INTERNATIONAL BAR ASSOCIATION
ANTITRUST COMMITTEE

SUBMISSION TO THE EUROPEAN COMMISSION'S CONSULTATION WITH REGARD TO A DRAFT COMMISSION NOTICE ON THE CONDUCT OF DIRECT SETTLEMENT PROCEEDINGS

1. INTRODUCTION AND EXECUTIVE SUMMARY

Introduction

1.1. This submission is made to the European Commission (the "Commission") on behalf of the Cartel Working Group on Leniency Programmes of the International Bar Association's Antitrust Committee in relation to the Commission's Draft Notice on the conduct of direct settlement proceedings. The Antitrust Committee of the International Bar Association ("IBA") brings together antitrust practitioners and experts among the IBA's 20,000 members from across the world, with a unique blend of jurisdictional backgrounds and professional experience. The Members of the Working Group are set out in Annex A.

Executive Summary

1.2. The Working Group very much welcomes the Commission's initiative to introduce direct settlement proceedings. As evidenced by experience in other jurisdictions, the possibility to enter into direct settlements is beneficial both to the enforcement agency and the business community. It has the potential to provide for a more efficient and timely finalization of individual cases by lowering the administrative burden for both enforcer and settling party and will ultimately result in more effective enforcement of cartel laws.

As to the Commission's current proposal, the Working Group submits that the settlement discount should be sufficiently high to cause the parties to enter into settlement discussions and suggests it should be in the range of 20-25 percent. In addition, the Working Group is concerned about the lack of transparency and certainty for the parties

willing to settle. This may discourage and prevent these parties from entering into settlement discussions and could thus undermine the goals of the Commission's initiative. These concerns arise in particular in respect of the following areas of the Commission's Draft Notice where the Working Group believes there is room for improvement in terms of transparency, certainty through increased guidance and safeguards:

a) The need for increased transparency regarding the range of likely fines: the settling party should know early in the process what fine the Commission intends to impose as that would promote certainty and therefore early settlement;

b) The need for increased certainty regarding the Commission's commitment to settle the matter: the Commission's seemingly absolute discretion both as regards the decision to enter into settlement discussions as well as to endorse the written settlement submission puts the settling parties at serious risk of exposure. Having entered into discussions and the settling parties having put their cards on the table in a *bona fide* manner and there having been positive discussions – then one would have thought there should be a high degree of commitment by the Commission to also settle on the terms discussed in principle;

c) The need for improved safeguards regarding the admissions made by the settling parties: the current proposal does not provide sufficient safeguards in respect of the acknowledgements made by the settling parties, regardless of whether the Commission finally endorses the written settlement submission. In this respect, the Working Group also questions whether it is indeed necessary to make a submission in writing and why it could not be made orally.

These concerns are discussed in more detail in this submission.

1.3. The Working Group looks forward to discussing these and any other issues with the Commission, as well as providing such further input as the Commission may find of assistance in relation to the Draft Notice.

2. THE SETTLEMENT DISCOUNT

2.1. The Working Group notes the Commission's view that the leniency programme is an investigation tool as compared to the proposed settlement notice, which is aimed at simplifying and expediting the investigation therefore allowing procedural savings and redeployment of enforcement resources. In return, the Draft Notice is intended to provide an additional reduction of any fine as an incentive to settle. Accordingly, the Draft Notice and any settlement process should provide compelling incentives with sufficient certainty of an outcome to be attractive for parties to renounce developing a full defence to the cartel accusations. Moreover, the rewards should incentivize the parties to settle expeditiously, enhancing good faith cooperation and contribution to procedural efficiency consistent with the Commission's objectives.

2.2. We have three main comments to make in this respect

a) The settlement discount should reward the settling party for the contribution to procedural efficiency. That contribution may vary among the parties, and for this reason the Commission should retain the freedom to reward parties accordingly, depending on the varying contribution. However, the criteria guiding the Commission's exercise of its discretion should be transparent for the parties involved.

b) The settlement discount should be sufficiently high to cause the parties to enter into settlement discussions. The Working Group submits that it should be in the range of 20 to 25 percent. Any settlement discount capped below that range is unlikely to be attractive to parties – at least to some of them and since the Commission will seek to settle with all parties in a case, some holding out might undermine the purpose of the new policy.

c) The settling party should know early on in the settlement discussions what fine it would otherwise incur based on the Commission's then understanding of the facts. Such information should provide details about all the components for the fine calculation. Only such information will allow the party to make an informed

decision about whether settling, in accordance with the Commission's proposal, is worthwhile.

We now consider these three main comments in more detail.

A The Commission Notice should properly incentivize parties to enter into a good faith settlement, and such incentive mechanism requires the possibility of a different settlement percentage discount for different parties in the same case.

