JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW
IN RESPONSE TO THE COMMISSION OF THE EUROPEAN COMMUNITIES' REQUEST FOR PUBLIC COMMENT ON THE DRAFT EU SETTLEMENT PROCEDURES

DECEMBER 2007

The Section of Antitrust Law and the Section of International Law of the American Bar Association (collectively, "Sections") appreciate the opportunity to present their views concerning the Commission of the European Communities' (the "Commission") 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 (the "Draft Notice"). The views expressed in these comments are those of the Sections and have been approved by the Sections' Councils. They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

Executive Summary

The Sections fully support the Commission's efforts to develop a settlement program for cartel participants. We believe that this will be a welcome complement to the Commission's leniency program and will assist the Commission in using its enforcement resources more efficiently and effectively.

The Sections are concerned, however, that some of the procedures proposed in the Draft Notice will, in fact, undermine the Commission's objectives. The fundamental requirement of any effective settlement program is that it provides sufficient incentives for parties to want to settle. The Sections are concerned that the proposed procedures will not provide adequate incentives for settlement. Our experience confirms that a settlement program must satisfy several criteria to be effective: the process must be transparent, providing clear guidance regarding the potential fine if the party does not settle and the benefits from settling; it must provide sufficiently generous settlement benefits to make settlement worth the risks; it must generate legal certainty that a proposed settlement will be accepted; and it must incorporate procedures that protect the confidentiality of negotiations and that do not create significant adverse consequences in enforcement proceedings in other jurisdictions and in private damages actions. The proposed settlement procedures raise questions as to each of these criteria.

Procedural Transparency. The Draft Notice includes substantial detail about the proposed procedures, providing significant guidance as to the benefits of settling. But there is much that remains unclear. In particular, great uncertainty surrounds application of the new Fining Guidelines that the Commission introduced last year. And there is additional confusion regarding the way in which the Commission will calculate the range of likely fines when determining a proposed fine for the settling party. We recommend that the Commission provide as much guidance as possible regarding the application of the new Fining Guidelines in particular circumstances and the benefits that settling parties will receive in those circumstances.

Generous Settlement Discounts. No matter the stage of proceedings, settling has costs and risks for the defendant. Unless the Commission provides sufficiently generous settlement discounts, parties will not want to settle. Based on our experience and the current legal landscape facing prospective settling parties, we recommend discounts of at least 20 to 30%, with additional benefits for parties that participate in both the leniency and settlement programs. We also recommend that the Commission tailor the size of the settlement discount to the circumstances in order to reward parties that decide to settle early (instead of holding out) and to account for the amount of procedural savings that the settlement generates. This tailoring is not only equitable but may also be required by principles of non-discrimination set forth in the EC Treaty.

The Sections also are concerned about the requirement that parties state the maximum fine that they are willing to pay before the Commission proposes a fine. Such a requirement may not be workable in practice and will lead to gamesmanship. Thus, while we encourage the Commission to work with parties to reach a mutual understanding of the appropriate fine, we do not believe that it should require parties to state their maximum amount before a proposed fine is on the settlement table.

Legal Certainty. A party will not enter settlement negotiations if it is not sufficiently assured that those negotiations will result in an acceptable fine and that it will receive protection against further prosecution in matters directly connected to the acknowledged infringement. The proposed procedures do not provide that certainty. Under the Draft Notice, the Commission retains discretion in almost every particular. For instance, it can abandon settlement proceedings at any time, it can alter the terms of settlement, and it could potentially even bring another enforcement action later. In our estimation, very few parties can bear such uncertainty, especially if a settling party must submit a written settlement statement unequivocally acknowledging its liability as a precondition to settlement. If the Commission retains the requirement of a written settlement submission, there must be some point soon after that submission in which the Commission "commits" to settlement. Without that reciprocal commitment by the Commission, the effectiveness of its settlement program will be drastically undermined. In addition, the Commission should make clear that it will not further prosecute settling parties for any matter directly connected to the acknowledged infringement.

The Use of Procedures that Protect the Confidentiality of Settlement Negotiations and that Do Not Create Significant Adverse Consequences in Other Proceedings. Even if a party wants to settle with the Commission, it will not do so if the settlement requirements expose the party to significant liability elsewhere. In this respect, the Sections are particularly concerned about the requirement of a written settlement submission. Our apprehensions can be broken down into four separate areas.

First, the Sections question why there needs to be written settlement submissions at all. In the 2006 Leniency Notice (the "Leniency Notice"), the Commission adopted a nearly paperless procedure in order to encourage parties to come forward with evidence of the infringement because of the risk that written statements could be used against the party in U.S. civil litigation or in other enforcement proceedings. The same objective counsels in favor of the use of oral procedures in the settlement context as well. Moreover, on the other side of the

ledger, it is unclear what benefits a written settlement submission provides, as oral procedures appear equally capable of achieving the procedural efficiencies that the Commission desires.

Second, the Sections question how detailed the written submissions must be. While the Commission has identified several pieces of information that must be included in the submission, further guidance is required regarding whether the Commission envisions a very detailed statement or something more "bare bones" like the factual recitation in U.S. plea agreements. This matters because the greater the required level of detail, the greater the potential harm in other enforcement proceedings and in private litigation in the United States and in Europe, and therefore the lesser the incentive for the party to settle. We thus urge the Commission to provide further guidance regarding exactly what it requires a party to include in its submission.

Third, the Sections are concerned about whether settlement submissions would constitute "admissions" in private litigation and/or other enforcement proceedings. If they do, this will create a grave disincentive to settlement. As the U.S. plea and consent decree processes illustrate, there are ways to maintain transparency and achieve just results without forcing settling parties to formally admit substantial details of their participation in the cartel.

Fourth, the Sections believe that further clarification is required regarding what steps the Commission would take to safeguard the written settlement submissions from disclosure and use in private litigation and other enforcement proceedings. In the leniency context, the Commission has committed to protecting the confidentiality of corporate statements and has identified several concrete measures that it will take to protect that confidentiality. The proposed settlement procedures, however, are largely silent on whether the Commission intends to extend these measures to the written settlement submissions. We encourage the Commission to do so.

Other aspects of the settlement procedures also raise confidentiality concerns. For instance, it is not clear whether the Commission believes there to be a settlement privilege. Such a privilege is common in Canada. And the Commission has supported the existence of a similar privilege in U.S. litigation seeking the discovery and admissibility of documents that were previously produced to the Commission as part of the leniency program. We encourage the Commission to expressly recognize a settlement privilege. We also recommend that the Commission confirm the importance of confidentiality in settlement proceedings by incorporating the various measures that it has used to ensure confidentiality in the leniency proceedings into the settlement program as well.

