HOWREY LLP

Brussels 20 December 2007

Draft Settlement Notice

Howrey Comments

Summary

Howrey welcomes in principle the institution of a system for settlement in EC cartel investigations.

We believe that a more efficient way to promote settlements would have been to integrate the settlement procedure with the Leniency Programme.

However, since we understand the Commission has excluded that option, at least for the time being, we will focus on the existing Draft Notice and how to strengthen the incentives for companies to settle,

Key elements in this respect are (i) transparency, (ii) generosity, (iii) certainty, and (iv) containment of collateral exposure.

Our main recommendations and comments are:

- Given the link to the Leniency Programme the Commission should ensure this first stage is administered in a more transparent, predictable and generous manner than some recent cases might suggest;
- It should be for the Commission to (i) propose the appropriate fine and (ii) disclose the exact formula employed in order to reach that fine;
- Settlement "Discussions" with the Commission should be meaningful and allow parties to take a position on the allegations made against them;
- Parties should not be required to make a written admission of guilt.
- Should the Commission insist on a written procedure, the settlement submission should be a skeleton outline only;
- Once the procedure has started the Commission should be committed to make its best efforts to come to a result;
- The Commission should not reject settlements simply because one or only a few companies refuse to settle;
- Full disclosure of the evidence should be made before final settlement; and

- The settlement reduction should amount to at least 30% of the fine that would otherwise be imposed.

1. *Introduction*

1.1. We welcome the opportunity to comment on the Commission's recent Draft Settlement Notice.[1] Howrey is fully in agreement with the basic premise of the Commission's initiative that an appropriate system for direct settlements could lead to significant improvement of cartel enforcement in the EU. The finality that such a mechanism will provide will also benefit the offending undertakings provided the incentives to settle outweigh the potential downsides. As such, it would command wide acceptance in the business and legal community. However, Howrey is concerned that not only are the incentives to settle insufficiently attractive in the present form being proposed, but also that certain aspects of the package could in fact undermine the very objectives they are intended to promote. To that end we suggest a number of substantive amendments to the draft proposals.

1.2. We also have an important preliminary observation to make on the consultation exercise. Although the Commission sees the settlement procedure as a complement to the Leniency Notice, it insists on maintaining a strict operational separation between the two. In our view, settlements cannot be isolated from the Leniency programme. In most other jurisdictions the rewarding of cooperation in the fact-finding process and readiness to "settle" are combined in an integrated system which allows the authority the flexibility to adapt the incentives in a manner which maximises the attractiveness of the cooperation option and thus the effectiveness of the enforcement programme. The two naturally go hand in hand and without an aligned approach, the systems may well end up having a chilling effect on each other.

1.3. We consider that a more effective approach would be to integrate the two in a single system. Although we understand that the Commission has ruled out a combined fine reduction/settlements mechanism, we hope that such a system be considered in the future.

1.4. Our more immediate objective is to provide an assessment of the current draft on its merits. Our main conclusion is that the system as suggested risks creating such uncertainties for companies accused of cartel behaviour that if implemented in their current form the settlement proposals might in fact be counterproductive and provide perverse incentives to stay out rather than cooperate.

1.5. In order to reduce the likelihood of this unintended but quite possible scenario occurring, we offer certain practical suggestions that could make the proposals more attractive without redesigning their basic architecture.

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[1] Draft Commission 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 of 26 October 2007.

2. *The system must provide attractive settlement incentives*

2.1. We agree with the Commission (and probably virtually all other interested parties) that a procedure for settlements is a sound idea. However, for the process to be accepted and therefore successful, settling must be more attractive than contesting for the parties in those cases where their participation in a cartel infringement is likely to be established. In other words, the Commission must provide sufficient incentives to make settlement the most, if not the only, reasonable option for au undertaking facing the decision to "fight or fold". Different considerations of course apply where the evidence of involvement is tenuous: "settlement" should not be seen as the machinery to obtain admissions of guilt where this is questionable. As under the present system, where the Commission accepts that it has no reliable proof of a cartel, it should terminate the case based on the merits and not hold out an offer to the parties to "settle" on favourable terms simply in order to save further expense and to secure closure.

