



## European Commission Adopts Settlement Procedure for Cartel Cases

On 30 June 2008, the European Commission (the “**Commission**”) introduced a settlement procedure for cartel cases (the “**Settlement Procedure**”). Under the Settlement Procedure, the Commission can reduce the fine imposed on a party by 10% where it acknowledges having participated in a cartel in breach of Article 81 of the EC Treaty.

The aim of the Settlement Procedure is to simplify and shorten cartel investigations, as well as to reduce the number of cartel decisions that are appealed to the European Courts, thus allowing the Commission to handle more cases. In recent years, parties have often appealed cartel decisions with the sole objective of a reduction in fines, rather than to challenge the substance of the Commission’s decisions against them.

Details of the Settlement Procedure are found in amendments to Commission Regulation 773/2004 on the procedure for applying Articles 81 and 82 of the EC Treaty, and in a new Commission Notice, both of which were published in the Official Journal on 1 July 2008. Adoption of the Settlement Procedure follows a public consultation on the Commission’s draft proposals late last year.

The Settlement Procedure applies to any case pending before the Commission on or after 1 July 2008, where a statement of objections ( an “**SO**”) has not yet been issued.

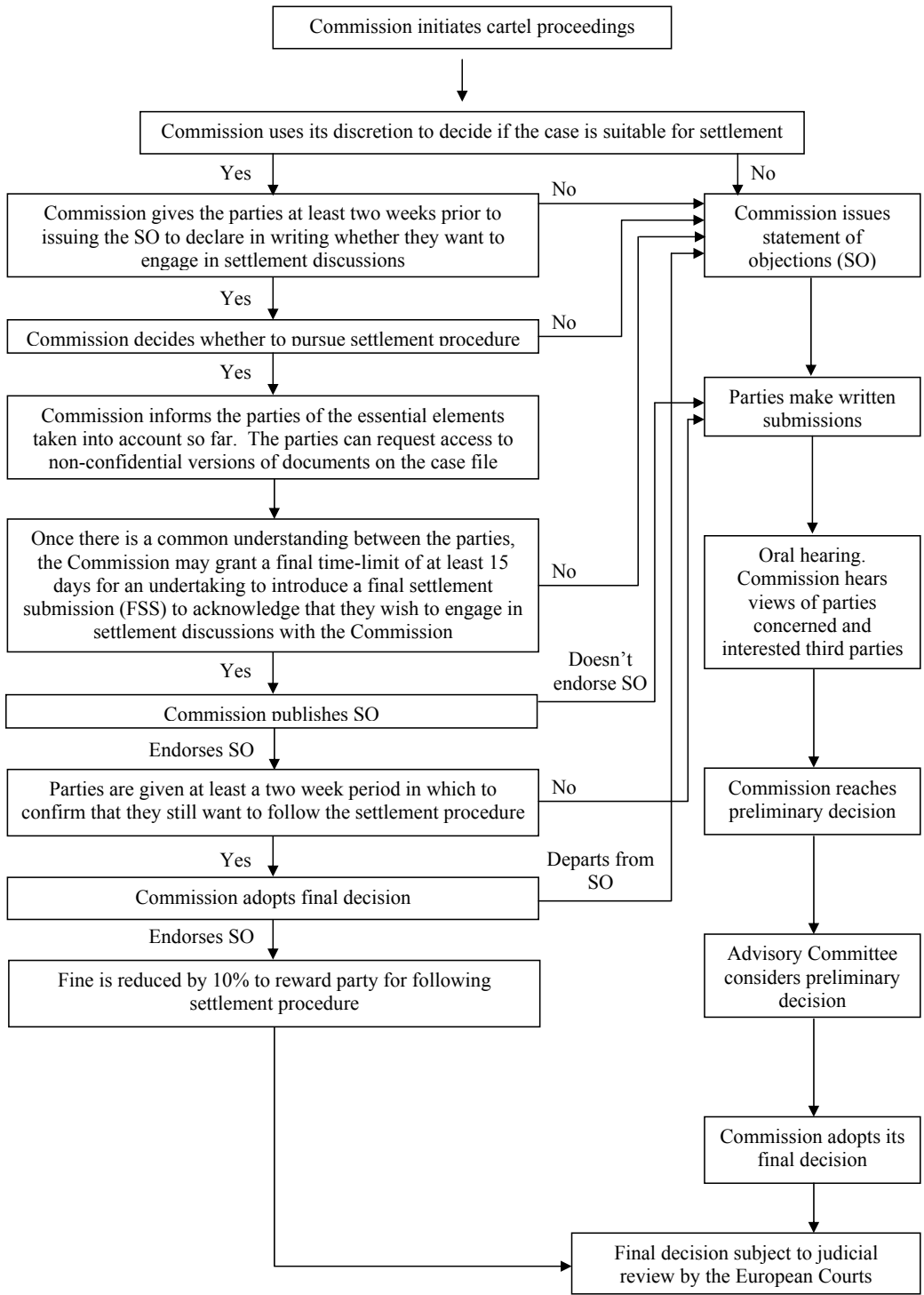
### The Settlement Procedure – Main Points

1. Parties subject to a Commission cartel investigation do not have a *right* to settle, rather the Commission will use its discretion to determine which cases are suitable for settlement. If the Commission wishes to explore the parties’ interest in settlement discussions, then before issuing an SO, it will give all the parties to the proceedings a period of at least two weeks in which to declare in writing whether they want to engage in such discussions. This written declaration does not imply an admission of participation in, or liability for, an infringement.
2. The Commission will then decide whether to pursue the settlement procedure. If talks ensue, the parties will be informed of the essential elements taken into account by the Commission so far, such as:
  - the alleged facts and their classification;
  - the gravity and duration of the alleged cartel;
  - the attribution of liability;
  - the likely range of fines; and
  - the evidence used to establish the potential objections.

