COMMENTS ON DRAFT LEGISLATIVE PACKAGE TO INTRODUCE SETTLEMENT PROCEDURE FOR CARTELS*

1) Overview – General Comments

We welcome the Commission's proposals to create a direct settlement procedure in cartel cases. According to paragraph 1 of the Draft Settlement Notice,[1] this new tool will allow the Commission "*to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence*". However, in our view, these goals may only be achieved if undertakings are offered sufficient incentives to make use of the settlement system while guaranteeing undertakings' due process rights.

We therefore believe that the draft package requires improvements if the Commission wants to attain its efficiency objectives. Our comments in this paper will be organised as follows:

- First, we briefly comment on the scope of the proposed settlement procedure, which should be available regardless of the number of parties willing to settle.
- Second, we argue that undertakings need to be given full access to file during settlement negotiations so as to allow them to make an informed decision regarding whether or not to settle.
- Third, in return for settling, undertakings must be offered a sufficiently high reduction on any fine so as to offset the corresponding reduction in their rights of defence. This is especially important in light of the Commission 2006 Fining Guidelines.
- Fourth, we discuss the proposed written nature of a Written Settlement Submission ("WSS") and the need for undertakings to admit guilt in their WSSs. In particular, we consider it essential to avoid a WSS or any equivalent document being discoverable in follow-on claims.
- Fifth, there must be a clear guarantee that if settlement negotiations fail, the content of these negotiations will not then be used against settling parties by the Commission, either to establish liability or to increase the level of any fine.
- Sixth, we analyse the relationship between the direct settlement proposals and the Commission's leniency programme, which we view as complementary. We make some suggestions to ensure that direct settlements will not undermine leniency and nor damage the settling parties' position in potential follow-on civil actions.
- Finally, we stress the need to protect the right of appeal of settling undertakings.

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* These comments are offered by the Brussels office of White & Case LLP in response to the Commission's invitation to comment. They are designed to assist the Commission in its ongoing work in this area and should be used for no other purpose, either by the Commission or by third parties. They do not represent the views of the Firm or of its clients.

[1] See 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, at paragraph 20 (a)

2) Scope of the proposed settlement procedure

a) Settlements only in cartel cases

The Commission's proposed settlement package will apply only to cartel proceedings (paragraph 6 of the Draft Settlement Notice). We agree with the Commission on this point.

We believe that direct settlements should, at least in the beginning, only apply to cartel proceedings. We are aware that under the French settlement system, the Competition Council has not excluded any particular type of competition law violation from being able to benefit from settlements. Furthermore, in the UK, a sectoral regulator – the Office of the Rail Regulator – has reached a settlement in an abuse of dominance case last year and in so doing saved significant resources.[2] However, we consider that commitment decisions under Article 9 of Regulation 1/2003 currently provide sufficient means for undertakings to settle with the Commission in non-cartel cases.

The question of extending settlements to other areas of EC competition law enforcement should be considered in the future, once the settlement system has been tested and fine-tuned in cartel proceedings.

b) Only some undertakings need settle with the Commission

We agree with the Commission that it is not necessary that all alleged cartel members need to engage in settlement discussions with the Commission. Requiring all undertakings concerned in an alleged cartel to settle could lead to pressure being brought to bear on unwilling undertakings by other alleged cartel members, which could in turn compromise the rights of defence of certain undertakings. Equally, if all parties have to approach the Commission for settlement, it can place a reluctant undertaking either in a position to bargain with the Commission or alternatively, to be pressurised into settling by other undertakings.

In reality, though, it is difficult to see how it will benefit the Commission if not all parties to a cartel seek settlement because the Commission will still have to go through the full procedure in relation to the non-settling parties. Thus, in most cases the Commission might choose not to settle if any less than all the parties to the cartel infringement are willing to enter into settlement discussions as this would undermine the whole rationale of the settlement scheme, which is to save resources and deal with cases more quickly.

