

The EU Cartel Settlement Procedure: Current Status and Challenges

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I. Introduction

The cartel settlement procedure under EU rules allows the Commission to settle a cartel case with the companies involved under a streamlined procedure if the parties agree with the Commission's findings on the infringement. This instrument was created in 2008 through an amendment of Commission Regulation 773/2004¹ as well as the introduction of a relating Commission Notice on the conduct of settlement procedures.²

Cartel settlement decisions are prohibition decisions based on Article 7 and 23 of Regulation 1/2003. The settlement procedure was established in order to optimise the enforcement of anti-cartel rules by making the handling of specific types of cartel cases faster and more efficient. The overall aim of the Commission was to benefit from these procedural efficiencies by freeing up resources to deal with more cartel cases. The more the Commission is able to adopt decisions identifying cartel infringements, the higher the deterrence effect because more cartels in many sectors or concerning many products in the same sector can be scrutinised at the same time. The higher the deterrence, the greater the convenience of cooperating with the Commission under its Leniency programme. It is a virtuous circle, from an enforcement point of view. Settlement and Leniency, although serving different purposes, work towards the same goal.

The key element in settlement, in comparison to standard antitrust procedure, is that settling companies choose to acknowledge their involvement in the cartel and their liability for it. Companies proceed to this stage after they have heard the objections against them, after they have been able to access the relevant evidence against them and after they have had the opportunity to express their observations. In return for settling, the companies receive a 10 per cent reduction in cartel fines.

Key Points

- Since 2008, six cartel settlements have been successfully concluded.
- In one additional recent case the settlement procedure has been discontinued by the Commission due to lack of progress and the Commission has reverted to the standard procedure.
- A new wave of cases is currently being dealt with under the settlement procedure.
- Lessons are being drawn from these experiences, which may allow further streamlining of the settlement process.

This benefit in fine reduction adds to the fine reduction of leniency, if applicable.

The Commission has to date successfully concluded six cartel cases by a settlement decision, covering altogether 30 undertakings and 61 legal entities. A total of 24 undertakings have been fined in the Commission's settlement decisions.³ In one recent case, *Smart cards chips*, the Commission has decided to discontinue the settlement discussions due to the lack of progress in the discussions.⁴ The settlement procedure has now become a well-established instrument for cartel enforcement. More cases are coming. Vice-President Almunia has already indicated that he sees the settlement procedure applied as many as up to half of the cartel cases in the future.⁵

The very first settlement cases, *DRAMS* and *Animal Feed Phosphates* set the ground for the Commission's settlement practice, in particular the following cases concluded in 2011–2012; *Consumer Detergents*, *CRT Glass*,

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1 Commission Regulation (EC) No 773/2004 of 7 April 2003 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ L 171, 1.7.2008, p. 3).

2 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, 2.7.2008, pp.1–6.

3 The total fine imposed in settlements amounts today to €1,125,715,800.

4 IP/13/346 of 22 April 2013.

5 See for example the speech of Vice-President Almunia of 8 March 2013: 'Remedies, commitments and settlements in antitrust'.

Refrigeration Compressors, and *Water Management Products* cases have enabled further clarification and streamlining of the settlement process. These cases have defined the procedural standard for future cases. While previous cases necessarily required much more time investment on both sides as it was learning by doing, the practice can now further evolve with each new case. In particular, efficiencies have been brought about by further streamlining of the process, further speeding up internal procedures, and applying more flexibility.

Experience achieved in settlement cases concluded so far confirm that the efficiencies which were the aim of the Commission when introducing the system have been achieved. Both the Commission as well as the companies have benefited equally from them. And on the company side, it may be said that the companies involved in the six successfully settled cartel cases which have been concluded to-date in settlement procedure have given positive feedback. Efficiencies have been generated, in particular, by the reduced drafting work and the absence or very small likelihood of subsequent litigation in the European Courts. For the Commission, settlement has also allowed for streamlined procedural organisation. Naturally, both the Commission as well as the companies and their legal counsels have, in exchange, been faced with new challenges in the new procedure.

Following the practical experience of six cases which have been settled,⁶ the Commission has built up a solid experience in this instrument. The lessons to be learned in the coming cases will be an additional opportunity to make the process even more efficient. It is a continuous development. Both sides need to contribute to this process as further progress will also require a proactive settlement attitude from companies and their legal representatives.