Finally, we address the foreseeable possibility that only some of the cartel participants will want to settle. While we encourage the Commission to seek all-party settlements, we in no way believe that the participation of all the settling parties should be a precondition to engaging in settlement negotiations or concluding a settlement. In many circumstances, the Commission will still be able to achieve significant procedural savings from settlement, even if only a few parties desire to settle. The Sections thus recommend that the Commission seek bilateral agreements once it has identified a case as being suitable for settlement, rather than wait for all parties to commit to settlement, and that the Commission expressly recognize that the initiation of settlement procedures does not require the participation of all parties. If the Commission adopts the foregoing measures, it will help tip the balance of incentives in favor of settlement.

Introduction

This submission presents the views of the ABA Section of Antitrust Law and Section of International Law concerning the Commission's Draft Notice on the Conduct of Settlement Proceedings. The Sections have previously commented both on matters relevant to the investigation and criminal prosecution of cartel conduct in the United States[1] and issues arising in other jurisdictions related to international cartel enforcement.[2] In particular, in 2001, the Sections provided comments to the Commission with respect to its then-proposed 2002 Leniency Notice.[3] And in 2006, they provided comments on the proposed amendments to the then-existing Leniency Notice.[4]

As with past comments concerning the Commission's and other jurisdictions' enforcement policies, the Sections proceed from the premise that, while consistency among the various competitive enforcement systems is a desired objective, no particular system is necessarily preferred. In the area of settlement, the Sections have the benefit of substantial experience with international cartel enforcement and have observed a variety of settlement programs in operation around the world. Members of both Sections have significant direct experience reaching settlement in cartel cases and have interacted with representatives of the Commission with respect to these issues in connection with bar association meetings, conferences, and the International Competition Network. And some of the Sections' members have extensive experience interacting with the Commission in leniency proceedings. Based on this depth of experience, the Sections offer the observations that follow for the Commission's consideration.

The Sections believe that the development of settlement procedures will be a welcome complement to its leniency procedures. As the Commission has recognized, it has needed to expend substantial resources prosecuting each case to conclusion, leading to an inefficient allocation of enforcement resources:

---

1 *See, e.g.*, ABA Section of Antitrust Law Comments in Response to the Antitrust Modernization Commission's Request for Public Comment on Criminal Remedies (Nov. 2005); ABA Section of Antitrust Law Comments On S. 443: "Antitrust Criminal Investigation Improvements Act of 2005" (June 2005).

2 *See, e.g.*, ABA Section of Antitrust Law and Section of International Law Joint Comments on the Japan Fair Trade Commission Draft Leniency Rules (Aug. 2005); ABA Section of Antitrust Law Submission to the OECD Competition Committee Working Party 3 Concerning Information Exchanges in International Cartel Investigations (Feb. 2004).

3 *See* ABA Section of Antitrust Law and Section of International Law Comments on Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases (Sept. 2001).

4 *See* ABA Section of Antitrust Law and Section of International Law Comments on the Draft Amendment of the 2002 Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases (Apr. 2006).

> [C]artel cases are typically long and procedurally complex. Our experience shows that procedural burdens are exacerbated in the handling of cartel cases because the procedure involves multiple parties, each raising specific confidentiality issues. The average cartel file numbers tens of thousands of pages, all of which have to be screened for confidentiality issues. Finally, parties to a case often request the use of multiple different languages for the administrative procedure.
>
> If even some of these issues can be avoided while fully respecting rights of defence, there is a tremendous scope to make substantial procedural savings, such that would justify a reward for cooperation.[5]

Settlement provides a well-established means to achieve these procedural savings, allowing "more cartels [to] be punished more quickly."[6]

We firmly believe that the proposed settlement procedures are a very important step in the right direction, creating opportunities to shorten proceedings and minimize prospects for appeal in appropriate cases. However, a few aspects of the proposed procedures raise concern.

One of our biggest concerns is the completely separate nature of the leniency and settlement programs. In the United States and other jurisdictions, both programs are combined on the basis that their objectives are closely related and that their operation, in practice, is often inextricably intertwined. Keeping the leniency and settlement programs separate, as the Commission has proposed, may not only create procedural difficulties and inconsistencies, it may also deprive the Commission of the flexibility necessary to achieve optimal antitrust enforcement. Indeed, as we have observed in jurisdictions with a unitary leniency/settlement program, the enforcement authorities have been able to tailor the incentives for cooperation to the specific circumstances of the cartel, sometimes enabling the authorities to break even some of the toughest cartels.

Nevertheless, the Sections understand that the Commission has a firm preference to keep the leniency and settlement programs separate. And so we do not address that issue in our comments. Instead, we discuss several ways in which we believe the proposed settlement procedures could be made more effective. We focus in particular on the incentives necessary to encourage parties to settle so that the Commission can receive the procedural savings that it envisions.

---

5 Neelie Kroes, European Commissioner for Competition Policy, *Assessment of and Perspectives for Competition Policy in Europe*, Celebration of the 50th anniversary of the Treaty of Rome, Barcelona (Nov. 19, 2007), *available at* http://ec.europa.eu/commission_barroso/kroes/index_en.html.

6 *Id.*

Comments

I. The Commission Must Provide Sufficient Incentives So That Parties Want To Settle.

The Sections agree with the Commission's position that a settlement procedure should be established "in order to enable the Commission to handle cartel cases faster by reaching an agreement with the parties,"[7] and that "Regulation (EC) No 773/2004 should therefore be amended accordingly."[8] However, for the settlement program to be successful, it is crucial that the settlement procedures provide adequate incentives for parties to choose settlement instead of contesting their liability and/or extent of participation before the Courts of the European Communities. After all, if no party sees settlement as an alternative that is more attractive than litigation, the Commission will not achieve any procedural efficiencies.

In our collective experience, the hallmarks of an effective settlement program are: (i) transparency regarding the application of the settlement procedures and the potential benefits from settling; (ii) the provision of generous settlement benefits; (iii) legal certainty that a proposed settlement will be accepted; and (iv) procedures that protect the confidentiality of negotiations and that do not harm settling defendants in enforcement proceedings in other jurisdictions (in which criminal penalties may be possible) and in private damages actions. Unless *each* of these criteria is present, a party contemplating settlement may forgo that option.

Transparency regarding the application of the settlement procedures and the potential benefits to be gained therefrom is important for several reasons. Speaking for all enforcement agencies, the Antitrust Division of the United States Department of Justice has recognized that "[t]ransparency is not only critical to fostering confidence among the defense bar and the business community that the Division provides proportional and equitable treatment of antitrust offenders, but it is also essential to securing cooperation from culpable parties."[9] "To maximize the goals of transparency, authorities must not only provide explicitly stated standards and policies, but also clear explanations of prosecutorial discretion in applying those standards and policies."[10]

Here, some procedural transparency is provided by common understanding as to the fundamental premises according to which the Commission calculates fines. But additional

---

[7] Preamble, Proposal for a Commission Regulation amending Regulation (EC) No 773/2004, at ¶ 4.