Finally, it would also be beneficial if the Notice were to make clear that, contrary to the situation in the US, settlement discussions will not be used as a means of gathering evidence from one party which will then be used in fining another. Such an approach should not be followed in the EU as it would go against the underlying efficiency rationale of the proposed settlement procedure and would also undermine the utility of the Leniency programme.

3) Undertakings need to be given full access to file during settlement negotiations

The Draft Settlement Notice only requires that the Commission outline its evidence and make available to settling parties key documents that support its views on any alleged cartel activity. Parties will also be required to state that they have been sufficiently informed by the

[2] See the settlement between the ORR and English Welsh and Scottish Railway Limited ("EWS") from November 2006. EWS was fined £4.1 million for abusive conduct. The fine included a reduction of 35% to take account of EWS' admission of guilt and co-operation.

Commission and would have to waive their rights to the access to file. We respectfully believe that such a requirement is excessive.

In our view, if undertakings are to be able to properly weigh up the advantages and disadvantages of settling, they must be guaranteed full access to the Commission's file, albeit for the limited period of the settlement negotiations. Without such full access to file, undertakings may be less inclined to settle as they may consider that the benefits of pursuing a case and being given full access to file outweigh any potential reduction in the level of fine that they would obtain by settling on the basis of limited or partial information. It will therefore be in the Commission's interests to offer full access to the case file to undertakings considering settlement.

With regard to the scope of access to the file, the discretion retained by the Commission at paragraph 17 of the Draft Settlement Notice is also troubling. Upon request by an undertaking, it should not be for the Commission to decide whether or not access to a certain piece of evidence is necessary for the undertaking to make its decision on whether to settle. Rather, undertakings should be given full access to the case file when considering settlement in order to be able to reach an informed decision. There may be a role for the Hearing Officer at this stage to guarantee the respect of due process.

4) The percentage reduction in fines for settling must be sufficiently high to offset the corresponding reduction in their rights of defence

First and foremost, we believe that any fine reduction for settling must be sufficiently high so as to outweigh the corresponding reduction in the parties' rights of defence. We believe that, at a minimum, the Commission should give undertakings at least a 20% reduction in all cartel case as the history of the 1996 Leniency Notice has shown that when a proposed reduction on the level of the fine is set too low, undertakings will not have sufficient incentives to make use of such a procedure. Incentivising the settlement system by offering undertakings a sufficiently large "carrot" will thus benefit not only parties who wish to co-operate effectively in order to settle as quickly as possible but also the Commission, who will be more likely to achieve the efficiency gains expected from the settlement procedure. In addition, it is important that the Commission remains open to discuss the different elements of the infringement and, in particular, the duration in light of the 2006 Fining Guidelines.

Second, when the Commission indicates to parties ""*a clear initial estimate of the level of fine the Commission considers appropriate for each individual party*" it is likely to impose, that estimate should not only contain an estimate of the maximum overall fine but also provide a breakdown of that fine (especially of any aggravating factors) so that an undertaking fully understands both the detailed nature of the allegations against it and the benefits it can obtain by settling.

Finally, we welcome the proposal that the Commission will not apply a deterrence multiplier of more than two (as opposed to five under the Fining Guidelines) on fines for settling parties as this will serve as an encouragement for undertakings to consider settling.

5) The written nature of a WSS and the need to admit guilt

a) The written nature of the submission

A striking feature of the proposed settlement package is the fact that parties will be required to make a formal request to settle in the form of a WSS, unequivocally accepting liability for an infringement (paragraph 20(a) of the Draft Settlement Notice).

However, the written nature of this admission of guilt may discourage parties from approaching the Commission as any written submission they prepare for the purposes of settlement may be discoverable and used against them in follow-on actions either Europe or in the US.

It may be that the Commission has plans to sidestep this problem by preparing the WSS itself, which parties would only then be required to check at Commission premises, sign and then leave without taking a copy. However, the detail of how this process would work is not apparent from the draft settlement package, nor is it clear that signing and leaving a document with the Commission will be enough for a party to avoid being compelled to produce a copy of that document in follow-on civil actions.

