

# The new Commission settlement procedure for cartels: A critical assessment

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*In view of its significant impact on cartel enforcement, the article attempts to describe and assess, from a legal, empirical and competition policy perspective, the newly introduced Commission Settlement Procedure with regard to the very goals it is purported to serve, i.e. legal certainty and procedural/cost efficiency.*

## 1. INTRODUCTION

The introduction of a new set of expediting procedural rules in the area of public cartel prosecution should be viewed against the background of an ever more successful leniency programme that is constantly testing the Commission's administrative capacity. The increasing number of immunity applications has created an expanding backlog of cartel cases that would need to be dealt soon, if the goal is still to achieve timely and effective cartel enforcement. It is in view of this threat that, few months after taking office, Commissioner Neelie Kroes warned in her 'first hundred days' inaugural speech that the Commission 'risks becoming the victim of its own cartel-busting success'.<sup>1</sup>

To face this administrative overload, she proposed an internal reorganization promoting a 'simplified handling of cases' and alluded to a 'direct settlement' procedure that would use enforcement resources more efficiently and effectively. She expressed the view that if,

'despite the efforts to improve anti-cartel enforcement, the Commission is not able to deliver swift enforcement with timely punishment, we may need to look at how some form of plea bargaining procedure could bring advantages in the context of European competition law'.<sup>2</sup>

Thus, the Commissioner hinted that the American model of 'plea bargaining' could be used as a blueprint for developing such a procedure in Europe. It is recalled, however, that similar procedures do exist in some Member States, such as in France,<sup>3</sup> the UK and Germany.

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<sup>1</sup> Commissioner Neelie Kroes Speech/05/205, 'The First Hundred Days', 40th Anniversary of the Studienvereinigung Kartellrecht 1965- 2005, International Forum on European Competition Law, Brussels, 7th April 2005.

<sup>2</sup> Above, Neelie Kroes Speech/05/205.

<sup>3</sup> In France, Art.L.464-2 III and R.464-4 of the Code de Commerce provides for a procedure called '*procédure de non-contestation des griefs*', and in Germany the *Bundeskartellamt* adopted a procedure leading to a consensual fining decision (*einvernehmliche Bußgeldbescheid*). For a comparative approach see: Faruga J., 'Settlement proceedings in competition law: European comparisons - *Les procédures de transaction en droit de la concurrence esquisse de droit comparé*' (2008), vol.1, Concurrences ; Burrichter J. & Zimmer D.J., 'Reflections on the Implementation of a 'Plea Bargaining'/Direct Settlement' System in EC Competition Law', in Ehlermann C.-D. & Atanasiu I., 'European competition law annual 2006', (2007) Hart, Oxford, page 612; Waelbroeck D., 'Le développement en droit européen de la concurrence des solutions négociées (*engagements, clémence, non-contestation des faits et transactions*): que va-t-il rester aux juges?' (2008), GCLC Working Paper 01/08, page 32.

'Plea-bargains' or 'direct settlements'<sup>4</sup> essentially consist in a procedural scheme that allows companies to admit involvement in a cartel, settle liability, and receive a reduced fine in bilateral discussions with the Commission, *in lieu* of having to follow the more costly and time-consuming full cartel investigation. Thus, as opposed to leniency, settlements do not reward companies for providing evidence or unveiling cartels, but recompense the companies' willingness to forego some important procedural rights in order to speed up the decisional process.

The rationale behind the introduction of an expedited settlement procedure lays on the premise that, handling more cases with the same resources leads to higher productivity in terms of decision delivery, hence ensuring timely and effective punishment and more chances of discovering a cartel. This ultimately leads to increasing overall deterrence.<sup>5</sup> It is recalled that the Commission has discretion in prioritising its cartel prosecution,<sup>6</sup> and in turning down leniency applications.<sup>7</sup> As explained in its Annual Competition Policy Report, the Commission focuses its efforts on violations that have an impact in at least several Member States or in the EEA as a whole, and sometimes violations of limited size are given an investigative follow-up by National Competition Authorities (hereafter NCAs).<sup>8</sup>

In October 2006, the Commissioner announced that some 'first thoughts' had been elaborated in the form of 'settlements' whereby settling parties would 'acknowledge the scope, duration and severity of the infringement against an authorised minimum level of fine, which would take into account any leniency benefit and settlement reduction'.<sup>9</sup> This suggested a complementary and independent application of the leniency and settlements procedures. The rules were further elaborated and one year later, the Commission presented for public consultation<sup>10</sup> a package of measures introducing the new rapid settlement procedure for cartels. It consisted of a Draft Notice on Settlements<sup>11</sup> and of a Draft Commission Regulation proposing amendments to Commission Regulation 773/2004<sup>12</sup> relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 EC.<sup>13</sup>

<sup>4</sup>'Plea bargains' derive from criminal law and are essentially negotiated agreements, in which a defendant agrees to plead guilty or not to contest a criminal offence in order to settle a case. As opposed to the US, where Sherman Act violations amount to criminal felonies, in Europe competition infringements are not to be of a criminal nature (Article 23(5) of Regulation 1/2003). Therefore, the term 'direct settlement' was initially to be preferred as it referred to an official agreement to terminate an argument without the attribution of any criminal connotation. However, the adopted package does not refer at any point to the epithet 'direct'. This is probably due to the fact that a 'direct settlement' would be perceived as a *per se* decision, in the same way as the Article 9 of Regulation 1/2003 commitment decisions constitute autonomous, enforceable and judicially reviewable decisions. The recourse to the use of the term 'settlement procedure' instead of 'direct settlements' insinuates that the focus is not placed on the value of the decision as such, but rather on the procedure it entails.

<sup>5</sup>Below note 11, Recital 1 of the Commission Notice provides that '*the settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence*'.

<sup>6</sup>Cases T-24/90 and T-28/90 *Automec II* [1992] ECR 2223, paragraph 77.

<sup>7</sup>Van Barlingen B. & Barennes M., '*The European Commission's 2002 Leniency Notice in practice*' (2005) EC Competition Policy Newsletter, Autumn, 6, page 6-16.

<sup>8</sup>2005 Annual Report on Competition Policy, [http://ec.europa.eu/comm/competition/annual\\_reports/2005/en.pdf](http://ec.europa.eu/comm/competition/annual_reports/2005/en.pdf), page 64.

<sup>9</sup>Commissioner Neelie Kroes Speech/06/595, '*Delivering on the crackdown: recent developments in the European Commission's campaign against cartels*', The 10th Annual Competition Conference at the European Institute, Fiesole, Italy, 13th October 2006.

<sup>10</sup>Commission Press Release IP/07/1608, Brussels, 26th October 2007.

<sup>11</sup>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.

<sup>12</sup>Draft Commission Regulation amending Regulation (EC) No 773/2004 as regards the conduct of settlement procedures in cartel cases.

<sup>13</sup>Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

Interested parties were given the opportunity to provide in a period of two months comments on the proposed package. In total 48 contributions were submitted.<sup>14</sup> As a general remark, most contributions welcomed the Commission initiative but solicited that some features of the proposal should be further improved. Concerns have been expressed in particular with regard to the extent of the Commission's discretion throughout the whole procedure and the ambiguity of certain procedural and fining rules. On 26 March 2008, the Commissioner publicly announced that a revised form of the proposal was about to be adopted later in the year,<sup>15</sup> stressing the pressing need of alleviating the procedural backlog. Effectively, in July 2nd 2008, the newly revised Commission Settlement Notice<sup>16</sup> and the Commission Settlement Regulation<sup>17</sup> entered into force.

In view of the impact of the newly introduced settlement procedure in cartel prosecution, this article tries to assess, from a legal and empirical perspective, the new procedure with regard to the very goals it is purported to achieve. In Part 2, this article provides a detailed examination of the reasons that prompted the enactment of such a procedure and opposes the theoretical risks it might entail in cartel enforcement. This 'cost and benefit' analysis should set the background for a better apprehension of the technical rules of each step of the settlement procedure (Part 3). Finally, the analysis shall serve as a basis to critically assess whether the enforcement goals the new procedure is purported to serve are met, and if so, at what cost (Part 4).

## 2. THE NECESSITY AND APPROPRIATENESS OF A 'DIRECT SETTLEMENT' SYSTEM IN EUROPE

### (A) REASONS FOR ADOPTING A DIRECT SETTLEMENT PROCEDURE: A COMMISSION'S PERSPECTIVE

Cartel cases should be clearly distinguished from the other competition infringements. In the words of Commissioner Kroes, cartels investigations are typically long and procedurally complex. The excessive length of cartel proceedings is not only associated to the period of investigation leading to a Commission infringement decision, but also extends to the post-decision period caused by the numerous appeals brought by parties before the CFI. The need for the adoption of a new set of rules was also prompted by the fact that the existing legal framework was not designed to accommodate an expediting settlement procedure.

#### I. PROCEDURAL COMPLEXITY AND OPPORTUNITY COSTS

Procedural complexity is due to several factors. First, 'procedural burdens are exacerbated in the handling of cartel cases because the procedure involves multiple parties, each raising specific confidentiality issues'.<sup>18</sup> Moreover, in each and every case brought the Commission is 'obliged to investigate every last substantive detail. Final decisions have to be

<sup>14</sup>The vast majority of the contributions (60%) came from law firms and law firm associations, 17% contributions came from associations representing industry and from chambers of commerce, 10% from national bar associations (10%) and the remaining 6% from academia and research institutes.

<sup>15</sup>Commissioner Neelie Kroes Speech/08/152, 'Competition policy objectives', Address to Economic and Monetary Affairs Committee of the European Parliament, Brussels, 26th March 2008.

<sup>16</sup>Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, Official Journal C 167, 2.7.2008, p. 1-6.

<sup>17</sup>Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, Official Journal L 171, 1.7.2008, p. 3-5.

<sup>18</sup>Commissioner Neelie Kroes Speech/07/722, 'Assessment of and perspectives for competition policy in Europe', Celebration of the 50 anniversary of the Treaty of Rome, Barcelona, 19th November 2007, page 4.

fully reasoned on the basis of [its] own analysis of the facts.<sup>19</sup> Hence, the Commissioner explained that ‘average cartel file numbers tens of thousands of pages, all of which have to be screened for confidentiality issues’.<sup>20</sup>

On top of that evidentiary barrier ‘parties often request the use of multiple different languages for the administrative procedure’<sup>21</sup> which implies a great loss of time in translations. This highly demanding set of procedures led the Commission to reinforce, in 2005, its cartel-fighting capabilities by creating a dedicated Cartels Directorate in the DG Competition.<sup>22</sup> Today, it is estimated that cartels expend approximately 35–40% of the Commission’s resources.<sup>23</sup> Neelie Kroes points that ‘the flow of immunity applications triggers a direct impact in terms of the number of inspections the Commission undertakes each year’.<sup>24</sup>

There are two ways for dealing with procedural overload: firstly, by promoting decentralisation and secondly by streamlining the existing procedure. Decentralisation of cartel enforcement would produce procedural efficiencies gained through delegation of cases to NCAs. However, in the words of Commissioner Kroes:

‘in an ideal world, the Commission would deal with every application... Otherwise we might leave applicants in a situation of uncertainty, trying to second guess whether, and when, to rush to file separate applications with those national competition authorities which offer national immunity programmes’.<sup>25</sup>

So, the Commission has a ‘moral’ and efficiency reason to evaluate every case that is brought to it and that affects the markets of multiple Member States.