II. Normal investigation prior to settlement phase

It is important to clarify that settlements do not mean an investigative shortcut. The Commission enters into this phase only when it has sufficient elements to proceed the case in standard procedure, including the adoption of a fully motivated Statement of Objections. Experience also shows that often, settlement discussions are the first time when companies and their management are confronted with the reality of an infringement or

with its full extent. A thorough investigation, before the settlement process starts, is therefore essential.

The Commission investigates all cartel cases (including cases which later on follow the settlement route) with the usual investigative measures such as leniency applications, inspections, and information requests. A rigorous investigation also allows for the case to be dealt with more effectively in settlement, for the focus to be on the essentials and the issues which arise to be handled efficiently. Settlements are built on factual evidence as is any cartel case dealt with under standard procedure.

Companies may at any time before the adoption of a statement of objections approach the Commission and express their interest towards settlement. However, settlement remains a choice of the Commission; it is neither a right nor an obligation for the companies. Even if all parties request to settle, it remains in the Commission's discretion to decide if the case is suitable. Furthermore, even if the discussions have already started, the Commission may decide to discontinue them if there is insufficient progress towards a 'common understanding'. If the investigation has been properly completed prior to entering into settlement, the Commission is able to switch quickly to normal procedure if settlement fails. This is in particular what happened in the *Smart cards chips*—case, where as mentioned by Vice-President Almunia: '*It is not because settlement fails that companies get off the hook*'. In this case, the Commission was able to rapidly revert to the standard procedure.

III. The settlement process

A. Initiation of proceedings and parties' confirmation of interest

Prior to starting settlement discussions with the parties, the Commission first initiates formal proceedings against those parties in view of settlement and invites each party to confirm its interest in the settlement process. Initiation of proceedings is a precondition to requesting the parties to express their interest in engaging in settlement discussions.⁷ This relieves other competition authorities from their competence to apply Article 101 TFEU to the case. A two-week deadline is set for the parties to confirm their interest and this confirmation must be received in writing.⁸ This period also allows a final opportunity for those companies which have so far refrained to apply for Leniency. The parties'

⁶ In addition to the six concluded settlement cases, as mentioned above, experience has also been gained in one case in which settlement discussions were recently discontinued (*Smart cards chips*).

⁷ Article 2(1) of Regulation 773/2004 (as amended by Regulation 622/2008); §9 of the Settlement Notice.

⁸ Article 10a(1) of Regulation 773/2004 (as amended by Regulation 622/2008); §§8–13 of Settlement Notice.

reply does not imply an admission of the infringement or liability for it.

B. Settlement discussions

When each of the parties against which proceedings have been initiated has confirmed its interest to engage in settlement discussions, the settlement discussions can be started. The content of these discussions is not used as evidence and they are without prejudice to the outcome of the case if the settlement procedure should fail. Participation in settlement discussions also does not imply an admission of the infringement. The infringement and liability are to be admitted only at the end of the process, when discussions have been concluded, within each company's settlement submission.

This is a challenging process, as intensive and confidential bilateral discussions are carried out in parallel with all parties and consensus must be reached with all of them. The Commission retains the discretion to determine the appropriateness, order, and pace of the meetings.⁹ It is important to stress that the settlement discussions do not give companies the ability to negotiate with the Commission with regard to the existence of the infringement or the appropriate sanction; the Commission does not bargain on evidence or the objections. The companies have to be able to effectively exercise their rights. They are heard on the envisaged objections and have access to a large selection of the available evidence. Also, they have to have disclosed to them the maximum amount of the fine before they can be asked to acknowledge liability for an infringement and for the respective fine. Colleagues with significant experience in settlement support the investigative case teams in the preparation and the handling of the discussions, in order to ensure consistency among cases and that the lessons learned are quickly implemented in other on-going cases. The Commission is particularly vigilant to treat all the companies fairly and equally. For example, the companies are given the same level of information both with regard to evidence as well as procedure. The parties may also call upon the Hearing Officer at any time during the settlement procedure in relation to issues that might arise relating to due process.¹⁰

The parties and their legal representatives participating in settlement discussions are bound by specific confidentiality provisions which concern the process itself as well as the treatment of the evidence which the parties

have access to in settlement.¹¹ Confidentiality protects all the parties and this obligation is common in other jurisdictions in which a settlement instrument is in place. The Commission relies on the value of the evidence in the case and the real incentives of individual undertakings to settle. The Commission monitors carefully to ensure that the confidentiality obligation is followed. Should confidentiality be breached, the Commission may decide to discontinue the settlement and return to the standard procedure. The author of this breach also exposes itself to a possible aggravating circumstance in the framework of the standard procedure. In order to guarantee respect of confidentiality, the Commission requests that each of the participants to the settlement process sign the necessary declarations and confidentiality statements, both with respect to settlement discussions as well as the evidence disclosed in the context of the settlement discussions.