2.3. The Commission's proposal to introduce a settlement procedure is motivated by the desire to enhance procedural efficiency (in terms of minimizing costs and delays and resource utilization beyond the investigative phase). In this respect, the Draft Notice assumes that, since the investigation phase is over, each settling party's contribution to procedural efficiency will be equivalent and, therefore, each party should receive the same settlement discount (see Paragraph 32 of the Draft Notice and the Commission's FAQs).

2.4. The Working Group does not agree with the premise that each party's contribution to procedural efficiency is likely to be the same. Parties may express a desire to settle but, unless properly incentivized, some of them may be less interested in moving forward swiftly or in renouncing a defence. The preparedness of the parties to settle may differ, and the Commission is unlikely to know upfront what parties' motives are. They may all express a desire to settle but it is likely that if they are not properly incentivized, case-handling strategies may vary, leading to a varying preparedness on behalf of the different parties. A party may seek to push its defence to the limits of what is permissible under the settlement procedure or may wish to explore where these limits are. Some may not even have a good faith desire to settle but may seek to delay or to improve their defence. Parties are not necessarily motivated by procedural efficiency.

2.5. Therefore, for a settlement policy based on procedural efficiency to be effective, it is important that proper incentives are created for parties to move forward expeditiously. It is to be expected that the greatest procedural efficiency is created by those who are prepared, after a summary review of the Commission's case to move towards a settlement submission. Therefore, the Commission should be prepared to give those parties the highest settlement discount.

2.6. Obviously, the Working Group recognizes that, in line with the jurisprudence of the European Courts, it is important to avoid discrimination in how settling parties are treated. Variation in the level of discounts should not mean that discounts are awarded arbitrarily. Hence, it is necessary that clear and transparent criteria are established to make the exercise of the Commission's discretion predictable. There may be several parties in the category of "first mover" and if so, those should receive the same percentage discount. However, if a party is holding out and delays the procedure or creates significantly larger burdens on the Commission's staff in coming to a settlement procedure – and, it is submitted, only then – this party should risk a lower discount. Whoever holds out unduly reduces the procedural efficiency, in terms of speed of process and investment of staff time. In reality, it may be that this incentive causes all parties to move forward without undue delay and, if so, all settling parties should receive the same or a similar discount. This proposal is not about creating a race, as is the case for leniency, but about creating the proper incentives of those who are interested in settling to do so in good faith and expeditiously, to the benefit of the Commission but also with a mutuality of benefits to the settling parties.

2.7. This variation in discounts will provide a proper incentive for parties to approach the settlement process with a spirit of efficiency, rewarding swift action and resolution.

Such incentive mechanism is not only important for the Commission but also for the parties who approach this phase in good faith, with the desire to move forward and put the cartel case behind them as quickly as possible.

2.8. There is a serious risk that if the Commission ties its hands and promulgates that all settling parties will always receive the same percentage discount, its settlement procedures will be run into the ground by parties who approach this procedure with tactical motives, delaying closure and causing the staff to invest much time and efforts in reaching a settlement with all parties. A "holding out" party may feel it has some leverage over the others, and the Commission and may delay the process. That would be deplorable for the Commission and those firms that approach the process in good faith. In such a case, the Working Group also recommends the ability to reach settlement with some parties only (see further below at points 3.13-3.14).

2.9. For this reason, the Working Group recommends that the Commission Notice should not provide for a fixed discount for settling parties. Rather it should provide a range of settlement discounts, allowing the Commission, if warranted, to vary the discount to take account of a varying contribution to procedural efficiency. The criteria on the basis of which the Commission will apply its discretion in this respect should be transparent.

B. The Commission Notice should provide an incentive for parties to enter into settlement discussions by allowing for a sufficient high settlement discount. There is not a fixed percentage that is appropriate but rather a range (between 20-25 percent the Working Group would recommend) that allows the Commission to adjust the incentives in terms of the procedural efficiency created and the reward for the cooperation.

2.10. The Commission invites comments on the appropriate level of the settlement discount. As explained above, the Working Group believes that the Notice should not indicate a specific percentage. A discount may vary from case to case and within a case from party to party, since the contribution to procedural efficiency may vary.

2.11. Those who settle give up significant upside opportunities. They will no longer be able to defend their case to the fullest extent and, possibly, forfeit the chance to obtain a lower fine than proposed by the Commission. Therefore, any settlement discount should be substantial. The Working Group believes that the range provided in the Notice should, at least, be between 20-25 percent. A lower level of reduction is unlikely to provide a sufficiently strong incentive for parties to enter into settlements.

