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COMMENTS ON THE DG COMPETITION DRAFT LEGISLATIVE PACKAGE TO INTRODUCE A SETTLEMENT PROCEDURE FOR CARTEL CASES

on behalf of

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I. Introduction

This paper provides Crowell & Moring LLP's comments on DG Competition's Draft Legislative Package to introduce a settlement procedure for cartels (hereinafter "Draft Legislative Package"). These comments are based on our experience in advising numerous clients in cartel investigations over many years. However, the comments are our own and do not necessarily reflect the views of clients, collectively or individually.

Crowell & Moring strongly supports the general initiative of the Commission to encourage and foster settlement. Crowell & Moring believes that an effective practice of case settlement will increase the efficiency and flexibility of EC antitrust investigations, will enhance Commission cartel enforcement policy objectives, and will ultimately improve Commission decision making. We also believe that such a process will offer substantial benefits to companies that choose to cooperate in commission investigations and engage in settlement dialogue, by, in addition allowing potential reduction in fines, reducing the costs and administrative burdens associated with a lengthy investigation and providing an opportunity publicly to make a clean break with past behavior and more expeditiously put the matter behind them.

EC cartel investigations involve a substantial expenditure of effort and resources by both the Commission and the companies under investigation. For the Commission costs include the organization and execution of 'dawn raids' and information request, the management of the case file and its preparation for the access to file process, the drafting and translation of the statement of objections and decision and the handling of any appeals. For companies under investigation the costs include the management time and other resources expended in dealing with both the direct internal impact of Commission 'dawn raids' and information requests on the business and their indirect external impact on company image and reputation, as well as the significant cost of external advice and support. Both the Commission and the companies under investigation therefore have strong incentives to expedite the process.

However, for a settlement procedure to work in practice, it must create appropriate incentives for all sides. We set out below our view that, although the Commission's Draft Legislative Package

identifies a clear opportunity to create a successful framework for settlement, significant changes will be needed if this is to be achieved. We also suggest several changes to the procedural structure proposed by the Draft Legislative Package that we believe will enhance the success of a settlement process.

II. Fundamental concerns

Before commenting in more detail on the Commission's initiative, we would like to highlight several general concerns regarding the structure and concept of the Draft Legislative Package.

1. Unnecessary detail and formality

We believe that the level of formality and procedural detail set forth in the Draft Legislative Package is likely to prove counterproductive and may discourage companies under investigation from entering into settlement discussions. As currently constructed, the proposals risk forcing companies under investigation (and the Commission) into a rigid and complex procedural straightjacket that may stifle potential settlements.

In our view, and that of other commentators,[1] existing procedural rules are sufficiently flexible to allow the Commission to adopt settlements in the form envisaged by the EC – i.e., a formal infringement decision on the basis of admissions from companies under investigation and waivers from the companies under investigation of certain procedural rights. Nor is there any barrier to the contacts between the Commission and the companies under investigation necessary to achieve such an outcome. At the same time, we see no reason to establish a rigid legal framework for these processes in advance of any concrete experience of how they might operate, particularly because they run the risk of providing procedural roadblocks to effective settlement. Our experience with the US Department of Justice indicates that constructive and successful settlement processes do not require strict and detailed rules. Thus, we believe it would be preferable at this time for the Commission to issue a clear a policy statement in favor of settlement, and limit its procedural guidance to the

minimum level necessary to facilitate its development. Whether and when detailed procedural guidance may become necessary is not an issue that needs to be addressed at this stage.

2. More balanced procedures

A settlement procedure will only be successful if it offers sufficient benefits to all sides. The Draft Legislative Package appears to ask too much of companies under investigation while offering too little in return. In particular, the Commission's insistence on written submissions that are likely to constitute disclosable admissions in US proceedings appears unnecessary, and the offer in return of imprecise assurances that can be withdrawn and at any time for any reason (or none) is unbalanced.

In our view, the following are minimum requirements for a successful procedure:

- the option of pursuing an oral process (as under the Commission's Leniency Notice[2]);
- greater clarity from the Commission as to at least the level of proposed fines before the companies under investigation agree to waive fundamental procedural rights and enter binding guilty pleas; and
- some restrictions on the Commission's ability to withdraw from the process without good and reasonably foreseeable reasons.