As set out in the Regulation, during the settlement discussions the parties are informed of the objections the Commission expects to raise against the parties, the evidence used to determine those objections (as well as additional documents which may be requested by the parties and justified to ascertain their positions) and the range of potential fines.¹² The established Commission practice is to organise the settlement discussions with each of the parties around a series of three formal bilateral meetings.

At the first formal settlement meeting the Commission presents to the parties its assessment of the case as well as the key evidence. While the preliminary assessment is being presented orally, the parties are directed to specific examples of evidence, and a selection of the evidence supporting the objections. In addition, the different steps of the settlement process are explained at this first meeting with an indicative timetable. The first meeting is followed by access to a wider selection of evidence contained in the file. Again, this is a selection of the evidence contained in the Commission file. More specifically, access is given to evidence used to determine the envisaged objections against the company and the potential fine. Access to additional evidence can be sought upon a reasonable and motivated request. For this purpose the parties are also provided a list of non-confidential versions of accessible documents in the case file.¹³ Access to the complete file is only foreseen in the standard procedure. As indicated in the Settlement Notice, procedural efficiencies which can be generated in access to file

⁹ §15 of the Settlement Notice.

¹⁰ §18 of the Settlement Notice.

¹¹ Article 10a(2) of Regulation 773/2004 (as amended by Regulation 622/2008); §7 of Settlement Notice.

¹² Article 10(a)2 of Regulation 773/2004 (as amended by Regulation 622/2008).

¹³ Article 10(a)2 of Regulation 773/2004 (as amended by Regulation 622/2008); §16 of the Settlement Notice

are an element considered when selecting and pursuing a case for settlement.

The main objective of the second round of formal settlement meetings is to verify whether there is a common understanding between the Commission and each of the parties regarding the scope of the potential objections in the case. At the same occasion, a common understanding should also be reached on the value of affected sales that will be taken into consideration for the calculation of fines. The Commission establishes preparatory contacts with the parties in order to facilitate discussion and the understanding at the formal meeting.

The main objective of the third settlement meeting is to disclose to the parties the maximum amount of the fine that the company has to commit to settle the case and to discuss and confirm the form and timing of the settlement submission. Fine calculations are carried out in settlement cases as in any cartel case and in application of the Guidelines on the method of setting fines. The difference comes from the 10 per cent settlement reduction which is added to the leniency reduction, if applicable.¹⁴

Between the three rounds of formal meetings with the parties, technical discussions may be organised between the Commission and each of the parties at their request. The parties may also submit technical papers ('non-papers') in order to address specific technical aspects of the case in more detail. The objective of such papers would only be to facilitate the discussions; they are not used as evidence. There is also no obligation to submit such papers even though they have been considered helpful to properly convey observations, especially if they concern a lot of detail. Companies should follow a pragmatic line and any unnecessary written submissions in the procedure should be minimised.

In order to maintain the appropriate momentum, no discussion on fines will take place before a common understanding has been reached on the scope of the infringement. The last moment when a company can decide to opt out from the settlement is before submitting the settlement submission, which is after having been fully informed of the elements of the case and of the range of potential fines. Each party is therefore aware of the maximum level of the fine before acknowledging liability.

C. Settlement submission, Statement of Objections, and Decision

Once a common understanding has been achieved with all parties after the three rounds of meetings, the Commission

sets a deadline of 15 working days¹⁵ for the parties to introduce a written 'settlement submission', which is their formal request to settle. The settlement submission is the backbone for the subsequent steps. It is the settlement submission which makes it possible to simplify the remaining steps of the procedure considerably. The settlement submission confirms the company's voluntary acknowledgement of the infringement. It can be submitted either in writing or orally. It must contain specific elements which are identified in the Settlement Notice.¹⁶ Most importantly it must contain a clear acknowledgement of the party's liability for an infringement which is summarily described as well as its main facts and legal assessment. Second, the settlement submission must contain an indication of the maximum amount of the fine the party foresees being imposed and would accept in the framework of settlement. Third, the settlement submission must contain the party's confirmation that it has been sufficiently informed of the Commission's objections, that it has had sufficient opportunity to make its views known, that it does not envisage requesting further access to file or to be heard in oral hearing, and that it agrees to receive the Statement of Objections and Decision in an agreed EU language.