2.2. Parties will measure the pros and cons in order to determine whether or not to settle. In virtually all cases companies faced with a solid accusation of involvement in a cartel regard the decision as business driven and to be taken on realistic rather than quixotic grounds. Their overriding objective is to emerge from the cartel investigation having contained the – possibly worldwide – financial and reputational damage to the maximum possible extent.

2.3. In the context of a Commission investigation under Regulation 1/2003, the advantages of settling would essentially be the following:

- A sizeable reduction of the fine;
- Lower procedural costs;
- Containment of reputational damage through adverse publicity; and
- Certainty for financial and business planning purposes.

2.4. The potential "downside" of settlement would include:

- Abandonment in practice of the possibility of any appeal;
- The collateral consequences of any admissions in terms of increasing exposure to civil damages and/or to investigation by other enforcement authorities; and
- Earlier liability to pay fines and damages.

2.5. There is general agreement inside and among the business, legal and enforcement communities that the characteristics of a successful settlement programme are:

- Transparency;
- Generosity;

- Certainty; and
- Containment of collateral exposure.

2.6. We do not believe the Commission would disagree with this assessment and need deal only briefly with each of the above.

2.7. **Transparency**: Potential settling parties need to know both their exposure in terms of the potential exposure if they do not settle and the benefits that will accrue if they do. Not only is it critically important that there should be sufficient disclosure of the core evidence and the Commission's theory of the case, but it should also be clear how the proposed penalties are being calculated and what the discount will be. Without sufficient clarity as to process and outcome, parties will be reluctant to engage in serious settlement discussions.

2.8. **Generosity**: If the parties do not see a clear advantage in settling rather than contesting, they will not be attracted to settle. The Commission will thus have to offer terms that make the decision to settle an easy one. At present, the Commission has not even indicated with any clarity what "going rate" it envisages for the settlement discount.

2.9. **Certainty**: As has been pointed out by leading enforcement figures, it is axiomatic that parties come forward to cooperate in direct proportion to the predictability and certainty of the outcome. This insight applies to their treatment at both the "leniency" and "settlement" stages. And once a party commits it has a right to expect that the commitment will be reciprocated. The Commission should not reserve to itself so much room for manoeuvre that the confidence of potential settling parties in the procedure being fairly administered is impaired.

2.10. **Containment of collateral exposure**: Parties will be deterred from considering settlement if the collateral consequences in terms of exposure to civil damages and enforcement by other agencies outweigh any advantage in the Commission's procedure. In particular, the generation of discoverable "confessions" that could be used in civil proceedings will act as a major deterrent to any potential settling party, as the Commission has acknowledged in the implementation of its leniency programme.

2.11. We will come back to these incentives below as they constitute the backbone of a successful settlement system.

2.12. These essential characteristics have to be incorporated into the Commission's proposed settlement procedure in the form of adequate incentives in order to attract "takers". Without these guarantees, there will be little incentive to settle and the Commission risks forfeiting the opportunity provided by a settlement procedure of making significant procedural economy gains.

2.13. As the current proposals stand, we are concerned that in a number of significant respects the shortcomings of the Draft Settlement Notice would lead to the opposite of the intended effect and could even provide perverse incentives for parties to stay out altogether rather than even consider the "first stage" of cooperation under the Leniency Notice.

2.14. We suggest that the Commission take greater account of three main elements in order to improve the Draft Notice:

- The link to the Leniency Notice;
- The link to the Fine Guidelines; and
- The potential perverse effect of the Settlement Notice actually creating incentives not to cooperate with the Commission.

2.15. A party facing cartel allegations needs to make a rapid decision whether to cooperate with the Commission or not in order to obtain a reduction of a fine. Time is of the essence. Before the Draft Settlement Notice, the decision for a would-be leniency applicant may not have been altogether easy (especially since the threshold for a reduction was raised in the last leniency Notice of 2006[2]) but it was at least presented with straightforward options; hold or fold. Taking the latter route would mean cooperating with the Commission and providing value added evidence. The logic of such a course did not however imply finality. Although in such circumstances the possibility of escaping a fine altogether would be minimal, many companies securing a discount under the Leniency Notice went on to challenge the Commission Decisions in the European Courts, often with some success in terms of an increased reduction.

