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**Settlement Procedure in EU Commission's
Competition Law Enforcement - A “Negotiation”
Game between the Commission and Cartelists**

Rong Zheng

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Settlement Procedure in EU Commission's Competition Law Enforcement - A "Negotiation" Game between the Commission and Cartelists

Rong Zheng*

Abstract

Settlement procedure as a "negotiated" enforcement instrument leaves space for the Commission and cartelists to game with each other in order to achieve a consensus serving varied purpose. The object of this thesis is to provide an overview of settlement procedure and answer the following questions: What is the gain and loss for the Commission and undertakings? What are their incentives? Does the procedure correspond to the legality of law of enforcement? Is the scope of infringement charged upon a same undertaking identical both in cartel settlement and ordinary procedure? And does the procedure contain a loophole for undertakings to act in bad faith and take advantage of it?

Keywords: Settlement procedure; EU Commission; competition law enforcement; cartel; settle; infringement.

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List of abbreviations

DG Comp: The Directorate General of Competition

EC: The European Commission

TFEU: the Treaty on the Functioning of the European Union

I. Introduction

In a world of open market, competitors are meant to compete with one another for the business of their customers, and not to cooperate with one another to distort the process of competition.¹ In other words, competition requires undertakings to act independently from each other and bear the competitive pressure exerted by each other.

Cartels, i.e. agreements between competitors that restrain competition, have long been a problem for free-market economies.² Tracing down to 1776, *Adam Smith* remarked in *The Wealth of Nations* “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices”³. Cartels are considered as “the supreme evil of antitrust”⁴.

Not surprisingly, all systems of competition law are united in condemning hard-core cartels, even if they may differ in the ways in which such cartels

¹ *Whish, Richard/Bailey David*, *Competition Law*, 8th ed., Oxford 2015, p. 546.

² *Kelley, Molly* (2010), *Settling for Settlement: The European Commission’s New Cartel Settlement Procedure*, 9 WASH. U. GLOBAL STUD. L. REV. 699, available at openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1061&context=law_globalstudies (accessed on June 09, 2016).

³ *Smith, Adam*, *An Inquiry into the Nature and Causes of the Wealth of Nations*, edited by S. M. Soares. MetaLibri Digital Library, 29th May 2007, p. 105.

⁴ *Barnett, Thomas O.*, *Seven Steps to Better Cartel Enforcement*, in *EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS*, Claus Dieter Ehlermann & Isabela Atanasiu eds., 2007, p. 141.

may be prosecuted and punished.⁵ As such, the European Commission introduced settlement procedure as a new law enforcement instrument in 2008, aiming to accelerate administrative process in cartel cases.

The purpose of this thesis is to offer an overview and critical analysis of settlement procedure in European Commission's competition law enforcement practice. Focusing on the "negotiation" factor of settlement procedure, this article will probe into the Commission and cartelists' contest and cooperation with each other, and argue about potential risks and/or loopholes in this enforcement instrument. Considering the historically short period of existence and the few number of successful settled cases since its introduction, there are several problems to be answered in order to understand settlement procedure better.

To achieve this goal, it makes sense to lay the foundation first by introducing settlement procedure – the definition and scope of application. Afterwards, the settlement procedure shall be compared with the other three EU law enforcement instruments which also have "negotiation" factors in the enforcement process –leniency policy, commitment decision and conditional merger control. Through this comparison, the negotiation between the Commission and undertakings in competition law enforcement will be

⁵ *Whish, Richard/Bailey David*, Competition Law, 8th ed., Oxford 2015, p. 546.

explained in different situations.

Three preliminary questions will then be answered to draw a picture generating a deeper understanding of why there is settlement procedure participation: What does settlement procedure “settle”? What is the gain and loss from both of undertakings’ and the Commission’s side? What are the incentives behind settlement procedure?

Finally, a critical analysis of settlement procedure will be addressed, focusing on legality of law of enforcement, scopes of infringement in cartel settlement and ordinary procedure, and scenarios when undertakings act in bad faith. Through this, potential risks and loopholes in settlement procedure will be revealed.

II. Settlement procedure as one of EU Commission’s enforcement instruments in the form of a public-private dialogue

The EU Commission is dedicated to improve their working efficiency. In order to avoid prolonged and expensive litigations, instruments, such as leniency policy, commitment decisions, conditional merger control, and settlement procedure, have been developed in the form of public-private dialogues. These dialogues center on the interaction and mutual will between the Commission and undertakings to solve the contested issue, which in turn

facilitates mutual benefits in enforcement outcomes.⁶ The Commission and undertakings communicate with each other before directly going to court in order to stop EU competition law infringements. This saves the Commission administrative resources and promotes a better EU competition law enforcement. Among those instruments, settlement procedure is a non-confrontational enforcement method, used to shorten administrative procedure.

To figure out how this public-private dialogue works, following aspects need to be considered: the definition and scope of application of settlement procedure, as well as its differences with the rest three EU competition law enforcement instruments with similar “negotiated” feature –leniency policy, commitment decisions and conditional merger control.

1. The settlement procedure

In accordance with the goal of deterrence and to expedite resolution of violations charges, the European Commission’s antitrust section, the Directorate General of Competition (hereinafter: DG Comp), introduced settlement procedure for cartel cases in June 2008.⁷

⁶ *Sage, Ewelina D.*, Increasing Use of “Negotiated” Instruments of European Competition Law Enforcement towards Foreign Companies, *Yearbook of Antitrust and Regulatory Studies*, VOL. 2014, 7 (10), p. 235-236.

⁷ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel

On May 19, 2010, the first full participation settlement was announced in a case concerning Dynamic Random Access Memory chips (DRAMs).⁸

Alongside the way of settlement procedure practice, in 2013, *Joaquín Almunia*, the former EU Competition Commissioner, made a bold prediction that “around half”⁹ of the Commission’s cartel cases would be resolved with settlement procedure. By 10 June 2016, 20 out of 54 cases had been settled under the Commission’s settlement procedure.¹⁰ The most recent case was *Alternators and Starters*, where the Commission fined car parts producers almost 138 million euros in January 2016.¹¹

In general, settlement procedure takes place, when the undertakings admit to the Commission's objections to settle a cartel case. They will receive a 10 per cent fine reduction in return. The Commission explores the undertakings’ interest in participating in the settlement procedure. Undertakings confirm their interest to pursue settlement in good faith to the Commission by a

cases (Text with EEA relevance), Official Journal C 167, 2 July 2008.

⁸ Press Release, European Comm’n, Antitrust: Commission Fines DRAM Producers €331 Million for Price Cartel; Reaches First Settlement in a Cartel Case (May 19, 2010) (IP/10/586).

⁹ See for example the speech of Joaquín Almunia of 8 March 2013: “Remedies, commitments and settlements in antitrust”, available at europa.eu/rapid/press-release_SPEECH-13-210_en.htm.

¹⁰ See official EU Commission’s cartel case pool; typically, the title of the respective press release refers to the settlement process. Available at: ec.europa.eu/competition/cartels/cases/cases.html.

¹¹ Press Release, European Comm’n, Commission fines car parts producers € 137 789 000 in cartel settlement (January 27, 2016) (IP/16/173).

written declaration. Following this, the Commission will engage in three rounds of settlement discussions with the undertakings. When undertakings are convinced that the Commission has a strong case, in view of the evidence gathered during the investigation and of their own internal audit, they may be ready to admit their participation in a cartel and accept their liability for it.¹² Upon submitting a settlement submission, undertakings voluntarily acknowledge their infringements, the settlement discussions are now regarded as complete. The Commission then, based on this settlement submission, notifies a statement of objections to the undertakings. Latter will be granted a time-limited period to reply the statement of objections. Without any further procedural step, the Commission can continue with the adoption of the subsequent final decision, after consultation of the Advisory Committee on Restrictive Practices and Dominant Positions.¹³ Final decisions taken by the Commission are subject to judicial review.¹⁴

The idea behind settlement is that the Commission services need to obtain a “common understanding” with all settling parties on the facts and the scope

¹² See the European Commission official website on cartel settlements, available at: ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html.

¹³ All the description of settlement procedure can be referred to the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008.

¹⁴ *Ibid.*, para. 41.

of the Commission's potential objections in a case.¹⁵ The Commission's aim in setting up the settlement procedure is primarily to reduce the length of the Commission's investigations where possible, thereby freeing up the Commission's resources to pursue other investigations.¹⁶

Regarding the scope of application, settlement procedure is limited to cartel cases. Here, agreements and/or concerted practices between two or more competitors are aimed at coordinating their competitive behavior on the market, and/or influencing the relevant parameters of competition.¹⁷ Only the Commission can decide which cartel case is suitable for settlement. The Commission Notice¹⁸ explicitly stipulates, that the power to explore the settlement procedure in cartel cases is bestowed on the Commission, ensuring that the choice of the settlement procedure cannot be imposed on the parties.¹⁹ In other words, the Commission retains a broad margin of discretion on the scope of application of settlement procedure. Even though there is no specific guideline directing the Commission how to choose a

¹⁵ See the European Commission official website on cartel settlements, available at: ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html.

¹⁶ *Olsen, Greg/Jephcott, Mark*, Sharing the Benefits of Procedural Economy: the European Commission's Settlement Procedure, International Developments, in: *Antitrust*, Vol. 25, No. 1, 2010, p. 76.

¹⁷ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 1.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 3.

settlement candidate, current practice revealed a routine the Commission takes. As addressed by the head of cartel settlement unit, Flavio Laina, the Commission will consider the following factors: (1) the number of parties involved, (2) the number and proportion of leniency applicants, (3) the degree of cooperation of the parties, (4) agreement to a fine, (5) the possibility of setting a precedent, and (6) international cartel enforcement procedures and private enforcement claims.²⁰ In the light of all the decisions adopted by the Commission under the settlement procedure, the respective parties among all the settled cases lie in varieties of industries, for instance, manufacturing industry, food industry, energy industry, transportation and banking. Even though the above-mentioned seven factors were not fully met in each of the previous practices, this did not prevent settlements to be reached. Since those guideline factors were mainly fulfilled, it can be concluded that they generally work in the right direction.²¹ If the Commission considers a case suitable for settlement, it will initiate proceedings once the investigation inspections reach the stage of drafting a

²⁰ *Laina, Flavio/Bogdanov, Aleko*, Survey: The EU Cartel Settlement Procedure: Latest Developments, in: *Journal of European Competition Law and Practice*, Vol. 5, No. 10, Oxford 2014, p. 718-719.

²¹ *Laina, Flavio/Bogdanov, Aleko*, Survey: The EU Cartel Settlement Procedure: Latest Developments, in: *Journal of European Competition Law and Practice*, Vol. 5, No. 10, Oxford 2014, p. 719.

statement of objections.²² The Commission then explores the interest to settle among all parties to the same proceedings before issuing the statement of objections.²³

The public-private dialogue in settlement procedure is based on communication between the Commission and the undertakings, to achieve a common understanding in settlement discussions. Here essential elements concerning the facts and evidence of the case are addressed. Since it is a dialogue rather than an obligation, undertakings are not obliged to enter settlement discussions or to ultimately settle. The Commission may only apply the settlement procedure upon parties' explicit request.²⁴ Meanwhile, both of the Commission and the parties involved have the right to terminate the settlement discussions before the initiation of settlement submission. However, the Commission's right to discontinue settlement is ultimate.

2. Differences between settlement procedure and other “negotiated” instruments

The European Commission is not an authority constituted by unlimited staff.

By consuming EU budget to maintain its function, the Commission is

²² Press Release, European Comm'n, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions (June 30, 2008) (IP/08/1056).

²³ *Olsen, Greg/Jephcott, Mark*, Sharing the Benefits of Procedural Economy: the European Commission's Settlement Procedure, International Developments, in: *Antitrust*, Vol. 25, No. 1, 2010, p. 77.

²⁴ Press Release, European Comm'n, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions (June 30, 2008) (IP/08/1056).

constantly confronted with outside pressure calling for higher work efficiency and better use of staff. The Commission pursues to meet the expectation by creating new enforcement instruments. This section will orientate on comparing the differences between settlement procedure and three other “negotiated” instruments – leniency policy, commitment decision and conditional merger control. The notion of “negotiated” refers to the interaction and discussion between the Commission and undertakings.

2.1. Leniency policy

Pursuant to the Commission’s leniency policy, the first undertaking that informs the Commission of the existence of an anti-competitive practice of which it is a member, and whose information allows the Commission to carry out an inspection or find an infringement under Article 101 TFEU, is able to obtain immunity from any fine.²⁵ In other words, the first one who blows the whistle of cartel participation with sufficient evidence gets immunity from fine. If an undertaking collaborates with the Commission during the investigation by providing important evidence strengthening the Commission’s case, it may receive a reduction in the fine of between 20 and 50 per cent.²⁶ The reduction will be more significant for those who

²⁵ *Chalmers, Damian/Davies, Gareth/Monti, Giorgio*, *European Union Law*, 3rd ed., Cambridge 2014, p. 969.

²⁶ Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17.

collaborate first. The reduction of the fine varies widely depending on the timing and significantly added value of the information and evidence provided.

In settlement procedure, all parties settling the same case will receive the same reduction of the fine (10 per cent), because they conjunctly contributed to procedural savings.