We would therefore strongly urge that the settlement procedure should follow the leniency process and allow settlement submissions to be made orally.[3] In our view, this will be far more effective in encouraging potential settlement candidates to come forward.

b) The requirement of an admission of guilt

The requirement that parties admit their guilt in their WSSs is in line with national practices in the US, UK and France. Indeed, it is fundamental to the process of settlement that there be an admission of guilt by the party seeking settlement since it is this admission that is in effect "traded" for a reduction in fine and expedited procedure.

However, we do have concerns about the admission of guilt being made in writing for the reasons set out above. In particular we question whether the incentive of reductions of fines will be enough to counter the fear of a party's written admission of guilt being discovered and used against them in subsequent proceedings. Many parties may take the view that it is better to fight the Commission action and risk a fine that is not reduced by 20%, rather than enjoy the reduction of their Commission fine but live in fear of third parties discovering their written statements of guilt and using them in follow-on actions.

6) Failure of the settlement negotiations, departure from the WSS and withdrawal of the WSS

We would like to emphasise the fact that for undertakings to fully engage in settlement discussions with the Commission, they must be sure that these settlement discussions take place on a "without prejudice" basis and remain strictly confidential. The final Notice should make clear that if settlement negotiations fail, the content of these negotiations cannot later be used by the Commission against an undertaking either to prove an undertaking's liability or as an aggravating factor which will increase the level of any fine. The importance of such

[3] See Commission Notice on immunity from fines and reduction of fines in cartel cases (2006/C 298/11), at paragraph 32.

principle would even require it to be embodied directly in the regulation rather than in an instrument lacking binding legislative nature.

If settlement negotiation fail or if the Commission departs from an undertaking's WSS and adopts a new Statement of Objections ("SO") under the normal procedure, the Notice and Regulation must ensure that neither the WSS nor the content of the settlement negotiations can then be used against the parties in the "normal" procedure. Similarly, the Commission should not be able, in the normal proceedings, to use against the undertakings any documents submitted to it by the undertakings during the settlement negotiations (as is already the case in the context of leniency applications).[4] All correspondence relating to the settlement negotiations from the formal commencement of the settlement negotiations should also not be part of the Commission file but should be kept in a separate file. This principle could be implemented by entrusting the Hearing Officer with the custody of the documents relating to the settlement discussions.

Lastly, the final settlement Notice should make clear that the failure by an undertaking to agree on settlement with the Commission cannot be considered an aggravating factor which will lead to an increase in an undertaking's final fine as otherwise the motivation to settle becomes the avoidance of an increased fine for not settling, rather than the size of the reduction given for actually settling.

7) Relationship with the leniency programme

The leniency and proposed settlement regimes pursue different goals. The proposed settlement procedure seeks to save administrative resources while the leniency programme is an investigative tool that rewards undertakings for providing the Commission with evidence to prosecute cartels.

We agree with the Commission that these two procedures should not be mutually exclusive. Settlement should also be possible regardless of leniency. However, we would urge the Commission to adopt an integrated approach to ensure the success of both programmes.

a) <u>The combination of leniency and settlement</u>

We agree with the Commission that the reductions in the level of fines granted under the leniency programme and under the settlement procedure should be cumulative (paragraph 33 of the Draft Settlement Notice). The two procedures pursue different goals and reward different conducts. Leniency encourages undertakings to provide evidence which enables the Commission to unearth and punish cartels. Settlement encourages undertakings to acknowledge their participation in a cartel and thereby enables the Commission to save resources. Both behaviours should be properly rewarded. We favour a reduction of at least 20% of fine for a settlement applicant.

Leniency creates a race amongst cartel members to be the first one to blow the whistle. The first leniency applicant may obtain immunity from fines if it provides the Commission with sufficient evidence to enable it either to carry out a dawn raid (Type 1A leniency) or to adopt a decision finding an infringement (Type 1B). Subsequent leniency applicants may also obtain a reduction of fines if they provide to the Commission evidence with "significant added value" (Type 2 leniency). The scaling of the reward as much as its nominal amount

[4] See Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (2006/C 298/11) at paragraph 20.

constitutes the incentive to apply for leniency. An undertaking choosing not to denounce a cartel runs the risk that another cartel member may decide to approach the Commission.

