SHEARMAN & STERLING LLP

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Comments on
the draft Commission Regulation amending Regulation (EC) No 773/2004 as regards the conduct of settlement procedures in cartel cases (the "Draft Regulation")
and
the draft 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 (the "Draft Notice")

Shearman & Sterling LLP appreciates the opportunity to comment on the draft legislative package. The Draft Regulation and the Draft Notice introduce a procedural framework for the settlement of cartel proceedings, which has the potential to offer significant efficiencies in terms of procedural burdens and workload for both the Commission and the parties involved. We welcome the Commission's decision to establish a procedure that makes it possible to reward parties contributing to such procedural savings independently of and cumulatively to the Commission's leniency program. We believe that the introduction of a settlement procedure is an important step in enhancing the effectiveness of Article 81 EC and that, if the incentives are sufficient and the procedure adapted so as to reduce risks in other jurisdictions, parties will embrace the opportunity to "*draw a line below past illegal behavior*" – as they have done in other jurisdictions where settlement procedures are already in place.

Below, we outline a number of issues that we consider worth discussing with the objective to further increasing the attractiveness of the settlement procedure. As will be explained below, most of our concerns relate to the parties' rights of defense and could be addressed very easily through further clarifications of the procedure to be adopted. We believe that a more fundamental change is required with respect to the way in which settlement submissions are to be made. In our view, the Commission's plan to ask for written settlement submissions is likely to reduce the attractiveness of the proposed system considerably. We also consider that the Commission's own practice demonstrates that written submissions of this type are not necessary. Finally, we would hope for indications in the Notice that the Commission will remain flexible in questions such as whether settlement can be an option if not all companies choose to settle or whether companies forming part of an "undertaking" in a larger sense can have separate counsel.

Access to all relevant information and evidence needs to be guaranteed. We understand the Commission's objective to limit the procedural burden related to access to the file and welcome its efforts to protect the parties' rights of defense. We are concerned, however, that under the draft legislative package parties might not have access to sufficient evidence to enable them to make an informed decision on whether or not to settle. Pursuant to the

proposed new Articles 10a(2) and 15(1a) of Regulation 773/2004, the scope of disclosure is largely at the Commission's discretion. While paragraphs 16 and 17 of the Draft Notice entitle the parties to request disclosure of certain "essential elements" or submit reasoned requests for access to documents in the case file, the scope of information and evidence to be disclosed in reply to such requests is again largely determined by the Commission.[1]

Experience in connection with discussions about the qualification of documents as "key documents" in merger control proceedings shows that the interpretation of abstract disclosure obligations is often difficult in practice and may lead to disputes between the parties and the Commission. We would therefore welcome further clarification – ideally in the Draft Regulation itself – of the parties' rights to access information and evidence, in particular with regard to the following aspects:

- ***All incriminating and exculpatory evidence should be accessible.*** In order to arrive at an informed decision about the advantages of settling and about the maximum settlement amount, it seems indispensable that the parties have access not only to incriminating evidence used by the Commission services to support their allegations but also to exculpatory evidence. However, the wording of the provisions cited above seems to refer to incriminating evidence only. In order to accept a settlement procedure, the parties must be comfortable that all information relevant for their decision, particularly all evidence relating to the factual elements decisive for the determination of the fine under the Fining Guidelines is accessible to them. We therefore suggest introducing a clarification that the parties are entitled to access all relevant evidence, be it incriminating or exculpatory.

- ***Detailed information on the calculation of the envisaged fine and its amount should be shared.*** We welcome the Commission's plans to provide an estimate of the range of likely fines. It is crucial that the parties understand the amount of the potential fine and its calculation prior to committing themselves to accepting a maximum amount in the written settlement submission ("WSS"). Given the Commission's margin of discretion – even under the new Fining Guidelines – it will not be sufficient for companies if the Commission merely refers to the abstract calculation scheme provided for in the Fining Guidelines or if they are told that the fine could be within a certain (wide) range. We would expect that, in practice, settlement discussions will be sufficiently detailed to permit companies to get a relatively precise idea of the fine that the Commission would want to impose, as well as of the details of its calculation.

[1] The same is true with regard to the information to be provided to a complainant under the Draft Regulation as it will not be mandatory anymore to make (a non-confidential version of) the statement of objections ("SO") accessible to complainants, draft Article 6(1) of Regulation 773/2004.

For the avoidance of doubt, we would nevertheless suggest to clarify this explicitly in the Draft Notice.

Discoverability of written submissions creates a disincentive to settle. The draft legislative package requires certain submissions, including the parties' consent to engage in settlement discussions and, particularly, the WSS, to be in writing. Such submissions will most likely be discoverable in civil litigation in certain jurisdictions such as the US.

US law protects settlement discussions to a certain extent but this does not remove the obligation to disclose documents produced in this connection. Even if the Commission was to receive the "original" signed version of the submission and the parties did not retain a paper copy thereof, the WSS would still be discoverable in US civil litigation (because available on the company's servers). While plea bargaining agreements with US authorities are also subject to discovery, those agreements tend to be short and often quite vague, particularly if compared to the detail that the Commission seems to expect in a WSS. The obligation to produce a WSS under discovery rules would therefore create a significant disincentive for the parties to settle. In the context of leniency submissions, the Commission has recognized the disincentives caused by discoverability and successfully introduced the possibility to submit oral statements (*e.g.*, corporate statements). Admittedly this procedure can be somewhat onerous at times, in particular when it comes to access to the file, but in our experience it nevertheless works well and has become the procedure of choice of leniency applicants. We therefore strongly recommend that the Commission accept oral submissions also in the context of the settlement procedure. The evidential value of such statements would not be inferior to that of written statements and the additional procedural burden would be limited – particularly if the Commission were to provide a template for WSS as indicated in informal discussions.

