Response to the Commission of the European Communities

DG Competition

Consultation on the draft proposals for settlement proceedings in cartel cases published on 26 October 2007

20 December 2007

FRESHFIELDS BRUCKHAUS DERINGER'S COMMENTS ON THE EUROPEAN COMMISSION'S DRAFT PROPOSALS FOR SETTLEMENT PROCEEDINGS IN CARTEL CASES

1. INTRODUCTION

1.1 Freshfields Bruckhaus Deringer welcomes the opportunity to comment on the European Commission's draft proposals for settlement proceedings in cartel cases (the ***Proposals***) published on 26 October 2007.

1.2 Our comments are based on our substantial experience of advising parties implicated in cartel investigations at both European and national level. The comments contained in this paper are those of Freshfields Bruckhaus Deringer. They do not necessarily represent the views of any of our clients.

2. OVERVIEW

2.1 We generally welcome the Commission's Proposals to allow for the possibility of settlements in cartel cases, in particular as these may allow for costs savings and potential reductions in fines, as well as providing for a more efficient disposal of matters. Our comments on the Proposals are set out below. The Annex to this paper sets out certain instances where we suggest that either the drafting needs to be clarified or corrected to avoid inconsistencies between the Notice, Regulation (EC) No 773/2004 and the FAQs.

2.2 While we support the objectives behind the Proposals, we believe that the Proposals are likely to be considered attractive to parties only where the facts under investigation are readily ascertainable, and where all (or, possibly, almost all) of the parties under investigation are prepared to settle. Parties are highly likely to take into account the likelihood and potential acceleration of follow-on damages litigation when assessing whether to seek to settle. The Proposals are therefore likely to be more attractive where the added exposure to civil claims is limited. As explained below, we also consider that, for many parties, the Proposals do not yet provide sufficient certainty or transparency for the process to be considered as an attractive option.

2.3 In order to increase the appeal of the Commission's Proposals, and hence to make settlement a useful tool in practice, the following issues should be addressed:

(a) the amount of the settlement reduction *must* be significant and readily ascertainable; and

(b) the procedures established by Regulation 773/2004 and supporting Notice need to be sufficiently *clear and detailed* to ensure that the parties can have confidence in the overall scheme of the settlement procedure. Clarifications and amendments are needed to mitigate some of the potential prejudice that will be faced by those entering into settlement discussions, or reaching settlement agreements.

2.4 We address these issues below. We have also suggested what we believe to be more practicable time-limits to those currently set out in the draft Notice.

3. THE AMOUNTS OF THE SETTLEMENT REDUCTION AND THE MAXIMUM FINE

Settlement reduction percentage

3.1 The success of the Proposals will depend to a large extent on specifying a sufficiently attractive incentive to settle, particularly having regard to the potential prejudice to settling parties (see below). We believe that this amount should not be less than a 20% reduction of the gross amount that a party would have been fined before taking into account any reduction for leniency, so that the reduction is *cumulative* with any percentage reduction granted under the Leniency Notice.[1] Any amount below 20% would in our view be significantly less likely to entice parties to settle. Further, we do not believe that any other alternative mechanism for calculating a settlement reduction would provide sufficient certainty for the settlement process to be regarded as attractive and thus work well in practice.[2]

3.2 We appreciate that the Commission may be concerned to ensure that the level of settlement reduction does not undermine the effectiveness of the Leniency Notice. We do not, however, believe that a 20% reduction would have this effect because: (i) settlement will be discretionary, not as of right so that no settlement reduction would ever be guaranteed; (ii) under the Proposals, the Commission will be able to disregard any application for immunity/leniency once the time limit for expressing an interest in engaging in settlement discussions has expired (paragraph 13 of the Notice, see further below); (iii) a reduction of 20% (or possibly more) is potentially materially less than the reduction in fine under the Leniency Notice and; (iv) any reduction under the settlement procedure would be cumulative with that under the Leniency Notice. The incentives of the Leniency Notice *will*, therefore, remain intact.

3.3 We believe that the amount of reduction should be a specified percentage rather than a range, and that this percentage should be the same in all cases and thus apply to all settling parties in a given case. This would make the settlement process more certain, ensure equal treatment between all parties involved and thus increase the attractiveness of the settlement process.

