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

By mail: COMP-CARTELS-SETTLEMENTS@ec.europa.eu

COMMENTS OF PAVIA E ANSALDO ON THE PROPOSED SETTLEMENT PROCEDURE FOR CARTELS

Dear Sirs,

Please find hereinbelow the comments of the Antitrust Department of Pavia e Ansaldo on the above captioned 'settlement package':

** ** **

(a) **Introduction**

In general, the comments we have outlined in the following paragraphs will refer to the system outlined in both the draft Commission Notice and the proposal for a Commission Regulation amending Regulation (EC) No 773/2004[1]. While we consider a highly welcomed opportunity the introduction of such procedure, the related mechanism seems to be rather complicated, involving a very significant number of different (and sometimes too complex) stages. We therefore hereinafter indicated a possible alternative route to the achievement of the same objectives.

[1] We would like to highlight that there is a language discrepancy between the wording of the Commission Notice (referring to "*the conduct of settlement **proceedings***" and the Proposal for a Commission Regulation amending Reg. 773, referring to "*the conduct of settlement **procedures***".

At the same time, we acknowledge that the Commission does not want to introduce a US style plea-bargaining because it is not prepared to negotiate either the guilt or the amount of the fine (as stated clearly in the Q&A press release published in connection with the issuance of the drafts on the Commission's web site). But if this is really the case, probably the entire procedure should be re-named. Reference to the notion of 'settlement' seemingly implies some sort of negotiation which, as such, would be at odds with the Commission's stated position. If the Commission does not want to convey an incoherent message, the procedure should be re-named, e.g, the 'no-contest' proceeding, because it essentially rewards parties for not contesting the findings of the Commission. The notion of settlement, instead, clearly hints (especially in civil law countries) to some sort of negotiations and reciprocal concessions which, again, would not fit perfectly well in the Commission's desired approach.

Furthermore, we would like to draw to the attention of the Commission the fact that the whole procedure explored in the draft Notice seems to imply, as a necessary corollary for its smooth functioning, that all defendants wish to settle and that a settlement is indeed reached with all of them (and not reversed by the College of Commissioners). In cases where, instead, some of the parties do not want to file a WSS, or where the Commission is not accepting it, there will be two 'parallel' and different proceedings, one pursuant to the Notice and the other one following the general rules, thereby leading to a potential prolongation of the proceedings, contrary to the very same objectives of the Notice. For example, if, as provided in paragraph 29, the Commission adopts a final position which departs from the statement of objections endorsing the parties' WSS, the Commission will notify to the parties a new SO. It I clear that this new SO will have implications also for non-settling parties, because the defensive scenario changes for them as well (they may want to re-consider or amend their defense in light of the reversal of the settlement): will the Commission grant the parties a new access to the file (we believe so) ? Will new pleadings be allowed and/or a new hearing necessary (we believe so) ? (see also our comment on paragraph 35).

In addition, and as another general remark, we believe that, though the Q&A press release provides, under Question 5, that "[*a*]*ll parties settling in the same case will receive equivalent reductions of the fine, because their*

contribution to procedural savings will be equivalent", a graduation of the reductions could be a tool the Commission should seriously consider so as to reflect the different degree of liability of the various parties (e.g. the cartel's ring leader may not get the same reduction of a minor participant: or, conversely, the Commission may have greater interest, for the expedition of the file, to have the ringleader admitting its guilt, as this may render the other defendants' arguments less credible).

(b) **Comments on the draft Notice**[2]

Para. 2: cooperation is linked to defendant acknowledging its participation in the cartel "*and*" its liability. This seems to imply that, for cooperation to exist under the Notice, a firm shall accept in its entirety the allegations made by the Commission. However, cooperation (and procedural savings) may take place also in those events where:

- participation and liability is acknowledged, but for a portion of the charges levied by the Commission (e.g., only in relation to certain facts and/or time periods and/or entities); and/or

- participation is acknowledged but, as regards liability, some qualifications are made by the defendant firm (e.g., that a statute of limitation applies to some of the conducts and that, as such, liability is therefore not fully admitted).

