

**PROCOMPETENCIA’S REGULATIONS FOR THE PROCESSING OF  
COMMITMENT PROPOSALS BY ECONOMIC AGENTS, COMMENT OF THE  
GLOBAL ANTITRUST INSTITUTE,  
ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY**

February 28, 2018

This comment is submitted in response to the Dominican Republic’s National Commission for the Defense of Competition’s (“Procompetencia”) public consultation regarding regulations for the processing of commitment proposals by economic agents in the framework of investigations under Procompetencia’s general law. We appreciate the opportunity to comment and commend Procompetencia for its transparency. We submit this comment based upon our extensive experience and expertise in antitrust law and economics.<sup>1</sup>

**GENERAL COMMENTS**

Overall, we commend Procompetencia’s desire to implement a settlement program. There are numerous benefits associated with settling antitrust cases by consent, including reducing administrative costs, reducing the time to curtail anticompetitive behavior, and eliminating the uncertainty regarding the course and outcome of a fully contested disposition. We also commend Procompetencia on its proposal to disclose settlements for third-party comment prior to final adoption—a

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<sup>1</sup> The Global Antitrust Institute (GAI), a division of the Antonin Scalia Law School at George Mason University (Scalia Law), is a leading international platform for economic education and research that focuses upon the legal and economic analysis of key antitrust issues confronting competition agencies and courts around the world. University Professor Joshua D. Wright, Ph.D. (economics), is the Executive Director of the GAI and a former U.S. Federal Trade Commissioner. John M. Yun, Ph.D. (economics), is the Director of Economic Education, Associate Professor of Law at Scalia Law, and former Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, at the U.S. Federal Trade Commission. Professor of Law Douglas H. Ginsburg is a Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Chairman of the GAI’s International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Associate Dean for Research and Faculty Development and Professor of Law Bruce H. Kobayashi, Ph.D. (economics), is a GAI Senior Scholar and Founding Director. Tad Lipsky is the Director of GAI’s Competition Advocacy Program, Adjunct Professor at Scalia Law, a former Deputy Assistant Attorney General for Antitrust, U.S. Department of Justice, and a former Acting Director of the Bureau of Competition, U.S. Federal Trade Commission. GAI gratefully acknowledges substantial assistance in the preparation of this Comment provided by Scalia Law students Taylor Alexander, Kristen Harris, Tyler Phelps, Travis Royer and Thomas Rucker.

near-universal practice. This disclosure is desirable to assure that the agency considers all significant ramifications of the conduct in question and the likelihood that the proposed relief would successfully address the agency's remedial objectives.

First, we recommend that Procompetencia give careful consideration to the benefits and costs of consent decrees. In many jurisdictions, settlement is by far the predominant mode of final disposition, as distinct from fully contested resolutions.<sup>2</sup> This offers a tremendous efficiency for agencies, since they are able to pursue many more cases than would otherwise be possible if they expended scarce enforcement resources on fully contested proceedings. Thus, the benefits of competition obtained through the agency's enhanced capacity to challenge unlawful conduct can be extended more broadly throughout the jurisdiction's economy.

Frequent use of settlement, however, also involves potential costs. Thus, any benefits from settling may be outweighed if, for example, settlements require the agency to monitor and supervise the competitive conduct of business enterprises for an extended period of time.<sup>3</sup> Additionally, over-reliance on settlements can be problematic if it inhibits sound development of the law. One desirable aspect of fully contested cases is that decisions are ultimately rendered in close accord with established law, rather than on the basis of legal positions that might reflect compromise between the agency and the parties.<sup>4</sup>

It is imperative that the agency not use settlements to avoid a careful analysis of the economic justifications for the affected conduct, and an assessment of the competitive effects of imposing relief as agreed between the agencies and the parties. In fact, to the extent possible and feasible, we recommend that Procompetencia issue some written description of the relevant economic evidence relied upon by Procompetencia when the final settlement is announced. The public interest in vigorous competition should always be the key consideration. Furthermore, it is important to strike the appropriate balance between litigation and settlement, keeping in mind the

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<sup>2</sup> See Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, in 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177 (Nicolas Charbit et al. eds., 2012); see also A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13 (1995) (describing antitrust enforcement as having "moved markedly along the continuum from the Law Enforcement Model toward the Regulatory Model").