The aim of leniency policy is to give members of a cartel the incentive to bring the existence of cartels to the attention of the Commission.²⁷ With numerous applications per year and averagely four applications per month,²⁸ leniency policy has proven immensely successful. It helps destabilize cartels and facilitate the gathering of information, facts and data on infringements of competition law.²⁹ By creating a powerful incentive for each cartel member to be disloyal, evidence of collusive wrongdoings in cartels are provided by leniency applicants, which saves the Commission a lot of effort in inspections. Leniency increases the risk of cartel behavior thereby deterring

For comment on earlier drafts of this document see *N. Levy and R. O'Donoghue, The EU Leniency Programme Comes of Age (2004) 27 World Competition 75.*

²⁷ And some have gone even further, suggesting that the Commission should pay whistleblowers. See *A. Riley, Beyond Leniency: Enhancing Enforcement in EC Antitrust Law (2005) 28 World Competition 377.*

²⁸ See the speech of Joaquín Almunia, “Fighting against cartels: A priority for the present and for the future”, 03/04/14, p. 3.

²⁹ *Flavion Laina*, Head of Cartel Settlement Unit, European Commission, as referenced by *David Vascott*, EU cartel settlements: are they working?, in *Global Competition Review: News*, April 2013.

cartel participation.³⁰ As an outcome, many long-standing, widespread cartels were only uncovered, stopped and penalized in recent years after the leniency policy was introduced.³¹ For example, the Animal Feed Phosphates cartel lasted for 35 years, the International Removal Service, Marine Hoses and Pre-Stressing Steel cartels lasted for up to 20 years each.³²

In contrast, the settlement procedure promotes a separate policy objective and is complementary to the Commission's leniency program. Access to settlement is not restricted to leniency applicants, which means reductions of the fine for settlement and for leniency are cumulative.³³ Settlement procedure seeks to simplify and expedite the administrative procedure, whereas leniency is an investigative tool aimed at uncovering cartel cases and collecting evidence, thus saving human resources in the cartel department.³⁴ It should be noted that leniency could only be applied before

³⁰ *Kelley, Molly* (2010), *Settling for Settlement: The European Commission's New Cartel Settlement Procedure*, 9 WASH. U. GLOBAL STUD. L. REV. 699, available at openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1061&context=law_globalstudies (accessed on June 09, 2016).

³¹ *Sage, Ewelina D.*, Increasing Use of "Negotiated" Instruments of European Competition Law Enforcement towards Foreign Companies, in: *Yearbook of Antitrust and Regulatory Studies*, Vol. 2014, 7 (10), p. 241.

³² *Ibid.*

³³ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 33.

³⁴ *Olsen, Greg/Jephcott, Mark*, Sharing the Benefits of Procedural Economy: the European Commission's Settlement Procedure, International Developments, in: *Antitrust*, Vol. 25, No. 1, 2010, p. 76.

settlement procedure. Upon undertakings' declaration of their interest in engaging in settlement procedure, the Commission may disregard any application for immunity from fines or for reduction of fines when settlement starts,³⁵ as an investigation then needs to be completed.³⁶ Thus, it can be reasonably indicated, that settlement procedure is the last choice lying in front of cartelists for fine reduction no matter leniency was granted or not. Leniency and settlements are therefore separate and complementary tools in the Commission's enforcement arsenal.³⁷

2.2. Commitment decisions

Settlement procedure should also be distinguished from commitment decisions. Those are designed to close investigations of a breach of Article 101 and/or 102 of the TFEU by making scrutinized undertakings' commitment legally binding.³⁸ So that undertakings have to make sure such action shall not be taken. In this case the Commission will not accuse the undertakings for having actually committed a European Competition Law violation and will not impose a fine. Commitment decisions are adopted on

³⁵ Commission Notice (fn. 33), para. 13.

³⁶ *Laina, Flavio/Bogdanov, Aleko*, Survey: The EU Cartel Settlement Procedure: Latest Developments, in: *Journal of European Competition Law and Practice*, Vol. 5, No. 10, Oxford 2014, p. 727.

³⁷ *Olsen, Greg/Jephcott, Mark*, Sharing the Benefits of Procedural Economy: the European Commission's Settlement Procedure, International Developments, in: *Antitrust*, Vol. 25, No. 1, 2010, p. 78.

³⁸ *Berry, Elspeth/Homewood, Matthew J./Bogusz, Barbara*, Complete EU Law: Text, Cases, and Materials, 2nd ed., Oxford 2015, p. 585.

the basis of Article 9 of Regulation (EC) No 1/2003. In spite of not establishing an infringement or impose a fine, commitment decisions bring a suspect behavior to an end by imposing the commitments on undertakings to meet the Commission's concerns. An example of this can be found in the *Coca-Cola* case.

Here the Commission made commitments from Coca-Cola, concerning its alleged abuse of a dominant position in the market, legally binding.³⁹ Such commitments prevented Coca-Cola from entering into exclusive agreements with shops and pubs, offering them target or growth rebates or forcing them to take less popular products with its stronger brands until December 31, 2010. It was also the first case of commitment decision based on Article 102 TFEU. Commitment decisions make the commitments legally binding and ensure that there are no longer grounds for action by the Commission. They “allow for the quicker resolution of competition concerns on a more cooperative basis”⁴⁰. Therefore commitment decisions do not constitute precedents to establish recidivism for subsequent infringements.⁴¹ Moreover,

³⁹ EC decision of 22/06/05 Coca-Cola (COMP/A.39.116/B2), available at: ec.europa.eu/competition/antitrust/cases/dec_docs/39116_258_4.pdf.

⁴⁰ Communication from the Commission to the European Parliament and the Council –Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014) 453, 9.7.2014, para. 21.

⁴¹ Press Release, European Comm'n, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions (June 30, 2008) (IP/08/1056).

commitment decisions are not appropriate in cartel cases, because the procedure was designed for cases that do not warrant a fine⁴². It can be reasonably deduced that commitment decisions are never meant for major violations such as cartels.

On the contrary, settlement decisions are only foreseen in cartel cases, adopted pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003, which are the standard legal basis for Commission Decisions acting against violations of Articles 81 and 82 EC. Settlement procedure ends with a final decision of the Commission, establishing the existence of an infringement, describing and proving all the relevant parameters thereof, requiring the termination of the infringement and imposing a fine. They constitute a precedent valid to establish recidivism for subsequent similar infringements and preclude the adoption of another decision for the same facts and pursuant to the same legal basis by the Commission or any EU National Competition Authority.⁴³

Furthermore, commitment decisions are a more flexible enforcement instrument for undertakings. They can design the remedies themselves by

⁴² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), Official Journal L1/1, 4 January 2003, recital 13.

⁴³ Press Release, European Comm'n, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions (June 30, 2008) (IP/08/1056).

considering all business and legal aspects of the case, as well as its own convenience and future plans. Contrarily, the Commission will not consider these factors in an ordinary procedure. Compared to settlement procedure, undertakings are more limited in the scope and extent of negotiation. They will not enjoy the flexibility and can merely discuss about facts concerning the cartel infringements and possible estimated fine with the Commission. The undertakings can only choose to acknowledge the infringement or opt out of the settlement; no bargaining can be conducted.

Nevertheless, both of these instruments are used to achieve a common understanding between the Commission and undertakings as well as to promote efficiency. For instance, as shown by the Microsoft 2009 investigation, commitment decisions considerably shorten the time needs to close a case.⁴⁴ In this case, Microsoft was investigated because it might have tied its web browser Internet Explorer to the Windows PC operating system. Such tying behavior violates EU competition law by abusing dominant market position. Microsoft commits to offer European users of Windows choice among different web browsers and to allow computer manufacturers

⁴⁴ *Sage, Ewelina D.*, Increasing Use of “Negotiated” Instruments of European Competition Law Enforcement towards Foreign Companies, in: *Yearbook of Antitrust and Regulatory Studies*, Vol. 2014, 7 (10), p. 252.

and users the possibility to turn Internet Explorer off.⁴⁵ Similar to commitment decisions in promoting case solving efficiency, cases are shortened to averagely two years compared to the prolonged litigation in settlement procedure.

2.3. Conditional merger control

Increased competition within the European single market and the globalization make it more attractive for companies to join forces. Merger is a useful method for companies to acquire bigger market influence or advance their business. However, such business transaction shall not exceed a certain extent, which might significantly impede effective competition in the EU.

Council Regulation (EC) No 139/2004⁴⁶ sets a legal basis for EU Commission to control this matter by examining proposed mergers. The objective is to prevent potential harmful effects on competition as early as possible. Mergers going beyond the national borders of any Member State are examined at European level. The Commission must be notified of any merger with an EU dimension prior to its implementation, when the annual turnover of the combined businesses exceeds specified thresholds in terms of

⁴⁵ Press Release, European Comm'n, Antitrust: Commission accepts Microsoft commitments to give users browser choice, (December 16 2009) (IP/09/1941).

⁴⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), Official Journal L24/1, 29 January 2004.

global and European sales. The Commission will then conduct examinations on this proposed merger. Below these thresholds, the national competition authorities in the EU Member States may also review the merger. These rules apply to all mergers no matter where in the world the merging companies have their registered office, headquarters, activities or production facilities. If undertakings can pass the examination, the merger will be approved unconditionally. If not, depending on the situation, undertakings can negotiate with the Commission by taking action to try to correct the likely competition distortion effect. This kind of behavior is regarded as merger remedies, which are specific conditions and/or obligations offered by the undertakings in order to gain clearance of a merger.⁴⁷ For instance, undertakings may commit to sell part of the combined business or to license technology to another market player. If the European Commission is satisfied with the proposed commitments in maintaining or restoring competition in the market, it will give conditional clearance for the merger to proceed. It then monitors whether the merging companies fulfill their commitments and may intervene if they do not. The mindset behind conditional merger control sees mergers essential to the economy therefore

⁴⁷ Sage, Ewelina D., Increasing Use of “Negotiated” Instruments of European Competition Law Enforcement towards Foreign Companies, in: Yearbook of Antitrust and Regulatory Studies, Vol. 2014, 7 (10), p. 243.

the rights of the undertakings should not be restricted more than necessary.⁴⁸

Both of the Commission and undertakings want to solve the identified merger problem. Thus, the negotiation factor is important for bringing out a resolution satisfying both parties. In other words, undertakings can carry out the intended merger under the condition, that they meet the Commission's requirements.

Comparing to settlement procedure, both instruments are conducted in the way of public-private dialogue between the Commission and undertakings to achieve a common goal and serve the purpose of competition law enforcement. However, bargaining exists in only conditional merger control, where undertakings can design the commitment they purport to conduct and have a bigger voice to really negotiate with the Commission. In settlement procedure, the negotiation is limited to essential elements, such as alleged facts of the case and likely fine and not about bargain the scope of infringement. Besides, settlement procedure is used in the case of existing infringement, while conditional merger control is conducted before such detriment happens.

⁴⁸ *Sage, Ewelina D.*, Increasing Use of “Negotiated” Instruments of European Competition Law Enforcement towards Foreign Companies, in: *Yearbook of Antitrust and Regulatory Studies*, Vol. 2014, 7 (10), p. 243.

III. Preliminary questions concerning settlement procedure

For taking a deeper analysis of settlement procedure, fundamental questions need to be discussed. In this chapter, following matters are addressed: What does settlement procedure “settle”? What is the gain and loss from both of undertakings’ and the Commission’s side? What are the incentives behind settlement procedure for both of undertakings and the Commission?

1. What does settlement procedure “settle”?

The settlement procedure is intended to establish an efficient route for processing clear-cut cases of cartel infringement. The Commission has stated that it is not used as a forum for negotiation as to the existence of an infringement or the level of a fine or sanction.⁴⁹ The Commission’s message is clear: “These discussions are not about bargaining or negotiating. The Commission will not bargain about evidence or objections.”⁵⁰ Therefore, the “settle” in settlement procedure does not refer to the common meaning of bargaining. When mentioning “negotiation” factor in settlement procedure, only the interaction and discussion characteristics between the Commission and undertakings are emphasized.

⁴⁹ Olsen, Greg/Jephcott, Mark, Sharing the Benefits of Procedural Economy: the European Commission’s Settlement Procedure, International Developments, in: Antitrust, Vol. 25, No. 1, 2010, p. 76.

⁵⁰ Press Release, European Comm’n, Neelie Kroes, Assessment of and Perspectives for Competition Policy in Europe, Celebration of 50th Anniversary of the Treaty of Rome (Nov. 19, 2007) (Speech/07/722).

By achieving a successful settlement, the undertakings are expected to acknowledge their participation in and liability for the cartel. They have to reach a common understanding, which will cause severe legal consequence the undertakings have to bear. For example, after an undertaking handed in its settlement submission, no oral hearings can be requested. Also, the undertakings' right to appeal will be impaired, because of the acknowledgement of infringement (at least to appeal on the existence of infringement, since undertakings recognized it by introducing settlement submission). Since it is inconceivable under settlement procedure that settling parties would be able to waive their right to appeal on essential matter,⁵¹ and it is burdensome for undertakings to settle cartel cases, the question occurs what undertakings expect from settlement procedure.

A big part of undertakings' incentive to participate in settlement procedure is a 10 per cent fine reduction it awards settled cartelists. However, the discount on the fine up to 10 per cent is not as generous as that found in other legal remedies (e.g. leniency policy), which may reduce settlement procedure's attractiveness.⁵²

⁵¹ *Scordamaglia, Andreas*, The new Commission settlement procedure for cartels: A critical assessment, in: *Global Antitrust Review* 2009, Issue 2, p. 78.

