COMMENTS ON THE SETTLEMENT PACKAGE
SUBMITTED BY WILLKIE FARR & GALLAGHER LLP

1. This document contains the comments of Willkie Farr & Gallagher LLP on the European Commission's (***Commission***) proposal for a Commission Regulation amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases and the Commission's 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 (collectively the ***Settlement Package***).

2. As we understand, this current proposal should open the floor for discussion and the public consultation process should give practitioners and other interested parties the opportunity to contribute their comments, so that the Commission can further develop appropriate rules that will provide both the Commission and the undertakings that participated in a cartel, incentives to close an investigation via a settlement rather than following the general procedural route laid down by Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004.

3. We would first like to welcome the Commission's initiative to introduce the discussion and to ultimately implement a settlement procedure for cartel investigations, as it will reduce costs and the length of the procedures, to the benefit of firms that may be involved in cartels. As a matter of principle, we also fully support the Commission's intention to optimize the use of its resources.

4. This being said, we would like to make the following comments on the Commission's proposal. As a general remark, we have the impression that the Settlement Package is envisaged by the Commission as a mean to diminish its backlog and as a way to optimize the use of its resources rather than as a dynamic negotiation tool introduced in the interest of companies that may be involved in cartel infringements. Many of the specific points we raise below are to be read against this general background.

Scope of the Settlement Package

5. One fundamental question that immediately arises is why the Commission did not expand the scope of application of the Settlement Package to cover Article 81 and Article 82 instead of limiting it to cartels only. We do not consider the Commission's justifications for adopting such an approach[1] as compelling reasons why investigations relating to abuses of a dominant position could not be brought to an end by a settlement. The facts that such cases are less frequent should not deprive companies from the opportunity to settle. We agree that the overall workload for a cartel case is potentially heavier than in an abuse of

[1] The Commission argues in its explanatory frequently asked questions that cartel cases are comparatively more frequent and often entail a heavier procedure because of the multiplicity of parties involved and the jurisdictional issues arising. Also, litigation concerning cartel investigation are mainly limited to the amount of the fine, procedural issues and the liability of the parent companies for actions undertaken by their subsidiaries.

dominance case. However, this is arguably not always the case as dominance cases raise sometimes more complex legal and economic issues. In addition, most of the times, cartel participants do provide the Commission with most of the necessary evidence within the framework of leniency, whereas building a case concerning an abuse of a dominant position can be much more burdensome for the Commission.

6. For instance, in France, settlement procedures are well established and do cover abuse of dominance cases. The French *Code de Commerce* provides the opportunity to settle the case (by foregoing the right to respond to the Statement of Objections) both for restrictive agreements and abuses of a dominant position. Also the US system provides the possibility for settlements in actions concerning restraint of trade and monopolization cases. The respective rules in criminal cases are in the *Federal Rules of Criminal Procedure.*

Commission's discretion to engage in settlement talks - deadline to declare intention to engage in settlement talks

7. The current draft provides the Commission with a "broad margin of discretion" to determine the suitability of a case to be settled with the undertakings involved. However, it does not state any specific criteria that make it foreseeable whether the settlement procedure might be a realistic option to close an investigation. In order to avoid unfair treatment between undertakings that participated in cartels, a right to discuss the possibility of a settlement should replace the currently proposed broad discretion of the Commission, which should only be in a position to reject settlement proceedings with an undertaking after such an initial discussions. At least, the criteria that the Commission would take into account to determine whether or not a settlement procedure may be used should be set out in a transparent manner.

8. In addition, we believe that the two weeks deadline set out in paragraph 11 of the Draft Notice may be too short in some instances and should be extended to at least 15 working days.

The need for a written settlement submission - confidentiality issues

9. We also have concerns regarding the current requirement of a "written" request to officially enter into settlement discussions and a "written" settlement submission (***WSS***). This seems particularly problematic as such documents could become discoverable in private enforcement actions, in legal systems such as the US. Exactly for this reason the US Department of Justice does not require anything in writing during its settlement process. We therefore urge the Commission to introduce a similar mechanism for oral requests as in the amended leniency program. In any event, the settlement submission should be treated as confidential by the Commission.

10. We understand that settlement discussions should be kept confidential by the parties to the proceedings. However, it should be made clear that this confidentiality requirement should not apply to relationships between parties belonging to the same undertaking, which, as such, have the obligation to appoint joint representatives.

Early admission of liability

11. The current proposal requires quite early in the proceedings (before a statement of objection is even issued) the written admission of the undertaking's liability. Although the

Commission points out that the settlement procedures do not deprive an undertaking of its right to defense and explicitly states that the final decision of the Commission can be appealed before the Court of First Instance, in practice the chances for a successful appeal of a decision resulting from a settlement procedure are already extremely limited. We therefore submit that the formal admission of liability could be made only when a formal settlement agreement is reached.

Incentives to settle and adequate reward

12. The current draft still leaves open many questions concerning the incentives for undertakings to settle. In this respect, as a general comment, it has to be pointed out that the current wording of paragraph 32 of the Draft Notice, i.e. *"[s]hould the Commission decide to reward a party for settlement"* leaves room for interpretation that the Commission does not have to reduce the level of fine in case of a settlement. This would defeat the main incentive for an undertaking to enter into settlement discussions with the Commission. The wording should be changed accordingly.

