

The Direct Settlement of EC Cartel Cases

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For some years Neelie Kroes, the European Commissioner for Competition, has tentatively mooted the possible introduction of a direct settlement procedure in cartel cases¹. Under such a procedure, infringing parties and the competition authority agree an understanding of the dimensions of both the illegal activity and the appropriate penalties. The introduction of such a procedure has been supported in a general way by a number of commentators as a natural corollary of the leniency policy.² Settlements are attractive as a way of concluding cases more quickly and avoiding costly appeals. In October 2007, the Commission published a draft settlement procedure for cartel cases that promises to free up resources, allowing the Commission to clear its apparent backlog of leniency applications and enhance deterrence by imposing more timely punishment on cartel members. Currently, only 'Consent Commitments' are possible by virtue of Article 9(1) Modernisation Regulation, but are not intended to be used where the Commission imposes a fine.³

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¹ N Kroes, 'The First Hundred Days'. Speech delivered to the International Forum on Competition Law, Brussels, 7 April 2005

² J Joshua and P Camesasca, 'Where Angels Fear to Tread: the Commission's 'New' Leniency Policy Revisited' (2004) *Global Competition Review*, 7(9) Supp (The European Antitrust Review 2005), 10-14; J Joshua, 'Criminalisation, Cartels, Leniency and Class Actions: a Look into the Future' (2004) *Competition Law Insight* 22(3), 12 October.

³ Preamble, Recital 13

Commissioner Kroes' original reflections were inspired by “a comparative glance across the Atlantic” where more than ‘90 per cent of corporate defendants charged with an antitrust offence have entered into plea agreements’ with the US Department of Justice, Antitrust Division (DOJ).⁴

The US system of ‘plea bargains’ represents an extreme form of settlement whereby the level of sanction is agreed between the competition authority and the infringing firm, and where rights of appeal are waived. The draft European settlement procedure, by contrast, is designed primarily as a procedural time-saving device; parties can still appeal the final decision and only a potential fine is agreed. In addition, it is not intended that parties can bargain or negotiate with the Commission, only that they should reach a common understanding through discussions.

The benefit of settlements in processing cases quickly is hard to dispute. Cases involving international cartels are usually concluded within four years in the US, whereas in the EC the same cases have taken as long as a decade – delayed mainly by long procedures and slow appeals to the Court of First Instance (CFI) and European Court of Justice (ECJ). However, a system of direct settlement may also bring with it a number of costs that can outweigh the benefits: The use of a settlement concession, and the competition authorities desire to settle as many cases as possible, can lead to lower fines at the expense of deterrence; Unjust outcomes can result from less detailed investigations and a greater reliance on information obtained through leniency submissions that may be inaccurate. Some firms may choose to settle when it is not equitable to do so because they are averse to risk, or as a result of bargaining pressure exerted by the competition authority. Safeguards are needed to ensure fairness (particularly if firms are forced to waive their right of appeal), however effective oversight by the courts is hard to implement where neither party wants the settlement to be challenged. Where less information about the infringement is made public upon settlement, private follow-on actions for damages may also be hindered.

⁴ SD Hammond, ‘The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All’ (2006) OECD Competition Committee Working Party No. 3. p1. Available: <http://www.usdoj.gov/atr/public/speeches/219332.htm> (all websites accessed 10 October 2007)

The aim of this paper is to review the US experience of direct settlement in cartel cases; outline the potential costs of such a system; and evaluate whether the new European settlement procedure is likely to enhance deterrence by freeing up resources, while limiting those potential costs.

Section 1 of this paper discusses the motivation for adopting a system of direct settlement in EC cartel cases. Section 2 looks at the extent to which settlements are currently possible on the Community level. Section 3 discusses the US experience of plea bargaining. Section 4 identifies some of the potential trade-offs and costs of a system of direct settlement and how these can be limited through safeguards. Section 5 reviews and evaluates the likely effectiveness of the European procedure in light of the costs identified in section 4. Finally, Section 6 identifies how the new procedure is unlikely to curb the levels of successful appeals which generally do not concern the extent of liability, but rather how final fines are calculated. It is suggested that savings in this area can be achieved, not by extending the settlement procedure, but by making the method of calculating fines more predictable and transparent.

1 Motivation for Change

Cartels have come to be seen as ‘cancers on the open market economy’;⁵ as the ‘supreme evil’ of antitrust,⁶ and as striking ‘at the very heart of the principal virtue of economic activity’⁷ As such, they have everywhere become a central focus of competition law enforcement. Enhanced mechanisms of cartel investigation and punishment have been introduced in many jurisdictions.⁸ In the EC, this has involved

⁵ M Monti, ‘Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?’ Speech delivered to 3rd Nordic Competition Policy Conference, Stockholm, 11 September 2000.

⁶ *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*, 124 S Ct 872, 879 (2004).

⁷ N Kroes, ‘Enforcement of Prohibition of Cartels in Europe’ in C Ehlermann and L Atanasiu, *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Oxford: Hart Publishing 2006)

⁸ JW Rowley and M Low, *Getting the Deal Through: Cartel Regulation* (London: Law Business Research 2006).

the refinement in 2002 and 2006 of the leniency programme for whistleblowers,⁹ the freeing of resources formerly consumed by the notification scheme, the provision of enhanced investigative powers in Regulation 1/2003,¹⁰ and the reestablishment of a dedicated cartel directorate within DG Competition.¹¹ In this context, it may seem pre-emptive that the Commissioner has introduced yet another reform. In 2005, she herself stated that “the measures we are already committed to taking to improve anti-cartel enforcement need to bed down and have a chance to demonstrate their effectiveness”¹². While the new enforcement armoury may prove sufficient in the fight against cartels, the concern is that it has engendered problems of its own. In particular, the motivation behind introducing a settlement procedure can be found in two related factors: the length of time taken to determine EC cartel cases, and the cost of subsequent legal defence.

1.1 The Length of Proceedings

The revisions of the leniency programme and the introduction of other enforcement initiatives have been damagingly iatrogenic. This is perhaps a curious contention given that, on the surface, the Commission’s intensification of its efforts to undermine cartels appears to have garnered a measure of success. The number of cartel decisions published by the Commission since 2001 has now surpassed those issued in the previous 30 years, and the average time taken by the Commission to process cartel cases has fallen significantly.¹³ Furthermore, by September 2005 the Commission had granted conditional immunity in response to 49 leniency applications.¹⁴

⁹ J Carle, ‘The New Leniency Notice’ (2002) *E.C.L.R.* 23(6), 265-272; MJ Reynolds and DG Anderson, ‘Immunity and Leniency in EU Cartel Cases: Current Issues’ (2006) *E.C.L.R.* 27(2), 82-90; A Stephan, ‘An Empirical Assessment of the 1996 Leniency Notice’ (2005) *Centre for Competition Policy Working Paper* 05-10. Available: <http://www.ccp.uea.ac.uk/public_files/workingpapers/CCP05-10.pdf>

¹⁰ (OJ 2003 L 1/1)

¹¹ See generally, C Harding and J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (Oxford University Press, 2003).

¹² Kroes (n 1)

¹³ Based on my own cartel database of horizontal Article 81 decisions, average case duration can be shown to have fallen: 1975-1996 (pre-Leniency Notice) - 48 months; 1997-2001 - 44 months; 2002-2005 - 42 months.

¹⁴ B Van Barlingen and M Barennes, ‘The European Commission’s 2002 Leniency Notice in Practice’ (2005) *EC Competition Policy Newsletter*, Autumn, pp 6-16, 6

Notwithstanding this apparent progress, further analysis demonstrates that the reorientation towards the ‘cartel-busting’ goal has brought many more cases to the attention of the authority than it is easily able to accommodate. The increasing burden of cartel cases is clear. The Commission explained in 2005 that “since entry into force of [the revised 2002 leniency notice]... [it had] received... 80 applications for immunity and 79 applications for a reduction of fine”.¹⁵ These figures contrast with the total of 80 applications in the six and a half years of the operation of the 1996 Leniency Notice: a four-fold increase.¹⁶ There has also been a substantial build-up of ongoing investigations with at least 40 different cases pending.¹⁷ This has failed to produce an increase in the number of hard core cartel cases concluded, with only 5 delivered in 2005 and 5 in 2006. It is not outlandish to suggest that this may be due to the diversion of resources to the processing of new leniency applications. Notably, by September 2005 the Commission had not yet completed any cases under the 2002 Leniency Notice.¹⁸ By March 2007 it had completed seven. This is important: any stagnation of the move to expedite the throughput of cartel cases sends out the wrong message as to enforcement and hence deterrence.¹⁹ Moreover, while the Commission may be complimented on its hastened consideration of cases, it was starting from a low base. The much-improved time taken from start to finish in cartel cases is still running at an average of three and a half years.