3. A need for discussion if not 'negotiation'

The Commission has made it clear that it sees no scope for "negotiation" with companies under investigation in the context of a settlement process. While understandable in principle, this position

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1 Wouter P.J. Wils, Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation NO. 1/2003, World Competition 29(3), 2006, pp 345 to 366, at p. 365 *et seq*.

seems unlikely to be viable in practice. In our experience, the facts of a case are rarely clear-cut – records are incomplete, recollections are imperfect and, regrettably, individuals often make misrepresentations – not only to investigating authorities but also (indeed perhaps more frequently) to employers and their advisors. As a result, the Commission may find itself in certain investigations in a situation in which initial representations by cooperating companies and individuals turn out not to be entirely accurate. From the perspective of companies seeking a settlement process, such companies in some cases will not be entirely certain of the precise scope of their infringement. In fact, sometimes companies may not always be sure whether an infringement even has occurred. We are aware of examples in which companies that initially feared they had been guilty of infringement were ultimately convinced that no infringement had occurred following a comprehensive internal investigation.

Moreover, these problems are magnified in multi-party cases: The Commission is likely to be faced with circumstances in which companies under investigation offer mismatched admissions (in terms of the scope, duration or even nature of the infringement), or in which some companies under investigation are prepared to settle and others are not. There will also be cases in which a legitimate difference of opinion exists between the Commission and the companies under investigation as to the facts of the case. In practice, we believe that these differences can only be resolved through detailed discussion – if not 'negotiations' – between the companies under investigation and the Commission.

As currently conceived, the Draft Legislative Package likely would produce an actual settlement only in those rare cases in which complete clarity exists as to the underlying facts, and both the Commission and the company desiring settlement can agree on both those facts and the application of the relevant law to those facts. From our experience we believe such clarity can only be achieved late in an investigation, and thus this approach undermines the important objective of securing early settlements that can advance the overall investigation and bring it to more rapid closure.

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[2] Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 2006, p. 17.

III. Ultimate goals of the settlement

We understand from recital 1 of the Commission Notice on the conduct of settlement proceedings in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (hereinafter "Draft Settlement Notice"), that the ultimate goal of the Commission's initiative is to achieve a better and more efficient allocation of DG Competition's resources. The Draft Settlement Notice is intended to foster this goal by allowing a more streamlined procedure and facilitating "delivery of effective and timely punishment".

We believe that a well-designed settlements process can achieve wider and deeper benefits. In addition to the advantages to the Commission's cartel enforcement efforts, settlement can allow companies under investigation to avoid the costs of a lengthy and unnecessary investigation and to move on publicly and more efficiently from past behavior. These advantages offer benefits to society as a whole as well as the companies under investigation and should, we submit, be recognized in the Draft Settlement Notice.

IV. Procedural issues

As set out above, our general comment is that, at this early stage in the development of the Commission's experience, the proposed level of formality and procedural detail in the Draft Legislative Package is unnecessary and counterproductive. In the sections that follow, we identify a number of procedural concerns raised by the existing Package, many of which would be avoided if the Commission were to abandon the proposed level of detail and formality.

1. Initiation of discussions

As we understand paragraphs 5, 6 and 9 of the Draft Settlement Notice it will be for the Commission to initiate contacts in relation to settlement.[3] The Draft Notice makes no provision for – and indeed appears to actively discourage – the initiation of settlement discussions by companies under investigation.

In our view, this makes little sense and, we would expect that, even if the Draft Notice is adopted unchanged, more flexible procedures will develop in practice. If companies under investigation are able, at an early stage, to offer a comprehensive settlement that would satisfy the Commission, we see no reason why they should not approach the Commission to propose it. Discouraging companies under investigation from doing so risks unnecessarily increasing the costs of an investigation to the detriment of all sides and society as a whole.

2. The requirement for written submissions

The insistence under the Draft Legislative Package on written submissions – both for the expression of interest under paragraph 9 of the Draft Settlement Notice and for the settlement submission under paragraph 20 – is one of our most serious concerns with the Commission's proposals. This is because written submissions are likely to be discoverable in US proceedings where they may prove seriously detrimental to the interests of the relevant party.[4] The potential for such disclosure in the US could cause many companies to forgo participating in the Commission's settlement process. From our perspective, therefore, the unintended effect of requiring written submissions – disincentivizing companies from settling – outweighs any potential benefits to the Commission of having written submissions on file.