The dynamics of settlement are different. The undertaking does not take into account the risk of being exposed because it is already under investigation. Moreover, it bases its decision of whether or not to settle independently of the attitude of the other companies being investigated. It simply has to assess the strength of the Commission's case and its chances of success on appeal. As with leniency though, settling undertakings must be substantially rewarded for their co-operation. This is especially true since according to the draft settlement package, they would have to admit their guilt and waive some of their rights of defence such as an oral hearing and access to the file.

We believe that at some point in the proceedings, the proposal of a number of undertakings to settle becomes more valuable than a new leniency application. Leniency is mainly useful to launch an investigation and conduct dawn raids (Type 1A). Leniency remains useful after the surprise inspections if it helps the Commission to adopt a final decision of infringement (Type 1B or possibly Type 2 following a Type 1A). At that point, the social benefit of an additional leniency application becomes minimal: most of the time, it serves only to prove an extended duration. Successful settlements also contribute to reinforcing deterrence. First, they will speed up the proceedings and shorten the delay between the infringement and its sanction. Second, they will free up resources that may be reallocated to prosecute other violations and unearth more cartels. Therefore, any loss in deterrence resulting from the condemnation for a more limited period of time is outweighed by the gains just described.

b) Safeguarding Type 1 leniency

We acknowledge the need to safeguard the attractiveness of Type 1 leniency. We believe that a significant reduction under the settlement procedure would not jeopardise the success of Type 1 leniency. The success of Type 1 leniency is grounded on the importance of its reward, namely immunity from fines, but also on the importance of the delta between the immunity and the reductions available to the subsequent undertakings who approach the Commission.

In that regard, it is useful to bear in mind that the leniency programme was specifically revised in 2002 to increase that delta: the new Leniency Notice capped the reduction of fines available to the second undertaking at 50%; required all undertakings, except the first one in Type 1A, to provide evidence with significant added value (as the amount of evidence needed to carry out a dawn raid remains limited); and repealed the automatic 10% reduction for mere cooperation during the proceedings. The settlement procedure would re-introduce the possibility of obtaining a fine reduction without providing significant added value, and the combination of settlement with Type 2 leniency would reduce the delta with immunity for fines.

We believe, however, that there is no serious risk of the settlement proposals undermining Type 1 leniency. When Type 1A immunity has been granted, a reduced delta is less problematic where the information provided by the first Type 2 applicant is necessary for the Commission to adopt a decision finding an infringement (after all, a Type 1B applicant is in a similar position and gets full immunity). When Type 1B immunity has been granted, the Commission is already in the position of adopting a decision finding an infringement. The speeding up of the proceedings and the saving of administrative resources clearly outweigh any information that would enable the Commission, for instance, to increase the duration of

the cartel. Therefore, the benefits brought about by the settlement procedure would outweigh any drawbacks

c) The timing issue

The Commission clearly envisages two procedural stages. The first one would be the investigative phase during which the Commission would gather the evidence necessary to adopt an SO and ultimately a decision of infringement. Leniency would be available during this stage. Settlement discussions would only begin during a second phase, near the end of the Commission's investigations and before the drafting of an SO. Leniency would no longer be available at that point.

We broadly agree with this approach. We firmly believe that settling parties should receive precise information on the allegations against them and the foreseen maximum fines (and their breakdown). Absent such detailed information, it would be impossible for undertakings to assess whether it is in their interest to settle. For that reason, we agree that settlement discussions cannot begin at the outset of the proceedings if the Commission is unable to provide the required information.

We would, however, urge the Commission to inform undertakings under investigation as soon as it has reached a preliminary view on a potential violation of Article 81 EC without waiting for more definitive conclusions. If the Commission and the undertakings under investigation reach a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed, both of them would save considerable resources. In case they do not, the Commission would continue its investigations and the possibility to obtain a reduction of fine for adducing new evidence with significant value should become available again (Type 2 leniency).