2.12. The Working Group accepts that any settlement discount should not undermine the effectiveness of the 2006 Leniency Notice. The Working Group does not believe that a reduction of 20-25 percent would be too high in view of this concern. The immunity applicant and both the first and the second parties qualifying for a reduction of their fine under Section III of the Leniency Notice will still see the reward for co-operating with the Commission as they can achieve a fine reduction of more than 20% on account of their participation in the leniency programme. These parties have the information that is most

relevant for the Commission and thus need to be attracted by the leniency programme. The fact that all other, subsequent, leniency applicants can at most qualify for a reduction of 20% of their fine under the Leniency Notice – which may be less than the discount for entering into a settlement – will in practice not affect the effectiveness of the Leniency Notice. In practice, there will be only a few cases in which such late leniency applicants can offer evidence that adds significant value to the evidence already in the Commission's possession. Thus, in the worst case scenario, it is unlikely that the Commission will miss out on relevant information. On the contrary, it is especially important to also provide an incentive to parties that do not (or only marginally) benefit from leniency to enter into settlement negotiations. Precisely those parties are most unlikely to enter into settlements because they will receive (proportionally) the heaviest fines. For those parties, a mere 10 or 15 percent fine reduction would be unlikely to encourage them to enter into settlement negotiations. In addition, those parties will need a clear commitment from the Commission and firm procedural safeguards in order to be convinced of the benefit of entering into settlement negotiations (as regards such commitment and safeguards, see in particular below at chapters 3, 4 and 7).

C. The Commission should provide early on in the settlement discussions sufficient detail about the fine proposals. That will allow the parties to make an informed decision about settling and will enhance the incentive to settle.

2.13. A decision to settle has significant financial consequences for any party. A party's preparedness to make a decision in favour of settling will be enhanced if it knows the financial outcome if it does not settle. Although the 2006 Fining Guidelines have improved the transparency of how the Commission will arrive at a proposed fine, absent any settlement, there are a significant number of unknown factors. Knowing the maximum proposed fine, and how this fine has been arrived at (i.e., the components) will be important for the client to make up its mind whether it should settle. Any secrecy in this respect is likely to make the party wary of serious settlement discussions and will finally make it difficult to convince the decision-makers within a company to reach a decision. Since the effectiveness of the Commission's settlement process is premised on swift decision-making by the settling party, it is crucial that the elements allowing it to make this decision are available early on with sufficient certainty.

2.14. In its written settlement submission, the settling party will be required to indicate the maximum amount of the fine it expects to see imposed by the Commission (Draft Notice, Paragraph 20). This indication will be based on previous discussions with the Commission staff whereby the Commission will provide the likely fine, absent any settlement. These discussions should lead to a common understanding regarding this "range of likely fines" (Paragraphs 16-17).

2.15. It is not clear what level of detail the Commission will provide in respect of the likely fine. The FAQs indicate that the Commission and the settling party will discuss the potential maximum fine "net of any other reduction".

2.16. The Working Group is of the opinion that the Commission should provide a maximum of transparency as regards the likely fine, in terms of providing a euro amount as well as the components used in arriving at this amount. It will be important for the party to know the elements of how the fine is built up, if applicable, including the duration multiplier, the deterrence multiplier, any percentage increase or reduction for aggravating or mitigating factors and the leniency discount. There is no reason for the Commission not to disclose these elements and they are crucial for the settling party to decide whether or not to settle. Transparency will avoid any misunderstanding when the party is asked to put forward its written settlement submission. This is necessary in view of the consequence that the settlement will be abandoned if the Commission does not endorse the party's proposed maximum fine in its written settlement submission.

2.17. The Working Group urges the Commission to provide a precise fine figure, subject obviously to the prerogatives of the College of Commissioners to take the final decision in this respect, rather than a range of likely fines.

3. CHANGE OF COURSE OF ACTION

3.1. The Working Group perceives the Commission's policy in favour of adopting a settlement procedure to be predicated on considerations of procedural efficiency (i.e., in particular minimizing costs and delays that are inherent in the ordinary procedures of the

Commission, including the adoption of a full statement of objections, multiple translations, organizing full access to the file, holding a hearing). Those considerations appear to have led to an approach that would provide very broad discretion to the Commission about whether or when to agree to even enter into the settlement procedure. A "broad margin of discretion" is to be vested in the Commission both at the beginning and the end of the proceedings: under Paragraph 5 of the Draft Notice, to determine if the case is "suitable" for the settlement procedure, and under Paragraphs 26-27 of the Draft Notice, whether a particular settlement submission should be "endorsed". Both these matters would benefit from the elaboration of further, quite specific, criteria for such decisions.