Settlement submissions cannot be unilaterally revoked. If the submissions correspond to the understanding reached during the discussions, the Commission adopts a Statement of Objections (SO). The notification of a written SO is a mandatory step before adopting an infringement decision,¹⁷ both in the standard and in the settlement procedures. The settlement SO is, however, streamlined and considerably shorter than an SO in standard procedure. The SO should contain the necessary information to enable the parties to verify that it corresponds to their settlement submissions. On this basis the parties can be expected to submit a short and simple reply confirming that the SO corresponds to the settlement submission, within the two-week deadline which the Commission sets.¹⁸ The reply must be submitted in writing. If the parties confirm that the SO reflects their submission, it becomes the basis for the settlement decision, which is streamlined and covers approximately 20–40 pages. The Commission can proceed to the adoption of the final decision without any intermediate step but the draft decision is submitted to the Advisory Committee representing the Member States for their opinion and the Hearing Officer prepares a report as in any antitrust procedure. Thereafter, the Commission determines its final position on the case in the decision, including the final amount of the fine.

14 §§32–33 of the Settlement Notice.

15 §17 of the Settlement Notice.

16 §20 of the Settlement Notice.

17 Article 10(1) of Regulation 773/2004 (as amended by Regulation 622/2008).

18 §26 of the Settlement Notice.

D. Settlement decisions are prohibition decisions based under Regulation 1/2003

As already stated above, cartel settlement decisions are prohibition decisions based on Article 7 and 23 of Regulation 1/2003, which is the standard legal basis for Commission Decisions against violations of Article 101 TFEU. Settlement decisions establish the existence of an infringement, describe its relevant parameters, require the infringement to be brought to an end, and impose a fine. Settlement decisions are adopted by the Commission under its normal procedural framework. Naturally, they also have to pass the same legal scrutiny as decisions in the standard procedure.

Cartel settlement decisions are sometimes confused with commitment decisions in antitrust cases. Commitment decisions, which are based on Article 9 of Regulation 1/2003 are, however, different from settlement decisions. Commitment decisions do not contain a finding of an infringement and no fines are imposed, whereas in settlements the settling companies admit their responsibility for an infringement and receive a fine. Commitment decisions also do not constitute precedents for establishing recidivism for subsequent infringements. Commitment decisions are not appropriate in cartel cases whereas the settlement instrument is reserved only for cartel cases.¹⁹

The settlement procedure has not replaced and is not supposed to replace the standard enforcement procedure for cartel cases. It is an alternative way that is offered to companies which enables them to turn the pages of the discovery of a cartel infringement faster and in a more focused manner, without spending large amounts of time and resources in procedure and in litigation.

E. Commission's six settlement decisions adopted between 2010 and 2012

Six very different types of cases have been settled so far. The very first settlements were concluded in cases which had been prepared in view of the standard procedure with a full Statement of Objections as the settlement regime was not yet available. In fact, the Commission had already been investigating those cases for quite some time when they were turned into settlement procedures in 2009 following the adoption of the new instrument.

The first settlement was adopted in the *DRAMS-case*²⁰ in 2010, concerning a complex international cartel in the market for memory chips used in computers. Ten companies, including Samsung and Toshiba, were imposed a fine of €331 million in total. This settlement decision was soon followed by the *Animal Feed Phosphates case*,²¹ in which a number of producers of animal feed were fined a total of €175 million for a 35-year long cartel for price fixing and market sharing in most of the EEA. As will be described in more detail below, this is also the first case in which one company decided to opt out of settlement having already participated in the settlement discussions.

A different approach in timing could be adopted in the subsequent set of settlement cases as the settlement regime was already well in place and allowed the cases to be directed towards settlement at an earlier stage, that is prior to preparing a full Statement of Objections under the standard procedure. In the *Consumer Detergents case*²² which was the third settlement decision concluded by the Commission, the decision was adopted on 13 April 2011 and fines imposed of €315 million. This was again a full settlement case, for example settlement was achieved with all parties: Henkel, Procter & Gamble, and Unilever. The case concerned the market for household laundry detergent powders used in washing machines in eight EU Member States.

Three further settlement decisions followed soon after. The decision in the *CRT Glass case* was adopted on 19 October 2011²³ with fines imposed of €128 million. A settlement was achieved with all four parties: AGC, NEG, SCP, and Schott. The case concerned an international price coordination cartel in the market for Cathode Ray Tubes. The peculiarity of this case in comparison to the other settlements is that this time the investigation was triggered by initial information available to the Commission pointing to a possible cartel.