Due to the confidential nature of the DOJ’s plea-bargaining process, it is not possible to learn precisely the start date and hence the duration of such negotiations. Anecdotal evidence suggests, however, that the first negotiated guilty plea in international cartel infringements typically occurs within two years of an investigation commencing. By contrast, in the EC every party to the infringement must wait as long as five years before learning of the final fine determination. Any appeals process then follows. It is not difficult to appreciate the basic attraction of a settlement procedure in releasing human resources for other tasks.

¹⁵ Ibid

¹⁶ ‘Commission notice on the non-imposition or reduction of fines in cartel cases’ (96/C207/04)

¹⁷ J Ratliff, ‘Plea Bargaining in EC Anti-Cartel Enforcement A System Change’ in Ehlermann, C., & Atanasiu, I., *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Oxford: Hard Publishing 2006) p1; Joshua and Camesasca (n 2) 10-14

¹⁸ In the six months following, three cases were completed which involved the 2002 notice: *Italian Raw Tobacco* (IP/05/1315); *Industrial Bags* (IP/05/1508), and *Rubber Chemicals* (IP/05/1656).

¹⁹ Reynolds and Anderson (n 9)

The relative tardiness of case determination is not the only concern. It is inevitable in this context that, in accordance with the *Automec II* prioritisation principle, some cases will not be investigated at all despite their presenting *prima facie* instances of anti-competitive abuses.²⁰ The Commission has conceded that a leniency application – that is, a fledgling cartel case – “may be unsuitable for further consideration... because it is considered too unimportant... to investigate, given the Commission’s limited resources”.²¹ This is not a situation that lends itself to effective deterrence. Moreover, the long duration of cartel investigations may be inconsistent with reasonable time requirements under EC law, under similar principles to the European Convention of Human Rights.²²

1.2 The Cost of Legal Defence

The second factor that may have originally prompted European interest in settlement procedures is that the frequency of costly legal challenge to cartel decisions and fine awards is high. The way the Commission determines fines is not a precise science, and the scope for appeals reducing those fines will exist for as long as the Commission exercises independently its wide discretion in their calculation. The rise in the number of cartel cases naturally entails a concomitant growth in the annual number of legal challenges. As Commissioner Kroes has noted: “one cartel decision triggers an average of 3 to 4 court cases... defending our decisions is an ongoing and implicit part of the process and needs to be planned for in terms of resources”.²³

Some statistics can help to illustrate this predicament.²⁴ According to Veljanovski²⁵ cartel fines were reduced by an average of 18 per cent on appeal to the CFI and ECJ during the period 1996-2005. From my own database of cases covering the same

²⁰ *Cases T-24 and 28/90 Automec II* [1992] ECR 2223.

²¹ *Van Barlingen and Barennes* (n 14) 7

²² Case 105/04P, Judgement of September 21, 2006; OECD, ‘Plea Bargaining / Settlement of Cartel Cases’ (2006) Directorate for Financial and Enterprise Affairs, Competition Committee. Working Party No.3 on Co-operation and Enforcement. DAF/COMP/WP3(2006)3, FN6

²³ Kroes (n 1)

²⁴ Unless otherwise stated, statistics from database of cartel decisions; Stephan 2007

²⁵ C Veljanovski, ‘Penalties for Price-Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission’ (2006) 27 *ECLR* 510 p512

period, I calculate the reductions to be closer to 20 per cent. The size of fine reductions at appeal has, however, fallen since the adoption of a leniency policy. In the pre-lenieny period (1975-1995), the average discount on appeal to the CFI was as high as 49.3 per cent. To date, in no case has the final fine set by the courts been higher than that originally imposed by the Commission.

Looking at the propensity to appeal, in 2005 and 2006 59 actions were brought against 11 cartel Commission decisions. Of the 72 firms fined over €1 million, 53 appealed – so almost three quarters of firms incurring significant fines currently appeal. This may be a substantial drop on previous years; Joshua and Camesasca²⁶ estimated that as many as 90 per cent of firms appealed prior to 2005. Of the 53 firms that appealed in 2005 and 2006, only 11 had received some form of leniency discount other than immunity, indicating a greater tendency for non-lenieny firms to appeal. Of 50 CFI rulings delivered between 2003 and 2006 the average length of CFI appeal was 3.5 years. ECJ rulings average three years. Upon the delivery of a Commission decision, an infringing firm has three months in which to either pay the fine, or if they decide to appeal they can submit a bank guarantee until the appeal is complete. In the event of the appeal being unsuccessful or leading to only a reduction in fine, the sanction is subject to an increase for interest over the period.

The high propensity for firms to appeal, despite their natural desire for a speedy conclusion of proceedings, is a reflection of how fruitful appeals of cartel decisions generally are. Although the propensity of appeals and reductions granted in the EC appears to be falling, they are still significant, consuming a sizable proportion of the Commission's resources. Given the incentives outlined above, it is also unsurprising that a protracted and costly legal defence has become a standard component of the cartel enforcement process. Moreover, for the firms involved, the cumbersome, costly and time-consuming process – that of waiting years for the Commission to reach a decision before learning the exact level of fine incurred, appealing to the CFI and waiting years for a ruling, and then possibly applying to the ECJ if unsuccessful and waiting even longer for a second ruling – is surely detrimental to cartel enforcement

²⁶ Joshua and Camesasca (n 2) 10-14

in Europe. Alongside costing the Commission valuable resources in prosecuting litigation, this process creates uncertainty as to the consequences of approaching the Commission for leniency leaving it less likely that firms will come forward in future to report infringements. It also does nothing to deter cartel formation in the first place, as fines are often reduced by the appeal process but never increased to levels above those initially imposed by the Commission.

Reading this situation, Commissioner Kroes characterised the cartel enforcement programme as a potential victim of its own success. A less charitable interpretation may be that the ramifications of a ‘successful’ leniency policy – one that draws in significant numbers of applicants and thereby secures a wealth of information on anti-competitive practices – had not properly been thought through in terms of the likely impact on the Commission’s capacity to respond.

1.3 The Attractions of a Settlement Procedure

In this context, the freedom to reach an understanding of both the extent of illegal activity and appropriate penalties with cartel participants would be welcome. For the competition authority, settlement is attractive because it would expedite the consideration of cases and allow the Commission to avoid the expense, risk and resource commitment attendant on allowing access to the file, conducting hearings, preparing formal decisions and defending them before the CFI and ECJ.²⁷ This would also be in the public interest as settlements would in principle allow taxpayers money to be used a lot more effectively in dealing with cartel infringements; enhancing deterrence as timely punishment is delivered to more cartels. The costs of lengthy trials are a welfare loss to society and their avoidance should be favoured if that does not compromise the effectiveness of cartel enforcement and deterrence.²⁸

As well as saving a competition authority resources and providing a fast and flexible way of clearing the backlog of leniency applications and investigations, settlements or

²⁷ Joshua and Camesasca (n 2) 14

²⁸ K Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing 2004) p110

plea bargaining might also offer benefits to defendants, despite their potentially having to waive their right to appeal. In particular, such advantages would include an expedited resolution to antitrust action with less uncertainty as to the outcome and avoidance of higher legal costs. Where a maverick individual within the firm is responsible for the collusion, firms will want to resolve the issue quickly. Defendants may also be attracted by the potential to negotiate concessions through settlements or plea bargaining as they would gain some power to achieve a lower agreed fine than might otherwise be imposed. In turn, such improved incentives may encourage more firms to co-operate, possibly making more investigations less contentious. Under the current European leniency system, firms are given an idea of the band of leniency they can expect, but do not learn what the exact fine discount or final fine will be until the full Commission decision is delivered years later. An additional benefit for guilty parties is that plea bargains tend to make follow-on cases more costly to private plaintiffs, as less information about the infringement is made public in the absence of a full Commission decision or Statement of Objections (SO) or trial. As discussed later in the paper, this is a potential cost to adopting a settlement procedure.

Commissioner Kroes' original reflections on a possible settlement procedure in EC cartel cases were inspired by "a comparative glance across the Atlantic".²⁹ It was once estimated that in the US more than 90 per cent of corporate convictions in criminal antitrust cases result from a negotiated plea of guilty³⁰ and only around three per cent of criminal cases are decided by jury trial.³¹ It cannot be disputed that plea bargains save the US legal system substantial resources. It is estimated that to reduce bargained guilty pleas in the US from 90 to 80 per cent for criminal cases in general would

²⁹ Kroes (n 1)

³⁰ Hammond (n 4) M Grossman and M Katz, 'Plea Bargaining and Social Welfare' (1983) *American Economic Review*, 73, 749-757; DJ Newman, *Conviction: Determination of Guilt or Innocence Without Trial*, (Boston Little, Brown & Co, 1966); TR McCoy and MJ Mirra, 'Plea Bargaining as Due Process in Determining Guilt' (1980) *Stanford Law Review*, May, 32, 887-941; J Kaplan, 'American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store' (1977) *American Journal of Criminal Law*, 5, 215-24; D Guidorizzi, 'Should we really "ban" plea bargaining?: The core concerns of plea bargaining critics' (1998) *Emory Law Journal*, 47, 753.

