ALLEN & OVERY

December 21st 2007

Dear Sirs

Please find attached our comments to the draft Commission Notice on the conduct of direct settlement proceedings in cartel cases.

With our best regards,

Yours sincerely

Allen & Overy LLP

# RESPONSE DATED 21 DECEMBER 2007 TO

## Commission of the European Communities

## DG Competition

Consultation on the draft Commission Notice on the conduct of direct settlement proceedings in cartel cases.

**DG Competition Draft Commission Notice on the conduct of direct settlement proceedings in cartel cases**

We very much appreciate the opportunity given to all interested parties to provide comments on the draft Commission Notice on settlement proceedings (hereinafter **draft Notice**) and particularly on those elements which can significantly influence the decision of undertakings involved in a cartel to cooperate with the Commission.

We support the Commission in its efforts to provide incentives for parties to settle, as well as enhancing good faith cooperation and procedural efficiency (in terms of minimising costs and delays and utilisation of resources beyond the investigation phase).

The draft Notice clarifies that settlement would enable the defendants to enter into discussions with the Commission by acknowledging their responsibility for the anticompetitive conduct in return for a reduction of fine. If there is a possibility of a significant discount of fines because an undertaking agrees to a direct settlement, this is something undertakings will consider seriously, provided that such a procedure leads to a fair and secure outcome. Therefore, a direct settlement system will have to provide for a procedure that safeguards the different aspects of the principle of a "fair trial". This includes: (i) the defendants' right to be fully informed about the objections raised by Commission, (ii) the Commission's duty to investigate fairly the facts of the case and (iii) the need for a fully reasoned decision with regard to the fine to be imposed and the reduction applied to the settling parties.

Bearing in mind the above mentioned principles, our comments aim to provide some suggestions for additional guidance/clarity about the way the procedure should work in practice in order to increase legal certainty.

## 1. General comments

1. We welcome the introduction of a settlement procedure because it fulfils a need of the business community. In addition, what may not seem evident at first but may well be the consequence of opening a settlement procedure, is that it will help due process in general and in leniency cases in particular. The procedure broadens the opportunities for contact with the Commission at the investigatory stage of the proceedings. Because these discussions will revolve around the (quality of) the evidence, these contact will help filter out exaggerations and tactical behaviour by applicants for leniency. It will avoid that only immunity applicants are allowed open communication with the Commission.

2. If the aim of the settlement proceedings consists mainly of achieving procedural efficiency, it is not clear why the Commission has to obtain an acknowledgement of liabilities by the settling parties. Instead of this, we suggest that the Commission could consider settling the case on the basis of waivers by the parties of some of their procedural rights.

3. Furthermore, we consider that an acknowledgement by the parties of their respective liabilities constitutes *per se* a procedural limitation for the settling parties from further applying for commitments (Regulation 1/2003, Article 9). As a matter of fact, in the commitment procedure, undertakings do not admit any past wrongdoing but just offer commitments as to future conduct.

4. The procedure will only work well if the Commission does indeed in practice provide equal opportunities to the parties involved. This will be difficult to put into a framework like the draft Notice. The relatively open-ended nature of the draft Notice is therefore in our view understandable. To improve legal certainty, we suggest that the Commission might consider publishing an internal code of conduct and fix internal protocols for settlement discussions on its website.

## 2. Specific comments on the draft Notice

*Paragraph 5*

The Commission would enjoy broad discretion in deciding whether or not a case may be suitable for settlement. The draft Notice contains some indications about the elements the Commission would take into consideration to determine whether a case is suitable for settlement. In particular, it cites the probability of reaching a timely common understanding about the scope of the Commission's case against the defendants, the prospect of achieving procedural efficiencies through the settlement process, and the value of the case as a precedent.

Discretion given to the Commission in this regard appears to be too broad. The overriding principle coming out of the draft Notice is that the Commission (but not the parties) will retain full discretion throughout the whole settlement proceeding. We consider that transparency on this issue (also through the elaboration of further specific criteria for limiting such discretion) will be crucial in inducing early cooperation, leading to a settlement.