While, decentralisation has undoubtedly brought about a burden-sharing potential that should be further exploited in the future, the most effective tool for alleviating the procedural complexity is the adoption of a simplified, and faster procedure that would discard some of the secondary tasks of the Commission’s investigation units.

## II. LENGTH OF CARTEL PROCEEDINGS AND APPEALS

### LENGTH OF THE COMMISSION DECISION

The burdensome character of cartel prosecution is also attributed to its increasing success that has had an impact on the decisional productivity of the Commission. From February 2002 up to the end of December 2006, the Commission received a total of 203 leniency applications (104 applications for immunity and 99 applications for a reduction of fine), meaning that the Commission received on average one such application every 3.5 months.<sup>26</sup> There has been a substantial build-up of cases with approximately 35–40 different applications having been handled simultaneously.<sup>27</sup> The 2006 Annual Report on Competition Policy<sup>28</sup> indicated that in 2006 the Commission issued 7 final decisions, according to which 41 undertakings were fined. That means that on average it took 3.4

<sup>19</sup>Above note 1, Neelie Kroes Speech/05/205, page 5.

<sup>20</sup>Above note 18, Neelie Kroes Speech/07/722, page 4.

<sup>21</sup>Above note 18, Neelie Kroes Speech 07/722, page 4.

<sup>22</sup>Above note 8, 2005 Commission Annual Report on Competition Policy, page 13.

<sup>23</sup>Above note 3, Waelbroeck, D., (2008), page 33.

<sup>24</sup>Above note 1, Neelie Kroes Speech/05/205, page 3.

<sup>25</sup>Above note 1, Neelie Kroes Speech/05/205, page 4.

<sup>26</sup>2006 Annual Report on Competition Policy, [http://ec.europa.eu/comm/competition/annual\\_reports/2006/en.pdf](http://ec.europa.eu/comm/competition/annual_reports/2006/en.pdf), page 12–13.

<sup>27</sup>Ratloff J., ‘Plea Bargaining in EC Anti-Cartel Enforcement - A System Change?’ (2007) European competition law annual 2006, Oxford, Hart, page 598.

<sup>28</sup>Above note 26, 2006 Annual Report on Competition Policy.

months to issue a decision for each undertaking. At first glance, it would appear that the Commission's decisional productivity corresponds to the rate of cartel leniency applications. However, what is at stake here is not the decisional productivity, but the per-firm length of cartel investigation, which Motta computed to be on average 5.5 months, that is 2 months longer than the application rate.<sup>29</sup> Finally, according to Reynolds<sup>30</sup> it takes approximately three years<sup>31</sup> for the Commission to reach a decision. Motta, in his recently published paper, confirms that period estimation and stresses that there is little evidence in arguing that the Leniency Programme has been able to cut significantly the time the Commission needs to successfully prosecute the case.<sup>32</sup>

This obviously means that unless the procedure is accelerated the backlog of cases will increase exponentially, stagnating the procedural mechanism. Such a scenario would possibly infringe the general principle of 'reasonable time' requirement in the conduct of administrative procedures,<sup>33</sup> which is of constitutional value.<sup>34</sup> It is recalled that exceeding the 'reasonable time' in issuing a decision can constitute ground for its annulment, where it has been proved that breach of that principle has adversely affected the rights of defence of the undertakings concerned. Yet, as such it does not affect the validity of the administrative procedure.<sup>35</sup>

#### LENGTH OF APPEALS BEFORE THE COURT OF FIRST INSTANCE (CFI) & THE EUROPEAN COURT OF JUSTICE (ECJ)

As explained above, another pole draining resources are the frequent legal challenges of the Commission decisions. Commissioner Kroes reported that 'a high number of enforcement decisions inevitably brings a corresponding increase in the number of legal challenges. One cartel decision triggers an average of 3 to 4 court cases'.<sup>36</sup>

Veljanovski calculated that from 1998 to September 2007, the CFI has decided appeals on fines over ?6 billions, or, over 98% of all fines imposed by the Commission. Fines were appealed in 45 out of the 50 cartels (19 still pending) by one or more firms, i.e. in 90% of the cases. Moreover, empirical evidence suggests that 59% of these appeals (16/24) were successful in achieving an average reduction of 19.3% (i.e. from a total of ?1,753.4 million to ?1,415.5 million).<sup>37</sup> Given the great success rate in fine reductions appeals are to be

<sup>29</sup>Average computed since 1996 date of adoption of the first leniency Notice; see footnote 31 below, Motta M., (2008) page 211.

<sup>30</sup>Reynolds, M., and Anderson, D., 'Immunity and Leniency in EU Cartel Cases: Current Issues' (2006) European Competition Law Review 27, page 85.

<sup>31</sup>According to A. Stephan cartel cases currently average 3.5 years from the opening of the investigation to the delivery of the Commission's final decision, cf. Stephan, A., 'The Direct Settlement of EC Cartel Cases', (2007), Working Paper - Commission Consultation submission, page 42.

<sup>32</sup>Motta M., 'On Cartel Deterrence and fines in the European Union' (2008) European Competition Law Review 29, page 211.

<sup>33</sup>Case C-282/95, *P Guérin automobiles v Commission*, [1997] ECR I-1503, paragraphs 36 and 37; Case C-238/99 P, *Limburgse Vinyl Maatschappij and Others v Commission*, of October 15th, 2002, paragraphs 167-171.

<sup>34</sup>Article 6(1) of the European Convention of Human Rights and Article 47 of the European Charter of Fundamental Rights.

<sup>35</sup>Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, paragraph 42; Case C-167/04 P, *JCB Service v. Commission*, paragraph 72. For a detailed discussion cf. Lenaerts, K., 'Some thoughts on evidence and procedure in European Community competition law' (2007) Fordham International Law Journal 30, page 1485.

<sup>36</sup>Above note 1, Neelie Kroes Speech/05/2005, page 4.

<sup>37</sup>Veljanovski, C., 'European Cartel Prosecutions and Fines, 1998-2007 - A Statistical Analysis' (2007) SSRN, page 5.

viewed as the natural route following the issuing of the Commission decision. The side effect of this trend is to delay on average by 3.5 years the final ruling, given that on the 50 CFI rulings delivered between 2003 and 2006 the average length of a CFI appeal was 3.5 years.<sup>38</sup>

This established propensity to appeal is not positive for the cartel enforcement process, but could probably be limited by adopting clearer criteria on the setting of fines. As long as the Commission retains ample discretion in fine determination, appeals are inevitable, irrespective of the procedure followed. Therefore, the new settlement procedure, given its consensual nature and limited appeal potential, would probably significantly limit the scope of appeals, but will not bring to an end the appeal predisposition of parties that, irrespective of any fine reductions, would be eager to see their fine further reduced.

### III. INAPPROPRIATENESS OF THE EXISTING LEGAL FRAMEWORK FOR REACHING CARTEL SETTLEMENTS

The DG Comp's activity to date furnishes numerous examples where the Commission found recourse to internal reorganisation and streamlining to respond to growing challenges of work overload.<sup>39</sup> The Court has allowed the Commission to 'take all the organizational measures necessary for the performance of that task where those priorities have not been determined by the legislature'.<sup>40</sup> A query arises, therefore, as to whether the 'simplified handling of cases' could be operated within the existing legal framework without laying down a new set of rules.

#### INFORMAL SETTLEMENTS

While the previous Regulation 17/62 prescribed no settlement procedure after the opening of investigations, Commission decisions of an informal nature did exist both in Article 81 and 82 cases where parties committed to so-called 'undertakings',<sup>41</sup> or abided by 'recommendations'. Moreover, the Commission using its broad discretion as to the infringements it wished to pursue, saw fit to close a number of files on the basis of informal commitment decisions that briefly appeared in the Commission's Annual Report. Some horizontal-cooperation cases were settled in view of the 'exceptional circumstances' of the market, such as the *Euro Bank Charges case*, where more than 50 banks fixed bank-charges for exchanging currencies before the introduction of the Euro. Due to the contestable legal value and the lack of transparency of the aforementioned procedures the Regulation 1/2003 replaced the practice of informal settlements.

#### ARTICLE 9 COMMITMENT DECISIONS

Regulation 1/2003 has for the first time provided a legal framework for the Commission to formally conclude settlements on the basis of commitments offered by undertakings. According to Article 9(1) of Regulation 1/2003 the Commission may adopt a formal settlement decision, which makes commitments offered by undertakings legally binding without a finding of a competition infringement. While, in principle, such

<sup>38</sup>Above note 31, Stephan, A. (2007), page 7.

<sup>39</sup>For instance, the notification regime 'comfort letters' were issued in order to alleviate the administrative burden caused by the individual exemption notification system.

<sup>40</sup>Cases T-24 and 28/90, *Automec II*, [1992] ECR 2223, paragraph 77.

<sup>41</sup>For extensive analysis, see Temple Lang, J., 'Commitment decisions and settlements with antitrust authorities and private parties under European Antitrust Law' (2006) *International Antitrust Law & Policy* - Fordham University School of Law, page 267.

commitments could have served the purpose of alleviating the overload of pending cartel cases they were not designed to deal with cartels. The procedure excludes from its scope cases where the Commission intended to adopt a fine,<sup>42</sup> thus, automatically leaving out hardcore cartels.

There are several reasons for this choice. First, in Article 9 commitments parties do not accept any infringement of competition rules, which could clash with the leniency programme, where parties do have to admit it. Moreover, as opposed to other competition concerns, it was hard for the Commission to exonerate from liability parties in cases where mere participation to the anticompetitive behaviour (such as participation in a cartel) amounts to a *per se* infringement. Finally, compelling a party to commit not to participate in a cartel for the period following the commitment decision, without fining its past participation would definitely sit at odd with the general Commission's stance of zero tolerance and war on cartels.

#### THE LENIENCY PROGRAMME

Leniency as an investigation tool aims at discovering cartel cases and collecting evidence to discharge the Commission's burden of proof. Settlements, on the other hand, aim at simplifying and expediting the procedure leading to the adoption of a formal decision. Therefore, the former rewards the significant added value of the information provided, whereas the latter rewards concrete contributions to procedural efficiency.

The distinction is more blurred in the US, where plea-bargains are effected in the framework of the leniency programme. Plea-bargains have been used in the US as a procedure to collect evidence, as the US Leniency Programme covers immunity for first-in applicants only. This function is performed in the EU through the Leniency Notice, which covers fine reductions in exchange for evidence also for second and third applicants. This distinction explains why, in the US, plea-bargains take place during the investigation phase, whereas in the EU, they occur after the Commission investigation (e.g. after dawn raids or leniency).

Thus, in Europe, there is a clear distinction in terms of the aims of each procedure. However, would it be possible for the present leniency system to accommodate an expediting procedure?

Under the 1996 Leniency Notice, voluntary admission of infringement was possible as it provided that a significant reduction in a fine (10-50%) would be granted where: i) before the Statement of Objections (hereafter SO) is sent, an undertaking provides the Commission with information, documents or other evidence which materially contribute to the establishment of the infringement, and, ii) after receiving the SO, it informs that it does not 'substantially contest the facts' on which the Commission bases its allegations.<sup>44</sup> The subsequent Notices removed this possibility, but, as pointed out by Professor Lenaerts, nothing precludes the Commission from granting a reduction for an undertaking's non-contestation of anti-competitive conduct alleged in the SO.<sup>45</sup>

<sup>42</sup>Regulation 1/2003, Recital 13.