As has been already outlined in the introductory section of this document, we believe that the Notice should clarify that partial cooperation is taken into account for the purposes of the settlement procedure, giving the Commission the power to 'weigh' the amount of cooperation offered (because it is a fact that, even if with some qualifications, the above examples would yet free resources for further enforcement actions).

Para. 3: this paragraph refers to the "*discretion*" enjoyed by the Commission in entertaining settlement negotiations. Paragraph 5 (as will be seen hereafter) states that the Commission retains a "*broad margin of discretion*". While it may be acceptable that the Commission is not forced to consider or

[2] Reference is hereby made to the order and headings used in the text of the Notice. When a given paragraph is not mentioned, no comment is made thereupon.

even accept settlement offers, it is however important that this instrument is not left to the discretion (or, worse, to the "*broad discretion*") of the Commission's officers) because that will impinge upon the basic principle of equality and proper administration.

It must be clear that "*discretion*" cannot mean that the Commission has the arbitrary power to decide whether or not to assess or grant a settlement. It is a basic notion of administrative law, in those jurisdictions who have this branch of law, that the exercise of a 'discretion' enjoyed by a public authority is always challengeable in court, because discretion is not equal to unqualified power to rule on a certain matter.

Indeed, if the procedure wants to be successful in practice, parties will want to have some guidance as to, e.g., whether a certain case is subject to settlement, and as to whether a certain WSS is likely to be considered. This is especially so because, in the current version of the Notice, a WSS has to be in writing and, while it will be disregarded if the Commission refuses to settle, yet it will remain a written document witnessing admission of liability that the Commission will hardly *de facto* ignore in making its decision.

Para. 7: it is not clear whether the confidentiality also covers the very same fact that a settlement procedure has been triggered. Paragraph 7 seems to literally refer only to the confidentiality as to the "*content of the discussion*" or of the "*document*" examined. Literally speaking, it seems not to prevent firms from disclosing they have entered into discussions with the Commission as such. Along the line of the objective presumably pursued by the Commission in this respect, probably such a clarification would be advisable (incidentally, this would be coherent with the non-disclosure provisions of Article "A 12" of the Leniency Notice).

It is suggested that, if possible, the entire procedure be summarised with additional clarity, eventually by adding a model time-table. The Notice does not appear to be entirely clear (at least at first glance) on the steps firms have to take in order to avail itself of a settlement procedure (a chart similar to the one describing Article 9 referral procedures in the merger area would be ideal).

Para. 9: this paragraph, along with Article 2(1) of Regulation 773, sets the initiation of proceedings at the moment in which the Commission issues a

request for the parties express their interest in engaging in settlement discussions. It not clear whether this request is a 'default' one or rather - as it seems in light of the other paragraphs of the Notice - it is released after an effective assessment by the Commission of the suitability of the case to be subject to settlement discussions. In other words, the fact that a notice is sent to the defendants, is in itself a manifestation of Commission's willingness to consider settlements ? Or, is the Commission envisaging such a notice as a routine step in every proceeding ?

Para. 10: the answer to the issue raised in relation to paragraph 9 is even more important in light of paragraph 10 which provides that, thereafter, the Commission is solely competent to apply article 81, and therefore it deprives the NCAs from the possibility to apply article 81.

Para. 12: this paragraph of the Notice refers to the possibility ("*may*") of appointing a common representatives. Article 10a of Regulation 773 seems to speak in terms of an obligation ("*shall*"). The two provisions should be reconciled.

Also, it would be probably appropriate to consider that there may be cases where companies, while belonging to the same group, do not wish to be jointly represented as their position is deemed conflicting (e.g. the antitrust intra-enterprise doctrine does not introduce a non-rebuttable presumption of statutory liability of the parent entity. There are cases where a parent company, while controlling another entity, may be able to differentiate its position from the perspective of antitrust liability).

