THE EC COMMISSION'S DRAFT NOTICE ON SETTLEMENTS
- comments and suggestions -

1. Arnold & Porter LLP welcomes the opportunity to submit comments and suggestions on the EC Commission's draft Notice on the conduct of settlement proceedings ("the draft Notice"). We focus on the question whether the proposed settlement proceedings, as described in the draft Notice, will provide enough incentives for companies to seek early termination of cartel investigations by foregoing their right to challenge the statement of objections and thereby achieve the Commission's stated aim of expediting such investigations so that it can handle more case with the same resources.

2. In this respect, we have doubts for the following reasons: a) companies cannot formally initiate the settlement process; b) once the Commission has formally initiated the settlement process, it retains a margin of discretion to discontinue that process at any time until the very end of the administrative proceedings; c) the current proposal is likely to attract primarily companies that are already cooperating with the Commission in the context of the leniency procedure; d) the procedural framework within which the companies are expected to make their written settlement submission ("WSS") can be improved, e) the maximum reduction of fines in settlement cases will be lower than in leniency procedures; and f) the conditions under which companies are expected to make a WSS, risk making these submissions discoverable in court. We will develop each of these points in turn.

a) <u>Companies cannot formally initiate the process</u>

3. In its draft Notice, the Commission gives itself the exclusive right of initiative to explore the viability of a settlement in a cartel case by inviting all companies (in writing) to express their interest in a settlement (also in writing). The companies only have the reassurance that the Commission cannot impose a settlement upon them. Without a written request from the companies, there can indeed not be a settlement.[1]

4. It is true that companies can informally indicate their interest in a settlement as soon as they become aware of the existence of an investigation, e.g. when they are subject of a surprise inspection (cf. the FAQ of 26 October 2007). However, it is unclear what incentive companies would have to express such an interest at this early stage, even informally. Before encouraging companies to do so, the Commission should make it clear that it considers the case important enough to be pursued. Otherwise, informal expressions of interest may have the counter-productive effect of encouraging the Commission services to seek cheap success by pursuing cartel cases under the "light" settlement procedure in spite of the fact that their resources would be better spent on the

[1] Cf. draft Notice: "Regulation (EC) No 773/2004 bestows on the Commission the discretion whether to explore the settlement procedure or not in cartel cases, while ensuring that the choice of the settlement procedure cannot be imposed on the parties." (§3).

cartel cases that really matter from an economic point of view. We make this point because it is our understanding that the avalanche of leniency applications since 2002 has forced the Commission to give priority to only the most harmful cartel cases and to terminate without more cartel cases that were simply not worth being pursued.

b) <u>Once the process has been formally initiated, the Commission retains discretion to discontinue it</u>

5. The draft Notice gives the Commission full discretion to decide to i) engage in settlement discussions; ii) discontinue these; or iii) definitely settle.[2] This means that there will be uncertainty for the companies until the very end of the administrative proceedings. The Commission will indeed retain its discretion, not only after companies have expressed an interest in a settlement, but also after they have made their WSS and even after they have confirmed that the statement of objections corresponds to their WSS.[3]

6. In the latter case, the uncertainty will remain because the Commission may change its mind "either in view of the arguments provided by the Advisory Committee or for other considerations in view of the ultimate autonomy of the Commission College to this effect" (§29). This wording even suggests that the companies' settlement prospects may be "killed" on the basis of considerations that are entirely beyond the control of the companies that have made a WSS because they are unrelated to any of the conditions that their WS must fulfill in order to be admissible.

c) <u>The current proposal is likely to attract primarily companies that are already cooperating with the Commission in the context of the leniency procedure</u>

7. The Commission will give companies a couple of weeks (no less than two) to declare whether or not they are in principle willing to engage in settlement discussions (§ 11). However, that time limit also constitutes a sort of "last call" for leniency applications since the Commission "may disregard any application for immunity from fines or reduction of fines under the Leniency Notice on the ground that it has been submitted after the expiry of the time-limit [for expressing this interest]".[4] In other words, at a time when companies will have no certainty about the outcome of the settlement procedure, they will have the certainty of having lost their right to earn a reduction of fine as leniency applicant. Yet, one would have thought that leniency applications can be submitted until the Commission has issued a formal statement of objections.[5] Why force settlement applicants to abandon the leniency route at an earlier moment in time, in

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2 Cf. § 5 of the draft Notice.

3 "The Commission retains discretion to determine throughout the procedure on the appropriateness (and the pace) of the bilateral settlement discussions with each undertaking" (§ 15).Even then, the Commission can decide to discontinue the process since it "may legitimately adopt a final position which departs from its preliminary position expressed in a statement of objections endorsing the parties' written settlement submissions" (§ 29).