<sup>43</sup>Explicitly mentioned in Commission MEMO/04/217 of 17 September 2004.

<sup>44</sup>See Commission Notice on Immunity from fines and reduction of fines in cartel cases, O.J. C 207/4 (1996), Article D(2).

<sup>45</sup>Above note 35, Lenaerts, K. (2007) page 1490.

While possible to include some elements of ‘settlements’ in the leniency programme, this would seem inappropriate because, drafted to complement it, the envisaged settlement procedure should be broader than leniency, inviting also non-leniency applicants to cooperate in order to achieve procedural efficiencies. For instance, if settlements were tied with leniency, following a successful dawn raid revealing sufficient incriminating evidence, the Commission would have been unable to expedite the procedure through a settlement.

#### THE FINING GUIDELINES

In addition to that, the 2006 Fining Guidelines allow reductions where undertakings have ‘effectively cooperated with the Commission’. While ‘effective cooperation’ could, in theory, enclose an early settlement, the term lacks sufficient precision and is of limited legal value given that Commission Guidelines are not binding or enforceable. This essentially means that the Fining Guidelines cannot serve as a basis for a very technical procedure such as the one leading to legally binding settlements. Moreover, the Commission has indicated that a party can choose self-incrimination as a line of defence in view of the possible rewards in the framework of the aforementioned ‘effective cooperation’, but this does not necessarily result in procedural efficiencies.<sup>46</sup>

#### ADOPTING A NEW PROCEDURE – THE DEBATE ON THE LEGAL BASIS

From a legal point of view, it appears that ‘direct settlements’ could not and should not be accommodated within the current legal framework of Article 9 ‘commitment decisions’ or the leniency programme. Yet, old-fashioned informal settlements could still be reached but only in exceptional cases.

In view of the aforementioned considerations, the Commission proceeded with the adoption of a new procedure based on Article 33 of Regulation 1/2003 that authorises it to take appropriate measures in order to implement the rules of competition.<sup>47</sup> Although the list of such measures is not exhaustive, the nature and the reach of the measures listed indicate that they generally do not seriously affect the parties’ rights of defence.<sup>48</sup> It is in light of this restrictive reading of the Article that the new procedure raises some reservations about its legality, as it does affect the defence rights of the parties. So, possibly it would have been more appropriate for the Council to adopt the settlement procedure under Article 83 EC Treaty, by amending Regulation 1/2003.<sup>49</sup> The Commission, nevertheless, opted for a non-legislative adoption of the package having regard to the fact that settlements would not constitute a new type of decisions, similar to Article 9 Commitment decisions, but would take the form of an Article 7 infringement decision imposing fines, pursuant to Article 23 of Regulation 1/2003. Besides, it considered that all rights of defence would, one way or another, effectively be guaranteed.

<sup>46</sup>Commission MEMO/08/458, ‘Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions’, Brussels, 30 June 2008, page 5.

<sup>47</sup>According to Article 33(1) of Regulation 1/2003 ‘the measures may concern, inter alia, (a) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints; (b) the practical arrangements for the exchange of information and consultations provided for in Article 11; (c) the practical arrangements for the hearings provided for in Article 27’.

<sup>48</sup>See Article 27 Regulation 1/2003.

<sup>49</sup>Above note 3, Waelbroeck, D (2008) page 35.



(B) REASONS FOR ENTERING INTO A DIRECT SETTLEMENT PROCEDURE: A COMPANY'S  
PERSPECTIVE

Commissioner Kroes pointed that companies involved will also accrue benefits<sup>50</sup> out of a settlement. These are both of financial and of procedural nature.

The first obvious incentive for companies to enter into settlement discussions is the reduction of the fine in return for cooperation. Of course the extent of the incentive is closely linked to the amount of the discount. So, companies applying for a fine reduction under the Leniency Programme could get an extra discount through settlements. The same applies for companies that do not or cannot qualify for leniency. Finally, first immunity applicants would also be inclined to cooperate under settlement because of the uncertainty that full immunity will effectively be granted, and of the other general advantages of the procedure, discussed below.

First, settlements offer a unique opportunity for companies to understand the potential extent of liability. Generally speaking, cartel cases are lengthy and the process involves the preparation of an array of written and oral submissions to the Commission, where usually the defendant is left 'in limbo' as to its liability and the financial penalty. Through settlement the defendants are given the opportunity to get a clear image of the objections raised against them and to be heard on those objections earlier in the procedure. An early appreciation of the objections gives less uncertainty as to the outcome of the procedure. In addition to that, defendants will have the chance to influence the Commission either at the early stage of the investigation in the interpretation of facts and objections or in relation to the level of fines.

Secondly, the immediate result of an expedited procedure is reflected on the lower legal costs incurred. Likewise, avoiding lengthy procedures will generate efficiencies in terms of time management for the companies' directors.

Thirdly, a very important, yet underestimated, advantage is that a consensual procedure might cause a lower reputational damage through adverse publicity. Estimating the level of reputational damage that cartel participants suffer from an official infringement decision, Motta and Langus conducted an event study analysis on the share prices of the infringing firms. The study showed that upon delivery of the infringement decision, share prices drop on average by 3.3%.<sup>51</sup> Despite leading to an official infringement decision, settlements can mitigate such effects.

Finally, settlement decisions are usually shorter than those of the normal procedure and reveal less factual background, hindering access to conclusive evidence for potential plaintiffs that are willing to bring private actions for damages. Despite the late awakening of private enforcement in Europe, follow-on actions are increasingly more frequent, and the Commission has taken positive steps to further boost them.<sup>52</sup>

The aforementioned advantages come at a cost. In that regard, the most important downside of the procedure is that usually through a settlement decision, companies effectively waive important defence rights, as well as their rights of appeal. So it is for companies to balance out the costs and benefits of the procedure and accordingly decide the profitability of a potential settlement.

<sup>50</sup>Above note 18, Neelie Kroes Speech 07/722, page 6.

<sup>51</sup>Langus, G. and Motta, M., 'On the Effect of EU Cartel Investigations and Fines On the Infringing Firm's Market Value' (2007) European competition law annual 2006 - Oxford, Hart, pages 363-376.

<sup>52</sup>See European Commission, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165 final, Brussels, 2.4.2008.

## (C) NEGATIVE EXTERNALITIES OF DIRECT SETTLEMENTS

Although settlements may accelerate the procedure and alleviate the backlog of cases, free resources and cut costs, they entail risks that should seriously be taken into account when devising the procedures. Those concern the inevitable lessening of deterrence, the obstruction on private enforcement and the possibility of unjust results produced by the bargaining power imbalances.

## I. LOWER FINES – IMPACT ON DETERRENCE

Measuring the level of deterrence or the effect of competition policy on cartels is practically unfeasible due to the impossibility of calculating the number of cartels that exist in an economy. However, simple economics tell us that deterrence will be effective when a firm perceives that its expected net gain from participating in a cartel is lower than its expected cost, including the probability of being discovered.<sup>53</sup> By adopting a ‘settlement procedure’ the probability of being caught increases as a result of the freeing of Commission resources. Nevertheless, the level of deterrence might remain stable, or even decrease, given that the further reduction of the fine might be perceived by the firms as internalized lower cost of ‘doing business’.

Whether giving the possibility to firms to receive an extra fine reduction would negatively affect the levels of deterrence, depends to a great extent on the level of the reduction given. However, several commentators have argued that the current levels of fines are far too low for achieving deterrence.<sup>54</sup> For instance, Veljanovski acknowledged that the amended 2006 Fine Guidelines move to the right direction but estimated that the actual or expected fines are not likely to reflect consumers’ losses or deter price-fixing. If that is the case, even minimal extra fine reductions would have a negative effect on deterrence.<sup>55</sup>

Nevertheless, there are also economists who adopt a more positive stance. For instance, Motta, based on a simple simulation, perceives that the fines as imposed according to the new Fines Notice are not of a ‘significantly different order of magnitude than the optimal fines’.<sup>56</sup> This approach is also advocated by Manzini who used an ‘optimal sanction formula’<sup>57</sup> to support this finding.<sup>58</sup> Espousing that position, we could *a priori* argue that a reasonable fine reduction through the settlement procedure would not have significant repercussions on the level of deterrence.

## II. SETTLEMENT VS LENIENCY

Generous settlement rewards can be perceived by undertakings as effectively being equivalent to leniency fine reductions. This would have a negative impact on the success of the leniency programme as companies would find it preferable to carry on their cartel infringement and to fully cooperate with the Commission only once a cartel has been revealed (by an *ex officio* investigation or through an immunity applicant). Therefore, the Commission made clear from the very beginning that the levels of settlement rewards would be much lower compared to those of fine reductions.

<sup>53</sup>Above note 51, Motta, M. (2008); Langus, G. and Motta, M. ‘The effect of EU antitrust investigations and fines on a firm’s valuation’ (2007) London: CEPR\Discussion Paper No.6176.

<sup>54</sup>Spagnolo, G., ‘Leniency and whistleblowers in antitrust’, (August 2006), Discussion paper (No.5794) Centre for Economic Policy Research (www.cepr.org); OECD, ‘Report: Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes’, (2002) available at www.oecd.org/dataoecd/41/44/1841891.pdf; Combe, E. et al. ‘L’efficacité des sanctions contre les cartels: Une perspective économique’, (2006), *Concurrences*, 4, 10–30; Veljanovski, C., ‘Cartel Fines in Europe—Law, Practice and Deterrence’ (2007) *World Competition* 30, pages 65–86.

<sup>55</sup>Above, Veljanovski, C., (2007) page 85.

<sup>56</sup>Above note 51, Motta, M. (2008) page. 215.

<sup>57</sup>The ‘optimal sanction formula’ determines the fine by only using objective actors, such as gain or harm.

<sup>58</sup>Manzini, P., ‘European Antitrust in Search of the Perfect Fine’, (2008) *World Competition* 31, page 16.

### III. WEAKENED PRIVATE ENFORCEMENT

In general, systems of direct settlement threaten the success of follow-on actions as a result of the fact that final decisions are 'inevitably much shorter',<sup>59</sup> thus containing, generally speaking, lesser details. It follows that private plaintiffs could find it difficult to rely on a Commission decision as irrefutable evidence to support a claim for damages. This constitutes one of the reasons why in the US defendants have a great incentive to plea-bargain, given that the risk of having to pay treble damages in follow-on actions is much more imminent following a normal full public trial procedure.<sup>60</sup> The impact on private enforcement is also tailored by the rules on disclosure. In the US the only information that is placed in the public domain is the identity of the firm, the admission of guilt and the level of the agreed fine. Obviously, from such limited information it is hard for private plaintiffs to extract evidence on the extent of liability and on the causation of the damage.

In Europe the trade-off between more private enforcement and more efficient public cartel prosecution is a very problematic one, as the Commission has placed both objectives high in its agenda. The recently published White Paper on Damages actions for breach of the EC antitrust rules<sup>61</sup> reminds that the Commission's aim remains to ensure 'that all victims of infringements of EC competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered'.<sup>62</sup> For instance, in the area of cartel related actions, the Commission promotes representative actions and opt-in collective actions.<sup>63</sup> The Commission however, stressed the complementary nature of private enforcement that does 'not replace or jeopardise, public enforcement'.<sup>64</sup> So where private enforcement jeopardizes the effectiveness of public enforcement, the latter should take precedence. Thus, given that generous rules on disclosure could put at risk the efficiency of the settlement procedure (by diminishing its attractiveness to settling parties), the Commission is more likely to opt for restrictive disclosure rules to the detriment of private actions. This, of course, depends on whether reaching procedural efficiencies (in the context of the settlement procedure) is viewed as part of the general policy goals of public enforcement or is thought of as a (procedural) advantage (or facilitation), purely serving the internal needs of the Commission.