2.16. For that reason, the interplay between the Leniency Notice and the Fine Guidelines absent a settlement system is limited. The leniency programme of course depends on an effective fining policy, but from a company perspective the two can be dealt with separately: "cooperation" did not mean acceptance of the fine.

2.17. In a settlement system, that would no longer be the case. Before applying for leniency, a company would need to assess the consequences of its cooperation not only for the first stage but in the context of the settlement procedure as well. Although the Commission insists on a separation of the two stages, the change in the balance of the incentives (and the effect the realisation of the implications will have on the strategy of the parties) will need to be factored into its calculus.

2.18. Unless the Commission has the incentives to cooperate at *both* stages exactly right, companies might see the opportunity to game the system to their advantage. The delicate equilibrium the Commission will need to achieve lies in the following conundrum: how does it ensure that the settlement discount on offer is transparent and generous enough to attract companies to the discussion table, yet at the same time not have the perverse effect of deterring them from coming in for leniency in Stage One? Rather than participating in the race for the graduated range of percentage leniency discounts, success in which implies the provision of a cascade of added value evidence that will make the case against all the cartel participants unassailable, companies could work out an alternative scenario: wait and see what the Commission can come up with in the expectation the other parties might do

[2] Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C 298/17.

the same, hope that in the absence of a viable "Second in" (30-50 per cent reduction) candidate to corroborate the oral statements of the immunity applicant the Commission will have to either: (a) drop (or significantly limit) the charges for want of independent evidence; (b) take the risk of proceeding with a weak case that could demolished with relative ease; or (c) have to offer greater aggregate rewards at the settlement stage to attract interest in settlement than it would have had to give in aggregate by way of leniency discount plus settlement rebate if the parties had played the game according to its expectations.

2.19. The delicate operation of balancing the incentives is of even more critical importance with the introduction of the new Fine Guidelines, which could result in a very significant increase in the general level of fines, in particular for cartels of long duration. As we will explain in more detail below, the new Commission fining policy is still untested in Court, and will remain untested for a few years to come.

2.20. This reasoning may sound hypothetical, but in the light of recent developments in EC cartel enforcement the "stay out" scenario is by no means far-fetched:

- The Commission has become much stricter in administering leniency reductions since its 2002 Notice first appeared, and indeed the 2006 Leniency Notice is fairly explicit in recognising that the bar has been raised. A good recent example is *Gas Insulated Switchgear*[3], where the Commission rejected all the applications for a fine reduction and imposed one of the largest fines ever. With this in mind, companies and their lawyers might be more careful in the future before making an application for leniency that could lock them into damaging confessions while earning no reduction in return;
- A settlement procedure which is non-transparent offers ungenerous rebates or is subject to excessive discretion will not be attractive to parties either. We need not rehearse in detail (and express no opinion on the merits of) the recent *Lift and Escalators*[4] episode, in which 12 applications for annulment of the Decision are pending before the Court of First Instance. The parties claim to have been aggrieved by the Commission's mismanagement of their expectations in terms of a reduction for not contesting in the administrative procedure.

2.21. With the above in mind, the following plausible scenario could be imagined. A company is the subject of a surprise investigation by the Commission. Some limited circumstantial evidence indicating an antitrust infringement is discovered by the officials, but far from enough to establish a solid case on its own. The company conducts an internal review and finds significant additional evidence of the same type. It does not know what evidence the Commission may have already from an immunity applicant or may have been discovered at other companies.

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3 Case COMP/38.899 *Gas Insulated Switchgears*, Commission Decision of 24 January 2007, not yet published.

4 Case COMP/38.823 *Elevators & Escalators*, Commission Decision of 21 February 2007, not yet published.

2.22. In the past the prisoner's dilemma has worked relatively well to the Commission's advantage. Although the parties would all be better off if no one decided to cooperate, the possibility of up to 50% reduction for effective cooperation has often made companies fold one after the other. Once the Commission has two cooperating companies, it usually can make a solid case against all participants, although further cooperation may still merit some reduction if it adds value.

