

European Commission
Directorate General for Competition
Consultation New Cartel Settlement Procedure
B-1049 Brussels
Belgium

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Comments on the European Commission's Proposed New Cartel Settlement Procedure

1. The Studienvereinigung Kartellrecht is a registered association incorporated under German law. Its purpose is the promotion of science and research in the field of national, European and international competition law. The Studienvereinigung Kartellrecht ("Studienvereinigung") has more than 700 lawyers specialised in competition law as members, mainly from Germany, Austria and Switzerland.
2. The Studienvereinigung welcomes the Commission's initiative to allow companies to settle cartel cases. In particular, the Studienvereinigung welcomes the introduction of settlement discussions prior to the statement of objections ("SO"), and the concept of "settled SO".

In the following, our comments will be restricted to those issues where we believe that the Draft Notice on the conduct of settlement proceedings ("Draft Notice") can and should be improved to achieve its objective to improve the efficiency of the procedure while safeguarding due process and the parties' rights of defence.

1. Timing of the early disclosure

The Studienvereinigung understands from paragraphs 14 to 17 of the Draft Notice that the parties are "entitled" to obtain from the Commission the early disclosure information within the meaning of paragraph 16 only before the Commission sets the

time-limit to submit a written settlement submission (“WSS”), and that an earlier disclosure is left to the Commission’s discretion (para. 15). The Studienvereinigung, in turn, believes that companies should, as a rule, obtain this information at the beginning of the settlement discussions. In particular, there should be no “drop-wise” disclosure of evidence, as suggested in the FAQ (“During the discussions the Commission services may disclose in a timely manner the evidence”). In fact, there can be no meaningful discussions on the “scope of the potential objections” and the “range of likely fines” if the parties do not know from the start the essential elements of the case against them and the supporting evidence in the Commission’s file. It also raises fundamental questions of due process and the parties’ right of defence if the parties could not assess the strengths or weaknesses of the Commission’s case prior to the initiation of detailed discussions which are to lead to a “common understanding” on the scope of the infringement and the fine range. Such early disclosure appears all the more important given that the “common understanding” on the fine range will normally form the basis for the party’s “maximum fine” indication within the meaning of paragraph 20 (b), and thus the final fine.

2. Scope of the early disclosure

According to paragraph 17, the early disclosure information includes, *inter alia*, an “estimation of the range of likely fines”. The Studienvereinigung submits that the specific parameters which form the basis for this “estimation” (e.g. definition of the “affected” products or services within para. 13 of the Fining Guidelines) should be disclosed as well. Transparency on these parameters is essential to enable companies to have a meaningful discussion on the “range of likely fines” (para. 17) and to make an informed decision on whether or not to settle.

3. “Common understanding” on fines

The objective of the settlement discussions is to lead to a “common understanding regarding the estimation of the range of likely fines to be imposed by the Commission” (para. 17). In their WSS, the parties must give an “indication of the maximum amount of the fine ... which they accept” (para. 20 (b)). Given that this “maximum amount” is to “result from the discussions as set out in para. 17” (fn 14),

the settlement discussions are, in fact, to lead to a “common understanding” also regarding the “maximum amount” within the meaning of paragraph 20 (b). The Studienvereinigung suggests clarifying that point in paragraph 17.

4. Settlement reduction must be substantial (at least 20%)

The Studienvereinigung believes that the settlement reduction must be substantial to create a sufficient incentive for companies to settle, mainly for four reasons. First, settling parties waive important procedural rights (access to file, oral hearing) and explicitly acknowledge liability (which may increase the risk of private litigation). Second, appeals against the Commission’s cartel decisions have, on average, led to a fine reduction between 10 to 20% over the past 10 years. Third, as recently confirmed by the CFI¹, there can already be a fine reduction of 10% for a party that does not substantially dispute the accuracy of the facts as set out in the SO. Fourth, and most importantly, the CFI and CoJ will not have ruled on the new Fining Guidelines, which can normally be expected to lead to significantly increased fines and form the basis for the settlement, for several years. Therefore, at least during the first years where questions about the legality and interpretation of the Fining Guidelines are still unresolved, companies need a particularly strong incentive to settle rather than to defend their case. Against that background, and also in light of the reductions provided in the Leniency Notice, we believe that the settlement reduction should be at least 20%. In order not to create another “race” (as under the Leniency Guidelines), the percentage reduction should be the same for all settling parties in one and the same case.

5. No “all or nobody” principle

The Studienvereinigung reads paragraph 14 (“some of the parties”) to mean that a successful settlement does not require that all the targeted parties settle. On the other hand, the repeated reference to the Commission’s “broad margin of discretion” to determine which cases may be suitable for settlement “in view of the progress made overall in the settlement procedure” (paras. 5 and 15) seems to imply that the

Commission would not normally consider the procedural efficiencies sufficient in cases where not all parties wish to settle. The Studienvereinigung believes that such an approach would create a serious “hold-out” problem which may jeopardise the whole process. In fact, companies cannot reasonably be expected to discuss in good faith the scope of the infringement and the range of likely fines (para. 17), thereby accepting (orally) liability, unless they have some comfort that the settlement will not fail for reasons which are outside their control, such as the unwillingness of other companies to settle as well. For that reason, competition authorities for instance in Germany, the UK and the US are generally prepared to settle with individual companies regardless of whether all defendants are willing to join. The Studienvereinigung strongly recommends following that practice, and clarifying this point in the Notice.