³¹ I Markovits, 'Exporting Law Reform – But Will it Travel?' (2004) *Cornell International Law Journal*, 37, 95-114, p 107.

require “the assignment of twice the judicial manpower and facilities”³², although more recent studies are needed.

By contrast to the lengthy European procedures, in the United States – with the benefit of a plea-bargaining regime – cartel cases are regularly disposed of within three to four years. Table 1 illustrates how much longer it took in Europe to resolve Archer Daniels Midland’s involvement in the Lysine cartel, as compared to the use of a plea bargain by the DOJ.

³² W Burger, ‘The State of the Judiciary’ (1970) *A.B.A.J.*, 56. 929, p 931 (cited in J Palmer, ‘Abolishing Plea Bargaining: an end to the same old song and dance’ (1999) *American Journal of Criminal Law*, 26, 505.) See also: R Posner, *Economic Analysis of Law* (4th ed, Boston: Little, Brown and Co, 1992), 561-562.

Table 1 – Archer Daniels Midland – Lysine Cartel³³

	US	EC
1992	INVESTIGATION OPENS	
1993	FBI BEGINS SECRET FILMING	
1994		
1995	DAWN RAIDS, ADM CHARGED	
1996	ADM ENTERS PLEA BARGAIN, AGREES TO PAY \$100 million	INVESTIGATION OPENED FOLLOWING LENIENCY APPLICATION
1997		DAWN RAIDS, REQUEST FOR INFORMATION
1998		STATEMENT OF OBJECTIONS SENT, CHARGING ADM
1999		
2000		COMMISSION FINAL DECISION, €47.3m FINE
2001		
2002		
2003		JUDGEMENT OF COURT OF FIRST INSTANCE - FINE REDUCED FROM 47.3m TO 43.9m
2004		
2005		
2006		FINAL JUDGEMENT, COURT OF JUSTICE

Thus, the introduction of a procedure for direct settlement may greatly enhance the efficiency of the Commission’s enforcement regime. It would allow the redirection of

³³ Case C-397/03P, *Archer Daniels Midland v Commission*, Judgement of 18 May 2006; Case T-224/00, *Archer Midland v Commission*, [2003] ECR II-2597; See also OECD (n 22)

saved resources from investigating/developing and defending decisions towards the consideration of cases that might otherwise be de-prioritised. The potential result promises to be a broader coverage of cases reported under the leniency programme, more cases in which infringing firms are punished and thus an increase in deterrence.

2 Extent to which settlement is currently possible on the Community level

2.1 “Consent Commitments” under Regulation 1/2003

Of course, the EC had previously moved some way towards a system of settlement of competition law. The recent reform of antitrust procedure in the EC saw the formalisation of the power of the Commission to accept commitments proposed by the parties to anti-competitive practices in settlement of its case file. Under Regulation 1/2003 (The Modernisation Regulation), the possibility that the European Commission might close competition law cases by way of the acceptance of commitments negotiated with the parties involved has been formally confirmed. By virtue of Article 9(1), where it already intends to adopt a prohibition decision, the Commission can accept commitments offered by the undertakings involved that address the identified competition concerns.³⁴ No such decision would imply any conclusion either way as regards whether there had in fact been an infringement³⁵, averting the possibility of costly appeals to the CFI and ECJ except in seeking annulment on grounds such as duress. The Commission may continue its proceedings should new evidence emerge or where the undertakings have failed to honour their stated commitments or have misled or obstructed the Commission’s investigations.

[The main novelty of the 1/2003 as compared to Regulation 17 which it replaced is that these consent decisions can] “be enforced by third parties in

³⁴ Per Sousa Ferro – “It was already common practice for the Commission to accept “undertakings” (commitments) during antitrust investigations. The significant change brought about by these new Decisions is that, if the companies in question do not abide by their commitments, they will be subject to the same fines and periodic penalty payments as might be applicable through a Decision finding a violation of Competition Law, without the Commission needing to demonstrate anything but a violation of the Commitment.”

³⁵ Article 9(2) and 9(3)

national courts, and by the Commission with the fines and periodic penalty payments provided for in Art 22(2) (c) and 23(1)(c)”³⁶

Under this existing provision, however, it was highly improbable that commitment decisions would be adopted to close cases involving cartel behaviour. The preamble to Regulation 1/2003 explains that ‘commitment decisions are not appropriate in cases where the Commission intends to impose a fine’³⁷. This clearly includes the vast majority of cartel cases. Some scope might have been left, however, by the fact that Article 9 itself includes no such limitation. In this sense commitment decisions are equivalent to American ‘consent decrees’ and are thus more regulatory in character rather than a tool of enforcement which is more akin to plea bargains. They are only useful where the Commission has concerns that can be addressed with simple commitments by a firm and where it would not be in the Community interest to pursue a full investigation and prosecution resulting in pecuniary sanctions.

The fact that commitment decisions are not appropriate where a pecuniary penalty is to be applied “may mean that in practice such decisions are unlikely to be frequently used given that the general presumption is that in the post-modernisation regime the Commission is expected to focus on the more serious breaches of law, and in particular hard-core cartels”³⁸ which is why they have been used infrequently. Perhaps it is a way of quickly resolving less serious cases, so as to free up resources for more serious infringements. The first example of a consent commitment pursuant to Art9(1) Reg. 1/2003 being used to conclude an Article 81 case was *German Bundesliga*³⁹ (January 2005) which concerned the exclusive selling of commercial broadcasting rights by a football association. In a one page decision the Commission brought the case to a close stating, “Without having conducted a full investigation of the case, it is considered that the League Association’s commitments seem to introduce competition ... The commitments shall be binding on the League Association until 30 June 2009”.

³⁶ WPJ Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics* (Kluwer Law Int. 2002) at 6.5.2.2

³⁷ Recital 13

³⁸ M Furse, ‘The Decision to Commit: Some Pointers from the U.S.’ (2004) *E.C.L.R.*, 25(1), 5-10

³⁹ Commission decision of 19 January 2005 (Case COMP/C.2/37.214 — Joint selling of the media rights to the German Bundesliga) OJ L 134/46

A similar consent commitment was reached in June 2005 with *Coca-Cola*⁴⁰ concerning the distribution of carbonated soft drinks (Article 82). In April 2006 another was reached with the Spanish *Repsol CCP*⁴¹ petroleum company in relation to vertical restraints in long-term exclusive supply agreements with service stations. These cases all concern restraints affecting the future and so differ fundamentally from hard core cartel cases.

Two further problems with commitment decisions exist: firstly, they do not protect undertakings from prosecution by national competition authorities or in national courts⁴². However under Art 11(4) 1/2003 they must consult the Commission first⁴³; and secondly, some supervision is required to ensure that the terms of the agreement are honoured. This means extra cost to the competition authority and to third parties who take firms to court. Contrast this to a plea bargain where a penalty reflecting punishment and deterrence is agreed upon. Perhaps, as Joshua⁴⁴ suggests, the modernisation regulation was a missed opportunity to “streamline the cumbersome procedures” of Regulation 17 (which Regulation 1/2003 replaced) by not going far enough to develop direct settlement under Article 9(1).

2.2 Leniency

Leniency discounts of fines in return for cooperation act as a settlement ‘surrogate’ in the EC to the extent that they offer a reward for cooperation and for not denying the existence of an infringement. Here a distinction needs to be made in the language of leniency programmes. In the US “leniency”, “immunity”, and “amnesty” are all synonymous, meaning that the first firm/individual to blow the whistle (satisfying the conditions of the US Corporate Leniency Program) receives complete protection from prosecution and sanctions (except from private damage actions⁴⁵). Where this has been granted and the remaining members of a cartel want to cooperate in return for a

⁴⁰ Commission decision of 22 June 2005 (Case COMP/A.39.116/B2 — Coca-Cola) OJ L 253/21

⁴¹ Commission decision of 12 April 2006 (Case COMP/B-1/38.348 — Repsol CPP) OJ L 176/104

⁴² Art 9, recital 3; Furse (n 38)

⁴³ Wils (n 36)

⁴⁴ Joshua (n 2)

⁴⁵ The Antitrust Criminal Penalty Enhancement and Reform Act 2004 has offered some protection from private damage claims to an amnesty (immunity) recipient by reducing a firm's liability to single (rather than treble) damages, and by removing joint and several liability from that firm.

discount in fines, they must approach the DOJ for a plea bargain. In the EC on the other hand, “immunity” refers to the protection from fines granted to the first firm to whistleblow (provided the conditions of Section I of the 2006 leniency notice⁴⁶ are met; formerly Section A of the 2002 notice). “Leniency” on the other hand refers to fine discounts granted to subsequent revealing firms party to the infringement in return for cooperation. These fine discounts are governed by the rules set out in Section II of the notice (formerly Section B) and are not directly negotiated between the firm and the Commission. In the past, it was not unusual for every infringing firm in a particular case to receive some leniency discount (typically at least 10 per cent) even if they only started cooperating in the later stages of the Commission’s investigation. It appears that this practice has now been abandoned. Although the Commission will verify that a firm has satisfied a certain “band” of leniency discount, the firm will not know the exact level of fine it will face or discount it has been granted until the final Commission decision is delivered a number of years later. In addition, though firms receiving leniency discounts may not refute the existence of an infringement, they are still free to appeal to the CFI and ECJ for the fines to be lowered or on procedural grounds, drawing the Commission into costly litigation. Indeed, it is not uncommon for firms to appeal the size of the leniency discount.