2.23. Given recent experience of stricter – and less predictable – application of the Leniency Notice however, suspected cartel participants may be less inclined in future to submit evidence at the leniency stage – the temptation of waiting and seeing what the Commission can produce will be greater. The risk identified by some enforcement officials is that unless the system is "tilted" to bring as many companies in as possible, they might all be reluctant to cooperate.

2.24. With an added settlement mechanism in place, the incentives to hold out could be all the greater. The Commission gives no extra incentives for early settlements, hence companies may benefit from playing a waiting game. Until the new Fine Guidelines are tested in court, the uncertainty as to their viability provides a clear disincentive to settling, whatever the strength of the evidence, unless the reduction on offer is really large. For less clear-cut cases, the benefit of finality will only outweigh the opportunity costs foregone if the reduction on offer is very significant indeed.

2.25. The Commission needs to strike a delicate balance to get the incentives right. While we believe that an integration of the Leniency Notice and the Settlement Notice would provide the flexibility needed for a much easier solution to the conundrum, we recognise that the Commission is strongly inclined towards keeping the separation. We would therefore urge the Commission to take care to ensure that the Leniency process is administered in a more transparent, predictable and generous manner than some recent cases and anecdotal accounts tend to suggest, otherwise the perceived uncertainty of outcome might have adverse effects on the settlement process as well. In the following, we will make a more detailed analysis of the problematic parts of the Draft Notice and make suggestions for improvements that do not upset the architecture envisaged by the Commission.

3. *The draft Notice – a case closure mechanism*

3.1. The Commission is clear on one point: the Draft Notice is not a dynamic investigative tool, aiming rather for procedural economy gains-basically a case closure mechanism. The Draft is an attempt to implement a system of unilateral commitment by parties to accept not only the facts and the assessment of the facts in terms of gravity and duration but also the fine levels. It is in effect a resurrection of the old (and discontinued) rebate for non-contesting the facts in the SO that used anecdotally to result in a 10% discount. This discount was ostensibly abandoned in the 2002 Leniency Notice since it had not stopped the parties to the procedure from banking their rebate and contesting the decision in the Court of First Instance.

3.2. Instead of merely not contesting the "facts", the Draft Notice now requires the settling parties to produce a written confession statement including:

- An admission of the facts;
- An admission that the facts constitute an infringement of Article 81 EC;
- An admission of duration; and
- An indication of an acceptable fine level (in effect conceding the legal entities responsible, value of sales, gravity, entry fee, aggravation, mitigation, sufficient deterrence, basis for turnover cap and leniency.

3.3. The efforts of the Commission to end the unsatisfactory situation of companies maximising their discount under the Leniency Notice but then systematically applying to the Court of First instance are understandable. It seems likely that for all practical purposes the Draft Notice will rule out appeals unless the Commission commits egregious procedural errors, breaches its obligations under the Settlement Notice or discriminates between parties to the proceeding.

3.4. Parties entering into the settlement process will do so in the knowledge that to all intents and purposes they are waiving their rights to contest the decision in court. That is positive as it goes to the whole purpose of the settlement system, but it means that the incentives to settle must be all the greater to compensate.

4. *The proposed settlement procedure is likely to prove attractive only for the clearest infringements*

4.1. As currently envisaged, the prospects for employing the settlement procedure successfully will no doubt be greatest in an "open and shut" case (the question of the untested new Fine Guidelines aside). Companies would realistically assess as low their chances of contesting the gist of the allegations and conclude that their best option is to consider a fixed settlement reduction.

4.2. The Commission indicates in the Draft Notice that it will encourage selecting especially those cases suitable to engage in settlement discussions, stating that "*account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of the factors such as the number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts*".

4.3. However, in less clear cut cases (especially with the untested new Fine Guidelines – see below at 12) parties might well find it tempting to try their luck and choose to contest the Commission Decision in the hope that even if an adverse decision is adopted, they might obtain a larger fine reduction by going to Court rather than opting for a fixed settlement reduction and losing its possibilities for an effective appeal (see also below).

