SLAUGHTER AND MAY

BRIEFING
MAY 2014

The shifting sands of settlement:
Have recent developments affected incentives to enter the European Commission's settlement process?

The European Commission (**Commission**) hails its settlement process as a major success in expediting cartel cases. It has suggested that as many as half of all cases will be concluded under this process. Does this remain realistic? Recent developments, most notably the Supreme Court's decision in *Deutsche Bahn*, are likely to make the civil litigation downsides of settlement more pronounced.[1] In this memorandum, we discuss how these downsides may discourage the use of the settlement process altogether, such that absent reform the Commission's aspirations will fail to be achieved.

THE SETTLEMENT PROCEDURE

Under the Commission's settlement procedure, parties can be invited, at the Commission's discretion, to admit liability for their involvement in a cartel in exchange for a shorter administrative procedure and public decision, and a 10% reduction in any fine which may ultimately be imposed.[2]

In deciding whether to invite parties to settle, the Commission will consider, in particular, the probability of reaching a common understanding regarding the scope and characterisation of a possible infringement, in particular to avoid cases where some undertakings settle and others continue a case under the conventional process (so called "hybrid settlements").

When determining whether the Commission's invitation to enter settlement is an attractive option, an undertaking will need to balance a number of factors, in particular, the prospect of a reduced fine as against potentially increased civil litigation exposure (especially in the United States where the public admission of liability can impede an undertaking's defence in civil proceedings).[3]

THE EFFECT OF *DEUTSCHE BAHN*

As a result of the recent *Deutsche Bahn* judgment, an immunity applicant (or other undertaking which has chosen not to appeal an infringement decision) is exposed to follow-on damages claims at an earlier moment

1 *Deutsche Bahn AG and others v. Morgan Advanced Materials Plc (formerly Morgan Crucible Co Plc)* [2014] UKSC 24. See Slaughter and May UK Competition & Regulatory Newsletter 15-28 April, available at https://www.slaughterandmay.com/media/2161409/uk-competition-and-regulatory-newsletter-15-apr-28-apr-2014.pdf.

2 See: Regulation 622/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases; and 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) No 1/2003 in cartel cases.

3 These factors include: a reduced fine; the impact on follow-on claims, including the need to admit liability weighed against a significantly shorter, more formalistic, published decision (the wording of which the settling undertaking will hope to influence); a quicker decision, increased visibility around fining levels, and earlier finality; certain PR advantages, including a view that a settling undertaking has accepted responsibility and benefits of being one of a larger group of settling parties; and the affect on rights of appeal.

than undertakings which have appealed the decision.[4] The concept of joint and several liability means that these undertakings will be liable for all the losses suffered by the claimants and will not be able to claim contribution from appealing undertakings until those undertakings are also subject to final infringement decisions – which may be at a point significantly in the future, or which may never arise.[5]

It follows that the civil litigation downsides which need to be assessed in determining whether to enter into settlement talks or to conclude a settlement agreement with the Commission now extend to the possibility that settling undertakings are exposed to the risk of assuming liability in damages for all customers of a cartel (i.e. to so-called "umbrella claims").

In a settlement scenario, the risk of being exposed to total liability without recourse to sufficient contribution is largely theoretical unless the case is, or becomes, a hybrid case. In a hybrid case, the timing implications for settling parties are particularly pronounced: the settling undertakings will be the subject of a public settlement decision on which follow-on damages actions can be based significantly ahead of the date when the Commission may publish an infringement decision against the non-settling parties (which could then be appealed at least once, and possibly twice, before it is finally binding on the non-settling parties). The disparity between the two can be measured in years.[6] In assessing the civil litigation risks of entering the settlement procedure the likelihood of hybridisation of the case, therefore, needs to be assessed. Whilst the Commission has been at pains to highlight that "*hybrid cases […] remain the exception*", this cannot detract from the fact that nearly a third of the cases concluded under the settlement procedure to date have been hybrid cases.[7]

