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Commission Settlement Proposals

1. This memorandum is in response to the Commission's draft Regulation and Notice amending Regulation 773/2004 to introduce a 'settlement' mechanism for certain types of infringement investigation under Article 81 and 82 of the EC Treaty of 26 October 2007. The proposed amendments also moderate complainants' rights to information in all kinds of Commission infringement procedures, but especially in those where the addressees of the proposed decisions ('parties' in the language of the drafts) enter into settlement discussions with the Commission services.

2. None of this memorandum is confidential.

About Cohen Milstein

3. Cohen Milstein's competition practice is widely acknowledged one of the world's leaders in the field of claimant private enforcement of competition (antitrust) laws. In June 2007, the firm opened its European office, based in London. This is the first such initiative in the EU by a US claimant firm. The firm intends to represent claimants and complainants before the courts and competition authorities in Europe to seek redress for damage caused by anti-competitive behaviour.

Introduction and summary

4. We understand the rationale behind the Commission's policy to introduce a simplified procedure in order to deal with cartel investigations more expeditiously where the essentials of the infringement are not contested so as to use the public resources available to pursue cartels more effectively.

5. As far as we are aware, in the five years to the end of 2006, conditional immunity was granted by the Commission in 51 cases and a further 34 applications were rejected, suspended or passed to a national authority. Therefore, we think it is safe to assume that a significant proportion of leniency applications are effectively left 'in limbo' – which not only acts to reduce the incentive to apply for leniency but also means that the victims of the cartels disclosed to the Commission will not be compensated.

6. However, we would be concerned if, in streamlining its processes in admitted cases, the Commission disincentivised or materially disadvantaged complainants and/or those who may wish to claim redress from the cartelists. Settlement should not be seen as a way for settling companies to reduce further the possibility of being required to compensate their victims.

7. In particular, we believe that the Commission should be cautious in changing the process substantially in a way which makes its procedures less transparent. We are particularly concerned that some of the statements in the Notice and press release may be seen to imply that the rights of the defence - and particularly the reluctance of cartelists to settle if too many of the details of the infringement are detailed in a published decision - override the requirement that the public reasoning in decisions should be sufficient for the European citizen to know whether he is likely to be affected by the decision and why it has been taken.

8. And, we suggest, it would be particularly unfortunate if the revised procedure led to the impression that he Commission was doing 'deals' with cartelists (in particular) in near secrecy. Such a perception would, we believe, seriously damage the credibility of the Commission's enforcement effort against cartels at a time when the central importance of competition law to the EU internal market is again being questioned.

9. Our more detailed comments on the proposals follow, grouped under three heads:
due process (and especially procedural transparency) considerations;
finality of settlement and appeals issues – particularly the concern that third parties (complainants for example) have limited standing in any appeal; and
the interaction with the Commission's policy initiative on private redress for competition law breaches.

Due process and transparency

10. We note that the essentials of the procedural efficiency envisaged by the Commission in the draft amendments to Regulation 773/2004 – and more particularly in the accompanying Notice and the press release – remove the inspection of the file and oral hearing stage of the process for settling cases. We also note, with concern, that the previous right of complainants to receive a disclosure copy of the Statement of Objections has been replaced in all cases by a discretion in the Commission to provide this document. The Commission would, going forward, only provide complainants with (unspecified) information on which to base their observations.

11. We are particularly concerned at the following changes to the process and believe they may need to be reconsidered.

Draft Regulation Article 1(2) – removal of complainants' right to SO

12. The proposed revised Regulation 773/2004 removes the right of a complainant to receive a disclosure copy of the Statement of Objections in all cases – not just those where a settlement may be contemplated. Not only does this change go beyond the scope of a 'settlements' policy but, we believe, it is misguided and should be reconsidered. We suspect that the reason the Commission is seeking this change is because of the extended disputes it currently has with defendants ('parties') over confidentiality. But there is no reason of principle why the Commission should effectively give way to defendants' demands by allowing itself to produce to complainants whatever document it likes in lieu of a (redacted) SO. A firmer line with recalcitrant defendants (for example by treating unmeritorious confidentiality claims as aggravating factors in setting a penalty) would have the same procedural efficiency effects.