The fifth settlement decision was adopted in the *Refrigeration Compressors case*²⁴ on 7 December 2011 with €161 million in fines imposed. A settlement was achieved with all five parties: ACC, Danfoss, Embraco, Panasonic, and Tecumseh. The case concerned a cartel aimed at coordinating European pricing policies and keeping market shares stable in the market for household and commercial refrigeration compressors used in

19 See for example §1 of Settlement Notice which defines cartels as 'agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive

actions against other competitors'. Such practices are among the most serious violations of Article 81 EC.

20 Commission Decision of 19 May 2010, C(2010) 3152 final.

21 Commission Decision of 20 July 2010, C(2010) 5004.

22 Commission Decision of 13 April 2011, C(2011) 2528 final.

23 Commission Decision of 19 October 2011, C(2011) 7436 final.

24 Commission Decision of 7 December 2011, C(2011) 8923 final.

fridges, freezers, vending machines, and ice-cream coolers. The most recent settlement was adopted on 27 June 2012 in the *Water Management Products* case²⁵ with three undertakings: Flamco, Reflex, and Pneumatex. The case concerned a cartel which first operated on the German market and then expanded to 13 other EU Member States. The cartel members informed each other through bilateral contacts of the amount and date of planned price increases and exchanged sensitive market information.

The total amount of fines imposed under the settlement procedure exceed €1,125 million. This is approximately one-third of the fines imposed by the Commission in all cartel cases between 2010 and 2012.

F. What makes a successful settlement case

The Commission retains a broad margin of discretion to determine which cases are suitable for settlement. As described above, experience confirms that the Commission has been able to conclude cases with settlement in various different types of cases in terms of the companies concerned, the scope and description of the infringement, as well as the level of the fines. Cases have been concluded with European, US, and Asian companies, for European and international infringements, with both relatively high and relatively low fines. However, precisely because cartel cases are different from one to another, some of them are not suitable for the settlement procedure. In such cases, the standard procedure is followed, including a full Statement of Objections and Decision. As cases are not fully comparable, it is not possible or necessary to conclude on a standard type of case which is optimal for settlement. However, on the basis of the experience gained by the six cases, certain elements can be identified which make it more probable that a successful settlement will be reached. The basic criteria have been identified in the Commission Regulation and the Settlement Notice²⁶ and the relevance of this criteria has been confirmed by experience.

Accordingly, the Commission assesses the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe on the basis of specific primary factors. For example, the Commission considers the number of parties, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts, and the possibility of setting a precedent. For example when assessing the extent to which the parties may be expected to contest the facts, it is rather

evident that the number and proportion of leniency applicants and the parties' level of cooperation is a factor taken into account. In the same vein, the impact of the case for setting precedents on novel issues and the presence of complainants or interested parties would be a relevant aspect to consider. Furthermore, as the companies must, within their settlement submissions, commit to pay a fine, the level of the fine, and, for example, the presence of aggravating circumstances which would increase the level of the fine, it can be seen that there are elements which may have an impact on the companies' willingness to settle.

In practical terms, as experience shows, settlements can be a good option both in 'bigger' and in 'smaller' cases. However, in general, a small market and a reduced duration mean a smaller fine at the end of the process, and therefore a more acceptable fine for the companies, but the acceptability is relative and depends on the position of the companies concerned. A majority of the factors which are assessed relate to the companies' incentives to settle. A common denominator in all cases concluded so far has been the companies' willingness and commitment to conclude the case with settlement. This also applies to cases in which all or most of the involved companies had already cooperated with the Commission under the Leniency programme.

Experience has confirmed that a settlement has more chance of success if it concerns an uncontested infringement which is evidenced by uncontested facts. Absent the companies' strong willingness to conclude a case with settlement and uncontested facts, it is probably not advisable to engage in settlement in a case involving a novel legal theory or other elements that have not received confirmation by the case law of the European Courts. During the settlement process, the involved companies can see very quickly that they are treated in a fair way, not only with respect to their own conduct but also to verify that they are not treated in non-proportionally in comparison with the other co-defendants.

Finally, the existence of parallel cases pursued in other jurisdictions adds to the complexity and has to be taken into account, as it can influence the timing of discussions and of companies' decisions as well as their willingness to admit participation in an infringement.

