARTEL SETTLEMENT PROCEDURES IN EU MEMBER STATES

France

The French competition authorities have made regular use of a negotiated settlement procedure (*procédure de non-contestation des griefs*) for competition-law infringements since its introduction in 2001. The procedure allows for a streamlining of procedural steps before the *Conseil de la Concurrence* ("Competition Council") and a reduction of the applicable fine when an undertaking agrees not to contest the allegations raised against it in a Statement of Objections and makes commitments regarding its future conduct.

Legal Basis and Procedure. Pursuant to article L. 464-2 III. of the French Commercial Code, when a company does not dispute the allegations raised against it by the Competition Council in a Statement of Objections and gives commitments in respect of its future conduct, the head case handler (*rapporteur general*) may propose to the Competition Council a reduction of the fine, on the basis of a settlement arrangement with the defendant.[6]

The settlement procedure is open to all undertakings against which the Competition Council has issued formal objections, and comes in addition to the leniency program (which, as in the European Commission's process, rewards cooperation during the investigation phase). In order to benefit from this procedure, the defendant must, within two months of receiving the initial Statement of Objections (the French system provides for both a Statement of Objections and a final Report to the Competition Council from the head case handler), indicate its willingness to settle the case. The initial discussion takes place on an informal basis with the head case handler and will cover in particular: (i) an agreement not to contest the facts; (ii) a commitment to desist from the infringing practices and adopt remedial action (such as adopting a compliance/whistle-blower program); and (iii) the percentage rate of reduction of the fine that the head case handler proposes to adopt in his Report to the Competition Council. The settlement procedure does not require any admission of guilt by the defendant. If the defendant agrees with the head case handler's proposal, an official minute will be produced that will be signed by both parties. The fact that a settlement was reached is then disclosed to the other firms under investigation (if any) in order to allow them to explore the possibility of reaching similar agreements. If the defendant and head case handler do not reach agreement on the terms of settlement, the defendant may choose to resume the normal procedure and respond to the Statement of Objections. Even where a settlement agreement was entered into, the defendant is allowed to file a response to the Statement of Objections limited to aspects affecting the basic amount of the fine (*e.g.*, damage to the economy).

The Competition Council is not bound by the discount proposed by the head case handler, and may decide to continue the case based on the regular procedure. Experience shows,

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[6] In addition to the negotiated settlement procedure and an immunity/leniency program, France also has a separate pre-Statement of Objections commitment procedure (*procédure d'engagements*) that largely parallels the European Commission's procedure under Article 9 of Regulation 1/2003. This process has similarly not been used in the cartel context but mostly in vertical/abuse of dominance cases. Commitments regarding future conduct may form part of the agreed resolution of the case under either the settlement or the commitment procedure.

however, that in most cases the Council does follow this recommendation. In certain cases, the procedure may be further accelerated if the Council is in a position to adopt a simplified procedure (*i.e.* dispenses with the formal Report of the head case handler).

Settlement Reward. Under the settlement procedure, the maximum level of the fine is reduced by 50%, *i.e.*, the fine may not exceed 5% of the undertaking's worldwide turnover (as opposed to a 10% cap under the normal procedure). In addition, the head case handler may propose a reduction of the fine based on the circumstances of the case. There are no standard rate reductions, but experience shows that fines have been reduced by 25-50% in most cases (and up to 90% in one case involving the French Post Office).

As indicated above, the Competition Council may depart from the reduction rate proposed by the head case handler, although its practice so far has been to adopt the head case handler's proposals. Also, as mentioned above, not contesting the infringements does not prevent the defendant from trying to further decrease the fine by challenging the alleged damage to the economy before the Competition Council (in order to decrease the basic level of the fine to which the settlement "discount rate" is applied).

Experience to Date. The settlement procedure is applicable to a range of competition-law infringements and is not limited to cartels. Since 2003, the settlement procedure has been applied in thirteen cases, involving bid rigging, cartels, abuse of dominance, and vertical agreements. The main drawbacks of the system are that (i) settlement discussions have remained in most cases limited to a discount rate that is only part of a proposal by the head case handler (although the Competition Council's practice has been to follow the recommendation of the head case handler in most cases) and (ii) the Council has remained free to set the basic fine at a level that has not been "negotiated," meaning that there is normally no cap on the possible fine even after reaching agreement with the head case handler. In a recent case, however, (*France Telecom*, which involved abusive conduct), as part of the settlement discussion the head case handler agreed to a fine cap that was, in fact, higher than the fine that the Competition Council ultimately imposed. It is not clear whether such agreements on fine caps will be available in the context of cartel cases.