### IV. POTENTIAL ABUSES

Potential inconsistent solutions that would create unjust results are in fact possible. Both companies and the Commission can abuse of their respective rights contained in the procedure.

#### COMPANY POTENTIAL ABUSES

Some companies might find it opportune to enter into a settlement and later pull out of the settlement in order to have access to the Commission evidence and prepare its defence at a very early stage. This might be unfair *vis-à-vis* the other cartel participants who opt for the normal procedure, as they would be able to get access to the Commission file only after the issuing of the SO.

<sup>59</sup> Above note 18, Neelie Kroes, Speech 07/722, page 6.

<sup>60</sup> Above note 31, Stephan, A. (2007) page 23.

<sup>61</sup> European Commission, White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165 final, Brussels, 2.4.2008.

<sup>62</sup> Above note 61, White Paper, paragraph 1.2.

<sup>63</sup> Above, White Paper, paragraph 2.1.

<sup>64</sup> Above, White Paper, paragraph 1.2.

## COMMISSION POTENTIAL ABUSES

## USE OF PARTY SUBMISSIONS FOLLOWING A FAILURE TO REACH A SETTLEMENT

There is an inherent risk to the procedure that the evidence submitted by parties throughout the procedure would be used by the Competition authority, notwithstanding an eventual failure of the settlement procedure. For instance, the Commission would be naturally inclined to fall back to the aborted submissions and conduct a new targeted and expedited full investigation to base an SO under the regular procedure.

## BARGAINING ASYMMETRY CAUSING UNJUST RESULTS

Settlement decisions are not really the fruit of mutual concessions of a negotiation procedure, but they often constitute the product of negotiation asymmetry between the defendant and the competition authority. For instance, for reasons of ‘corporate pragmatism’<sup>65</sup>, firms might agree to settle at a disproportionately high price, in order to bring a premature end to risky litigation, and reap the advantages of early settlements. This could be particularly true in the EU, where the risk of unpredictable level of fines is imminent. Moreover, firms might fear that if a settlement is not reached the Commission will seek higher sanctions deriving from the dissatisfaction of being forced to fall back to the standard procedure.

## (D) CONCLUSION

It has been shown that from a legal and empirical perspective, the Commission would, *prima facie*, benefit from an accelerated procedure that would free up resources. There seems to be ample room for improvement both with regard to the procedural complexity of system, and the length of the decision-making procedure. Moreover, the consensual nature of a settlement procedure could, *a priori*, slow down the pace of appeals. The procedure could be equally advantageous from the perspective of companies. Defendants, at the cost of waving important procedural rights, such as the right to appeal, could be given the opportunity to play an influential role on the Commission’s decision and fine, to better apprehend the objections, to save on legal costs and reputational damages, and to diminish the risk of facing follow-on claims for compensation. It has further been demonstrated that the current legal framework cannot properly accommodate any such settlement procedure for cartel prosecution and that the new adopted instrument was justified. Finally, settlements by nature involve serious trade-offs whose prioritisation falls in the sphere of competition policy with regard to both the negative impact that settlements can bring in terms of deterrence and the unjust results that derive from institutional and bargaining imbalances of the procedure.

Following the Chinese proverb that the ‘devil is in the details’, the new settlement rules are hereafter thoroughly examined, in particular, in light of the three examined aspects: the procedural efficiency sought by the Commission, the advantages sought by defendants, and,

<sup>65</sup>Above note 31, Stephan, A. N, (2007, December), page 32.

the externalities that give rise to some trade-offs in the general sphere of cartel prosecution and enforcement.

### 3. THE DRAFT SETTLEMENT PROCEDURE

The settlement procedure from the very beginning to the end runs in parallel with the standard procedure, where it can fall back to if either party decides to pull out. The procedure consists of five phases. In *Phase I*, the Commission has the entire discretion to initiate the procedure after the preliminary phase of investigation, by deciding on whether the case is *rationae materiae* suitable for settlement. If suitable, it will give a time-limit of at least two weeks for the parties to express in writing their interest in entering into settlement discussions. If the Commission agrees to enter into settlement discussions (*Phase II*) it will disclose the 'essential elements' of incriminating evidence it possesses against the settling party, such as the incriminating facts, their classification, gravity and duration and an estimation of the likely fines incurred. If a 'common understanding' is reached with regard to the scope and qualification of the infringement, parties are given a certain deadline to send a 'written settlement submission' (WSS) (*Phase III*) which should contain an acknowledgement of liability, sufficient information, a waiver to access to file, oral hearings and translation requests, and finally an indication of a foreseeable maximum amount of fine. The Commission can endorse the WSS in its SO (*Phase IV*) and parties should confirm the endorsement within a period of at least two weeks. Finally, the Commission adopts a final decision (*Phase V*) where it can adopt the position expressed in the SO, and impose a reduced fine.

#### (A) PHASE I: INITIATION OF THE PROCEDURE

##### I. SUITABILITY OF A CASE FOR SETTLEMENT

As with Article 9 Commitments, the Commission is in the driving seat of the settlement procedure from the beginning to the end and benefits from a broad margin of discretion regarding the initiation, the abortion or the conclusion of the procedure. Thus, undertakings have no autonomous right to settle. The timeframe for the initiation of the proceedings is any point of time between the initiation of an investigation to the issuing of the SO.<sup>66</sup> Hence, the Commission rejected the proposals arguing that the procedure should extend to the period following the issuing of the SO, notwithstanding the fact that, at that stage, there is still potential for settlement, especially for those parties who did not agree to settle at the first stage.<sup>67</sup>

Before opening the procedure the Commission should take into consideration the following elements to determine whether a case is suitable for settlement:<sup>68</sup> i) the probability of reaching, within a reasonable timeframe, a common understanding with the parties on the scope of the Commission's objections, ii) the prospect of achieving procedural efficiencies, and in particular, in view of the burden involved in providing access to non-confidential versions of documents from the file, iii) and the value of the settlement as a

<sup>66</sup>Above note 16, Commission Notice, paragraph 9. See also Article 11(6) of Regulation 1/2003 and Article 2(1) of Regulation 773/2004.

<sup>67</sup>In particular with regard to fining where the collection of data or technical legal arguments can still come into play.

<sup>68</sup>Above note 16, Commission Notice, paragraph 5.

precedent. In order to make a reasoned judgement, the Commission should examine a variety of factors such as the number of the parties involved, their foreseeable conflicting positions on the attribution of liability and the extent of contestation of facts.

The broad discretion on the Commission's hand seems to be reasonable and justified, given that it is best placed to consider whether a settlement will produce procedural efficiencies. Yet, a more precise delimitation of the Commission's discretion could further increase the attractiveness of the procedure to interested parties.

## II. EXPLORATION OF THE PARTIES' INTEREST

Provided the Commission considers that a case is suitable for settlement it will '*explore the interest in settlement of all parties to the same proceedings*'.<sup>69</sup> While the wording signals that all parties would be given equal opportunities to settle (irrespective of whether they are Leniency applicants) the wording is elusive as to whether there should be unanimous willingness on behalf of the parties to settle. So the Notice remains silent as to whether the Commission can settle and reduce the fine of only one interested undertaking, when the other parties to the same proceedings have not expressed such an interest. The question is pertinent and seems to be answered by the Commission's MEMO, which distinguishes between cases 'where all parties settle' and 'hybrid cases'.<sup>70</sup>

The trade off between the two possible options is crucial. On the one hand, the 'hybrid solution' due to the simultaneous operation of two parallel procedures could lead to a further procedural onus and effectively annihilate the procedural gains. On the other hand, the willingness of one company to settle should not be negated by (nor be made dependent on) the other non-settling parties' willingness, which for a variety of reasons linked to their very involvement in the alleged cartel, could be divergent. As a matter of fact, partial settlements have been admitted by some NCAs across the EU, such as by the German *Bunderkartelgericht* and the OFT.

Parties have at least two weeks to declare in writing whether they envisage engaging in settlement discussions.<sup>71</sup> This declaration does not imply an admission of participation in a cartel. Parties belonging to the same undertaking may appoint a joint representative. Joint representation, does not prejudge the finding of joint and several liability amongst parties of the same undertaking, but rather aims at achieving more efficient discussions.<sup>72</sup>

### (B) PHASE II: SETTLEMENT PROCEEDINGS

#### I. RULES OF THE PROCEEDINGS

The Commission has unfettered discretion to start discussions with the interested parties on a bilateral basis.<sup>73</sup> The pace and appropriateness of the proceedings are fully determined by the Commission.<sup>74</sup> For instance, the Commission may decide, in view of the progress made, on the order and sequence of the discussions as well as on the timing of disclosure of the incriminating evidence.<sup>75</sup> While leaving considerable discretion for the Commission with regard to individual treatment, the wording does not include any

<sup>69</sup>Above note 16, Commission Notice, paragraph 6.

<sup>70</sup>Commission MEMO/08/458, 'Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions', Brussels, 30 June 2008, page 4.

<sup>71</sup>Above note 16, Commission Notice, paragraph 9.

<sup>72</sup>Commission MEMO/07/433, page 3.

<sup>73</sup>Above note 16, Commission Notice, paragraph 14.

<sup>74</sup>Above note 16, Commission Notice, paragraph 15.

<sup>75</sup>Above note 16, Commission Notice, paragraph 9.

reference to the (implicit) principle of non-discrimination. As a result, the risk of favouritism *vis-à-vis* one of the parties is not eradicated.

Moreover, Commissioner Kroes has explicitly made clear that the Commission will not negotiate or 'bargain about evidence or objections'.<sup>76</sup> This, however, does not mean that all bargaining possibilities are excluded as some leeway for negotiation is left in practice. For instance, the Commissioner herself acknowledged that parties will 'have the opportunity to influence the Commission's objections through argument before the notification of the formal statement of objections'.<sup>77</sup> Thus, while the settlement procedure is not a 'forum' of negotiation, parties would be expected to bring forward their interpretation of events, and some flexibility would have to be shown by the Commission in order to come to a 'common understanding'.<sup>78</sup> For the sake of legal certainty and clarity, some authors propose that negotiations on the contents of the SO and of the final decision should be conducted on the basis of drafts to be disclosed to the undertakings before adoption.<sup>79</sup> Finally, the parties have the right to call upon the Hearing Officer at any time during the settlement procedure. The latter's duty is to ensure the effective protection of the undertakings' rights of defence,<sup>80</sup> especially that relating to access to evidence.

## II. DISCLOSURE OF EVIDENCE TO THE SETTLING PARTIES

### TYPE OF EVIDENCE

Under the normal procedure access to file is only allowed after the issuing of the SO. In the case of settlements the Commission will allow the parties from the early stages of the settlement discussions to be informed of the 'essential elements' taken into consideration so far, such as the facts alleged, their classification, 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.

Evidence disclosed at this early stage should enable parties to assert their views on the potential objections against them and allow them to make an informed decision on whether or not to settle. Throughout the procedure, the parties can potentially have access to further information. For instance, parties can request the Commission to grant access to non-confidential versions of any accessible documents listed in the case file, as long as they are justified for the party to ascertain its position regarding the time period or any other aspect of the cartel. The older version of the Notice also included the condition that the 'procedural efficiency is not jeopardized'.<sup>81</sup> By wiping it out the Commission shows its intention to limit certain aspects of its discretion that could be perceived by undertakings as potentially abusive.

