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European Commission
Draft Legislative Package for Cartel Settlements

Comments submitted by Reed Smith Richards Butler LLP[1]
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1 Introduction

1.1 The concept of a cartel settlement procedure which enables the European Commission to expedite its review of cartels when parties acknowledge their liability is to be welcomed. From the European Commission's perspective a settlement procedure will enable it to allocate its resources more effectively and reduce the costs of investigations. By being able to enter into focussed discussions with settlement candidates, the Commission will not only be able to deal with more cases, but will be able to allocate resources to more complex investigations, ensuring that these are also dealt with more effectively.

1.2 For companies, an expedited cartel settlement procedure can also have benefits. Not least, it will enable companies to arrive at an early point of legal certainty, thus limiting the detrimental effects that an in-depth cartel investigation can have on share prices and customer confidence. An expedited settlement will also mean that there will be lower legal costs for the affected company and resources, such as key personnel, will not be tied up in lengthy discussions and hearings with the Commission. Ultimately the cartel settlement procedure will enable companies to admit past actions, deal with the consequences of those actions and enable them to get on with running their businesses.

1.3 However, while there are benefits for both the European Commission and companies of having in place a settlement procedure, there are issues which need to be addressed to ensure the procedure works effectively. Set out below

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are our brief comments on the Commission's draft Notice for Cartel Settlements ('the Notice').

2 Initiation of settlement proceedings - the discretion of the European Commission

2.1 The Notice states that the European Commission will only initiate proceedings once it has undertaken its "core investigations". This means after any leniency discussions have taken place and after all the evidence has been reviewed. The European Commission therefore has a wide discretion when identifying those cartel cases which are suitable for settlement. However, this could lead the Commission identifying certain cartel investigations for settlement, perhaps before an investigation is completed. For example, if a party or parties to a cartel have already entered into leniency discussions with the Commission, it may favour those parties for settlement discussions as they have already indicated a willingness to cooperate with the Commission. The Notice should make clear that the Commission will not be influenced by previous contact with parties arising as a result of leniency applications.

2.2 Further, it is likely that when leniency applicants approach the Commission, they will want to indicate, even at this early stage, their willingness to enter into settlement proceedings. The Notice does not address how the Commission will deal with such approaches. If the intention is that such approaches will not be accepted by the Commission at the leniency stage, then this should be clearly stated in the Notice. Alternatively it should also be made clear that leniency applicants will not be required to indicate a willingness to settle. It is important that leniency and settlement requests are kept separate, as blurring the distinction between the two could weaken their long term impact.

2.3 The Commission should also recognise the possibility that there may be occasions when companies will want to put themselves forward as candidates for settlement discussions, whether or not they have made leniency applications. This could even arise before the Commission has initiated settlement discussions and disclosed its case to the parties. Under the current proposal, it seems that companies will have to wait for the Commission to complete its investigation and then be invited to consider settlement

discussions. The Commission should therefore acknowledge in the Notice that such independent approaches could be possible and set out the steps it will take in dealing with those approaches.

3 Settlement Discussions

3.1 *"Hybrid" Discussions*

3.1.1 The Notice does not address how the Commission will deal with so called "Hybrid" cases, where only some of the parties to the offence are willing to enter into settlement discussions and others are not. Such a scenario cannot be ignored, as there will be cases where the parties will want to strongly dispute their participation in a cartel, while others will want to settle. It is understood that the Commission will look initially at the cost savings arising from the settlement proceeding to determine whether or not settlement with some of the parties is worthwhile. In particular, there is a danger that companies not willing to go for settlement could be viewed as having the power to prevent settlement discussions outright. If this occurs in one case, potential settlement candidates in other cases may be discouraged from entering into settlement discussions, for fear that one member of the alleged cartel could fight the allegations and undermine the whole settlement process. The Notice should therefore be more specific and identify parameters within which they will enter into "hybrid" settlement discussions.

3.2 *Rights of Third Parties*

3.2.1 The Notice does not deal with the effect of the settlement discussions and subsequent publication of a statement of objections on third parties, especially complainants, and the extent to which they will be informed of or allowed to participate in the proceedings.

3.2.2 In ordinary proceedings a complainant is entitled to a non confidential statement of objections and has the right to express its views on the SO at an oral hearing. Such rights seem to have been removed from the settlement procedure where the Commission will issue "short" statement of objections after the settlement discussions. The notice provides for the parties to respond to the SO by formally submitting a written settlement submission. However the Notice does not address the rights of a complainant to be informed of the

settlement discussions or to address the statement of objections. In particular, given that once the Commission has adopted a settlement procedure decision there will be no oral hearing, one wonders how complainants' rights are to be addressed. Further, given that a complainant has to be informed about the rejection of a complaint, we would suggest that the rights of a complainant during the settlement procedure are addressed.