Even before the EC leniency notice was introduced in July 1996, the Commission used its discretion to award substantial fine discounts in return for cooperation with their investigations, even though such discounts were not explicitly provided for in Regulation 17 and the Commission purportedly acknowledged that there was no legal basis for them.⁴⁷ An example of this pre-1996 *de facto* leniency is *Cartonboard*⁴⁸ in which two undertakings were granted 66 per cent fine discounts and another eight received 33 per cent in return for providing evidence and admitting the infringement.⁴⁹ *Wood Pulp*⁵⁰ also involved a substantial reduction in fines in return for cooperation.

⁴⁶ ‘Commission notice on immunity from fines and reduction of fines in cartel cases’ [2006] OJ C 298/17; preceded by [2002] OJ C 45/3 and [1996] OJ C 207/4

⁴⁷ I Van Bael, ‘Fining a la carte: the lottery of the EU competition law’ (1995) *E.C.L.R.*, 16(4), 237-243

⁴⁸ 94/601/EC: Commission Decision of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 – Cartonboard)

⁴⁹ Van Bael (n 47)

Firms have also for some time been able to influence the level of fine they incur, by trying to convince the Commission that they should be granted a further fine discount due to “attenuating circumstances” as now set out in the 2006 ‘Guidelines on the method of setting fines pursuant to Article 23(2)(a) of Regulation No 1/2003’⁵¹. Recital 29 (formerly Section 3f) of the guidelines lists as a mitigating circumstance, “where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so”.⁵² The guidelines do not provide an exhaustive list of such attenuating circumstances and the Commission has wide discretion in the application of discounts. A common ground for fine reductions in cartel cases is where firms are undergoing financial difficulties or where the industry is in crises.⁵³ In the US this “ability to pay” type discount (available under the U.S. Sentencing Commission Guidelines) is negotiated as part of the plea bargain and then presented to a district court for approval.

The leniency programme and other cooperation create incentives for firms to come forward and cooperate, speeding up the investigation process, but it is still up to the Commission alone to decide the exact level of fine discounts that will be awarded. Moreover, leniency has created a backlog of leniency applications, no doubt many of which will prove to be spurious, and as will be explained later in this paper, does not discourage firms from appealing.

Thus the European Commission is currently unable to enter into settlements with infringing firms in hardcore cartel cases, although firms have for many years been granted concessions for cooperating and admitting liability, even before the introduction of the leniency notice.

⁵⁰ 85/202/EEC: Commission Decision of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.725 - Wood pulp)

⁵¹ [2006] OJ C210/2; formerly [1998] OJ 98/C 9/03

⁵² see also PM Roth, *Bellamy and Child European Community Law of Competition* (Sweet & Maxwell 2001) at 12-054

⁵³ For a detailed discussion see: A Stephan, ‘The Bankruptcy Wildcard in Cartel Cases’ *Journal of Business Law*, August Issue, pp.511-534

3 The American experience

Commissioner Kroes' original suggestion of adopting a settlement procedure specifically for cartel cases, implicitly drew upon the experience of the United States antitrust authorities in plea-bargaining and negotiating consent decrees with the parties to alleged anti-competitive practices. An important distinction must be drawn, however, between the US and EC antitrust regimes. First, in contrast to the European Commission, the DOJ imposes criminal, not civil, sanctions on hard core cartels and so has no power in itself to determine whether a cartel offence has been committed or to impose appropriate penalties. Rather, it acts as a criminal prosecutor in a court and must persuade a jury that an offence has been committed. For less serious offences, the DoJ can also proceed by means of civil enforcement of the Sherman Act. However, punitive fines for cartel behaviour are imposed under criminal law. The DoJ has the monopoly of prosecution in this area (it enjoys an exclusive competence to enforce the Sherman Act, but shares authority to enforce the Clayton Act with the FTC).

Under the equitable civil jurisdiction, the DoJ is entitled to any remedy that is reasonable and necessary to achieve adequate relief from anti-competitive behaviour. Relief is deemed adequate where it stops the alleged illegal practices, prevents their renewal, and restores competition to the state that would have existed had the violation not occurred. By negotiating a consent decree in a civil antitrust case, the DoJ can obtain effective relief without taking the case to trial. This may include the making of a restitutive payment, but not a punitive fine. Similarly, by negotiating a plea bargain in a criminal antitrust case the DoJ can achieve enforcement with punishment, again without taking the case to trial.

It is important to distinguish between a *consent decree* and a *plea bargain*. Despite both requiring court approval and essentially amounting to a settlement in lieu of trial between a defendant and a prosecutor, they have very different implications, with the stakes being much higher in plea bargaining. The former is an agreement by which a defendant ceases certain actions alleged to be illegal by the antitrust authority in

return for prosecution being dropped. It is not an admission of guilt and does not involve the imposition of a sanction *per se*. Plea bargains on the other hand are a negotiated agreement in which a defendant agrees to plead guilty to a criminal offence (unless *nolo contendere* discussed below), cooperating with any ongoing investigation and waiving its rights of appeal, in return for concessions granted by the antitrust authority (prosecutor). These concessions typically take the form of a lesser offence or a reduced sanction. Under the Sherman Act, there is no lesser offence for cartels. Both consent decrees and plea bargains are legally binding and can be enforced in court. Thus a competition authority cannot use a consent decree to acquire injunctive relief, or use a plea bargain to obtain evidence, and then go ahead with a prosecution in the courts anyway – at least not in connection to the offence or activities as described in the agreements.

3.1 US Consent Decrees

More than 70 per cent of civil antitrust cases brought by the DoJ have been settled with consent decrees.⁵⁴ Consent decrees are regulatory in character; they are not about enforcement, but rather about injunctive (equitable) relief, designed to restore the competitive position. Settlement discussions are normally initiated by the respondent. The parameters of the judgment are then negotiated with DoJ staff, and ultimately approved by the Assistant Attorney General. A negotiated judgment is subject to withdrawal by the DoJ at any time prior to its formal entry by the court.

The DoJ's negotiation and entering of consent judgments is subject to the Antitrust Procedures and Penalties Act of 1974 (APPA, also known as 'The Tunney Act'), which provides scope for public scrutiny and comment. The APPA requires the DoJ to file a competitive impact statement with the court at the same time as its consent judgment. This document must detail all of the information necessary to allow the court and the public to understand the background circumstances, the impugned practices and the competitive harm, and to evaluate the DoJ's case and the coherence of the proposed remedies. It must explain why the proposed judgment is appropriate

⁵⁴ ML Weiner, 'Antitrust and the rise of the regulatory consent decree,' (1995) *Antitrust*, Fall, 41; Furse (n 38) FN5

in the circumstances, and how it serves the public interest. All competitive impact statements follow a prescribed format. “The substantive component requires the court to ‘determine that the entry of such judgement is in the public interest’”⁵⁵.

The proposed judgment and the competitive impact statement must be published in a Federal Register at least 60 days in advance of the date at which it is to come into force. This is intended to allow time for objections to be raised to the proposal. Summaries of the proposed judgment and the statement must also be published in newspapers in line with a similar timescale (e.g. *Washington Post*). Each defendant must file with the court a description of all communications with the DoJ regarding the proposed consent decree. A court must approve the relief accepted by the government if it is within the "reaches of the public interest." (*United States v. Microsoft*⁵⁶). Once entered by the court, consent decrees are normally effective for at least ten years and can be enforced in the courts by third parties.

The main benefit of consent decrees is that they save the prosecutor the substantial costs of trying a case in full as well as dealing with subsequent appeals. They also benefit defendants by resolving allegations permitting them to avoid the effect of section 5(a) of the Clayton Act, which accords prima facie treatment in subsequent private actions to a judgment adverse to the defendant in a litigated government action. As consent decrees are not an admission of guilt, they cannot be used by private parties in litigation – not even as prima facie evidence.⁵⁷ However, they normally serve as a signal to affected buyers to assess whether there is scope for such an action.⁵⁸

⁵⁵ SI Weisburst, ‘Judicial Review of Settlements and Consent Decrees: An Economic Analysis’ (January 1999) 28 *J. Legal Stud.* 55.