3.2. The Working Group recommends that a party that is exposed to substantial sanctions should in principle have the right to initiate or to propose the consensual settlement of its liability. Its request to engage in settlement discussions should not be denied without cogent reasons. In particular, it should not be prevented from participating in good faith measures to advance a settlement by circumstances that it cannot control. A particular concern in this regard is the possibility that the Commission might consider settlement procedures to be inefficient if not all the targeted parties wish to settle. In such a case, the Commission may, of course, decide that it is appropriate to conduct bilateral discussions pursuant to Paragraph 14 of the Draft Notice, but the tone and content of that paragraph, and the draft Notice in general, suggest that this is intended as an essentially unfettered discretion, unguided by any objective factors that would justify a decision to reject the interest of a cooperative party in achieving a reasonable settlement of its exposure.

3.3. In the view of the Working Group, considerations of fairness interact with a broader public policy in favour of settlements, in place of adversarial and eventually litigious proceedings. A settlement with any party that avoids the risk of non-cooperation by that party will make an important contribution to efficiency and fairness. The party's acceptance of responsibility and its decision to accept a proportionate penalty, rather than disputing details of the Commission's procedures and contesting the eventual outcome, will contribute to the overall objective of deterring cartel behaviour by freeing resources to focus on other cartels. These advantages apply not just in the particular matter under investigation, but more generally, in promoting a wider public perception that settlements are beneficial to all those with an interest in the Commission's procedures, and not just the

Commission itself. The Commission's Notice should avoid giving the impression that this is a one-sided process, administered by the Commission primarily with a view to advancing its own efficiency and essentially for utilitarian ends. Unless there are evident aspects of a settlement proposal that would misuse the settlement procedure, either for the purposes of delay or otherwise, or that is substantively unrealistic, for example, by avoiding acceptance of provable facts or by insisting on a very low penalty, the Commission's approach should be that all cases are amenable to a reasonable settlement, and that any party that seeks to conduct settlement discussions in good faith should not be rejected.

A. Failure to Endorse a Settlement

3.4. It appears that the Commission will retain unilateral discretion not to endorse a settlement submission made by a party after participating in discussions with the Commission. The proposed revisions to Articles 12 and 15 of Regulation 773/2004 make it clear that parties that submit a written settlement submission must forgo an oral hearing and full access to the file, except where the statement of objections "does not endorse the contents of the written settlement submissions". Paragraph 27 of the Draft Notice explicitly states that the Commission "may legitimately adopt a statement of objections which does not endorse the parties' settlement submissions". But there is nothing in the proposal for the amendment to the Regulation, the Draft Notice or the FAQs that provides any insight into the circumstances in which a party's settlement submission would, in effect, be rejected.

3.5. We understand the written settlement submission to be the result of settlement discussions and to be the proposal of the settling party, based on these detailed discussions. If this settlement discussion corresponds to the good faith understanding of the settling party about the terms on which a settlement will be acceptable to the Commission, the Commission should not have unfettered discretion to reject such a submission. At that time, the Commission should know whether a global settlement of the case is possible, based on discussions with all the parties. Only at that time should it invite each of the parties to put a settlement submission on the table. If one of the parties, for whatever reason, does not come forward with an agreeable settlement submission,

other parties should not be penalized by the Commission's withdrawing the whole settlement procedure and reverting to a normal case procedure. If the Commission were to do so, it would strongly disincentivize parties to come forward with a settlement submission.

3.6. As a matter of context, the Working Group is of the view that clarity of process, transparency in substance, a demonstrable commitment to discussions in good faith and a high degree of predictability of outcome are necessary prerequisites to widespread movement towards settlement on the part of companies and their advisors.

3.7. Paragraphs 14–18 of the Draft Notice should provide a considerable degree of confidence in the process. On the other hand, according to the FAQs, the Commission will have formed the view that the case is suitable for settlement by the time the issue of a written settlement submission has matured. And once the settling party introduces its written settlement submission, it will have made a number of fundamental concessions, as set out in Paragraph 20 of the Draft Notice. Having reached that stage, the party will presumably have already been engaged in a process involving considerable mutual disclosure, it will have complied with the time frame set by the Commission, and it will have developed expectations as to a potentially acceptable sentencing submission. Moreover, the settlement submission is, pursuant to Paragraph 22, irrevocable by the party, unless it is not endorsed (i.e., is rejected) by the Commission. It is also evident, in the view of the Working Group, that by the time the party is to submit the written submission, the Commission will have developed a sound appreciation of the facts, the contribution to efficiency (and otherwise) of the different parties, and a perspective of an appropriate disposition.

