# The European Commission's Settlement Procedure for Cartel Cases Costs and Benefits

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## A. Introduction

With the aim to be able to handle certain cartel cases faster and more efficiently, the European Commission adopted on 30 June 2008 a legislative package introducing the settlement procedure for cartel cases.[1] The legislative package consists of a regulation amending Regulation 773/2004 (the "Implementing Regulation")[2] and a Notice on the conduct of settlement procedures (the "Settlement Notice").[3] Regulation 1/2003 was left intact, although its general review is currently in progress.[4] The settlement procedure has been introduced after long internal discussions within the Commission and a public consultation on the initial drafts of the legislative package.[5]

In essence, the settlement procedure is an alternative framework for sanctioning violations of EC competition law. Settlements allow for the simplified disposal of cartel cases by rewarding the procedural cooperation of the parties. The procedure builds on the experience that in certain cartel cases parties can already anticipate at an early stage of the procedure the Commission's envisaged findings concerning the infringement. If the case does not involve novel questions of law and if it is clear from the outset of the investigation that the Commission is in the possession of solid evidence proving the infringement, companies concerned may have an interest to get the infringement behind as swiftly as possible without seriously contesting the Commission's objections.

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1 On the settlement procedure see *Wils*, The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles, World Competition 31 (2008), p. 335; *Mehta/Tierno Centella*, Settlement procedure in EU cartel cases, Competition Law International, 2008, p. 11; Cartel Settlements, Report to the International Competition Network (ICN) Annual Conference, Kyoto, 2008, http://www.internationalcompetitionnetwork.org/index.php/en/library/conference/8 (26/11/2008); at the time of writing the Commission is considering to initiate the first settlement procedure with Siemens, Toshiba, ABB and several other companies involved in the power transformer cartel.

2 Regulation (EC) No 622/2008 of 30/6/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 1/7/2008, p. 3.

3 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, OJ C 167, 2/7/2008, p. 1.

4 Regulation (EC) No 1/2003 of 16/12/2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4/1/2003, p. 1. For up-to-date information concerning the review, see the website of the Commission at http://ec.europa.eu/comm/competition/index_en.html (26/11/2008).

5 See *Kroes*, 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, 8/3/2007. The procedure was originally referred to as "direct" settlements, although it is unclear to what the term "direct" referred to and why it has been abandoned.

The settlement procedure creates a shortcut to reach the same result as under the standard procedure, namely the adoption of an infringement decision and the imposition of a fine under Art. 7 and 23 of Regulation 1/2003. It allows parties to settle the case by paying a reduced fine if they acknowledge their involvement in the cartel together with their liability for it and renounce of exercising certain procedural rights.

The settlement procedure aims at accelerating the administrative procedure of the Commission and it will most likely reduce the number of appeals against the Commission's decisions, too. If it becomes a success, the new procedure will significantly reduce the resources the Commission needs to bring cartel investigations to an end. This would allow the Commission to handle more cases with the same resources, what would lead to an increased efficiency and a higher level of overall deterrence.[6]

If settlements become widespread, they may fundamentally change the landscape of European antitrust enforcement. This results not simply from a streamlined administrative procedure but more importantly from a dramatic fall in the number of appeals against the Commission's cartel decisions. Such a decline in litigation would redraw the current system of checks and balances as it would practically eliminate judicial control over the Commission's cartel enforcement activity.

This paper elaborates on the new procedure giving a brief overview of the general features and the structure of the procedure in Chapter B, and drawing up the costs and benefits that may result from settlements in Chapter C.

## B. Overview of the settlement procedure

### I. General features

#### 1. Available only in cartel cases

The settlement procedure is a variant of the standard procedure which is only available in investigations relating to cartel cases. Cartels are defined by the Settlement Notice as "agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors".[7] In the light of this definition, the possibility to settle is limited to

6 Settlement Notice, (fn. 3), pt. 1.

the most serious violations of Art. 81 ECT, which are often referred to as "hard-core cartels".[8] This limitation is understandable for a number of reasons.

First, hard-core cartel cases relate to well-established principles of EC competition law, where it is unlikely that parties would dispute the illegality (or the legal qualification) of the conduct in question. Companies know that EC competition law prohibits any agreement or concerted practice with their competitors by which they fix selling or purchase prices, limit output, share markets, rig bids or enter into a collective boycott. Such behaviour has been considered by the Community Courts to be manifestly anti-competitive and to restrict competition by its very nature ("object type" restrictions).[9] Moreover, concealed hard-core cartels do not merit an exemption under Art. 81(3) ECT either. This avoids the need to assess complex economic evidence and simplifies to a large extent the legal assessment of the conduct in question. Additionally, the above infringements are condemned morally by the general public and constitute a criminal offence in an increasing number of Member States.[10] Taking this into account, if the Commission holds convincing evidence, any legal dispute is normally limited to some narrow elements of such cases, which may, however, influence the amount of the fine.[11] Most of the arguments raised in the course of the Commission's administrative procedure (and before the Community Courts in subsequent litigation) relate to the duration of the infringement, to the existence of aggravating or mitigating circumstances, to the attribution of liability, to an alleged unequal treatment of the parties, or to some other procedural irregularity of the Commission's investigation. Insofar such arguments are pursued merely to achieve a reduction of the fine, parties may as well abandon them to sign up for a settlement reward instead.

Second, cartel procedures are cumbersome and costly both for the Commission and the undertakings concerned. The Commission must conduct its procedure against several companies in different languages, and it also has to handle an administrative file which can easily reach hundred thousands of pages. The management of the file (preparing non-confidential versions, organizing proper access to the file) and the case itself (translation of the statement of objections and other

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7 Ibid., fn. 2; see also Commission Notice on Immunity from fines and reduction of fines in cartel cases, recital 1, OJ C 298, 8/12/2006, p. 17.

8 See *Bellamy/Child*, European Community Law of Competition, 6th ed. 2008, para. 2.069.

9 See in general ibid., para. 2.075 et seq.

10 See e.g. the United Kingdom, which may become a driving force in prosecuting individuals with criminal charges for antitrust infringements.

11 There are, however, also a number of unclear points of law even concerning hard-core horizontal cartels. See e.g. the concept of single continuous infringement CFI, joint cases T-101/05 and 111/05, *BASF/Commission*, Rec. 2007, II-4949, or the uncertainty relating to the attribution of liability (see under fn. 102, below).

procedural documents, organizing hearings, processing replies to the statement of objections) imposes an enormous burden on the case-team and the different services of the Commission. The procedure is, however, also costly for the parties as it consumes substantial management time and incurs immense legal costs. Both sides may have, therefore, common incentives to simplify the procedure and to proceed straight to the result which is likely to be achieved anyhow.

Third, cartel cases automatically generate a large number of appeals to the Community Courts. Even many successful leniency applicants appeal in the hope to obtain an additional reduction of the fine or to delay the full effectiveness of the Commission's decision.[12] Defending decisions before the Community Courts requires substantial resources and as cartel cases normally do not involve important points of law but rather center on the facts or some minor legal issues, the Commission does not actually benefit from obtaining a clarification of the law.[13] The Commission would find, therefore, any instrument particularly valuable that could reduce the number of unwanted appeals.

### 2. Optional for the parties but dependent on the discretion of the Commission

The settlement procedure is an alternative to the standard procedure for adopting infringement decisions: it is optional both for the parties and the Commission. The Commission reserved a particularly broad margin of discretion to determine which (cartel) cases may be suitable to settle, and it also retained the possibility to abandon the settlement procedure and to revert to the standard procedure at any time.[14] Thus, unlike under the Leniency Notice, parties do not have a right to settle, not even once they committed themselves to do so.[15]

In view of the broad margin of discretion reserved by the Commission and the lack of case-law, it is yet uncertain on the basis of what criteria the Commission will select cases for settlement and what circumstances would result in abandon-

12 Leniency applicants are indeed sometimes successful in gaining a further reduction, see e.g. CFI, case T-109/02, *Bolloré/Commission*, Rec. 2007, II-947: AWA granted a 50% reduction instead of the original 30% reduction, fine reduced accordingly. Note, however, that pursuant to Art. 242 ECT, an appeal does not automatically suspend the contested decision.

13 In certain cases, the Commission may have an interest to bring the case before the Community Courts to clarify novel questions of law.

14 Implementing Regulation, (fn. 2), recital 4; see also Settlement Notice, (fn. 3), pt. 5.

15 Ibid., pt. 6. A right to settle is unlikely to emerge even if the settlement route became standard practice. Even in the US, where 90% of the criminal antitrust cases are settled, the Department of Justice maintained its discretion to decide whether it enters a plea agreement or goes to trial. See *Hammond*, The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All, conference: EU Cartel Law Enforcement: Practice and Policy, Brussels, 2006, p. 5.

ing the settlement procedure. The Settlement Notice provides some guidance by stating that the Commission may take into account the probability of reaching a common understanding with the parties regarding the scope of the potential objections within a reasonable timeframe. For this assessment, factors such as the number of parties involved, the foreseeable conflicting positions on the attribution of liability and the extent of contestation of the facts could become relevant.[16] The Notice also refers to the possibility of setting a precedent as a consideration, which might move the Commission to opt for the standard procedure. When deciding on whether or not to continue with a settlement, the Commission will consider the prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including the scale of burden involved in providing access to non-confidential versions of documents from the file. Moreover, the Commission may decide to discontinue settlement discussions if the parties to the proceedings coordinate to distort or destroy any evidence.[17] Although the above considerations may give some guidance on what to expect from the Commission, in light of its broad margin of discretion other factors may become relevant too, and in fact, the Commission is not even obliged to motivate its refusal to settle.[18]

### 3. Distinct from and cumulative with leniency

The Commission's enforcement procedure in antitrust cases is divided into two phases, the investigative and the administrative phase. The investigative phase centres around fact-finding which is especially important in cartel investigations as these are particularly fact-intensive. In this first phase of the procedure, the Commission uses its investigative powers such as on-site inspections and requests for information to collect all relevant pieces of information and evidence necessary to build a case. However, the Commission uses not only a stick, but also a

16 Settlement Notice, (fn. 3), pt. 5.

17 Distortion or destruction of evidence relevant to the establishment of the infringement or any part thereof may also constitute an aggravating circumstance within the meaning of pt. 28 of the Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003, OJ C 210, 1/9/2006, p. 2 ("Fining Guidelines"), and may be regarded as lack of cooperation within the meaning of pts. 12 and 27 of the Notice on immunity from fines and reduction of fines in cartel cases, OJ C 45 of 19/2/2002, p. 3 ("Leniency Notice").