13. Regarding the specification or the percentage for the level of reduction of a fine, the following considerations have to be taken into account: if they settle (i) companies waive many possibilities to exercise their right of defense, namely the opportunity to provide a detailed response to a statement of objection, to have access to the file (and therefore to exculpatory evidence) and to put their views forward in the course of an oral hearing, (ii) the fine will be paid much faster as one of the very purposes of the Settlement Package is to reduce the duration of cartel proceedings.

14. Therefore, we suggest that the percentage of the reduction after the 10% cap should be of at least 25%. Such a percentage on one hand represents substantial savings for the undertaking concerned and on the other hand leaves sufficient incentives to apply for leniency, where higher and/or additional reductions can be obtained. In addition, the amount of a reduction for a settlement has to be set in relation to the fact that the average reduction of a fine by the Court of First Instance ("CFI") is today at 29% leaving full annulments aside.

15. Furthermore, the Commission can stop the settlement discussions at any time. Although the current proposal states that the content of the WSS would be disregarded in the further proceedings, it is hard to imagine how the Commission would not make use of any of the information that it became aware of during settlement discussions. This could prove to be a strong disincentive to engage in settlement talks. We note in this respect that the CFI ruled in *Akzo*[2] that officials of the Commission can be hindered to even take a quick look at a particular document, when the companies argue that it is legally privileged. In line with this principle, a solution should be offered on how to treat the information that the Commission became aware of during settlement discussions. One possibility would be to grant an undertaking a 5 to 10% reduction of the fine in case a WSS is submitted but no settlement is ultimately reached. This could somehow compensate for the risk companies would run in case they disclose information in the course of a settlement negotiation that would eventually not succeed.

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[2] See *Akzo v. Commission*, joined cases T-125/03 and T-253/03 dated 17 September 2007.

16. Another major obstacle for an undertaking is the fact that according to the current proposal the Commission may only at an advanced stage of the settlement discussions provide an undertaking with the information on which it built its case to determine the potential amount of the fine (e.g. the size of the market, the duration of the infringement, whether the parent company will be held liable or not, whether the infringement will be considered to be "continuous" or not, the multiplication factor that the Commission considers to use, etc.). However, such information is absolutely crucial for a company that may wish to settle as it is the only mean to evaluate its potential exposure. Absent such information, we cannot see how a company could be ready to disclose the amount of the fine it would be ready to bear, as currently contemplated in the Settlement Package. Moreover, corporate principles require companies to demonstrate an interest in entering settlements before doing so. Therefore, the undertakings concerned should be granted access to such information early in the process. Also such information should be sufficiently detailed. In this respect, we believe that companies should have access to all the basic information that would be used in the Statement of Objections and the related pieces of evidence. The current drafting of the Draft Notice (see in particular paragraphs 15 and 16) leaves too much discretion to the Commission both in terms of type of information to be provided and in terms of timing.

17. This problem is all the more acute that the current fining policy of the Commission is arguably not fully transparent and predictable, despite the recent clarification that result from the new Notice on fines. We are of the opinion that in the US settlements are common practice and work well at least partly because the fining policy of the authorities is more predictable.

Multi-party settlement talks

18. The current proposal states that all undertakings of a cartel reaching a settlement with the Commission will be rewarded the same percentage of reduction of the fine. This may lead to a number of difficulties in particular when one party refuses to settle. Indeed, in such a case, from the Commission's point of view, the benefit associated with a settlement is reduced significantly as it will still need to follow the full proceedings for at least one undertaking (full statement of objections, access to file, oral hearing, etc.). As a consequence, the reward granted to settling parties would arguably be much less significant. We believe that the reward should take into account the personal contribution of each firm, otherwise incentives to settle will be significantly reduced.

Relationship with leniency

19. Except for the fact that the reduction for a settlement should be in addition to the reduction for leniency, the relationship between the leniency program and the settlement procedure is still left open. Therefore, it should be made clear that if a leniency applicant does not want to engage into settlement talks with the Commission or steps out during this process, then such behavior should not influence the assessment of the level of an undertaking's cooperation, to which it is obliged to in terms of the leniency procedure.

Termination of settlement negotiations

20. The current draft states that after the submission of a WSS, only the Commission can unilaterally withdraw from the settlement procedure. To do so, an undertaking needs the Commission's consent. Also, in case an undertaking does not confirm the statement of

objections containing the content of the settlement discussions the Commission *may* disregard the undertaking's request to follow the settlement procedure. In order to remove this unbalance, undertakings should be granted the same right to withdraw unilaterally from the settlement procedure after a WSS.

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21. Willkie Farr & Gallagher LLP would be happy to discuss any points raised in this document which the Commission finds unclear or wishes to see elaborated. For this purpose, the Commission can contact Jacques-Philippe Gunther (JGunther@willkie.com), David Tayar (DTayar@willkie.com) or Christina Hummer (CHummer@willkie.com).

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