3.2.3 The rights of a complainant to be informed of the settlement negotiations has been considered by Competition Appeal Tribunal in the United Kingdom. In its judgment in *Pernod Ricard SA v Office of Fair Trading*[2] the CAT held that, while the OFT's ability to settle in appropriate cases was a valuable tool, "*from the point of view of the fairness and transparency, the complainant should be informed of the outcome of negotiations and given the opportunity to be heard before the OFT closes its file on [a] complaint. That in effect means that the OFT cannot definitively commit itself to accepting the undertakings without giving the complainant the chance to comment.*"

3.2.4 The findings of the CAT reflected established European case law. In *BAT and Reynolds*[3] the ECJ had previously held that "*the legitimate interests of complainants are fully protected where they are informed of the negotiations in light of which the Commission proposes to close the proceedings*."

3.2.5 The Commission Notice should therefore address the rights of third parties, especially those with legitimate interest in the case, in particular complainants. If the rights of third parties are not sufficiently addressed in the settlement procedure, there will always be the risk that any settlement agreed by the Commission could be challenged in the European Courts.

4 Written Settlement Submissions

4.1 Subsequent to entering into bi-lateral discussions with the Commission, the Notice requires that a company make a formal request to settle and submit a written settlement submission (WSS), if it is to benefit from a reduction in fines. In particular, the WSS must contain an "*acknowledgement in*

[2] Case 1017/2/1/03 – *(1) Pernod Ricard SA (2) Campbell Distillers Limited v Office of Fair Trading supported by Bacardi-Martini Limited*
[3] Joined Cases 142 and 156/84 – *British-American Tobacco Company and R.J. Reynolds Industries Inc v Commission of the European Communities* – Judgment of 17 November 1987.

unequivocal terms of the parties' liability for the infringement summarily described as regards the main facts, their legal qualification and the duration of their participation in the infringement in accordance with the results of the settlement discussions.

4.2 The requirement to provide an unequivocal written statement acknowledging full guilt is likely to discourage many companies from entering into the settlement procedure. In particular, companies will be concerned that the WSS could be discoverable for the purposes of private enforcement in some jurisdictions, such as the United States, and some Member States. Further, the Notice states that the WSS is made "without prejudice" and will be withdrawn should the settlement negotiations break down. However, the fact that the WSS exists and will be held on Commission files, whether or not it is deemed to be withdrawn, will still cause companies concern, especially in relation to the disclosure during potential private action claims.

4.3 Under the leniency procedure, it is common for the Commission to accept oral statements from parties who are applying for immunity from fines. We suggest that under the settlement procedure oral settlement submissions should be accepted rather than written settlement submissions. This would provide a greater incentive to companies to enter into the settlement process.

5 Statement of Objections and Reply

5.1 The Notice states that the Commission can issue a statement of objections which does not endorse the parties' settlement submission. However, the notice does not explain how such a situation could arise, given that the Commission and the settlement candidates will have had bi-lateral discussions before the WSS is submitted. As such, the settlement candidates should be fully aware of the case against them. The Notice should therefore explain how and in what circumstances the Commission could adopt a statement of objections which is contrary to previous discussions with the settlement candidates.

5.2 In such circumstances, where the statement of objections differs from the settlement submissions, the Notice suggests that the normal cartel enforcement procedure would apply. Given that the case handling team who were involved in the settlement procedure will have become familiar with the settlement

candidates' admissions, any future review of the case by them would be prejudiced. We therefore suggest that the Notice stipulates that a new case handling team will be allocated to the case in such instances.

6 Commission decision and settlement reward

6.1 At paragraph 32 of the Notice the Commission states that the reward to the settlement candidate should be a percentage reduction of the fine amount. It is understood that the Commission considers that this percentage reduction should not be too high. This is on the basis that if the reduction cap is set at, for example 50%, this will discourage parties from entering into leniency negotiations. Similarly, the final fine should also be significant enough so as to deter any future anti-competitive behaviour. This said, the potential reduction in fine for settling should also be sufficiently high to encourage parties to consider settlement. We would therefore suggest that the percentage reduction be capped at 20% of the overall fine. This figure is sufficient to encourage parties to consider settlement, but still enables the fine to be a significant deterrent against future anticompetitive activity. Applying the reduction to the overall fine will send a clear picture to companies of the precise benefits that they can expect from settlement.

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