3.4 For parties to have confidence in fair and transparent treatment within the settlement procedure, we consider it important that the Commission identify within its Proposals a certain stage in the procedure whereby those who have entered into settlement discussions will know precisely what benefit will be obtained by agreeing to settle (and therefore what they would be risking by not settling). Providing parties with a wide range of potential benefits would not suffice and, in our view, would make the Proposals less likely to prove attractive in practice.

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1 This appears to be the Commission's intended process, although this is not entirely clear from paragraphs 32 and 33 of the draft Notice. This should be clarified.

2 For instance, we do not consider that a reduction in the percentage applied to calculate the 'basic amount of the fine' under the Fining Guidelines would be an appropriate alternative.

Maximum fine

3.5 We do not believe that parties should be obliged to indicate in the written settlement submission (*WSS*) the maximum amount of the fine they foresee to be imposed and which they accept in the framework of the settlement procedure, unless such an indication is made following the provision by the Commission of an initial *clear and reasoned* indication as to the amount of the probable fine, which forms part of the bilateral discussions between the Commission and the party concerned. Requiring parties to indicate the maximum amount of the fine that they would accept, without the Commission having set out its own reasoning beforehand, would be likely to undermine the Proposals. It may be that the Commission's intention is that it will provide, as part of the bilateral discussions, such a clear and reasoned indication as to the amount of the probable fine, so that the parties may know with a degree of certainty the amount that they should include in the WSS before it is submitted. If this is the intention, it should be clearly set out in the Proposals.[3]

3.6 We suggest, moreover, that the Commission should be obliged to inform parties, during the bilateral discussions, of *all* elements taken into consideration when assessing the level of any fine – we note that paragraph 16 of the draft Notice refers to certain of these elements, but not to all.[4]

3.7 If, on the other hand, the Commission does not intend to provide parties with a clear and reasoned indication of the amount of the probable fine, we are concerned that parties will not be able to assess the appropriate figure and therefore may be inclined to pitch their number too low in the WSS, which may then not be accepted (and deemed withdrawn) and thus render the settlement procedure ineffective.[5]

3.8 For these reasons, we believe that in order to gain maximum procedural efficiencies from the process and for the Proposals to be attractive, as much detail as possible should be provided by the Commission on the likely level of fines, including the reasoning behind reaching these levels before the WSS is submitted. We therefore emphasise the need for transparency in, and greater explanation of, the Commission's envisaged process for bilateral contacts and the nature of the iterative discussions (if any) it proposes before a "*common understanding*" (referred to in paragraph 17 of the draft Notice) can be reached.

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[3] In particular, we note that footnote 10 of the draft Notice only gives the Commission the discretion to inform parties of an estimate of their potential fine. This should be a requirement imposed on the Commission.

[4] For instance, paragraph 16 does not specifically mention recidivism, mitigating circumstances.

[5] The difficulty in assessing the potential level of fine is compounded by the complexities in determining the amount of fines under the Fining Guidelines. Further, it is not clear at this stage whether public cartel decisions will explain in detail the methodology adopted by the Commission in calculating the level of fines; and in particular whether the percentages of "*value of sales*" and the so-called "*entry-fee*" will be disclosed in public versions of cartel decisions. Accordingly, it is not clear whether parties would be able to rely on precedents in estimating the level of fine under the Fining Guidelines. Furthermore, it is not always clear in proceedings involving more than one product whether the Commission will find separate infringements and impose separate fines for each. As things presently stand, we believe that parties would not be willing to indicate an amount in a WSS without clear guidance from the Commission.

3.9 Further, the Notice should make clear that in the event that no such "*common understanding*" can be reached, so that a settlement is not achievable, this will not be regarded by the Commission as an aggravating factor in the calculation of any fine that is subsequently imposed on the non-settling party concerned. This confirmation is necessary to prevent a *de facto* settlement requirement from arising.

4. PROCEDURE: REQUIRED CLARIFICATIONS AND AMENDMENTS

4.1 The procedures established by the Regulation and supporting Notice need to be sufficiently *clear and detailed* to ensure that the parties can have confidence in the overall scheme of the settlement procedure and are thus encouraged to use it. We also consider that certain clarifications and/or amendments are needed to avoid some of the potential prejudice that those entering into settlement discussions, or reaching settlement agreements, will suffer in the future conduct of proceedings brought by the Commission (in the event that the settlement does not go ahead), or when compared to other (non-settling) parties, particularly in potential subsequent private enforcement actions.