Germany

In Germany, there is no formal settlement procedure written into law. However, it has been the "best practice" of the German Federal Cartel Office ("FCO") to settle cartel cases with individual companies. The following paragraphs summarise the principal points arising out of the ECLF's experience in such cases.

Procedure. The practice of settlements in Germany is based exclusively on oral communications between the parties and the FCO. The FCO does not require a written acknowledgment of liability as a precondition for entering into a settlement negotiation or into a full settlement: the basis of a settlement agreement is established in oral discussions, on which the FCO's statement of objections is founded. The German practice thus does not include any equivalent to the Commission's proposed written settlement submission (WSS), or indeed any other precondition for the settlement negotiations or the settlement as such. However, in some cases the FCO has required the settling party to approve or consent to its statement of objections in writing. Subsequent to this, the FCO issues its final decision.

"Hybrid" cases. The FCO is willing to settle and in the past has settled proceedings with individual companies even though not all of the potential defendants are willing to enter into a settlement. On at least one occasion the FCO has settled the proceeding with one company out of a group of ten or more defendants.

Settlement reward. In essence, the FCO has settled cases on the basis of a certain amount. The FCO is transparent with regard to the parameters and factors that it intends to apply with respect to the company willing to settle. These parameters are applied on an equal basis to all defendants willing to settle. In our experience, whatever has been discussed and settled with one company is applied in an equivalent and non-discriminatory manner to the other settling firms.

Appeal of settlement decisions. The FCO expects that the settlement will not be appealed to the responsible Court of Appeal (Oberlandesgericht Düsseldorf). However, under German law any waiver of the right to appeal an administrative decision is invalid if that waiver is given prior to obtaining the (final) decision as such. Under German law, the receipt of the equivalent of a statement of objections would not be sufficient to render such waiver valid. Thus, whilst the FCO does not require a waiver, it is the expectation that the settlement of the decision will not appealed.

However, if after the settlement decision and within the appeal period, a party were to challenge the decision before the responsible Court of Appeals, this appeal would be valid. The settling party would need to balance the potential pros and cons of such an appeal, in particular since the Court could subsequently increase the fine (*reformatio in peius*). Moreover, under German law, if the FCO decision is appealed, the FCO itself can withdraw its own settlement decision and impose a new decision outside the scope of the settlement. This new decision would then again be subject to appeal. However, to our knowledge, there has been no instance where the FCO has withdrawn its own decision following an appeal.

The Netherlands

The Dutch Competition Authority ("NMa") has shown itself to be creative and flexible in devising practices that have elements of a settlement procedure.

The most notable example came in connection with the NMa's investigation into alleged cartel behaviour by a large number of companies in the Dutch construction industry. In that case, the NMa developed a framework in which companies were offered the opportunity to agree to a "collective, shortened sanction procedure" in exchange for a fine reduction of 15%. The NMa is also prepared to settle certain cases informally, closing down an investigation and foregoing the possibility of imposing a fine if, after a constructive dialogue with the undertaking(s) involved, the latter is prepared to change its behaviour.[7]

Collective, shortened sanction procedure. The NMa established the collective, shortened sanction procedure in the context of an investigation into alleged cartel behaviour between 1998-2002 across much of the Dutch construction industry. Upon opening its investigation, it soon became clear to the NMa that the magnitude of the forbidden practices – which involved several hundred companies – was too great to be enforced through the regular procedural instruments available to the NMa, as the burden on the NMa's resources as well as on those of the judicial system would have been unbearable.

The collective, shortened sanction procedure was designed to efficiently close proceedings against those construction companies that had applied for leniency (some 230 companies), as well as those undertakings that did not apply for leniency but were implicated by the applications of others.

Under the accelerated procedure, the companies in each sector of the construction industry would assign a single representative to enter into discussion with NMa on the sanctions to be imposed on the companies within that sector, and who would be allowed to bring forward general arguments on behalf of the sector. After the discussion between the NMa and these representatives, a Statement of Objections would be sent to the companies involved. At that point, the companies could either opt for the accelerated procedure or choose to follow the normal procedure. Those companies that opted for the shortened procedure would waive their rights to individually get access to the NMa's case file as well as their right to be heard individually, and would agree not to contest the SO on grounds relating to the facts established by the NMa or their qualification. In exchange, the companies would receive a 15% fine reduction.

The offer was reportedly widely taken up, and by the end of 2006, all collective shortened sanction procedures in the construction industry sectors had been finalized.