### CONFIDENTIALITY RULES OF THE COMMISSION EVIDENCE

Parties may not, unless explicitly authorized by the Commission, disclose to any other undertaking or third party in any jurisdiction the content of the discussions held and of the documents used in view of the settlement.<sup>82</sup> Breach of the confidentiality clause may lead

<sup>76</sup>Above note 18, Neelie Kroes Speech 07/722, page 4.

<sup>77</sup>Above note 18, Neelie Kroes Speech 07/722, p. 5.

<sup>78</sup>Camesasca, P. et al., 'The 2008 Settlement Notice: Will the Commission Make it Work?' (2008) GCP, p. 7.

<sup>79</sup>Above note 3, Burrenchter, J. and Zimmer, D.J., (2007) p. 617.

<sup>80</sup>Above note 16, Commission Notice, paragraph 18

<sup>81</sup>Above note 11, Draft Notice, paragraph 17.

<sup>82</sup>Above note 16, Commission Notice, paragraph 7.

the Commission to disregard the undertakings' settlement request and may constitute an 'aggravating circumstance' resulting in the imposition of an increased fine. While the importance of evidence is not questionable, the sanction against the breach of the confidentiality clause may appear disproportionate in light of the existing Guidelines on fines<sup>83</sup> that do not include such confidentiality considerations.

### III. FROM THE 'COMMON UNDERSTANDING' TO A 'WRITTEN SETTLEMENT SUBMISSION' (WSS)

Once the discussions have reached the point of '*a common understanding on the scope of the potential objections and the estimation of the range of likely fines*' the Commission will grant 15 days for the undertaking to introduce a final written settlement.<sup>84</sup> If the parties fail to introduce such a settlement submission, then the settlement procedure comes to an end and the case falls back on the normal track of procedure of Regulation 77/2004.<sup>85</sup>

#### (C) PHASE III: THE CONTENT AND EFFECTS OF THE 'WRITTEN SETTLEMENT SUBMISSION' (WSS)

##### I. THE CONTENT OF THE WSS

Parties opting for a settlement must introduce a formal request to settle in the form of a 'written settlement submission'. The WSS shall be formulated according to a specified template,<sup>86</sup> drafted along with the results of the settlement discussions, and should contain the following:

##### ACKNOWLEDGEMENT OF LIABILITY

An acknowledgement in unequivocal terms of the parties' liability for the infringement should briefly describe the basic parameters of their participation in the cartel under investigation, and particularly, its object and its possible implementation, its main facts and their legal qualification, the party's role and duration of participation. This seems to require more elements compared to the Draft proposal, which requested merely the main facts, the legal qualification and the duration.

##### INDICATION OF THE MAXIMUM FORESEEABLE AMOUNT OF FINE

The Notice requires that the parties should provide an indication of the maximum amount of the fine they foresee to be imposed by the Commission and which they accept. Such a calculation would be based on the 'range of possible fines' revealed by the Commission throughout the discussion phase. The Commissioner specified that 'the range is net of any other reduction',<sup>87</sup> hinting that a high degree of certainty will be revealed over the level of the fine. This is the method chosen in the US plea-bargaining system where a judge would have to inform the defendant before pleading guilty, of 'any maximum possible

<sup>83</sup>See in particular Commission 2006 Fine Guidelines, paragraph 28.

<sup>84</sup>Above note 16, Commission Notice, paragraph 17.

<sup>85</sup>Point 19 of Commission Notice; Articles 10(2), 12(1) and 15(1) of the Regulation will apply.

<sup>86</sup>Commission MEMO/07/433, page 3.

<sup>87</sup>Above note 18, Neelie Kroes Speech 07/722, page 5



penalty, including imprisonment'. This is also the case with the German and French legal systems.

This method is not included in the legislative package. The Draft Notice, however, referred to settled case law on the necessary elements that have to be communicated to determine 'the range of fines'. Accordingly, the Commission should '*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'*'.<sup>88</sup> This brings no added value to companies, as this information would have to be disclosed anyway by the Commission during the settlement discussion phase. So the only helpful indication is the 2006 Fining Guidelines,<sup>89</sup> which have received ample criticism with regard to their uncertain application. This has been a recurrent point of almost all consultation submissions and commentaries. Overcoming this uncertainty through Commission guidance would be crucial for appealing to settlement applicants and therefore a clarification of the different aims of the fine calculation seems to be imperative. Commissioner Kroes has rejected appeals to review the Guidelines for lacking sufficient transparency, doubting from the very beginning that allowing 'potential infringers to calculate the likely cost/benefit ratio of a cartel in advance will somehow contribute to a sustained policy of deterrence and zero tolerance'.<sup>90</sup>

This is not convincing. As pointed by Ratliff, 'as a matter of principle, it is not clear why companies should not be able to calculate what fines they face if they infringe' as it happens with any other area of law, especially in view of the possibility of a lower number of appeals on the level of fines.<sup>91</sup> In principle, the Commission also has an incentive to be more specific on the 'range of fines' as the settlement would have to be abandoned if it does not endorse the maximum fine proposed by the party. Besides, lack of certainty, in practice, might cause the following three problems. Firstly, given the uncertainty over the potential fine incurred, companies will be deterred from entering into settlements. Secondly, companies may fear that other settling parties have based their fines on different criteria leading to disproportionate fines. Thirdly, companies will have a natural tendency to reduce the fine, knowing that the Commission would be tempted to accept a lower fine at the risk of falling back on the normal lengthy procedural track.

Thus it would be preferable, if not to pronounce a precise potential fine, at least to provide clarifying guidance on the components that make up the potential fine based on the 2006 Fining Guidelines.<sup>92</sup>

#### CONFIRMATION OF SUFFICIENT INFORMATION

The parties must confirm that they have been sufficiently informed of the Commission's objections and have been given the opportunity to make their views known. This provision aims at eliminating the risk of running further delays following the issuing of the final Commission decision due to possible appeals deriving from an infringement of their rights of defence. The provision is a legal fiction in the sense that no rule can *de jure* deprive the company from its right to appeal (see below).

<sup>88</sup>Cases 100/80 to 103/80 *Musique diffusion française and Others v Commission* [1983] ECR 1825, paragraph 21; Case T-16/99 *Lögstör Rör v Commission* [2002] ECR II-1633, par.193; Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-0000, paragraph 428; Case T-15/02 *BASF AG v Commission*, paragraph 48; Case T-329/01 *Archer Daniels Midland Co. v European Commission (sodium gluconate)*, paragraph 361.

<sup>89</sup>Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, (06/C/210)

<sup>90</sup>Above note 1, Neelie Kroes, Speech/05/205, page 6.

<sup>91</sup>Above note 27, Ratliff, J. (2007) p. 604

<sup>92</sup>Some consultation contributions proposed that, ideally, a settlement should refer to a standard calculation scheme applied to all parties, the contents of which could be scrutinized by external auditors.

## WAIVER TO AN ACCESS TO FILE OR ORAL HEARING REQUEST

The settling parties must also confirm that they do not envisage requesting access to the file or requesting to be heard again in an oral hearing. This waiver of rights aims at speeding up the procedure before the Commission reaches its final decision.

## AGREEMENT TO RECEIVE THE SO AND THE FINAL DECISION IN AN OFFICIAL LANGUAGE OF THE EC

The parties must also agree to receive the SO and the final Commission decision in an official language of the EC. This provision obviously aims at reducing the cost and delay caused by translations often requested by parties.<sup>93</sup>

## II. EFFECTS OF THE WSS

## THE RIGHT OF REVOCATION

Interestingly, once submitted, the WSS cannot be revoked unilaterally by the undertakings until the issuing of the SO. The settlement proposal ceases to be bounding on the parties only and when the Commission decides not to endorse it. According to the Commission, this flows from the fact that the WSS signals the parties' willingness to cooperate until the release of the SO. The prohibition of unilateral revocation has been confronted with disapproval by many commentators. Barring parties from revoking their WSS after the 'common understanding' serves no apparent reason. Parties willing to revoke unilaterally prior to the SO will withdraw from the procedure anyway after the SO, thus, potentially causing additional work for the Commission in trying to consolidate the various WSS in a SO. Moreover, it is not impossible that crucial new information amending the party's role in the cartel is revealed after reaching the 'common understanding' and prior to the issuing of the SO. That evidence should definitely be allowed and taken into consideration by the Commission.

## THE RIGHT TO APPEAL

As opposed to US plea bargains, where parties explicitly wave their rights to appeal, such a provision would not be possible under EC Law and such a waiver would be legally void. Regulation 1/2003 requires its interpretation and application according to the rights and principles recognized by the Charter of Fundamental Rights.<sup>94</sup> Article 47 of the Charter stipulates that *'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.'* In view of the constitutional value attributed to the Charter upon adoption of the new Treaty of Lisbon,<sup>95</sup> it would appear inconceivable for the Commission to legally bar any right of appeal. That is why the Notice affirms that final decisions are subject to judicial review in accordance with Article 230 of the EC Treaty.<sup>96</sup> But what is the practical value of such a right in the framework of settlements?

<sup>93</sup>Above note 18, Neelie Kroes Speech 07/722, page 4.

<sup>94</sup>Recital 37 of Regulation 1/2003.

<sup>95</sup>Article 6(1) of Treaty on the European Union.

<sup>96</sup>Above note 16, Commission Notice, paragraph 41.

Despite possessing the right to appeal, in practice, the situations of a successful assertion of this right are limited. One should distinguish between the various possible appeals. As acknowledged by Commissioner Kroes, in most cartel cases 'parties litigate to reduce the level of the fine, rather than to deny that the anticompetitive behaviour took place'.<sup>97</sup> This means that few appeals are expected to focus on the finding of liability, while more commonly, companies would appeal to reduce the attributed fine.

As for the former, the finding of liability, it seems that little room will be left for successfully arguing that the parties were not liable, in view of the 'unequivocal acknowledgement of liability for the infringement' contained in the WSS and their prior 'common understanding' with the Commission'. Hence, the only plausible argument would consist in making a case for a 'manifest abuse' on behalf of the Commission in the form of a constraint or of an intentional withholding of evidence. Besides, as pointed by Professor Lenaerts, the ECJ has implicitly recognized a right of an undertaking that has received a fine reduction for providing the Commission with facts proving an anticompetitive conduct, to contest those same facts.<sup>98</sup>

Appeals on fines are more critical for companies. Here again the possibility of appealing is, in practice, to a great extent given up due the fact that the imposed fine cannot exceed the maximum fine proposed by the parties themselves. Moreover, arguing that at the time of their proposal some relevant information was unavailable or withheld by the Commission would be quashed by the confirmation of sufficient information in the WSS. Thus, it seems that appeals from settling parties are probably going to be scarce where parties could not reasonably have known that additional, crucial for the proposal, information existed.