4.4. Under the limited case closure system proposed, the settlement procedure could well end up being used only for the most flagrant hardcore violations where the evidence assembled is so overwhelming the Commission would have had little difficulty proving its case anyway. If this happens, the Notice might not in the end achieve the hoped for procedural efficiencies. A more transparent and effective settlement procedure could alter this negative outcome by creating incentives for parties to cartel infringements to accept settlement proposals, even in the less obvious cases.

5. *The process is too discretionary*

5.1. In the proposed system, the availability of a settlement does not depend upon the volition of the parties. On the contrary, the Commission retains full discretion whether or not to offer a settlement option at all. In the case the Commission does offer settlement discussions, it still may discontinue them at any point (paras 5 and 15 of the Draft Notice).

5.2. As the Commission holds the *de facto* unlimited discretion in deciding whether or not to pursue and endorse a settlement, companies are expected to acknowledge incriminating facts and their related liability with an inherent risk that the Commission may withdraw at any time. Although some officials have recognized publicly that exercising this right after the parties have made their admissions other than in exceptional cases would mean the end of the system, the Draft Notice still provides this right and parties always need to take this risk into account.

5.3. **Suggestion: To make the settlement process more attractive, once the procedure has started the Commission should be *committed* to make its *best efforts* to come to a result. If, under exceptional circumstances, the Commission decides not to offer the companies a settlement, the Commission should state the reasons for the withdrawal of the process in a clear and transparent manner.**

5.4. The measure of the Commission's discretion is particularly apparent in cases where some but not all companies under investigation are willing to engage in settlement discussions. We will discuss this situation further below.

6. *The Commission, and not the parties, should make the settlement proposal*

6.1. Para 20 of the Draft Notice requires the would-be settling party to indicate the maximum amount of the fine it foresees the Commission imposing and which it would be willing to accept.

6.2. We do not see this counter-intuitive sequence of events as being viable in practice. Companies are unlikely to be willing to state their real "bottom line" in advance of making their final decision whether or not to accept the settlement. Even if the Commission does not see the procedure as one of negotiation, business people would view this as no more

than an opening shot in the procedure. It is difficult to believe that in every case applicants would forgo the opportunities of gaming the system.

6.3. Nor do we foresee many would-be applicants willingly committing their estimate of the likely fine in writing as the Commission proposes. The negative implications for any potential damages suits would render any such procedure deeply unattractive. We come back to this when discussing the impact of written system in Section 8.

6.4. **We suggest that (a) it should be for the Commission to propose the appropriate fine and (b) the exact formula for reaching that fine should be provided to the parties.**

7. *The Commission should provide transparency for any fine calculations including the settlement discount*

7.1. Just as with the fine amount, we find it hard to envisage a situation where a party would accept high fine without knowing precisely how it has been calculated until the final Decision is rendered. Parties are entitled to know the case against them before they settle as the fine may create important spill-over effects. In related damages proceedings, for example, the percentage of value of sales used in the fine calculation may have a strong impact. Likewise, companies will be reluctant to accept party-specific fine uplifts (aggravation, mitigation, leniency, for example). Finally, a party would want to know the exact size of its settlement discount before taking a decision to settle, to measure the value of the discount against the procedural rights forgone.

7.2. The Commission should therefore always, in the settlement discussions, disclose its case including the nature and scope of the cartel, the party's involvement, aggravating or attenuating circumstances, as well as the exact formula and value of sales figures that will be used for the fine calculation.

8. *The Commission should commit to meaningful settlement discussions*

8.1. The Commission emphasises that settlements will be preceded by "discussions" not by "negotiations". It is important that these discussions, which essentially replace the right to be heard in normal proceedings, should be a two-way process. The parties must be allowed to respond to any objections raised against them, and have the opportunity to convince the Commission through dialogue and argument if parts of the objections are inaccurate. We therefore welcome recent statements by Commissioner Kroes indicating that the parties will indeed have an opportunity to affect the content of the SO.[5]

[5] N. Kroes, *Assessment of and perspectives for competition policy in Europe*, Speech/07/722, 19 November 2007.