Para. 13: it deals with the relationship between the Notice and the Leniency Notice. We wonder whether it is really necessary to introduce in this Notice such restriction to the applicability of the Leniency Notice. For example, it is hard to see what would be the problem in applying the Leniency Notice after the expiry of the two weeks term if some parties have come forward with a settlement submission and the Commission has not accepted it. At least, the Commission should explain on which grounds it would reject application for the Leniency Notice.

Para. 14: in the paragraph at stake, the use of the word "may" could give rise to confusion and uncertainty, as it seems to suggest that the Commission could decide at its sole discretion not to pursue the settlement procedure.

Para. 17: the use of the expression "*common understanding*" seems to hint that the rationale lying behind the settlement proceedings is that of an 'agreement' between the Commission and the parties. However, if one reads the Q&As press release, one gets the impression that there is no negotiation but only a reward that the Commission gives to the parties who enables it to achieve procedural savings. If this last interpretation is the correct one, as explained in the introductory section, it would make much more sense to call the proceedings the "*no-contest proceedings*".

In addition, the last sentence of paragraph 17 provides that the Commission could grant a party access to the file upon submission by the latter of a "*reasoned request*"; i.e. of a request specifying the grounds thereof. Actually, this seems to conflict with paragraphs 15 and 16 which apparently provide an unconditional right of access to the file, as the latter is regarded as necessary to allow the parties to "*effectively assert their views on the potential objections against them and will allow them to make an informed decision on whether or not to settle.*" If that is true, it not clear which additional 'reasoned' grounds should be provided by the defendant request pursuant to paragraph 17.

Para. 20: as a general remark, this paragraph and the following ones seem to structure a rather complex and complicated mechanism articulated in a significant number of different steps: (i) the Commission's initiative testing the parties' availability to enter into a settlement; (ii) the paeties' declaring their interest: (iii) the negotiations; (iv) the filing of a formal WSS by the defendant, (v) the issuance by the Commission of a statement of objections: (vi) defendant's written confirmation of the correspondence between the WSS and the SO, (vii) the adoption of the final decision by the Commission.

All the above multiplied by the number of defendants potentially interested.

We believe that this complex procedure risks preventing a simplification of cartel proceedings. On these grounds we respectfully propose to adopt a mechanism (somewhat similar to the one in force in the USA), where:

- there is a public announcement by the Commission (as currently envisaged)

- which is followed by in-depth discussions with the parties aimed at reaching a common understanding on a number of points, and
- if a consensus is reached, then the Directorate General of the Commission and each of the parties pleading guilty execute a settlement agreement, which is subject to the unqualified approval of the Commission;
- the Council of Commissioners may either reject it or approve the agreement, but cannot modify the terms thereof (if procedurally possible, the Commissioners should enter into a partial decision only on the admissibility of the settlements, so that the Commission is not bound to issue 2 SOs).

This way, when a party makes an admission of guilt, it does so having something in writing which binds the Commission staff too. And probably this makes the proceedings much more appealing to the defendants which, otherwise, may be reluctant simply to rely on a unilateral offer to settle (even if pursuant to the consensus reached with the staff).

As regards to the contents of the WSS, provided in detail in paragraph 20, point (a) thereof lists as the very first element that the WSS shall contain an "*unequivocal*" acknowledgment of the parties' liability indicating inter alia the main facts and the duration of their participation thereof. Actually, this provision does not seem to fit the frequent cases where a number of parties are involved up to a different extent as to the facts and the duration, as well as to cases where a limitation period applies to some facts carried out only by some of the parties and not by all of them. In our opinion, in order to ensure more legal certainty, the Notice should provide a clear discipline of cases like the just mentioned ones.

Point (b) requires, in turn, that the parties indicate the maximum amount of the fine they consider justified. First of all, as the parties are required to indicate not only their liability but also that they admit they deserve a fine and the maximum amount thereof, it is difficult to envisage that, if the Commission does not endorse the settlement these acknowledgements would not be taken into account by it while carrying the following normal procedure. Secondly, as it is now shaped, the system pushes the parties to set the maximum fine at a very low level thereby entailing the risk that in most cases the Commission does not endorse the settlement submissions, the parties knowing it will not be interested in taking part to a procedure

with very little chances of success, so that the system will not work in practice (in the UK this seems to be a major factor in the failure of the settlement system).