[8] *Id.* at ¶ 6.

[9] Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, *The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits for All*, Address before the OECD Competition Committee (Oct. 17, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/219332.htm.

[10] *Id.*

guidance is necessary, especially in light of the recent issuance of the new Fining Guidelines.[11] There remains great uncertainty as to how those guidelines will apply in practice. Moreover, there is some question among practitioners whether the new Fining Guidelines will be upheld by the European Court of First Instance ("CFI").[12] This uncertainty undermines the incentive to initiate the settlement process, because settling parties cannot accurately predict their potential exposure and the benefits to settlement. Hence, as we discuss the below, we urge the Commission to provide as much guidance as possible as to the application of the new Fining Guidelines in particular circumstances and the benefits that settling parties will receive in those circumstances.

Likewise, generous settlement benefits are also critical. Unless a party is assured of a substantial benefit, the party will not seek settlement. The Draft Notice leaves ambiguous the amount of a settlement discount.[13] As we discuss below, the reduction in fines to a settling party should be at least in a range of 20 to 30% to be attractive, with additional bonuses for parties that cooperate in both the leniency and settlement programs.[14]

Indeed, the uncertainty surrounding the new Fining Guidelines makes the provision of generous settlement discounts imperative. Unlike parties that contest their fines, settling parties will presumptively be bound by the agreed fine, even if the new Fining Guidelines are subsequently invalidated. This poses an opportunity cost to settling that will enter into a party's settlement calculus. Unless the benefits to settlement are sufficiently large, parties may choose to forego settlement simply out of the hope that, within the next few years, the Fining Guidelines will be overturned (at which time they could seek a lesser fine).

Legal certainty also is essential. As our experience has confirmed, "[p]rospective cooperating parties come forward in direct proportion to the predictability and certainty of their treatment following cooperation. Therefore, a party must be able to predict, with a high degree of certainty, how it will be treated if it cooperates, and what the consequences will be if it does not."[15] In addition, once a party commits to settlement and submits a written statement, it must be assured, at some point soon thereafter, that the Commission will likewise commit to the settlement (except in extraordinary circumstances) and that the party will not subsequently be faced with further prosecution in matters directly connected to the acknowledged infringement. The Sections thus recommend that the Commission clarify its commitment to settlement and limitations on subsequent prosecution in the Draft Notice.

---

11 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210 (Sept. 1, 2006), *available at* http://ec.europa.eu/comm/competition/antitrust/legislation/fines.html.

12 *See* http://curia.europa.eu.

13 *See* Draft Notice at ¶ 32.

14 *See infra* Section II.

15 Hammond, *supra* note 9.

These commitments are particularly important in light of recent practice under the leniency program. As the Commission is aware, it recently raised the bar for receiving a reduction of a fine in the 2006 Leniency Notice by requiring cooperating companies to provide evidence with "significant added value."[16] In both the *Gas Switchgears* and *Elevator* proceedings, there were several leniency applicants that believed that they met that threshold but whose applications for leniency were rejected. These examples affect defendants' perceptions of the process and may create a disincentive to cooperation. Unless the Commission provides certainty in its settlement program, parties that are aware of this enforcement history might be wary to come forward.

Finally, the Sections cannot overstate the importance of procedures that protect the confidentiality of negotiations and that do not create significant adverse collateral consequences in other enforcement proceedings and private damages actions. These procedures include the use of oral statements, rather than written ones; minimizing the amount of information that a settling party must acknowledge as a requirement for settlement; avoiding (or minimizing) the "admissions" that a party must make; limiting third-party's rights of access to the file; and granting a settlement privilege. Each of these procedures helps foster an environment in which parties will want to cooperate and settle.

As we discuss below, the Draft Notice is unclear with respect to some of these procedures and, more problematically, contrary to others. We in particular urge the Commission to rethink the necessity of a written settlement submission, allowing the option of oral submissions instead. This change will harmonize the settlement procedures with the Leniency Notice, which already is nearly paperless, and will help the Commission best achieve the procedural efficiencies it desires. If the Commission does remain steadfast in its commitment to written settlement submissions, the Sections respectfully request that the Commission make clear if, how, and to what extent the written submissions would affect the parties and their rights.[17]

II. Settlement Discounts Must Be Transparent And Generous.

A. The Commission Should Provide Parties with a Clear Indication of the Potential Fine and How It Was Calculated so that Parties Can Accurately Determine an Appropriate Maximum Amount.

Under the Draft Notice, a settling party must indicate a maximum amount of the fine that it expects will be imposed by the Commission and that it accepts in the framework of a settlement procedure.[18] The Draft Notice foresees the Commission reaching a common understanding with parties regarding the scope of the potential objections and the estimation of the range of likely fines.[19]

---

16 Leniency Notice at ¶ 26.

17 *See infra* Sections IV-V.

18 Draft Notice at ¶ 20.

19 *Id.* at ¶17.

When deciding whether to enter into a settlement, the decisionmakers of a company will need to know the financial consequences of agreeing to settle. In order for a company to make such a decision, it is important that there is transparency regarding the potential amount of the fine and the components that have been used in calculating it.

The Draft Notice refers to a "range of likely fines."[20] In order for decision makers to evaluate whether settlement should be entered into this range should be as small as possible, ideally an exact amount. This should assist parties to reach a common understanding with the Commission as to an accurate and realistic "maximum amount."[21] This is particularly important since a settlement will be abandoned if the Commission does not endorse the maximum fine proposed in a party's written settlement submission[22] and companies that have engaged in negotiations could face serious consequences, in terms of possible discovery of the documents and exposure to private damage actions.

The new Fining Guidelines set forth several factors that affect the potential fine, including the duration, the deterrence multiplier, and whether there are any aggravating or mitigating factors.[23] A change in any one of these factors could have a considerable impact on the amount of any fine. For example, an extension in the duration of an infringement by a few months could result in a fine increased by millions of Euros. Accordingly it is important for a prospective cooperating party to know the components that make up a potential fine: Without this information a party will be unable to understand the basis for the "range of likely fines" and will not be able to decide whether to settle. In contrast, if the Commission promptly discloses a precise potential fine, explaining its components in detail, parties will be able quickly to determine whether to settle and what the "maximum amount" should be – further expediting the settlement process.

The Sections therefore recommend that the Commission provide an indication of how a potential fine was calculated, including an explanation of the duration, the deterrence multiplier, whether there are any aggravating or mitigating factors and the reduction for leniency, and any other considerations affecting the Commission's determination. Such guidance would give the parties a sufficient understanding of the basis for the Commission's fine calculation so that a decision on whether to settle can be made and so that an accurate maximum amount can be included in written settlement submissions.[24]

---

20 *Id.*

21 *Id.* at ¶ 20(b).

22 *See id.* at ¶ 22.