18 Such a decision is not a 'reviewable act' under Art. 230 ECT. See more generally *Bellamy/Child*, (fn. 8), para. 13.220. The legal qualification of a refusal to settle is similar to that of a refusal to accept commitments under Art. 9 of Regulation 1/2003. See *Schweitzer*, Commitment Decisions under Art. 9 of Regulation 1/2003: The Developing EC Practice and Case Law, EUI Law Working Papers, LAW 2008/22, p. 1, fn. 2; see also CFI, case T-170/06, *Alrosa/Commission*, Rec. 2007, II-2601, paras. 96 and 130.

carrot for this purpose: it offers immunity from or a reduction of the fine for undertakings which decide to cooperate with it under the Leniency Notice.

Once the Commission collected and assessed all evidence necessary to clarify every aspect of the case, the second phase of the Commission's procedure commences. This phase normally starts with the adoption of the statement of objections ("SO"), which is followed by an adversarial administrative procedure that allows the undertakings concerned to exercise their rights of defence, in particular their right to be heard, before the Commission adopts a final decision.[19] In order to ensure that the rights of defence are observed, the Commission is obliged to grant the undertakings concerned access to the file, parties may submit written observations on the objections of the Commission and they may also request a hearing to advance their arguments orally. These procedural safeguards are indispensable as the Commission as a single entity embodies the prosecutor, the judge and the jury: it is empowered to investigate, to adjudicate and to sanction infringements.[20]

The settlement procedure is distinct from leniency as it does not reward the voluntary submission of evidence, but rather a contribution by the participating undertakings to procedural efficiency.[21] The two different forms of cooperation take place in two different phases of the Commission's procedure. Leniency is intended to enhance the efficiency of the investigative phase by motivating undertakings to provide the Commission with intelligence and evidence. The settlement procedure aims rather at simplifying and expediting the adversarial administrative procedure by creating incentives for parties to waive certain procedural rights and to accept their liability and the payment of a reduced fine. It follows that the settlement procedure leaves the investigative phase intact and the settlement route departs from the standard procedure only during the administrative phase – i.e. only once the Commission has made up its mind on the case. Therefore, although parties may express their interest in a hypothetical settlement any time already during the investigative phase, for example when submitting a leniency application, the investigation is concluded as usually even if the Commission considers the case potentially suitable for a settlement.[22]

In light of the above, cooperation under the leniency notice and the settlement procedure is kept strictly separate. Cooperation under leniency does not prejudge

19 See Art. 27(1) and (2) of Regulation 1/2003.

20 See *Wils* , The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis, World Competition 27 (2004), p. 201.

21 See Commission introduces settlement procedure for cartels – frequently asked questions, MEMO/08/458, p. 2.

22 See the overview of the procedure leading to the adoption of a (settlement) decision pursuant to Art. 7 and 23 of Regulation 1/2003 attached to the Settlement Notice, (fn. 3).

either a leniency applicant's or the Commission's decision whether or not to settle. In particular, a party may opt for the standard procedure without loosing conditional immunity (or a reduction of the fine) as a refusal to settle will not qualify as a lack of cooperation within the meaning of points 12 and 27 of the Leniency Notice. The same is also true *vice-versa* as a settlement does not require cooperation under leniency. Nevertheless, in practice, leniency applicants may well consider to opt for a settlement as the reduction of the fine under leniency and under the settlement procedure are cumulative.[23] Moreover, in light of their cooperation under the Leniency Notice, the Commission is less likely to have any objection against settling.

## II. The outline of the settlement procedure

### 1. Initiation of the settlement procedure

Although parties may approach the Commission with their interest in a hypothetical settlement anytime during the investigation, the first formal step towards settling is to be made by the Commission. If it considers a case suitable for settlement, it will officially explore the parties' interest to engage in settlement discussions.[24] The Commission is likely to make such a call only once it has concluded its investigation and when it is already in the position to draft a SO or when a draft SO has already been produced internally. If the Commission considers a case suitable for settlement and decides to explore the parties' interest to settle, it must do so with regard to all parties to the same proceedings.[25] Parties are then granted a time-limit of at least two weeks within which they can declare in writing whether or not they wish to opt for the settlement procedure.[26] A written reply is indispensable as the Commission may only engage in settlement discussions upon the written request of the parties concerned.[27] To avoid concerns

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23 Ibid., (fn. 3), pt. 33. Insofar as immunity applicants are concerned, a reduction of the fine is obviously not applicable to them. Nevertheless, they may still be interested in settling in order to get the infringement behind as soon as possible. There are, however, also some disincentives to settle, resulting in particular from an increased exposure to private enforcement, see p. 697, below.

24 Ibid., pt. 11. This act qualifies as initiation of proceedings which grants the Commission sole jurisdiction to deal with the case, see Settlement Notice, pt. 9. The settlement procedure differs, therefore, from an Art. 9 commitment procedure which does not preclude national competition authorities to proceed against the undertakings concerned even after the adoption of the commitment decision (although Member States must observe their obligations under Art. 10 ECT).

25 Ibid., pt. 6. This is not necessarily the case under all settlement regimes.

26 See ibid., pts. 11, 13 and Art. 10(a) of the Implementing Regulation, (fn. 2).

27 Settlement Notice, (fn. 3), pt. 5.

that this document could be used as evidence later in the procedure, and also to avoid an increased exposure to damages claims because of the discoverability of such a written request, the Notice stipulates that a positive response by the parties does not imply an admission of participation in the infringement, but merely expresses their willingness to opt for the settlement procedure.[28]

Each undertaking concerned must submit its reply to the Commission separately. Nevertheless, if the investigation involved more than one party belonging to the same group of undertakings, they are required to appoint a joint representative if they wish to engage in settlement discussions. The Notice explicitly provides, however, that the appointment of joint representatives aims solely to facilitate the settlement discussions and does not prejudge in any way the attribution of liability for the infringement among the different legal entities within the group.[29]

The time-limit set for requesting settlement discussions also marks the last opportunity for the parties to file a leniency application. Once the window for requesting settlement discussions expires, the Commission may disregard any application for immunity or reduction of fines.[30]

## 2. Bilateral settlement discussions

### a) The initiation of settlement discussions

If the parties opt for the settlement procedure by submitting a positive reply to the Commission's inquiry, the Commission may decide to pursue the settlement procedure by engaging into bilateral settlement discussions. The Commission retains, however, complete discretion to determine whether it is appropriate to do so. In fact, the Commission is not obliged to proceed to bilateral settlement discussions with all undertakings requesting this, but seems to have retained discretion to decide on the appropriateness of a settlement with each undertaking separately.[31] Although it is understandable that the Commission reserved the right to refuse settling a case as a whole, it may raise concerns if it refused entering into settlement discussions with some of the parties which requested this. As the settlement procedure rewards exclusively a contribution to procedural efficiency, a refusal to engage in settlement discussions with some of the parties requesting this requires justification that relates to circumstances impeding the efficiencies a settlement would normally generate. The Settlement Notice provides a rather obvi-

28 Ibid., pt. 11. The draft Notice did not contain such a limitation.

29 Ibid., pt. 12. In the absence of such a provision, active participation in the proceedings may establish liability.

30 Ibid., pt. 13. The Commission does not seem, however, to be obliged to do so.

31 Ibid., pt. 15.

ous example, namely if parties distort or destruct evidence relevant to the establishment of the infringement.[32] It seems, however, that the Commission could not refuse a settlement with reference to circumstances relating to the substantive assessment of the case, e.g. with regard to a party's role as a ringleader or the instigator of the cartel or because of coercing others to participate in the infringement.

It follows from the above that the Commission is not prevented from pursuing hybrid cases,[33] i.e. cases where some parties follow the settlement procedure and others proceed along the standard procedural rules. Such hybrid cases may occur either if some parties refuse to opt for the settlement route and yet the Commission decides to initiate settlement discussions with the rest, or if the Commission refuses to settle with some of the parties requesting this but proceeds to settlement discussions with others.