⁵² *S.-P. Brankin*, The First Cases Under the Commission's Cartel Settlement Procedure: Problems Solved? (2011) 32(4) *ECLR* 5, for an informative insider's perspective. *M. P. Schinkel*, Bargaining in the Shadow of the European Settlement for Cartels (2011) 56(2)

Settlement procedure functions in the way that within three rounds of settlement discussions, undertakings communicate with the Commission about the nature and scope of the illegal activity and the appropriate penalty to reach a common understanding.⁵³ Theoretically, once settlement procedure starts, it is an uncontested fact that the target undertakings' conducted certain illegal activity. It then depends on whether the evidence the Commission gathered is sufficient enough to prove the case and convince undertakings to acknowledge it. The appropriate penalty relies on the scope and severity of existing infringements, and of course, the calculation of fines conducted by the Commission. As long as the settlement submission is not issued, the undertaking has all the freedom to opt out, while the Commission retains flexibility to discontinue settlement through the whole process.

However, upon introduction of the settlement procedure in 2008, widespread skepticism about its effectiveness arose. Doubted was, if the Commission were to maintain its stated position on negotiation, because a mere expectation of a reduction of 10 per cent on an as yet unqualified level of fine seemed unlikely to be a sufficient inducement on its own for cartelists to

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⁵³ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 5.

enter into a settlement agreement.⁵⁴

To sum up, despite of the Commission's claim of settlement procedure's "pure" position away from "bargaining", one may query that because of the uncertainty/loophole in settlement discussions and opt out scheme, there might actually exists a scope of indeterminacy based on the scope of infringement and penalty for undertakings. Settlement procedure is a "negotiation" game between the Commission and cartelists.

2. What is the gain and loss from both undertakings' and the Commission's side?

2.1. Analysis of settlement procedure from undertakings' point of view

Whether or not to engage in a settlement procedure depends on the undertakings' interest analysis, i.e. a comparison between the profitability of settlement procedure participation outcome and the result of non-engagement.

2.1.1. Gain

For undertakings, the benefit of settlement procedure primarily fastens on fine reduction, streamlined procedure and prerogative of confidentiality.

(1) Fine reduction

⁵⁴ *Olsen, Greg/Jephcott, Mark*, Sharing the Benefits of Procedural Economy: the European Commission's Settlement Procedure, International Developments, in: *Antitrust*, Vol. 25, No. 1, 2010, p. 76.

The Competition Department of European Commission has the authorized power and duty to detect unlawful activities as well as impose punishment on infringements, whilst the undertakings have the incentive to pursue the best economical and practical business plan while avoiding extra costs. Regarding the gravity of the infringements, the Commission is required to penalize accordingly. The objectives of punishment and deterrence justify the goal of preventing undertakings from being in a position to assess the benefits of infringement. These undertakings would participate in a cartel infringement by previously taking account of the amount of fine, which might be imposed on account of that unlawful conduct.⁵⁵ In such situations, when deciding whether to violate the law, the undertaking compares the gain it gets from the violation, with the expected costs associated with being detected – the fine it would obtain once detected times the probability of detection.⁵⁶ As a result, cartel infringement fine imposed by the Commission is relatively high. The highest cartel fine in history was imposed in 2012 in the *Carglass* case on an undertaking named Saint Gobian for 715 million euros. The total cartel fine imposed between 2012 to 2016

⁵⁵ Case T-279/02 *Degussa AG v. Commission* [2006] ECR II-897, para. 83. It was affirmed on appeal but only a summary of the judgment is provided: Case C-266/06P *Evonik Degussa v. Commission* [2008] ECR I-81.

⁵⁶ *Ascione, Aurora/Motta, Massimo*, Settlements in Cartel Cases, Barcelona Graduate School of Economics, online publication, p. 4, available at: www.barcelonagse.eu/tmp/pdf/motta_settlementscartels.pdf.

was nearly 5.8 billion euros on 135 undertakings.⁵⁷

As far as the undertakings are charged of/involved in a competition infringement, they are most likely to decrease the possible fine to the maximum extent. If succeed to appeal settlement procedure, a 10 per cent fine reduction will be deducted from the fine that the undertakings would normally have to pay according to the provisions of the current Commission's guidelines on fines.⁵⁸ It can be a considerable amount of loss for undertakings that conducted cartel infringements.

It is also reasonable for a cartelist to try every means to reduce the scope of punishment. When the leniency application did not turn to be as ideal as expected, engaging in the settlement procedure is financially beneficial to a cartelist that is not eligible for full immunity under leniency program.⁵⁹ As mentioned above, there is no contradiction for an undertaking to apply for both leniency policy and settlement procedure. Even when leniency policy was not under the undertakings' consideration, settlement procedure can still be the final opportunity to get fine reduction for those undertakings refrained to apply for leniency.

⁵⁷ See the official statistics offered by the European Commission, available at: ec.europa.eu/competition/cartels/statistics/statistics.pdf.

⁵⁸ Press Release, European Comm'n, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions (June 30, 2008) (IP/08/1056).

⁵⁹ See International Competition Network, Cartel Settlements 39 (2008), p. 2, available at www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf.

(2) Streamlined administrative process

The settlement procedure is similar to, but different from a criminal plea bargain within the U.S. settlement system. Under which a party admits an infringement, accepts a sanction, and waives any right to appeal as part of a negotiated agreement.⁶⁰ Plea bargain in the U.S. is an instrument used to gather evidence of cartel behavior from companies who are not “the first in” for immunity. While such purpose is already covered in the EU by rewarding early cooperation with “reductions of fines” under the leniency policy, EU settlement procedure is not created for gathering evidence. As former Competitor Commissioner Neelie Kroes referred, “the system that we have proposed is therefore focused solely on procedural economy”.⁶¹ In this sense, EU settlement procedure is similar to the U.S. plea bargain, in the way that both of them serve to promote administrative efficiency.

Competition law is firmly based in economics, which cannot be considered an exact science. Hence, proving a violation within an administrative procedure of an adversarial character was always under the threat of juridical

⁶⁰ Olsen, Greg/Jephcott, Mark, Sharing the Benefits of Procedural Economy: the European Commission’s Settlement Procedure, International Developments, in: Antitrust, Vol. 25, No. 1, 2010, p. 76.

⁶¹ Press Release, European Comm’n, Neelie Kroes, Assessment of and Perspectives for Competition Policy in Europe, Celebration of the 50th Anniversary of the Treaty of Rome (Nov. 19, 2007) (Speech/07/722).

review.⁶² By stipulating explicit infringement scope in settlement submission in change of a settled case for fine reduction, EU settlement procedure saves both, the undertakings and the Commission, a lot of time and effort. The former Commissioner Joaquín Almunia emphasized: “As the procedure will start to be applied to new cases it is expected to speed up investigations significantly”⁶³. Reviewing from the cases settled by the Commission, settlement procedure above all has allowed speeding up the procedures, on average, reducing their length by 2 years.⁶⁴ It is generally expected that future cartel settlement will be dealt with even more quickly, presumably within six months from the initial invitation by the Commission to engage in settlement discussions, as the Commission and the antitrust community become more familiar with the process.⁶⁵

On the contrast, the process of an ordinary procedure to reach a final, fully reasoned decision is often a prolonged one. It takes longer time than in settlement procedure to get a full access to the file, reach a fully detailed

⁶² *Sage, Ewelina D.*, Increasing Use of “Negotiated” Instruments of European Competition Law Enforcement towards Foreign Companies, in: *Yearbook of Antitrust and Regulatory Studies*, Vol. 2014, 7 (10), p. 241.

⁶³ Press Release, European Comm’n, Joaquín Almunia, First Cartel Decision under Settlement Procedure – Introductory Remarks (May 19, 2010) (Speech/10/247).

⁶⁴ *Laina, Flavio/Bogdanov, Aleko*, Survey: The EU Cartel Settlement Procedure: Latest Developments, in: *Journal of European Competition Law and Practice*, Vol. 5, No. 10, Oxford 2014, p. 720.

⁶⁵ *Olsen, Greg/Jephcott, Mark*, Sharing the Benefits of Procedural Economy: the European Commission’s Settlement Procedure, International Developments, in: *Antitrust*, Vol. 25, No. 1, 2010, p. 79.

statement of objections, participate in oral hearing, reply to the statement of objections, and achieve a fully motivated decision. More than ninety per cent of cases are extended by an appeal to the Court of Justice of the European Union by the parties,⁶⁶ which in most instances will be challenged before the EU courts in Luxembourg. This can add four or five years to the entire timeline.⁶⁷ In an extreme case, *Graphite Electrodes*,⁶⁸ nine years elapsed between the Commission's decision to open an investigation in 1997 and the final judgment of the Court of Justice in 2006.

Taken all above-mentioned factors into consideration, undertakings participated in settlement procedure will not only be able to get a streamlined administrative procedure with an essentially shorter period, but also save significant legal fees, because the settlement procedure will avoid a burdensome procedure before the Commission as well as what could be a long appeal before the EU judiciary in Luxembourg.⁶⁹

(3) Confidentiality

Confidentiality is a key characteristic in settlement procedure, which attracts

⁶⁶ Dekeyser, Kris/Roques, Christian, The European Commission's settlement procedure in cartel cases, in: The Antitrust Bulletin, Volume 55, No. 4, 2010, p. 820.

⁶⁷ Flavion Laina, Head of Cartel Settlement Unit, European Commission, as referenced by David Vascott, EU cartel settlements: are they working?, in Global Competition Review: News, April 2013.

⁶⁸ Case COMP/E-1/36.490, *Graphite electrodes*.

⁶⁹ David Vascott, EU cartel settlements: are they working? (fn. 67)

undertakings to participate in. Taking part in the settlement procedure does not imply an admission from the undertakings of having conducted an infringement or of being liable for it.⁷⁰ On the other hand, since the media retains strong power on the society because of freedom of speech, potential cartels can always be the media's target. More general publicity on the existence of settlement discussions would go against the presumption of innocence, the principle according to which one is innocent until proven guilty. It shouldn't be forgotten that the settlement discussions take place before the issuance of a statement of objections, which is the moment where preliminary charges are formally laid down for the first time.⁷¹ Thus, undertakings that are willing to participate in settlement procedure are reasonable to pursue more protection based on confidentiality. This is covered by information protection scheme in settlement procedure. In cases where all parties settle, settlement submissions will not be rendered accessible, because no access to the file will be provided once the "settled" statement of objections is issued. In hybrid cases, where not every cartel member settles the case, the parties who do not settle will only get access to

⁷⁰ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 11.

⁷¹ *Flavion Laina*, Head of Cartel Settlement Unit, European Commission, as referenced by *David Vascott*, EU cartel settlements: are they working?, in: *Global Competition Review: News*, April 2013.

other parties' settlement submissions at Commission premises, and they are not allowed to make any mechanical copy thereof.⁷² The information obtained from the settlement submission may solely be used for their defense in procedures where Community competition rules are at issue. Other parties such as complainants will not be granted access to settlement submissions. For instance, when researching on any Commission Decision of cartel settlement cases on the official European Commission online case pool, the research will end up with the mark on the cover sheet of the Decision showing “parts of this text have been edited to ensure that confidential information is not disclosed”⁷³, if the Decision is relevant to confidential issues. Furthermore, the parties to the proceedings and their legal representatives are not allowed to disclose to any third party the content of their discussions with the Commission's services or of the documents which they have had access to. A breach of this rule may constitute an aggravating circumstance to be taken into account in setting the fine.⁷⁴

Generally speaking, the confidentiality factor in settlement procedure can

⁷² Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 35.

⁷³ Access to the European Commission's case pool:
ec.europa.eu/competition/cartels/cases/cases.html.

⁷⁴ The description of confidentiality in settlement procedure can be indicated from the Press Release, European Comm'n, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions (June 30, 2008) (IP/08/1056).

lessen the undertakings' concern of privacy and give them more confidence for participation.

2.1.2. Loss

During the time period 2012-2016, 27 cartel cases were decided by the European Commission, 14 cases among them went through settlement procedure.⁷⁵ As argued in the earlier section, undertakings are paying a high price to achieve a successful settlement, receiving only a 10 per cent of fine reduction. The following aspects illustrate the losses undertakings might need to bear under settlement procedure, which mainly lie in the negative consequence of undertakings' acknowledgement of infringements and the Commission's leading position and ultimate right in settlement procedure.

(1) Negative consequence of undertakings' infringement acknowledgement

After three rounds of settlement discussion, undertakings will be asked to hand in a settlement submission, which contains

“an acknowledgement in clear and unequivocal terms of the parties' liability 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

⁷⁵ The total amount of cases refers to the European Commission official statistic pool, available at: ec.europa.eu/competition/cartels/statistics/statistics.pdf. The total amount of settlement cases are counted through a thorough case review on all the Commission Decisions between 2012 and 2016, the Commission Decisions are available at: ec.europa.eu/competition/cartels/cases/cases.html.

of their participation in the infringement”⁷⁶ (emphasis added).

By such submission, the undertakings confirm that they have been given sufficient opportunity to make their views known to the Commission and will not request access to the file or to be heard again in an oral hearing, unless the following statement of objections did not reflect this submission.

Once the settlement submission is submitted, undertakings cannot unilaterally request to revoke the settlement.⁷⁷ Therefore, it can be deduced, that such detailed and unequivocal infringement acknowledgement in the settlement submission can lead to a nonreversible impairment on its right for oral hearing and right to appeal in the future based on the existence of infringement. Moreover, undertakings can still face additional time-consuming and expensive lawsuits from national governments after the European Commission has resolved their case.⁷⁸ For example, in *Elevators and Escalators* case, the Commission found four elevator manufacturers guilty of cartel participation and levied 992.3 million euros.⁷⁹ Shortly

⁷⁶ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 20(a).

