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Antitrust Alliance

COMMENTS ON COMMISSION'S DRAFT LEGISLATIVE PACKAGE ON SETTLEMENT PROCEDURE

I. INTRODUCTION

The following contains suggestions and input by the **Antitrust Alliance** with regard to the Commission's Draft 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 (hereafter "Draft Notice") and the proposal for a Commission Regulation amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (hereafter "Proposal"). The **Antitrust Alliance** consists of specialised antitrust teams within various law firms across the European Union. This memorandum is a consolidation of the views expressed by the antitrust teams of the firms listed below that are part of the **Antitrust Alliance**.

II. COMMENTS PER TOPIC

The observations are arranged by topic.

A. DISCRETION OF THE COMMISSION

The Draft Notice and Proposal provide that the Commission retains a broad margin of discretion on various aspects of the settlement procedure. These aspects include *inter alia*:

- the possibility to determine the cases that are suitable to explore the parties' interest to engage in settlement discussions, as well as the decision to engage in them, or to discontinue or definitely settle (paragraphs 5 and 6 of the Draft Notice [1]);
- the determination throughout the procedure on the appropriateness and the pace of the bilateral settlement discussions with each undertaking (paragraph 15 of the Draft Notice);
- the adoption of a statement of objections which does not endorse the party's settlement submission (paragraph 27 of the Draft Notice);
- the adoption of a final position which departs from its preliminary position expressed in the statement of objections which at first endorsed the written submission by the party concerned (paragraph 29 of the Draft Notice).

The Commission's discretion concerning these various aspects may have a negative impact on the success of the settlement procedure due to the lack of predictability.

The Antitrust Alliance is of the opinion that companies will have more confidence in the settlement procedure if it were to include expressly certain minimum guarantees that render the process more transparent and predictable. Such minimum guarantees could include (1) equal treatment (principle of non-discrimination) and (2) greater predictability once a common understanding has been reached.

1. Equal treatment

The Draft Notice (paragraphs 14 and 15) seems to leave considerable discretion for the Commission with regard to the individual treatment of undertakings in the course of the settlement proceedings. The Antitrust Alliance submits that such treatment should be consistent with the principle of non-discrimination.

[1] We would like to point out that the Dutch version of para. 6 differs from the English version. The Dutch version seems to leave the possibility open for the Commission to contact only part (and not all) of the parties involved (*"[…] kan de Commissie […] peilen of alle partijen in diezelfde procedure voor een schikking belangstelling hebben"). The* English version on the other hand seems to impose an obligation on the Commission to contact all parties involved ("will *explore").* From the perspective of legal certainty, the Antitrust Alliance believes that this point merits clarification.

For example, it seems possible for the Commission to start settlement discussions with only some (and not all) of the parties having expressed their interest in being engaged in such discussions[2]. Moreover, the continuous assessment of the appropriateness of bilateral discussions seems to indicate that the Commission remains free to stop ongoing settlement discussions with one or more companies at any stage, while continuing the process with other companies.

Although the Antitrust Alliance appreciates that undertakings do not have a right to settle (cfr. paragraph 6 of the Draft Notice), it is of the opinion that all parties to the same proceedings should be treated equally. Hence, if the Commission decides not to start or continue settlement discussions with some of the parties to the same proceedings, such decision should be based upon objective reasons that are communicated to the party concerned and that can objectively justify the difference in treatment between the companies involved. Parties to proceedings that are in the same situation should be treated equally and procedures should be in place making it possible to check whether the principle of equal treatment has been complied with.

Futhermore, in order to enhance confidence in the process, it would be useful to state explicitly that there will be no discrimination in respect of the disclosure of evidence in the Commission's file. The Draft Notice (paragraph 15) provides that the Commission retains discretion in determining the appropriateness of such disclosure (including presumably the scope of such disclosure). It would be unfair if evidence that applies to several companies is shown to some of them and not to others and that such difference in treatment has an impact on the ability to arrive at a common understanding or on the contents of such common understanding.