The possibility of non-settling parties appealing against the decision is more likely to succeed. However, given the brevity of the evidential and factual motivation of the Commission decision, a judicial review will be restricted, unless the Commission is ordered to issue a new, more extended, version of the decision. For instance, in a similar set of circumstances, due to its shortened summary of facts and curtailed legal reasoning, the Bundeskartellamt had to replace a German 'consensual fining decision' by a new fully reasoned fining decision.<sup>99</sup>

#### USE OF PARTY SUBMISSIONS FOLLOWING A FAILURE TO REACH A SETTLEMENT – AN OPEN QUESTION

Following a failure to reach a settlement, the Commission has committed not to use information acquired throughout the settlement procedure against any of the parties to the proceedings.<sup>100</sup> Yet, reasonable doubts persist. The problem arises from the non-separation of jurisdictional and prosecutorial powers of the Commission.<sup>101</sup> The Commission finds itself in the hypocritical position of possessing evidence that it cannot directly use.

To tackle the issue, some commentators suggested that a new team of Commission officials should start the investigation and the prosecution anew, as the ones conducting the failed settlement procedure would be naturally inclined to fall back to the known incriminating information (for instance by requesting parties the same information anew). Others proposed to label the SWW acknowledgements as privileged and to return the

<sup>97</sup>Above note 18, Neelie Kroes Speech 07/722, page 4.

<sup>98</sup>See above note 35, Lenaerts, K. (2007), p. 1490 ; Case C-121/04 P *Minoikes Grammes ANE (Minoan Lines SA) v. Commission*, paragraph 66; Case C-111/04 P *Adriatica di Navigazione SpA v. Commission*, paragraph 91; Case C-110/04 P *Strintzis Lines Shipping SA v. Commission*, paragraph 63.

<sup>99</sup>Above note 3, Burrichter, J. and Zimmer, D.J., (2007), page 613.

<sup>100</sup>Above note 16, Commission Notice, paragraph 27

<sup>101</sup>See Wils, W.P.J., 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law' (2006) *World Competition* 29, page 3-24.

documents supplied by the companies. Finally, some have proposed that the Commission should have two separate teams handling the case and the settlement process. Settlement discussions should be conducted with the first team and should remain confidential.

Summing up, no matter how hypocritical and antithetic to the Commission's enforcement goals, it would be unjust for undertakings that reveal confidential information for a specific purpose and for a *quid pro quo* to see that very information be used otherwise than originally planned, especially in view of the Commission's great discretion in terminating the settlement procedure.

#### (D) PHASE IV: THE STATEMENT OF OBJECTIONS (SO) AND THE PARTIES' RESPONSE

##### I. ACCEPTANCE OF THE 'WRITTEN SETTLEMENT SUBMISSION'

Endorsement takes the form of including in the SO the references with regard to the cartel description and its legal qualification, as well as, the imposition of a fine that does not exceed the maximum amount indicated by the parties. In practice, the Commission has indicated informally that the operative language of the SO will be exactly the same as the WSS.<sup>102</sup> This suggests that the Commission will opt for a personalised SO incorporating the settling party's WSS instead of a general SO addressed individually to all parties involved. If so, two forms of SOs would have to be issued (one for settling and one for non-settling parties), which could cause procedural stagnation instead of acceleration, given that under the normal procedure there is usually a single SO addressed to all parties.

According to the Notice, the Commission's acceptance of the parties' submission takes place implicitly at the moment of the issuing of the SO. Yet, whether the Commission has actually accepted or rejected the written submission is completely subjective, as it is up to the parties to say whether their submissions are reflected in the SO or not. If the company interprets the facts of the cartel involvement differently than the Commission, then it has the possibility to renounce the settlement and mount a full defence.

##### II. REJECTION OF THE 'WRITTEN SETTLEMENT SUBMISSION'

While parties have no right to revoke their written proposal,<sup>103</sup> the Commission has no obligation to endorse it as it has the discretion to adopt an SO which diverges from the parties' submissions. If it decides to do so the general provisions regarding the time-limit,<sup>104</sup> the oral hearing<sup>105</sup> and access to file<sup>106</sup> shall apply, and the settlement is deemed to be withdrawn and deprived of any evidential value against any of the parties.

While the defence rights of the parties are judiciously returned, the capacity of the Commission to legitimately adopt –without any justification– a SO which does not endorse the parties' submission has been subject to criticism. The solution is problematic also in that parties get to know the Commission's decision only at the deliberation of the SO. It appears therefore, preferable to opt for an alternative solution whereby the Commission, prior to issuing its SO, will issue a decision informing the parties as to whether their submissions have been approved. Moreover, the 'common understanding' reached

<sup>102</sup> AmCham consultation submission, page 5.

<sup>103</sup> Above note 16, Commission Notice, paragraph 22.

<sup>104</sup> Article 10(2) of Regulation 773/2004.

<sup>105</sup> Article 12 of Regulation 773/2004.

<sup>106</sup> Article 15(1) of Regulation 773/2004.

creates a legitimate expectation to the parties that their WSS will, *a priori*, be endorsed. Therefore, although the Commission needs to maintain the unilateral power to withdraw, this power should be exercised in reasonable circumstances. Diverging from that 'common understanding' may be due to three reasons: a) on a new reading of the legal or factual evidence already provided, b) on a new input of evidence that proves that the Commission has been misled or mistaken, or, c) on a disagreement over the proposed maximum level of fines. Should one of those arise, the Commission should legitimately depart by giving reasons to the interested parties. Certainly the side effect of such a solution would be to impose a significant procedural burden by compelling the Commission to motivate each decision especially having regard to the possible contradictions deriving from allegations of the settling parties. The impracticality of the solution is to a great extent dependent on whether the Commission opts for a general or an individualised SO and on the level of detail provided.

### III. PARTIES ACCEPTING THE COMMISSION'S ENDORSEMENT OF THE SETTLEMENT IN THE SO

Parties have the right to express their views on the objections before the adoption of a final decision, just like in the normal procedure.<sup>107</sup> Issues may arise as settling parties might discover upon the delivery of the SO that evidence provided by the other settling, or non-settling parties, had not been disclosed to them. The Commission shall take into account those views and, where appropriate, factually or legally reassess its findings.

When the SO does endorse the settling parties' submissions, the parties shall, within a 'time-limit of at least two weeks reply to the Commission confirming (in unequivocal terms) that the SO corresponds to the content of their submissions.'<sup>108</sup>

#### (E) PHASE V: COMMISSION DECISION AND SETTLEMENT REWARD

##### I. COMMISSION DECISION

###### DECISION CONFIRMING THE SO

Following the parties' confirmation response, the Commission is entitled, pursuant to Articles 7 and 23 of Regulation 1/2003, to issue a final decision upon consultation of the Advisory Committee and in view of the ultimate autonomy of the Commission College.<sup>109</sup> This essentially means that time will be saved as there will be no oral hearing or access to the file requests coming from the parties that have waived these procedural rights in their submissions.

###### DECISION DEPARTING FROM THE SO

The Commission retains the power to depart from its position expressed in its SO that endorses the parties' submissions. This can be a result of the Advisory Committee's different approach or of other considerations that came into play when deciding the case at the

<sup>107</sup>Under Article 11(1) of Regulation 773/2004 and Article 27(1) of Regulation 1/2003

<sup>108</sup>Above note 16, Commission Notice, paragraph 26.

<sup>109</sup>Article 14 of Regulation 1/2003.

Commission College. Should this happen, the effects of the settlement as well as those of the existing SO will be null and void, and the parties will be offered a new SO and the chance to exercise all their procedural rights of defence waived throughout the settlement procedure. Essentially this means that the acknowledgements and confirmations would be deemed withdrawn and rendered unable to be used in forthcoming proceedings.

These provisions have been heavily criticised for giving, once again, too much discretion to the Commission. The fact that the Commission may legitimately depart from the parties' submissions, because of a divergent assessment of the Advisory Committee or the Commission College, deprives the parties of any legal certainty about the outcome of the procedure. The critique is accurate for the additional reason that there is limited scope for new information to come to the Commission's attention in the period between the issue of the SO and the final decision. Therefore, it would make sense to expect the parties to know that when the Commission decides to endorse a settlement in its SO it has the implicit backing of the College of Commissioners. Burrichter<sup>110</sup> opined that the problem could also be mitigated by authorizing the Competition Commissioner to take the decision on behalf of the College, just like in Article 6 decisions of the Merger Regulation. Furthermore, just like in the case of deviations from the WSS, deviations from the SO position should normally be limited in cases where the Commission comes into the possession of new evidence, subsequent to the issuing of the SO, that materially contradicts previous evidence. If that were the case, it would make sense to expect the Commission to give reasons for departing from the SO position. Besides, the Commission itself acknowledges in its MEMO that '*departing decisions*) should occur only exceptionally if the usefulness of the settlement instrument is to be preserved'.<sup>111</sup>

## II. QUANTIFYING THE SETTLEMENT REWARD

The fine is determined in the final Article 7 decision that should indicate, *inter alia*, the undertaking's cooperation at the administrative procedure. The Notice provides that the Commission '*will reduce by 10% the amount of the fine after the 10% cap has been applied having regard to the Guidelines pursuant to Article 23(2)(a) of Regulation 1/2003*' and that any deterrence multiplier '*will not exceed a multiplication by two*'.<sup>112</sup>

In theory, the reduction should be significant enough to make up for the rights of defence foregone. Similarly, considering that the most important right given up is that of receiving an effective appeal before the CFI, it would be reasonable to set the level of reduction close to the average level of reduction achieved through CFI appeals, i.e. approximately 20%.<sup>113</sup> According to others, the reward should correspond to the value of actually expediting the cartel investigation process. So, if efficiency is the *quid pro quo* for settling, some have proposed to adopt a sliding scale of settlement reward, with a higher reward offered in cases where the savings are greater (i.e. all parties settle) and reduced when they are less (some settle and some not). However, such a scale could be a constant source of uncertainty and additional disagreements between parties and the Commission. Parties might appeal against their own settlement if other companies have received a higher reward.

<sup>110</sup>Above note 3, Burrichter, J. and Zimmer, D.J. (2007), page 617.

<sup>111</sup>Commission MEMO/07/433, p. 5

<sup>112</sup>Above note 16, Commission Notice, paragraphs 30 and 32.

<sup>113</sup>20% according to A. Stephan (Above note 31, in Stephan, A., (2007), p. 7) and 19,3% according to Veljanovski, C., 'European Cartel Prosecutions and Fines, 1998-2007 - A Statistical Analysis' (2007) SSRN, p. 5

So, irrespective of the theoretical basis of the *quid pro quo* upon which the reduction should be based, it constitutes a common ground that the settling members of the same cartel should all receive the same percentage and that this reduction should apply in all cases. This is in line with the Commission's position whereby 'all parties settling in the same case will receive equivalent reductions of fine, because their contributions to procedural saving will be equivalent'.<sup>114</sup>

Despite the fact that, *prima facie*, quantifying the value of the foregone parameters or the efficiency gains appears impossible, a careful examination of the reduction practice in the Leniency programme with regard to 'attenuating circumstances' could prove useful. For instance, in *Prym/Commission* (Case T-30/05) the Commission awarded a 10% reduction for the sole fact that a company had not challenged the SO.<sup>115</sup> Thus, in view of the extent of the forfeited rights in the case of settlements, it would be fair to argue that the held 10% reduction is appropriate. Probably having that in their mind, most of the consultation contributions agree that the appropriate settlement reduction would be around 10-20% although voices for reductions up to 50% have also been put forward.<sup>116</sup> NCA's practice could also be used as an indicator. For instance, in the recent UK case of the dairy cartel, early resolution agreements were reached between the OFT and with six out of nine defendants,<sup>117</sup> by reportedly granting a 35% fine reduction.<sup>118</sup> The French procedure provides for a 10% reduction of the total fine (calculated on the basis of 5%, not 10%, of the total turnover) for mere procedural efficiencies that could increase up to 30% when the parties offer commitments in order to remedy their infringements.<sup>119</sup>

Arguably the 10% reduction is not enough, given that board members would probably be willing to try out their chance before the CFI. Time will show whether undertakings will opt for the old route of lengthier and costlier proceedings with higher, but less certain, fine reductions on appeal.