The Notice should set out clearly the key stages of the settlement process

4.2 The inter-relationship between the various stages in the settlement process is not sufficiently clear from the draft Notice. In the interests of transparency and clarity, the Notice should set out (ideally, in diagrammatic or flow-chart form) the key stages in the process and explain how the time-limits inter-relate with each other.

4.3 We suggest that the Notice set out how settlement discussions can be initiated and, in particular, whether settlement discussions can be initiated by: (i) a request from one or more parties; and/or (ii) the Commission exploring the interest of parties in settling. In particular, it is unclear what is meant by the final statement in paragraph 5 of the draft Notice that: "*the Commission may only engage in settlement discussions upon the written request of the parties concerned*". It appears that the statement means that a party must "make the first move" to initiate settlement discussions by making a written request to the Commission to engage in such discussions.[6] If so, it is not clear why the Commission should (apparently) have no power to explore the willingness of parties to enter into settlement discussions on its own initiative: we suggest that the Notice should make clear that the Commission should have that ability to initiate discussions in appropriate cases. Where prospective settlement parties take the initiative and propose settlement discussions to the Commission, we suggest that parties should be entitled to make such requests orally rather than in writing (see also paragraph 4.17(c) below).

The Proposals should amend and clarify the provisions relating to "bilateral contacts" and provide greater flexibility in the settlement process

4.4 The Commission contemplates "*bilateral contacts*" between DG COMP and the settlement candidates (paragraph 14 of the draft Notice). The parties to the proceedings and their legal representatives are not allowed to disclose to any third

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[6] On the assumption that this statement does not refer to the WSS.

party the content of their discussions with the Commission's services or of the documents to which they have had access, without prior authorisation from the Commission (paragraph 7 of the draft Notice). A number of issues arise:

(a) the Notice should clarify the extent to which parties are free to disclose to other potential settlement candidates the *fact* that settlement discussions are taking place. This is important, given that a breach of the rule against disclosure may constitute an aggravating circumstance to be taken into account when setting the fine. If such a disclosure is not possible, it will be unclear whether settlement will be a real option in any given case and may even discourage parties from coming forward to seek settlement. We consider that, even if the Commission does not accept that the content of settlement discussions should be disclosed generally, at the very least potential settlement candidates should be permitted to disclose amongst themselves the fact that they are considering or pursuing settlement, as this may be an incentive to others to come forward and so contribute to the success of any settlement initiative. Alternatively, such disclosure could take place through the Commission (with the agreement of the parties concerned) rather than by direct contact between the parties.

(b) prospective settlement candidates may be reluctant to settle without having any opportunity to verify, or the means of verifying, the position with the other parties concerned. In order to provide reassurance to settling parties (and therefore to maximise the chances of reaching a settlement), the Commission could consider a way for parties to obtain confirmation of key factors such as whether other parties have admitted a particular duration or scope of the alleged infringement.

(c) paragraph 7 of the draft Notice gives the Commission the discretion to authorise parties to disclose the content of settlement discussions or of the documents to which they have had access in view of settlement. This raises the possibility of discriminatory treatment between parties under investigation. On the face of the draft Notice, it appears that the Commission could disclose party A's position in discussion with party B but preclude party B from verifying the Commission's representation with party A. We question whether it is desirable to leave open this possibility. There needs to be much greater clarity over when the Commission might use this discretion.

The Proposals should be modified to clarify the extent to which there can be negotiation of the content of a proposed statement of objections or decision

4.5 In her speech of 19 November 2007, Commissioner Kroes stated that: "*the Commission will not bargain about evidence or objections*". However, she then went on to say that "*[p]arties will […] have the opportunity to influence the Commission's objections through argument*" and "*[t]his will allow companies to influence even the contents of the statement of objections and, thereby, of the decision itself*". We believe that the Notice should set out more clearly what will be discussed between the Commission and a party in the context of a settlement discussion. We assume that the discussions would involve examining the facts of the infringement and the evidence

on which the Commission is intending to rely to prove the infringement, and that the discussions would involve a debate on the Commission's interpretation of documents that are in its possession and the potential relevance of the Commission's "evidence" to proving its case.[7] While we can understand that the Commission would want to exclude "horse-trading" over proposed findings in a way that is unrelated to the evidence, it is important that settling parties have the opportunity to influence the statement of objections and final decision based on discussions as to the evidence. Such discussions must be able to lead to the narrowing or withdrawing of particular proposed findings if the Commission is persuaded that this is appropriate based on the evidence and in light of the arguments submitted by the settling party.