⁷⁷ *Ibid.*, para. 22.

⁷⁸ Kelley, Molly (2010), Settling for Settlement: The European Commission’s New Cartel Settlement Procedure, 9 WASH. U. GLOBAL STUD. L. REV. 699, available at openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1061&context=law_globalstudies (accessed on June 09, 2016).

⁷⁹ Press Release, European Comm’n, Commission fines members of lifts and escalators cartels over €990 million, (February 21, 2007) (IP/07/209).

thereafter, an Austrian Court upheld an 88 million euros judgment against the same companies.⁸⁰ Even though *Elevators and Escalators* was not a settlement case, since a final decision drawn by settlement procedure has the same legal capacity as the ordinary one and there is no regulations prohibiting national authority to investigating in a same cartel, one can regard this case as sounding the alarm for cartelists to take extra consideration.

(2) EU Commission's leading position and ultimate right in settlement procedure

Starting from the beginning of the procedure, the Commission retains a broad margin of discretion to determine settlement candidates.⁸¹ Along the way of settlement discussions period, the Commission preserves the right to discontinue settlement discussions unilaterally when the undertakings are not cooperative, i.e. the undertakings distort or destroy any evidence relevant to the establishment of the infringement or to the calculation of the applicable fine. Such distortion or destruction of evidence may also constitute an aggravating circumstance for the undertakings, and may be regarded as lack

⁸⁰ *Lipman, Melissa* (2008), Austrian Court Upholds €35M in Elevator Cartel Fines, Law 360, available at: www.law360.com/articles/76065/austrian-court-upholds-35m-in-elevator-cartel-fines (accessed on June 09, 2016).

⁸¹ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 5.

of cooperation.⁸² Furthermore, the Commission reserves the authority to adopt a statement of objections that does not reflect the undertakings' settlement submission. In this case, the parties concerned would no longer be bound by their settlement submissions.⁸³ Except these prerogatives the Commission obtains through settlement procedure, additionally, the Commission has the competency to compel an undertaking to provide all necessary information concerning cartel facts as may be known to it and to disclose to it. Such information gathering right was initially established in infringement inspection procedure. If necessary, these documents relating thereto can be obtained in the Commission's possession, even if the documents may be used to establish the existence of anti-competitive conduct against this undertaking or another one.⁸⁴

To sum up, it can be interpreted that EU Commission has a dominant position in settlement procedure. Standing in a weaker position, undertakings' "misfortune" is yet not at an end.

In discontinued settlement, discontinuation may arise as a result of the conduct of the settling parties and in particular, the inability of the parties to

⁸² Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 5.

⁸³ *Ibid.*, para. 27.

⁸⁴ Case 374/87 *Orkem v. Commission* [1989] ECR 3283, para. 34.

arrive at a consensus with the Commission. Nevertheless, the Commission's prerogative to discontinue the settlements procedure as envisioned in the implementing legislation can be used to coax or pressure a settling party towards a consensus, depending on the perspective taken.⁸⁵ A carteliser who defected from the settlement procedure might fear that, if a settlement is not reached the Commission will seek higher sanctions deriving from the dissatisfaction of being forced to fall back to the standard procedure.⁸⁶ Besides, even undertakings enjoy the right to appeal after settlement procedure, as confirmed by the Commission Notice that all final decisions are subject to judicial review in accordance with Article 230 of the Treaty.⁸⁷ Appeals from the settlement procedure can still be seen to risk the retaliation of the Commission.⁸⁸ As echoed by former Competition Commissioner *Joaquín Almunia* who commented with regard to the appeal as follow: "the court has full jurisdiction on fines – either to reduce or increase them."⁸⁹

⁸⁵ *Dunne, Amy*, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement, in: *The King's Student Law Review*, Vol. 6, No. 1, Spring 2015, p. 44.

⁸⁶ T-98/14 Action brought on 14 February 2014 – *Société Générale v. Commission*, C 142/47 OJ 12 May 2014.

⁸⁷ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 41.

⁸⁸ *Dunne, Amy*, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement, in: *The King's Student Law Review*, Vol. 6, No. 1, Spring 2015, p. 50.

⁸⁹ Joaquín Almunia, DG Comp, Speech to SV Kartellrecht, "Fighting against cartels: A priority for the present and for the future", 3rd April 2014; available at:

In *Smart Card Chips* case, the Commission discontinued the settlement, reverted the case to the normal procedure, and adopted a final decision where the Commission imposed fines totaling 138 million euros.⁹⁰ The cartelists involved were accused of collusion in coordinating their market behavior throughout Europe. The Commission explored the possibility of settling the case with some of the companies involved after the infringement investigation started. But in 2012 the Commission decided to put an end to the settlement talks due to the claimed “clear lack of progress in these discussions”⁹¹, where the essence of a cartel settlement – a more efficient procedure, and a common understanding between the Commission and the undertakings concerned on the existence and characteristics of a cartel – could not be achieved. The *Smart Card Chips* case involves four cartelists: Renesas (and joint venture Hitachi and Mitsubishi) (Japan), Samsung (South Korea), Philips (NL), and Infineon (DE). Renesas received full immunity under leniency policy, as it was the first to reveal the existence of the cartel to the Commission, and avoided a fine of more than € 51 million for its participation in the infringement. Samsung received a reduction of 30% of its

europa.eu/rapid/press-release_SPEECH-14-281_en.htm.

⁹⁰ Commission Decision of 3 September 2014 in case AT.39574 *Smart Card Chips*.

⁹¹ Press Release, European Comm’n, Statement by Vice-President Almunia on *Smart Card Chips* cartel (September 3, 2014), available at: europa.eu/rapid/press-release_STATEMENT-14-268_en.htm.

fine for cooperating with the investigation. In the end, Philips and Infineon had to bear nearly 75% percent of the total fine, separately 20.148 million euros and 82.784 million euros. The Commission started the investigation in 2008 with unannounced inspections while the settlement discussions were discontinued in 2012 and the final decision was reached in late 2014. Since the Commission Decision is still confidential up to date (June 10, 2016), we cannot pry deep into a more detailed cause and effect.

Undertakings face different business situations and have varied concerns when measuring the profitability and loss of settlement procedure. Hence, multiple undertakings with different interests might have variety of standpoints, which could be against each other. Settlement in this case seems not be too attractive for the remedied Renesas and Samsung, nevertheless, the prolonged period where settlement was discontinued and reverted back into normal procedure casted a huge loss especially for Philips and Infineon who do not enjoy the prerogative and benefit from leniency program.

2.2. Analysis of settlement procedure from EU Commission's point of view

Since the introduction in 2008, the EU Commission has been positive of settlement procedure. As mentioned earlier, 20 out of 54 cartel cases have been settled from then up to date. Yet it has to be asked what the

Commission is gaining and what is it losing.

2.2.1. *Gains*

(1) Streamlined administrative process

The Commission's scarce resources are clearly occupied for too long with cartel cases, even when leniency policy has unveiled crucial documentary evidence.⁹² Settlement procedure is designed to lead to a shorter and quicker decision rather than happening in a fully contested case.⁹³ By engaging in settlement procedure, both of the undertakings and the Commission try to achieve a common understanding by three rounds of settlement discussions. Through communication, undertakings will be informed of essential elements the Commission has taken into consideration, such as the facts alleged, the gravity and duration of the alleged cartel, the attribution of liability, the evidence used to establish the potential objections, and so on.⁹⁴ However, the Commission insists that settlement procedure is not about bargaining. One of the arguments it contends lies in the fact, that the infringement inspection was conducted before the settlement starts. Despite the Commission's attitude, that the inspection was fully conducted ahead,

⁹² *Ascione, Aurora/Motta, Massimo*, Settlements in Cartel Cases, Barcelona Graduate School of Economics, online publication, p. 1-2, available at: www.barcelonagse.eu/tmp/pdf/motta_settlementscartels.pdf.

⁹³ *Whish, Richard/Bailey David*, Competition Law, 8th ed., Oxford 2015, p. 445.

⁹⁴ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 16.

one may ask if the evidence the Commission gathered was 100 per cent sufficient, in other words, if the case the Commission has is strong enough. Why should the Commission settle the case on the loss of 10 per cent of cartel fine?

Taking a look into settlement procedure, settlement submission will explicitly set the scope of infringements, all main cartel facts admitted by undertakings. Once the Commission receives such submission, it can thus avoid further more thorough inspections and reach to a statement of objections. A clear alleviation of burden of proof for the Commission can be seen as a result. It is also saving essential period of time in administrative process. Contrarily, if insisting the ordinary competition law enforcement procedure, once the Commission issued a statement of objections, the parties remain the right to a hearing.⁹⁵ The hearing officer is not involved in the preparation of the case but has the task of ensuring “that the hearing is properly conducted and contributes to the objectivity of the hearing itself and of any decision taken subsequently”⁹⁶. This Commission official is independent of DG Comp and reports directly to the Commissioner for

⁹⁵ Article 27(1), Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), Official Journal L1/1, 4 January 2003.

⁹⁶ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (Text with EEA relevance), Official Journal L275/29, 20 October 2011.

competition.⁹⁷ In settlement procedure, once the statement of objections has reflected the settlement submissions submitted by the undertakings, no oral hearing or access to the file may be requested by the parties.⁹⁸ This is another reason for a short administrative procedure in cartel settlement.

In general, settlement procedure serves the purpose of reducing the Commission's workload and shortens the administrative process. Proven by practice, in the *Automotive Wire Harness* case, where all parties expressed their interest to settle, the duration of the settlement discussions took less than a year, counting from the initiation of the proceedings until the adoption of the decision.⁹⁹ In a similar way, a streamlined administrative procedure creates extra space for the Commission to have a more flexible use of personnel, where more staff can be appointed to additional cartel cases, thus creating a benign circle for the Commission to better deter cartel infringements focused on the European market.

Due to the benefits from a shorter and quicker administrative process, settlement procedure may allow the Commission to handle more cases with the same resources since the resources freed through settlements can be

⁹⁷ *Chalmers, Damian/Davies, Gareth/Monti, Giorgio*, European Union Law, 3rd ed., Cambridge 2014, p. 964.

⁹⁸ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 28.

⁹⁹ Commission Decision of 10 July 2013, C (2013) 4222 final, case AT.39748.

allocated to the prosecution of more cases and in a more effective way.¹⁰⁰

Such benefits can foster the public interest in the Commission's delivery of effective and timely punishment, and thereby increase overall deterrence.¹⁰¹

(2) Less appeal in court

While the undertakings have the right to appeal a settlement decision before the European Courts, significant procedural efficiency in settlement procedure is actually achieved by the low probability of subsequent litigation.¹⁰² The review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union were afforded by Article 17 of Regulation No 17 and which is now recognized by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU.¹⁰³ Regarding the legality review, the Courts of European Union are not refrained from reviewing the Commission's interpretation of information of an economic nature. Those Courts must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to

¹⁰⁰ Easterbrook, F., *Criminal Procedure as a Market System*, *Journal of Legal Studies*, Vol. 12, 1983, p. 289-332.

¹⁰¹ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 1.

¹⁰² Laina, Flavio/Bogdanov, Aleko, Survey: The EU Cartel Settlement Procedure: Latest Developments, in: *Journal of European Competition Law and Practice*, Vol. 5, No. 10, Oxford 2014, p. 719.

¹⁰³ Case C-272/09P, *KME v. Commission*, Judgment of 8 December 2011, para. 103.

assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.¹⁰⁴ Along with it, if the parties appeal to any competent court, the procedure can be extremely long and costly for both of the Commission and the cartelists. As mentioned above, settlement involves substantial concessions on the part of the cartel list, most notably “an acknowledgement in clear and unequivocal terms” of its liability for the infringement,¹⁰⁵ therefore effectively contributing to an abandonment of any appeal rights, based on the legality review of the existence of cartel infringements.¹⁰⁶ In other words, even if parties to a settlement do not give up their formal rights of appeal to the EU courts, it remains unlikely that a settlement participant would in practice be in a position to credibly appeal in a decision to which they have consented through the settlement procedure.¹⁰⁷ It again remains questionable, why an undertaking would appeal a Commission settlement decision when it has voluntarily and unequivocally acknowledged its liability for the infringement and the other elements contained in the settlement submission and confirmed in its reply to the

¹⁰⁴ *Ibid.*, para. 94.

¹⁰⁵ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 20(a).

¹⁰⁶ *Olsen, Greg/Jephcott, Mark*, Sharing the Benefits of Procedural Economy: the European Commission’s Settlement Procedure, International Developments, in: *Antitrust*, Vol. 25, No. 1, 2010, p. 76.

¹⁰⁷ *Ibid.*, p. 78.

statement of objections that the latter reflected its settlement submission.¹⁰⁸

Nevertheless, the EU Courts must review decisions by carrying out an “in-depth review” of the law and of the facts.¹⁰⁹ Where the Commission is guilty of factual errors the General Court will reduce the level of fines; it will also do so, for example, where it considers that one member of a cartel has been treated unequally compared with others in the same cartel.¹¹⁰ The Commission’s experience shows that litigation mainly relates to circumstances having a bearing on the amount of the fine and liability of parent companies for actions undertaken by their subsidiaries.¹¹¹ So far, only one case appealed for discounting fines¹¹² appeared after the undertaking opt-out of settlement, the *Animal Feed Phosphate* case. And only one appeal has been lodged with the General Court in the *Euro Interest Rate Derivatives* case,¹¹³ where the appeal is limited to the determination of the value of sales and does not concern the scope of the infringement or the liability for the

¹⁰⁸ *Laina, Flavio/Bogdanov, Aleko*, Survey: The EU Cartel Settlement Procedure: Latest Developments, in: *Journal of European Competition Law and Practice*, Vol. 5, No. 10, Oxford 2014, p. 721.