3.8. In that context, the absence of any indication of the circumstances that might motivate a decision by the Commission not to endorse the submission is startling. It may be that Paragraph 27 does no more than record the legal truism that the discretion of the Commission may not be fettered. But the retention of wholly unguided discretion to refuse to endorse the submission, after such a serious set of discussions, concessions of fact and liability, and the formal submission of a proposal that is virtually irrevocable, does little to contribute to the confidence building that is essential to the prospective

success of the proposed settlement procedure. The Working Group sees no reason for the Commission to maintain unilateral and potentially arbitrary discretion to withdraw from the settlement procedure in such a manner. It believes that the unilateral ability of the Commission to change course, after a full process of discussion in good faith with the objective of a reasonable resolution, will inhibit broad public acceptance of the proposed policy by companies that may be implicated in a Commission investigation.

3.9. The Draft Notice taken as a whole, it is apparent that a party is locked into the process, with an irrevocable written acknowledgement of the most damaging facts and of its own liability, unless the Commission declines to endorse the submission, or endorses it but imposes a higher fine than the party will accept.

3.10. The Working Group considers that there is a preferable policy, one that is more likely to attract widespread adoption of the settlement procedure and one that offers a better balance of fairness in the resolution of litigable liability. In this approach, the Notice should provide that the Commission commits that it would not, in effect, repudiate the procedure by declining to endorse a submission that adequately reflects the substance of the settlement discussions, unless there are exceptional circumstances that warrant such an approach. Exceptional circumstances might include cases where the party deliberately sought to mislead the Commission's staff who were engaged in the settlement procedure, or other deliberate efforts to misuse the procedure. But quite explicit criteria for such a decision would seem the minimum that the parties might expect, when considering whether to opt for settlement discussions.

3.11. Clearly, a party cannot expect to compel the Commission to endorse a submission that proposed for example a disproportionately low fine, or factually incorrect description of the circumstances of the cartel. However, this is unlikely to happen provided that the "common understanding" reached between the Commission and the settling party on which the settlement submission is based is sufficiently clear. This should avoid that party being put in a position where its written settlement submission, submitted in good faith, is rejected because it does not accurately reflect the Commission's expectations. However, on the face of the Draft Notice, it would appear that the Commission could change the course of the settlement discussions, and the outcome contemplated by a settlement

submission, even if there were no disagreement among the participants in the discussions about the facts, the qualities (or relative responsibility) of the different parties or the conditions applicable to the settlement submission. The Commission even indicates that it may depart from a statement of objections endorsing the written settlement proposal in its final decision (Paragraph 29 of the Draft Notice).

3.12. The perception that a settlement submission might not be endorsed after good faith discussions requires a leap of faith for a party that is at risk, in the absence of the prior articulation of the considerations that warrant such a decision. If ever a submission were not endorsed, the Working Group is concerned that the Settlement Notice would be rendered nugatory for future purposes. The Working Group believes that clarification should be provided on this important issue, at least in the FAQs, but preferably in the Draft Notice.

B. Must All Exposed Parties Settle?

3.13. The Working Group reads the Draft Notice to mean that not all of the parties must opt in for the settlement procedure to be put in motion. That appears to be the intent of Paragraph 14, which gives the Commission the authority to pursue bilateral contacts. It also appears to follow from the phrase, in Paragraph 20 "Parties opting for a settlement procedure…" But the Notice is not free from doubt on this issue. The Working Group recommends that the bias of the Commission should be in favour of bilateral discussions in any case even if not all parties choose to invoke the procedure.

3.14. The Commission again retains a degree of discretion that is difficult to assess. That appears from the unguided discretion of the Commission, in Paragraph 15, to determine the "appropriateness" of bilateral discussions, or the ability of the Commission to determine the "suitability" of the case for the settlement procedure at all. The Working Group believes that certainty and predictability are extremely important factors in the anticipated level of uptake of the proposed procedure. For those reasons, the Working Group supports the adoption of criteria that would enable the parties to evaluate the possibility that invocation of the procedure might be repudiated, merely because all the parties do not come forward. As indicated, the Working Group believes that settlement by

any party makes a significant contribution to efficiency and effectiveness of the Commission's enforcement capacity, and a party that is willing to settle in good faith should not be barred from a consensual resolution by the reticence of others.

C. Conflicting Standards of Revocation

3.15. The Working Group perceives a logical and literal discrepancy between Paragraphs 22 and 26. On the one hand, under Paragraph 22, the parties may not unilaterally revoke their submission, that is, withdraw from the procedure, unless their submission is not endorsed or the fine level they consider acceptable is exceeded. But under Paragraph 26, if the party fails to provide an appropriate or timely reply to a statement of objections that endorses the party's submissions, the Commission may "disregard" the party's request to follow the settlement procedure. How this affects the irrevocability of the party's submission, and what safeguards would apply in such a case,[1] are not explained. It may be that the failure of a party to confirm a statement of objections, which the Commission considers consistent with the written settlement submission of that party, is treated as tantamount to a withdrawal of the settlement submission. But that interpretation appears to be at odds with the text of Paragraph 22. This may be more of a textual concern than a truly substantive issue. However, these issues are of fundamental importance to the parties that will assess the desirability of adopting a settlement strategy under the proposed procedure, and textual clarity is highly desirable.