6. Prohibition to communicate with other parties

According to paragraph 7 of the Draft Notice, the parties to the proceedings may not disclose to any other undertaking or third party the content of the discussions or of the documents which they have had access to in view of the settlement, unless they have a prior explicit authorisation by the Commission. The Commission even takes the view that a breach of this obligation could constitute an aggravating circumstance in calculating the fine. The Studienvereinigung submits that such general “prohibition to communicate” is counterproductive. The objective of the new legal instrument to create procedural efficiencies is achieved in the most effective way where all parties settle. However, such outcome is more likely if companies know and can verify that (i) the Commission does not apply a “*divide et impera*” policy, (ii) treats all companies in a fair and non-discriminatory way, and (iii) other companies are also likely to settle (domino effect). In order to give companies sufficient comfort on these points, it will in many cases be necessary to contact other parties and convince them that a reasonable understanding has been achieved in the settlement discussions. Experience in Germany, particularly in the 1980s and 1990s, where many settlements have been agreed upon in cartel cases, shows that contacts, at least on a counsel-to-

¹ See Court of First Instance, Judgment of 12 December 2007, Joined Cases T-101/05 and T-111/05 – *BASF AG and UCB SA*, para. 222.

counsel basis, had been key to ensuring settlements involving all parties. In any case, the Commission should be flexible as to the “authorisation” referred to in paragraph 7 of the Draft Notice.

7. Settlement after issuing of statement of objections

The Draft Notice does not specify whether a settlement procedure could still be initiated after a full statement of objections has been issued. The Studienvereinigung takes the view that such an option should not be rejected from the outset, since procedural efficiencies may still be available at this point. For instance, in Germany and the UK, settlements can take place after the statement of objections had been issued. However, the settlement reward for the companies would need to be lower in such case, for instance 10 to 15%.²

8. Oral settlement submission and acknowledgement of the statement of objections

The requirement of a “written” settlement submission in paragraph 20, including a written acknowledgment of liability, and the requirement of an (apparently) written confirmation of the SO³ (para. 26), provide for a strong disincentive for parties to settle. Such written submissions could be discoverable in the US and several Member States, e.g. the United Kingdom. In fact, paragraph 35 (“normally”) explicitly provides for the possibility of the public disclosure of the WSS or other documents exchanged between the parties and the Commission.

The United States and several Member States have successfully introduced procedures under which settlement discussions are held exclusively orally until a final settlement arrangement is reached. In the context of the Leniency Notice, the Commission also accepts oral statements, which it records. The possibility of such procedure is required here as well in particular because the Commission intends to retain full discretion not to settle until the very end of the procedure (paras. 27 and 29).

² See the case law referred to above in footnote 1: reduction of 10% where the facts set out in the SO were not contested.

³ Given the importance of the parties’ reply to the SO, the time-limit in para. 26 should be extended at least to two weeks.

Therefore, an obligation to submit “written” statements in the course of the settlement process creates the possibility that the parties would in the end not benefit from a settlement reward but nevertheless face the disclosure of self-incriminating documents. Therefore, the Studienvereinigung considers it essential that companies will be able to make the statements under paragraphs 20 and 26 also orally, in the same way as under the Leniency Notice.

9. The Commission should be entitled not to endorse a settlement only in exceptional and clearly defined circumstances

Another disincentive for parties to entering into a settlement process is created by the uncertainty whether the Commission will indeed endorse an agreed settlement (paras. 27 and 29). Although there may be exceptional circumstances under which the Commission will have good grounds to depart in its final decision from its position during the settlement negotiation process, the Notice should make it clear that this will occur only in very exceptional and clearly defined circumstances, such as the emergence of materially new facts.

Furthermore, the safeguards provided in paragraphs 27 and 29 (according to which the parties’ settlement statements are “deemed to be withdrawn”) do not sufficiently protect the parties’ rights of due process. The Notice should therefore clearly provide for a settlement privilege and acknowledge that not only all statements by the parties are made “without prejudice” but explicitly provide that such statements, respectively records thereof, are either returned to the parties or destroyed. It should further be clarified that, should the Commission “walk away” from a tentative settlement agreed with the Commission’s services, a new case team would be put in place by the Commission. Such safeguards are important to ensure the integrity of the process and give companies comfort to discuss openly with the Commission’s services the existence and scope of their liability.

10. Transmission of the power of decision to the Competition Commissioner

A further source of uncertainty comes from the fact that the final decision to endorse the results of the settlement discussions does not lie with the Commission's services with whom a "common understanding" has been reached, but with the College of Commissioners. The Studienvereinigung therefore submits that the College of Commissioners should empower the Commissioner for Competition to make decisions in settlement cases, similar to the practice in merger control proceedings.