As cartel settlements have now become 'every-day life', the Commission tries to enhance the possibility of exploiting the efficiencies in full by systematising the screening of cases at a sufficiently early stage. With this method the Commission does not lose any time in starting up the procedure. The fact that companies nowadays

25 Commission Decision of 27 June 2012, C(2012) 4313 final.

26 Recital 4 of Regulation 622/2008 amending Regulation 773/2004; §5 of the Settlement Notice.

proactively contact the Commission and express their interest in settlement also provides a concrete incentive to enter this screening exercise.

The Commission's experience confirms that the success of any settlement cases necessitates a proactive and pragmatic approach by all participants to the process. The philosophy of settlement is different to the standard procedure. The Commission needs to obtain a 'common understanding' with all settling parties on facts and qualification of a case. On the other hand, the means for achieving this should not be misunderstood; as already emphasised, settlements do not mean negotiations which allow companies to bargain. As already noted, the Commission starts the settlement procedure only after a thorough investigation of the case has been completed, when it has sufficient elements to pursue the case under the standard procedure with the adoption of a full Statement of Objections. With respect to the practical carrying out of the process, both the Commission as well as the parties (including their boards and legal advisers) have to be fully committed to the process. If a company does not devote resources to the process and gives a low level of priority to it, it shows that it does not take the process seriously. For example, the participation of the relevant managers in the formal settlement meetings with the Commission allows them to be directly informed of the relevant issues and to take the right messages back home. Furthermore, the settlement procedure is built in particular on oral communication and bilateral discussions between the Commission and each of the parties. Settlement can therefore be successful only if there is a sufficient level of trust and open communication. It is also necessary for all the parties to have a detailed knowledge of the case in question, to be prepared for meetings, and other discussions. On the company side, this necessitates the ability to react without delay to the topics which are discussed. Such quick reactions necessitate a degree of flexibility and speed in in-house consultations. Feedback received by involved companies in previous cases shows that for them the Commission's availability and readiness to discuss forthcoming issues and concerns without any delay is extremely important in settlement. The key factors for success therefore seem to be the availability and the flexibility of both sides.

G. Benefits of settlement

It is commonly accepted that the 10 per cent reduction in fines for settling companies, which is cumulative with

the reduction under leniency, is not the only reason for companies to settle.

The objective of the Commission when introducing the system was to increase efficiency. Experience gained until now confirms fully that this objective has been achieved and that both the Commission as well as the companies have equally benefited from efficiency gains. This benefit would also appear to be one of the main reasons why companies consider settlement. The companies involved in the six cartel cases which have until now been successfully concluded in settlement procedure have confirmed a positive and specific feedback. Efficiencies have been generated in particular by the reduced drafting work for both sides. In settlement the written character of the standard procedure has largely been replaced by more targeted oral communication. Gains in drafting can be shown by a simple comparison with traditional cartel cases where Statements of Objections and Decisions amounted to several hundreds of pages, and settlements range on average between 20 and 40 pages. The absence or very small likelihood of subsequent litigation in the European Courts has also been recognized as an important benefit both for the Commission as well as for the companies.

In addition, companies have considered that with settlement they have been able to move on after the case in a more focused manner. They have been able to concentrate on their business instead of spending resources on lengthy and expensive litigation. The same applies for the Commission. With respect to the process itself, companies have particularly appreciated the transparency and the open and immediate dialogue with the Commission both on the substance of the case as well as on procedural and company related concerns. Such concerns may come up in relation to the settlement procedure, for example with regard to their reporting obligations and the parallel obligation to respect confidentiality rules in settlement.

For the Commission, settlement has also allowed for streamlined procedural organisation. Examples of gains in procedural organisation are similarly evident with access to the file. In this category of gains, the use of a single procedural language instead of many plays a significant role,²⁷ although it is an issue which often goes unnoticed in other jurisdictions as the Commission is probably the only Competition authority in the world with a duty of addressing European companies in their own national language.

²⁷ According to §20(e) of the Settlement Notice the parties are to agree within their settlement submission to receive the Statement of Objections and Decision in an agreed official language of the European Community.

Naturally, both the Commission as well as the companies and their legal counsels have been faced with new challenges due to the increased intensity and speed of the procedure, the oral character of exchanges and the necessary logistics which are different from the standard cartel procedure. Settlement has required the adoption of a new way of thinking in cartel procedure.