13. The recital (5) in the draft Regulation, motivating this change, refers only to the 'negative consequences' of a right for complainants to see a disclosure version of the Statement of Objections on parties' willingness to co-operate with the Commission. However:
    - we doubt whether the reluctance of parties to co-operate because their conduct would otherwise be exposed to comment by complainants and others is a sufficient motivation for a change of this importance; and
    - even if it were the case that complainants should have their rights reduced simply because of defendants' reluctance to co-operate with the Commission procedure, this does support a change to complainants' rights in all cases, even where the

parties do not intend to co-operate with the Commission in the way envisaged in these proposals in any event.

14. This abbreviation and clouding of the infringement process is clearly capable of affecting the position of third parties – especially the victims of a cartel – who, we believe will be in a worse position to make a valuable contribution in the administrative stage or, importantly, in any appeal against a Commission decision. The same applies if they wish to bring a damages claim for redress in respect of cartels where a settlement has been reached. We would note here the jurisprudence of the Court of First Instance and the European Court of Justice to the effect that the CFI's supervision of the Commission's decisions is the guarantee of compliance with Article 6(1) of the European Human Rights Convention[1]. The Commission's proposals will have the effect of making claimants' and complainants' exercise of the right to a (public) judicial review of the Commission's decisions (even) more difficult in the highly likely event that their rights are affected by a Commission decision.

15. We also question whether this change reflects best practice among the competition authorities which are members of the ECN: for example, the Office of Fair Trading's guideline[2] on third party participation in its procedures gives not only formal complainants the right to a copy of any Statement of Objections, but also other interested parties, such as representative consumer bodies.

16. We suggest that, at the very least, the Commission should proceed cautiously in this regard. So, if this change is nevertheless to be retained, we believe that, as a minimum:
    - the Regulation (or at least the Notice, or an amended version of the Commission's Notice on complaints[3]) should set out in some detail the information to which complainants will have access to allow them to put their case in the administrative procedure; and
    - complainants should have a right of access to the Hearing Officer where they believe that the information (including access to the documents on the Commission's file) has not been adequate to allow them to exercise their right to put forward an informed set of observations.

17. In fact, we believe that reinforcing the role of the Hearing Officers in settlement cases will be essential to ensure that due process is seen to be respected and we would expect the current practice of the Hearing Officers' report on all cases being published in the Official Journal[4] to continue even for settlement cases.

1/ "***In the determination of his civil rights and obligations*** *or of any criminal charge against him,* ***everyone*** *is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [….]*" (emphasis added).

2 OFT451 at paragraph 3.7

3 OJ C101/65, 27 April 2004

4/ Under Article 16 of the Hearing Officers' Mandate (Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, Official Journal L 162, 19.06.2001, pages 21-24).

Information disclosure restrictions

18. We are also concerned at the indications in the draft Notice and related press release[5] concerning information disclosure. The Notice prevents disclosure by those wishing to settle with the Commission of '*the discussion or of the documents which they have had access to in view of settlement*' without the Commission's permission. The scope of this prohibition seems to us to be wider than is necessary to protect any legitimate interests either of the Commission or of the other parties to the investigation. In particular, it may prevent the use of any relevant documents which the settling party already has in its possession – and which he may, for example, wish to disclose to victims in the context of settling any damages exposure he may have in the case. Indeed we suggest that this exception should be made to the blanket prohibition on disclosure in all Commission cases (for example for leniency applications) in all Commission infringement proceedings

19. We also believe that the indication in the draft Notice[6] that public disclosure of documents or statements made during settlement cases would be contrary to the public interest, '*even after the decision has been taken'* goes too far. Firstly, although it refers to public disclosure (and not to disclosure, for example, to complainants in the case) it does not appear to us to be within the spirit of the Regulation on access to EU documents[7] which presumes that all documents held by Community institutions are available to the public unless there is a good reason for withholding them. The Commission's sweeping and unreasoned assertion in the draft notice that '*normally, public disclosure of documents […] received in the context of this Notice would undermine certain public and private interests, for example the protection of the purpose of inspections and investigations*', amounting to an effective reversal of the Regulation's presumption in favour of disclosure, cannot, we believe, be consistent with the proper operation of the Regulation.