⁵⁶ 56 F.3d 1448, 1461-62 (D.C. Cir. 1995)

⁵⁷ 15 U.S.C., 15 s.16(a); Furse (n 38)

⁵⁸ Furse (n 38)

3.2 US Plea Bargaining

Plea bargains are governed by the Federal Rules of Criminal Procedure, Rule 11(c)(1):

An Attorney for the government and the defendant's attorney... may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offence or a lesser or related offence, the plea agreement may specify that an attorney for the government will:

- (A) Not bring, or move to dismiss other charges; [TYPE A Plea Bargain]
- (B) Recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation does not bind the court); or [TYPE B Plea Bargain]
- (C) Agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement) [TYPE C Plea Bargain]

The defendant usually approaches the DOJ although the reverse is also possible. According to the DOJ's "Grand Jury Manual" (GJM Chapter IX) TYPE B plea bargains are the most commonly used because courts are more willing to approve them, with their discretion available to reject the proposed sentence and impose a different one. TYPE C plea bargains can only be approved or rejected and so courts tend to be more hostile towards them.

The entering of a guilty plea is usually a condition of any plea bargain – however, there is an exception: *Nolo Contendere*. Literally meaning "I do not contest it", this plea is often entered by a criminal defendant when he faces a realistic prospect of conviction, does not wish to undergo a trial, and yet is not willing to admit that he

committed the offence. Generally, a defendant pleading *nolo contendere*, or "nolo," will be found guilty of the offence by the court, as he has agreed not to contest the charge. His plea (unlike any other guilty plea) may not be used against him to establish negligence per se, malice, or even that he actually did the acts which resulted in the conviction, in later civil proceedings related to the same set of facts as the criminal prosecution. This makes follow-on actions for damages difficult. However, *nolo contendere* pleas are extremely rare in antitrust cases and will only be granted by the DoJ in unusual circumstances according to the GJM (Chapter IX). There can also be an *Alford Plea*⁵⁹ in which a defendant pleads guilty, but continues to maintain his innocence. Prosecutors normally foresee such pleas and take extra care to collect factual evidence that proves the defendant's guilt. *Alford* pleas offer no protection from subsequent civil action.

The DoJ and the defendant are not completely free to negotiate any level of fine. The Sentencing Reform Act 1984 (SRA) requires that sentences arrived at through plea bargains adhere to the United States Sentencing Commission Guidelines (henceforth U.S.C.). Plea bargains can however be conditional.

Under the rule established in *Brady v Maryland*⁶⁰, prosecutors are required to disclose any evidence it possesses which is favourable to the defence.⁶¹ However in most cases the defence counsel must make a specific request for "exculpatory material" and even then, the obligation on the prosecutors only applies if the information "in and of itself creates reasonable doubt of guilt of the accused"⁶² (*United States v Agurs*⁶³).

There are two recent developments which may prove detrimental to the operation of plea bargaining in US antitrust enforcement. *Firstly*, s.1 of the Antitrust Criminal Penalty Enforcement Act 2004 has substantially increased antitrust sanctions. Maximum statutory corporate fines have increased from \$10 million to \$100 million

⁵⁹ *North Carolina v Alford*, 400 U.S. 25 (1970)

⁶⁰ 373 U.S. 83 (1963)

⁶¹ C Barrett Lain, 'Accuracy Where It Matters: Brady v Maryland in the Plea Bargaining Context' (Spring 2002) 80 *Wash. U. L. Quarterly*, 1,

⁶² FC Zacharias, 'Justice in Plea Bargaining' (March 1998) 39 *William and May L. R.* 112

⁶³ 427 U.S. 97, 112 (1976)

and for individuals personal fines have increased from \$350,000 to \$1 million and prison sentences increased from three years to ten. Joshua suggests that: “While this reform may "encourage" applicants to rush in first for full immunity, it might prove to be a disincentive to negotiating a plea bargain. Faced with the offer of an 18-month sentence, a defendant might decide to play safe rather than risk three years. An opening offer from the DoJ of five years might, on the other hand, tempt the individual to take their chance with a jury”⁶⁴. Secondly, in *United States v Booker* the US Supreme Court ruled that district judges are no longer required to follow the US Sentencing guidelines⁶⁵, used in the calculation of penalties. They now have the power to set fines that are lower than the minimum required by the guidelines making it tempting for firms to try their chances with a jury, with the aim of incurring a lower fine than would be on offer from the DOJ in plea bargaining that adheres to the guidelines. The Supreme Court also held that “when a sentencing judge determines facts not found by jury or admitted by the defendant in imposing an enhanced sentence under the U.S. Sentencing Guidelines, the defendant’s constitutional right to trial by jury is violated”⁶⁶. Despite *Booker* and other Supreme Court decisions confirming the Guidelines status as advisory, it appears that courts continue to follow them when accepting plea agreements.⁶⁷

Under Federal Rules of Criminal Procedure, Rule 11(e)(f) a guilty plea made through a plea bargain is admissible in civil (private) actions unless *nolo contendere*. However if one examines the contents of a plea bargain document, there is very little detail contained therein compared to a full European Commission Article 81 decision, for example. This is because the plea bargain discussions themselves occur behind closed doors away from the court. There is thus an incentive to settle in a plea bargain, rather than having the details of an infringement fought out in court, resulting guilty plea. This, coupled with the revealed evidence, will likely assist injured parties in their legal action more so than a plea agreement. Under Rule 11(e)(6), "any statement made in the course of plea discussions with an attorney for the government which do not

⁶⁴ Joshua (n 2)

⁶⁵ United States Sentencing Commission, <www.ussc.gov/guidelin.htm>

⁶⁶ SD Hammond, ‘Antitrust Sentencing in the post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants’ American Bar Association Section of Antitrust Law, Spring Meeting, Washington D.C., March 20, 2005.

⁶⁷ OECD (n 22) FN14

result in a plea of guilty" are privileged communications and are not admissible in subsequent criminal and civil proceedings. The benefits this brings vis-à-vis follow on suits may make this a very strong driver for firms.

The plea bargaining systems which exist in the USA and Canada both operate within criminal competition law enforcement regimes. Forms of direct settlement also exist in some civil / administrative enforcement systems including Australia, New Zealand and South Africa.⁶⁸

The U.S. thus has a definitive system of plea bargaining that has evolved over more than a century and which the judiciary has developed in parallel to. It represents an absolute settlement procedure under which the competition authority and infringing firm agree the exact level of fine to be paid, and where the latter agrees to waive rights of appeal, bringing cases to a swift conclusion. Savings are clearly maximised under such a system allowing more cases to be dealt with. However such a system is not without a number of trade-offs.

3.3 The incentives for firms to settle in the US

Before discussing the trade-offs which exist in a system of direct settlement, it is important to understand why such a high proportion of firms in the US choose to settle with the DOJ, rather than go to trial. Apart from the benefit of bringing proceedings to a timely conclusion, there are three main reasons why firms choose to settle: *First*, to gain from the concessions available at settlement. In the US, leniency discounts are not available once immunity has been granted to the first revealing firm. Any subsequent firms seeking concessions in return for cooperation have no choice but to plea bargain; *Secondly*, apart from an admission of guilt and the level of sanction agreed, no other information about the infringement is generally made public at plea bargain. This hinders follow-on actions for damages and so is more desirable than a full public trial. This is a particularly strong incentive in US antitrust cases where treble damages are normally available to injured parties; *Thirdly*, the DOJ

⁶⁸ OECD (n 22) recital 11

prosecutes individuals and firms for cartel infringements, both of whom can approach them together in order to settle their culpabilities. These incentives in the US have to be strong because, by entering into a plea bargain with the DOJ, infringing firms waive their rights of appeal, making the settlement final.⁶⁹

4 The costs of direct settlement

The perceived benefits of adopting a broad US style settlement procedure have to be weighed against the potential costs. Although plea bargains may save the competition authority resources, speed up cartel enforcement and clear any backlog of leniency applications, the introduction of such a system is likely to result in three trade-offs: (i) *Lower Fines* will result from the offer of a settlement concession and from a potential agency cost, whereby the competition authority becomes increasingly willing to accept lower fines at settlement in order to complete more cases. If fines are the only effective sanction, there will be a negative impact on deterrence as the level of punishment will be reduced; (ii) *Unjust Outcomes* may come about as a result of shortened investigations and procedures, where there is a greater reliance on information of questionable accuracy obtained through leniency. In addition, the competition authority may put undue pressure on firms to accept settlements. Some judicial oversight is required to ensure fairness at settlement, especially where firms are forced to waive their right of appeal. (iii) *Private Enforcement* in the form of follow-on actions will be weakened if settlements result in less information (or no information at all) about the infringement becoming publicly available. The first and third effects will be particularly detrimental to deterrence and may outweigh any benefits in terms of processing more cases in a timely manner or clearing a backlog of leniency applications.