*Paragraph 6*

The parties have no right to settle or duty to request a settlement. They may only indicate, at an early stage of the investigation, their interest in exploring settlement. The draft Notice remains silent on whether a settlement request will be available in cases where only one undertaking is prepared (willing) to settle the case. It is therefore not sufficiently clear whether the Commission will be prepared to settle with willing defendants even where some defendants are not prepared to enter into settlement discussions. In this respect, the draft Notice fails to make clear whether the Commission would reward with reductions in fines such individual defendants who offer settlement. Denying settlement in such cases just because some undertakings are unwilling to settle would create a situation in which the outcome for an undertaking is dependent on the other players in the game.

In our view, in order to provide legal certainty, the draft Notice should indicate clearly that settlement proceedings do not require a minimum number of participants.

We believe that settlement discussions should not be denied by the Commission without cogent reasons.

*Paragraph 7*

An aggravating circumstance should in principle in our view be related to the facts of the case itself and/or the obstruction of the investigation. The wording of this part is too strict

especially with reference to disclosure to other parties in the same case. We think the only logical sanction against a breach of confidentiality should be a reduction, or revocation of, the settlement discount for parties who breach the terms and conditions of the settlement procedure.

*Paragraph 8*

It is not clear whether the request to settle by an undertaking belonging to a group affects the whole group involved in the cartel.

In our view, the Commission should allow "holding companies" to opt out of a settlement if they want to challenge joint liability for the conduct of their subsidiary. In such a case, we would propose that a subsidiary should be able to settle, while the parent company would not be bound to the admissions on the facts made by the subsidiary.

*Paragraph 9*

We consider that, in exceptional circumstances, a settlement should be available following a statement of objections as well. It is not unheard of for the scope of a case to be expanded or reduced following the hearing. If this happens, there may be renewed interest from both sides in a settlement. Furthermore, the calculation of the fine under the new guidelines in particular cases may well be so complicated (because of the data collection or because of technical legal arguments about a limitation on the competence of the Commission to impose a fine in all fact that may be raised) that a procedural logic for a settlement exists at this stage of the proceedings.

*Paragraph 12*

It is not clear whether the joint representative "shall" or "may" be appointed: in the draft Notice, the expression used is "may be appointed joint representative" while in the draft Regulation, the expression used is "shall appoint a joint representation". We consider that it would be more appropriate for undertakings to be free to decide whether to appoint a joint representative or to individually request a settlement.

*Paragraph 13*

It is unclear when the window for settlement would be open and to what extent the Commission's initial findings should be formalised. It would be preferable for the Commission to enter into direct settlement discussions with the parties as soon as the facts are sufficiently established. Consequently, this provision might drastically reduce the period available to apply for leniency. Moreover, the reference to point 11 puts the deadline for leniency applications in the hands of the Commission, in contradiction to the Leniency Notice (which does not rule out the possibility of submitting a leniency application even after the issuance of a statement of objections). We consider this a restriction of the rights of defence which should be avoided, in particular by allowing each individual party to settle, irrespective of the other parties.

*Paragraph 14*

Settlement proceedings will involve discussion on a bilateral basis of the scope of the

objections and the likely fine. The tone and the content of this paragraph suggests that this is again intended to provide the Commission with an unfettered discretion. We consider that this is a one-sided process, administered by the Commission primarily with a view to advancing its own efficiency.
We suggest that the Commission's approach should be that all cases are suitable for a reasonable settlement, and that the Commission should agree to carry out settlement discussions in good faith with any parties.

*Paragraph 17*

The draft Notice deals with the final time limit which the Commission will provide the settling parties to submit a final written settlement submission. This submission is the result of settlement discussions and consists in an irrevocable offer to settle which has a profound impact on the undertaking's legal position and financial exposure. The time limit imposed on the parties should allow the parties enough time to exercise their rights of defence and therefore to complete the full preparatory work which would normally be done in order to submit a final written settlement submission. For these discussions to have a chance to succeed, transparency, fairness and equal treatment are vital.