#### 4. IMPACT AND CRITICAL ASSESSMENT OF THE SETTLEMENT PROPOSAL

The detailed analysis of the settlement procedure enables to assess the effectiveness of the proposed system against the goals it is supposed to pursue. This juxtaposition can be attempted from the point of view of both the Commission and that of the undertakings. Likewise, it also seems imperative to consider the externalities that the new system might produce, especially with regard to its interaction with both the Leniency Programme and the private enforcement.

##### (A) ASSESSMENT IN VIEW OF THE COMMISSION GOALS

The procedural efficiencies produced by the proposal are noticeable, especially in alleviating the procedural complexity and reducing the length of the Commission decision. In addition to that, the risk of lengthy appeals persists but it is considerably weakened.

#### I. CONFRONTING PROCEDURAL COMPLEXITY AND THE EXCESSIVE LENGTHS OF COMMISSION DECISIONS

<sup>114</sup>Commission MEMO/07/433, p. 2

<sup>115</sup>Commission MEMO/07/353, 'Antitrust: Commission welcomes Court of First Instance judgments in needles and other haberdashery products cartel case', 12/09/2007

<sup>116</sup>A&O (10-20%), Antitrust Alliance (at least 20%), ABA (20-30% and greater for parties participating in both leniency and settlement programs. 40-50% Addleshaw Goddard LLP; AmCham 20-30%, AEDC 25%, Baker& McEnzie 25%, Howrey 30%,

<sup>117</sup>See OFT press release of 7th December 2007, <http://www.of.gov.uk/news/press/2007/170-07>, see also the previous OFT schools cartel settlement <http://www.of.gov.uk/news/press/2006/88-06>.

<sup>118</sup>AmCham submission, 'Position Paper on Commission Proposals on the conduct of settlement procedures in cartel cases', [www.eucommittee.be/Pops/2008/COMP\\_cartels140108.pdf](http://www.eucommittee.be/Pops/2008/COMP_cartels140108.pdf), page 2.

<sup>119</sup>See Carswell-Parmentier, L., 'Recent developments in French competition law - Commitments, Leniency and Settlement Procedures - the French approach' (2006) *European Competition Law Review*, 27, 616-630.

The procedure yields savings by not requesting access to the file or a formal hearing after the SO, by saving time on translations and by resulting in the drafting of a shorter SOs and final decisions. The majority of the savings come from the period between the SO and the final decision, when parties usually request access to file and oral hearings. According to Stephan, this period averages 12-13 months, meaning that the potential saving in time from the settlement procedure can be up to one third, given that a cartel case lasts 3 years on average.<sup>120</sup> So, significant resources can be freed through the proposed procedure. Savings are also affected throughout the SO preparatory phase, as parties can facilitate the speedier analysis of existing evidence. Finally, it is submitted that the Commission could achieve further time savings by accepting settlement offers also after the issuing of the SO note. This, however, could be possible only in well defined circumstances in order to avoid free-riding phenomena on behalf of non-settling parties.

## II. CONFRONTING THE RISK OF LENGTHY APPEALS BEFORE THE CFI

It is recalled that 90% of the Commission decisions are appealed before the CFI, delaying on average the definitive decision by 3.5 years and using up the valuable resources of the Commission's legal service. In addition to that, the possibility of effectively bringing an appeal is of an underestimated importance, given that it influences to a great extent the decision to enter into settlement discussions at the first place. The confirmation of sufficient information and the wavers to the right of access to file and of an oral hearing formally expressed by the settling parties do not legally prejudice the right of parties to appeal. Nevertheless, it has been demonstrated that, given the limited circumstances under which the parties will be able to appeal, a de facto waiver to the right of appeal is formed through the proposed decision, especially for settling parties.

### (B) ASSESSMENT FROM THE PERSPECTIVE OF UNDERTAKINGS

Generally speaking, there is a series of advantages for companies that participate in settlements. However, despite the straightforward advantages, procedural ambiguities that are present throughout the procedure might inhibit a company to proceed to a settlement.

#### I. THE ADVANTAGES OF SETTLING

Having regard to the advantages listed in Part I the following conclusions can be drawn:

##### FINE REDUCTION AND REDUCED COSTS

Despite the 10% set reduction, it still appears impossible for undertakings to estimate with a relative precision the reward that they are likely to receive. This rate would be particularly appealing to second and third leniency applicants, as well as to all undertakings that do not qualify for leniency.

The reduced length of the procedure will definitely be reflected on the undertaking's budget as it is estimated that the time needed for a decision to be delivered will be shorter per one third (1/3). Moreover, companies will not have to draft costly reports for the

<sup>120</sup>Above note 31, Stephan, A. (2007) pagr 42.



Commission in the context of exchanges of information, thereby freeing-up valuable managerial resources. All these elements may affect the companies' predisposition of appealing against the Commission's decisions.

#### REDUCED RISK OF FOLLOW-ON ACTIONS

It is hard to quantify the potential risk for companies of follow-on actions, especially in view of the absence of consistent private litigation in Europe. Nevertheless, the success of follow-on actions is conditioned by two parameters: the precision of information given in the final decision, and the rules of disclosure. As explained below, while the brevity of the Commission's final decisions is an advantage for undertakings, the rules concerning oral and written submissions are still unclear.

#### THE SHORT SO AND FINAL DECISION

Obviously, the fact that the SO and the final decisions are expected to be 'shortened' and probably not fully reasoned will not help private plaintiffs to alleviate the burden of proof of the infringement. The legal test for proving the causation link between the cartel and the damage suffered is not evident, and more information than mere cartel participation is needed. However, the plaintiffs might petition to the judge to (or the judge might *ex officio*) ask the Commission to disclose further information. It is those rules on disclosure that are of focal interest in determining the private enforcement potential in the ambit of settlements.

#### RULES ON DISCLOSURE

Normally, written party submissions to the Commission in the framework of leniency are not discoverable under most national procedural rules. However, even when a cartel affects the European area only, the discovery of cartel activities in Europe could have some bearing on alleged cartel activities in other countries, and in particular in the US,<sup>121</sup> where leniency submissions are discoverable under the national rules of procedure. The effect of such wide discovery is obviously to undermine the EC Leniency Programme. The Commission has sought to tackle the problem by intervening in US civil litigation to oppose discovery of EU leniency applications.<sup>122</sup> In addition to that, it has introduced an oral statements procedure in the Leniency Notice<sup>123</sup> and is planning to adopt more restrictive rules on the discoverability of written statement. For instance, the recently issued White Paper on actions for damages explicitly provides that 'adequate protection (from disclosure) should be given to corporate statements by leniency applicants and to the investigations of competition authorities'.<sup>124</sup> The Commission justifies this provision on the ground that it seeks to 'avoid placing the leniency applicant in a less favourable situation than the co-infringers. Otherwise, the threat of disclosure of the confession submitted by a leniency applicant could have a negative influence on the quality of his submissions, or even dissuade an infringer from applying for leniency altogether'.<sup>125</sup> The same logic was *mutatis mutandis* applied in the 'settlement procedure', as settling parties would be more exposed than non-settling ones in the event of a request for discovery.

<sup>121</sup>Dechert On Point, 'European Commission proposed Framework for Cartel Settlements', Nov.2007, p. 2, [http://www.dechert.com/library/Antitrust\\_25\\_11-07\\_European\\_Commission.pdf](http://www.dechert.com/library/Antitrust_25_11-07_European_Commission.pdf).

<sup>122</sup>According to Reynolds, M and Anderson, D, 'Immunity and Leniency in EU Cartel Cases: Current Issues' (2006) European Competition Law Review, 27, p. 83, the Commission filed amicus curie briefs in US civil litigation relating to the Vitamins, Methionine and Choline Chloride cartels.

<sup>123</sup>Commission 2006 Leniency Notice, paragraph 32.

<sup>124</sup>Above note 61, White Paper, paragraph 2.2.

<sup>125</sup>Above note 61, White Paper, , paragraph 2.9.

The final version of the Commission Notice added four new paragraphs concerning access to evidence.<sup>126</sup> At first, it clarifies that ‘normally public disclosure of documents and written or recorded statements received in the context of this Notice would undermine certain public or private interests, [...] even after the decision has been taken’.<sup>127</sup> The provision is the same as the one of point 40 of the Leniency Notice. The Commission takes a clear stance of no access to evidence, thereby excluding any real possibility for a private party to get access to the settlement submissions for successful follow-on (or standalone) actions for damages. Non-settling cartelists will have access but will not be able to make a copy by mechanical or electronic means of any information of the settlement submissions, and other parties, such as complainants will not be granted access to settlement submissions. In addition to that, the Commission retains the possibility, whenever the information is used after the Commission’s prohibition decision, to ask the Community Courts to increase the fine in respect to the responsible undertaking.<sup>128</sup> The Commission made sure that the same diligence would also apply in the case of national courts, as it provides that the settlement submissions will only be transmitted to competition authorities, provided that level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.<sup>129</sup>

Finally, according to a newly introduced provision in the Notice, settlement submissions may be provided orally. Such oral statements will be recorded and transcribed at the Commission’s premises.<sup>130</sup> This solution might nevertheless cause the Commission to incur significant costs running counter to the underlying procedural efficiency objective. Yet, under settled jurisprudence,<sup>131</sup> oral evidence constitutes equally good (valid) evidence, so the Commission added that it would not transmit settlement submissions to national courts without the consent of the relevant applicants.

Summing-up, generally, companies would be less inclined to settle when the risk of exposure to civil damages outweighs the advantages acquired through settlement. In the current legal framework, however, companies appear to enjoy a *de facto* immunity from follow-on law suits, given that not only does the settlement procedure result in shorter and less investigated decisions, but also it provides a virtually impenetrable scope of protection of the parties’ submissions against any type of generous discovery rules.

#### PROCEDURAL ADVANTAGES

All settlement applicants (including the immunity applicants) will benefit from the greater insight they will get regarding the Commission objections. The Commission will have to disclose all available evidence before proceeding to the SO. Furthermore, parties will receive from the Commission a ‘range of possible fines’ as a result of their infringement. As aforementioned, the degree of certainty over the range of fines is still subject to debate. Yet, parties will definitely have a sounder idea of the financial sanctions that would derive from a possible infringement decision, as they would be in the position to propose a maximum range of fines. Such a solution is particularly attractive in view of the uncertainties surrounding the application of the 2006 Fining Guidelines. Finally, the parties will have an active role to play in interpreting the factual evidence, in establishing the liabilities and in

<sup>126</sup>Above note 16, Commission Notice, paragraphs 35–38.

<sup>127</sup>Above note 16, Commission Notice, paragraph 40.

<sup>128</sup>Above note 16, Commission Notice, paragraph 36.

<sup>129</sup>Above note 16, Commission Notice, paragraph 37.

<sup>130</sup>Commission 2006 Leniency Notice, paragraph 32.

<sup>131</sup>Above note 7, Van Barlingen, B. and Barennes, M., (2005), page 6–16.

setting the fines, and will also have the opportunity to influence the Commission's objections during settlement discussions.