Therefore, we propose that the final settlement proposals set out in greater detail the contours of settlement negotiations. The initiative for settlement negotiations would continue to come from the undertakings, who would informally approach the Commission to express their readiness to start settlement negotiations. Once the Commission is also ready to start such negotiations because it has gathered enough evidence to make its case and to provide the necessary information regarding the objections and the likely fine, the Commission would formally inform all undertakings that it has opened the settlement negotiations for a given period of time. In that regard, our proposal differs from the system described in the draft package which only envisages a deadline to file the settlement proposals, but no formal opening date. Thus, as of the formal opening of the negotiations, all undertakings will have the possibility to come forward and begin negotiations. New leniency applications would not be accepted any more. At the end of the period, the Commission would close the negotiations. If the negotiations were not successful, this closing would be only temporary. Indeed, undertakings may later contact the Commission again and the Commission would open a new window of negotiations. In the meantime, Type 2 leniency would be *de novo* available.

d) The need to cooperate

All leniency applicants (Type 1 and Type 2) are under an obligation to cooperate "*genuinely, fully, on a continuous basis and expeditiously*" throughout the administrative procedure (paragraphs 12(a) and 24 of the 2006 Leniency Notice). They are required, among other things, to promptly provide to the Commission all available information and evidence and to

remain at the Commission's disposal to respond to requests for information or for interview of their employees. No corresponding obligation will be imposed on settling undertakings and nor should such an obligation be imposed. Settling parties acknowledge their participation in the cartel so that the proceedings can be rapidly closed. There is therefore no need to lay down any obligation to cooperate. Leniency applicants who enter into settlement negotiations with the Commission would be in the paradoxical situation of still being under a continuous obligation to cooperate during these negotiations and thereafter. They would thus be in a less favourable situation than settling undertakings that did not apply for leniency.

We submit that all leniency applicants who enter into settlement discussions with the Commission (and automatically for Type 1 applicants) should see their obligation to cooperate fully under the Leniency programme suspended as of the formal beginning of settlement negotiations (see previous section). The obligation to cooperate fully would resume if either the undertaking or the Commission withdraws from settlement negotiations. We believe for that reason that the Commission should formally indicate the beginning of the settlement negotiations. If the negotiations fail at the end of a predetermined period of time, the normal proceedings resume. Nothing prevents the Commission from re-opening settlement negotiations some time later at the request of some of the undertakings. In case the Commission conducts bilateral negotiations, only the companies concerned by those bilateral negotiations would see their obligation to cooperate suspended.

8) Safeguarding the right of appeal

Under the settlement procedure, the parties must acknowledge their participation in the cartel. This does not, however, justify curtailing their basic rights of defence. Rather, the requirement of having to admit guilt requires strong procedural guarantees to be put in place. Settling parties must remain entitled to have access to the file and to appeal any Decision to the CFI. In this regard, we welcome the fact that the right to appeal of settling undertakings is not challenged by the settlement proposals. While limiting the number of appeals to the European courts might have been one of the Commission's objectives, maintaining judicial control over the legality of the Commission's conduct is essential for the rights of defence of undertakings.

Since the parties will have to sign a written settlement submission, any appeal will be necessarily limited: having acknowledged their participation in the cartel, the undertakings may no longer contest that fact – or only with great difficulty. In addition, the Commission is likely, in these circumstances, to annex the WSS to its defence. From that moment on, the WSS will then become discoverable as the parties will receive a copy of that document. This may further discourage parties to lodge an appeal. It remains nonetheless particularly important to have the possibility to appeal if, for instance, the Commission departs from the WSS without adopting a new SO or if the Commission breaches one of the parties' procedural rights. Moreover, in such circumstances, it would be inappropriate for the Commission to demand an increase the fine on appeal. The Commission should also refrain from annexing the WSS to its pleadings in cases limited to the procedural rights of defence of the settling parties, unless this is absolutely essential for the Court to understand the dispute. ⊕