23 Fining Guidelines, *supra* note 11.

24 *See also infra* Section II.E (further discussing the requirement that parties submit their maximum fine before the Commission itself proposes a fine).

B. The Commission Should Offer Generous Settlement Discounts.

As discussed above, a settlement process must offer sufficient incentives to encourage parties to settle and reward them for deciding to cooperate and contribute to procedural efficiency. A party deciding to settle incurs opportunity cost. This opportunity cost includes: (i) the waiving of significant defense rights;[25] (ii) the curtailing of the prospects of an appeal before the CFI – since a party must forego access to the file so there is limited scope to challenge the findings of the Commission;[26] and (iii) the exposure to the risk of private litigation (which can be considerable in certain jurisdictions).[27] For a settlement program to succeed, the opportunity cost of settlement must be outweighed by the incentives offered.

When deciding the amount of the reduction, the Commission should bear in mind the need for internal consistency with judgments, decisions and legislative materials on fines. For example, the CFI in *Prym/Commission*, T-30/05, awarded a 10% reduction for the sole fact that a company had not challenged the Statement of Objections.[28] In that case the company in question retained full access to the file and did not make any admission of liability. It follows *a fortiori* that a much larger reduction is required to persuade a prospective settling party to forfeit its file-access rights, admit liability, *and* potentially open itself up to a host of adverse collateral consequences in enforcement proceedings in other jurisdictions and in private litigation. The Sections recommend, therefore, that the reduction provided for joining a settlement should be much higher, at least in a range of 20 to 30 %, in order to be attractive. Furthermore, the Commission should consider whether the existence of a specific maximum range or percentage might strait-jacket the Commission and thus ultimately be counter-productive to its aim of settling cases.

C. The Commission Should Offer an Additional Reduction in Fine for Participation in Both the Leniency and Settlement Programs.

Companies that enter into both leniency and settlement offer notably pronounced efficiency savings. In particular, they contribute through their leniency submissions to the establishment of the facts on which the Commission will subsequently rely to reach a "common understanding" with all other parties of the cartel.[29] The Commission should consider an

---

[25] *See, e.g.*, Draft Notice at ¶ 28 ("this implies that no oral hearing or access to the file may be requested by those parties once their settlement submissions have been endorsed by the statement of objections").

[26] *See id.*

[27] *See infra* Sections IV, V.

[28] *See Antitrust: Commission Welcomes Court of First Instance Judgments in Needles and Other Haberdashery Products Cartel Case* (Sept. 12, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/353&format=HTML&aged=0&language=EN&guiLanguage=en.

[29] Draft Notice at ¶ 17.

additional yet limited bonus (5%) for companies that cooperate both under the Leniency Notice and the settlement procedures, as these companies arguably provide a more substantial contribution to both the fact finding stage and the decision itself. This additional discount could provide a further incentive to cooperation and help bring about a swift conclusion of the case.

D. The Amount of the Settlement Discount Should Vary According to the Party's Contribution to Efficiency in Order To Prevent Unfair Discrimination.

Under the Draft Notice, each party joining the settlement will be deemed to contribute equally to the procedural efficiency of the case and will awarded the same reduction.[30] The EU proposal differs from the U.S. system, in which the amount of the reduction depends on the individual contribution provided by each party. The Sections recommend that the Commission tailor its reductions for several reasons.

1. Incentives Should Be Created for Deciding To Settle Early.

There is a risk that the Draft Notice creates an incentive for parties to "hold out." Under the Draft Notice, the Commission retains the discretion to decide whether or not to enter into settlement based on the prospect of achieving procedural efficiencies.[31] In cases in which not all of the parties are willing to settle, the Commission would still need, for example, to prepare its case file for full access by other parties, conduct an oral hearing, and issue a statement of objections that was not directly supported by settlement submissions. The degree of procedural efficiency, therefore, will depend in part on how many parties are willing to settle.

The Draft Notice thus potentially creates incentives for strategic behavior that may undermine the goals of the settlement program. Because the benefits of settlement to the Commission turn largely on the decisions of the parties that decide to settle last (the "marginal" parties), these parties may hold out and attempt to use the potential efficiency savings they offer as leverage to obtain favorable settlement terms, such as a lower "maximum amount."

The Commission should not reward this sort of strategic behavior. Parties that seek to "hold out" to gain a strategic advantage by deciding to settle last should receive less of a discount than other settling parties, not more.

In addition, companies against which the Commission has a weak case (including those who have not submitted evidence during leniency submissions who may face the heaviest fines) will have little incentive to come forward and join the settlement. There will be incentive for these companies not to settle until they are sure that the Commission is going to settle with the other parties. This could, in turn, result in procedural savings being unavailable in those cases where they would be most needed.

---

30 *See id.* at ¶ 32.

31 *Id.* at ¶ 5.

The Sections recommend, therefore, that the Commission should reward early settlement and discourage "holding out." The Commission should be able to offer larger discounts for parties who agree to settle early. These discounts are distinct from those awarded to leniency applicants and should be awarded in addition to any reduction under the leniency program. In contrast to the position with leniency applicants, a discount should be offered to all parties that are willing to proceed without delay. Therefore, if several parties were willing to proceed swiftly, they would all receive a settlement reward.[32]

2. The Commission Should Have the Flexibility To Reward Parties that Contribute Greater Procedural Efficiencies.

In addition, providing the same discount to all settling parties fails to account for differences between settling parties: Different participants in the cartel may be able to offer more procedural efficiencies than others. Depending on a party's involvement in the cartel (in terms of geographic presence, duration, and role), it may be particularly well-situated to offer procedural savings with respect to either the preparation of the statement of objections, access to the file, or conducting an oral hearing. The current proposal of a single reduction may thus be inequitable and unfair: it would prove to be too favorable to companies with a limited and demonstrated involvement in the cartel, and too penalizing for companies that – despite their more substantial (or difficult to prove) involvement – are willing to come forward and help the Commission achieve a quick disposal of the case.

The Sections thus recommend that the Commission tailor the settlement discount to the expected amount of procedural savings instead of awarding the same discount to all settling parties. The criteria for determining the amount of the individual reduction should reflect the procedural savings represented by the information provided through cooperation. Such criteria should be transparent and not too rigid – to accommodate those cases where a company may give a significant contribution in terms of efficiency despite the limited duration/scope of its involvement in the cartel.

3. A Uniform Reduction May Breach the EC Treaty and the Principle of Non-Discrimination.

Furthermore, there is a risk that a uniform reduction would constitute a form of discrimination because it would treat different contributions equally. A uniform reduction might be in breach of fundamental principles of non-discrimination under EC law and lead to a challenge of the Regulation as well as of the Notice.

The Sections recommend, therefore, that the Commission Notice should allow for non-uniform discounts to be awarded for settlement. A tailored reduction could instead provide an adequate incentive to each company involved, including companies that also consider the possibility of litigating the case.