A settlement which did not involve all parties to the case is, however, inherently of less value to the Commission as it involves a duplication of the administrative procedure under two different sets of procedural rules. Moreover, in hybrid cases the Commission cannot avoid that non-settling parties appeal the decision. Additionally, a hybrid procedure also creates a number of delicate problems. On what schedule should the Commission proceed with the two parallel procedures? Can the Commission adopt a settlement decision before arriving to the final decision under the normal procedure? What happens if a non-settling party prevails before the Courts and if the decision is annulled? In light of such legal uncertainties and with regard to the increased administrative burden resulting from conducting parallel procedures, the Commission is likely to prefer settlements where all parties to the investigation decide to cooperate under the Settlement Notice.[34]

### b) The conduct and the content of settlement discussions

Settlement discussions take place between DG Competition and the settlement candidates, though it is not yet known whether the discussions will be conducted by a team of specially trained officials or by the case-team itself.[35] The form and sequence of settlement discussions is uncertain as well, as the Commission

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32 Ibid., pt. 5.

33 See *Carlin/Alegi/Murray*, Cartels and Settlements: Cutting a Deal With the European Commission, IBA cartel enforcement conference, Brussels, 7-9/3/2007, p. 7.

34 Although, it cannot be excluded that the Commission would feel inclined to settle the case with as many parties as possible. See e.g. Office of Fair Trading (OFT), Press Release 170/07, 7/12/2007, http://www.oft.gov.uk/news/press/2007/170-07 (26/11/2008), concerning an early resolution agreement with some of the parties in the dairy and supermarket sector. The Commission may also be tempted to show that a party refusing to settle simply looses a 10% reduction of the fine without achieving any benefit, as it can defend its decisions before the Courts.

35 Settlement Notice, (fn. 3), pt. 14.

retained a broad discretion in this regard, too. According to the Settlement Notice, the Commission may determine the pace of bilateral settlement discussions with each undertaking which includes determining the order and sequence of bilateral settlement discussions as well as the timing of the disclosure of information, including the evidence in the Commission's file used to establish the envisaged objections and the potential fine. When making such decisions, the Commission takes into account the progress made overall in the settlement procedure.[36]

Settlement discussions could either be organized similarly to a hearing, with all parties admitted to the settlement procedure being present, but it is also possible for the Commission to proceed separately with each party, even on a delayed schedule. The Commission is not prevented from drip-feeding information and evidence either: the Notice stipulates rather vaguely merely that "information will be disclosed in a timely manner as settlement discussions progress".[37] Although the Commission may attempt to take advantage of information asymmetries by proceeding separately with each party, this may not be very effective as parties to the same procedure are allowed to discuss among each other the contents of settlement discussions.[38]

However, no matter how settlement discussions are organized, the disclosure of information in the course of these discussions will have to allow the parties to be informed of the essential elements of the case, such as the facts alleged, the classification of the facts, the gravity and duration of the alleged infringement, the attribution of liability and an estimation of the range of likely fines.[39] In addition to the above elements, the Commission must also disclose the evidence used to establish its potential objections.[40]

The legal standard for disclosing information and evidence during settlement discussions is to enable parties to assert their views effectively on the potential objections raised against them and to allow them to make an informed decision on whether or not to settle.[41] If the Commission failed to meet this standard, parties could most certainly find good arguments for a successful appeal against the settlement decision.

36 Ibid., pt. 15.

37 Ibid.

38 Ibid., pt. 7. The draft Notice referred to "any other undertaking or third party" and prohibited parties to the same procedure to discuss the contents of their discussions with the Commission.

39 Ibid., pt. 16. As regard to the estimation of the fines, the Notice provides that the Commission will inform the parties concerned of an estimate of their potential fine in view of the guidance contained in the Fining Guidelines, (fn. 17), the provisions of the Settlement Notice and the Leniency Notice, (fn. 17), where applicable. The new Fining Guidelines may prove as an important tool to increase transparency in the calculation of the fine.

40 Settlement Notice, (fn. 3), pt. 16; Art. 10(a)(2) of the Implementing Regulation, (fn. 2).

41 Settlement Notice, (fn. 3), pt. 16.

The objective of settlement discussions is to inform parties about the essential elements of the case, and to allow them to exercise their rights of defence effectively. This implies that in the course of the settlement discussions parties must be granted the opportunity to express their views on the evidence and the charges brought against them. Although the Commission has been keen to emphasize that it will not allow any bargaining during settlement discussions,[42] compliance with the rights of defence requires the Commission to hear the parties' views. In fact, the Commission is also obliged to take the parties' views into account by amending its preliminary analysis where appropriate.[43] It is namely settled case-law that the Commission is required to hear parties against whom it raises objections and, where necessary, it must take account of any observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence.[44]

### 3. The settlement submission

If the progress made during the settlement discussions leads to a common understanding regarding the scope of the potential objections and the estimation of the range of the likely fines, and if the Commission takes the preliminary view that procedural efficiencies are likely to be achieved in view of the progress made overall, the Commission may grant a final time-limit of at least 15 working days to submit a final settlement submission pursuant to Art. 10a(2) and 17(3) of Regulation (EC) No 773/2004.[45]

The settlement submission is a formal request to settle which contains a number of acknowledgements and confirmations, all being conditional on the Commission meeting the settlement request, including the anticipated maximum amount of the fine.[46] The settlement submission must contain:[47]

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42 Ibid., pt. 2; it seems that the Commission will not allow any bargaining either on the charges or on the fine. Theoretically the question could arise whether parties would have the possibility to settle only for a part of the infringement or for only some of the infringements if more than one are dealt with in the same procedure. Nonetheless, the Commission is unlikely to accept such a partial settlement as this would not result in significant efficiency gains, thus making the settlement reward void of its purpose.

43 Ibid., pt. 24.

44 Ibid.; CFI, case T-44/00, *Mannesmannröhren-Werke/Commission*, Rec. 2004, II-2223, para. 100.

45 Settlement Notice, (fn. 3), pt. 17.

46 Ibid., pts. 20-21. It is uncertain whether the list provided by the Notice is a minimum checklist which can be expanded by the Commission with additional elements. Such additional elements could relate e.g. to voluntary compensation to third parties who suffered damages, but could prescribe a behavioural or structural remedy, too. Concerning compensation see e.g. the Independent Schools settlement of the OFT, OFT Press Release 88/06, 19/5/2006, http://www.oft.gov.uk/news/press/2006/88-06 (26/11/2008).

(a) an acknowledgement in clear and unequivocal terms of the parties' liability[48] for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the duration of their participation in the infringement in accordance with the results of the settlement discussions;[49]

(b) an indication of the maximum amount of the fine the parties foresee to be imposed by the Commission and which they would accept in the framework of a settlement procedure;[50]

(c) the parties' confirmation that they have been sufficiently informed of the objections the Commission envisages to raising against them and that they have been given sufficient opportunity to make their views known to the Commission;

(d) the parties' confirmation that, in view of the above, they do not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does not reflect their settlement submissions in the statement of objections and the decision;

(e) the parties' agreement to receive the statement of objections and the final decision pursuant to Art. 7 and 23 of Regulation (EC) No 1/2003 in an agreed official language of the European Community.

The settlement submission is to be filed within the given deadline either in writing or orally.[51] If parties fail to submit a settlement request, the procedure falls back to the standard procedure automatically. However, if a party submits a formal settlement submission, it is bound by this request, which cannot be revoked unilaterally. The acknowledgements only become void if the Commission does not meet the settlement request in the statement of objections or subsequently in the final decision.[52]

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47 Settlement Notice, (fn. 3), pt. 20.

48 See *Montesa/Givaja*, When Parents Pay for their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios, World Competition 29 (2006), p. 555.

49 The Commission does not accept no contest pleas but requires an explicit acknowledgement of the infringement and liability. *Ratliff*, Plea Bargaining in EC Anti-Cartel Enforcement – A System Change?, 2006, p. 8. It is not possible to make an acknowledgement 'for the purpose of the given procedure' either. See *Carlin/Alegi/Murray*, (fn. 33), p. 6.

50 This acknowledgement relates, however, merely to the maximum amount. It does not require parties to accept the calculation of the fine. If the Commission commits an error in the calculation of the fine, parties may therefore appeal the settlement decision.

51 Settlement Notice, (fn. 3), pt. 38. The draft version of the Notice did not provide for the possibility to file an oral settlement submission.

52 Ibid., pt. 22.

## 4. The statement of objections and the reply

As the law currently stands, it is mandatory for the Commission to notify a written statement of objections to each of the parties against whom it intends to adopt an infringement decision.[53] Once the time-limit for submitting settlement requests has expired, the Commission will therefore proceed to issuing a statement of objections also under the settlement procedure.

The Commission retains, however, even at this very late point in the procedure the right to fall back to the standard procedure by adopting an SO which does not reflect the settlement submission, e.g. if it describes a broader and/or longer infringement, or merely contains a higher fine. In this case the acknowledgements provided by the parties in the settlement submission are deemed to be withdrawn and cannot be used in evidence against any of the parties to the proceedings.[54] If the settlement procedure is abandoned, the parties concerned are granted full access to the file, they may request an oral hearing and may file a reply to the SO under the rules of the standard procedure.

If, however, the Commission wishes to proceed towards a settlement, it will adopt a SO which corresponds to the settlement request of the parties. This SO is likely to be briefer than the one issued in a regular procedure, although it must contain the information necessary to enable the parties to ascertain whether it reflects the contents of their settlement submissions. Pursuant to point 22 of the Notice, the SO is deemed to have endorsed the settlement submission if it reflects its contents on the issues mentioned in lit. a) of point 20 of the Notice (see above) and if the fine does not exceed the maximum amount indicated in the request.[55]

If the SO reflects the settlement submission, parties are required to confirm this in unequivocal terms within a time-limit of at least two weeks set by the Commission. This can occur by way of a simple reply in which the parties also state that they remain committed to follow the settlement procedure.[56] In the absence of such a reply, the Commission will take note of the party's breach of its commitment and may disregard the party's request to follow the settlement procedure although it does not seem to be obliged to do so.[57]

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53 See ibid., pt. 23. Pursuant to Art. 27(1) of Regulation 1/2003: "The Commission shall base its decisions only on objections on which the parties concerned have been able to comment". See also CFI, case T-15/02, *BASF/Commission*, Rec. 2006, II-497, para 58.