4 Cf § 13 of the draft Notice.

5 Cf. § 29 of the Leniency Notice : "The Commission may disregard any application for a reduction of fines on the grounds that it has been submitted after the statement of objections has been issued."

particular since the Commission has hammered in the point that the leniency and settlement procedures pursue different objectives?[6]

8. In view of the above, one is inclined to believe that the settlement procedure will primarily attract companies that are already operating in a spirit of cooperation with the Commission in the context of the leniency procedure. As a practical matter, these companies have nothing to lose when they seek to obtain an additional discount on the fine via the settlement route. However, even for these companies, the Commission's current proposal contains a number of disincentives, to which we now turn.

d) <u>The procedural framework within which the companies are expected to make their WSS can be improved</u>

9. Once the settlement discussions will have led to a "common understanding regarding the scope of the potential objections and the estimation of the range of likely fines", the Commission will ask the companies to introduce a "final" WSS (§ 17). The critical point is that the companies will have to introduce this WSS before they get to see the formal statement of objections. Whether they will have an incentive to do so will depend on the concrete modalities of what the Commission calls "the early disclosure" of "the facts, the classification of those facts, the gravity and the duration of the alleged cartel as well as the evidence used to establish the potential objections" (cf. § 16).

10. However, in its draft Notice, the Commission does not spell out these modalities. Its reference to "early disclosure in the context of settlement discussions" (§ 16) suggests that such disclosure will be oral. Two other passages in the draft Notice are more ambiguous. The Commission states that it can "exercise its discretion as to the timing of the disclosure of the <u>evidentiary basis</u> in the file supporting the envisaged objections to parties who envisage introducing settlement submissions after the initiation of proceedings" (footnote 12 at § 16, emphasis added) and that companies will be entitled to have the information specified in § 16 disclosed to them "<u>upon request</u>" (§ 17, emphasis added). These passages suggest that the companies might at least get to see (at the Commission's premises?) the evidence that will serve as a basis for the potential objections, if they make a request to that effect. In our view, if the Commission will maintain its position that the WSS should precede the issuing of the statement of objections, this would seem to be an absolute *sine qua non* to convince the companies to submit their WSS. We see at least two reasons for this.

11. First, it seems to be the only way in which the companies could possibly acknowledge "in unequivocal terms" their liability for the infringement summarily described as regards the

[6] Is the Commission perhaps trying to reduce its workload stemming from the screening of multiple leniency applications? While there is formally no limit to the number of admissible leniency applications, it is probably the case that the most valuable leniency applications are those submitted by the immunity applicant (who usually brings evidence that enables the Commission to undertake successful dawn raids) and the evidence presenting significant added value brought by the second-in-the-door leniency applicant. One could therefore imagine that the Commission is trying to avoid in the future the painstaking job of having to screen the evidence brought by other "late coming" leniency applicants to determine whether they add significant value and prefers to re-direct these latecomers to another form of cooperation, i.e. requests for settlement. On the other hand, one notes that the Commission has regularly (i.e. in roughly half of its cases) granted reductions of fines below 30% on the basis of its Leniency Notice - which means that there were at least two companies that had adduced evidence with significant added value.

main facts, their legal qualification, and the duration of their participation in the infringement (§ 20 *sub* a) and to confirm that "they have been sufficiently informed of the objections the Commission envisages raising against them" (§ 20 *sub* c).

12. Second, this disclosure to the settlement candidates would also seem to be necessary to "enable the Commission to effectively take their views into account already when drafting the statement of objections" (§25).

13. Incidentally, the latter point raises a separate issue. On the one hand, the Commission has made it clear that it "will not bargain about evidence or its objections" (cf. FAQ). On the other hand, the companies "will have an opportunity to influence the Commission's objections through argument" (ibidem). The Commission even goes so far as to state that the "parties' rights of defence under the settlement procedure remain the same as in the ordinary procedure" and that they are simply exercised in the framework of discussions in anticipation of the formal notification of objections" (ibidem). Since these settlement discussions will consist in a series of bilateral exchanges of view, it would be helpful if the Commission could clarify how the companies can effectively influence the contents of the statement of objections. In the draft Notice, the Commission seems to struggle with this point, as it concludes the relevant paragraph with the conservative statement that "the statement of objections (…) may draw on the contents of the settlement submissions, where appropriate" (§ 25, emphasis added). It should drop these open-ended qualifications and say something like: "the Commission will draw on the contents of the settlement submissions whenever these enable it to refine its statement of objections".

e) The level of the reduction in fines

14. The reduction of fines under the leniency program will be more significant than under the settlement procedure (cf. FAQ). It is unclear whether this cap will vary with the number of successful leniency applicants (e.g. less than 30% if one company has brought evidence with significant added value, less than 20% if several companies have adduced such evidence). In any event, it is unclear why the Commission intends to set the settlement discounts in fines automatically at a lower level than those available to leniency applicants.

15. Neither the reductions under the leniency procedure, nor the smaller reductions under the mitigating circumstance of effective cooperation outside the scope of the Leniency Notice (cf. the 2006 Guidelines on the method of setting fines) imply that the cooperating companies accept the Commission's qualification of the facts, including its conclusion with regard to gravity and duration of the infringement, and recognize their liability for the infringement. In contrast, settlement applicants would *de facto* give up their right to challenge any of these findings in the administrative proceedings before the Commission or even in an appeal procedure before the Court of First Instance ("CFI").