4.1 Lower fines: Settlement concession & agency costs

In a cartel enforcement regime where fines are the only sanction (as is the case on EC Community level), high fines are necessary in order to ensure an effective level of

⁶⁹ SD Hammond (n 4) p2, 11

deterrence is achieved. As well as persuading firms to desist from cartel behaviour, high levels of fines improve the effectiveness of leniency programmes in uncovering infringements. This is because more firms are enticed into revealing their anti-competitive behaviour in return for immunity from the high fines. Hammond has frequently commented that “if a jurisdiction relies... on financial penalties alone to sanction cartel conduct, then the fines must be severely punitive if they are going to attract amnesty applicants”⁷⁰. It is generally accepted that fines imposed by European Commission, capped at the statutory 10 per cent of annual worldwide turnover, are inadequate to achieve a high level of deterrence⁷¹, in the absence of effective criminal enforcement against individuals⁷² and of prevalent private enforcement in terms of injured parties bringing follow-on actions for damages.

4.1.1 The settlement concession

Firms’ primary incentive to participate in a settlement procedure is the availability of a concession in the form of a fine discount. The greater the settlement concession, the greater the willingness of infringing firms to settle. However, as the concession will be equally available to all firms that settle, greater concessions also amount to reduction in the magnitude of fines imposed in cartel cases. This has the effect of weakening deterrence and could outweigh any gains in terms of freed-up resources. There is also a danger that large settlement concessions could undermine the leniency programme which relies on a stark difference between the immunity prize and the size of the sanction otherwise faced.⁷³ On the other hand, if the settlement concession is small, then firms may be unwilling to participate in settlements that waive their right to appeal, particularly if an appeal is likely to lead to 20 per cent reduction in fine, as has been the case in the EC.

⁷⁰ SD Hammond, ‘Cornerstones of an effective Leniency Program’, ICN Workshop on Leniency Programs, Sydney, Australia, Nov 22-23, 2004

⁷¹ Wils (n 36) at 6.5.2; P Bucciross and G Spagnolo, ‘Optimal Fines in the Era of Whistleblowers, Should Price Fixers Still Go to Prison’ (2005) Lear Research Paper 05-01

⁷² A criminal offence against individuals exists within some member states, and private enforcement is assumed to be weak, although we do not know how many cases are settled out of court.

⁷³ OECD (n 22) recital 7

In US plea bargaining, a settlement concession in addition to leniency is not necessary. Firms that miss the immunity prize have no choice but to settle if they wish to receive lenient treatment in return for cooperation. Firms in the US also have a strong incentive to plea bargain, regardless of the concession available, as this makes it harder for private parties to rely on public prosecution to assist them in seeking damages. Typically, only a press release and brief court hearing are made public. These usually confirm an admission of guilt and the level of sanction agreed at plea bargain. Both these incentives are likely to be weak in the EC where follow-on actions are less prevalent and where a separate and distinct leniency programme grants discounts to subsequent firms to come forward after immunity has been awarded.

It is also in the interest of firms in the US to enter plea bargains in order to secure immunity from prosecution or reduced sentences for *employees* involved in the infringement. In the EC on the other hand, criminal sanctions exist only within some member states (e.g. UK and Ireland) and the Commission is not in a position to grant such guarantees on behalf of national competition authorities in criminal matters. In addition, firms negotiating plea bargains with the DOJ can benefit from *amnesty plus* whereby further concessions are granted in return for information about another infringement. Inversely, where it is later revealed that a firm held information about another infringement that it did not produce, it may be subject to *penalty plus* under which fines are increased.⁷⁴

In the absence of the incentives outlined above, the need for generous settlement concessions may also be heightened by firms' varying willingness to settle.⁷⁵ For example, firms who choose not to cooperate at all, or who are reluctant because they were one of the ringleaders (precluding them from immunity⁷⁶), may be less willing to settle than those already 'in bed' with the regulator. Even if only one firm in a particular case refuses to settle, the procedural gains of settlement will be lost. This is because delivering and defending a decision or conviction against that firm will

⁷⁴ Hammond (n 70)

⁷⁵ E.g. N Boari and G Fiorentini, 'An economic analysis of plea bargaining: the incentives of the parties in a mixed penal system' (June 2001) 21 *Int'l Rev. L. & E.*

⁷⁶ 2006 Leniency Notice, Recital 13

require a full investigation and case file. The competition authority is also more likely to face costly appeals from the firm, especially if it would otherwise have waived its right of appeal at settlement.

The settlement concession may also need to reflect the probability of a conviction failing, or of the penalty being reduced at appeal.⁷⁷ As fines in the EC are currently reduced by an average of 20 per cent at appeal, a settlement procedure that required parties to waive their right to appeal, would need to be underpinned by a generous concession. Finally, concessions may also need to counter other advantages of seeking a drawn-out process; for example, to delay follow-on actions for damages in the courts of national member states.⁷⁸

4.1.2 The potential agency cost

The public interest in cartel enforcement lies primarily in the deterrence of future infringements, averting the harm caused by collusive agreements in the first place. Deterrence depends, not only on the number of infringements punished, but also on the gravity of the punishment. In particular, if the punishment is inadequate, then the net benefit from cartel infringements, even if a large proportion are caught, may still be positive. However, politicians and members of the public may crudely measure a competition authority's success simply in terms of the number of cases it completes each year. If this is so, then there is pressure on the competition authority to conclude cases as swiftly as possible in order to improve its reputation, secure public and political support, and to justify the public money invested in its activities.

“the prosecutor's position as an agent means that guilty plea settlements negotiated case by case tend to diverge from those that would most efficiently serve the public interest in optimal deterrence... this divergence usually takes the form of unduly lenient sentence offers”⁷⁹

⁷⁷ JR Lott Jr., ‘Should the wealthy be able to “buy justice”?’ (December, 1987) *The Journal of Political Economy*, Vol. 95, No6, 1307-1316

⁷⁸ OECD (n 22) FN39

⁷⁹ SJ Schulhofer, ‘Plea Bargain as Disaster’ (June 1992) 101 *Yale L. J.* 1979,

Thus the agency problem that may arise in any system of settlement, is the strong temptation for competition authorities to process as many cases as possible by offering greater concessions at settlement.⁸⁰ This may be particularly tempting where there is a backlog of leniency applications waiting to be processed, or where the regulator is keen to curb the number of costly appeals resulting from its decisions/prosecutions; particularly where these result in prosecutions being overturned or severely criticised at judicial review. There may also be a desire to increase credibility, reputation or to use competition law enforcement as a way of furthering other policy objectives.⁸¹

In the US, fines in plea bargains are calculated according to the US Sentencing Commission Guidelines as required by the SRA. These set minimum and maximum thresholds for fines, with specific criteria under which fines can be set outside of these limits. One of the grounds for imposing a fine below the minimum is the “ability to pay” exception. The DOJ’s treatment of firms including SGL, UCAR and Hynix suggest that this exception is applied loosely during negotiations at plea bargain. The firms were granted concessions under this exception as part of plea bargain settlements even though the ‘continued viability’ of the organisations did not appear ‘substantially jeopardized’ as required by the U.S.C; in particular Hynix was about to spend \$250 million on a business venture in China⁸² Although such cases suggest fine discounts may be used as bargaining tools in settlements, this is less of a concern in the US where other sanctions also exist.

More generally, collusion between the authority and the infringing firm is considered to be a serious danger in the US.⁸³ One of the purposes of the US Tunney Act in requiring court approval of consent decrees and 60 days in which the public can scrutinise them, was to prevent alleged ‘sweetheart deals’ that occurred before those requirements came into place. Allegedly under these deals “powerful corporate

⁸⁰ Palmer (n 32)

⁸¹ Schulhofer (n 79)

⁸² See also: Stephan (n 53); H Mutchnik and C Casamassima, ‘*United States v Hynix Semiconductor, Inc*: Opening the Door to the Inability-to-Pay Defence?’ (2005) *Antitrust Source*, September 2005, p.4.

⁸³ RE Scott and WJ Stuntz, ‘A Reply: Imperfect Bargains, Imperfect Trials and Innocent Defendants’ (1992) 101 *Yale L. J.* 2011

interests used political influence to negotiate a consent decree that did not adequately address the issues raised in a law suit”⁸⁴ or that was not in the public interest.⁸⁵

In Europe, the obvious danger that arises in this context is the Commission’s obligation to take social factors into account when setting fines: “...the consequences which payment of the fine would have, in particular by leading to an increase in unemployment...”⁸⁶ As a consequence of this, the Commission may give favourable treatment to European firms and firms with large operations within the EU. Apart from lowering fines, this will adversely affect predictability and consistency.

Lower fines resulting from generous concessions and a potential agency cost are thus detrimental to deterrence in jurisdictions where fines are the only sanction, such as on the European Community level. If the settlement concession is too high then there may be a net reduction in deterrence, despite the freeing-up of resources which can be employed in more cases.⁸⁷ Where there is a danger that fines are already insufficient to deter cartels (in the absence of other sanctions) then direct settlements risk reducing the cost of collusion for infringing firms, widening any gap between the illegal cartel profits earned and the sanction faced, given the likelihood of being detected. On the other hand, if the settlement concession is too low, then firms may choose not to settle; particularly where they are expected to waive their right to appeal as part of the settlement. Instead, they will choose the normal enforcement procedure under which cases continue to be taxing on a competition authority’s time and resources, while any backlog of leniency applications continues to grow.