Two related factors make the insistence on written submissions particularly unreasonable. First, the submissions must be made at stages in the process when the Commission remains free to withdraw from the process as it deems appropriate. Thus, companies under investigation would be significantly compromising their own positions without any assurance that the Commission will not elect to withdraw from the settlement process. Second, the requirement for written submissions seems altogether unnecessary. The Commission's own leniency program operates well on the basis of oral submissions, and there seems no reason why a similar process could not be permitted here.

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3 See also the proposed new Art. 10a (1) Reg. 773/2004.

4 The fact that the Commission will not itself disclose these submissions does not resolve the issue: companies under investigation making the submissions may themselves be required to make disclosure.

3. No general right to settle

The Draft Settlement Notice makes clear that the companies under investigation shall not have a right to settle. The Commission may decide not to initiate settlement discussions in a particular case or to withdraw from discussions that it has initiated at any stage. Whether or not the Commission invites companies for settlement talks may in turn depend on factors including the "probability of reaching a common understanding", the "number of parties involved", "foreseeable conflicting positions", and the "procedural efficiencies".

We believe that, as in the case of leniency, settlement should be generally and automatically available provided the companies under investigation meet certain conditions, including offering admissions compatible with the nature and scope of any final decision adopted by the Commission. As is the case under Part III of the Leniency Notice, the Commission could retain discretion over the precise amount of the appropriate reduction in fines. However, companies under investigation would have the protection that, in the event the Commission unreasonably rejects a settlement offer, they would be able to seek a remedy in the European Courts. Further, this would offer comfort to companies under investigation prepared to offer settlement in cases where some but not all of the companies under investigation are prepared to settle. At present, such companies appear to be at risk of compromising their own positions by offering settlement while receiving nothing in return from the Commission.

In particular, we see no reason why the Commission should be entitled to withhold the possibility of settlement in a case where it wishes to "set a possible precedent".[5] Given that the Commission will in any event publish a fully reasoned infringement decision (albeit one based at least in part on admitted facts), we see no bar to the Commission's setting precedents in cases involving settlement.

[5] Paragraph 5 of the Draft Settlement Notice.

4. Limitation to cartel cases

The Draft Settlement Notice is designed to apply only to cartel cases. This follows in particular from the title of the Draft Settlement Notice which explicitly refers to "cartel cases" as well as from the references to the Leniency Notice in paragraphs 1, 13, and 33.

In the FAQ issued together with the Draft Legislative Package, the Commission gives three reasons for the focus on cartel cases:

- cartel cases are currently the most frequent case type within the Commission;
- the issues typically hinge on the extent and probative value of the evidence gathered; and
- in view, among other things, of the multiplicity of parties, they often entail a heavier procedure.

Aside from the simple number of cases involved – which does not of itself seem a sound reason for limiting settlement to cartel cases – we submit these arguments will often apply equally in non-cartel cases.

Similarly, we are not convinced that the settlement procedure should be confined to cases in which the Commission intends to impose fines.[6]

[6] Paragraph 8 of the Draft Settlement Notice may in fact indicate that the procedure will also apply to certain cases in which the Commission does not intend to impose fines since it refers to "decisions pursuant to Article 7 and/or Article 23". This could be clarified.

5. Other procedural points

The following more minor procedural points, which largely involve drafting issues, again illustrate the risks involved in adopting the overly formal approach in the Draft Legislative Package:

- We question the appropriateness of the provision in paragraph 9 of the Draft Settlement Notice that the Commission may initiate proceedings no later than it issues an SO. It is not unknown for the Commission to issue more than one SO in a case, and in such cases there might be substantial benefits from a settlement reached post an initial SO. Indeed, any early termination of proceedings will have some beneficial impact in terms of cost and resources, even if it happens post SO.

- We question the provision in paragraph 13, which permits the Commission to reject leniency applications made after the expiry of the time limit for response to an invitation from the Commission to engage in settlement discussions. Leniency is granted only if companies fulfill the strict preconditions set out in sections II and III of the Leniency Notice. If these conditions can be fulfilled after the expiry of the time limit for response to an invitation to engage in settlement discussions we see no reason to withhold leniency. Indeed, to do so would potentially mean forgoing the public benefits of the cooperation offered by the company concerned.

- Paragraph 27 of the Draft Settlement Notice provides that where the Commission's final decision does not endorse the companies' settlement submissions the "acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used against any of the parties to the proceedings." In order to cover, *inter alia*, the parties' confirmation that the SO corresponds to their settlement submission pursuant to paragraph 26 of the Draft Settlement Notice, "in the settlement submission" should be replaced with "in the settlement process according to this notice". A similar change would also be required in paragraph 29.