Finally, the principle of equal treatment should also apply to the contents of the common understanding. If identical evidence relied upon for two companies is deemed sufficient to establish a duration of 4 years of cartel participation, it seems unfair that the Commission were to accept a common understanding providing in one case for a duration of, e.g., 3 years and in the other case of 4 years. Comparable facts and comparable evidence must result in identical common understandings on all of the points that are relevant for the calculation of the fines.

[2] At least in the Dutch language version (see footnote 1 above).

2. Commitment by the Commission

The Draft Notice provides that a written settlement request cannot be revoked by the undertaking that has provided it (paragraph 22 of the Draft Notice). It appears from the Draft Notice that the Commission is, however, not bound by the "common understanding".

It would seem fair and a factor rendering the process more certain and predictable if the Commission were not to enjoy complete discretion as to the decision to deviate from a common understanding. Deviations from a common understanding should be limited to cases where the Commission comes into the possession of new evidence subsequent to the common understanding and where such new evidence contradicts material facts included in the common understanding.

B. INTERACTION WITH LENIENCY POLICY

Under the Leniency Notice[3], undertakings have the possibility to apply for immunity from fines or a reduction of fines until the Commission issues a statement of objections (paragraph 14 of the Leniency Notice).

The Draft Notice provides that the Commission may disregard any application under the Leniency Notice on the ground that it has been submitted after the expiry of the time-limit imposed on the parties during which they should declare whether they wish to engage in settlement discussions (paragraph 13 of the Draft Notice).

The consequences of imposing a time-limit after which the Commission can disregard leniency applications are double:

- Firstly, it shortens the period available to the undertakings involved to submit leniency applications.

- Secondly, the Antitrust Alliance believes that the invitation by the Commission to engage in settlement discussions will be an incentive for all possible leniency

[3] Commission notice on immunity from fines and reduction of fines in cartel cases, *O.J.* C-298, 8.12.2006, p. 17.

applicants to immediately submit their leniency application. That is so because the undertakings involved will at that time know that all participants to the alleged cartel will become aware of the Commission's ongoing investigation and the risk that leniency applications are barred at the end of the aforesaid time-limit. The sequence of leniency applications is decisive for obtaining full immunity or a reduction of the fine.

In order to avoid discrimination between the parties involved in the alleged cartel, the Antitrust Alliance believes that it is of the utmost importance that the Commission ensures that all parties are notified of its intention to start the settlement discussions at exactly the same time. Any delay in such notification may (from a leniency perspective) work to the detriment of the company or companies that are informed later than others. In this respect the concept of delay should not be understood in terms of days or weeks, but of hours.

C. ORAL SUBMISSION

The reference to "recorded statements received in the context of this Notice" in paragraph 35 of the Draft Notice raises questions.

The Draft Notice indicates that parties opting for a settlement procedure must introduce a formal written submission (paragraph 2(2) of the Draft Notice). In the Draft Notice, no reference is made to the possibility to submit an oral submission.

The Antitrust Alliance believes that settlement proceedings could become more attractive for the parties involved if they could opt for an oral submission instead of a written submission (as they can under the Leniency Notice). The same considerations that have caused the Commission to accept oral submissions in a leniency context apply here.

D. SIGNIFICANT REDUCTION OF FINES

The Draft Notice indicates that in case the Commission decides to reward a party for settling, it will grant a reduction of the fine, expressed as a specific percentage of the amount of the fine (paragraph 32 of the Draft Notice).

The Draft Notice does not yet indicate the level of said percentage. The Antitrust Alliance understands that the Commission will establish the level after the public consultations.

The Antitrust Alliance submits that the reduction of the fine should be significant enough to compensate for the rights of defense that the settling undertakings agree to forego (e.g. limited access to the file, no right to an oral hearing) and should in any event not be lower than a 20% reduction of the fine that the company would normally receive according to the provisions of the 'Commission's Guidelines on the methods of setting fines'[4].

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Please note that the views expressed in this document reflect the position of the majority of the authors. This implies that on specific points individual authors may have a different position. The antitrust practices that have participated in the drafting of this document are:

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[4] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, *O.J.* C-210, 1.09.2006, p. 2-5.