<sup>3</sup> See Joshua D. Wright & Douglas H. Ginsburg, *Costs and Benefits of Antitrust Consents*, George Mason University Law and Economics Research Paper Series No. 16-42, (Oct. 27, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2860174](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860174).

<sup>4</sup> See Ginsburg & Wright, *supra* note 2, at 178.

consequences of an overreliance on consent decrees in antitrust cases.<sup>5</sup> For example, excessive use of settlements can weaken the deterrent effect of conventional enforcement depending upon the remedies the agency is able to obtain through a consent resolution.

Second, we recommend that the proposed conditions to present a commitment proposal, as described in Chapter II, Article 3, take into account that a critical element of successful settlement negotiations is flexibility. Therefore, no time limits or predetermined conditions should restrict Procompetencia's willingness to consider a proposal for settlement. Indeed, settlement may be appropriate and efficient for all parties regardless of the stage of a proceeding. Thus, we recommend removing Chapter II, Article 3, numeral 2 entirely, which requires a proposed settlement to "be submitted before Executive Directorate notifies the parties of the investigation and file the formulation of arguments on the evidence presented." We further recommend removing language in Chapter III, Section I, Article 5, which states "and before the Executive Directorate notifies the parties of the investigation file for the formulation of allegations about the evidence presented."

We also recommend that any conditions for settlement eligibility be deemed relevant to the relief required, rather than being set up as a complete ban on entering settlement negotiations. The limitation in Chapter II, Article 3, numeral 1, which prohibits an economic agent who has been previously sanctioned by Procompetencia for similar conduct to that investigated from entering a compromise proposal, suggests that settling with parties who have committed prior infringements will be less efficient than a fully contested case. However, while prior competitive behavior—even very serious violations—may warrant more stringent conditions in a later settlement, it does not necessarily alter the desirability or efficiency of negotiating a settlement in such cases. Therefore, we recommend removing Chapter II, Article 3, numeral 1 in its entirety.

In Chapter III, the proposal provides a number of detailed requirements and procedural steps as part of the consideration of any settlement. Again, we encourage Procompetencia to adopt a very flexible approach to the consideration of settlements. It should carefully specify its main remedial objectives, request any relevant information from the parties proposing the settlement, and otherwise seek to facilitate and streamline the process of reaching a settlement. The key elements in negotiating a

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<sup>5</sup> See Wright & Ginsburg, *supra* note 3.

settlement are: (1) the agency's ability to specify its view of the respondent's conduct—specific reasons why the agency considers it anticompetitive and illegal—and the key remedial objectives that a settlement must address, and (2) the parties' ability to persuade the agency that the proposed settlement addresses agency concerns and is otherwise in the interests of maintaining and/or restoring competition. The parties should be willing to provide the agency with any information reasonably considered relevant to these questions. Moreover, given the structure of the agency, with significant authority and discretion lodged with the Executive Director, it seems likely that the Executive Director can rely upon frequent and direct communication with the respondent and the Board of Directors to identify and anticipate questions about the settlement, and to further assure that the process of arriving at a final agreement is efficient and expeditious. Accordingly, we urge the agency to employ maximum flexibility in its treatment of settlement proposals, up to the time when the agreement between the Executive Director and the parties is presented to the Board and/or to the public for comment prior to final approval.

Third, we recommend that in any settlement, Procompetencia specify the intended preclusive effect. For example, the agency should indicate whether a settlement may be used by non-parties to establish presumptions of illegal conduct in other proceedings involving the settling parties. This eliminates a potential source of future disputes involving the agency, the settling parties, and third parties who may be affected by the provisions of the settlement after it has become final—possibly at some future date when it may be more difficult to discern the intended effect of the settlement. Additionally, the agency should bear in mind that reduced transparency and predictability inherent in consent decrees creates uncertainty for third parties and may chill procompetitive behavior ultimately to the detriment of consumers.

Finally, in Section II, Article 10, numeral 4, the proposal refers to “complementary measures,” without providing guidance for the meaning of the term. We recommend the agency clarify its definition of “complementary measures” in order to allow parties to provide comment.

## CONCLUSION

We appreciate the opportunity to comment and would be happy to respond to any questions Procompetencia may have regarding this comment, or to assist Procompetencia in any other appropriate manner.