The Notice needs to explain the Commission's approach in "hybrid" cases, where not all parties settle

4.6 The draft Notice is not, in our view, sufficiently clear as to the procedure that will be followed by the Commission in cases involving a number of parties, some of whom (but not all) wish to settle (***hybrid cases***). As they stand, the Proposals do not permit parties to verify, between themselves, who is willing to settle. Parties will, therefore, *in every case* have to assume that theirs is potentially a hybrid case. They must therefore know how the Commission intends to deal with such cases. Greater explanation is required in the Notice than is presently given.

4.7 First, on the assumption that settlement discussions will take place after the Commission has reviewed the evidence available to it and reached a conclusion on the scope of the case it believes can be advanced, the Notice does not address what would happen if, once a settlement had been reached with the settling parties, further evidence were to come to light in the Commission's continuing investigation of the non-settling parties, either in those parties' responses to the Commission's full statement of objections, at their oral hearing, or in light of the non-settling parties' full access to the Commission's file. For example, with regard to duration or in light of exculpatory material that later comes to light, the Commission could potentially enter into a settlement with a number of parties for a given number of years or in relation to a different scope of cartel than that which is finally the subject of its conclusions against non-settling parties. We believe that most parties would find the Proposals much less attractive if the Commission had any right to revisit the terms of the settlement if further evidence came to light during a full investigation against a non-settling party. The Notice should therefore make it clear that such revisions will not take place at any stage after confirmation is given that a statement of objections accords with the WSS.

4.8 Second, it is unclear whether the Commission intends to issue a separate statement of objections for each individual participant in the cartel, or one statement for parties that have agreed to settle and another for all other parties. This should be clarified.

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[7] In this regard, the apparent discretion of the Commission under Article 10a(1) of the draft revised Regulation 773/2004 to inform parties willing to engage in settlement discussions of the objections and evidence to be raised against them and the potential fines should be amended to ensure that the Commission "shall" (rather than "may") make that information available to parties if the Commission considers the case appropriate for settlement.

4.9 Third, it is not clear whether, in hybrid cases, the Commission will issue two decisions: the first, a "*much shorter than traditional*" decision[8] for the settling parties, and the second, a "*traditional*" decision for the one or more non-settling parties.

4.10 For the settlement procedure to be attractive to parties, we consider that the Commission should set out in the Notice its proposed procedures in relation to the timing of the making of decisions in hybrid cases, and in relation to any publicity it intends to give to such decisions.

4.11 The Commission should take into account, in devising its procedures, the requirements of undertakings under investigation, or who are the subject of a decision, to comply with regulatory requirements to announce material developments to their regulators, their shareholders and the markets. The Proposals must, therefore, be clear and flexible.

4.12 It appears to us that the Commission has two options as to the timing of the making of any decisions in hybrid cases. The first is that it could take a decision at the time of settlement in relation to settling parties, and a second decision (if appropriate) at a later date in relation to non-settling parties. Alternatively, the Commission could delay the taking of any decision until its proceedings against non-settling parties have reached the decision stage. We are concerned that if this second option is adopted, it will increase the period of uncertainty for the undertakings seeking to settle (because the College of Commissioners may not ultimately approve the terms of the settlement due to factors arising from the Commission's continuing investigation of the non-settling parties; something that is obviously outside the control of the settling parties) and the Proposals would be less attractive. However, this option might in certain circumstances provide undertakings with more flexibility in relation to the types of public announcements mentioned in paragraph 4.11 above.

4.13 On balance, we would favour the second option – no decision should be taken until the Commission makes a decision in relation to non-settling parties, but with a clear understanding that the Commission cannot revise the settlement in light of further evidence or facts that have come to light after the settlement was reached (see paragraph 4.7 above).

4.14 If the Commission does first take a decision on the settling parties and then later a decision on the non-settling parties, most parties would, we believe, favour no publicity being given to any settlement agreement reached with the Commission until after a decision has been taken against the non-settling parties. This would reduce the risk of settling parties being subject to an increased and earlier exposure to civil damages claims, thus discouraging parties from settling. It would also have the benefit of avoiding prejudicing the position of non-settling parties (who may have valid reasons for contesting the Commission's proceedings).