¹⁰⁹ Case C-501/11 P *Schindler Holding v Commission* EU:C:2013:522, para 37 (*Elevators and escalators*).

¹¹⁰ *Whish, Richard/Bailey David*, *Competition Law*, 8th ed., Oxford 2015, p. 555.

¹¹¹ Press Release, European Comm’n, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions (30 June 2008) (IP/08/1056).

¹¹² Case T-456/10: Action brought before the General Court on 1 October 2010 – *Timba Industries and CFPR v. Commission*, OJ C 346 from 18 December 2010, p. 46.

¹¹³ Case T-98/14: Action brought on 14 February 2014 – *Société Générale v. Commission*, OJ C 142, 12 May 2014, p. 36-37.

infringement.¹¹⁴

To sum up, the settlement procedure significantly reduced the possibility of subsequent litigation concerning the infringement itself. Even there is appeal to the courts, it will highly likely be focused solely on scope of fines or on the basis of violation of fundamental principles of law, e.g.: the principles of non-discrimination and equal treatment. Even if the settlement procedure significantly limit the scope of appeals, one should still bear in mind, that it does not end the appeal predisposition of undertakings, which would be eager to see their fine further reduced irrespective of any fine reductions.¹¹⁵

Whilst vexatious litigants may always seek additional reductions, the Commission should not deter appeals in order to salvage efficiency gains.¹¹⁶

Granted that settlement procedure is a potent drug to reduce the Commission's workload, it is still not a one-cut end of the story. Thus, the Commission is obliged to deal the settlement procedure carefully enough in order to prevent to the maximum extent the possibility of such scenarios.

2.2.2. *Loss*

Settlement procedure is not applied by the Commission to all cartel cases.

¹¹⁴ *Laina, Flavio/Bogdanov, Aleko*, Survey: The EU Cartel Settlement Procedure: Latest Developments, in: *Journal of European Competition Law and Practice*, Vol. 5, No. 10, Oxford 2014, p. 719.

¹¹⁵ *Scordamaglia, Andreas*, The new Commission settlement procedure for cartels: A critical assessment, in: *Global Antitrust Review* 2009, Issue 2, p. 66.

¹¹⁶ *Ibid.*, p. 65.

This section will interpret the few elements restraining the Commission to engage in cartel settlement.

(1) Hybrid case scenarios might impair settlement efficiency

An appraisal of the efficiency yields of the cartel settlement procedure is closely connected to the increasing frequency of hybrid settlement scenarios.¹¹⁷ A hybrid case refers to the situation whereby one or more of the settling parties opt out of the settlement procedure and the Commission may settle with the remaining parties and follow the “normal” procedure for the parties that opt out.¹¹⁸ Settlement procedure will achieve the maximum efficiency in the event that all cartel members will uniformly agree to admit liability in exchange for a ten percent reduction in fines.¹¹⁹ If the DG Comp were to allow settlement for only selected cartel members, it would nevertheless need to spend resources to fully litigate against the remaining undertakings.¹²⁰

While the Commission tries to avoid hybrid cases at the exploratory stage,

¹¹⁷ *Dunne, Amy*, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement, in: *The King's Student Law Review*, Vol. 6, No. 1, Spring 2015, p. 38.

¹¹⁸ See the EU Commission's official website, DG Comp, Cartel Cases Settlement, available at:

ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html.

¹¹⁹ Article 3, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), Official Journal L1/1, 4 January 2003.

¹²⁰ Press Release, European Commission, Antitrust: Commission Adopts First Cartel Settlement Decision-Questions & Answers (May 19, 2010) (IP/10/201).

the Commission may not predict a shift through pre-settlement screening in the perspective of the parties who may evaluate their participation and interests in a settlement differently through the whole duration of the procedure.¹²¹ As a result of a hybridized procedure, the Commission has to undertake both the settlement procedure and the ordinary procedure in respect of a single cartel infringement.¹²² Therefor pushing settlement into a position losing its “raison d’être if it cannot bring procedural efficiencies.”¹²³ It can also be argued, that if a settlement has been properly completed prior to entering into settlement, the Commission is able to switch quickly to normal procedure if settlement fails.¹²⁴ However, the time, personnel and resources put into the settlement procedure cannot be retreated, at any rate, switching to normal procedure will undoubtedly throw extra burden to the Commission.

(2) Less amount of fine received

The 10 per cent of fine reduction granted to the undertakings will on the other hand be a 10 per cent of fine lost by the Commission. As regard to the

¹²¹ *Dunne, Amy*, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement (fn. 117), p. 42.

¹²² *Dunne, Amy*, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement, in: *The King’s Student Law Review*, Vol. 6, No. 1, Spring 2015, p. 39.

¹²³ *Laina, Flavio/Laurinen, Elina*, The EU Cartel Settlement Procedure: Current Status and Challenges, in: *Journal of European Competition Law and Practice*, 5th ed., Oxford 2013, p. 8.

¹²⁴ *Ibid.*, p. 2.

severity of infringement of cartel itself, the amount of fine collected by the Commission will normally not be low. However, any fine the Commission levied won't directly be attributed to the department of competition in the Commission, but rather will be contributed to the EU budget. In this sense, the less amount of fine able to be received by the Commission cannot be regarded as a real loss.

3. What are the incentives behind settlement procedure for both of undertakings and the EU Commission?

Combined with the analysis in the whole previous section, it is not hard to see an outcome comparison between the undertakings and the Commission whereby both parties enjoy a streamlined administrative process. The undertakings gain 10 per cent of fine reduction on the cost of essential appeal right and stays in a weaker position in the whole settlement procedure; the Commission gains more flexible use of staff and less burden of work while remaining leading position in the whole journey, on the cost of potential efficiency detriment and a not virtually hurt from less gain in the cartel fine collection. Settlement procedure is a “negotiation” game between the Commission and cartelists. While this game does not seem equal, it leads to consider, what the incentives behind settlement procedure for both of undertakings and the EU Commission are. When analyzing the

Commission's gain and loss in cartel settlement, it is clear enough that the benefit outweighs the disadvantages. Even for the negative part of potential less efficiency in hybrid settlement cases, where the Commission has to revert to the ordinary procedure for parts of the parties involved. Regarding that it was the Commission's duty to conduct ordinary procedure in any case at the first place, it can be concluded, that it is not a real detriment. Nevertheless, losing an extra bonus does not hurt the essence.

In order to construe the incentives of the undertakings, there are two scenarios need to discuss: (1) the undertakings who applied leniency ahead, and (2) the ones who are not. For those who has already applied leniency policy, acknowledgement of infringement was already conducted, which can clear a huge part of potential settlement candidates' concern. Participating in settlement procedure will only bring them an accelerated process of Commission Decision issuance and further benefit of fine reduction if they do not enjoy full immunity. The rest of cart settlement applicants who did not apply for leniency or failed to apply, will face direct cartel charges in litigation, if not participating in settlement procedure, where the outcome is hard to predict and can not be control. Settlement procedure can be regarded as a last chance they have to get to know the Commission's standing and

decrease the scope of fine loss they might suffer. Especially, settlement discussions lay a solid foundation for the undertakings to acquire knowledge in the scope of infringement and potential fine.

IV. Critical analysis towards settlement procedure

Settlement procedure as a newly introduced instrument in EU competition law enforcement is not perfect. To analysis the possible defects, three problems will be answered: (1) whether settlement procedure corresponds to the legality of EU law of enforcement, (2) whether the scope of infringement charged upon a same undertaking in cartel settlement and in ordinary procedure will be identical, and (3) whether settlement procedure leaves a whole for undertakings to act in bad faith in order to gather essential information in discontinued settlement scenarios.

1. Legality of law of enforcement

Cartels are described as “cancers on the open market economy”¹²⁵. The trend today among the world’s competition authorities, is the determination to root out and bring hard-core cartels to an end.¹²⁶ Despite the effort put to deter cartels, settlement procedure shall not be over exploited by the Commission

¹²⁵ See speech by Mario Monti, the former Commissioner for Competition, “Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behavior”, 11 September 2000, available at: europa.eu/rapid/press-release_SPEECH-00-295_en.htm.

¹²⁶ *Whish, Richard/Bailey David*, Competition Law, 8th ed., Oxford 2015, p. 547.

as way of a cutoff to clear their table. Settlement procedure, as an instrument initiated by the Commission, shall not be taken as granted, and it is necessary to discuss whether it corresponds to the legality of law of enforcement.

Tracing to the source, the EU Commission's powers in competition law and policy were originally set out in Regulation 17/62, which came into force in 1962; and have been expanded by Regulation 1/2003, which came into force on 1 May 2004.¹²⁷ The confirmation of the Commission's powers is a boost in its fight against cartels because these powers allow the Commission to design a fining policy that it considers necessary to deter undertakings to create cartels.¹²⁸ There is a long-standing debate about whether the institutional set-up, by which the Commission investigates, prosecutes and reaches a decision, is compatible with fundamental rights.¹²⁹ The interplay between the fundamental rights of legal persons and competition enforcement remains a balancing exercise: at stake is the protection of

¹²⁷ Regulation 17/62/EC, First Regulation implementing Articles 81 and 82 [1959] OJ Special edn 062, 57; Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 [2003] OJ L1/1.

¹²⁸ *Chalmers, Damian/Davies, Gareth/Monti, Giorgio*, European Union Law, 3rd ed., Cambridge 2014, p. 969.

¹²⁹ See *F. Montag*, The Case for Radical Reform of the Infringement Procedure under Regulation 17' (1998) *ECLR* 428; *Ehlermann, Claus-Dieter/Marquis, Mel*, European Competition Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases, Oxford 2011.

fundamental rights versus effective enforcement of Community competition law.¹³⁰ Settlement procedure was set in a clear position to protect settling parties' fundamental rights starting from its initiation. On the one hand, the Commission's conduct should ensure that the undertakings concerned are afforded the opportunity to effectively make their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission throughout the administrative procedure to be known.¹³¹ On the other hand, the engaging undertakings' rights of calling for oral hearings and requesting files are protected before they hand in settlement submission. Moreover, undertakings' right to defense is secured throughout the whole settlement procedure. Besides, before reaching the final decision, the Commission has the obligation to consult with the Advisory Committee on Restrictive Practices and Dominant Positions.¹³² This third party consultation scheme guarantees the legitimacy and validity of the Commission's conduct to a great extent.

However, criticisms on settlement procedure still emerged. Some criticize that the Commission's selective choice of settlement candidate might cause

¹³⁰ Case C-301/04P *Commission v. SGL Carbon* [2006] ECR I-5915, Opinion of Advocate General Geelhoed, para. 67.

¹³¹ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 4.

¹³² *Ibid.*, para. 28.

discrimination or unfair treatment on the rest of undertakings that applied for settlement but failed. The economic rights of all the undertakings are equally important and worth protecting as the rights of consumers or other market participants.¹³³ Undertakings shall be treated equally by the Commission. Settlement procedure makes the Commission competent to selectively choose certain cartelists to participate in settlement procedure. Consequently, these chosen undertakings will enjoy a 10 per cent of fine reduction, while others cannot. Such selective choices can be detrimental and discriminatory to the rest.

Moreover, the confidentiality feather in settlement procedure is also challenged. Most of competition cases are closed without a formal decision. During 2000 to 2003, the proportionality of cases closed without formal decision out of all competition cases was over 90 per cent.¹³⁴ For undertakings, informality has the obvious advantage, that fines and publicity of an investigation, which may give rise to claims of damages, are

¹³³ Sage, Ewelina D., Increasing Use of “Negotiated” Instruments of European Competition Law Enforcement towards Foreign Companies, in: Yearbook of Antitrust and Regulatory Studies, Vol. 2014, 7 (10), p. 242-243.

¹³⁴ In 2000 there were 38 formal decisions and 362 settlements; in 2001, 54 decisions and 324 settlements; in 2002, 33 decisions and 363 settlements; and in 2003, 24 decisions and 295 settlements (*Twenty-third Report on Competition Policy* (2003) 62). For a review of the settlement practice under Regulation 17/62 see I. van Bael, The Antitrust Settlement Practice of the EC Commission (1986) 23 *CMLRev.* 61.

avoided.¹³⁵ The disadvantages however are over-enforcement, on the one hand, e.g. without a full hearing the Commission may abuse its powers by accusing parties of a non-existent infringement; or under-enforcement on the other, such as informal closures avoid the imposition of fines which are privately communicated between parties and Commission. For instance, during settlement submissions the Commission has to inform undertakings of the likely scope of fine they might raise, undertakings can decide whether they acknowledge or opt out of settlement.¹³⁶

Nevertheless, criticisms on the Commission's selective choice of settlement candidates can be refuted by an important principle in EU law of enforcement, the discretion principle. In Cambridge Dictionary, "discretion" is defined as the right or ability to decide something. The Commission should be free to start proceedings at its convenience, in keeping with its role as the guardian of the Treaties.¹³⁷ Article 7 of Regulation 1/2003 emphasized the Commission's right to deter a competition infringement to an end, and the Commission Notice¹³⁸ explicitly expressed the Commission's

¹³⁵ *Chalmers, Damian/Davies, Gareth/Monti, Giorgio*, European Union Law, 3rd ed., Cambridge 2014, p. 971.