V. Sufficient incentives – balancing cost and benefits

The companies under investigation will only make use of the settlement procedure if they have a reasonable basis to assess the costs and benefits and conclude that the benefits will outweigh the costs. This means the procedure must offer tangible and clearly defined benefits, and the outcome of the process must be reasonably predictable. As set out further below, the Draft Legislative Package appears to ask too much of companies under investigation and to offer too little, with too little certainty, in return.

1. The requirements on companies under investigation

The Draft Settlement Notice clearly defines the requirements that companies under investigation must fulfill if they are to be eligible for a settlement. Pursuant to paragraph 20 of the Draft Settlement Notice, companies are required to issue a written submission in which they:

- acknowledge the Commission's allegations, their legal qualification as well as their own liability;
- confirm that they have been sufficiently informed and heard by the Commission;
- confirm that they do not envisage to request access to the file or to request an oral hearing; and
- agree to receive the statement of objections and the final decision in a language which they might not understand.

We have already expressed our views on the requirements for written submissions. Leaving that aside, the proposal is that companies give up many of their basic procedural rights and offer substantial admissions that, in practice, may be difficult to withdraw from if no settlement emerges.

2. The offer in return

The Draft Settlement Notice, at paragraph 32, sets out two specific financial benefits that companies may obtain if their settlement submissions are accepted by the Commission:

- a percentage decrease in the fine – although no specific percentage or even range is mentioned; and

- a limit on the deterrence multiplier applied in calculating the fine to maximum of 2.

With regard to the percentage reduction in fine, we have two principal comments. First, we submit that the reduction ought to be substantial, potentially of the order available under part III of the Leniency notice – between 20% and 50%. We believe that this level of reduction will adequately motivate companies to engage in the settlement process.

Second, and at least as important, companies must have a clear understanding of the financial impact of this reduction. Paragraph 16 of the Draft Settlement Notice indicates that during settlement discussions the Commission will only disclose "an estimation of the range of likely fines". The proposed new Art. 10a (2) (c) of Reg. 773/2004 is even less clear, stating only that companies under investigation "may" be informed about the potential fines. However, before they can be expected to enter detailed admissions and give up basic procedural rights, companies will expect a much clearer understanding of their exposure to financial penalties than this language suggests. Indeed, given the Commission's substantial discretion in the calculation of fines, companies are likely to require a detailed understanding of the level of fine envisaged by the Commission. At a minimum, companies will require both a clear understanding of the factual basis on which the Commission intends to calculate the fine and an understanding of the approach the Commission intends to adopt on the basis of those facts at each stage in the fine-calculation process. We see no reason why the Commission should not be prepared to offer such information to companies under investigation. And, as experience with the U.S. system makes clear, transparency in the process is critical to the success of a settlement process.

As to the limit imposed on the increase for deterrence, we note simply that for smaller and single-product undertakings this offer will likely be of minimal or no value. We see no reason why such a specific benefit should be offered to larger multi-product undertakings only. Indeed, it may raise issues of unequal treatment in individual cases. An alternative option may be to cap the maximum basic amount of the fine under recital (21) of the Commission's Fining Guidelines to 20%.

Finally, we are concerned that under the Draft Settlement Notice the Commission retains an absolute discretion to withdraw from settlement discussions at any time and for any reason. Companies are therefore exposed to the risk that, having made a settlement submission, settlement will be withheld without good and predictable reasons. As long as the Commission has such unlimited discretion as to whether settlement will eventually materialize, there is a real risk that companies will not regard the settlement procedure as sufficiently predictable to merit use. Although we appreciate that the College of Commissioners and the Advisory Committee cannot be bound by settlement discussions held at the operational level within the Commission, we see no reason why the Commission's discretion to reject settlement submissions should not be restricted to certain limited circumstances, including where:

- the settlement submission departs substantially from the common understanding reached with the Commission during prior discussions; or

- the College of Commissioners does not adopt a settlement proposal recommended by Commission officials.

Failure to limit the Commission's discretion to reject settlement submissions to some predictable and objective criteria will in our view risk substantially limiting the value of the proposed process. Companies are not likely to enter into a settlement procedure if its outcome is entirely unknown and will depend on factors lying beyond their control.

Crowell & Moring LLP
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