COMMENTS ON THE EUROPEAN COMMISSION'S DRAFT LEGISLATIVE PACKAGE ON SETTLEMENT PROCEDURES IN CARTEL CASES

1. INTRODUCTION

Maclay Murray and Spens LLP welcomes the opportunity to comment on the European Commission's proposed package the conduct of settlement proceedings.

We support the Commission's proposal to adopt a process for cartel settlement as this is a positive move towards a more efficient system. We would, however, recommend that the Commission revisits some of the areas of the proposal which create uncertainty, reduce the parties' rights of defence and increase exposure to third party actions without adequate reward in the administrative process. Indeed, if there is insufficient certainty, companies are likely to be deterred from entering into the settlement process in the first place. To a large extent, the success of a settlement process will depend on the Commission being trusted to deliver.

We begin with some general observations on the Proposal, before going on to highlight some specific issues.

2. GENERAL

The current process for dealing with parties accused of participating in a cartel. Parties often spend huge amounts of management time dealing with a cartel investigation, even in cases where they would be willing to admit some level of participation in the anti-competitive behaviour. Further, as recognised by the Commission, delays caused by the Commission's workload, as well as appeals on the matter, can mean that companies have to wait even longer for a resolution. In turn, companies are simply unable to resume their normal affairs and put the cartel behaviour behind them for many years. This is regrettable, particularly where infringements are historic or are uncovered following the purchases or disposals of infringing undertakings. We therefore welcome a change to the current policy to increase efficiency in the system, allow parties a more flexible approach to reaching a solution and settle matters within a reasonable timescale.

3. DISCRETION OF THE COMMISSION

The Commission suggests in paragraph 5 of the Draft Commission Notice that it intends to retain a "broad margin of discretion" when deciding whether cases may be suitable for the settlement process. We understand why the Commission would want to retain some discretion to choose which cases would be suitable for settlement, especially if the over-arching principle is the efficiency of the system and the reduction of the administrative burden. However, as with any

Community institution, discretion should be exercised reasonably, proportionately and transparently. Further, if the Commission's aims in pursuing a settlement process are to be met, parties will require a degree of certainty as to the availability of settlements if they are to be encouraged to approach the Commission with a view to settling.

Therefore, we would suggest that the Commission should set out the factors that it intends to take into account when deciding whether a case is suitable for settlement discussions and, indeed whether the availability of settlements should be exceptional or the norm in an administrative process. The Commission notice as it is currently drafted would not allow parties to predict when it would be appropriate to pursue settlement discussions and, therefore, may not encourage such parties to act in the way the Commission intends. Some particular concerns are highlighted below.

3.1 **Reaching a "common understanding"**

One criterion which is particularly unclear is the meaning of "common understanding" at point 5 of the draft notice. Does this refer to the agreement between one co-operating party and the Commission or a common understanding across all parties alleged to have participated in an infringement? If the former, the disclosure of a sufficient amount of evidence will also be key to the ability of parties to reach such an understanding (see paragraph 4 below). If the latter, if one or more parties to the investigation dispute it, does this affect the availability of settlement to other parties willing to co-operate?

3.2 **Setting a possible precedent**

The Commission states that it is concerned about setting a precedent but, again the meaning of this is not clear. Indeed, it is unclear whether this is viewed as a reason to settle or as a reason not to settle. By accepting or rejecting settlements in certain circumstances, the Commission may give rise to legitimate expectation of parties in similar circumstances that they will be treated consistently. It is difficult to see how this can be avoided or why it should be a criterion for the availability of settlements. If the concern is about the precedent of the level of reduction in fine, it would seem that this is already addressed by the proposal to insert a fixed percentage reduction in the Notice.

The concern may, on the other hand, be that, where the Commission considers it important to set a precedent, settlements and the correspondingly short statement of objections and decision will reduce the predictability of future investigations. We question whether that wider ground is a valid reason to deny a settlement to parties in a particular case.

3.3 Timing of the exercise of discretion

It appears that the Commission proposes retaining discretion not only as regards the availability of settlements but the stage at which a decision will be made on such availability. Companies are likely to be reluctant to enter into discussions with the Commission and provide the written documents required, if the Commission can decide at a late stage to reject the settlement. We suggest that the Commission should be clearer in the Notice about the stages in the process at which a decision to reject settlement could be made and the factors giving rise to such a decision. For example, is the Commission only proposing to reject a settlement at a late stage if it discovers that the party in settlement discussions has acted in bad faith, been a ringleader or similar types of circumstances?

4. RIGHTS OF DEFENCE

Part of the balance to be achieved in the settlement process is between a limitation of a party's rights of the defence and a corresponding reduction in fine. It seems that some information will be disclosed to settling parties but there will be no opportunity to discuss or negotiate this with the Commission. This could be problematic where, for example, the Commission relies on misleading documents or will not accept any arguments as to the appropriate attribution of liability within a corporate group or between vendors and acquirers of undertakings. Given that rights of the defence are a fundamental tenet of civilised legal systems, it appears to us that the proposed reduction in penalty may not compensate parties adequately for the surrender of their rights. This risks either parties being deterred from pursuing settlement discussions or parties seeking to challenge the Commission's settlement decision at a later date, neither of which outcomes seems to pursue the Commission's aims in the Proposal.

5. SETTLEMENT IN WRITING

We note that the Commission requires the ultimate settlement submission to be in writing. By contrast, corporate leniency statements can be made orally. Both documents would seem to contain similar information which would justify similar treatment. As required by the Proposal, it would appear likely that the settlement request would be discoverable in private litigation and may, therefore, deter parties from entering into settlement discussions.

It also appears that even the request to be considered for settlement discussions requires to be in writing and there is no mention in the Proposal as to the treatment of this letter by the Commission, particularly where the settlement request is ultimately rejected. Although at paragraph 27 of the Draft Notice, the Commission proposes that the parties' "acknowledgements" be withdrawn if the Commission rejects the settlement. It is unclear if this

includes the initial request which, although it may not contain an admission, could indicate to third parties, in particular potential litigants, that a party was involved in the infringement.

6. FINES

The Proposal anticipates disclosure by the Commission of the likely level of the fine to be levied. However, the level of detail to be disclosed regarding the fines is unclear. We routinely try to provide clients with a range of potential fines when they are alleged to have participated in infringements. There are many variable factors other than gravity, duration and the addressee of the decision which affect the penalty. If parties are to make informed decisions about the level at which to make a settlement submission, we suggest that the Commission disclose as much information as possible regarding the penalty assessment.

We note that the proposed percentage reduction for settlement has not yet been included in the proposal. The level of reduction will be important to encourage parties to act as the Commission desires. Too low a figure and there will be little incentive to settle given the possible increased exposure to private actions. Too high a figure could affect the leniency policy, in particular leniency awards at the lower end of the scale.

7. INTERACTION WITH LENIENCY

We note that the reductions for settlement and leniency are cumulative and we agree that this is helpful. However, for parties eligible for only a small leniency reduction, we consider that the burden to co-operate with the Commission throughout an investigation may conflict with the commercial incentive of settlement to reduce management time spent on the investigation. The need for parties to consider leniency and settlement separately may create uncertainty. Therefore, it would be helpful if the Commission gave further consideration in the proposal to the interaction between leniency and settlement.