54 Settlement Notice, (fn. 3), pt. 27.

55 Ibid., pt. 22.

56 Ibid., pt. 26.

57 Ibid.

## 5. The last procedural steps and the final decision

If parties confirm that the SO corresponds to their settlement submissions and that they remain committed to pursuing the settlement procedure, the Commission may proceed straight to adopting a final decision pursuant to Art. 7 and/or 23 of Regulation 1/2003 without granting any further access to the file or organizing an oral hearing.[58]

But again, even at this very last stage of the procedure the Commission may depart from the SO which endorsed the parties' settlement submissions, and it may abandon the proposed settlement on the basis of the opinion provided by the Advisory Committee or with regard to the ultimate decisional autonomy of the College of Commissioners.[59] Nevertheless, if the Commission withdraws from the settlement, it is obliged to revert to the rules governing the standard procedure, and it will have to notify a new statement of objections setting out the Commission's new position, grant access to the file and hold an oral hearing if requested by the parties. The Commission will also have to process the replies of the parties to the new SO, taking into account all major arguments raised therein. Moreover, the acknowledgements provided by the parties in the settlement submissions are deemed to have been withdrawn and cannot be used in evidence against any of the parties to the proceedings.[60]

If, however, the Commission decides to settle and adopts a decision which endorses the settlement submission and the SO, undertakings cooperating under the settlement procedure are granted a 10% settlement reward. The reward is net of any reductions pursuant to the Fining Guidelines and the Leniency Notice and it is after the application of the 10% cap. In addition to the 10% reduction, parties who settled are granted a further and perhaps an even more valuable concession: any specific increase for deterrence will not exceed a multiplication by two.[61]

The final settlement decision is likely to be very similar in its content to the statement of objections which, in turn, reflects the contents of the parties' settlement submissions. Otherwise, if the decision was more detailed than the SO or departed from it even merely in its wording, the Commission may face disputes over its

58 Ibid., pt. 28.

59 Ibid., pt. 29.

60 Ibid.

61 Ibid., pts. 32 and 33; see also Fining Guidelines, (fn. 17), pt. 30, according to which the Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect and to that end it may increase the fine for undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates. Pursuant to Fining Guidelines, pt. 31, the Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.

validity. Although the settlement decision may in theory be briefer than the SO, it will contain at least a short description of the infringement and its legal characterisation, together with some paragraphs on the attribution of liability.[62] Moreover, the decision will also indicate the fact that the party cooperated with the Commission under the settlement procedure in order to explain the reason for the level of the fine.[63]

## 6. Appeal to the Court of First Instance?

Final decisions taken by the Commission under Regulation 1/2003 are subject to judicial review in accordance with Art. 230 ECT. Moreover, Art. 230 ECT and Art. 31 of Regulation 1/2003 provide that the Court of Justice has unlimited jurisdiction to review decisions on fines adopted pursuant to Art. 23 of Regulation 1/2003.[64] By submitting a settlement request, companies do not waive their right to appeal the final decision. In fact, it is questionable whether such a waiver could be valid at all.

Notwithstanding the above, in view of the acknowledgements and confirmations contained in the settlement submission, it is unlikely that an application would succeed against a Commission decision which reflects its contents. This seems to follow also from the case-law of the Courts as "where [an undertaking] explicitly admits during the administrative procedure the substantive truth of the facts which the Commission alleges against it in the statement of objections, those facts must thereafter be regarded as established and the undertaking estopped in principle from disputing them during the procedure before the Court".[65] A successful appeal is conceivable, however, if the decision departed from the settlement submissions, or if the Commission committed a manifest procedural error, discriminated among the parties, or eventually coerced a party to file a settlement submission.

It will be interesting to see whether the parties will be able to appeal successfully the amount or the calculation of the fine. This will most likely depend on the wording of the acknowledgements prescribed by the Commission, but accepting a maximum amount does not seem to prevent undertakings from successfully arguing against the exact amount of the fine if the Commission committed any manifest error in its calculation. Such errors may relate to a series of legal issues which are nowadays commonly litigated before the Community Courts, e.g. unjustified

62 These are mandatory elements under Art. 253 ECT.

63 Settlement Notice, (fn. 3), pt. 31.

64 Ibid., pt. 41.

65 CFI, case T-236/01, *Tokai Carbon/Commission*, Rec. 2006, II-1181, para 108; see also *Kerse/Khan*, EC Antitrust Procedure, 5th ed. 2005, para. 4-054.

discrimination among the parties, in particular in connection with reductions under leniency.[66]

## C. The costs and benefits of the settlement procedure

From an efficiency point of view, a new instrument for the enforcement of the antitrust rules is desirable if its benefits outweigh its costs. This chapter provides an overview of the benefits and the potential costs of the settlement procedure - both from the Commission's and from the parties' perspective. The aim of this exercise is to assess whether settlements could result in a positive sum game, and whether they seem beneficial for both sides by creating a win-win situation.

### I. The Commission

Clearly the main incentive for the Commission to introduce the settlement procedure is an efficiency gain it could expect from the reduction of the overall resources needed to bring a case to an end. However, despite the obvious benefits resulting from a less burdensome and swifter enforcement, the settlement procedure could also incur certain costs which have to be offset against its benefits.

#### 1. The Commission's incentives to settle: a swifter enforcement with less resources

##### a) The investigative phase

The law imposes a heavy burden on the Commission to prove infringements to a high standard of proof.[67] As Commissioner *Kroes* put it "in each and every case we are obliged to investigate every last substantive detail", "our final decisions have to be fully reasoned on the basis of our own analysis of the facts." In the same speech, she said that if the Commission were not able to deliver swift enforcement with timely punishment, it could become necessary to look into "how some form

66 See e.g. CFI, joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré/Commission*, Rec. 2007, II-947.

67 The Courts require the Commission to meet a high standard of proof, by producing "sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place", *Faull/Nikpay*, The EC Law of Competition, 2nd ed. 2007, para. 8.508; see also CFI, joined cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering/Commission*, Rec. 2004, II-2501, para. 179. See Art. 2, 7 and 23 of Regulation 1/2003 and the extensive case-law on the matter, summarised in *Kerse/Khan*, (fn. 65), para. 8-037 et seqq.

of plea bargaining procedure could bring advantages in the context of European competition law".[68]

Could the settlement procedure indeed lower the standard of proof required to prove an infringement? Could it cut down on the resources needed to conclude the investigative phase? It seems that the answer is clearly no. Both the burden and the standard of proof remain unchanged, and – as discussed in section B.II.1, above – the settlement procedure only affects the administrative phase of the Commission's proceedings. Irrespective of the fact whether or not the Commission will ultimately settle, it is obliged to make its own assessment of the case first. Although in the case of a settlement the detail of the puzzle may be reduced to some extent, its pieces will still have to be collected and put together. In the investigative phase the Commission will proceed, therefore, as usually, and although parties may signal early on their willingness to settle, the Commission will work its way through leniency applications, make inspections, collect and assess relevant information until it is confident that it can build a solid case.[69]

### b) The administrative phase

While in the investigative phase it makes no real difference whether a case is ultimately settled or not, the settlement procedure allows the Commission to speed up and to simplify the administrative phase considerably. A swifter and simplified administrative procedure will likely result in substantial resource savings. The efficiencies relate to the cornerstones of the standard administrative procedure: the statement of objections, the access to the file and the hearing of the parties.

#### aa) Settlement discussions: a flexible instrument to comply with the rights of defence

The administrative phase of the Commission's procedure – if both sides opt for the settlement variant – will centre on the settlement discussions. The settlement discussions serve as a flexible instrument to ensure that the rights of defence are complied with. In particular, these discussions ensure that (i) parties are informed of the objections raised against them, (ii) they can access the evidence on which such objections are based, and (iii) they can effectively assert their views on the objections. The settlement discussions integrate therefore the functions of a number of procedural steps and safeguards of the standard procedure, namely the statement of objections, the access to file, the written replies to the SO and the oral hearing.

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68 *Kroes*, The First Hundred Days, 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005, International Forum on European Competition Law, 7/4/2005, p. 4 and 5.

69 See Section B.II.1. concerning the initiation of the settlement procedure.

### (1) Settlement discussions versus the statement of objections

Under Art. 27(1) of Regulation 1/2003, the Commission can only base its final decisions on objections on which the parties concerned have been able to comment. This requirement, in conjunction with Art. 10(1) of Regulation 773/2003, obliges the Commission to notify a written statement of objections to each of the parties concerned before a final decision is adopted against them. The purpose of notifying a statement of objections is to comply with the fundamental rights of defence, in particular with the right to be heard. Without having been notified of the exact scope of objections raised against them, the parties cannot assert their views on such objections.