9. *Parties should not be required to make a written admission of guilt*

9.1. Under the Draft Notice, the Commission will require both the declaration of interest and admissions of liability to be made by way of a Written Settlement Statement ("WSS"). The parties are asked to provide extensive and unequivocal confessions in writing.

9.2. The requirement of a WSS is a real disincentive for parties to settle and if the Commission insists on its retention it is very likely to jeopardise the success of the settlement process.

9.3. There is a major risk that a WSS may be subject to discovery in civil proceedings in the US, Canada, several EU Member States and elsewhere. Discovery is a crucial concern for any company operating in an international context and involved in an antitrust procedure. It is therefore likely to constitute a major disincentive for companies considering whether or not to express their interest in settlement. It is worth noting that while the oral procedure reduces substantially the risks of discovery, it may not necessarily provide a watertight guarantee that the underlying preparatory materials will be immune from discovery under all circumstances.

9.4. Discovery is all the more risky since once a party has made a WSS, it is *committed* to settle and cannot unilaterally revoke the WSS unless the Commission departs from the proposed terms of the settlement in the Statement of Objections or in the final decision. The Commission, on the other hand, retains complete freedom to stop settlement discussions at any time (see at 5 above). Companies are thus exposed to the real danger of finding themselves in the untenable position of having generated a discoverable confession that could still be subject to overseas discovery and destroy any civil litigation strategy even if they contest the Commission's charges.

9.5. The requirement of a WSS is not in line with the oral procedure of the Leniency Notice. There is no valid argument against extending the protection the Commission has granted for admissions of liability in the context of the leniency process to the settlement proceedings. The discrepancy is also surprising given the Commission's insistence that the system of oral applications is functioning well in the framework of the Leniency Notice. A requirement of a WSS could render nugatory the whole benefit of the oral procedure under the Leniency Notice.

9.6. Experience from other jurisdictions confirms that oral settlements are functioning well. A number of EU Member States, such as Germany, France and the United Kingdom (as well as the United States) have all adopted settlement procedures based essentially on oral procedure. In these jurisdictions, the settlement discussions are oral until a final, mutually satisfactory agreement is reached between the party and the relevant authority. We are not aware of any major disadvantages that these jurisdictions are facing due to oral admissions of liability.

9.7. Commission officials have justified the requirement of written admissions with the proximity in time to the SO and final Decision (a matter of weeks, if all goes according to

plan) and the need to have a written submission which parties can easily check with the SO so that there will be no doubt as to the compatibility of the SO with the WSS. These arguments are unconvincing for three reasons:

- A Commission Decision (even if based on a settlement) is not the same as a unilateral admission of guilt. The WSS will be much more powerful than the Decision in civil proceedings;
- The Draft Notice gives no guarantee that a WSS will be accepted (see above); and
- Coupling an oral settlement submission with the SO would not undermine the viability of settlement procedure.

9.8. We do not see any need for the WSS and indeed consider it would be an almost insurmountable obstacle to a meaningful settlement procedure. At the very least, if the Commission nevertheless decides to maintain the WSS, the parties should have guarantees that the Commission is willing to settle on the exact terms of the WSS (if it corresponds to the conclusions of the settlements discussions). In case that one or more parties are not willing to settle in the end, the Commission should still make its best efforts to settle with those who have provided a WSS. In our judgment however even these assurances would still not render the procedure any more palatable.

9.9. Unlike the Leniency Notice, the Draft Settlement Notice does not even purport to offer any protection, however imperfect, against discovery. The discoverability of these documents will be a disincentive to come in early, let alone to come in at all.