20. For similar reasons to those given above, we believe this restriction may also unreasonably restrict the effective exercise of claimants' rights under Article 6(1) of the European Convention on Human Rights.

21. Secondly, at least as far as it purports to extend the confidentiality obligation after the decision has been made, we suggest the proposal may be impossible for the Commission to comply with if it is to properly conduct itself (for example) in relation to an appeal by a non-settling cartelist.

22. And in cases where a claim is brought by a cartel victim for redress in a national court we cannot believe that the Commission would refuse a request from the court to disclosure documents on its file – even where they were created for the purpose of a settlement by now embodied in a decision – if the court feels it necessary to see

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5 See, for example, paragraph 7 of 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 and the Commission's press release: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels.

6 Paragraph 35.

7 Regulation 1049/2001, OJ L145/43; 31.5.32001

then them for the purpose of deciding the litigation before it[8]. Clearly such disclosed documents may need to be referred to in a public hearing. Both bodies (the Commission and the national court) are of course bound by the reciprocal duty of sincere co-operation between the Commission and Member States contained in Article 10 of the Treaty which, in our view, not only strongly militates in favour of disclosure by the Commission subject to limits on the use of the documents so disclosed to the proceedings before the national court – as envisaged in the Commission's notice on co-operation between it and the national courts.

Finality of settlement and appeals

23. We have two issues of concern at the impact of the Commission's settlement proposals on the finality of any decision made and thus the appeal procedure before the Court of First Instance:
    - where the Commission is able to reach a settlement with all of the cartelists, such that an appeal to the Court of First instance is highly unlikely, it will be difficult (if not impossible) even for complainants – and even more so for other third parties – to challenge the decision. This is so even if the Commission (inadvertently) makes a finding materially in error. This problem appears to us potentially to be made worse by the Commission's current practice of excising extensive parts of the decision before publication;
    - where (as we believe is probable in the majority of cases) the Commission is not able to reach a settlement with all of the cartelists, we would be concerned if:
        - in the continuing administrative proceedings against the 'hold-outs' or on appeal, documents from settling parties were not available for inspection by complainants where they would be if the parties had not offered a settlement;
        - limitation periods in respect of follow-on damages claims against the settling cartelists were different from those against the 'hold-outs' who may have appealed;
        - as a result of differing limitation periods for suing in respect of the same cartel, the joint and several liability of the cartelists (where it exists in the law applied by the court where the case is brought) might be put in jeopardy due to the expiry of limitation as regards only some of the cartel members.

24. For the direct settlement system to work viably, we believe it should be open to each individual undertaking involved in the investigation of a given cartel to be able to take up the opportunity to take part in the direct settlement process regardless of whether other cartel members also cooperate.

25. It may also prove practically impossible for the Commission to enter into settlements with fewer than all cartel participants because the non-settling parties may contest the facts that the settling party conceded. The Notice (sensibly in view of need to treat all members of the cartel in the same position equally) appears to opt for a single decision covering both settling parties and those holding-out. We assume settling parties that do not appeal will not benefit if the hold-out prevails before the

8/ See paragraphs 21 to 26 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, Official Journal C 101, 27.04.2004, p. 54-64

courts on appeal, which may create substantial pressure even for settling parties to appeal points of law[9].

26. If this is the case, then it is not clear to us how the Commission proposes to 'ring fence' the information it has obtained from the settling parties from the ongoing investigation. To the extent that information informs the Commission's eventual decision, that information should (where it would otherwise have been made available to complainants) continue to be available for comment by complainants during the administrative proceeding despite any settlements.

27. On appeal, since it must be possible for the motivation of the Commission's decision in respect of the hold-outs to be materially different from that based on the settlement offer of settling cartelists, complainants (and potentially a wider group of third party victims of the cartel) will have an interest in ensuring that the settling cartelists are also held to account for the full extent of their cartel activity (which may well be that in the parts of the decision addressed to the 'hold-outs'). Similar concerns to those set out above in relation to the administrative procedure as to third party access to evidence may therefore also arise at the appeal stage. Given the limited standing of third parties to appeal Commission decisions (addressed to others) the risk of cartel victims being unable properly to vindicate their rights due to an overly 'light' or inadvertently misleading description of the infringement in the motivation of the (settlement) decision must be a real concern.

