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ASHURST COMMENTS ON THE COMMISSION'S DRAFT LEGISLATIVE PACKAGE TO INTRODUCE A SETTLEMENT PROCEDURE FOR CARTELS

1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 Ashurst welcomes the opportunity to comment on the Commission's draft legislative package to introduce a settlement procedure for cartels. We confirm that we do not consider any part of this response to be confidential.

1.2 We recognise that there may be benefits in introducing a settlements procedure in cartel cases from the perspective of both the Commission and companies under investigation. In particular, a settlements procedure will offer companies the opportunity to remove at an early stage the uncertainty which an investigation necessarily represents and will offer companies the opportunity to reduce the expense and management time which a full investigation would otherwise demand. From the Commission's perspective, it is clearly beneficial to introduce a procedure which allows the Commission to simplify investigations and reduce the number of appeals against its decisions, thereby freeing up its resources. Moreover, we agree with the Commission that any settlements procedure should not apply to non-cartel cases.

1.3 However, we consider that there are a number of difficulties with the procedure as it is currently proposed in the Draft Commission Notice on the conduct of settlement proceedings (the **"Draft Notice"**) and the Proposal for a Commission Regulation amending Regulation (EC) No 773/2004 (the **"Draft Regulation"**). In summary:

(a) we consider that the proposed procedure would restrict the fundamental rights (including the rights of defence) of the parties and accordingly would require the Council of Ministers to amend Regulation 1/2003, in particular, the Commission's procedure as set out in Article 27 of Regulation 1/2003. However, we would suggest that the need to amend Regulation 1/2003 and consult the Member States would be obviated if the Commission were to respect the fundamental rights of the parties by moving the timing of settlement discussions to a period *after* the statement of objections has been issued and the parties have been granted full access to the file. We would observe that this was the approach taken by the OFT in relation to the recent milk pricing case;

(b) we consider that the proposals have the *de facto* effect of reducing the right of appeal to a minimum. In light of the unique powers which the Commission has as an executive body (including the right to impose fines without prior recourse to a judge), the entire procedure risks falling outside the control of the EU courts, which would be a serious infringement of fundamental rights. We would suggest that serious consideration should be given to the involvement of a judge in approving settlement agreements and, as above, we would suggest that the settlement discussions do not start until after the statement of objections has been issued;

(c) it is not entirely clear from the current proposals whether the Commission would be prepared to settle cases where only some of the parties to the cartel are prepared to settle. We would propose that the Commission makes it clear in the legislation that it is willing to consider settlement in cases where only one or two parties have indicated their willingness to enter into settlement discussions (again, this would be consistent with the approach of the OFT in the recent milk pricing case);

(d) the content of the settlement discussions is not clear in the current proposals, and in particular, it is unclear how precise a figure will be given for the potential fine (an *"estimation of the range of likely fines"* will be given, according to the Draft Notice). Parties should be provided with a relatively precise figure rather than a potentially wide range, and, more generally, we would emphasise that we cannot envisage parties using a settlement procedure unless the content of the discussions and the level of fine (and reduction of fine) are given the necessary clarity and certainty to enable parties to take an informed decision to settle;

(e) in relation to appeals, we would suggest that the Commission make it clear in the draft legislation that a settling party should be able to appeal an infringement decision in its (the party's) own right and that a settling party would not be required to waive its right to appeal. In connection with this, we would also ask the Commission to consider refunds to settlement participants in cases where a successful appeal resulted in the annulment of the entire Commission decision; and

(f) finally, we would expect the Commission to improve the protections offered against the use of information and submissions in cases where the Commission abandons the settlement procedure. Similarly, in respect of protection against disclosure to third parties, we would expect the Commission to consider setting up a specific procedure to allow companies to provide settlement submissions orally (as with statements provided under the Leniency Notice).

2. POWER OF THE COMMISSION TO AMEND ITS PROCEDURE

2.1 We consider that the settlement procedure as currently proposed should be debated by the Member States on the basis that the draft legislative package proposes amendments to the Commission's procedure which would restrict the fundamental rights of the parties involved in the proceedings. In particular, as set out further below, we consider that the Commission is seeking to introduce a procedure which would substantially restrict the rights of defence (and the rights of third parties) guaranteed by Article 27 of Council Regulation 1/2003. Accordingly, if the Commission decides to implement the proposals as currently formulated, the Commission would be obliged to seek amendments to Regulation 1/2003 by the Council of Ministers (in consultation with the European Parliament).