Upon reasoned request, the Commission will also grant a company access to non-confidential versions of any specified accessible document listed in the case file, in so far as it considers it justified. This would not normally be permitted until after the SO has been issued, but is intended to allow the parties to make an informed decision on whether or not to settle.

3. Where the settlement discussions lead to a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed, the Commission may then grant a time-limit of at least 15 days for a company to make a final settlement submission (an “FSS”). If the company fails to do so, then the usual cartel investigation procedure will apply. If it chooses to make an FSS (which can be made orally or in writing), this must contain:
  - an acknowledgement in clear and unequivocal terms of its liability for the infringement;
  - an indication of the maximum amount of the fines it foresees being imposed by the Commission and which it would accept in the framework of a settlement procedure;
  - confirmation that it has been informed of the Commission's objections in a satisfactory manner and that it has been given the opportunity to be heard;
  - confirmation that it does not envisage requesting access to the file nor a formal oral hearing, unless the Commission does not reflect its settlement submissions in the SO and final decision; and
  - an agreement to receive the SO and the final decision of the Commission in an agreed official language of the European Community.
4. An FSS cannot be revoked unilaterally by the party which has provided it unless the Commission does not meet the settlement requests made therein by reflecting them first in an SO and, ultimately, in a final decision.
5. Having given the parties the opportunity to submit an FSS, the Commission will then issue an SO to each of the parties, which may or may not endorse any FSS made by them. If it *does not* endorse a party's FSS, the acknowledgments made in the FSS will be deemed to be withdrawn and cannot be used against any of the parties to the proceedings. The parties concerned will then be granted a time-limit allowing them to present their defence anew. If the SO *does* endorse a party's FSS, that party then has a time period of at least two weeks to confirm that the SO corresponds to the contents of their FSS and that they therefore remain committed to follow the settlement procedure. In this case, there will be no oral hearing or further access to the file before the Commission adopts its final decision, as there would be under the normal procedure.
6. The Commission's final decision may depart from the position expressed in the SO. If it does so, the Commission will inform the parties that this is its intention and issue a new SO, after which the usual rules of procedure in cartel cases will apply. In addition, the acknowledgements provided by the parties in the FSS will be deemed to have been withdrawn and cannot be used in evidence against any of the parties to the proceedings. Alternatively, the Commission may decide that its final decision should follow the position in the SO. In this case, the fine imposed will be reduced by 10% to reward the company for settlement, a fact that will be indicated in the final decision. This reduction will be applied as a final step in the penalty calculation, ie after the 10% cap has been applied.
7. A decision taken following application of the settlement procedure is still subject to judicial review before the European courts and does not affect the courts' jurisdiction to review fines.

The flow-chart below shows how the new settlement procedure differs from the standard procedure followed in cartel investigations:



## Considerations for parties involved in cartel investigations

- Of course, the Settlement Procedure is not the only means of having a fine reduced: this runs alongside the Commission's existing leniency procedure (the "**Leniency Procedure**"). Under the Leniency Procedure, full immunity from fines is available to the first undertaking to provide information to the Commission that would either enable it to carry out an investigation or find an infringement of Article 81 EC. In addition, reductions in fines (of up to 50% for the first applicant) are available to undertakings which provide significant added value to that evidence already obtained by the Commission. The Settlement Procedure differs from the Leniency Procedure in that all parties settling in the same case will receive an equivalent reduction in their fine, whereas leniency applicants receive different reductions in fines depending on the timing of their application and the value of the evidence provided. For parties that are not granted full immunity under the Leniency Procedure, any reduction in fine granted under the Settlement Procedure will be applied after (i.e. in addition to) any reduction granted under the Leniency Procedure.
- Parties will need to weigh up the benefits of a possible 10% reduction in fine with the potential downsides of following the Settlement Procedure. First, the Commission's procedure does not offer the certainty of the US plea bargaining system. Whereas in the US, the parties' plea agreement is binding on the Department of Justice once a court approves it, an FSS is not binding on the Commission, which can still issue an SO or a final decision that departs from it. The Commission's procedure involves considerably more delay and uncertainty before a party can put the Commission's allegations behind it. Second, although technically, as mentioned above, an FSS will not be able to be used against a cartel member in subsequent proceedings if settlement discussions are ultimately unsuccessful, parties may be concerned that the case team will be influenced by the parties' admissions in an FSS if discussions fail. Finally, although the Settlement Procedure is not conditional on any agreement by the parties not to appeal, given that the Commission's final decision will be based on the FSS made by the company concerned, the scope for finding grounds to appeal would seem to be limited.

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Mayer Brown International LLP

3 July 2008

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