"Informal settlements". The NMa has settled a number of cases informally on the basis of cooperation and behavioural modifications agreed to by the companies under investigation. To date, this procedure has not been applied in the cartel context, and it seems likely that cases of infringement causing severe market impact will not be settled informally. The NMa has settled informally cases against: a company that removed exclusivity clauses from its

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[7] In addition, as in several Member States, the Netherlands has a "commitment decision" procedure parallel to Article 9 of Regulation 1/2003, which has not yet been applied but which will in any case not apply to settlement of cartels with fines.

contracts after a discussion with the NMa; a company that reduced its involvement in a competitor in order to increase competition on that particular market; an association of pharmacists that introduced a compliance program; and a company that introduced Chinese walls within its business in order to separate competitive sensitive information. No fines were imposed in any of these cases, and the NMa did not adopt a formal decision following the settlement agreement.

United Kingdom

The UK has not yet adopted a formal settlement procedure. Nevertheless, the Office of Fair Trading ("OFT") welcomes settlement approaches from parties implicated in potential competition infringements[8] and, like the Commission, is investigating the possibility of formalising the settlement process.[9]

1. Practice to Date

Whilst the number of cases in which early settlement has been used is currently limited, the OFT has shown itself able to apply considerable flexibility in adapting its process to meet the differing situations which cartel cases present.

(i) ***British Airways/Virgin.*** The most high-profile settlement reached by the OFT was the settlement, in August 2007, of its investigation into the fixing of fuel surcharges by British Airways and Virgin. The OFT's investigation, commenced in response to an immunity application by Virgin, was brought to an early conclusion following the admission by both undertakings that they had participated in the cartel. Whilst the final amount of the fine is now public (£121.5 million),[10] the basis for the calculation and the amount of the settlement discount is not and will be recorded in due course when the OFT's final infringement decision is published.

(ii) ***Independent Schools.*** The only other case in which the OFT has settled a cartel investigation is *Independent Schools*, where the OFT issued a Statement of Objections against 50 fee-paying independent schools before a settlement was reached. After issuing the Statement of Objections, the OFT reached a settlement with each of the schools whereby they admitted participation in a cartel but, crucially, made no admission that the cartel had had any effect on the fees paid by parents. The schools also made *ex gratia* payments totalling £3 million to a charitable educational fund to be used for the benefit of pupils who attended the schools during the years of infringement. Both of these aspects will make potential follow-on actions for damages (*e.g.*, by parents) difficult. The OFT finally published individual infringement decisions and imposed a nominal fine of £10,000 on each school.

(iii) ***Construction Cartels.*** In the ongoing *Construction* cartels investigation, the OFT offered financial reductions in any penalties to all implicated companies who had not already applied for leniency in exchange for specific cooperation. This was an attempt by the OFT to streamline its process and fast-track the investigation, by offering "*significant*" reductions (though not as large as those available to undertakings who had sought leniency prior to the making of the

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8 The OFT is "always open to sensible approaches with creative agreed solutions" (quote from speech by Vincent Smith, Director of Competition Enforcement at the OFT) published by OFT 14 July 2006 (www.oft.gov.uk/shared_oft/speeches/0506.pdf).

9 See, for example, speech by Philip Collins (Chairman, OFT) to the Law Society's European Group, 6 June 2006 (www.oft.gov.uk/shared_oft/speeches/0306.pdf).

10 See OFT Press Release dated 1 August 2007 (www.oft.gov.uk/news/press/2007/113-07).

fast-track offer) in exchange for admissions to participation in bid-rigging along with certain ancillary promises.[11]

(iv) ***Dairy Products***. In the ongoing investigation into collusion in respect of the retail prices of certain dairy products, the OFT has offered "*significant reductions*" in the financial penalties to a number of the implicated companies.[12] This was despite the fact that the OFT had already issued a Statement of Objections and that two implicated retailers and one implicated dairy processor declined to engage in settlement discussions. The OFT recognised the significant benefits to it in terms of cost and resources in resolving the case swiftly and effectively by settling even post-SO. This includes a vastly reduced burden in terms of access to the file and dealing with substantive responses. Further, the OFT recognised that offering early settlement discounts in exchange for cooperation would assist their closure of the case against any recalcitrant companies and significantly reduce (for all practical purposes) the scope or scale of any possible appeal.

2. Procedure

Given the scarcity of precedent, it is difficult to comment in detail on the steps taken by the OFT or how the procedure works in practice. The settlements to date have been achieved through the application of the OFT's leniency programme and the exercise of the OFT's discretion to manage its caseload. The Commission will nevertheless be able to consult with the OFT to obtain a more in-depth understanding. Some of the more important emerging aspects of the UK process are the following:

(i) **Reward for settlement.** It is clear from cases summarised the above that the OFT has a policy to offer reductions in the fine as part of the early settlement process. This has ranged from almost total reduction in the *Independent Schools* case to "*significant*" reductions in respect of the *Construction* cartels. Whilst the quantum of the reduction in *British Airways/Virgin* is as yet unknown, it is clear from stock exchange announcements of those settling in *Dairy Products* that the discounts were very significant (as much as 35%) in spite of the fact that settlement was post-SO. It seems likely that an admission of participation in the infringement and a commitment to future cooperation are an integral part of the process.