D. Possible discrepancies between the statement of objections and the final decision

3.16. The Working Group is concerned that footnote 26 of the Draft Notice cites the standard case law on the flexibility for discrepancies between the statement of objections and the final decision. The Court's acceptance of such flexibility in standard cases recognizes that the Commission can take account of new information in the responses it receives from all of the parties, without overstepping the limits of providing an adequate

[1] For example, the safeguards outlined in Paragraph 27 are applicable only where the Commission does not endorse the submission, not where the procedure ends for some other reason. This may be a drafting or technical consideration, but, in the Working Group's opinion, its importance should not be underestimated.

opportunity for the defence to respond to all objections. In contrast, in the case of settlements, the parties' right to defence is specifically brought forward to the settlement discussion phase before the statement of objections is issued and so there is no need for any flexibility. The decision should track the statement of objections, and any variation at all should open up the right to a new statement of objections and full defence.

4. SETTLEMENT PRIVILEGE

4.1. Settling parties should be willing to discuss openly with the Commission all the circumstances relating to the cartel and their prospective liability to penalties in the course of the settlement discussions, and indeed are required to make significant admissions or acknowledgements in their written settlement submissions. As this potentially results in serious exposure of the settling parties, the very existence of settlement discussions should be kept confidential by the Commission unless and until a final decision based on the settlement is adopted. In any press contacts, the Commission should thus decline to acknowledge the existence of or comment on the settlement proceedings.

4.2. Generally, the Working Group does not believe that the safeguards contemplated by Paragraphs 27 or 29 of the Draft Notice provide a satisfactory level of comfort to the settling parties. Nor does Paragraph 7 clearly cover the issue of protections for the communications and disclosures that may be made in the course of settlement discussions. The stipulation that acknowledgements in the submission would be deemed to be withdrawn, and would not be used against the party in case the submission is not endorsed, is quite appropriate, as far as it goes.

4.3. However, having regard to the contents of the acknowledgement required by Paragraph 20(a), for example, a party might well be concerned that if the settlement were not endorsed, its admissions might form part of the collective knowledge of the case team, facilitating further investigation against it, and enhancing the ability of the Commission to develop equivalent information to be used in formulating a statement of objections after there has been informal disclosure of the circumstances relating to the party during the discussions. An assurance that any acknowledgements would be privileged – or put beyond use – would be preferable to the deemed withdrawal and non-use requirement to

meet this concern about such derivative or indirect use of the information against the party that introduced the submission. This could well imply the need for further safeguards for the party that has introduced a settlement submission that is not endorsed. It would seem necessary at a minimum to stipulate that any documents that have been voluntarily supplied, along with correspondence and statements by or on behalf of the party that has participated in the procedure, must be returned and must not be used in any manner to the detriment of the party that participated in the settlement procedure. This concern about the privileged character of the settlement discussion should also extend to information that has come to the knowledge of the case team as a result of the settlement procedure and could create a need to establish a new case team to protect the integrity of the settlement process in the event that the party's submission is not endorsed.

4.4. Finally, in addition to the concern about protecting the self-incriminating information of the party that engages in the settlement procedure, it could well be necessary to take account of the time that the party has spent in settlement procedures that ultimately fail because the Commission does not endorse the submission. In such a case, the party may well need a considerable period to re-open and re-organize its defence. Presumably the party has been proceeding with an aspiration that a settlement will be achieved, rather than maintaining its focus on defending its interests through an adversarial stance. The change of circumstances arising from the decision of the Commission not to endorse the submission may require it to re-think the entire nature of its prior defence.

4.5. In addition, there is concern about the protections that are available for the acknowledgements the party is required to make, regardless of the possibility that the submission might not be endorsed. It is not clear if the required acknowledgements can be provided by way of an oral procedure or subject to other safeguards against third-party access. The aim of providing an assurance of such a privilege would be to ensure that a party that engages in the settlement procedure openly and in good faith will not prejudice its civil damages exposure, relative to parties that have not invoked the procedure and have not otherwise cooperated with the Commission in the resolution of the case. Measures to protect the product of the settlement procedure such as the written settlement submission against third-party access, as well as careful editing of the statement of

objections that results from a settlement submission endorsed by the Commission would seem vitally important to the success of the proposed procedure.

5. THE NEED FOR WRITTEN SUBMISSIONS

5.1. As indicated earlier, the Commission's desire to obtain a written settlement submission (Paragraph 20 of the Draft Notice) creates disincentives for parties seeking to settle with the Commission pursuant to the Draft Notice. The same applies as regards the unequivocal confirmation of the statement of objections required by Paragraph 26 of the Draft Notice. Although it is understandable that the Commission wishes to reduce the risk that parties will use "hold out" tactics or even walk away from settlement negotiations, the disadvantages of requiring written statements outweigh these concerns.