Mandatory joint representation and joint liability. We welcome the proposition that various legal entities forming a single economic unit can appoint a joint representative. However, contrary to what the Draft Regulation provides, a joint appointment should remain an option and not be a prerequisite to settlement discussions. As a matter of fact, if the parent company holds less than 100% of the subsidiary, there can be disagreement as to whether the legal entities are part of the same "undertaking" within the meaning of Article 81 EC. While the Commission stated in its Memo/07/433 that "*joint representation will not prejudge the finding of joint and several liability*", joint representation may make it more difficult to contest the existence of a single economic unit at the time of the infringement. At the very least, we would expect that the statement referred to above be included in the Notice itself.

Parties must have the possibility to influence the Commission by argument. In principle, we agree with the Commission's position that the settlement procedure is not meant to introduce the concept of plea bargaining. At the same time, the parties must have the

opportunity to react to the Commission's objections and to influence the Commission's position, *e.g.*, regarding the duration of the infringement or their own role within the cartel. The Commission recognizes that its unwillingness to "bargain" does not prevent the parties from contesting the Commission's objections when it states that the parties will have *"the opportunity to influence the Commission's objections through argument"* (Memo/07/433). We consider this clarification too important to be made in the Commission's memorandum of frequently asked questions. Therefore, we would welcome the incorporation of a corresponding statement into the Draft Notice.

Discount granted for settlement needs to be a real incentive. We believe that the amount of the discount for settlement must be significant in order to incentivize the parties to give up a large part of their basic rights of defense. An amount considerably below the reductions under the leniency program would, in our view, not suffice. Therefore, we consider that the discount should be in the range of 15% to 30%. This range is at the lower end of settlement discounts currently granted by national authorities. While we agree with the Commission that the opportunity to settle must not impact the parties' interest in applying for leniency, we do not see this risk associated with the suggested discount because the Commission has made clear that the settlement discount will apply cumulatively with reductions under the leniency notice so that parties will have an incentive to benefit from both.

We welcome the proposal that all undertakings in a given case receive the same reductions. This is in line with the objective of the settlement procedure since all parties contribute equally to the procedural efficiencies. Even if it could be argued that some parties could potentially bind more resources than others (*e.g.*, because of a higher complexity of their involvement), the evaluation of such differences could incentivize parties to engage in "blackmailing" and increase the Commission's (and the other parties') workload.[2] On the other hand, we consider it beneficial to give the Commission the discretion to apply different discounts in different cases and therefore suggest setting out a range of possible discounts in paragraph 32 of the Draft Notice.

Time limits should not be applied too conservatively. Experience has shown that the Commission often stays at the lower end of its discretion when it comes to setting deadlines. Against this background, the minimum time periods foreseen in the Draft Regulation (draft Article 17(1) and (3) of Regulation 773/2004) seem very short, *i.e.*, two weeks for the parties' written indication of their willingness to engage in settlement discussions (including the appointment of a joint representative) and the submission of the WSS and one week for the parties to confirm that the SO corresponds to the WSS. The time required to decide about

[2] Incidentally, distinguishing on the basis of potential work load reduction could also lead to a discrimination against smaller companies that are unable to invest as much in legal proceedings as larger companies.

whether or not to enter into settlement discussions or to draft a WSS may easily exceed two weeks – particularly when different legal entities in different jurisdictions and with different internal decision-making processes are involved. While we agree that time limits in the framework of the settlement procedure should be kept short, we believe that in many cases significantly longer periods will be necessary. In addition, we suggest defining the applicable time periods in terms of Commission working days in order to avoid situations in which the short time limit includes public holidays and where access to the parties' internal resources is, therefore, limited.

Decision not to settle must not have negative consequences. It is important to ensure that parties deciding not to settle after entering into settlement discussions are not disadvantaged as a result of their choice to fully exercise their legitimate rights of defense. This must apply even if all other parties involved in the same procedure are ready to settle. While the Commission acknowledged in its Memo/07/433 that *"any party may decide at any moment to stop the settlement discussions"*, we are concerned that, in practice, the fact that the Commission would be forced to go through access to the file, an extended SO and, potentially, a hearing, might lead it to put significant pressure on individual companies not willing to settle. Given the fundamental nature of the rights developed to protect companies accused of wrongdoing, it is essential that a company does not have to fear that its fine would include a "surcharge" for its unwillingness to settle (that could be "hidden" in various elements making up the fine). We would appreciate if the Commission could confirm in its Notice that a party's decision to make use of its legitimate rights of defense will not have a detrimental impact on its position in the further course of the proceedings.

The Commission should remain open to settlements also in cases where individual companies are unwilling to settle. In cases where an individual company is unwilling to settle, the Commission would have to go through the regular procedure (including SO, access to file and, potentially, oral hearing) for the party not willing to settle. As a result, the administrative savings resulting from settlements with the other parties in the procedure may be insufficient to justify a reduction in their fines. We understand from informal discussions with Commission officials that for this reason the Commission may not want to settle cases unless all companies are on board. While we believe that this position is probably justified in most cases, we would hope that the Commission is not categorical in this respect. For instance, in a case with more than 20 participants that could choose to respond in several different languages, the savings that can be achieved could still be significant even though the Commission has to provide access to the file and draft a somewhat longer SO for one party. In such a case, where both the Commission and a large number of companies could benefit from ending proceedings many months if not years earlier than if the regular procedure were used, the Commission should be open to settling with the companies willing to do so. This should be stated explicitly in the Draft Notice.