(ii) **Appeals.** Under section 46 of the Competition Act 1998, appeals may be made to the Competition Appeals Tribunal against any OFT decision to impose a fine or against the level of the fine imposed. Early settlement cannot remove a party's right to appeal. However, because early settlement is likely to require an admission of participation in the infringement and because a Court is unlikely to look favourably on any application to reduce a fine that has been

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11 See OFT Press Releases dated 22 March 2007 (www.oft.gov.uk/news/press/2007/50-07).

12 The Financial Times reported that the discount was as much as 35%, a figure borne out by Dairy Crest's stock exchange announcement, which reported a gross fine of £14.5m, or £9.6m net of a 35% early settlement discount (see http://www.ft.com/cms/s/0/65c61d58-a530-11dc-a93b-0000779fd2ac.html and http://www.investegate.co.uk/Article.aspx?id=200712070714193974J).

agreed with the regulator – and which includes a reduction for early settlement – the possibility of successfully reducing a settled fine on appeal seems remote. Indeed, the Court has discretion to increase the fine, which would need to be considered a realistic possibility in such a scenario.

(iii) **Oral Procedure.** The OFT has been willing to proceed with settlement discussions on the basis of oral submissions (made during meetings). Concerns persist about the potential for third party litigants to obtain disclosure orders for documents produced in the course of cartel investigations, and the settlement process is no different. In recognition of this, the OFT has shown flexibility for parties to proceed by way of oral or written procedure. The firm's signed admission of the infringement is not required until after the OFT has signed and immediately before public announcement.

(iv) **Flexibility.** It is not a prerequisite for all participants to cooperate with the OFT for individual settlements to be reached. In *Dairy Products* the OFT was willing to settle with only 3 out of the 5 implicated retailers and 3 out of the 5 implicated dairy processors (a fourth was the immunity applicant). Equally, the OFT's fast-track offer made during its investigation of the construction industry clearly implies that undertakings who do not choose to come forward will not benefit from early settlement, indicating that the OFT still sees advantages in settling cases even if not all the offenders participate in the early settlement. The OFT has shown itself to be as flexible as possible and to review early settlement at any stage of the investigation, whether pre-SO (*British Airways*) or post-SO (*Dairy Products*) and whether or not all participants have agreed to settle.

(v) **Publicity**. The OFT has been flexible and pragmatic about the sensitivity of public statements on the settlement and has built agreement on what each side will say into its procedure.

Annex 3

CARTEL SETTLEMENT PROCEDURE IN THE UNITED STATES

In the United States, it is common for firms and individuals under investigation for criminal antitrust offences to reach formal agreements with the Department of Justice in order to resolve the matter. These so-called plea agreements are sanctioned by the Federal Rules of Criminal Procedure and are subject to the approval of a federal district court. The agreements are negotiated by attorneys representing the putative defendant and attorneys within the Antitrust Division of the Justice Department. The negotiation process does not require a party acknowledging liability to make any written submission in advance of the plea agreement itself. The content of plea agreements has been refined over the years, to the point where today standard form individual and corporate plea agreements are available on the Justice Department's website.[13] Once the terms are negotiated and reduced to writing, the formal agreement is presented to the federal district court for a hearing and a decision either approving or rejecting the proposed disposition of criminal charges.

The principal components of a plea agreement settling cartel-related charges are: (1) a description of the offence and charging language; (2) the proposed penalty; (3) cooperation obligations, if any; and (4) immunity from other potential illegal conduct, if any. Each of these items is fully negotiable and resolved on a case-by-case basis, depending on the circumstances. Regarding the proposed penalty, the starting basis is the framework set by the U.S. Sentencing Commission's Sentencing Guidelines. Under the Guidelines, a potential fine is based on 20% of the firm's sales in the relevant market(s) in the United States. This so-called base fine is then adjusted depending on the size of the firm, whether senior management was involved in the offence, and whether the firm obstructed the investigation or cooperated fully. The base fine is then turned into a range of potential fines under the Sentencing Guidelines' framework.

For a firm wishing to enter into a plea agreement with the Department of Justice, the firm typically seeks an agreed-upon fine amount that is below the low end of the Guidelines' range. Depending on the firm's level of cooperation and the timeliness of such cooperation, the Justice Department in practice normally agrees to a fine that could be substantially below the low end of the Guidelines' range.[14]

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13 http://www.usdoj.gov/atr/public/criminal.htm

14 The same sort of practice applies to plea agreements with individual defendants, although it is typical for the Justice Department to insist on a term of imprisonment in addition to a fine.