According to the Commission's current practice, the SO is a document of 100 to 200 pages in which the Commission sets out in detail all objections against the parties, including the facts and legal arguments on the basis of which it came to its conclusions. If applicable, the statement of objections must also state the Commission's intention to impose a fine or another remedy.[70]

Although the settlement procedure maintained the statement of objections as such, it has been deprived of any practical significance. In fact, under the settlement procedure the Commission is only required to notify the statement of objections when the adversarial administrative procedure (including access to the file and the hearing of the parties in the course of the settlement discussions) has effectively come to an end as the parties already submitted their settlement requests from which they cannot depart any further. Under such circumstances it is apparent that the SO cannot serve its original purpose, namely to notify the parties of the objections (and the Commission's intention to impose a fine). In fact, recital 2 of Regulation (EC) No 622/2008 states that the early disclosure of information and evidence in the course of the settlement discussions should enable the parties concerned to put forward their views on the objections which the Commission intends to raise against them as well as on their potential liability. Therefore, the settlement discussions take over the original function of the SO. As parties are already bound by their settlement submissions at the time of receiving an SO, the latter remains a formal document without any practical significance (apart from creating a marked opportunity for the Commission to abandon the settlement procedure).[71]

In light of the above, although the Commission is under an obligation to issue a SO also under the settlement procedure, this document could be much less detailed, concentrating on the core elements of the infringement and on the main points in law. Although it should contain the information necessary to enable the

70 See in detail *Kerse/Khan*, (fn. 65), para. 4-018.

71 It seems that there is nothing to prevent parties from putting forth arguments in their reply to the SO, however, this could move the Commission to abandon the settlement.

parties to ascertain whether it reflects the contents of their settlement submissions, and it must also contain the minimum mandatory elements required to be able to adopt an infringement decision,[72] the drafting of such a SO may require significantly less resources than the drafting of a document which will have to survive scrutiny by the Community Courts. Additionally, the statement of objections will be notified in an agreed language which will reduce the burden on the translation services.[73] Although these factors might not lead to a vast amount of resource savings, they constitute some of the benefits which may prove to be important when coming to a conclusion whether the benefits of the settlement procedure outweigh its costs.

### (2) Settlement discussions versus access to the file

Under the rules governing the standard procedure, the Commission is obliged to grant access to the case-file after notifying the SO.[74] The file contains all documents on which the Commission relies as evidence. No access is granted, however, to internal documents of the Commission, to documents or parts of documents containing business secrets, and to other confidential information.[75] As in more complex cases the file can amount up to hundred thousands of pages, in practice it can impose a very serious burden on the Commission to grant proper access and to ensure at the same time adequate protection of business secrets.[76]

Therefore, one of the most interesting questions is how the Commission could achieve efficiencies in connection with the management of the case file while ensuring that parties' rights of defence are observed. Some form of access to the file is not only required to ensure a due process, but it is also indispensable to convince settlement candidates that the Commission has a strong case. By granting access at least to a core file and showing the "smoking gun", the Commission could avoid attempts to bargain away charges and could pave the way to a smooth settlement.

The Settlement Notice reflects a flexible approach to the terms of granting access to the file in the course of the settlement discussions and allows the Commission to disclose only such evidence which it considers relevant. Pursuant to the Notice, the Commission has complete discretion which documents it discloses at what time to the parties.[77] The Commission must ensure, however, that it discloses suf-

72 See Art. 253 ECT.

73 Settlement Notice, (fn. 3), pt. 20 lit. e).

74 See Art. 15 and 16 of the Implementing Regulation, (fn. 2).

75 *Kerse/Khan*, (fn. 65), para. 4-028 et seqq.

76 Ibid., para. 4-035.

77 Settlement Notice, (fn. 3), pt. 15.

ficient information and evidence to enable the parties to assert their views effectively on the potential objections against them and to allow them to make an informed decision on whether or not to settle.[78] The failure to do so could undermine the legality of the settlement procedure irrespective of any acknowledgements and confirmations made by the parties in their settlement submissions.

In this regard, it is not known how the Commission will approach requests for further access to the file, i.e. to documents other than those selected by the Commission itself. According to the Settlement Notice, the parties will receive a list of accessible documents and upon request the Commission will grant access to non-confidential versions of any specified accessible document listed in the case file, in so far as this is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other aspect of the cartel.[79] This wording is somewhat worrying, in particular when read together with point 5 of the Notice, according to which the Commission will take into account the prospect of achieving procedural efficiencies, including the scale of burden involved in providing access to non-confidential versions of documents from the file when deciding on whether to continue or to discontinue settlement discussions. As a request for further access to the file may motivate the Commission to abandon the settlement procedure, parties may face in practice a choice between (full) access to the file or a settlement.

An attempt to reject or to discourage justified requests for additional access to the file may raise serious concerns. As the Court of First Instance pointed out, granting access to the file is a fundamental element of the rights of defence and any technical difficulties that might arise with regard to this issue should be overcome by an effective administration.[80] Obviously, by "overcoming such difficulties" the Court did not refer to linking full access to the file to a 10% overcharge in the fine. This is particularly true in view of the recent technological developments and the new tools, e.g. the electronic handling of documents and tagging of business secrets, available to ensure proper access with much less burden.[81]

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78 Ibid., pt. 16.

79 Ibid., pt. 16 and fn. 2 accompanying the same point of the Notice.

80 "The Court of First Instance is aware that, as the Commission stated at the hearing, the preparation of lists and the protection of business secrets which may be needed before granting 'access to the file' involves a considerable administrative burden for the Commission's departments. However, respect for the rights of the defence should not be allowed to conflict with technical and legal difficulties which an efficient administration can and must overcome." CFI, case T-36/91, *ICI/Commission*, Rec. 1995, II-1775, para. 112.

81 In addition to the above concerns of principle, limiting the right of access to the file would seem to be a mistake also from a policy point of view. By allowing parties to access all accessible documents in the file if they wish which is just as burdensome and costly for the parties as for the Commission, the Commission could ensure that it has indeed nothing to hide in the

In light of the above, a streamlined access to the file should not be regarded as a source of significant efficiency gains. In fact, it seems that the Commission can only economize on the burden of granting access to the full file if it produces sufficient evidence on its own initiative to convince parties of its case: if parties suspect that the Commission may be hiding something in the file, they are not likely to waive their right to a full access anyhow.

#### (3) Settlement discussions versus a formal oral hearing and a reply to the statement of objections

Under the standard procedural rules, the parties' right to be heard is ensured by the possibility to file a written reply to the SO and by organizing an oral hearing if they request one.[82] However, managing and translating lengthy replies is a cumbersome exercise and if parties argue strongly against a SO, it can place a considerable burden on the Commission to refute their arguments. A hearing also consumes significant resources of the Commission's various services as it implies a considerable organizational and translation burden.[83] In the light of the above, the Commission could save substantial resources by opting for the settlement procedure and by substituting these procedural steps with the more informal and less cumbersome settlement discussions.

### bb) The settlement decision

The final result of the settlement procedure is a settlement decision which is a regular Commission decision adopted under Art. 7 and 23 of Regulation 1/2003. Similarly to the shorter SO, the settlement decision could also contain less details than a standard infringement decision. Nevertheless, the resource savings resulting from the decision being shorter are limited. This results from the fact that the decision will have to comply with certain minimum standards and will have to describe the infringement with all relevant facts, together with their legal assessment and the attribution of liability.[84] This is a consequence of Art. 253 ECT

file. This would create an internal check in the procedure which could prove particularly valuable in view of the dramatic loss of judicial control over settlement decisions.

82 See chapter V of the Implementing Regulation, (fn. 2).

83 The preparation for the hearing and ensuring proper representation on it binds the resources of both DG Competition's case-team and the Legal Service. Conducting the hearing also requires the resources of the Hearing Officer and its team. Moreover, the hearing consumes significant administrative and translation capacities, too. In more detail on the conduct of hearings see *Kerse/Khan*, (fn. 65), para. 4-057 et seqq.

84 The obligation to adopt a finding on the existence of an infringement results primarily from the principle of *nulla poena sine crimine.* This principle is applicable to the settlement procedure, as the very purpose of the procedure is to impose a pecuniary sanction for a serious breach of

which requires decisions of the Commission to be fully reasoned. In order to comply with the requirements of Art. 253 ECT, the settlement decision will have to state at least "the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning that had led the Commission to its decision may be understood".[85] Nonetheless, Art. 253 ECT does not oblige the Commission to discuss all the matters of fact and of law which may have been dealt with in the administrative proceedings, which may leave at least some room for reducing the complexity of the decisions.[86] Moreover, avoiding the burden related to translating the decision into several languages may also generate substantial efficiencies.

### c) Efficiency gains from reducing the number of appeals

Although a simplified administrative procedure increases efficiency in itself, the resource savings that result from avoiding appeals to the Community Courts seem to generate a much greater efficiency gain. The reasons for this are summarised briefly below, first by illustrating the delay in antitrust enforcement resulting from excessive litigation and second by providing an overview of the inefficiencies that result from excessive litigation and a delayed enforcement.

#### aa) Excessive litigation results in a delayed enforcement

Every cartel decision of the Commission triggers today three to four appeals on average which imposes a heavy burden on the Commission.[87] In the words of Commissioner *Kroes*: "Defending our decisions is an ongoing and implicit part of the process and needs to be planned for in terms of resources."[88] At the end of 2006 the Commission was said to handle 120 ongoing cartel appeals.[89] Every time a decision is appealed, the full effectiveness of the decision is delayed by five to ten years until the judicial review by the Community Courts is finished.

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the antitrust rules (in contrast to an Art. 9 commitment decision). It is therefore a procedure imposing a sanction that is of criminal nature within the meaning of the ECHR, see *Wils*, Principles of European Antitrust Enforcement, 2005, p. 77; see also *Faull/Nikpay*, (fn. 67), para. 8.596 and the literature cited there.