The additional advantage of limiting 'reputational' damage could be the result of a shorter and less detailed final decision. The limited information about the particularities of cartel activity can only serve as a good purpose for companies. Besides, early acknowledgement of liability and the resulting reduced sanction can also accredit a company's mature management capacity.

Moreover, there is an additional issue of extreme importance, that of confidentiality. Given the very restrictive possibility of disclosure, confidentiality is very well protected. According to the Regulation 'information shall be confidential vis-à-vis third parties, save where the Commission has given a prior explicit authorisation for disclosure'.<sup>132</sup>

Finally, as discussed below, private enforcement is substantially affected through settlements because of the brief and not fully reasoned decisions. Companies will, nevertheless, welcome more precise rules on disclosure that would form a safe-harbour against private actions.

## II. THE DISADVANTAGES OF SETTLING

The aforementioned advantages come at a cost that, under the present proposal, goes beyond the mere waiver of defence rights.

The first issue is the lack of certainty with regard to the outcome of the procedure. The Commission has absolute and unfettered discretion on the initiation, termination and running of the procedure, and at no point of the procedure is accountable for its choices. Namely, it has the power to determine the suitability for the settlement of a case, the settlement itself or its discontinuation, the progress of discussions, the extent and timing of evidence disclosure, the adoption of an SO that departs from the WSS and finally the adoption of a final decision that departs from the position expressed in the SO. The latter case constitutes the most worrying manifestation of the Commission's discretion. Finally, the risk of favouritism or discrimination among parties is imminent given the lack of an express provision in the notice that renders equal treatment the guiding principle of the rules of the proceedings.

The second price to pay is the *de facto* giving up of the right to bring an effective appeal on the Commission decision. For the reasons explained above, there are very limited grounds for bringing such a successful appeal when companies agree to state that all their defence rights have been respected.

Finally, there is a series of issues of less critical importance that could affect the attractiveness of settlements. For instance, in cases of breach of the rules on confidentiality over the disclosed evidence, the legal impossibility of unilaterally revoking the WSS prior to the issuing of the SO and the risk of paying disproportionate fines could disincline companies from entering into settlements.

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<sup>132</sup>Article 10(2) of Regulation 622/2008.

## (C) ASSESSMENT WITH REGARD TO THE EXTERNALITIES OF THE SETTLEMENT PROCEDURE

## I. SETTLEMENTS AND THE LENIENCY PROGRAMME

While being autonomous and complementary to each other, the draft proposal contains some provisions that could affect the interaction of the leniency and the settlement procedures. Of course, as examined in *Part 2* the aim of the two procedures is different; leniency focuses on input of evidence, whereas settlements on input of procedural economies (efficiencies). Nevertheless, the interplay of the two procedures is evident. The Commission points that the incentive for companies to continue applying for leniency will be strong after the entry into force of the settlement procedure for three reasons: first, the fine reduction under the Leniency programme will be more significant than the one achieved through a settlement; second, once the settlement procedure starts, companies will no longer be able to apply for leniency; and finally, reductions of fines for leniency and for settlement will be cumulative.<sup>133</sup> Thus, there are incentives that are formed at the level of fining, and other that are of a procedural nature.

## INCENTIVES FOR LENIENCY AT THE LEVEL OF SETTLEMENT FINING

The settlement reduction is completely independent of the leniency reduction but leniency applicants that decide to settle can cumulatively benefit from both fine reductions. The effect of a cumulative application of those two proceedings is to provide a further incentive to cartel members to come forward and blow the whistle to competition authorities. However, attractiveness is not going to be the same for immunity applicants (whistle-blowers) and fine reduction applicants (second and third applicants). Whistleblowers are in the privileged position of being granted full immunity. Thus, a possible further fine reduction would not, *prima facie*, induce them to settle early. However, full immunity is never certain and on top of that, through settlements, whistle-blowers can benefit from procedural facilitations (speedier solution, reduced costs, shorter SO leading to reduced risk of subsequent private actions). On the other hand, the remaining leniency applicants could have a much greater financial incentive to cooperate, given the uncertainty over the exact level of fines that they should be expecting. When companies do not qualify for leniency or when leniency is not available, a further reduction of 10-20% can be particularly attractive, especially when companies are convinced that the Commission is in possession of ample incriminating information.

## INCENTIVES FOR LENIENCY THROUGH SETTLEMENT PROCEDURAL RULES

The first issue arises out of the provision that the Commission may disregard any leniency application that has been submitted after the expiry of the initial deadline for companies to express their interest in settling.<sup>134</sup> This provision brings about two important consequences. First, the period available to undertakings to submit leniency applications is significantly shortened compared to the provision of the Leniency Notice that grants undertakings the right to apply for immunity or fine reductions until the Commission issues

<sup>133</sup>Above note 18, Neelie Kroes Speech 07/722, page 3.

<sup>134</sup>Above note 16, Commission Notice, paragraph 13.

its SO. Secondly, once the Commission expresses its intention to engage into settlement discussions, signalling that it has already started investigations in a particular sector, it gives an incentive to all possible leniency applicants to immediately submit their application (in the absence of a second chance after the settlement deadline lapses). The aim of the provision is obviously to instigate early leniency cooperation, coupled with an early settlement, as it is unlikely that a party would initiate settlement cooperation without being willing to apply for immunity. Given that the invitation to engage in settlement discussion should, to a great extent, be perceived as an invitation also to submit a leniency application, it seems imperative to safeguard an accurately simultaneous notification of that invitation to all interested parties.<sup>135</sup>

Summing up, it seems that the settlement would promote leniency applications, especially once a Commission *ex officio* investigation on a specific sector has been concluded. However, given the limited financial incentives it gives to immunity first applicants, the settlement procedure will not greatly affect first applicants to blow the whistle when the Commission is unsuspecting with regard to a particular cartel activity. Once the whistle is blown though, both financial and procedural incentives of the new procedure will prompt parties to apply for settlements and leniency alike. So, what appears to be clear is that the Commission is not only aiming at intensifying immunity applications, but also at inducing leniency applicants to settle.

## II. SETTLEMENTS AND PRIVATE ENFORCEMENT

As discussed above with regard to follow-on actions, the Commission clearly prioritizes efficient cartel prosecution over private enforcement. It is in light of that trade-off that Commissioner Kroes has pointed out that what ‘we need to look at very carefully is the link between this kind of direct settlement and civil litigation where plaintiffs seek damages’.<sup>136</sup> So, in principle the Commission seems to favour the effectiveness of the settlement procedure over the right to get compensatory damages for the victims of anti-competitive behaviour. This is a result of the Commission’s prioritisation of public over private enforcement. While correct in principle, it is doubtful whether procedural efficiencies are to be considered as a *per se* goal of public enforcement rather than a means for its improvement. On top of that, as a matter of law, assertion of a right to compensation should in principle prevail over the goal of reaching procedural efficiency.

## III. POTENTIAL ABUSES IN THE USE OF THE SETTLEMENT PROCEDURE

As indicated above, both the undertakings and the Commission might use the procedure to achieve goals other than procedural efficiency. Companies might be willing to enter into settlement discussions in order to get a comparative advantage against other cartel participants by having early access to evidence. On the other hand, the Commission might use the procedure to force parties to settle, to indirectly use the party submissions at a latter stage and to avoid a thorough investigation.

<sup>135</sup>Commission 2006 Leniency Notice, paragraph 14.

<sup>136</sup>Neelie Kroes Speech/07/128, ‘Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe’, Commission/IBA Joint Conference on EC Competition Policy Brussels, 8th March 2007.

## COMPANY POTENTIAL ABUSES

It seems that, in its current state, companies will find it hard to abuse of the procedure by getting an early access to the Commission in order to mount, at an early stage, a full defence. This limited risk derives from the capacity of the Commission to progressively reveal the incriminating evidence and from the prohibition of revocation of a WSS once submitted. Parties could still, theoretically, pull out of the procedure just before presenting their WSS and after having been given full access to evidence. The time advantage gained from withdrawing is, nevertheless, minimal given that the Commission might either draft the SO anyway formally based on the submissions of the other parties, or informally benefit from the evidence already provided throughout the settlement discussions to quickly re-start targeted investigations and draft a new SO. Once the SO is drafted, all parties will be able to have full access to the Commission evidence and the time advantage given to the party is devoid of any practical value.

## COMMISSION POTENTIAL ABUSES

Concerning the use of acknowledgements and information provided by the parties throughout the procedure, the current proposal clearly states that a potential failure in the settlement procedure would automatically void the submissions of any evidential value. As explained, in practice, it is hard to believe that the Commission will completely abandon the progress made and start from scratch its investigation. Moreover, the Commission retains legal capacity to use the procedure to fully prosecute a cartel member without granting him the advantage of a fine reduction, by abandoning or refusing to endorse a WSS.

## 5. GENERAL CONCLUSION

An ideal system should be drafted in such a manner that guarantees that the advantages deriving from an increased and accelerated rate of enforcement through the freeing of resources outbalance the costs that such a procedure might entail. Under the current state of affairs it is hard to express a clear judgement on whether, in aggregate, the proposal is beneficial for cartel enforcement. While the procedural efficiencies gained in terms of time and cost are clearly present through rules that are tailored to meet the needs of the Commission, uncertainties persist for companies in being positively predisposed to enter into settlement discussions. The Commission possesses the right to initiate, to abandon and even to neglect the settlement discussion throughout the whole procedure. Companies, on the other hand, benefit from a fine reduction, from reduced risks of follow-on actions for damages and from a variety of procedural advantages that yield cost savings and greater insight of the Commission's objections.

Settlements, by nature, involve serious trade-offs whose prioritisation falls in the sphere of competition policy with regard to both the negative impact settlements can bring about in deterrence and the unjust results that derive from institutional and bargaining imbalances

of the procedure. It is clear, that the existing settlement procedure was to a great extent intended to complement the leniency programme. It gives strong incentives to parties, through various advantages but also through well-thought rules of procedure, to cooperate with the Commission from the very beginning of the cartel investigation. The initial invitation to settle launched by the Commission will probably be perceived as an attempt to make publicly known a particular area of cartel investigation, giving cartel members a last chance to come forward and 'blow the whistle' before it's too late. Besides, in light of the high success rate of Leniency, the new Settlement procedure is likely to gradually replace the existing lengthier procedure of cartel cases.

While the coexistence with leniency seems cooperative (effective), the same is not certain with regard to reaching overall deterrence by means of private enforcement. The stringent rules of disclosure show that the Commission, while formally appearing to pursue two complementary objectives, i.e. those of streamlining the procedure and of enhancing private enforcement, in reality, is much more concerned with the former. If the settlement procedure becomes the usual procedure, one can hardly imagine how under the current regime cartel decisions would be followed-on by private damages actions, let alone by stand-alone ones. Thus, the current landscape illustrates the annihilation of the effectiveness of the initiatives proposed in the recent White Paper on damage actions and confirms the clear pro-public enforcement competition policy choice of the Commission.

Finally, only future practice can show whether the 10% reduction is to be regarded sufficient to give undertakings a strong incentive to join the new procedure. Undertakings will, in any case, have to carefully ponder on their strategic options in order not to jeopardise the procedural guarantees they enjoy under a full SO. Along the same lines, it remains to be seen whether the Commission will demonstrate the necessary flexibility and good faith in conducting the proceedings in a manner that safeguards legal certainty and aspires confidence to all parties involved.