Interaction with private enforcement

28. In developing a system of direct settlement, we suggest that the Commission should also consider the possible effects to the developing system of private antitrust enforcement in the EU Member States, which the Commission also seeks to encourage. We have commented above on the likely adverse effect of the proposals during the administrative stage of the proceedings and on appeal against the Commission's decisions. But, we believe, in practical terms, settlement with the Commission may hinder the development of private enforcement in follow-on cases, for similar reasons to those set out above – in essence the lack of transparency of the procedure as against third parties.

29. Consequently, it is likely that it will be in the interests of undertakings involved in cartel investigations to enter into direct settlement proceedings with the Commission in order to avoid an extensively reasoned decision being made public, thereby gaining a potential advantage in damages actions at national level.

30. A major issue for private claimants against cartels will be a difference in possible limitation periods as between the settling and non-settling members of the cartel. Differences in limitation periods for bringing an action as between different Member Sates are already a significant complicating factor for private claimants: differing limitation periods as between different members of the same cartel even in respect of actions consolidated in one national court would make the situation close to impossible to deal with.

31. This issue become particularly relevant for claimants where the cartelists are jointly and severally liable for the whole of the damage caused by the cartel. Where the

9/ Case C-3100/97 P, *Commission v AssiDöman Kraft Products*, 1999 ECR I 5363,.

limitation periods differ as between cartelists, it is possible that the settling parties will be able to avoid some or all of their liabilities to victims, due to the expiry of limitation periods before all of the appeals against the Commission's decision have themselves been decided.

32. A solution to this issue may be found in the recent decision of the UK Competition Appeal Tribunal in the *Emerson Electric* case[10]. The Tribunal found that no limitation period would begin to run until all of the appeals against a single cartel decision are exhausted seems to us to be a sensible one. It would be helpful if the Commission (either in this package of measures or its forthcoming consultation on improving access to private redress) would propose the adoption of this solution at a European-wide level.

33. A related issue – given the very limited information that would be available in all cases (even to complainants) under the proposed changes – is the extent to which the Commission excises paragraphs from its published decisions. We note, with some concern, an apparent tendency to excise large parts of the motivation from published decisions (well over 100 paragraphs in a recent decision[11]). Even assuming that such a policy of confidentiality is capable of fulfilling the Commission's legal obligations to motivate its decisions adequately, we strongly question whether it can be in the long-term interests of the legitimacy of the European competition enforcement regime for so much of the Commission's reasoning to remain in confidence.

34. If the Commission is unwilling to reconsider its confidentiality and excisions policy generally, we suggest that a more limited, but nevertheless important, improvement on the current situation would be to allow third parties with a legitimate interest to apply to the Hearing Officer after publication of the decision for disclosure to them of further detail of the motivation of the decision held in confidence. Although this may require a change to the Hearing Officer's Mandate[12], we believe that the availability of recourse to an independent officer will go a substantial way towards ensuring that the Commission's confidentiality policy in settlement (and indeed other) cases is seen as balanced and appropriate.

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London
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10 *Emerson Electric Co and others v Morgan Crucible Company plc and others*, Case: 1077/5/7/07. The issue before the tribunal was whether the damages claim could proceed against Morgan Crucible (an non-appealing leniency applicant) whilst other alleged cartelists' appeals against the underlying infringement decision were continuing before the Community courts. The CAT held on 17 October 2007 that, under the 1998 Act, the claim could not proceed without the permission of the tribunal. The tribunal's rules provide that no claim for damages may be brought before it without its permission where the decision on which the claim is based is still subject to appeal. The claimants subsequently sought the permission of the CAT to claim damages against Morgan Crucible. On 16 November 2007 the CAT decided to grant permission for the claim to be made, on the basis that if permission was not given, there would be a risk that the documents currently being held by Morgan Crucible would not be available by the time the case went to trial.

11 Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate of 3.05.06: recitals 104-285 describing the infringing meetings, were deleted in their entirety

12/ See footnote 4 above.