4.15 In other words, we recommend that in the interests of making settlement as attractive as possible, a settlement decision should not be published at a separate time

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[8] See Commissioner Kroes' statement of 19 November 2007.

from the decision for non-settling parties.[9] Nor should there be any announcement by the Commission of the existence of such a decision. If this route is pursued (and we believe it should be), the Notice should set out the intended procedure, but make it sufficiently flexible to enable undertakings, where legally obliged to do so or for other reasons wish to do so, to make, with the Commission's approval, appropriately limited announcements about the settlement reached.

The Notice requires amendment and clarification in order properly to respect rights of defence

4.16 The Proposals give rise to a number of concerns in relation to rights of defence:

(a) ***Access to the file***: it appears from paragraph 17 of the draft Notice that the Commission will decide to which documents, if any, settling parties will have access from the case file. We suggest that, at the very least, the parties should be given the full (descriptive) list of *all* materials on the Commission's file, so that they can form a view as to the extent of the evidence against them; and whether the Commission has, for example, any exculpatory materials. We believe that the failure to provide access to exculpatory evidence increases the likelihood of inconsistency between settling and non-settling parties, will reduce confidence in the transparency of the Proposals and may discourage settlement;

(b) ***Departure from the Commission's preliminary position***: paragraph 29 of the draft Notice states that "*The Commission may legitimately adopt a final position which departs from its preliminary position expressed in a statement of objections endorsing the parties' written settlement submissions, either in view of the arguments provided by the Advisory Committee or for other considerations in view of the ultimate autonomy of the Commission College to this effect*". We suggest that the Notice should clarify whether the Commission's right to depart from its preliminary position is limited to the two scenarios referred to in paragraph 29, or whether the Commission could depart from its preliminary position if, for instance, new evidence came to light after the statement of objections had been issued. Further, although the draft Notice states that any acknowledgements made by the parties would be deemed to be withdrawn should the Commission depart from its preliminary position, parties will be reluctant to make such acknowledgements (particularly in writing) without some guidance on when the Commission could depart from the WSS after a "*common understanding*" as described in paragraph 17 has been reached. Finally, we assume that cases where the Commission would depart from its preliminary position would very much be the exception to the rule and occur only within well defined parameters, as such departures would undermine the credibility of the settlement procedure. This should, again, be explained in the Notice.

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[9] We note that Article 30(1) of Regulation 1/2003 does not set a time limit for publication.

(c) ***Joint and several liability***: the Commission states in its FAQs that "*joint representation will not prejudge the finding of joint and several liability amongst parties of the same undertaking or group*". Although the Commission addresses joint representation in paragraph 12 of the draft Notice (and Article 10a(1) of the draft revised Regulation 773/2004), it is silent on whether this required joint representation has any impact upon the position with respect to the joint and several liability of group companies. We would suggest that the Notice should reflect the position in the FAQs (i.e. that "*joint representation will not prejudge the finding of joint and several liability amongst parties of the same undertaking or group*") for the avoidance of any doubt on this issue.

(d) ***Case team***: in our view, the Notice should make clear that a new Commission case team will be allocated to take charge of the case if settlement discussions prove unfruitful (for any reason), and settlement is ultimately terminated or withdrawn for one or more parties. It would be impermissible for Commission officials who had had access to without prejudice settlement materials (including confidential admissions) to be involved in the future conduct of the investigation or proceedings if settlement discussions prove fruitless.

Relationship with private litigation

4.17 There are a number of features of the Proposals that tend to undermine the attractiveness of the settlement procedure as it will expose parties to earlier crystallisation of their exposure to private damages actions and potentially greater liability than would be the case if no settlement were reached:

(a) ***Acceleration of private damages actions***: any publication of a decision, or indeed the fact that a settlement agreement has been reached (through, for example, a press release) prior to the publication of the decision against the non-settling parties, is likely to accelerate the crystallisation of damages exposure in private litigation brought against the settling parties. Delaying publication of the Commission's final decision until the Commission's case is resolved for all parties concerned (both settling and non-settling) would, as we have explained, assist in making the Proposals more attractive.

(b) ***Confidentiality***: the draft Notice does not address the issue of how to protect the WSS from private litigants. Whilst the Leniency Notice may not be fully effective in this respect, it does at least address the issue.[10] Paragraph 35 of the draft Notice, by contrast, implies that public disclosure of documents might occur: "*<u>normally</u> public disclosure of documents and written or recorded statements received in the context of this Notice would undermine certain public or private interests"* [*emphasis added*.] As explained above, we consider that the WSS and any other submissions made in the context of settlement discussions should be granted at least the same protection as leniency statements are under the Leniency Notice.