⁸⁴ Anderson, L.C., ‘United States v Microsoft, Antitrust Consent Decrees, and the need for a proper scope of judicial review’, (1995) 58 *Antitrust Law Journal* 1.

⁸⁵ Furse (n 38)

⁸⁶ Joined Cases T-236/01, T-239/01, T-244/01, T-251/01 and T-252/01 *Tokai Carbon and others v Commission of European Communities* [2004] ECR II-1181, at 371

⁸⁷ Schulhofer (n 79)

4.2 Abuse, fairness and judicial safeguards

In an efficient settlement procedure, the competition authority will agree to sanctions that accurately reflect firms' respective culpabilities, minus the settlement concession.⁸⁸ Where a settlement procedure is adopted in order to free up resources and time, there is an implication that investigations will become shorter and that case files will be less detailed. Moreover, the outcome of settlement negotiations or discussions will depend heavily on the bargaining power of the competition authority. The settlement procedure occurs behind closed doors and judicial safeguards are needed to insure fairness.

4.2.1 Imperfect information and abuse by co-conspirators

In order to save resources and deliver swift justice, settlements have to be reached at an earlier procedural and investigative stage so that the case can be brought to a close and the competition authority's finite resources can be moved onto the next leniency application or letter of complaint.⁸⁹ The problem with shortened investigations is that the competition authority will arrive at a settlement with an infringing firm using less detailed evidence than would otherwise be the case. In particular, the competition authority will rely more heavily on evidence obtained through the leniency programme which may be of questionable accuracy.

Cartels are multi-agent infringements, but investigations opened through a leniency application will initially depend on information provided by just one firm. In the *Seamless Steel Pipes* appeal, the CFI stated that "no provision or any general principle of Community law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings..."⁹⁰. The question is whether firms may abuse this reliance by providing information that exaggerates the involvement of fellow cartel members (now competitors once more) with a view of granting themselves a competitive advantage in the post-cartel period. The temptation

⁸⁸ Schulhofer (n 79)

⁸⁹ Scott and Stuntz (n 83)

⁹⁰ JFE Engineering Corp. and others v. Commission, Joined Cases T-67/00 T-68/00, T-74/00 and T-78/00 8 July 2004 par 192; see also Van Barlingen and Barenas (n 14)

to embellish evidence may be heightened by the ‘race to the commission’ and concerns as to whether enough information will be provided to secure immunity. It is not inconceivable in extreme cases, that cartels may use the threat of exaggerating a cheating firm’s role in an infringement to sustain the collusive agreement.⁹¹

Allegations of whistle blowing parties embroidering or exaggerating evidence that is relied upon by the Commission has been alleged in the past before the CFI and ECJ – for example in the *Cartonboard* appeals⁹² More recently in an appeal lodged with the ECJ concerning the *Pre-Insulated Pipes Cartel* it was alleged that ABB had its fine reduced by exaggerating the participation of other firms in the infringement, even though it was the main instigator of the cartel⁹³. Also in *Copper Fittings*⁹⁴ the fine for one infringing firm was increased by 50 per cent because it initially provided information through the leniency notice that later proved to be inaccurate.

A further problem outlined by Ratliff exists where the settlements are final and binding once reached, regardless of information subsequently uncovered,

“...one company’s position may be closely affected by the position of others. What happens if two companies in a cartel plead to a short duration, but three others do not settle and the investigation continues, revealing ultimately a longer duration of infringement? Presumably, the Commission cannot go back on its plea agreement.”⁹⁵

Incidents of abuse of the nature outlined above may very well be rare. In Europe the Commission will normally conduct dawn raids on firms at the beginning of an investigation and should, in most cases, be able to extract evidence from firms that will either corroborate or cast doubt over information initially acquired through

⁹¹ It is not uncommon for the leniency policy to uncover cartels that have already failed, rather than active ones, as explored in Chapter 2.

⁹² [1998] ECT II-2099; Harding and Joshua (n 11) p251

⁹³ 2002/C 202/02: Appeal brought on 21 May 2002 by Dansk Rørindustri A/S against the judgment delivered on 20 March 2002 by the Court of First Instance of the European Communities (Fourth Chamber) in Case T-21/99 *Dansk Rørindustri A/S v Commission of the European Communities* (Case C-189/02 P)

⁹⁴ RAPID Press Release, 20th September 2006, IP/06/1222

⁹⁵ Ratliff (n 17)

leniency. However, there is an inherent problem in that those “most involved in a conspiracy can offer the most evidence when they cooperate with a competition authority, not only about their own, but also the other participant’s activities in a cartel”⁹⁶. Consequently, it will be harder for firms possessing less evidence of the infringement to rebut any claims made by the primary leniency applicant. As infringements become more sophisticated, the scarcity of written evidence is bound to increase. Shorter investigations make it harder to corroborate the accuracy of evidence obtained through leniency, leaving the settlement procedure open to abuse.

4.2.2 Fairness and bargaining power

As Yeung points out, a “plea bargain is not fair simply because it represents a genuine consensual agreement between parties”⁹⁷. Although settlement procedures are likely to lead to a net decrease in the level of fines imposed, there is a danger that a minority of firms will agree to settle when it is not in their best interest to do so. The fines on offer by the competition authority may be unduly high because of imperfect information obtained from a shortened investigation or through leniency.⁹⁸ In Australia, where a civil settlement procedure in competition cases exists, there have been instances of firms admitting guilt at settlement to bring proceedings to a swift conclusion, while publicly protesting innocence.⁹⁹

On the one hand, firms may do this out of corporate pragmatism: because they want a swift end to the case, or because they want to limit the amount of information about the infringement that becomes public, so as to make follow-on suits for damages harder and to limit reputational damage. The danger of this is greatest amongst firms who are particularly averse to risk and uncertainty.¹⁰⁰ In Europe, much of this risk and uncertainty may be created by the unpredictable manner in which fines are calculated, which make it very difficult for firms to predict the fines they will face if

⁹⁶ OECD (n 22) recital 53; Kobayashi, B. H., ‘Deterrence with Multiple Defendants: An Explanation for “unfair” Plea Bargains’ (Winter 1992) *THE RAND Journal of Economics*, Vol. 23, No4 507-517

⁹⁷ Yeung (n 28) p130

⁹⁸ Scott and Stuntz (n 83)

⁹⁹ *ACCC v J McPhee* (1998) ATPR 41-628; *ACCC v NW Frozen Foods Pty Ltd* (1996) ATPR 41-515 at 42, 441; Yeung (n 28) p145 & FN19

¹⁰⁰ BH Kobayashi and JR Lott Jr, ‘Low-Probability-high-Penalty Enforcement strategies and the efficient operation of the Plea-bargaining System’ (1992) *Int. Rev. of Law and Economics*, 12, 69-77.

they refuse to settle. In this respect, predictable fines would act as a ‘screening device’¹⁰¹ in settlements; when firms are unable to negotiate a fine with competition authority at settlement that reflects its culpability in relation to the other cartel members, it will have the confidence to wait for the Commission’s final decision and then appeal to have the fine reduced.

On the other hand, firms may choose to settle when it is not in their best interest to do so, as a consequence of pressure exerted through the competition authority’s strong bargaining advantage. Firms may fear that the competition authority will seek even higher sanctions if settlement discussions reach stalemate.¹⁰² In the mid 1990s Van Bael observed how “a party with a high degree of culpability may end up with a fine considerably lower than a party shown to have played a very minor role... simply because this latter party has decided to use its fundamental right to defend itself”¹⁰³, illustrating the pressures that may be exerted on firms.