¹³⁶ For a discussion of these concerns, see *G. Bruzzone* and *G. Boccaccio*, Taking Care of Modernization After the Startup: A View from a Member State (2008) 31 *World Competition* 89.

¹³⁷ *Borissova, Lora*, Enforcement Actions under EU Law, page 11, available at: www.eipa.eu/files/repository/product/20070813130142_EA_07_w_01e.pdf.

¹³⁸ Commission Notice on the conduct of settlement procedures in view of the adoption of

discretion in choosing settlement candidates. The Commission has no obligation to reach a decision on every complaint or confession it receives, i.e. it may prioritize cases on the basis of whether there is a Union-wide interest.¹³⁹ Such as when the parties commit important violations, when the case gives rise to novel points of law, or when the practices in question have a significant effect on market integration.¹⁴⁰ Besides, it shall not be forgotten that settlement procedure is not about offering special treatment to certain cartelists, but about how the Commission can expedite the administrative process. The Commission conducts infringement inspections long before settlement procedure starts, i.e. sufficient evidence against cartelists was established before settlement. Ideally, neither the settled party nor the non-engaged party will be influenced by substantial scope of infringement the Commission intends to charge. The Commission only chose those cartel cases that are suitable to settle. In this sense, the settlement candidates have to meet criteria settings to be able to fit in settlement scheme. The unchosen undertakings cannot criticize the selective choice discretion the Commission has if they did not meet the standards at the first place. Meanwhile, the

Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008

¹³⁹ Case T-24/90 *Automec Srl v. Commission (Automec II)* [1992] ECR II-2223; but reasons must be given, see T-427/08 *CEAHR v. Commission* [2010] ECR II-5865.

¹⁴⁰ Commission Notice on cooperation within the Network of Competition Authorities (Text with EEA relevance), Official Journal C101/43, 27 April 2004, paras. 14, 15 and 54.

Commission retains a broad margin of discretion to determine the appropriateness and pace of the settlement¹⁴¹ with the ultimate right to discontinue when it finds no common understanding could be reached. Therefore, an entrance ticket to the settlement procedure does not guarantee the chosen undertakings an absolute qualification in settlement if they do not cooperate. Last but not least, the law does not prevent any cartelists to apply for settlement procedure by its own initiative. It is up to the Commission to ultimately decide which one to choose. Besides, settlement procedure is regarded as an option but not obligation, even the Commission might invite some cartelists for participation, these cartelists remain the right to refuse or quit settlement when it considers necessary, even though the Commission is in a leading position (see Chapter III, Section 2.1.2 (2)).

In conclusion, settlement procedure does not induce potential discrimination or unfair treatment, neither to settled cartelists, nor to the non-engaged ones.

To answer the question whether settlement procedure contains defects in its confidentiality feather, it is necessary to understand the notion of settlement.

Settlement is an act of adjusting or determining the dealings or disputes between legal persons without pursuing the matter through a trial. Including

¹⁴¹ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 15.

a confidentiality provision in settlement is generally not only good practice for both sides, but also a virtual necessity for undertakings.¹⁴² The undertakings can avoid extra publicity of the case and thus reduce detriments on its public image. By avoiding a court hearing, both of the undertakings and the Commission communicate the case privately, through which a consensus is to be achieved. Before a final settlement submission is introduced, all the settlement discussions cannot be regarded as binding. If there is no confidentiality protection, any party's interest can be easily impaired; consequently there will not be a success in any cartel settlement. This also secures the efficiency of the Commission to enforce competition law with settlement procedure instrument.

The purpose of settlement procedure is to achieve a consensus between the undertakings and the Commission. The undertakings need confidentiality protection to avoid publicity. Additionally secured by the third party consultation scheme in settlement procedure, the Commission cannot force its authority on cartelists since it is subjected to consultation of Advisory Committee on Restrictive Practices and Dominant Positions before taking any decision.¹⁴³

¹⁴² *Stevens, Gregg/Subar, Lorin, Confidentiality in Settlement Agreements is a Virtual Necessity*, GPSOLO, Vol. 29, No. 6, 2012, p. 1.

¹⁴³ Article 14, Council Regulation (EC) No 1/2003 of 16 December 2002 on the

Hence, the confidentiality factor in settlement procedure is not only necessary, but also safeguarded by Advisory Committee's consultation in order to ensure the fairness and protection towards undertakings as well as validity and legitimacy of the whole process.

To sum up, it is reasonable to deduce that settlement procedure corresponds to the legality of law of enforcement.

2. Scope of infringement in cartel settlement and in ordinary procedure

Settlement procedure is different from the Game theory, which originally addressed zero-sum games –one person's gains result in losses for the other participants. However, similar to the Game theory, regarded as “the study of mathematical models of conflict and cooperation between intelligent rational decision-makers”¹⁴⁴, the essence of settlement procedure is a game between the Commission and cartelists to achieve the best outcome serving their varied purpose based on the behavior of each other. Even though the Commission has conducted sufficient inspections to prosecute the cartelists, the Commission cannot guarantee a certain victory. Three rounds of settlement discussions leave enough space for the Commission and

implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), Official Journal L1/1, 4 January 2003.

¹⁴⁴ Myerson, Roger B., *Game Theory: Analysis of Conflict*, Harvard University Press, 1991, p. 1.

undertakings to communicate on the alleged facts and an estimation of the range of likely fines of the case. This is where both parties play a game on convincing each other and where the uncertainty arises.

If there are certain “negotiation” and gaming elements in settlement procedure, then it could leave a loophole worth to be discussed –whether the scope of infringement charged upon a same undertaking in cartel settlement and in ordinary procedure will be identical.

To answer this question, it is necessary to first horizontally compare whether cartelists in a hybrid case are treated equally, then probe into how the Commission calculates cartel fines upon settled parties and the parties following ordinary procedure in a same cartel case, which leads to the discussion of whether the scope of infringement charged upon a same undertaking in cartel settlement and in ordinary procedure will be identical.

2.1. Hybrid cartel settlement

2.1.1. Definition of hybrid cases

Hybrid cases are cases in which a settlement was reached with most but not all involved parties and the non-settling parties are prosecuted under the normal procedure,¹⁴⁵ such as the *Steel Abrasives*, *Euro Interest Rate*

¹⁴⁵ *Laina, Flavio/Bogdanov, Aleko*, Survey: The EU Cartel Settlement Procedure: Latest Developments, in: *Journal of European Competition Law and Practice*, Vol. 5, No. 10, Oxford 2014, p. 718.

Derivatives, and *Canned Mushrooms* case. In the *Euro Interest Rate Derivatives* case, three parties did not wish to settle, and the Commission was able to revert to the normal procedure by sending them a statement of objections without receiving their settlement submission.¹⁴⁶

It is acknowledged that the prospect of a hybrid case developing will remain as long as cartel settlement remains a voluntary procedure.¹⁴⁷ To better understand this, it is necessary to take a deeper look at the cause of hybrid cases.

According to the Commission Notice¹⁴⁸ and the Commission Regulation¹⁴⁹, hybrid case scenario is explicitly caused by the following three circumstances: (1) conduct of the parties to the settlement procedure prompts the Commission to discontinue the settlement discussions and revert to the normal procedure (e.g. the parties distort or destroy any evidence relevant to the establishment of the infringement or any part thereof or to the calculation

¹⁴⁶ See Press Release, European Comm'n, Antitrust: Commission sends Statement of Objections to Crédit Agricole, HSBC and JPMorgan for suspected participation in euro interest rate derivatives cartel (20 May 2014) (IP/14/572).

¹⁴⁷ *Dunne, Amy*, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement, in: *The King's Student Law Review*, Vol. 6, No. 1, Spring 2015, p. 56.

¹⁴⁸ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008.

¹⁴⁹ Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (Text with EEA relevance), Official Journal L171/3, 1 July 2008.

of the application fine);¹⁵⁰ (2) when the statement of objections issued by the Commission does not reflect the parties' settlement submissions and no consensus is reached, the parties can revert to the ordinary procedure, in other words, when the Commission adopts a statement of objections that does not reflect a participant's settlement submission, the Commission is then required to comply with the "applicable general rules of procedure"¹⁵¹; and (3) the Commission retains the right to adopt a final position that depart from its preliminary position as expressed in the statement of objections endorsing the parties' settlement submissions.¹⁵² Any undertaking participating in settlement procedure has the essential right to opt out,¹⁵³ which constitutes an unstipulated fourth means of the cause of hybrid cases.

2.1.2. Commission's treatment towards settled parties and

non-engaging parties

In hybrid scenarios, the Commission will have a dual-track system: settlement procedure with the settling parties and ordinary procedure with the non-engaging parties.

As mentioned above, the Commission's purpose of settlement procedure is

¹⁵⁰ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 5.

¹⁵¹ Commission Regulation (EC) No 662/2008 (fn. 149), at Article 1(7).

¹⁵² Commission Notice (fn. 150), para. 29.

¹⁵³ *Ibid.*, para. 16.

not to gather evidence, but to accelerate administrative process. The settlement procedure simply provides incentives and organizes the procedural steps to promote similar procedural choices by the parties to the same proceedings in order to obtain procedural efficiencies.¹⁵⁴ This means, that the Commission's treatment towards settled parties will focus on how to bring the case to an end, by settlement among a group of parties and thus avoiding huge trials before the courts. The substantive issues about facts on infringement, attribution of liability, estimation of fines and so on will not be bargained through settlement procedure. The rights to have access to the file or to request an oral hearing are exercised upon parties' request in both procedures. The difference is, that oral hearing cannot be granted after undertakings' settlement submission, which cannot be revoked unilaterally once submitted by the undertakings in settlement procedure.¹⁵⁵ Full access to file remains available after issuance the statement of objections for those who do not settle.

Undertakings' rights of defense under the settlement procedure remain the same as in the ordinary procedure. They are exercised in the framework of

¹⁵⁴ Press Release, European Comm'n, Antitrust: Commission adopts first cartel settlement decision – questions & answers, available at: europa.eu/rapid/press-release_MEMO-10-201_en.htm?locale=en.

¹⁵⁵ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 22.

bilateral discussions both orally and by means of a submission, in anticipation of the formal notification of objections.¹⁵⁶ All settlement decisions are available for appeal. On this condition, right of defense is protected in both procedures. Besides, similar to settlement procedure where undertakings acknowledge their infringements, a party can choose self-incrimination as a line of defense in view of possible rewards also in the framework of the ordinary procedure. By introducing a settlement phase, the Commission increases undertakings' options to be informed earlier of potential objections and of the evidence supporting them. In addition, undertakings would be informed of the likely range of fines prior to the adoption of the final decision. On the basis of these facts and documents, the parties have the opportunity to express their views to the Commission.¹⁵⁷ This enables undertakings to influence the contents of the statement of objections and, thereby, of the decision itself. While in ordinary procedure, the parties will have to confront with the issued statement of objections without better knowledge ahead. To this extent, the settled parties gain the benefit of an earlier notice by the Commission on essential elements of the

¹⁵⁶ Press Release, European Comm'n, Antitrust: Commission adopts first cartel settlement decision – questions & answers, available at: europa.eu/rapid/press-release_MEMO-10-201_en.htm?locale=en.

¹⁵⁷ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, para. 16.

infringement, by which they can design their defense plan. Contrarily, non-engaging parties will have to go through ordinary procedure in front of the courts. In addition to the 10 per cent settlement discount and a shorter procedure, it is important to note that the settled or streamlined decision does not contain a full assessment of the facts as it would be for a contested ordinary case; this reduces the amount of publicly available information that could be used by potential damage claimants.¹⁵⁸

Both procedures have their own unique features and are relatively independent from each other. Both procedures protect undertakings' access to files, right to be heard and right to defense themselves. There is no logical link to come to a conclusion that the Commission is treating settled parties and non-engaging parties unequally only because they are different procedures.

2.2. Calculation of fine in cartel cases

The scope of fine reduction in settlement procedure is 10 per cent, awarding to all parties involved. Instead of leaving the discretion and the choice of the maximum fine to the undertaking, the Commission and the undertaking

¹⁵⁸ *Flavion Laina*, Head of Cartel Settlement Unit, European Commission, as referenced by *David Vascott*, EU cartel settlements: are they working?, in *Global Competition Review: News*, April 2013.

should agree on a given fine before the settlement submission.¹⁵⁹ To answer the question how to calculate cartel fines, following aspects need to be concerned: the scope of the fine itself and the method used in calculation.

According to Article 23, Regulation 1/2003, the total fine the Commission imposes shall not exceed 10 per cent of the sum of the total turnover of each member active on the market affected by the infringement of the association.

The gravity and to the duration of the infringement will also be considered.

Calculation of cartel fine is complicated; it needs considerations of various aspects. When weighting the sum of the total turnover, the commission considers the “value of sales”, the amount of money that would be received if something is sold, as a substantial part in the fine calculation in a settlement procedure.¹⁶⁰ On the other hand, other relevant issues might not be suitable for settlement discussions, such as whether “indirect sales” – sales outside of Europe which would allegedly have an indirect effect on European customers – but they shall be included in the affected turnover.¹⁶¹

Besides, the Commission may also modify or retract some original

¹⁵⁹ *Ascione, Aurora/Motta, Massimo*, Settlements in Cartel Cases, Barcelona Graduate School of Economics, online publication, p. 6, available at: www.barcelonagse.eu/tmp/pdf/motta_settlementscartels.pdf.