5.2. Requiring written statements potentially places the party in a worse position in seeking to cooperate and settle compared to a non-cooperating party which has not made such admissions. The settlement submission is effectively an admission as opposed to a statement of events in a leniency application and as such will be sought after by third parties to found follow-on claims for damages. Thus, procedures and processes are necessary to ensure that the written submission does not become available to third-party litigants. However, Paragraph 35 of the Draft Notice only provides that public disclosure of such written statements would "normally" undermine certain public or private interests. The Draft Notice thus fails to guarantee that the written statements will not be discovered in the context of private antitrust litigation in Europe and elsewhere.

5.3. The associated risk also exists in cases where the Commission does not endorse the written settlement submission either in its statement of objections (Paragraph 27 of the Draft Notice) or in the final decision (Paragraph 29 of the Draft Notice). In such cases, the parties, by entering into the settlement process, would increase their risk exposure in private antitrust litigation without obtaining the expected benefit from such settlement process. The Working Group notes that the intention of the process is to be facilitative of resolving matters and as such should attract a privilege on the basis that the submission is "for the purposes of settling the proceedings with the Commission" only.

5.2 The Working Group questions whether given the problematic nature of a written submission, it is strictly necessary to require written statements and why it could not be made orally given that the Commission's need for something in writing is obviated by the issue of a statement of objections as the next step in the settlement process in any event. Rather, the Draft Notice should explicitly provide for the possibility of orally submitted settlement statements. In fact, several jurisdictions (including the US, UK, France, Germany, ...) have implemented or informally practise settlement procedures which are conducted exclusively orally until a final arrangement is reached. Furthermore, the Commission could also draw from its own experience with corporate leniency statements in this respect. The Working Group believes that such a process would still give the Commission sufficient comfort that companies would not "walk away" from settlement discussions.

6. TIME PERIODS FOR RESPONSE

6.1. The Working Group understands that the Commission's overriding objective is to simplify the administrative proceedings in cartel cases and to ensure greater efficiency. Thus, time is of the essence but the decision to engage in a settlement and to define the parameters thereof are important matters for which the parties need sufficient time. Allowing the parties the time to settle their case will not significantly affect the potential to reduce the current five-year-plus time frames for cartel investigations. It is necessary to safeguard the already limited rights of defence of the settling parties. It is in fact in the interest of everyone and will maximize chances of serious, productive settlement discussions and resolution.

A. Time period to submit an initial expression of interest to settle

6.2. Articles 10a(1) and 17(3) of the proposed revised Regulation No. 773/2004 and paragraph 11 of the Draft Notice deal with the initial time limit that the Commission will set for the parties to indicate whether they will engage in settlement discussions. The proposal is for just two weeks. Two weeks may well be adequate for a party which has

applied for leniency and may even be sufficient for those who have been dawn-raided and so are aware of the investigation and have had the chance to consider their approach to settlement before the Commission explores their interest to do so. But not all defendants, not even all of those dawn-raided, will necessarily have had a clear indication of the scope of the investigation and the opportunity to consider settlement.

6.3. The decision whether to engage in settlement discussions will be a serious one for companies and is certainly not a decision which the Commission has any interest in parties taking lightly. So the Commission has every interest in allowing enough time at this stage to avoid potentially time-wasting later if the decision to explore settlement has been forced on a company under time pressure.

6.4. Two weeks is likely to be very short in many cases, bearing in mind that the decision to enter settlement discussions will need to be made at a senior level within a group, which may well have implications for many group companies, all of which will need to be involved in the decision. In international cases, the decision will most likely need to be discussed with advisors in other jurisdictions. The Working Group thus recommends that the Commission set the minimum time period at one month or 20 working days.

B. Time period to submit a written settlement submission

6.5. Articles 10a(2) and 17(3) of the proposed revised Regulation No. 773/2004 and Paragraph 17 of the Draft Notice deal with the final time limit which the Commission will give the settling parties to submit a final written settlement submission. In the Regulation, the proposal is at least two weeks. Paragraph 17 of the Draft Notices leaves the minimum number of working days blank and provides for an extension following reasoned request.

6.6. To some extent, the period required at this point will depend on the adequacy and timing of the disclosure of evidence and the time allowed for the settlement discussions themselves, as well as the clarity of the "common understanding" reached. The FAQs envisage a "specified template" for the written settlement submission which would be "drafted along with the results of the settlement discussions". But however

comprehensive and clear these preparatory steps, adequate time will be needed for a company to finalize a written settlement submission and get approval to submit it, since this is an irrevocable offer to settle which has a profound impact on the undertaking's legal position and possible financial exposure.