H. The timing perspective in settlement procedure

As described above, the purpose of settlements is to increase efficiency in the handling of cartel cases, which also means that cases should be brought to an end faster. Some of the public discussion on settlements has recently concentrated on the duration of the settlement procedure. Even though it may be estimated that the total duration of the cartel procedure has been shortened by two years in the most recent settlement cases, some practitioners still appear to consider that it takes too long to settle.

Based on the Commission's experience, the exact length of the whole settlement process varies case by case and depends on various factors. Settlements are a challenging process for both sides. It has required the acceleration of internal procedures and the introduction of more flexibility. The Commission has faced new logistical challenges as intensive bilateral discussions need to be carried out in parallel with all parties and consensus must be reached with all of them separately.

It is obvious that the most time-consuming phase of the settlement procedure is the phase in which bilateral discussions are carried out between the Commission and each of the parties. Until now the Commission has been able to conclude settlement discussions within 6–13 months. Administrative processes for the adoption of the Statement of Objections and of the final decision automatically require a given timeframe, for which the planning should be realistic. In the past, the discussions have consumed at least two-thirds of the total duration of the settlement stage.

Considering that the practice of the settlement procedure is now well established, it may now be appropriate to make further efforts to shorten the total duration of time spent on the settlement procedure. However, a careful balance must be found between, on one hand, the parties' procedural rights which must be respected and, on the other hand, unnecessary delays in the process leading to a loss of the momentum required to reach the consensus which is necessary in settlements. In general, for the moment, there is scope for a further

acceleration of the procedure, in particular as the instrument is no longer a novelty.

Based on this background, the Commission has in on-going cases for which internal deadlines are to be set and parties informed. This can be expected to have an impact especially on the 'technical discussions' which the Commission carries out with the parties between the first and the second formal settlement meeting. Based on the Commission's experience, some interlocutors still tend to open discussion on clear facts, which unnecessarily delays the procedure. The purpose at this stage is only to identify whether a common position may be found on the basis of the factual evidence which has already been set. If a company has decided to head for settlement in pursuit of a faster resolution, it should show this interest consistently during the discussion stage.

Deadlines based on Regulation 773/2004 and the Settlement Notice do, however, apply to specific formal steps of the procedure. Namely, when proceedings are initiated, companies are invited to confirm their settlement interest within two weeks. Also, when the settlement discussions have been finalised, parties are given a three-week deadline for the introduction of their settlement submission. Finally, following the notification of the Statement of Objections, parties are again given a two-week deadline in which to reply.²⁸

I. Special situations: Hybrid cases and discontinued settlements

Settlement loses its *raison d'être* if it cannot bring procedural efficiencies. The objective would therefore be to settle the case with each of the parties with whom the settlement process has been launched. However, the fact that a company could opt out should not necessarily force the Commission to discontinue the settlement to the detriment of all the other parties. Two situations should be distinguished in this regard: (i) one or more companies refuse to enter into the settlement process, and (ii) a company participating in the settlement discussion decides to opt out during the settlement process.

The first scenario concerns those cases which appear to be 'hybrid' from the start, that is, those cases in which it appears from the beginning that at least one company would not be willing to settle. Such an outcome would not fully meet the purpose of the settlement which is to achieve efficiency benefits. Normally, cases in which an early assessment indicates that not all the parties in similar situations would be willing to ultimately settle, are therefore not pursued in this procedure.

28 See in particular §11, §17, and §26 of the Settlement Notice.

In the second scenario, a company which has been involved in settlement discussions finally decides to opt out during the settlement process before the introduction of the settlement submission. It is foreseeable that this would happen when a company has received all the elements of the case, including the range for the fine and before the issuance of a settlement submission, as in the *Animal feed phosphate* case, but it could also happen in situations where there was strong disagreement with the Commission's case. In the *Animal feed phosphate* case, the Commission decided to continue settlement with the other parties and adopted a streamlined settlement SO and decision addressed to these settling parties. A fully motivated SO and prohibition decision was adopted separately against the non-settling party in standard procedure.

Efficiency gains in this case were somewhat reduced due to the fact that one party dropped out of the settlement route at a very late stage and the Commission therefore had to carry out two parallel procedures. As in any cartel case in standard procedure, the party which opted out of settlement was also granted an additional access to the complete file and a hearing was organised.²⁹ The decision was also subsequently appealed by the non-settling party. This explains why the decisions in this case were adopted only one and a half years after formal settlement discussions had started. If this scenario were to repeat itself, the Commission would carefully assess whether it would be beneficial to shift back to the standard procedure with all parties instead of settling with only some of the parties. A case by case assessment would therefore be necessary, taking into account, for example, the reasons and timing for a company opting out, as well as the possible changes in the remaining parties' incentives to continue the settlement process. This reflection should not ignore alternative possibilities such as, for example, first finalising the settlement decisions and then pursuing the non-settling parties under the standard procedure.