85 ECJ, case 24/62, *Federal Republic of Germany/Commission*, Rec. 1963, 63, 69; compare *Kerse/Khan*, (fn. 65), para. 6-007 et seqq.

86 See further *van Bael/Bellis*, Competition Law of the European Community, 4th ed. 2005, p. 1105 and the case-law cited there.

87 *Kroes*, (fn. 68), p. 4. For a discussion on the incentives to litigate see *Harding/Gibbs*, Why Go to Court in Europa?, An analysis of Cartel Appeals 1995-2004, ELR 30 (2005), p. 349.

88 *Kroes*, (fn. 68).

89 *Dekeyser*, Direct Settlements in European Commission Cartel Cases, EU Cartel Enforcement: Practice and Policy, 2006, Slide 3.

The problem can be best illustrated by comparing investigations in major jurisdictions that relate to the same global cartels. *Archer Daniels Midland* (ADM) filed, for example, in December 2006 two appeals at the European Court of Justice concerning its participation in two world-wide cartels.[90] The same cases were settled ten years and two months before with the United States Department of Justice, when ADM entered into a plea agreement and paid a total fine of $100 million.[91] Thus, even one decade after other jurisdictions closed these cases so that they became antitrust history, the European machinery has not been able to produce a final decision.[92] Unfortunately, this case is not about an exceptional malfunction of European antitrust enforcement, but rather a good example for illustrating its general features. Other procedures relating to global cartels show similar track records,[93] and also purely domestic European procedures offer many disappointing examples.[94] Thus it is not astonishing to read *en passant* in antitrust literature that European antitrust enforcement operates on a "somewhat delayed schedule".[95]

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90 See the applications lodged in ECJ, pending cases C-510/06P and C-511/06P, *Archer Daniels Midland/Commission*, OJ C 56, 10/3/2007, p. 15 against the judgments in CFI, joined cases T-59/02 and T-329/01, *Archer Daniels Midland/Commission,* Rec. 2006, II-3627, which essentially upheld the Commission Decisions in cases COMP/36.604, *Citric acid*, and COMP/36.756, *Sodium Gluconate*.

91 See US Department of Justice Antitrust Division, Archer Daniels Midland Co. To Plead Guilty, Press Release, 15/10/1996; OECD Secretariat, Plea Bargaining – Settlement of Cartel Cases, 2006, p. 3, referring to the *lysine* case as an example of excessive duration.

92 After settling the cases with the DOJ, ADM settled also in other jurisdictions, see for example Canada Canadian Competition Bureau, Competition law and policy developments 1998-1999, para. 42. The ECJ has handed down a final judgement in the *lysine* case in 2006, upholding the CFI judgement which in turn only granted a small reduction in the fine for ADM. See ECJ, case C-397/03P, *Archer Daniels Midland/Commission*, *Rec.* 2006, I-4429 and CFI, case T-224/00, *Archer Daniels Midland/Commission*, Rec. 2003, II-2597.

93 See e.g. another pending appeal in the *sodium gluconate* case ECJ, case C-509/06P, *AKZO Nobel/ Commission*. See also the ECJ judgements of 2006-2007 in the *graphite* cases, where the companies pleaded guilty in the US in 1998 and 1999. ECJ, case C-328/05P, *SGL Carbon/Commission*, Rec. 2007, I-3921; ECJ, case C-289/04P, *Showa Denko/Commission*, Rec. 2006, I-5859; ECJ, case C-308/04P, *SGL Carbon/Commission*, Rec. 2006, I-5977, and on cross appeal ECJ, C-301/04P, *Commission/SGL Carbon*, Rec. 2006, I-5915. See also CFI, case T-15/02, *BASF/ Commission*, Rec. 2006, II-497 where the CFI reduced the fines imposed on BASF for its participation in the Vitamins cartel (BASF settled the case in the US in 1999 and paid a 225 million US$ fine).

94 In ECJ, case C-282/05P, *Holcim/Commission*, Rec. 2007, I-2941, the ECJ decided on a procedural issue (reimbursement of bank guarantees) resulting from the *Cement* case, where the investigation has started more than 18 years ago.

95 *Connor*, Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation, in: Kwoka/White (eds.), The Antitrust Revolution: Economics, Competition and Policy, 2003, p. 4.

Many examples illustrate the contrast between the slow pace of case disposal in Europe and a more efficient antitrust enforcement on the other side of the Atlantic. It is, however, evident even at a first glance that the difference does not result from an extreme efficiency of the federal judiciary in the United States, but rather from shortcuts that have been introduced in the procedure in order to allow for a much quicker disposal of cases by avoiding lengthy litigation.[96] These shortcuts in the form of plea agreements consent decrees and consent orders, allow for extensive procedural cooperation between the enforcement agencies and the targets of the investigation and are aimed at delivering a final and expedited result. As these instruments are considered to be beneficial by both sides, they are applied in a vast majority of the cases.[97] Similar efforts to establish attractive forms of cooperation that are aimed at a quick and final disposal of antitrust cases can also be observed in several EU Member States.[98] The reason for this is the quest of antitrust enforcement agencies to avoid costs and inefficiencies resulting from a delayed enforcement.

### bb) A delayed enforcement is costly and inefficient

Excessive litigation incurs immense costs both for the Commission and the parties. Moreover, it binds resources which cannot be used to detect and to prosecute other infringements. This results in fewer investigations and leads to a lower risk of detection. Therefore, excessive litigation diminishes deterrence and impedes the efficiency of antitrust enforcement. Litigation may also result in a significant delay in the imposition of the sanction, which in itself weakens deterrence:[99] a longer delay undermines the moral commitment to competition compliance,[100] and a

96 Compare DOJ plea agreements (in criminal cases), DOJ consent decrees and FTC consent orders (in civil cases). On consent decrees see U.S. Department of Justice Antitrust Division, Antitrust Division Manual, 3rd ed. 1998, chapter E; on plea agreements U.S. Department of Justice Antitrust Division, Antitrust Grand Jury Practice Manual, I, 1991, chapter 9. See further FTC Rules 16 CFR 2.31-2.34 (consent order procedure) and FTC Rules 16 CFR 3.25 (consent agreement settlements).

97 Relating to criminal cases see *Hammond*, (fn. 15), stating on p.1 that 90% of criminal cases are dealt with by plea agreements; on consent decrees and consent orders see *Furse*, The Decision to Commit: Some Pointers from the US, ECLR 25 (2004), p. 5 and *Barakonyi*, Az egyezségi határozatok és ítéletek néhány eljárási kérdése az amerikani versenyfelügyeleti hatóságok gyakorlatában, Versenyfelügyeleti Éntesítö 1995, p. 172.

98 See e.g. the successful system of expedited procedure and settlements in France *Carswell-Parmentier*, Recent developments in French competition law – Commitments, Leniency and Settlement procedures – the French approach, ECLR 27 (2006), p. 616; compare also in the UK the Construction industry investigation by the OFT, the EWS-ORR settlement, and the Independent schools case, http://www.oft.gov.uk/ (26/11/2008).

99 *Hammond*, (fn. 15), p. 20.

fine that is payable only after several years of litigation also looses a part of its net present value.[101] A longer delay in the imposition of the sanction not only reduces deterrence, but it is also incompatible with market dynamics and could ultimately harm competition. By the time the sanction is enforced, if the payment of the fine is suspended by the Courts, the undertaking concerned might have been restructured, merged with other entities, sold off from the corporate group, or it may even have ceased to exist. In such cases intervention could not only become less effective, but it could cause more harm than no intervention at all.[102]

In addition to the above, there are also some more fundamental concerns with regard to a delayed enforcement that go beyond the question of procedural efficiency and a good allocation of the society's resources. It is namely strongly questionable whether an excessive duration of the procedure is compatible with the European Convention on Human Rights and the Strasbourg case-law standards as a longer delay in the enforcement could severely interfere with the rights of defence.[103]

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100 This could result from offenders remaining not fined for decades or from innocent companies being fined from time to time. On the moral considerations of antitrust enforcement see *Wils*, Efficiency and Justice in European Antitrust Enforcement, 2008, p. 126.

101 Despite the payable interest rate.

102 See for example the sanctioning of "innocent" buyers who have been held liable for acts committed by the acquired business that were committed before the acquisition. Compare CFI, joined cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich/Commission,* Rec. 2006, II-5169, paras. 331-334. See also *Steinle*, Lassen sich Kartellverstöße „ausgliedern"?, Unternehmensstrukturierung und die Bußgeldhaftung nach EG-Kartellrecht, in: Scheuing/Stockmann (eds.), Recht und Wettbewerb, Fs. für Bechtold, 2006, p. 558. The approach of European competition policy to this problem is rigid, and it rather concentrates on imposing a sanction on some entity than on avoiding harmful intervention. Thus it is accepted that even an entity that had nothing to do with the infringement, as for example an innocent buyer, can be fined. Imposing a sanction on an entity that did not have control over the undertaking which committed the infringement is questionable both as to its legality and to its policy rationale. But even if the sanction is imposed on the culpable entity, a substantial delay will distort competition in a manner that would not occur in the case of a timely imposition of the sanction.

103 See for example ECJ, case C-185/95 P, *Baustahlgewerbe/Commission*, Rec. 1998, I-8485, paras. 47-49, the Court granting a reduction of the fine for an excessive duration of the proceedings before the CFI (5,5 years); for delays by the Commission see *Kerse/Khan*, (fn. 65), para. 7-057. Whether a symbolic reduction in the fine could remedy excessive duration and cure interference with the rights of defence is questionable. See also CFI, case T-43/02, *Jungbunzlauer/Commission*, Rec. 2006, II-3435, paras. 361-369, arguments of the appellant rejected by the Court.