¹⁶⁰ For example, in *EIRD* case, value of sales was an essential topic of debate between the Commission and undertakings.

¹⁶¹ *Flavio Laina*, Head of Cartel Settlement Unit, European Commission, as referenced by *David Vascott*, EU cartel settlements: are they working?, in *Global Competition Review: News*, April 2013.

objections owing to the parties' submissions. Consequently this may impact the range of potential fines.¹⁶² Among the first six cartel settlement cases, in two settlement decisions, the Commission has accepted there was a period of limited cartel activity, for which no fine was imposed. That is a typical settlement tool that might be used to facilitate a consensus in a settlement context while in a normal process the Commission might stick to its guns.¹⁶³

An individual cartelists' settlement outcome may be impacted by the bargaining asymmetries of the other settling parties and the Commission.¹⁶⁴

For instance, for reasons of "corporate pragmatism"¹⁶⁵, undertakings might agree to settle at a disproportionately high price, in order to bring a premature end to risky litigation, and reap the advantages of early settlements.

In the in the *Euro Interest Rate Derivatives* case,¹⁶⁶ *Société Générale* became the first settling party to appeal a Commission settling decision alleging an error in the assessment of its fine.¹⁶⁷ Specifically, *Société*

¹⁶² Mehta, Kirtikumar/Centalla, Maria Luisa Tierno, Settlement Procedure in EU Cartel Cases, in: Competition Law International, 2008, p. 13.

¹⁶³ David Vascott, EU cartel settlements: are they working? (fn. 161).

¹⁶⁴ Dunne, Amy, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement, in: The King's Student Law Review, Vol. 6, No. 1, Spring 2015, p. 48.

¹⁶⁵ Scordamaglia, Andreas, The new Commission settlement procedure for cartels: A critical assessment, in: Global Antitrust Review 2009, Issue 2, p. 72.

¹⁶⁶ Case AT.39914, *Euro Interest Rate Derivatives*.

¹⁶⁷ Case T-98/14, *Société Générale v Commission*, action brought on 14 February 2014.

Générale argued, inter alia, that the Commission made a manifest error of assessment in determining the value of sales to which the infringement directly or indirectly relates. In the Commission methodology for the calculation of fines, the value of sales serves as a basis for determining the final amount of the fine. Such appeal occurred despite the fact that *Société Générale* claimed in its settlement submission an indication of the maximum amount of the fine it would accept in the framework of the settlement procedure.

To sum up, cartel fine is calculated on the base of the sum of the total turnover affected by the infringement of the undertaking. The calculation of fine is complicated and can leave space for the Commission to adjust to for a successful cartel settlement.

2.3. Scope of infringement in cartel settlement and in ordinary procedure

The commission bears the burden to prove the alleging competition law infringements,¹⁶⁸ despite of whether it is an ordinary procedure case or a settlement case. To determine the scope of infringement in cartel cases, sufficient inspections need to be carried through.

In the anti-cartel field, the practical ability of the Commission to enforce the

¹⁶⁸ Berry, *Elspeth/Homewood, Matthew J./Bogusz, Barbara*, Complete EU Law: Text, Cases, and Materials, 2nd ed., Oxford 2015, p. 581.

EC Treaty's rules on restrictive business practices (Article 81) hinges on the extent and probative value of the evidence gathered during the investigation.¹⁶⁹ Article 20 of Regulation 1/2003 empowers the Commission to conduct all necessary inspections of undertakings and associations of undertakings, whilst the officials and other accompanying persons authorized by the Commission shall inspect on varieties of activities, written documents and even persons related to the subject matter.

Cartel investigations in general, i.e. including ordinary procedure and settlement procedure, are comparatively more frequent and often entail a heavier procedure in view of the multiplicity of parties and languages involved and the jurisdictional issues they raise (e.g. discovery).¹⁷⁰ During investigation period, the Commission may make use of its authority to expedite inspection process by asking cooperation from undertakings. Regulation 1/2003, Article 18(1) empowers the Commission to require undertakings to hand over information, but only to the extent related to the infringement.¹⁷¹ The information normally consists of documents setting out

¹⁶⁹ Press Release, European Comm'n, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions (30 June 2008) (IP/08/1056).

¹⁷⁰ Press Release, European Comm'n, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions (June 30, 2008) (IP/08/1056).

¹⁷¹ Case C-36/92 P *SEP v. Commission* [1994] ECR I-1911, para. 21.

how the undertaking has acted.¹⁷² The Commission had also relied on statements made to it by the parties,¹⁷³ thanks to Article 19(1) of Regulation 1/2003, which empowers the Commission to interview any person who consents to be interviewed, but there are no penalties if the information provided is incorrect or misleading.¹⁷⁴

Despite these legislations promote the Commission's efficiency to gather information, the Commission cannot escape from its burden to prove, if such duty is incumbent upon the Commission. The Commission may not compel the undertaking to provide more essential information even the undertakings' answers might involve an admission on its part of the existence of an infringement.¹⁷⁵ On the fact of the case in *Orkem v. Commission*, the Court of Justice held that some of the information sought by the Commission infringed the applicant's rights.¹⁷⁶ For example:

“[b]y requiring disclosure of the ‘details of any system or method which made it possible to attribute sales targets or quotas to the participants’ and details of ‘any method facilitating annual monitoring of compliance with any system of

¹⁷² Chalmers, Damian/Davies, Gareth/Monti, Giorgio, *European Union Law*, 3rd ed., Cambridge 2014, p. 958.

¹⁷³ See, for instance *Pre-insulated Pipes* [1999] OJ L24/1, para. 24; *Zinc Phosphate* [2003] OJ L153/1, paras. 57 and 59.

¹⁷⁴ Chalmers, Damian (fn. 172), p. 958.

¹⁷⁵ Case 374/87 *Orkem v. Commission* [1989] ECR 3283, para. 35.

¹⁷⁶ Chalmers, Damian/Davies, Gareth/Monti, Giorgio, *European Union Law*, 3rd ed., Cambridge 2014, p. 959.

targets in terms of volume or quotas', the Commission endeavored to obtain from the applicant an acknowledgment of its participation in an agreement intended to limit or control production or outlets or to share markets." (emphasize added)

Likewise, the Commission cannot ask parties how many meetings they had with their competitors that infringed Article 101 TFEU. Nevertheless, it is possible to obtain documentary information concerning agreements entered into, or factual information, for instance, about which undertakings were present in certain meetings.¹⁷⁷ One of the Commission's most draconian means to secure information about a possible competition law infringement is its power to enter business premises of the parties under investigation and seize the relevant information.¹⁷⁸ Such procedure is colloquially referred to as 'dawn raids'.¹⁷⁹ However, for this kind of inspections, the Commission must specify the subject matter and purpose of its investigation

"not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding

¹⁷⁷ *Austrian Banks* [2002] OJ L56/1, para. 488.

¹⁷⁸ *Chalmers, Damian/Davies, Gareth/Monti, Giorgio*, *European Union Law*, 3rd ed., Cambridge 2014, p. 960.

¹⁷⁹ *Joshua, Julian*, *The Element of Surprise: EEC competition investigations under Article 14 (3) of Regulation 17*, in: *European Law Review* 3, 1983.

their rights to defense”.¹⁸⁰

Above-mentioned described how the Commission carries out inspections and how to gather evidence. These types of conducts apply to both procedure – settlement procedure and ordinary procedure. As mentioned before, settlements do not mean an investigative shortcut,¹⁸¹ i.e. settlement discussions are preceded by an “investigation as usual”¹⁸². Indeed, if settlement discussions initiated prematurely before having adequately investigated the sufficient extent of the relevant misconduct, the Commission would risk imposing sanctions whose deterrent value is sub-optimal.¹⁸³ Overall, it remains the case that the settlement procedure is unlikely to be particularly attractive to alleged cartelists unless the evidence against them is clear and compelling.¹⁸⁴ If an adequate investigation is already undertaken prior to the initiation of the settlement proceedings, combined with the argument that scope of infringement will not be bargained in settlement

¹⁸⁰ Joined Cases 46/87 and 227/88 *Hoechst AG v. Commission* [1989] ECR 2859, para. 19.

¹⁸¹ *Laina, Flavio/Laurinen, Elina*, The EU Cartel Settlement Procedure: Current Status and Challenges, in: *Journal of European Competition Law and Practice*, 5th ed., Oxford 2013, p. 2.

¹⁸² *Dekeyser, Kris* (2009), European Commission, Alternative procedures in the European antitrust legal framework: Cartel Settlements and Commitment Decisions, available at: [www.euchinacomp.org/attachments/article/161/PPT1-Settlements%20and%20commitments-Kris-EN%20%20\(small%20size\).pdf](http://www.euchinacomp.org/attachments/article/161/PPT1-Settlements%20and%20commitments-Kris-EN%20%20(small%20size).pdf). (accessed on June 09, 2016).

¹⁸³ *Arts, Dirk/Miotto, Francesca* (2014), Cartel Settlements: An overview of EU and national case law, in: *e-Competitions Bulletin Cartel settlements*, No 67003.

¹⁸⁴ *Olsen, Greg/Jephcott, Mark*, Sharing the Benefits of Procedural Economy: the European Commission’s Settlement Procedure, International Developments, in: *Antitrust*, Vol. 25, No. 1, 2010, p. 80.

procedure, it is logical to interpret that the scope of infringement an undertaking could be charged, should be the same under settlement procedure and ordinary procedure. Thus, if no new evidence shows up, there would be no further scope to conduct an additional investigation which would impact the final infringement decision in an ordinary procedure following a same case in settlement.¹⁸⁵

However, contrary to this, *Flavio Laina*, head of the Cartel Settlement Unit, addressed this issue on whether the scope of infringement charged upon a same undertaking in cartel settlement and in ordinary procedure are identical by answering:

“[t]he scope of the infringement does not have to be identical under both procedures. Settlement means convincing the interlocutor. Should it become impossible for one or more reasons to convince one or more companies, the Commission will have to reflect and investigate why it was not able to convince its interlocutors. It cannot be excluded that such reflection brings new elements into the picture of that in the absence of procedural efficiencies the Commission deems it necessary to conduct an additional investigation the result of which

¹⁸⁵ *Dunne, Amy*, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement, in: *The King’s Student Law Review*, Vol. 6, No. 1, Spring 2015, p. 49.

might have an impact on the scope of the infringement.”¹⁸⁶ (emphasize added)

What *Flavio Laina* argued laterally reflected that the Commission might carry out additional infringement inspections if settlement cannot be achieved, which could influence the scope of infringements. In the end, settlement procedure is a “negotiation” game between the Commission and undertakings. It is up to both parties to determine when to cooperation more and when to quit the process.

To sum up, combining the arguments in previous sections, even though settled parties and non-engaged parties are treated equally in both of settlement procedure and ordinary one, there still exist a margin of space to determine scope of infringement and fine calculation in settlement procedure. Such uncertainty could make the outcome of a cartel settlement case slightly different from the one from ordinary procedure.

3. Undertakings act in bad faith in discontinued settlements scenario

Settlement procedure is neither a right nor an obligation but merely a choice offered by the Commission for a faster resolution of a cartel case. If there are no procedural efficiencies, there might be no reason for the Commission to continue the settlement. On the other hand, undertakings have to analyze

¹⁸⁶ *Laina, Flavio/Laurinen, Elina*, The EU Cartel Settlement Procedure: Current Status and Challenges, in: *Journal of European Competition Law and Practice*, 5th ed., Oxford 2013, p. 9.

their profitability and cost in settlement procedure in order to get to a conclusion whether they settle or not. The undertakings have to analyze the optimal settlement discussions in order to maximize the advantages and minimize the disadvantages associated with settlements in cartel cases.¹⁸⁷ A settling party, who may prefer the ordinary procedure and the subsequent opportunity to litigate through appeal, is prompted to renege on the settlement process depending on its perception of the impact of the procedure on its individual interests.¹⁸⁸ After all, settlement procedure is all about parties finding common ground.¹⁸⁹ This leads to a concern whether undertakings could act in bad faith by deliberately participating in settlement procedure to get essential information of the Commission and spitefully opt out. To answer this question, following aspects need to be concerned: The consequences of discontinued settlements and the benefits undertakings gain in settlement discussions in order to get to a conclusion.

3.1. Consequences of discontinued settlement

There are two ways a settlement can be discontinued: one is the Commission

¹⁸⁷ *Ascione, Aurora/Motta, Massimo*, Settlements in Cartel Cases, Barcelona Graduate School of Economics, online publication, p. 5, available at: www.barcelonagse.eu/tmp/pdf/motta_settlementscartels.pdf.

¹⁸⁸ *Dunne, Amy*, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement, in: *The King's Student Law Review*, Vol. 6, No. 1, Spring 2015, p. 46-47.

¹⁸⁹ *Schinkel, Maarten Pieter*, Bargaining in the Shadow of the European Settlement Procedure for Cartels, in: *Antitrust Bulletin*, 22nd ed., 2010.

discontinues the case; the other one is undertakings opt out and then the case will be reverted to ordinary procedure, consequently create a hybrid case scenario.