16. The Commission contests this argument by observing a) that the "parties' rights of defence under the settlement procedure remain the same as in the ordinary procedure" and are simply exercised (…) in anticipation of the formal notification of objections" and b) that the companies that have accepted a settlement can appeal the Commission's decision to the Court of First Instance (cf. FAQ).

17. However, the settlement discussions have only one declared goal, i.e. to consolidate a common understanding between the Commission and the companies on the scope of the statement of objections. When the companies engage in discussions aimed at reaching such a common understanding, they do not really exercise their rights of defence. Companies exercise their rights of defence when they challenge the validity of such objections (and they make use of their right of access to the file for the same purpose) Furthermore, it is submitted that successful settlement applicants will rarely, if ever, appeal the Commission's final prohibition decision. How could a company credibly argue before the CFI that the Commission's legal assessment is flawed if it has fully subscribed to that assessment in the course of the settlement procedure?

18. Therefore, if the Commission wishes to provide companies with an incentive to effectively forego their right of appeal in return for a settlement, it should offer them a reduction of fine which is distinctly more attractive than the reduction that can be earned on the basis of a leniency application (or in the presence of a mitigating circumstance).

19. As a matter of fact, in the absence of an appeal, the Commission will save valuable enforcement resources. Virtually all cartel decisions are being appealed these days. In a way, all these cases start a second life after the Commission has adopted its decision. Settlements will therefore not only expedite the administrative proceedings once a statement of objections has been issued. They will also enable the Commission to invest its scarce resources in new cases the day after it has adopted its decision in the settled case rather than to use them for the purpose of assisting the Legal Service in defending that decision in the CFI. The procedural "post-decision" economies of resources justify that settlement reductions not - at least not automatically - be set at a level below the leniency reductions.

20. Another reason for not automatically capping the maximum reduction of fines in settlement procedures with reference to the leniency reductions is that this maximum will be uniform for all settlement candidates. While this makes sense in a framework that separates settlement completely from leniency (and thus leaves no room for differentiating the settlement rebates on the basis of the quality of evidence submitted by the candidates, as in the USA), the Commission will have to make sure that the maximum reduction is attractive for as many cartel participants as possible. A uniform reduction of, say, only 10% may be attractive for a company who has not participated in the cartel for longer than, say, a year but it is unlikely to be attractive for companies that have participated in the cartel for many years because their fines will be doubled for every year of participation. Incidentally, the latter companies are also - understandably - the most active litigators in the CFI.

21. Lastly, we assume that a settlement will be available to one or more companies even if not all cartel participants opt for settlement. It may be worth explicitly stating this in the Notice.

f) Discoverability of written settlement submissions

22. In its 2006 Leniency Notice, the Commission has made an effort to minimize the consequences of the fact that under the 2002 Notice, the corporate leniency statement was discoverable in court. Leniency applicants can now confess their participation in a cartel and give all relevant information in the form of an oral corporate statement, although that

statement must of course be accompanied by all available pre-existing documentary evidence of the cartel available to the applicant. The oral statement remains under the Commission's control at all times. It is taped and transcribed at the Commission's premises and applicants do not retain or receive any copies of it from the Commission. This is to minimize discoverability and disclosure in national courts and thus reassure leniency applicants that they will be not put into a worse position in civil antitrust claims than non-co-operating participants.

23. The problem with the WSS (as described in the draft Notice) as well as with the subsequent reply to the statement of objections is that they seem to remain under the control of the settlement applicants. For the WSS, the Commission states that they will only be successful when "the statement of objections endorse [them]" (§ 26), not the other way around. The same seems true for the reply to the statement of objections by which the companies "simply" confirm "(in unequivocal terms) that this statement of objections corresponds to the contents of their settlement submissions" (ibidem). This means that the WSS and the reply will stand by themselves as reference documents for the Commission's statement of objections.

24. The risk of discoverability of the WSS and the reply to the statement of objections is all the more serious since these corporate statements amount to a guilty plea and, as far as the WSS is concerned, a guilty plea that the company will have made even before having received the statement of objections with the formal charges.

25. The Commission is therefore invited to work out a procedure that takes inspiration from the one put in place under the Leniency Notice and ensures that the corporate statements that serve as WSS or as reply to the statement of objections become documents under the Commission's control.

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26. The first leniency Notice in 1996 was a half-hearted attempt to encourage companies to assist the Commission in collecting evidence about alleged cartels. Not surprisingly, the Notice did not achieve the results hoped for. If the Commission wants to get it immediately right with its settlement proposal, it should take this proposal a few critical steps further. The main amendments which would, in our view, increase the attractiveness of the settlement proposal considerably are the following:

    – provide additional procedural guarantees for the companies at the "early disclosure" stage;

    – reconsider the timing as well as the format of the WSS, e.g. by enabling the companies to validate the statement of objections - or at least an executive summary thereof - and enabling them to do so in an oral corporate statement;

    – abandon the idea that the reduction of fines in case of a settlement should, as a matter of principle, be lower than the reduction of fines in case of leniency.