## 2. Commission costs

### a) Additional rebate on the fine weakening deterrence?

Despite the considerable benefits that would result from settling, the introduction of a settlement system could also incur costs that reduce efficiency and deterrence. Before the publication of the final Settlement Notice, one of the major concerns was whether the rebate granted for settling – especially in combination with further reductions under leniency – could excessively reduce the amount of the fines and decrease the level of deterrence. Although the threat of overcompensation existed in theory, a 10% reduction is not likely to give rise to such any concerns.

In any case, the Commission has been increasing gradually the general level of the fines to reach a level it considers optimal to ensure maximum deterrence. Unaffected by the introduction of the settlement procedure, the Commission will be free to continue to increase the level of fines within the absolute limits posed by the 10% turnover cap. To put it more bluntly, the Commission could at any time increase the general level of fines to compensate for the reduction it grants under settlements. The 2006 Fining Guidelines seem to fit in this trend as any reduction for settlements is granted from a fine that turns out to be much higher under the new Guidelines than before.[104]

In order to avoid overcompensation, the Commission could also take a stricter approach on granting reductions of the fine under leniency to third- and fourth-in applicants. Instead of reducing the fine on the basis of a generous reading of the Leniency Notice, the cooperation of parties who cannot provide useful evidence could be rewarded under the settlement procedure, provided they cooperate during the administrative procedure, too. In view of the recent cartel decisions of 2007 and the restrictive approach the Commission took on leniency, one could wonder whether it was not already setting the stage.[105]

Finally, settlement rewards will not interfere with deterrence also for a more fundamental reason: a lower fine in a single case will be compensated by the increase in the number of cases the Commission will be able to pursue. This also increases the total amount of fines imposed which, in turn, raises the overall level of deterrence.

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104 The new Fining Guidelines, (fn. 17), are also an important step in increasing transparency.

105 See for example the recent *Elevators and Escalators* decision in COMP/38.823 of 21/2/2007, where the Commission imposed fines reaching in total almost 1 billion Euros and applied leniency in a restrictive manner. See *Veljanovski*, Cartel Fines in Europa – Law, Practice and Detterence, World Competition 30 (2007), p. 65.

### b) The perception of a "soft" procedure impeding deterrence

It should be avoided that undertakings perceive settlements as a "soft option" for antitrust enforcement as such a perception could generally lower deterrence.[106] As, however, the Commission reserved a broad margin of discretion whether or not to opt for a settlement, the perception that a 10% settlement reward is "automatically" available has been avoided. But parties will not consider settlements as some soft procedure already because of the magnitude of the fine that can be imposed even after a reduction for settling. Moreover, the Commission is likely to refuse any bargaining during settlement discussions and will rather follow a strict take-it or leave-it approach. It will most likely also make use of all available communication tools to condemn hard-core infringements, no matter whether they have been settled or not, in order to do away with any doubts relating to the vigour of enforcement.

### c) Loosing leniency applications

Before the adoption of the Settlement Notice, there was some fear that settlements could interfere with the success of the leniency policy by reducing the incentives to apply for immunity or a reduction of the fine. Such interference would certainly be of a great concern as a successful leniency policy is a precondition to effective antitrust enforcement.[107] Any negative impact would thus incur significant costs for the system.

The greatest concern is undoubtedly loosing immunity applications which are by their nature most valuable to the Commission. If there was an automatic and high reduction of the fine available under settlements – especially if combined with a reduction available under Chapter III of the Leniency Notice, i.e. the reduction of a fine – companies might decide not to blow the whistle as they would only risk paying a limited fine if the infringement was discovered. Everything turns on the difference in absolute terms between the two hypothetical positions of a) receiving immunity from the fines and b) settling the case without applying for immunity but being able to secure some additional reduction under leniency. The difference between the two positions has to remain significant in order to maintain the incentives to apply for immunity.[108] To illustrate this with an example, it is likely that if it were possible to combine a 50% reduction under leniency with a 50% reduction of the fine for settling, the difference between being fined and not being

106 *Stockmann*, Ziele und Zielkonfikte bei Kartellsanktionen, in: Brinker/Scheuing/Stockmann, (fn. 102), p. 567.

107 *Wils*, Leniency in Antitrust Enforcement: Theory and Practice, World Competition 30 (2007), p. 25.

108 Taking into account also the advantages and disadvantages that settlements could imply in connection with private damages actions, see below in further detail.

fined would, due to the aggregate reduction of 75%, become so insignificant that the incentives to apply for immunity would be strongly impeded. It is obvious, however, that a 10% reduction for settling has no significant effect on the incentives to blow the whistle as the difference between full immunity and even a combined reduction under leniency and settlements remains enormous.

The second concern relates to a potential reduction in the number of applications under Chapter III of the Leniency Notice, i.e. applications for a reduction of the fine. Under Chapter III of the Notice, the Commission is willing to grant the first undertaking qualifying for a reduction a rebate of 30-50%, the second undertaking a reduction of 20-30%, and subsequent undertakings a reduction of up to 20%.[109] The 10% settlement reward comes on top of any such reduction under leniency. If the settlement reward was set higher, the incentives to rush to the Commission with any available evidence could be undermined as the gaps between the different categories, i.e. second-in, third-in, fourth-in, would diminish or, more importantly, there would be no significant gap in the reduction obtainable with or without leniency. As a reduction under settlements increases, the gaps between the different variants of cooperation become smaller.[110]

Even if a 10% settlement reward is not likely to cause any of the above concerns, it may be worth considering how the incentives to apply for a reduction under Chapter III of the Leniency Notice could be increased. One solution would be to introduce the possibility to apply for "amnesty plus", an institution already applied successfully in the United States.[111] This would grant parties an additional reduction in the fine in an ongoing investigation for uncovering other unrelated infringements in which they participated. Of course, for infringements uncovered under the amnesty plus regime the applicant would be granted conditional immunity. The introduction of amnesty plus would create further incentives to "clear up the house" and would benefit both the Commission and the parties concerned. It is also compatible with the settlement procedure allowing parties to avoid a lengthy administrative procedure and to get the infringement swiftly behind.

### d) Obstructing private litigation?

The Commission has been persistent in its efforts to spread private enforcement as a tool to enforce EC competition law. In every recent press release announcing fines for antitrust infringements, it calls on private parties to bring damages

109 Leniency Notice, (fn. 17), pt. 26.

110 It might be argued, however, that third-in leniency applications are not that useful at all, and it is therefore not a major concern if some of them are lost.

111 See *Bloom*, Despite Its Great Success, the EC Leniency Program Faces Great Challenges, 2006, p. 4; *Wils*, (fn. 107), p. 42.

claims.[112] The question could arise whether a settlement decision is just as valuable to potential plaintiffs as a standard infringement decision. As a settlement decision is likely to describe the infringement in less detail than a standard decision, plaintiffs could indeed loose valuable information which they could otherwise use before national courts to assert their damages claims. Nevertheless, a settlement does not obstruct private enforcement as it contains at least a brief description of the infringement and is based on the same legal basis as regular infringement decisions. A settlement decision has therefore the same evidentiary value before national courts as a standard decision.

### e) The dangers of malfunction

The costs resulting from settlements discussed above are costs that could arise under the normal functioning of the procedure. Certain malfunctions could, however, considerably raise the costs of the settlement procedure. In the following, costs relating to over- and under-enforcement are discussed.[113] Both are of major concern as they not only reduce efficiency and deterrence, but may also raise concerns relating to the legality of the procedure.

Under-enforcement could lead to a serious malfunction of the enforcement system. From a policy point of view it is unsupportable to leave even parts of an infringement without a sanction or even uncovered.[114] This could seriously impede deterrence and it would also raise concerns in connection with third party rights. Under-enforcement could result from the interference of settlements with the investigative tasks of the Commission. If targets of an investigation can move the Commission to settle in a very early stage, the investigation may remain incomplete. Under-enforcement could also occur if, although the Commission uncovered the infringement, it is willing to bargain away some objections in exchange of the companies agreeing to a settlement.[115]

The problem could also exist, the other way around, namely if companies accept facts, points of law or remedies that the Commission would not be able to defend

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112 See e.g. press release IP/07/209, 21/2/2007 on the *Elevators and Escalators* cartel.

113 There are general threats of perversion to any enforcement system such as corruption or lobbying. See e.g. *Kerse/Khan*, (fn. 65), para. 6-056; see also the similar problem of false positives and false negatives.

114 See the early resolution agreement of the OFT with various dairy processors and supermarkets: OFT, press release, (fn. 34): "parties have [...] admitted involvement in certain of the anti-competitive practices identified by the OFT in the SO. [...] These parties have accepted a liability in principle, and will pay penalties which amount to a maximum of over £116 million."

115 This could also result from a less in-depth investigation leading to weaker evidence, or simply from the Commission willing to give too much away for avoiding litigation.

before the Courts under the standard procedure. Such over-enforcement may result from several factors. It could be the result of the parties' lack of information about the infringement. Parties may also simply be reluctant to risk a settlement reward by disputing certain minor aspects of the case.[116] Such malfunctions can only be avoided if the Commission exercises strong self-control in formulating its objections and conducting settlement negotiations.