Recently, the Commission announced that it had discontinued the settlement discussions in the *Smart cards chips* case for lack of progress and was reverting to the standard procedure. It is the first time that a settlement has been discontinued against all the companies involved in a case.

Given that the involved companies are exercising their rights to be heard, and the Commission has not yet taken adopted a final decision in this case, it is not appropriate to give more details here. However, a number of general considerations can be made. As Vice-President

Almunia said about this case, '*It is not because settlement talks fail that companies get off the hook. The essence of settlement is to benefit from a quicker, more efficient procedure, and to reach a common understanding on the existence and characteristics of a cartel. If that is not possible, the Commission will not hesitate to revert to the normal procedure and to pursue the suspected infringement.*' And the Commission does not hesitate to pursue it quickly. This would tend to prove that the Commission's approach to have a thorough investigation before opening the settlement discussion is the correct one, to enforce this message.

A second point of discussion among practitioners will certainly be to know whether the scope of the infringement in a standard case following a discontinued settlement case against all the involved companies should be identical to the scope of the latter. Speaking on a theoretical level, not related to any specific case, the authors submit that the 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 or that in the absence of procedural efficiencies the Commission deems it necessary to conduct an additional investigation the result of which might have an impact on the scope of the infringement.

J. Interplay between the Leniency and Settlement programmes

Leniency and settlements are complementary tools in the Commission's cartel enforcement. Leniency is an investigative tool whereas settlement provides a faster and more efficient way to conclude the administrative procedure after the window for leniency has already closed. The EU settlement procedure is indeed not used to gather evidence. Under the Leniency Notice companies involved in cartels are rewarded for disclosing the existence of the cartel to the Commission and for providing evidence for it. Under the Settlement Notice companies are rewarded for procedural efficiencies in the administrative stage.

The link between the two instruments, leniency and settlement, exists and is further evidenced, for example, by the fact that the settlement reduction had to be carefully calibrated in order to preserve the incentives of both instruments. On one hand it needed to be suffi-

²⁹ In comparison, based on §20(d) of the Settlement Notice, settling companies confirm within their settlement submissions that they do not envisage requesting access to the file or requesting to be heard again in an

oral hearing, unless the settlement SO and decision do not reflect the settlement submission.

ciently high to attract companies not cooperating with the Commission into settlement discussions and, on the other hand, it needed to be sufficiently low to preserve the incentive of companies wishing to apply for the lower bands of the Leniency programme.

As for the impact of leniency applications in reaching a settlement, even though settlement has in general been perceived as a more likely alternative for leniency applicants, it should be noted that in the cases the Commission settled so far, not all parties have been leniency applicants. In fact, around two-thirds of the undertakings which settled so far had applied for leniency. The CRT Glass case was even triggered by initial information available to the Commission. Whereas all the three parties to the *Consumer Detergents* settlement had applied for leniency, the *Water Management Products* case is an example of a settlement with only one leniency applicant. Therefore, as the Commission's experience shows, settlement can also succeed in the absence of a high share of leniency applicants, provided that other elements supporting the settlement route are present.

K. Role of judicial review after a settlement decision

As explained above, the Commission settlement decisions are prohibition decisions adopted under Regulation

1/2003 and they impose a fine. Cartel settlement decisions, as any Commission infringement decisions, can be appealed to the EU Courts, but appeals on the substance can be expected to be much less likely because the settling parties have voluntarily acknowledged an infringement and their liability for it, either as direct participant or as parent of the infringing legal entity. On the other hand, it should be noted that before considering the settlement route, each company should carry out an assessment of settlement benefits from its perspective. If from the company's perspective the assessment of the infringement or the company's liability for it is doubted and it wishes to preserve a position to appeal on those aspects to EU Courts, it would not even opt for settlement. If it agrees to settle, it in fact agrees with the Commission's view of the infringement and therefore there is little point in further litigation.

So far none of the settling parties have appealed the Commission's settlement decisions and significant Commission resources have therefore been saved in litigation. The difference is apparent when compared with some cartel cases of the Commission which were dealt with under the standard procedure and generated numerous appeals.

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