2.2 Regulation 1/2003 specifically states that it respects the fundamental rights of the parties and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.[1] In particular, Article 27(2) of Regulation 1/2003 provides *inter alia* that *"The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States."*

Right of access to the file

2.3 The current settlement procedure will restrict the fundamental rights of the parties, including their rights of defence, in several respects. In particular, the parties' right of access to the file, which is an integral part of the right to be heard if not a right in itself, will be considerably restricted. In respect of access to the file, the Draft Notice provides that the Commission will grant a party access to non-confidential versions of any accessible document listed in the case file at that point in time, in so far as the Commission considers it justified for the purpose of enabling the party to ascertain its

[1] Recital 37 of Council Regulation 1/2003.

position regarding any other aspect of the cartel and provided that the procedural efficiencies of the settlement process are not jeopardised.[2]

2.4 Under Article 27(2) and the case law of the European Courts, the right to access the file is qualified only by the need to protect the business secrets of other parties and the internal documents of the Commission or national competition authorities. However, the Draft Notice proposes adding a new qualification to this aspect of the rights of defence, namely that access to the file will not be granted if it jeopardises the procedural efficiencies of the settlement process. This proviso is not only unclear (what is meant by the procedural efficiencies of the settlement?), but the very idea is an additional qualification to the parties' rights of defence.

Right to appeal decisions

2.5 Separately, we believe that the currently proposed settlement procedure is also likely to infringe other fundamental rights such as the right to an effective remedy and to a fair trial (Article 47 of the Charter of Fundamental Rights of the EU).[3] This right is acknowledged in the Preamble to Regulation 1/2003 and is specifically incorporated into the Regulation by Article 31 which provides that the Court of Justice has unlimited jurisdiction to review decisions whereby the Commission has fixed a fine.[4] Although the Draft Notice specifically states that final decisions under Regulation 1/2003 may be appealed to the EU Courts[5], it seems clear that such a route of appeal is in practice likely to be severely limited.

2.6 Under the Draft Notice, a settling party must give an (apparently voluntary) unequivocal acknowledgement of its liability as regards the main facts, their legal qualification and the duration of the infringement. The chances of successfully appealing a final decision in those circumstances are greatly reduced. The right of appeal would therefore be limited to a few instances, including perhaps appeals on the grounds of broader principles such as discrimination if the Commission has applied different settlement discounts to parties in similar positions or appeals where the Commission has departed from the settlement agreement in the final decision without issuing a new statement of objections and adopting the usual administrative procedure. We would suggest that the circumstances in which an appeal would be permitted should be clearly identified in the settlement agreement itself.

Rights of third parties to be associated closely with the proceedings

2.7 Furthermore, the proposed settlement procedure appears to interfere with the rights of complainants to be associated closely with and comment on the proceedings. Article 27(1) of Regulation 1/2003 states *inter alia* that *"Complainants shall be associated closely with the proceedings."* The Commission states in the Preamble to the Draft Regulation that complainants will continue to be closely associated with the proceedings.[6] However, this right is restricted since the Draft Notice specifically provides that the settlement discussions are strictly confidential (point 7) and that disclosure of documents to third parties will be prohibited (point 35). It is appropriate to have the protections set out in

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2 Point 17 of the Draft Notice.

3 Article 47 provides that *"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. …".

4 Recital 37 and Article 31 of Council Regulation 1/2003. Article 31 provides that *"The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed."*

5 Point 36 of the Draft Notice.

6 Recital 5 of the Draft Notice.

points 7 and 35 of the Draft Notice, but the *timing* of the settlement discussions will mean that the Commission will have reached a settlement, including an agreement on the maximum level of fine, before the complainant will have had an opportunity to review (and respond to) the Commission's statement of objections (which, in cases where a settlement is reached, will only be issued after the settlement has been agreed).