In addition, and taken into account that all parties are supposed to get the same fine reduction, it is not clear how the maximum fine should be indicated. In fact, the Notice does not specify if the maximum fine shall be indicated e.g. as a percentage of the parties' turnover or as a specific sum.
Again, in light of all the above critical aspects arising from the present wording e.g. of letters a) and b) of paragraph 20, a more suitable solution seems to be represented by the adoption of a system like the US one providing the signature of a pre-agreement where all these problems have already been dealt with and sorted out between the Commission and the parties.

Point (e) provides the parties' agreement to receive the statement of objections and the decision "*in a **given** official language of the EU*". The wording of this provision seems to suggest that the parties are bound to accept as language of the proceedings any official language of the EU. Is this the sense to be given to the expression '*given language*' ?.

Finally, we believe that in the WSS it could be worth introducing the parties' confirmation that they will **not** challenge the final decision before the European Courts, unless – e.g. - under exceptional circumstances (in some European jurisdictions these exceptional circumstances allow for the so-called 'revokation' appeals): e.g. the settling parties may appeal if a fundamental document on which they admitted to be guilty is later found to have been false). As a matter of fact, waiving the parties' right to appeal would be justified in exchange to the reduction of the fines or to the admission to the settlement proceedings. We do not see major propcedural or due process implications: if a party may waive its right to have access to the file or argue its case (as the Notice currently states), it should be able to also waive it right to appeal the decision.

Para. 22: according to the provision at stake, the statement of objections shall reflect the contents of the WSS as regards the description of the cartel, the undertakings involved therein and the legal qualification thereof.
The procedure outlined by this provision looks susceptible to give rise to problems any time the Commission uses in the statement of objections a

wording different from the one used in the settlement submissions. Here again, it could be worth considering the opportunity to adopt a system similar where the presence of a signed pre-agreement would prevent such problems from arising (the SO would simply refer to the agreement).

Further to that, what is the meaning of the second sentence of paragraph 22: does it mean that the parties are bound to accept the statement of objections whenever it "*reflects*" the contents of the WSS ?

Para. 26: this provision too witnesses the complexity of the procedure shaped by the Notice. Such complexity runs against the possibility to obtain the procedural savings representing the goal the system is conceived to achieve. In this paragraph, it would be preferable to make reference to "*working days*" rather than to "*weeks*".

Para. 27: although the paragraph at stake (as well as paragraph 29) provides that, if the Commission does not endorse the parties' settlement submissions, "*[t]he acknowledgments provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used against any of the parties to the proceedings*", it seems difficult for the Commission not to be influenced by the parties' acknowledgment of liability contained in the rejected settlement submissions. Even more so if one considers that the same officials who have examined the submissions will handle the case pursuant to the 'ordinary' proceedings. This again stresses the need that parties must be re-assured that when a WSS is filed, it will be accepted save for exceptional reasons (which, needless to say, should be somewhat described).

Para. 32: as the provision at stake does not indicate yet the exact percentage by which the fine will be reduced in settlement cases, we would deem it appropriate to set such a percentage at a level close to, but lower than, the minimum reduction granted to the less favorite party benefiting from the Neniency Notice (i.e. 20% pursuant to the third indent of paragraph 26 of the Leniency Notice).

Para. 34: it is not clear what cases are covered by the notion of "*pending cases*". Will the Notice apply also to cases where an SO has been already issued at the time of publication of the Notice ?

Para. 35: from the wording of this provision it is not clear whether the various documents relating to the negotiations and more in general to the settlement procedure between the Commission and the parties will be disclosed to other parties to the proceedings interested in knowing them. Would be another defendant/third party allowed to have access to the agreement ?

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We remain at the disposal of this Hon. Commission for any additional comment and/or explanation that is requested. For any further request, please contact us at:

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Best Regards

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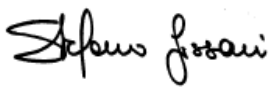

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