We foresee a problem in practice in relation to the calculation of fines, namely how turnover will be calculated and determined. Companies may fear that other parties have based their calculation on different criteria leading to disproportionate fines. Ideally, a settlement should refer to a standard calculation scheme applied to all parties in the same case, the contents of which can be scrutinised by external auditors. To improve legal certainty, we recommend that the Commission follows the existent 2006 Fining guidelines.

*Paragraph 20*

The draft Notice does not offer a sufficient degree of protection of the confidentiality of the written submissions and disclosures that may be made by settling parties in the course of settlement discussions. Nor does the draft Notice expressly state that such a written submission will not be used against the parties which decided not to settle. Moreover, it is not specific, as it should be, whether such a submission is discoverable in civil litigation. We suggest that it should not be. It would be advisable for the Commission to provide for the possibility of an oral submission to be recorded at the Commission's premises, as it happens for leniency statements.

As part of the process of building enough trust to allow settlement to occur, the Commission should have two separate teams handling the case and the settlement process. Discussions that take place as part of settlement negotiations should be on a "without prejudice" basis and remain strictly confidential. They should not be used by the Commission against the settling party if no settlement is ultimately reached. At the same time, the information provided to the Commission in the context of settlement negotiations should not be used by anyone else against the settling party, including complainants and national courts before which actions for damages might be brought / pending.

As stated, in our view undertakings are only likely to accept a settlement if the fine is calculated in the greatest detail. An "indication of the maximum amount of the fine" does not seem to provide sufficient legal certainty in that respect.

*Paragraphs 21 and 27*

It is not clear whether the acknowledgements and confirmations provided by the parties in view of settlement require formal acceptance by the Commission before the adoption of the statement of objections or whether the Commission only endorses the request for settlement in a simplified statement of objections. We suggest that the Commission formally adopt a decision either endorsing or rejecting the settlement before the statement of objections and set a time limit within which such decision must occur.

*Paragraph 27*

This paragraph explicitly states that the Commission may legitimately adopt a statement of objections which does not endorse the parties' settlement submissions. It again appears that the Commission retains unilateral discretion not to endorse a settlement submission made by a party after having participated in discussions with the Commission. From the perspective of legal certainty, we consider this discretion excessive and therefore we strongly recommend that the statement of objections adopted by the Commission to reject the settlement should contain a full reasoning for the Commission's choice.

*Paragraph 29*

The draft Notice sets out that the final decision lies with the College of Commissioners. Respecting the principle of collegiality of the Commission's decisions means that the College of Commissioners may legitimately depart from the parties' submissions or the results of their discussions with the Commission case team up to the final decision. Consequently, the Commission is constrained by the fact that the final decision lies with the College of Commissioners. Therefore there is no legal certainty for the parties about the outcome of settlement proceedings. We consider that undertakings need to know that the Commission's offer to settle an infringement is fully backed by the College of Commissioners.

*Paragraphs 30 and 32*

In exchange for the defendant agreeing to a settlement, the Commission will grant a reduction of the fine, expressed as a specific percentage of the amount of the fine. In the light of past practice under the original and current Commission Leniency Notices, we consider that it would be appropriate for the settlement reduction to be around 10 to 20%.

*Paragraph 33*

We welcome the opportunity for undertakings to add the leniency reward to the settlement reward. The proposed settlement procedure could increase the incentive for undertakings to come forward and make use of the leniency policy, as a combination of both sets of reduction could be extremely attractive to companies who are willing to cooperate with the Commission's investigation. In fact, as the leniency programme is intended to uncover anticompetitive conduct and the settlement system is designed to facilitate the prosecution of such conduct, they serve different purposes. Consequently, the undertakings should also be able to benefit from a direct settlement, since this will significantly ease the burden on the Commission and guarantee swift and timely punishment.