2.8 We note in this regard that the Commission intends to amend its obligation under Regulation 773/2004 to supply complainants with statement of objections and reduce this to a commitment only to *"inform the complainant in writing of the nature and subject matter of the procedure … The Commission may also provide the complainant with a copy of the non-confidential version of the statement of objections."*[7] We would suggest that the nature and subject matter of the procedure may amount to complainants being "locked out" of proceedings and that accordingly this provision should be clarified to make it clear that the key elements of the statement of objections will be conveyed to complainants.

Conclusion

2.9 In light of the points above, if the Commission were to pursue the settlement procedure as currently envisaged, we believe it would be obliged to seek amendments to Regulation 1/2003. There would otherwise be a material risk that the Commission would be exceeding its powers by seeking to change fundamental rights enshrined in the Charter of Fundamental Rights, the EU Treaty and Regulation 1/2003 without the consent of the Member States.

3. THE COMMISSION'S UNIQUE POWERS AND THE CURRENT PROPOSALS

3.1 The proposed settlement procedure raises important questions in the context of the current EU institutional architecture, under which the Commission is granted exceptional powers for an executive body. The effect of this in the context of the settlement procedure is that, in essence, businesses are being put in the position of having to "negotiate" with a counterparty which is both their prosecutor and their judge.[8] The Commission is in effect a judge since it has the power to impose substantial fines and to enforce those fines without recourse to a judge.[9] The burden is on the parties to seek the involvement of a judge by appealing the decision.

3.2 Furthermore, as set out above, the proposed procedure has the effect of significantly restricting the right of appeal to a very limited number of cases. The whole settlements procedure therefore risks falling outside judicial control. This would clearly run contrary to the whole Community tradition of adherence to the rule of law, including key articles of the EU Treaty such as Article 6.[10] In addition, we consider that the unique powers which

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7 Article 1(2) of the Draft Regulation.

8 The term "negotiate" is used in the broad sense given that the Commission has made it clear that it does not intend to negotiate as to the existence of an infringement or the appropriate sanction (see Speech/07/722 "Assessment of and perspectives for competition policy in Europe", 19 November 2007 in which Neelie Kroes stated that *"These discussions are not about bargaining or negotiating. The Commission will not bargain about evidence or objections."*)

9 Some Member States have already implemented a form of settlement procedure in which there is a procedural distinction between the negotiation of the settlement, which is part of the prosecution of the case, and the decision to settle, which is a matter for judgment by a separate body. Under the French "no contest" procedure (article L. 464-2 III of the Commercial Code), the negotiations take place between the defendant and the head case officer. The defendant must agree to change its behaviour and not to object to the statement of objections and in exchange the head case officer can propose a reduction of fine to the College of the Competition Council. The result of this negotiation is formalised in a statement which has to be agreed by the College during the hearing.

10 Article 6(1) of the EU Treaty states that *"The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."* Article 6(2) carries on to state that *"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of*

the Commission has as a prosecutor mean that if a settlement procedure is to be adopted, a variety of special safeguards should be built into the procedure.

3.3 We would therefore suggest that serious consideration be given to the involvement of a judge in approving a final settlement agreement after the party has had an opportunity to raise any concerns over the settlement process with the judge in advance. This appears to be the normal procedure in other jurisdictions. For instance, we understand that in the United States, the results of plea agreement negotiations between the Department of Justice Anti-Trust Division and a defendant may only result in a recommendation for a plea agreement and no binding agreement can exist until it is approved by the Assistant Attorney General.[11] We view the involvement of a judge in the EC settlements procedure as essential to providing greater certainty that procedural rights would be respected and in minimising the risk of abuse of these rights.

3.4 In any event, we would also strongly recommend that settlement discussions should not take place until *after* the statement of objections has been issued and the parties have had an opportunity to exercise their rights of access to the file. Some Member States have adopted this approach in their settlement procedures. For instance, in France, under the so-called "no contest" procedure (see footnote 9 above), the Competition Council can settle a case and grant a reduction of fine to defendants which (1) acknowledge the facts set out in the statement of objections, their legal definition and attribution of liability and (2) commit to change their conduct. In the UK, the OFT adopted a similar approach in the milk pricing case.

3.5 In addition, we would expect the Commission to amend the guidelines on setting fines to include a specific statement that if parties reject the opportunity of settlement discussions (or fail to submit a written settlement submission), this will not result in any increase in the fine. Such a safeguard is crucial to redressing the imbalance of power between the Commission and the parties (potentially) involved in settlement negotiations.