---

[32] *See also infra* Section VI (discussing the situation in which not all parties wish to settle).

E. The Commission Should Not Require Settling Parties To State the Maximum Amount that They Are Willing To Pay Before Proposing a Fine.

As discussed above, the Draft Notice requires settling parties to state the maximum fine they are willing to pay before the Commission has itself proposed a fine.[33] The Sections believe that this sequence will often be unworkable in practice. Frequently, companies may not realistically be able to determine their maximum fine until they make their ultimate decision. We also worry that requiring parties to state their maximum fine before the Commission itself proposes a fine will encourage gamesmanship by the parties. Hence, while we believe that the Commission can and should work with the party to determine the appropriate fine, we do not believe that it should require parties to put their maximum fine in writing before any actual fine has been proposed.

III. Legal Certainty Must Be Guaranteed To The Parties.

In considering the Commission's settlement package, the Sections concur with and are guided by a fundamental premise of the Commission's proposal – that the legal certainty provided through an effective settlement system will benefit parties faced with substantiated allegations of their participation in a cartel. By providing a prompt resolution of the matter and certainty regarding the level of fine imposed, the system allows undertakings to move on with their business and not be distracted by extended proceedings. This benefit afforded to parties in the form of legal certainty will in turn benefit the Commission, as more parties will settle and the Commission will thereby enjoy procedural savings in a greater percentage of cases.

Nevertheless, parts of the Draft Notice may undermine legal certainty instead of promoting it. In particular, the Draft Notice indicates that (i) "[t]he Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle";[34] (ii) "[t]he Commission retains discretion to determine throughout the procedure on the appropriateness and the pace of the bilateral settlement discussions with each undertaking";[35] (iii) the Commission retains discretion "to accept or reject the parties' relevant arguments" and re-evaluate them throughout the proceedings;[36] and (iv) the Commission retains discretion to "adopt a final position which departs from its preliminary position expressed in a statement of objections endorsing the parties' written settlement submissions, either in view of the . . . ultimate autonomy of the Commission College to this effect."[37] Each of these provisions of discretion undermines a party's ability to predict the consequences of settling and therefore decreases the attractiveness of settlement.

---

33 *See supra* Section II.A; Draft Notice at ¶¶ 16, 17, 20, 21.

34 Draft Notice at ¶ 5.

35 *Id.* at ¶ 15.

36 *Id.* at ¶ 24.

37 *Id.* at ¶ 29.

We recognize that the Commission needs to retain a certain amount of discretion when deciding to enter settlement negotiations and determining the appropriate settlement. Indeed, such discretion is necessary to treat like parties alike.[38] But there is a limit. And there is a point at which the Commission will need to "commit" to the settlement in order to provide parties with the assurance they need to make settlement a desirable option.

The primary issue thus becomes maximizing the legal certainty provided to parties without unduly impeding the Commission's discretion. We believe that the best way to strike this balance and serve the stated goals of the settlement program is to create a commitment point, after which the Commission can scuttle a settlement only in extraordinary circumstances.

As an initial matter, the Sections agree with the Commission's decision to not propose changes to Regulation 1/2003, which requires the Commission to issue a statement of objections and consult with the Member State Advisory Committee prior to issuing an infringement decision, and the principle of collegiality under Article 217 EC, pursuant to which an infringement decision must be adopted by a majority of the members of the Commission. Any changes to Regulation 1/2003 or Article 217 EC would require significant political consensus and would likely delay adoption of the settlement program. Thus, we recognize that there are certain points, such as the submission of the written settlement statement, at which the Commission cannot legally confirm its acceptance of a settlement, even though doing so might maximize legal certainty.

Nevertheless, commitment should be feasible in the vast majority of circumstances soon after the issuance of a statement of objections. In addition, there are several other steps the Commission could take to maximize legal certainty. First, the Commission could increase the legal certainty of the parties by minimizing the time between the submission of a written settlement statement and the issuance of a final decision. It can accomplish this objective both by allowing parties to submit a written statement as late as possible in the process and by ensuring that the statement of objections and a final decision are issued as soon as possible following the submission.

Likewise, in hybrid proceedings (proceedings in which some parties settle while others do not), the Commission should attempt to prevent undue delay. In particular, a party should not be forced to submit a written statement and then face a delay while the Commission is awaiting the submission of statements from other parties. And parties should receive final decisions with respect to their case, even though proceedings against other cartel participants are not fully resolved.

Second, the Commission can maximize legal certainty by affording protection to settling parties against further prosecution in matters directly connected to the acknowledged infringement. For example, where a party acknowledges an infringement of a fixed duration and gravity and a corresponding decision is issued, they should not subsequently be faced with additional infringement proceedings should the Commission thereafter discover evidence of additional duration or gravity. Therefore, the Sections respectfully request that the Commission

[38] *See supra* Section II.D.2-3.

clarify and expressly circumscribe the extent to which further actions may be brought against settling parties in matters directly related to the acknowledged infringement.

Finally, the Sections agree with the Commission that it should not depart from the "settled" terms following the submission of a written settlement statement except in extraordinary circumstances. If too many settlement negotiations fall apart, the usefulness of the settlement process will be undermined drastically. The Sections respectfully submit that, in such cases, the Commission should provide the affected parties with a written statement explaining the decision to depart from the statement and confirming that their written settlement submission will have no further effect and has been destroyed.

IV. Written Settlement Submissions Should Be Strictly Limited And Protected.

The Sections also are concerned about the disincentives to settlement created by the Commission's requirement that a settling party submit a written statement that unequivocally acknowledges its liability and includes other information about the underlying cartel. Indeed, as we explain below, given the extraterritorial reach of the Free Trade Antitrust Improvement Act[39] and the multinational nature of many cartels, the scope and form of acknowledgements that a settling party must make can greatly influence the effectiveness of settlement procedures. We urge further guidance on several aspects of written submission requirement.

A. Are Written Settlement Submissions Necessary at All?

In the 2006 Leniency Notice, the Commission adopted a near paperless procedure, allowing parties to provide corporate statements "orally unless the applicant has already disclosed the content of the corporate statement to third parties."[40] It recognized that written corporate statements were potentially discoverable in civil litigation. And it defended the use of oral procedures, stating that:

> [It would be] inappropriate that undertakings which cooperate with [the Commission] in revealing cartels would be placed in a worse position in respect of civil damages claims than cartel members that refuse to cooperate. The discovery in civil damage proceedings of corporate statements which have been made especially to [the Commission] in the context of its leniency programme risks creating this very result and, by dissuading cooperation in [the Commission's] leniency programmes, could undermine the effectiveness of [the Commission's] fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions.[41]

---

39 15 U.S.C. § 6a.

40 Leniency Notice at ¶ 32.

41 European Competition Network, Model Leniency Programme, explanatory note 47, *available at* http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf.

