

# ADDLESHAW GODDARD

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## BY EMAIL

European Commission  
Competition Directorate-General  
Unit G5 – Cartels V  
Settlements package  
B-1049 Brussels

Dear Sirs

### Response to the Commission's consultation on settlements in cartel cases

We refer to the proposal of the European Commission ("EC") to introduce a settlement procedure in cartel cases.

We make the following comments:

1. We expect the reforms would be welcomed by many in the business community, as they offer: a much needed opportunity to bring what can be protracted investigations and legal proceedings to an earlier conclusion; reduced legal costs and management time; and certainty, provided that fundamental safeguards are preserved, as more fully set out below;
2. One of the most important aspects of this procedure will be to ensure that a party is placed in a position to make an *informed* decision about whether to settle the case. This necessitates knowing the full case against the party, including the strength of the evidence and the exact scope of the allegations. In short, parties should not feel pressured into deciding whether or not to settle whilst being kept in the dark about some of the evidence available against that party.

Nor should the settlement procedure be misused, by the EC seeking to agree a settlement in order to avoid the need to collate the requisite evidence to prove the infringement: the leniency process is designed to assist the EC in that respect and can and should continue to fulfil that function.

3. We note the Commission documents do evince an intention to respect a party's rights of defence. This is entirely appropriate. Throughout the documentation, there is reference to the party being informed of the evidence and having access to documents, prior to deciding whether to accept the settlement by making a formal written settlement submission. We note, for example, Articles 15 to 17 of the draft Notice, which say:

*"15. The Commission retains discretion to determine ...the timing of the disclosure of information, including the evidence in the Commission file used to establish the envisaged objections and the potential fine. Information will be disclosed in a timely manner as settlement discussions progress.*

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16. *Such an early disclosure in the context of settlement discussions ...will allow the parties to be informed of the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections. This will enable the parties effectively to assert their views on the potential objections against them and will allow them to make an informed decision on whether or not to settle.*

17. .... the Commission may grant a final time-limit of at least XXX working days for an undertaking to introduce a final written settlement submission ...*Before granting such time-limit, the parties will be entitled to have the information specified in point 16 disclosed to them upon request. Upon reasoned request by a party, the Commission services will also grant it access to non-confidential versions of any accessible document listed in the case file at that point in time, in so far as they consider it justified for the purpose of enabling the party to ascertain its position regarding any other aspect of the cartel and provided that the procedural efficiencies referred to in point 5 are not jeopardized.* [emphasis added]

4. However, the wording in other areas of the documentation is less clear and should be strengthened to mirror the provisions set out in Articles 15 to 17. For example, Frequently Asked Questions ("FAQ") Number 9 states that:

*"During the discussions the Commission services may disclose in a timely manner the evidence supporting the envisaged objections. Accessible versions of other documents listed in the case file may be disclosed upon reasoned request when it is justified to enable a company to ascertain its position on a given time period or issue, and where this disclosure does not jeopardise the overall efficiency sought with the settlement procedure. This issue is raised in article 15 of the proposed notice."* [emphasis added]

5. Similarly, there is an inconsistency between Articles 1(4)(2) and 1(7) of the draft Regulation.

Article 1 (4) (2) states that:

*"2. The Commission may inform the parties willing to introduce settlement submissions of:  
(a) the objections it envisages to raise against them;  
(b) the evidence supporting them, and  
(c) the potential fines."* [emphasis added]

Whereas, Article 1(7) states that:

*"7. After the initiation of proceedings ...the Commission shall disclose, where appropriate, the evidence supporting the envisaged objections to parties willing to introduce settlement submissions in order to enable them to do so. In view thereof, when introducing their settlement submissions the parties shall confirm to the Commission that they will only require access to the file after the receipt of the statement of objections, if the statement of objections does not endorse the contents of their written settlement submissions "* [emphasis added]

6. We consider that the Commission's approach that the rights to appeal the final decision, by a party which has settled a cartel case, are not affected by the settlement procedure, is appropriate.
7. We harbour some concerns regarding the statement that parties in the same corporate group should be jointly represented in settlement proceedings. We can envisage many instances in which this would be inappropriate and may contravene rules with regard to conflicts of interest. The Commission could modify its approach such that it agrees to negotiate with a corporate group as a whole, and that group then seeks to determine how it marshals its component parts and its advisors so it can negotiate on masse.

Please also note that the documentation is not entirely consistent on this point as Article 1(4)(1) of the draft Regulation says that the parties "shall" appoint a joint representative, whilst Article 12 of the draft Notice states that they "may".

8. It is not clear when a party can unilaterally withdraw from the settlement discussions: the impression we gained on reading FAQ 13 was that a party could withdraw at any time. However, Article 22 of the draft Notice says this right only applies up to the point the party submits a formal written settlement submission. It would be helpful if the position was clearly stated in the supporting documents as well.
9. With regard to the amount of settlement reduction, it is not clear whether the percentage reduction will be the same for everyone (per Article 32 of the Notice), or will be the same for all cartelists who settle in an individual case (per FAQ number 5).

We note that: the amount is intended to be less than the reduction a company may achieve for leniency, but can be coupled with a reduction granted on an earlier application for leniency. However, for the settlement system to work, it follows that the percentage reduction must be a sufficient incentive to the party to settle.

Similarly, we can well understand that the Commission would not want to undermine its own leniency programme, by offering settlement discounts which mean companies cease to come forward with the valuable information it needs to establish infringements in the first place. Accordingly, in our view the settlement discount must be added to any leniency discount to which the company might be entitled.

We consider that the settlement discount should be not less than 40%; although we can envisage some clients which would not be incentivised to settle below a 50% reduction.

Should you have any questions regarding these comments, please contact Trudy Feaster-Gee of this firm in the first instance.

Yours faithfully

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