4. HOW MANY PARTIES MUST BE INVOLVED?

4.1 It is unclear from the Draft Legislation whether the settlement procedure will be available in cases where only one or two (rather than all) of the parties show an interest in settling. The wide discretion which the Commission envisages for itself means that even if the proposals are silent on the issue, it may be the Commission's intention that settlements would only ever be pursued if all parties to a case were willing to settle. A de facto policy might therefore arise that only cases in which all parties are willing to settle would be settled.

4.2 We would suggest that consideration be given to inserting a provision to make it clear that the Commission has a good faith commitment to settling in cases where only one or two parties are willing to settle.[12] This would have the additional effect of encouraging other parties to consider the settlement procedure as it would reduce the likelihood of the Commission abandoning the settlement process if one or two parties dropped out of the procedure or did not even start it. Although the Draft Notice provides that the acknowledgements provided by the parties in the settlement submissions could not be used against any of the parties to the proceedings if the Commission abandons the settlement procedure[13], parties are clearly likely to be concerned that entering into

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Community law."

[11] US Department of Justice, Plea Agreement Guidelines: Chapter 9 of the Antitrust Grand Jury Practice Manual (first edition, 1991), page IX-10.

[12] This approach has been adopted by the French Competition Council in relation to the "no contest" procedure referred to above.

[13] Point 27 of the Draft Notice provides *inter alia* that "The Commission may legitimately adopt a statement of objections which does not endorse the parties' settlement submission. … The acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used against any of the

settlement discussions (let alone providing written settlement submissions) would inevitably give the Commission information which could not be retracted (see further on this below).

4.3 We consider that the Commission should allow for the possibility of settling cases where only some (or possibly just one or two) of the parties are willing to settle and that the Commission should make it clear in the guidance that such a possibility exists.

5. SCOPE OF THE DISCUSSIONS

5.1 It is not clear from the Commission's proposals what the actual scope of the proposed settlement discussions would be. The Draft Notice states that the information disclosed by the Commission *"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 allow the parties effectively to assert their view on the potential objections against them and will allow them to make an informed decision on whether or not to settle."*[14]

5.2 The Commission appears to have at least partially based the points above on a line of case law which indicates that in order for the Commission to fulfil its obligation to respect the undertakings' right to be heard (in the context of a statement of objections), the Commission must indicate expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and must set out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed *"intentionally or negligently."*[15]

5.3 However, the above points would only reflect a basic legal minimum rather than the necessary clarity which is required in order to give companies comfort that the information that the Commission would give would be sufficiently detailed and precise to allow the companies to make an informed choice of whether or not to settle. We would recommend that as much clarity as possible is given as to what information will be given to the companies, and in particular, that the provision of information on the fine should be as precise as possible.

5.4 For instance, an *"estimation of the range of likely fines"* is unlikely to be precise enough to permit companies to determine whether to settle or not unless the range is very narrow. In particular, we believe the Commission should implement a maximum range which it could give e.g. the two figures would differ by no more than 5 per cent of the smaller figure, so that for example, a range of €100 million - €105 million could be given but not a range of €100 – €130 million. Separately, we would also expect to see an amendment to point 16 to clarify that the Commission will provide the index to its file as well as any exculpatory evidence.

6. SETTLEMENT SUBMISSIONS

6.1 The renunciation of rights required at point 20 of the Draft Notice is very extensive and in light of the earlier comments on the timing of settlement discussions, we would suggest that the settlement discussions take place after the issue of a statement of objections and access to the file has been granted so as to guarantee that the fundamental rights, including the rights of defence, of the parties will be respected.

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parties to the proceedings."

[14] Point 16, Draft Notice.

[15] See the references at footnote 11 to point 16 of the Draft Notice.

6.2 As the renunciation of rights in the written settlement submission is so extensive, we believe that the Commission should give the parties a minimum time limit in the legislation (at point 17 of the Draft Notice) of at least 20 working days to introduce a final written settlement submission (the currently proposed two week minimum period is insufficient in this respect).[16] This would allow the directors of companies sufficient time to consult with their advisors and with each other. However, directors might in some cases also need to consult with their shareholders (which could take longer than 20 working days depending on the jurisdiction) and we would therefore expect the Commission to state in the Draft Notice that it will not unreasonably refuse a reasoned request for a time extension by a party.