Termination due to undertakings' initiation can be found in *Animal Feed Phosphates* case. In this case, several producers were fined for participating in price-fixing and market sharing cartels.¹⁹⁰ Among these producers, one producer enjoyed full immunity as a result of revealing the existence of the cartel to the Commission, and certain other producers received reductions in fines also pursuant to the leniency program. In addition, all except one producer (*Timba Industries*) received a further 10 per cent reduction because of settlement procedure. *Timba Industries* initially participated in the settlement but withdrew the procedure before the parties had submitted settlement statements.¹⁹¹ The Commission's investigation thus continued by means of a dual track – a shortened administrative process for the parties who had chosen to participate in the settlement procedure, and the full-length administrative process for the non-settling party, involving a full statement of objections and the rights of access to the Commission's file

¹⁹⁰ Press Release, European Comm'n, Antitrust: Commission Fines Animal Feed Phosphates Producers €175,647,000 for Price-fixing and Market Sharing in First "Hybrid" Cartel Settlement Case (July 20, 2010) (IP/10/985).

¹⁹¹ *Ibid.*

of supporting evidence and an oral hearing.¹⁹² In the end, the settling parties received a 55-page “settled” decision in English whilst *Timba Industries* was addressed to a 108-page “separate” decision in French. Even though the separate decision contains more details in the description of the facts but their scope of infringement remains generally the same.¹⁹³

However, *Timba Industries* appealed the decision of the Commission before the General Court¹⁹⁴ arguing that it was punished for refusing to settle and for withdrawing its settlement submission in breach of fundamental principles of law, including the principle of equal treatment. *Timba Industries* considered that the level of fine ultimately imposed by the Commission decision should have been 10% higher than the fine range discussed in the settlement procedure, but instead, it was 25%. The Court dismisses the *Timba Industries*’ action and confirms the fine imposed by the Commission.¹⁹⁵ The Court argued that the Commission applied the same method when calculating the range of fines at the stage of the settlement

¹⁹² Olsen, *Greg/Jephcott, Mark*, Sharing the Benefits of Procedural Economy: the European Commission’s Settlement Procedure, International Developments, in: *Antitrust*, Vol. 25, No. 1, 2010, p. 79.

¹⁹³ *Flavion Laina*, Head of Cartel Settlement Unit, European Commission, as referenced by *David Vascott*, “EU cartel settlements: are they working?”, *Global Competition Review: News*, April 2013.

¹⁹⁴ Case T-456/10, *Timab Industries and CFPR v Commission*.

¹⁹⁵ General Court of the European Union, Press Release No 57/15, Luxembourg, 20 May 2015, Judgment in Case T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission*, p. 1.

procedure and the amount of the fine ultimately imposed as part of the standard procedure.

Discontinuation initiated by the Commission can only be found in one case – *Smart Card Chips*. In *Smart Card Chips* case, the settlement procedure was terminated by the Commission due to an alleged lacking of progress of the settlement talks. The Commission reverted to the normal procedure and adopted a final decision.¹⁹⁶ However, there is no public version of final decision on this case. What can be deduced from the Commission's press release is after failing to settle, the Commission reverted the case into ordinary procedure. Four undertakings are involved, one enjoyed full immunity, because of leniency policy, one enjoyed fine reduction also due to leniency, and the remaining two were fined separately around 82 million euros and 20 million euros. More detailed analysis of this case can be found in Chapter III, Section 2.1.2 (2) above.

To sum up, discontinued settlement leads to a procedure reversion into ordinary one, the consequence will be undertakings having to face trial in court.

3.2. Benefit undertakings gain in settlement discussions

In practice, the Commission organizes the settlement discussions in three

¹⁹⁶ Commission Decision of 3 September 2014 in case AT.39574 Smart Card Chips.

steps, through three rounds of bilateral meetings with undertakings.¹⁹⁷

Engagement in settlement discussion does not indicate that the participating parties are involved in or liable for cartel infringement, which gives the undertakings a free ticket to try to settle the case without being put in a preconditioning “guilty” position.

During the settlement discussions, upon a reasonable request by the parties, access can be given to further evidence, based on the list of non-confidential versions of accessible documents, which are provided to the parties.¹⁹⁸

Other essential elements like alleged facts, the gravity and duration of questioned cartel and an estimation of the range of likely fines will also be addressed by the Commission in these discussions. Moreover, all communication in settlement discussions is protected by the confidentiality scheme. Unless authorized by the Commission, none of the content of the discussions or the documents all parties had access to can be disclosed to a third party. Violating this rule may cause an aggravating circumstance and will be regarded as lacking of cooperation. This reduced undertakings’ scruple against other cartelists in a same case. It is conceivable that at a late

¹⁹⁷ *Laina, Flavio/Bogdanov, Aleko*, Survey: The EU Cartel Settlement Procedure: Latest Developments, in: *Journal of European Competition Law and Practice*, Vol. 5, No. 10, Oxford 2014, p. 720.

¹⁹⁸ Article 10(a)2, Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance), Official Journal L123/18, 27 April 2004.

stage in the settlement discussion, being better informed with access to all non-confidential form of the adverse evidence, a party will be more able to foresee the likely outcomes of the settlement procedure and may be inclined to reassess its interest in participating.¹⁹⁹

In general, undertakings benefit from engaging in settlement procedure for more substantial information and a flexible space in deciding whether to settle before introducing settlement submission.

3.3. Conclusion

The success of the settlement program depends on whether undertakings will find that the benefits of choosing settlement outweigh the benefits of litigation.²⁰⁰ Like an effective leniency program, an effective cartel settlement program requires sufficient benefits and incentives for both the Commission and the cartel participants, or neither will commit to settlement.²⁰¹ Even if the settlement procedure provides adequate incentive for some cartel members to agree to settle, it seems unlikely that all members

¹⁹⁹ *Dunne, Amy*, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement, in: *The King's Student Law Review*, Vol. 6, No. 1, Spring 2015, p. 42.

²⁰⁰ See International Competition Network, Cartel Settlements 39 (2008), p. 9, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf>.

²⁰¹ *Kelley, Molly* (2010), Settling for Settlement: The European Commission's New Cartel Settlement Procedure, 9 WASH. U. GLOBAL STUD. L. REV. 699, available at openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1061&context=law_globalstudies (accessed on June 09, 2016).

will choose to do so.²⁰² In fact, some may enter settlement discussions in bad faith, merely to try “to gain an advantage by finding out what their fine might be and delaying the investigation”²⁰³.

When the Commission invites parties to engage in settlement discussions, it will set a time-limit for the parties to declare in writing, whether they wish to participate in settlement with a notice states that “this written declaration does not imply an admission by the parties of having participated in an infringement or of being liable for it”²⁰⁴. With this, the undertakings can take part in the settlement procedure in an innocent status. Furthermore, the Commission is obliged to investigate and sanction individual infringements,²⁰⁵ which ensures the certainty that the each party’s liability is determined on the basis of its own infringement and not extrapolated from fortunes and performance of the cartel group as a whole in settlement discussions.²⁰⁶ One undertaking will not be bounded by the cartelists group’s pressure and is thus free to choose whatever the best benefit for itself.

²⁰² International Competition Network (fn. 191), p. 11.

²⁰³ *Ibid.*, p. 17.

²⁰⁴ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance), Official Journal L123/18, 27 April 2004.

²⁰⁵ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance), Official Journal C210/2, 1 September 2006, at recital 4.

²⁰⁶ *Dunne, Amy*, Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement, in: *The King’s Student Law Review*, Vol. 6, No. 1, Spring 2015, p. 47.

The purpose of most of undertakings is to make profit. They spare no effort to reduce cost and try to gain as much profits they can. The likelihood that a party may “see the Commission’s card and walk away”²⁰⁷ is ubiquitous, if the procedure is to remain voluntary by nature.²⁰⁸

However, it should be noted that during settlement discussions, the undertakings are required to cooperate. By benefiting from the information gained in the discussions from the Commission, the spiteful undertaking has also to expose its own business information. Despite the Commission Notice²⁰⁹ clearly states that if the Commission and undertakings cannot reach a common understanding, the acknowledgments provided by the parties in the settlement submission could not be used against any of the parties to the proceedings; undertakings may worry that the Commission may later use any information disclosed during the procedure.²¹⁰ Besides, they unavoidably invest resources in the discussions, including time consumed, legal counsel involved and money spent in. It is a contest

²⁰⁷ *Laina, Flavio*, Head of Cartel Settlement Unit, European Commission, *Use and Abuse of Settlements in Antitrust Policies?*, in: *Concurrences Workshop*, 14th ed., Brussels 2015.

²⁰⁸ *Dunne, Amy*, *Hybrid Cases under the EU Cartel Settlement Procedure: the Individuality in Collective Infringement*, in: *The King’s Student Law Review*, Vol. 6, No. 1, Spring 2015, p. 46.

²⁰⁹ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008

²¹⁰ *Ascione, Aurora/Motta, Massimo*, *Settlements in Cartel Cases*, Barcelona Graduate School of Economics, online publication, p. 6, available at: www.barcelonagse.eu/tmp/pdf/motta_settlementscartels.pdf.

between the Commission and undertakings, where by taking every aspect into consideration and analyzing the outcome of all situations, both parties decide what is the best solution for them.

V. Conclusion

Today's competition policy has "a kind of rock star status"²¹¹ because of the active way these powers are exercised. The EU Commission has been combating cartels, which is one of the main targets of EU competition law enforcement, for long time. The introduction of settlement procedure helped the Commission to streamline procedural process and consequently saved administrative resources. The growing practical application of settlement procedure in cartel cases suggests that the former is becoming a rule, rather than an example in the enforcement of European Competition Law.

Different from ordinary procedure, settlement procedure is one of EU competition law enforcement instruments that focus on the public-private dialogues between the Commission and undertakings. Within this dialogue, discussions are conducted to promote a common understanding between the Commission and undertakings on essential issues of alleged infringements. Even though this dialogue is not about bargaining, it still opens another door

²¹¹ Kelemen, R. Daniel, *Eurolegalism: The Transformation of Law and Regulation in the European Union*, Harvard University Press 2011, p. 143.

for cartelists to choose when facing competition law charges.

Settlement procedure is different from other three “negotiated” law enforcement instruments –leniency policy, commitment decisions and conditional merger control. Comparatively speaking, the purpose of leniency policy is to gather evidence of cartel existence. Commitment decisions are to bring out behavior remedies offered by the undertakings in order to alter competition wrongdoings. Conditional merger control is used to change of merger conditions if undertakings’ intended merger goes beyond the scope and could distort competition. Nevertheless, all of these “negotiated” enforcement instruments are created to offer faster, more accurate solutions to identified competition problems. Being applied to varied situations in a huge number of cases, they greatly accelerated procedural efficiency and advanced EU competition law enforcement.

As former Commission *Joaquín Almunia* said: “most companies implicated in anti-competitive practices go for the solution that can best protect their interests and reputation”²¹². Before deciding whether to participate in settlement procedure, it is to the undertakings’ own interest to carry out a profitability cost analysis, in order to foresee their position.

²¹² See the speech of Joaquín Almunia of 8 March 2013: “Remedies, commitments and settlements in antitrust”, available at: europa.eu/rapid/press-release_SPEECH-13-210_en.htm, p. 3.

Settlement procedure does not have the ordinary meaning of settle a case.

What undertakings gain are 10 per cent fine reduction, streamlined administrative process and confidentiality protection. What they have to bear are negative consequences of acknowledging a cartel infringement and EU Commission's leading position as well as ultimate right in settlement procedure. Also enjoying the streamlined administrative process, the Commission benefits from less possibility of appeals in court, which significantly promotes Commission's working efficiency. On the other hand, the Commission has to face probable settlement efficiency impairment in hybrid case scenarios. In general, settlement procedure sets a preferential standpoint for the Commission to ultimately lead the procedure without too much concern of disadvantages.

Incentives behind undertakings who consider engagement of settlement procedure are varied. For those enjoying immunity or fine reduction from leniency policy, settlement procedure can be used to shorten administrative process and/or further reduce the fine. For those who do not have any preliminary remedies in cartel cases, settlement procedure is regarded to be the last choice they have to get discounted fine.

Since introduction in 2008, there are 20 out of 54 cases settled during the

total period of nine years of practice. Settlement procedure has induced criticisms and concerns. By analyzing the legality of law of enforcement of settlement procedure, it is conceivable that discretion the Commission has justifies its selective choice of settlement candidate. Together with the judicial review system and consultation of Advisory Committee on Restrictive Practices and Dominant Positions, settlement procedure guarantees the legitimacy and justice of the Commission's conduct.

The "negotiation" factor in settlement procedure leaves a potential loophole to query whether the scope of infringement charged upon a same undertaking in cartel settlement and in ordinary procedure is identical. Since the inspection were sufficiently conducted before settlement starts, and the scope of infringement will not be bargained in settlement discussions, it is reasonable to conclude those scopes are identical. However, it should also be noted that in practice, due to the complexity of fine calculation and the pressure to achieve a common understanding, the actual scope of infringement charged could be counted slightly different.

Furthermore, due to the flexible opt-out scheme in settlement procedure, undertakings can benefit from an earlier knowledge of the Commission's attitude and detailed information of the case without being proved liable, as

long as settlement submission is not issued. This reflects a risk in settlement procedure when certain cartelists act in bad faith to peek into the Commission's cards. However, as long as settlement procedure remains a voluntary choice shown to undertakings, such situations are unavoidable. It is up to the Commission to increase vigilance through the whole process of settlement procedure to reduce the possibility of such situations to the minimum amount.

To summarize, the procedural and monetary benefits cartelists gain from settlement procedure are largely precluded in a more adversarial procedure. Settlement procedure is an attractive game drawing both of the Commission's and the undertakings' attention in participation. Yet, how to benefit from this game and achieve a win-win ending depends on how the "negotiation" takes place.

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