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[10] See Section IV of the Leniency Notice.

(c) ***Admission of guilt***: the WSS must contain "*an acknowledgement in unequivocal terms of the parties' liability for the infringement summarily described as regards the main facts, their legal qualification, and the duration of their participation in the infringement*".[11] We do not believe that a written admission should be required or that any written settlement documents are necessary.[12] Given the potential adverse consequences in private litigation, we suggest that it should be permissible for all contacts regarding settlement, including both prior to the submission of the WSS and the confirmation that the statement of objections properly reflects the WSS (paragraph 26 of the draft Notice) to be made orally. Further, we suggest that parties be permitted to provide the Commission with their suggested wording for the WSS orally, and that option should be available for the WSS to be signed by a party at the Commission's premises, with the sole copy left with the Commission. This approach, which would broadly follow that adopted under the Leniency Notice in relation to corporate statements, would assist in avoiding detracting from the utility of the Proposals because of the disclosure risks. The draft revised Regulation 773/2004, Article 10a should be amended accordingly.

(d) ***"Deemed withdrawal"***: the Commission may adopt a statement of objections or final position which does not endorse the WSS, in which case the WSS is deemed to be withdrawn (paragraphs 27 and 29 of the draft Notice). It does not appear that such a "*deemed withdrawal*" would necessarily be effective to preclude a successful discovery application in private damages actions in national courts. This highlights the importance of oral rather than written submissions.

Relationship with leniency

4.18 Paragraph 13 of the draft Notice states that the Commission *may* disregard any application under the Leniency Notice on the ground that it has been submitted after the expiry of the time-limit referred to in paragraph 11 of the draft Notice. First, we assume that the availability of leniency applications terminates for *all* parties under investigation once the settlement process commences; i.e. not only for those parties that are engaged in settlement discussions. This should be confirmed in specific terms in the Notice. Second, we assume that the Commission would not have any discretion to accept leniency applications once the time-limit referred to above has expired: the word "may" suggests otherwise. This should be revised.

Position of complainants

4.19 The Proposal for amending the draft revised Regulation 773/2004 (recital 5) states that "*complainants should continue to be closely associated with the proceedings and be informed of and able to provide their views on the nature and subject matter of the procedure in writing*". It would assist predictability and

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[11] Paragraph 20(a) of the draft Notice.

[12] We also note in passing that there is a potential discrepancy between the requirements set out in paragraphs 11 and 14 of the draft Notice with regard to whether or not parties have to declare their interest in engaging in settlement discussion *in writing*.

transparency if the Notice were to set out in more detail the rights of complainants prior to a decision being issued. Article 6 of the draft revised Regulation 773/2004 addresses the non-confidential version of the statement of objections but not access to file. We believe that complainants should not be given any access to the Commission's file, including details of the settlement process. Giving complainants such rights would severely undermine the attractiveness and effectiveness of the settlement procedure and potentially add to the timing and complexity of the process. Further, giving complainants such access will not benefit the Commission's administrative procedure and therefore we consider that it cannot be justified on such grounds.

5. TIME-LIMITS

5.1 As a general matter, we consider that the time-limits proposed in the draft Notice and Article 17 of the draft revised Regulation 773/2004 are too short. We have suggested below alternative time-limits that we believe are more likely to be achievable in practice. It would assist the clarity of the Notice if the trigger event from which each period runs were stated in the Notice. We also suggest that the Commission introduce a mechanism whereby time-limits could be extended in appropriate cases and not only in relation to submission of the WSS (paragraph 17 of the draft Notice). Further, we suggest that the Notice follows a consistent approach in setting time-limits either in working days or in weeks. To be consistent with Regulation No 773/2004, time-limits should be expressed in weeks (see Article 17).