7. CLARITY OF THE FINING GUIDELINES

7.1 One of the key factors for parties to assess when considering whether to enter into a settlement agreement or not is the level of the fine. The Commission's new Fining Guidelines have not been sufficiently tested for a settled view to have emerged as to how they are to be applied, and in any event, the Fining Guidelines are not sufficiently precise to enable parties to calculate with accuracy the likely level of fines. The Commission has traditionally argued that its guidelines should contain an element of uncertainty so as to prevent companies doing a cost-benefit calculation when deciding whether to engage in cartel or other illegal activity.[17] Nevertheless, we would observe that in the context of settlement discussions, the parties are being asked to perform a cost-benefit calculation.

7.2 The point above means that it is important that the envisaged provision during settlement discussions of an "estimation of the range of likely fines" should be as precise as possible as there is no other means for the parties to establish exactly how much they may have to pay if they are found to have infringed Article 81. It is therefore crucial that the Commission clarify exactly what is meant by an estimation of the range of likely fines (in relation to which, please see our suggestion above as to implementing a maximum spread for the range of fine).

8. APPEALS AND SETTLEMENT

8.1 We have already suggested that the circumstances in which an appeal would be permitted should be clearly identified in the settlement agreement itself. Although the Commission states at point 36 that its decisions are subject to judicial review (albeit that as discussed above the right to appeal would in effect be restricted), we would suggest that the Commission make it clear in the draft legislation that a settling party should be able to appeal a decision *in its (the party's) own right* and that a settling party would not be required to waive its right to appeal.

8.2 In connection with appeals, we would also ask the Commission to consider what would happen in circumstances where a successful appeal resulted in the annulment of the entire decision? For instance, in a case involving five alleged cartelists, if four parties were to settle and one party refused to settle and later successfully appealed the Commission's decision, what would the position of the Commission be as regards the remaining four participants? If the appeal were successful and the entire decision was annulled, we would observe that it would seem unjust for the Commission to retain the settlement payments from parties who had settled an investigation of a non-existent cartel. We would therefore suggest that the Commission consider amending the Draft Notice to clarify that in such cases the settlement payments would be refunded to the parties (presumably with interest).

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[16] We note that according to Article 1(8) of the Draft Regulation the time limit must be at least two weeks, even though the time limit at point 17 of the Draft Notice remains blank.

[17] For instance, Neelie Kroes expressed the view that allowing potential infringers to calculate the likely cost/benefit ratio of a cartel in advance would not contribute to a sustained policy of deterrence and zero tolerance. Speech/05/525 "The First Hundred Days", Neelie Kroes, 7 April 2005.

9. DISCLOSURE AND USE OF THE SETTLEMENT SUBMISSION AND RELATED ISSUES

Use of information and submissions if the Commission abandons the procedure

9.1 We welcome the protection in point 27 of the Draft Notice which provides that in the event that the Commission abandons the procedure at the statement of objections stage, *"the acknowledgements 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."* However, we consider that this protection does not go far enough and should be expanded. In particular, the parties would want to know that any other information and evidence provided to the Commission during the course of the settlement discussions would not also be used against them (or other parties to the cartel). We would also expect the Commission to clarify that point 27 applies if the Commission abandons the settlement procedure at any point *after* the statement of objections as well as at the statement of objections stage itself.

9.2 In relation to the above points, consideration should also be given to requiring the Commission to change the team members working on the case in situations where the Commission decides to abandon a settlement agreement. This would prevent the original case members from being influenced by the information received during settlement discussions. In such situations, we would expect the Commission to use a Chinese wall arrangement to prevent the former and current team members from exchanging information gained in the settlement procedure.

Protections against disclosure of documents and submissions

9.3 We welcome the protection offered at point 35 of the Draft Notice that *"public disclosure of documents and written or recorded statements received in the context of [the] Notice would undermine public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 …., even after the decision has been taken."* However, we consider that as with corporate statements under the Leniency Notice, a specific procedure should be set out to allow companies to provide settlement submissions orally. This would improve protection against disclosure to third parties and in so doing would encourage parties to use the settlement procedure.

15 January 2008