We applauded these developments when they were introduced[42] and we do so even more heartily now. In the year since the 2006 Leniency Notice went into effect, the use of oral corporate statements as part of the leniency program has proven highly effective in getting parties to come forward.

In light of these procedures – and this success – we believe that the Commission should strongly consider use of oral procedures in the settlement context too. Written settlement submissions create the same risks and disincentives to cooperation that written corporate statements do. Moreover, both corporate statements and settlement submissions are available cumulatively and appear to be related means of addressing the same basic concern, a fact that supports similar evidentiary treatment across-the-board.

In addition, it is unclear what benefits written settlement submissions would provide the Commission over oral procedures. For instance, a written settlement submission is unnecessary to thwart a party's ability to challenge a settlement on appeal, because a transcribed oral statement would equally bind a settling company without creating as many problems for subsequent civil damages actions and in other enforcement proceedings.[43] Thus, using oral procedures is a preferable means for the Commission to achieve the procedural efficiencies that it desires.

The Sections accordingly recommend that the Commission consider abandoning the requirement of written settlement submissions. Alternatively, we respectfully request that the Commission clarify the relationship between the oral corporate statements used in the leniency context and the written settlement submissions and explain why the disparate evidentiary treatment is necessary.

B. How Detailed Must the Written Settlement Submissions Be?

If the Commission does require written settlement submissions, the Sections are concerned about how detailed the submissions must be. The Draft Notice states that written settlement submissions must contain "an acknowledgement in 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."[44] This language, however, does not provide sufficient guidance as to exactly how detailed this acknowledgement must be.

---

42 *See, e.g.*, ABA Section of Antitrust Law and Section of International Law Comments on Draft Amendments to 2002 Leniency Notice, *supra* note 4, at 1.

43 As we explained in the comments to the 2006 Leniency Notice, the use of transcribed oral statements still raises some problems, depending on whether parties have to affirm the contents of those statements and whether they are used in evidence. *Id.* at 7-12. But these problems are much smaller in scope than if the parties are forced to prepare full written admissions.

44 Draft Notice at ¶ 20(a).

For instance, would it suffice for a party to acknowledge that it "participated in a price-fixing conspiracy in the X industry for Y years affecting Z volume of commerce"? Or would substantial additional detail be required? This is a critically important issue because whatever a party must put in writing may be used against that party at a later date.

In the United States, for instance, consent judgments often contain no statements of fact for this reason. And criminal plea agreements tend to be very "bare bones," containing only a few brief paragraphs on the underlying facts.[45] Likewise, in Germany, the Bundeskarellamt will sometimes negotiate an "amicable fine decision"; in these matters, the defendant need only confess to the most basic facts of the case.

It is not clear whether the Commission would accept these sorts of bare-bones admissions or whether it envisions something more detailed. In our view, requiring substantial detail would be highly unadvisable. The bare-bones admission would suffice to prevent a party from challenging the settlement on appeal. Moreover, the greater the requisite detail, the lesser the incentive for companies to engage in settlement discussions. At the very least, the Sections respectfully request that the Commission clarify the level of detail that it expects.[46]

C. Will Settlement Submissions Constitute Admissions in U.S. Civil Litigation and Other Enforcement Proceedings?

As the Commission is well-aware, its investigation is typically only one of many antitrust proceedings related to any given international cartel. Other national competition authorities and/or the U.S. Department of Justice may bring enforcement proceedings as well, seeking criminal penalties for culpable individuals and extradition when necessary.[47] There may also be many be private plaintiffs seeking treble damages.

The Sections are particularly apprehensive about whether the written settlement submissions and/or other materials produced during the settlement discussions would constitute "admissions" in these proceedings. While the Commission protects business secrets and other

---

[45] *See, e.g.*, Model Corporate Plea Agreement, *available at* http://www.usdoj.gov/atr/public/guidelines/220671.htm (containing four brief paragraphs on the facts).

[46] The Draft Notice also requires that a party state what its maximum fine would be. This may not be feasible for the reasons explained in Section II.E of these comments.

[47] The U.S. Department of Justice will often seek criminal penalties for culpable individuals for participation in a cartel. In addition, significant Member States of the European Union, including France, Germany, and the United Kingdom, will punish price fixing, market sharing and bid rigging; notably in the United Kingdom by the application of the provisions of the Enterprise Act 2002. In recent years, inter-jurisdictional cooperation has been increasing. In particular, the 2003 extradition and mutual legal assistance agreements between the United States and the European Union and the respective agreements between the United States and the EU Member States (such as France, Germany, and the United Kingdom), play a significant role in cartel cases punishable by criminal penalties.

confidential information from complainants' eyes,[48] unprotected written settlement submissions and/or final decisions – especially ones of significant factual and legal elaboration – meet the basic criteria for admissibility in the United States[49] and are available and useful to European complainants in pursuit of parallel competition proceedings in other Member States.

In some cases, such as the Methionine and Rubber Chemicals litigation, the Commission has intervened as *amicus curiae* and helped preclude the admissibility of documents produced as part of EC investigations on international comity grounds.[50] However, in other instances, the Commission has not been so successful. In the Vitamins litigation, for instance, private plaintiffs discovered and used documents from the Commission's investigation of the vitamins cartel over the Commission's objection.[51] The district court subsequently relied on some documents produced to the EC in its rulings.[52]

Even some risk that a settlement submission will be treated as an admission in subsequent proceedings could dissuade companies who are participating in a multinational cartel from seeking to settle. Moreover, there appears to be no reason why an "admission" is necessary for the Commission to achieve the procedural efficiencies it desires. It is possible to maintain

---

48 *See Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004*, at ¶¶ 17-20, available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/c_325/c_3252005/222en00070015.pdf.

49 Public records would be admissible, if relevant, in the United States. *See* Fed. R. of Evid. 401 (governing relevance); *id.* 803(8) (providing a hearsay exception for public records). Indeed, foreign public documents are self-authenticating under Federal Rule of Evidence 902(3) and can be proved under Federal Rule of Civil Procedure 44(a)(2). In addition, admissions of a party opponent would be permissible under the hearsay exceptions for prior witness statements and party opponent admissions in Federal Rule of Evidence 801(d).

50 *See infra* Section V.

51 The Commission filed an *amicus curiae* brief opposing the production of certain documents. *See* Brief of the Commission of the European Communities Appearing as *Amicus Curiae* in Opposition to Plaintiff's Joint Motion to Compel Bioproducts to Produce its Governmental Submissions ("EC Brief").