6.7. As with the decision to agree to enter into the settlement discussions, this decision will involve senior management within the group and in many cases within a number of companies in the group as well as advisors in other jurisdictions in international cases. The Commission requires a joint representative for the whole group for purposes of the settlement discussions, but at this stage some companies within the group may need to consult their separate advisors, who will need to be fully briefed. Given the size of many current fines, the likely size of fines even after the settlement discount and the implications of the written settlement submission, the main board will need to be involved in many cases. In addition, any company with listed securities will need to involve their securities disclosure advisors in all relevant jurisdictions and will need time to plan any appropriate disclosures. All this takes time and two months should in our view be a minimum.

6.8. The option to make a reasoned request for more time is necessary but not sufficient. The uncertainty makes it more difficult to use time effectively when an initial deadline is too short, even if the deadline is later extended.

C. Time period to reply to the statement of objections

6.9. Proposed Articles 10a(3) and 17(3) of Regulation No. 773/2004 and Paragraph 26 of the Draft Notice deal with the time for the parties to reply to the statement of objections if it endorses their written settlement submission. The proposal is a minimum of just one week.

6.10. One week is likely to be woefully short. At least, where more than one party is settling, the statement of objections may not be identical to each party's settlement submission and will need to be carefully considered. Although there will have been discussion of the objections at the earlier stage, consideration of the formal statement of

objections will still be a vital step for the defence, and therefore the Working Group suggests one month would not be too long a minimum period.

6.11. Paragraph 27 of the Draft Notice deals with the situation where the statement of objections does not endorse the written settlement submission and the party will need to "present its defence anew", including accessing the file and preparing for an oral hearing. It is proposed that the standard time limits would apply.

6.12. If the Commission does not endorse the written settlement submission, the time which will be granted to reply to the statement of objections should be adequate, not just to represent the defence but also to complete the full preparatory work which would normally be done prior to receipt of the statement of objections as well as during the time for response. The single joint representative used by all members of a group will at this stage need to be replaced by separate counsel in those cases where the interests of various group members may diverge or where case law suggests the advisability of separate representation for parent companies.

6.13. If it is not clear that the time which would be allowed at this stage would be fully adequate, this will in itself be a disincentive for companies to settle, since they will need to conduct the defence on parallel tracks, conducting settlement discussions while simultaneously preparing for a full defence involving multiple counsel, and so will lose the efficiencies which are part of the incentive for parties to follow the settlement route.

6.14. Realistically, the best approach may be to ask that the Commission make clear in the Draft Notice that a minimum of three months will apply in this situation.

6.15. Paragraph 29 of the Draft Notice deals with the situation where the statement of objections confirms the written settlement submission, but the final position of the Commission subsequently departs from this. The proposal envisages that after the new statement of objections has been notified, time for the procedure and time for the defence will follow the general rules. The same comments apply as for Paragraph 27 of the Draft Notice.

7. ACCESS TO FILE

7.1. A final comment as regards the procedure concerns the access to file of the settling parties in exercising their (already limited) rights of defence. According to Paragraph 16 of the Draft Notice, the parties will be informed of the essential elements taken into consideration by the Commission during the bilateral settlement discussions. Paragraph 15 provides that the Commission retains discretion to determine throughout the procedure the appropriateness and the pace of the settlement discussions, which includes the timing of the disclosure of information. Paragraph 17 of the Draft Notice seems to suggest that it is only after a common understanding has been reached that the parties can request access to the Commission's file. Since the common understanding will already set out the boundaries and limits of the written settlement submission (that is, if the settling parties want the Commission to endorse their submissions), it is, however, essential that the parties get access to such essential information as early as possible in the process and in any event prior to reaching a common understanding. Indeed, access to such information is simply necessary to reach a common understanding with the Commission.

7.2. As to the evidence that will be disclosed by the Commission, it is clear that the settling parties will not obtain access to the full file. Full access would defeat the main objective of the settlement procedure, which is to speed up the procedure. According to Paragraphs 16-17 of the Draft Notice, the Commission will disclose the Commission findings as to the alleged facts, the classification of the 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 against the parties. The Draft Notice does not define "the evidence used to establish the potential objections". The Working Group submits that this should at least include access to any (oral) corporate statements of the leniency applicants.

7.3. As regards third parties, as mentioned above (point 4.5), the Working Group believes that procedures should be put in place to ensure that access to the Commission's file is available only for limited purposes related to EU Competition law enforcement and should not be available and subject to litigation in foreign courts. The Working Group has

previously made submissions to the Commission noting the importance of appropriately restricting access to material placed on the Commission's file; any such safeguards should also apply in the context of the procedure under the Draft Notice.