9.10. **We submit that the settlement procedure should proceed orally, if the parties so request. The concerns the Commission has expressed regarding an oral settlement submission do not outweigh the great risks of a written procedure. In any event, a system where the Commission – rather than the parties – makes the final settlement proposal would remedy whatever concerns the Commission may have had. Should the Commission insist (contrary to our strong urging) on a written procedure, the WSS should be a skeleton outline only.**

9.11. The Draft Notice states that WSSs would be made "*without prejudice*". If the settlement discussions break down the WSS would thus be withdrawn. For the reasons set out below, we are of the opinion that this does not provide sufficient guarantees for the parties in related proceedings[6]:

- There is no clear consensus whether or not a "without prejudice" would be considered discoverable in overseas proceedings;

[6] We refer to the submission of the American Bar Association sections, which provides a more detailed explanation of the complexities of "settlement privilege" and discovery in particular in transatlantic cartel investigations.

- The Commission provides no clear commitments to intervene in overseas proceedings to ensure protection from discovery;
- There is no express guarantee in the Draft Notice of confidentiality vis-à-vis third parties.

10. *The Notice should not reject settlements for the sole reason that one or only a few companies refuse to settle*

10.1. In the case at least one party decides not to settle, the Draft Notice is silent as to the consequences for both those parties willing to settle and for the opt-outs. This situation might not be a rarity.

10.2. In the case even one party to the cartel investigation is not interested in settling on the Commission's terms, the Commission will be obliged to draft a full Statement of Objections to that party and the efficiencies of a shorter procedure will be significantly reduced. Given its wide discretion, the Commission will likely be less tempted to allow / engage settlements in such cases. However, in particular in cases where settlement discussions are initiated, it would be unfortunate if the cooperating companies, who could form the vast majority, were precluded from settlement simply because a very few other companies (possibly for very good reasons) were unwilling to settle. Where the discussions have reached the stage of a WSS, a Commission withdrawal would be disastrous. Howrey submits that the fact some opt out should not compromise or limit the settlement process for others, even at an earlier stage where the Commission is considering whether to offer settlement discussions or not.

10.3. For the parties that ultimately decided not to settle, the question needs to be addressed to what extent the Commission can objectively guarantee that it will not use any information gathered during the settlement discussions in the SO and the final Decision. The Commission should guarantee equal treatment of all companies involved, even if some parties refuse to submit a final settlement submission. In addition, the draft Notice is unclear on the possible consequences for any company abusing the settlement discussions with a view to obtaining additional case "intelligence" without any real intent to settle.

10.4. The uncertainty surrounding the consequences of at least one company refusing to settle further reduces the incentive for parties to engage in a settlement procedure. As Commission Officials have previously indicated, refusing to endorse the settlement submissions of those parties that want to settle could indeed discourage parties in other cartel cases and in the end work counterproductively for the settlement system as an institution. This should be manifested in the Notice.

10.5. **We submit that, in addition to a Commission obligation to make its best efforts to settle, the Notice should clarify the criteria for cases meriting settlement discussions, as well as the procedure in case of settlements with some but not all parties. This clarification should ensure that the Commission does not refuse to engage in**

settlement discussions or actual settlements merely on the basis that one party refuses to settle.

11. *The need for full disclosure*

11.1. Besides lacking transparency as regards the fine calculation and the discount offer, the Draft Notice significantly limits access to the evidence. As the Commission envisages completing the investigation stage along normal lines before entering the settlement stage, we can see no reason not to disclose the evidence as per normal "access to file". To allow an undertaking effectively to make known its views on the facts, objections and circumstances relied on by the Commission (1) Article 10a (2) of the amended Regulation 773/2004 should be amended to impose a duty on the Commission to disclose the evidence supporting the objections ("shall" rather than "may") and (ii) the positive duty to disclose evidence at Article 15(1a) should not be qualified ("where appropriate" should be deleted).

11.2. The parties are supposed to select from a list the evidence they wish to review. A better approach would be to offer <u>all</u> the evidence for review. The draft Notice allows the Commission to determine the evidence of relevance for the parties, restricting their right to know the case against them or see potentially exculpatory material. In such cases, the parties may refer to the Hearing Officer but it is not clear what a referral to the Hearing Officer will entail or what remedies might be available.

11.3. As undertakings are expected to acknowledge that they have been "*sufficiently informed of the objections the Commission envisages raising against them*", it would be preferable to grant full access to file during the settlement negotiations.