52 *See, e.g.*, *In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d 1, 10 n.17 (D.D.C. 2004) (noting that DuCoa "provided information to the European Commission regarding its role in the following agreements: the worldwide market for choline chloride was to be shared among the participants; the North American producers were to withdraw from Europe and vice versa; sales volumes and market shares were to be stabilized; the activities of converters and distributors were to be controlled by cutting their supplies and/or forcing them out of business; prices for each grade or form of the product were to be increased worldwide according to an agreed schedule; regular meetings were to be held and commercial information was to be exchanged in order to monitor the implementation of the above agreement. DUCOA SUPP 000869.").

transparency in settlement proceedings and reach a mutually acceptable result for both the Commission and the defendant while limiting the use of documents as evidence. The U.S. consent judgment process is illustrative.

As part of the U.S. consent judgment process, a proposal of consent judgment and a competitive impact statement are filed in U.S. district court and published in the Federal Register, and summaries of these documents are published in newspapers in various jurisdictions. Comments are sought, received, and considered by the government.[53] The district court then conducts proceedings and receives evidence as it sees fit, to the end of making a public-interest determination regarding the consent judgment.[54] While these proceedings are open, the competitive impact statement and the public-interest determination related to the consent judgment are not admissible in court,[55] rendering them evidentially useless. While the proposed consent judgment may be admissible, it is not an admission of anything. Thus, defendants can undergo the settlement process without worrying about "admitting the misconduct" in other proceedings. This greatly enhances the incentives for the defendant to settle, while providing procedural transparency, due process, and accountability.

The Sections recognize that differences between the enforcement landscapes in the United States and Europe might preclude application of identical settlement procedures to Commission investigations. In particular, the administrative context in Europe is more complex, and it has more regulatory oversight. But we do not believe that any of these differences require a settling party to formally admit its conduct. Given the deleterious negative ramifications to such an admission in other proceedings, we urge the Commission to consider the use of hypothetical fact patterns and proposed statements instead of requiring a written submission that could be considered an admission.

D. How Can Settlement Submissions Be Safeguarded Against Disclosure?

Finally, the Sections are concerned about protecting against the disclosure of settlement submissions. In the 2006 Leniency Notice, the Commission adopted several safeguards to protect against the disclosure of information provided in connection with those proceedings. In addition to allowing oral corporate statements, it provided a clear policy statement that use of corporate statements in civil litigation would undermine the effectiveness of the Commission's fight against cartels; it restricted parties' right of access to the file, providing access only for the purposes of administrative and judicial proceedings for the application of Article 81 of the Treaty (and requiring signed statements to that effect); it prohibited mechanical copies of corporate statements; and it made clear that it will seek sanctions or a higher fine against parties that abuse

---

53 15 U.S.C. § 16 (b)-(d).

54 *Id.* (e)-(f).

55 *Id.* (e).

its right of access to the file.[56] The Commission also has intervened as *amicus curiae* in several actions to emphasize the need for confidentiality.[57]

The Commission has not indicated which, if any, of these protections are applicable to settlement submissions. The Draft Notice does state that, if the statement of objections does not endorse the parties' settlement submission, "the acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used against any of the parties to the proceedings."[58] But that seems to apply only to the Commission itself and not to private plaintiffs and other enforcement authorities.

In our view, the Commission needs to clarify what protections would prevent the use of those "withdrawn" statements by those plaintiffs and authorities. It also needs to clarify, as part of the settlement notice itself, what steps the Commission would take to safeguard the settlement submissions against disclosure, especially given its agreements to cooperate with other enforcement authorities.[59]

V. A Settlement Privilege Is Critical To All Parties.

Another factor that increases the incentives for a company to settle is the existence of a settlement privilege that prevents the admissibility of documents and communications that were created for the purpose of achieving settlement. We urge further clarification regarding whether such a settlement privilege exists.

Several jurisdictions have recognized such a settlement privilege previously. In Canada, for instance,

> [i]t has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or if an action has been commenced, encouraged to effect a compromise without a resort to trial. . . . In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming . . . .[60]

---

56 *See* Comments discussing changes to 2002 Leniency Notice.

57 *See, e.g.*, EC Brief, *supra* note 51; *In re Rubber Chems. Antitrust Litig.*, 486 F. Supp. 2d 1078, 1081 (N.D. Cal. 2007) (the Commission submitted a letter opposing discovery of various documents produced to the Commission).

58 Draft Notice at ¶ 27.

59 *See supra* note 47.

60 John Sopinka et al., *The Law of Evidence in Canada*, at 817 (2d ed. 1999).

Deemed the "without prejudice" rule, the privilege protects discussions and communications that are used for the purpose of arriving at a settlement and are intended to be of a confidential nature, although the ultimate agreement between the parties is not itself privileged.[61]

The Commission also has supported the existence of a similar privilege with respect to documents produced for the purpose of obtaining in leniency. In the Vitamins litigation, it filed an *amicus curiae* brief opposing the discovery of certain documents such as corporate statements on the ground that discovery of these documents "will hamper ongoing and future investigations and do long-term significant harm to the EC's anti-cartel efforts . . . [which] will, in turn, greatly hamper co-ordination, co-operation and hence, the effective enforcement of EC and US antitrust laws and the overall efficiency of the global fight against international cartels."[62] The Commission also noted that "principles of international comity" strongly "counsel[] against disclosure of Corporate Statements such as the one at stake" because of the need of "cooperation between the EC and the US for effective enforcement of their antitrust laws to fight global cartels."[63] More recently, the Commission submitted a letter opposing discovery of various EC documents in the Rubber Chemicals litigation.[64]

Nevertheless, in other jurisdictions, such as the United States, the existence of a settlement privilege is a highly disputed issue. In recent years, different U.S. courts have reached different conclusions regarding the admissibility of documents produced in foreign enforcement proceedings despite similar underlying circumstances. In the Vitamins litigation, for instance, a federal district court rejected the Commission's position and ordered production of, among other things, letters between Bioproducts' legal counsel and the Competition Bureau with respect to Bioproducts' request for immunity and supporting information.[65] The court also ordered production of certain Canadian documents that were not yet public and may have been barred from production in Canadian litigation because of the Canadian settlement privilege.[66]

---

61 *See, e.g.*, *Rush & Tompkins Ltd. v. Greater London Council* [1989] A.C. 1280, 1299-1300 ("The 'without prejudice' rule is a rule governing admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish . . . [T]he underlying purpose of the rule . . . is to protect a litigant from being embarrassed by an admission made purely in an attempt to achieve settlement.").

62 EC Brief, *supra* note 51.

63 *Id.*; *see also* Calvin S. Goldman et al., *Comity After* Empagran *and* Intel, 19 Sum-Antitrust 6 (2005).

64 *In re Rubber Chems. Antitrust Litig.*, 486 F. Supp. 2d at 1081.

65 *In re Vitamins Antitrust Litig.*, No. 99-197, 2002 U.S. Dist. LEXIS 25815, at *46 (D.D.C. Dec. 18, 2002).