Over-enforcement could also occur for exogenous reasons, namely if companies are forced to settle due to some external circumstances. This could be a result of an external pressure that distorts the balance of the two sides' bargaining power, e.g. the threat of insolvency or the consequences of a lengthy procedure on a contemplated M&A or a financial, e.g. stock market transaction. Finally, the bargaining power of the two sides may also be distorted as a result of a strong communication campaign by the Commission against the parties concerned.[117]

### f) Loss of judicial control and an increase in legal uncertainty?

If settlements become the standard procedure followed in the majority of investigations, judicial control over the Commission's enforcement activity could decline dramatically. Such a shift in the current system of checks and balances could incur costs by raising the risk of malfunction. In fact, the current system in which the Commission's decisions are under a strict judicial control is intended *inter alia* to eliminate the errors of the administrative procedure. However, the loss of judicial control would not only leave potential errors uncorrected, but it may also cause an increase in their number.[118]

Moreover, as the case-law of the Courts serves as authority to interpret the competition rules of the EC Treaty, a decline in the number of cases may lead to an increased legal uncertainty. However, a vacuum of case-law is unlikely to arise as the settlement procedure is exclusively intended for cartel cases where the principles of law are already well established. In any case, in view of the broad margin of discretion reserved by the Commission to decide which cases are suitable to

116 The parties may have very little knowledge of the infringement themselves, e.g. because a longer time period has elapsed, because the employees have left, or due to the restructuring of the corporate group.

117 See the investigation preceding the (rather disappointing) German banks case in which banks all over Europe modified their conduct due to the Commission. This led to the informal closure of investigation against them, press realease IP/01/1159, 31/1/2001 in COMP/37.919. The Commission's infringement decision against those banks which were not willing to amend their conduct has been annulled by the Courts.

118 With no external judicial control, the administration might not devote as much resources to eliminating errors. Moreover, in certain cases the Commission and the parties may have a common interest to agree on a solution which could not be achieved otherwise under the standard procedure.

settle, it may well refuse settling with the aim to receive clarification of the law from the Courts.

There is also another benefit of judicial control which relates to a more general idea of checks and balances. By exercising judicial review, Courts inherently limit the omnipotence of the Commission concerning policy developments. Although it is undisputed that the Commission is better equipped to decide and develop competition policy issues, at least some control by the Courts would seem beneficial. As, however, the law of cartels is fairly settled, a loss of judicial control would not raise concerns in this regard.

#### g) The balance of the Commission's costs and benefits

It follows from the above sections that the most significant benefit resulting from the settlement procedure is the dramatic decline of appeals which it is likely to bring about. This, together with the simplification of the administrative procedure could lead to substantial resource savings. Cutting back on the resources needed to bring a case to an end, together with the other benefits discussed above, may substantially enhance the efficiency of antitrust enforcement and could lead to a significant increase in the overall level of deterrence. This is so despite certain costs of the procedure, a large part of which the Commission can eliminate by an optimal use of the new instrument.

## II. The settlement candidates

### 1. Benefits

#### a) An additional reduction in the fine

If the Commission is to realise the benefits of a settlement procedure, it has to offer the parties a deal that contains sufficient incentives to take the settlement route. Clearly the most significant and direct incentive is the reduction of the fine. The reduction has to compensate companies for acknowledging the infringement as they will most likely be estopped from filing an appeal. The reduction will also have to compensate parties for waiving important procedural rights. Based on the previous practice of the Commission to grant a 10-20% reduction for not contesting the facts, which was not combinable with further reductions under leniency,[119] one could expect that a 10% settlement reward would create sufficient incentives for at least some parties to settle, in particular in conjunction with the Commission's commitment not to use a multiplier higher than two for a specific increase for deterrence.[120] Parties benefit, however, not only from a settlement

[119] See the 1996 Leniency Notice, section D, OJ C 207, 18/7/1996, p. 4.

[120] Settlement Notice, (fn. 3), pts. 32 and 33; see also Fining Guidelines, (fn. 17), pts. 30 and 31.

reward and possibly a lower specific increase for deterrence (in particular successful immunity applicants do not have any such financial incentive), but also from a number of other advantages that result from getting the infringement quickly behind.

### b) Cost savings on the administrative procedure and litigation

Besides the direct financial benefit of receiving a smaller fine, companies can save considerable costs both as a result of the simplified and expedited administrative procedure and also by avoiding litigation. Not only the legal costs would turn out to be significantly lower, but also the amount of internal resources e.g. management time consumed by the proceedings would be reduced. Moreover, a settlement would reduce overheads such as providing a bank guarantee for the duration of the court proceedings.[121]

### c) Certainty – getting the infringement behind

Companies caught up in antitrust investigations may well be nervous about the outcome of the procedure as they may face fines of up to 10% of their global group turnover in the preceding business year. The uncertainty surrounding the outcome of the procedure and the level of the fine can be damaging for a number of reasons.[122] It may disturb shareholders and could lead to significant losses for publicly listed companies. Lengthy proceedings and the negative publicity connected with it could hurt business relations and harm the reputation of the company. Most companies also have a moral commitment to keep their business in line with antitrust laws and make substantial efforts to enhance compliance. Many multinational firms are caught up in an infringement by negligent employees or remote subsidiaries, and it may also turn out that a company is held liable only because it acquired a business which was involved in an infringement before the time of the acquisition.[123] In such cases it will have a value for companies to cooperate with the Commission, to get certainty about the fine and to close the case as quickly and as discreetly as possible. It could also be wise to get a quote on the fine as soon as possible as the Commission can freely increase the general level of fines – also with a retroactive effect –, and a fine imposed after many years of

121 See a recent judgement on the reimbursement of bank guarantees cited above under fn. 94.

122 Under the standard procedure the parties have no information on the objections of the Commission nor the evidence in its possession until the notification of the statement of objections.

123 See CFI, case T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich/Commisson*, Rec. 2006, II-5169, paras. 333-335.

administrative procedure might turn out to be substantially higher than one agreed upon at an early point in the procedure.[124]

### d) The possibility to influence the terms of the settlement – reducing exposure to damages claims

No matter how tough the Commission's approach to avoid bargaining on charges, it is impossible to avoid that the parties have at least some influence on the terms of the settlement. For companies even a minor influence could make an important difference as it could affect the Commission's finding on important issues such as the scope or the duration of the infringement, its effects on the market, the sales volumes used to calculate the fine or the attribution of liability. Such aspects could become important in connection with private enforcement, and even if parties are not successful in altering the Commission's position, they may achieve to include less information in the settlement decision in order to minimize exposure to damages claims.[125] If in exchange for settling the parties can avoid certain critical observations, e.g. on the effects of the infringement, it may save them millions of Euros on damages.

## 2. The costs of settling – the parties' perspective

A settlement will, however, not only result in benefits, but parties will have to assume certain costs, too. By admitting participation in the infringement and accepting the payment of a fine, parties loose the opportunity to contest the objections in the course of the administrative procedure and before the Community Courts. This is a foregone opportunity to achieve a more favourable finding on the infringement and to receive a reduction of the fine. Moreover, it is, of course, less convenient to pay the fine right after the procedure rather than making the payment only in a few years time, and an immediate payment will also mean an increase in the net present value of the fine.[126]

However, a settlement means not only the earlier payment of the fine but could also speed up and facilitate damages actions. In fact, third parties who suffered harm from the infringement are more likely to sue for damages if they can do so shortly after the termination of the infringement by basing their claim on an enforceable decision – so-called follow-on actions. A longer delay automatically decreases the risk of being sued. Judicial review of the Commission's decision by

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124 See e.g. ECJ, case C-3/06P, *Danone Group/Commission,* Rec. 2007, I-1331, paras. 90-92.

125 See p. 692 and 693 above.

126 Although the payment of the fine is not automatically suspended by an application to the CFI. See Art. 242 ECT.

the Community Courts may, therefore, delay damages awards.[127] In case of a settlement decision an appeal to the Community Courts is unlikely. As these decisions have the same legal value as a standard decision, they may directly pave the way for damages claims. This is so, even if a settlement decision contains a lower level of detail as that could only make the calculation of damages more difficult, but certainly not impossible.

An increased exposure to damages claims could become particularly important in hybrid cases, where only some parties settle. A settlement decision will allow private plaintiffs to proceed immediately on the basis of joint and several liability against those parties who settled, without having to wait until the judicial review of the decision with regard to non-settling undertakings is finished.[128] Therefore, it is doubtful, whether a 10% reward would be sufficient to compensate for an increased exposure to damages claims in hybrid cases. This is particularly true with regard to immunity applicants which do not receive any further reduction for settling, but risk to pay massive damages instead of other non-settling parties if those appeal the decision before the Courts.

## D. Closing Remarks

The aim of the paper was to provide a brief overview of the settlement procedure and to assess whether and how the new instrument could enhance the efficiency of European antitrust enforcement. On the basis of the above analysis, it seems that the benefits of the settlement procedure outweigh its costs and that a settlement could result in a win-win situation for both sides.

Nevertheless, when applied in practice, both the Commission and the settlement candidates will have to assess the costs and benefits of settling in view of the unique circumstances of each case. This is a complex exercise and in particular immunity applicants will have to take into account a number of factors, including a potential increase in their exposure to private damages claims. However, a decision to accept a settlement offer will not only depend on a set of objective factors, but just as much on the transparency of the procedure and the credibility of the Commission: unless the Commission is able to build up an air of confidence, parties are not likely to settle, no matter how large the settlement reward is.

127 National courts may suspend follow-on damages proceedings until the judicial review of the infringement decision is finished.

128 Some jurisdictions may, however, stay the damages proceedings until the contested decision becomes enforceable against all addressees.