Stage	Draft Notice	Suggestion
Parties to declare interest in settlement discussions	No less than **two weeks** (paragraph 11 of the draft Notice)	The Commission's proposal is too short to enable parties adequately to consider their rights of defence. This should be no less than **4 weeks** from the Commission formally informing a party that the Commission is prepared to engage in settlement discussions.
Submission of a final WSS	**XXX working days** (paragraph 17 of the draft Notice)	The Commission has not provided a proposal for this time-limit. This should be no less than **6 weeks** from the Commission formally communicating to a party that a "*common understanding*" has been reached regarding the scope of the potential objections and the estimation of the range of the likely fines to be imposed by the Commission.
Confirmation that the statement of objections corresponds with the WSS	No less than **1 week** (paragraph 26 of the draft Notice)	The Commission's proposal is too short to enable parties adequately to consider their rights of defence. This should be no less than **3 weeks** from the notification to a party of the statement of objections.

Consequences of failing to meet time-limits

5.2 The consequences of failing to meet the procedural time-limits referred to in the draft Notice are not clear, particularly for any acknowledgments made:

(a) prior to a WSS being submitted; and

(b) in the WSS, if a party is out of time in indicating whether the statement of objections corresponds with the WSS.

5.3 It appears from paragraph 27 of the draft Notice that if the Commission adopts a statement of objections which does not endorse the WSS, any acknowledgements made would be deemed to be withdrawn. However, a situation could arise where the statement of objections endorses the WSS but a party does not meet the formal time-limit for confirming that this is the case (in accordance with paragraph 26 of the draft Notice). In such a case, it is not clear whether the acknowledgements provided by the relevant party are deemed to be withdrawn or whether the party is irrevocably bound by the WSS that is endorsed by a statement of objections even if the time-limit referred to in paragraph 26 is not met. We suggest that the Notice clarifies this issue.

6. CONCLUSION

6.1 In conclusion, we hope that the Commission will find our comments of assistance with what we believe to be a worthwhile exercise in exploring the possibility of introducing settlement procedures.

6.2 We consider that, provided (i) a sufficiently compelling incentive is given to parties in terms of a settlement reward of at least 20% of the gross fine, and (ii) steps are taken to amend and clarify the Proposals to deal with most or all of the concerns set out above, the Proposals are likely to prove attractive in certain cases and to deliver related administrative efficiencies to the Commission.

6.3 We believe, however, that a number of the concerns we have raised will, if not adequately addressed in the final version of Regulation 773/2004 and/or Notice, materially reduce the utility of the proposed settlement regime. We have particular concerns in relation to the matters that we have outlined in relation to hybrid cases (notably in relation to the timing and publication of decisions), the provision of written statements/admissions/confirmations, and clarity in relation to the process of achieving a “common understanding”.

ANNEX

Drafting clarity and inconsistencies

There are a number of areas where either the drafting should be clarified or there are inconsistencies in the drafting of the Notice, Regulation and the FAQs. A number of these affect whether a requirement on the Commission or the parties (as the case may be) is mandatory or permissive. The table below identifies those that are most significant.

Area	Regulation	Notice	FAQs	Suggested reconciliation
Appointment of joint representatives	"parties *shall* appoint a joint representation" (Article 10a (1))	"*may*" appoint joint representatives" (paragraph 12)	"Why does the Commission *require* parties to the procedure belonging to the same group of undertakings to appoint a joint representative?"	The requirement should be permissive. Suggest use "*may*"
Disclosure of information by the Commission to settlement candidates	"The Commission *may inform* the parties willing to introduce settlement submissions …" (Article 10a (2))	"Information *will be* disclosed in a timely manner as settlement discussions progress" (paragraph 15)		This requirement should be mandatory. Suggest amending the draft revised Regulation to require that the Commission "*shall*" inform the parties of the information set out in Article 10a (2).
Disclosure of evidence by the Commission to settling parties	"… the Commission shall disclose, *where appropriate*, the evidence supporting the envisaged objections to parties willing to introduce settlement submissions …"			This requirement should be mandatory. Suggest deleting the words "*where appropriate*" set out in Article 15 (1a).

Area	Regulation	Notice	FAQs	Suggested reconciliation
	(Article 15 (1a))			
Application for immunity/leniency after the expiry of the time-limit for declaring an interest in engaging in settlement discussions		"The Commission *may* disregard any application for immunity from fines or reduction of fines under the Leniency Notice on the ground that it has been submitted after the expiry of the time-limit referred to in point 11." (paragraph 13)	"… Secondly, companies *will not* be able to ask for leniency once the settlement procedure is formally open."	This requirement should be mandatory. Suggest replacing the word "*may*" with "*shall*" in paragraph 13 of the Notice