In theory, it may be possible for a settling party in a hybrid case to mitigate some of the risks by bringing an appeal against the settlement decision. However, in order to postpone the time at which a follow-on claim can be launched, an appeal needs to be against the finding of liability and not simply against the fine level.[8] Given that a settling undertaking has already admitted liability, its ability to launch such an appeal is severely compromised and there is a real risk that the appeal will be summarily dismissed. In addition, when hearing appeals, the European Courts have unlimited jurisdiction to review fines: Senior members of the Commission have suggested (in the context of the recent appeal by Société Générale against its settlement decision) that fines for a settling party that chooses to appeal could be increased by the Court.[9]

4 In the *Deutsche Bahn* decision, the Supreme Court ruled that in England and Wales, the two-year period for claimants to bring a follow-on damages action under section 47A of the Competition Act 1998 against an immunity applicant commenced once the period for the immunity applicant to appeal the Commission's infringement decision to the General Court expired and the decision was therefore final vis-à-vis the immunity applicant, notwithstanding that other members of the cartel had appealed the decision such that the Commission's decision was not binding on these other undertakings until much later.

5 As the Supreme Court in *Deutsche Bahn* recognised, the non-appealing or settling undertakings also have to carry the risk that the appealing or non-settling undertakings are successful (in whole or in part) in their efforts: either reducing their liability altogether or reducing the scope of the cartel (for example duration).

6 For example, in the *Animal Feed Phosphates* case, although the settlement and conventional track decisions were announced at the same time on 20 July 2010, Timab brought an appeal before the General Court on 1 October 2010. This judgment is still pending.

7 Vice President Almunia in SPEECH/14/281 "*Fighting against cartels: A priority for the present and for the future*" (Brussels, 3 April 2014).

8 [2012] UKSC 45 *BCL Old Co Limited and others v. BASF plc and others* at paragraph 38.

9 See, comments of Vice President Almunia in SPEECH/14/281 "*Fighting against cartels: A priority for the present and for the future*" (Brussels, 3 April 2014); comments of Dirk van Erps at the 13th Annual Conference, International Competition Network (Marrakesh, 24 April 2014); and Joined Cases T-360/09 and T-370/09 *E.ON Ruhrgas, E.ON AG and GDF Suez SA v. Commission* (29 June 2012), where the Court reduced the duration of the cartel but set fines that, according to Vice President Almunia, were much higher than the Commission's Guidelines would have provided for that duration.

IMPLICATIONS OF THE DAMAGES DIRECTIVE

With respect to immunity recipients, the consequences of the *Deutsche Bahn* decision may be less severe as a result of the recently enacted Damages Directive, once transposed into national law. The Directive generally limits the immunity recipient's exposure to loss suffered by its own direct and indirect customers.[10] The Member States have two years within which to implement the Damages Directive into national law.

RIPE FOR REFORM?

In order to ensure that the number of hybridised settlements are kept as the "*exception*" so that litigation risks associated with an earlier public decision do not weigh too heavily in the balance, it seems an appropriate time for the Commission to consider some reforms to the settlement procedure. These reforms could include:

(i) More transparency around the participation in settlement discussions of undertakings which are under investigation so that undertakings can assess the risk of hybridisation of the proceedings, coupled with greater assurances that the Commission will pursue the case against any non-settling parties in a timely manner;

(ii) Greater stress-testing of undertakings' commitment to settlement before formal discussions are instigated so as to minimise the hybridisation risk;

(iii) Greater clarity of the adverse consequences for a settling undertaking which drops out of the settlement process, in particular at a late stage;

(iv) Where there is hybridisation, the Commission explicitly stating that the settlement decision will not be published until the infringement decision against the non-settling parties is published (as is the case in the UK), or going further and publishing the settlement decision only once there is a binding decision against non-settling parties (i.e., once periods for appeal have expired); and/or

(iv) Increasing the attractiveness of the settlement procedure by, for example, increasing the settlement discount, so that increasingly pronounced civil litigation consequences are outweighed by the benefits of settlement.

CONCLUSION

In order for the settlement procedure to remain a useful tool, the civil litigation risks discussed above need to be mitigated. If they are not, the balance of factors which an undertaking must consider before deciding whether to pursue settlement may more often tip in favour of not settling. The end result would be material erosion of the more recent gains in the speed with which cartel cases are investigated and concluded by the Commission.

[10] See Article 11 of the Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the **Damages Directive**). See also Slaughter and May EU Competition & Regulatory Newsletter 18-24 April, available here.