11.4. It seems the Hearing Officer is intended to play a prominent role in settlement proceedings. If parties are to be able to call upon the Hearing Officer "*at any time during the settlement procedure in relation to issues that may arise relating to due process*"[7], the Hearing Officer's limited mandate[8] should be amended accordingly.

11.5. With a different procedure of integration with the leniency programme and earlier settlements, we believe access to file could be effectively simplified, with the Commission merely stating and providing the key evidence (of both inculpatory and exculpatory nature) on which its objections are based.

11.6. **In the proposed procedure, where the evidence will all be gathered before the settlement stage is even opened, we submit that full access to file on normal lines is appropriate.**

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7 Draft notice on the conduct of settlement proceedings, paragraph 18.

8 Commission Decision (EC) 2001/462 on the terms of reference of hearing officers in certain competition proceedings ('the Hearing Officer's mandate')

12. *The envisaged level of reduction may be insufficient – in particular as the new Fine Guidelines are untested in Court*

12.1. The settlement procedure is neither appropriate nor attractive as a test bed for the operation of the 2006 Fine Guidelines. No doubt the 2006 Fine Guidelines will eventually be challenged in Court. The question is how many settlement attempts will be made before the 2006 Fine Guidelines are reviewed by Court?

12.2. The maximum reduction offered by the Settlement Notice must take into account the many pending appeals of cartel Decisions – not only under the 2006 Fine Guidelines but also for the past few years of cartel enforcement – which saw a steep increase in fine levels. Ultimately, the Commission will need to test the confidence of parties to cartel proceedings in the Commission's enforcement. History shows that even before the steep increase, the CFI often reduced but rarely annulled cartel Decisions. Recent statements such as those of former CFI President Judge Vesterdorf indicate that the CFI is contemplating more active role in the assessment of the Commission fining policy[9]. A party will need to assess the chances of the fine imposed by the Commission being reduced in Court by a higher percentage than the settlement discount. The Commission must take also this into account when determining the potential size of reductions.

12.3. The Commission's Q&A Memorandum on the Draft Settlement Notice says that "*the expected reduction of fine under the leniency programme will be more significant than under the settlement procedure*". This seems to imply a modest reduction of 10-20%. We are concerned that such a reduction will not be sufficient to induce companies to abandon their chances of a successful appeal. Successful settlement schemes in other jurisdictions offer significantly higher discounts. In France, the *Conseil de la Concurrence* has offered discounts up to 90%.[10] There is no set percentage reduction under the UK OFT settlement discussions, but in the English, Welsh and Scottish Railway Limited (EWS) case a 35 % reduction was offered.[11] In the US, there is no standard discount but in general parties settling early are offered reductions of 30 - 50% off the bottom of the Sentencing Guidelines range.

12.4. We understand that the Commission does not foresee differentiating between settling parties on the basis of their perceived respective contributions to the economy of the procedure. This is probably logical enough under the limited case closure system that is

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9 E.g. Judge Bo Vesterdorf, Address at the Studienvereinigung Kartellrecht Conference (May 24, 2007), and Helmut Hauschild, *Kartellrichter fordert Haftstrafen für Manager*, HANDELSBLATT, June 19, 2007, *available at* http://www.handelsblatt.com.

10 Decision 04-D-65 of 30 November 2004 (where the *Conseil* offered a reduction beyond the normal statutory ceiling of a 50% discount in Article L. 464-2 (III) of the French code of commercial law.

11 See Lawrence and Sansom, "The increasing use of administrative settlement procedures in UK and EC competition investigations" [2007] Comp Law 163, pg. 166.

envisaged; any other solution could risk court challenge based on discrimination. However, we see no reason why the Commission could not offer a different level of discount from case to case, as long as the reduction is transparent (before final settlement) and justified.

12.5. **We would urge the Commission to offer settlement discounts of at least 30% (or more when appropriate) off the fine that would otherwise be imposed after leniency. As with the rest of the fine calculation, this percentage should be disclosed to the parties in the settlement discussions.**