66 *Id.* at *62. The only Canadian documents that were not ordered produced were those the court believed would harm Canada's ability to enforce its competition laws in the future. *Ibid.*; *see also* Goldman et al., *supra* note 63, at 7.

By contrast, the court reached the exact opposite result in *In re Methionine Antitrust Litigation (Methionine)*.[67] U.S. class plaintiffs sought information provided to the Commission and to Australian competition authorities. The court took judicial notice of the *amicus curiae* brief filed by the Commission in the Vitamins litigation. And, following the Commission's suggestion, the court refused to order production of the documents in part because production would cause considerable harm to foreign leniency programs and antitrust enforcement generally and contravene principles of international comity.[68] The court reached the same conclusion in the Rubber Chemicals litigation, concluding that "principles of comity outweigh the need for production of the EC documents."[69]

The uncertainty created by this dispute over the existence of a settlement privilege in the United States undermines efficient and effective antitrust enforcement. As some commentators have observed:

> The uncertainty over whether amnesty/plea documents and/or communications to enforcement authorities are subject to production in U.S. civil proceedings creates new issues and arguably some disincentive for companies and individuals considering making an amnesty application or entering a guilty plea outside the United States. Those who want to seek amnesty or plead guilty may now go to some length to ensure that neither they nor their counsel retain, or possibly even create, copies of key documents, which in many cases makes the amnesty/plea negotiation process more protracted and difficult. Some applicants may rely on the enforcement officials to keep the only notes or record of meetings, discussions, or proposed terms until a final document is executed. Even then, some uncertainty still exists as to the production reach of U.S. courts if any relevant documents are kept by the defendant or counsel. Finally, the willingness of U.S. courts to compel production of these types of documents over the serious concerns of foreign governments may create new issues regarding the degree to

---

67 No. C-99-3491 CRB (JCS) MDL No. 1311 (N.D. Cal. June 17, 2002).

68 *Id*. In the United States, there is also a split between different courts with respect to the existence of a settlement privilege in purely domestic disputes in which international comity concerns are not present. *Compare, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 977, 980 (6th Cir. 2003) (recognizing a settlement privilege in later, unrelated proceedings because of the policy of encouraging the voluntary resolution of disputes: "In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of 'impeachment evidence,' by some future third party."), *with In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n, WD Energy Servs., Inc*., 439 F.3d 740, 754-55 (D.C. Cir. 2006) (ruling that there is no privilege from disclosure of settlement discussions and materials prepared for purposes of settlement negotiations in an earlier unrelated proceeding with the government).

69 486 F. Supp. 2d at 1082.

which multilateral or bilateral frameworks for information sharing in cartel investigations can be pursued.[70]

The Section recognizes, of course, that the Commission cannot control the behavior of U.S. courts (as the Vitamins litigation illustrates). But, in our view, the Commission can take several steps to mitigate the risk of production of documents produced to the Commission as part of the settlement process. In particular, we recommend the following measures, which the Commission has supported in the leniency context:

- The Commission should ensure that the negotiations are secret and confidential. This is especially important in cases in which no settlement is ultimately reached.

- The Commission should minimize the amount of factual information concerning the underlying offense that would be contained in any press releases.

- The Commission should restrict third-parties' access rights to the file, requiring commitments from the party and their counsel (i) not to make any copy of the information by mechanical or electronic means; and (ii) to use the information solely for the purposes of judicial or administrative proceedings before the Commission.

- The Commission should commit to filing *amicus curiae* briefs when a party seeks the admission of evidence produced as part of the settlement procedures.

We respectfully request that the Commission expressly confirm its commitment to these measures.

VI. The Fact That Not All Parties Are Settling Should Not Limit Or Compromise The Settlement Procedure.

Under the Draft Notice, the Commission may engage in settlement discussions only upon the written request "of the parties concerned."[71] The Commission will then consider whether the case is one that may be suitable for settlement. If the Commission considers a case suitable for settlement it will explore the willingness of all parties to the proceedings to settlement.[72] The procedural benefits of settling when all parties join in the settlement are clear. However, the Commission also can realize significant procedural savings even when some parties do not wish to settle.

The Draft Notice indicates a strong preference for approaching a settlement with all parties through the hierarchy of processes it has established in considering a settlement. First, one of the factors which the Commission will consider in deciding whether or not to settle a case

---

[70] Goldman et al., *supra* note 63, at 7.

[71] Draft Notice at ¶ 5. It is unclear whether the initial request for consideration of the possibility of a settlement must come from all parties or from any parties to the proceedings.

[72] *Id.* at ¶ 6.

is the likelihood of reaching a common understanding on the facts. This includes consideration of the number of parties involved and foreseeable conflicting positions on the attribution of liability.[73] Second, if some but not all parties to the proceeding request settlement discussions, the Commission retains discretion to abandon those discussions.[74]

The Sections respectfully request that the Commission strongly consider settlement even when some parties to the proceeding do not participate. In many circumstances, the Commission can achieve significant procedural savings even when there are some "hold outs." In particular, the Commission could still achieve procedural efficiencies by removing the settling parties' ability to access the file, the right to be heard again in an oral hearing, the right to receive a copy of the statement of objections in the relevant national language, and by limiting the settling parties' ability to appeal. While some proceedings will still be required, these proceedings will likely be much more expedient than without settlement. Thus, although we believe the Commission should seek all-party settlements, it should not make all-party settlements a requirement.

Indeed, encouraging bilateral settlements between the Commission and individual parties can also create an incentive for others to cooperate as well. This has been the experience in a number of jurisdictions, including the United States and Canada. In those jurisdictions, the incremental pressure applied to hold-outs as the number of settling parties increases has been a key part of the success of their enforcement programs.[75] In contrast, settlement is less likely when a party knows that no settlement can occur without its participation, because such an environment encourages gamesmanship, which undercuts transparency and legal certainty.

The Sections thus urge the Commission to seek bilateral agreements once it has identified a case as being suitable for settlement, rather than waiting for all parties to commit to settlement. And we recommend that the Commission expressly recognize that the initiation of the settlement procedure does not require the participation of all parties.

---

73 *Id.* at ¶ 5.

74 *Id*. at ¶ 14.

75 Though settlements in the United States often occur at the earlier evidence gathering stage, we nevertheless believe that the U.S.'s experience in this regard is instructive.

Conclusion

The Commission's admirable objective of settling cases to achieve procedural efficiencies, allowing the Commission to use its enforcement resources more effectively, depends upon the balance of incentives and disincentives that applicants face. Many factors affect those incentives. The Sections commend the Commission's careful consideration of these issues and its clear awareness and constructive engagement of the unavoidable cross-jurisdictional consequences of its settlement decisions. We hope that these comments are helpful to the Commission's development of an effective settlement program.

Respectfully submitted,

SECTION OF ANTITRUST LAW
SECTION OF INTERNATIONAL LAW
AMERICAN BAR ASSOCIATION