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European Commission
Directorate-General for Competition
Unit G5- Cartels V

Settlements package
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ANTITRUST: SETTLEMENT PROCEEDINGS FOR CARTELS – DRAT LEGISLATIVE PACKAGE

The Confederation of Finnish Industries EK is the leading business organisation in Finland. It represents the entire private sector, both industry and services, and companies of all sizes. EK's member companies represent more than 70 percent of Finland's gross domestic product and over 95 percent of exports from Finland. EK has 35 different branch federations with a membership of 15.000 companies in all, which employ about 900 000 employees.

EK supports more efficient and effective antitrust enforcement in Europe. EK welcomes the Commission's proposal to enhance and simplify the administrative proceedings provided that the proposal will ensure more effective decision making whilst safeguarding due process. EK supports the aim of the proposal that is to reduce litigation in cartel cases and, thereby free resources to pursue more cartel cases. However, the new procedure should offer substantial, real, and guaranteed benefits for companies in order to be attractive to encourage a large number of settlements early enough to save the Commissions or companies costs or resources.

The proposed procedure could increase incentives for companies to settle and make use of the leniency policy, since a combination of leniency and settlement reductions could be attractive to companies willing to cooperate with the investigation. However, EK has some doubts whether the proposed procedure for settlement would lead to a more

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efficient antitrust decision-making unless some substantial modifications and clarifications are made. The settlement procedure will be effective only if there are clear and binding conditions for the fine reduction. The companies must be able to determine correctly their position. There also needs to be a certain level of certainty as regards the possible outcome of the settlement procedure. The proposal leaves a very broad margin of discretion for the Commission and thus leads to uncertainty for companies.

Draft Commission Notice

According to the draft Notice the Commission enjoys broad discretion to decide whether or not a case is suitable for a settlement. The Commission can also quite freely decide the modalities of proceedings, even though the proposal contains some indications about the elements that the Commission would take into account. At the same time the defendant needs to agree to a simplified statement of objections and to renounce its right to request access to the file and an oral hearing. The broad margin of discretion regarding the admissibility and progress of settlements, the extent and timing of evidence disclosure and the unclear opportunities to discuss and influence objections might weaken the willingness of companies to enter into a settlement procedure.

The proposed settlement procedure requires that the defendant submit a written settlement submission in which it acknowledges their liability for the infringement and also summarizes the infringement and its duration. The effectiveness of the proposed system is seriously undermined if such self-incriminating statement could be used in subsequent private damages actions before national courts. EK would also like to point out that such a submission is likely fully discoverable in US civil litigation and may be very harmful in that process. Therefore, the Commission should ensure the confidentiality of settlement information and provide for the possibility of an oral submission similar to the procedure for oral company leniency statements.

The proposal does not make clear whether the Commission is prepared to settle with willing defendants if there are some defendants that are not ready to enter into settlement discussions. If only some defendants settle, the handling of the cartel case will most likely not be much simpler and faster.

The draft proposal allows the Commission a very broad margin of discretion in setting the fines as long as it does not exceed the absolute limit of 10 percent of worldwide consolidated turnover. The proposal does not give indication as to what this percentage would be. Also the fact that the final decision is taken by the College of Commissioners creates uncertainty. EK would like to point out that the uncertainty regarding the reduction in fine discourages companies from cooperating

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as they can not assess the advantage of cooperation. Therefore, the Commission should provide an express reduction percentage in the final version of the notice.

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