

MEMORANDUM

Date 21 December 2007

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To The European Commission
Competition Directorate-General
Unit G5 – Cartels V

From John Ratliff
Frédéric Louis
Thomas Mueller
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Re **The Commission's Cartel Settlements Proposals**

[1] The object of this memorandum is to offer comments on the Commission's Settlements Package, as invited by the Commission on 26 October 2007 (IP/07/1608).

[2] At the outset, we would like to complement the Commission on achieving a very serious proposal, addressing the difficult issues of balancing the various interests concerned. We think that companies will welcome the opportunity to have an earlier insight into the Commission's thinking on a case. Specifically, if companies can receive a clear and detailed understanding of the Commission's position on likely fines, this may be highly conducive to settlement.

[3] We have essentially seven comments:

[4] First, in para 5 of the Draft Commission Notice (O J C255/51, 27 October 2007), it is not clear to us whether the Commission intends that it should be a factor in its discretion to accept settlement proposals that all defendants should do so or not. We think that should not be the case and that each company should be individually considered. Otherwise, we think that (i) such a requirement may put unreasonable pressure on defendants to follow the group and (ii) such a requirement may deter settlement offers (since defendants may think that the chance of all agreeing may be too remote). We are also concerned that in the case of bilateral settlement discussions, one defendant might decide not to pursue settlement, making the effort of others worthless. We also note that other parts of the proposed Settlement Package appear to suggest that the Commission will consider settlement offers individually and think that is the right route to take.

[5] We suggest that the Commission add a sentence specifically stating that the Commission will not decline to accept individual settlement proposals simply because not all defendants are prepared to settle.

[6] Second, in para 7 of the Draft Commission Notice, we understand that the Commission does not object to defendants making public the fact that they have made a settlement offer to the Commission (if not the content). If so, we suggest that should be made clearer in the text to avoid any misunderstanding.

21 December 2007

Page 2

[7] Also we suggest that it be made clearer when a defendant may indicate such a fact, (i.e. is it at the moment of the settlement submission or only after the submission has been accepted?).

[8] Third, in para 12 of the Draft Commission Notice, we think that it should be clearly stated that the appointment of joint representatives will not be considered as evidence of parental or other group (joint or several) liability. This appears to be suggested in the Commission's MEMO/07/433, but in our view should be specifically stated in the Notice.

[9] Fourth, the requirement of a written settlement submission in para 20 of the Draft Commission Notice and the proposed Article 10a of Regulation 773/2004 (O J C255/48, 27 October 2007) is already causing some concern, insofar as it may be discoverable in US treble damage proceedings. All the more so, if the submission is to be detailed (i.e. going beyond a typical US style plea agreement).

[10] We would therefore suggest that the Commission consider accepting settlement submissions in oral form, as it has been willing to do as regards corporate statements for leniency.

[11] Should that not be acceptable, we would suggest that the Commission explore whether it is possible to consider specific coordination with other Antitrust and Competition enforcement agencies on the timing of settlements and plea agreements in the EU and elsewhere. Otherwise, we are concerned that, in some cases, divergence in time scales of procedures and proceedings may deter offers of settlement.

[12] Fifth, we question whether it is lawful or reasonable to require as stated in para 22 of the Draft Commission Notice, that written settlement submissions cannot be revoked unilaterally by the parties who have provided them. Is it not a fundamental right of every defendant to accept or deny the case against it at any time? What if new evidence came to light or there were other considerations which meant that the defendant wanted to change its submission?

[13] Sixth, we think that the Commission should consider issuing early, short decisions for those which have settled, even if others continue. This possibility would make it more attractive for companies to make such offers, as they would be able to bring to an end the relevant proceedings more quickly.

[14] Seventh, we would urge the Commission to go as high as possible in rewarding settlement offers, so that companies have a clear incentive to do so (at least 20%).

[15] We hope these comments are useful. Clearly we would be willing to discuss further, if that might assist.