Competition authorities imposing civil sanctions (including the European Commission) have particularly strong bargaining power. Whereas in the US the alternative to a settlement with the DOJ is a criminal trial, in Europe it would be a full decision, with the Commission acting as investigator, prosecutor and judge. Also competition authorities can typically pull out of a settlement at any time before it is approved by a court or presented in a final decision, whereas the infringing firm cannot (for example the US Tunny Act in relation to consent decrees). This means that the authority can pull out of the decree at the last minute to force a renegotiation of its terms.¹⁰⁴ In such instances, risk-averse firms are more likely to settle, even for an unduly high sanction, the more generous the settlement concession is.¹⁰⁵

¹⁰¹ Grossman and Katz (n 30)

¹⁰² Yeung (n 28); S Bibas, ‘Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas’ (July 2003) 88 *Cornell L. Rev.* 1361; Scott and Stuntz (n 83); Kobayashi and Lott Jr (n 100); F H Easterbrook, ‘Plea Bargaining as Compromise’ (June 1992) 101 *Yale L. J.* 1969; SJ Schulhofer, ‘Criminal Discretion as a Regulatory System’ (1988) 17 *J. Legal Stud.* 43; Grossman and Katz (n 30)

¹⁰³ Van Bael (n 47)

¹⁰⁴ Furse (n 38)

¹⁰⁵ Yeung (n 28) p115; Kobayashi and Lott Jr, (n 100)

4.2.3 Safeguards

In settlement procedures, some judicial oversight is required to ensure against unjust, inconsistent, or discriminatory outcomes, while still allowing the competition authority to free up some of its resources to be employed in other cases. This is particularly important in (although not exclusive to) systems of settlement that involve waiving right of appeal. Some suggest that settlement “merely reflects the risks of improper conviction [and punishment] that would already exist at trial” and that “any increased risk of improper conviction is offset by the lighter sentences imposed on these defendants”¹⁰⁶. However, as Scott & Stuntz point out, “no system of consensual allocation is better than the dispute resolution process that backs it up”¹⁰⁷. Indeed the potential costs of increased unfair outcomes as a result of the US plea bargaining process have in the past raised enough concerns for some local jurisdictions (namely Alaska and California) to reduce and even attempt to abandon (unsuccessfully) the use of plea bargains altogether.¹⁰⁸ However, this is not to suggest that trial and appeal systems never produce unjust outcomes.¹⁰⁹

Yeung contends that settlement procedures “put strain on values of procedural fairness, accountability, transparency consistency, proportionality”¹¹⁰ and goes on to identify three safeguards which can limit these effects:

First, the separation of prosecutorial and judicial functions is considered fundamental¹¹¹, otherwise the defendant is vulnerable should they decide to reject a direct settlement offer. As mentioned earlier in this paper, the European Commission assumes both these functions in cartel cases. In the past, the same officials have been involved in investigating and in drafting cartel decisions. There may be a bias towards a finding of guilt where the defendant has refused the Competition authorities plea

¹⁰⁶ Guidorizzi (n 30)

¹⁰⁷ Scott and Stuntz (n 83)

¹⁰⁸ Ibid; R Wright and M Miller, ‘The Screening/Bargaining Trade-Off’ (2002) 55 *Stanford Law Rev.* 29, Oct; Guidorizzi (n 30)

¹⁰⁹ Easterbrook (n 102)

¹¹⁰ Yeung (n 28) p132-138

¹¹¹ M Loughlin, *Swords and Scales* (Oxford, Hart Publishing 2000)

offer. As it is there have been criticisms by firms that the Commission does not properly take into account arguments put forward by them following the SO.¹¹²

Secondly, because settlements are negotiated behind closed doors, they rely on the skills and professionalism of the legal representatives and prosecutors. Whereas in the US, *nolo contendere* pleas are not generally accepted unless in exceptional circumstances, in Australia the competition authority clearly should not have entered into settlements with firms who publicly protested their innocence.¹¹³ Yeung contends that such cases should go to trial where guilt can be firmly and publicly established beyond doubt.¹¹⁴ Thus a lot of trust is placed in the 'prosecutorial ethics' of the competition authority. The best safeguards against ethical laxity are transparency and judicial review. The former safeguard cannot exist in settlement discussions because they occur behind closed doors. Moreover, in Europe it is alleged to be lacking from the method with the Commission calculates fines.

Thirdly, the outcome of settlements negotiated in secret should be supervised by a judicial body to insure consistency, proportionality and to safeguard against the adverse effects of asymmetric bargaining power. In the US, all plea bargains are approved by a federal court which can, in principle, throw out the agreement if it is unfair or inconsistent. This judicial scrutiny should be genuine and robust, not merely a formality.

A major difficulty in achieving this third safeguard is ensuring that incentives for meaningful scrutiny exist in the first place. Courts generally rely on an adversarial dynamic; a prosecutor and a defendant or appellant. Where courts are faced by two opposing parties in consent, putting forward a direct settlement, it will be difficult for courts to scrutinise those settlements, especially as they too will usually have a heavy

¹¹² R Wesselling, 'The Draft-Regulation Modernising the Competition Rules: The Commission is Married to One iDea' (2001) 26 *European Law review* 357; Van Bael (n 47); M Levitt, 'Access to the File: The Commission's Administrative Procedures in Cases Under Article 85 and 86' (1997) 34 *Common Market LawReview* 1413

¹¹³ *ACCC v J McPhee* (1998) ATPR 41-628; *ACCC v NW Frozen Foods Pty Ltd* (1996) ATPR 41-515 at 42, 441; Yeung (n 28) FN19

¹¹⁴ Yeung (n 28)

work load and will thus welcome the swift settlement of cases. In Australia courts actively encourage penalty agreements for this reason. In fact, in one of the cases mentioned earlier, the court accepted a plea agreement even though the defendant in this case consented to the allegations without admitting their truth.¹¹⁵ Yeung contends “It is contrary to the rule of law to penalise innocent firms and individuals, even if they voluntarily accept, punishment for reasons of commercial pragmatism”¹¹⁶. A further difficulty is the reluctance by both sides to cooperate with judicial oversight:

“Once a deal has been struck, it is in the parties’ mutual interest to ensure that its terms are observed and they are therefore unlikely to welcome measures, such as judicial oversight, that might inhibit their freedom to bargain”¹¹⁷.

In addition, the prosecutor and defendant typically make a joint statements of guilt, culpability and agreed sanction.¹¹⁸ It is hard for a court to distinguish whether such statements accurately reflect the negotiations and there may not enough information contained in such statements to scrutinise its conclusions. Even where a firm accepts an unduly high sanction at plea bargain out of corporate pragmatism, the defendant may conceal facts from the court to ensure the settlement is approved.¹¹⁹

Even in the US, critics suggest that judges “routinely accept agreed penalty recommendations, thus effectively usurping the court’s role in sentencing and replacing it with trial by prosecutor”¹²⁰ Providing effective safeguards in settlement procedures can thus be difficult, even where parties are not required to waive their rights of appeal.

¹¹⁵ *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285, 296-7; Yeung (n 28) p145

¹¹⁶ Yeung (n 28) p147

¹¹⁷ Ibid p145

¹¹⁸ Ibid p148

¹¹⁹ Ibid p116

¹²⁰ Ibid p141; K Mack and S Anleu, *Pleading Guilty: Issues and Practices* (Carlton South, Vic, Australian Institute of Judicial Administration, 1995) p98; OECD (n 22) recital 14

4.3 Uncertainties over private enforcement

Competition authorities are always keen to encourage the private enforcement of competition law, both in the form of original actions and follow on actions for damages, once there has been a public finding of wrongdoing. In Europe, private enforcement appears to be weak, although it is hard to estimate the number of out of court settlements.¹²¹ Systems of direct settlement threaten to make follow-on suits harder for private litigants. An important incentive for firms to participate in settlement procedures arises if less information about the infringement, which would otherwise be relied upon in private actions, is made public. Competition authorities will naturally want to publicise as much information about the infringement as possible, but will not do so if this undermines a settlement procedure. After all, their function is primarily to secure public prosecution, not private damages.

In US plea negotiations the only information that is typically made public, even where court approval is required, is the identity of the firm, an admission of guilt, and the level of fine agreed to. By contrast to a full detailed 150 page Commission decision, very little information about a firm's involvement in the infringement is placed in the public domain. Plea bargains enable firms to make follow-on cases more costly to plaintiffs. Although private parties can rely on the firm's admission of guilt, proving the extent of their liability and causation will normally be harder following a settlement. In the United States, plea bargains do not seem to discourage private actions in cartel cases, although the incentive to sue is much higher there, thanks to the availability of treble damages and cost rules which heavily favour claimants.¹²² As investigations that end in settlement will be shorter, this hindrance to private enforcement will exist even where a detailed decision is released by the competition authority.

¹²¹ Green Paper 'Actions for damages' (Dec 2005) available at

<http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/index_en.html>

¹²² D I Baker, 'Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?' (2004) 16(4) *Loyola Consumer Law Review* 379

Ratliff¹²³ identifies third party rights as a key issue. A complainant may contest a settlement, with a view to making a follow-on claim for damages. He suggests that the Commission may simply reject such action, perhaps using arguments of Community interest as in *Automec II*.

The benefits of direct settlements must be balanced against a number of potential costs. Lower fines will result from the necessary use of concessions and may be made worse by the competition authority's desire to process as many cases as possible. In order to save resources, settlement implies shorter investigations and a greater reliance on information obtained through leniency, which may be of questionable accuracy. Some firms may choose to settle when it is not equitable to do so because they are averse to risk, or as a result of bargaining pressure exerted by the competition authority. Safeguards are needed to ensure fairness (particularly if firms are forced to waive their right of appeal), however effective oversight by the courts is hard to implement where neither party wants the settlement to be challenged. Settlements will normally result in less information being made public, hindering follow on actions for damages.

5. The European Commission's Settlement Procedure

In October 2007, the European Commission published a draft settlement procedure for cartel cases. This included a draft Commission notice¹²⁴ on the conduct of settlement proceedings in cartel cases, a proposal for amendments¹²⁵ of Regulation No 773/2004 to allow for such a procedure, and two press releases¹²⁶ containing further guidance.

¹²³ Ratliff (n 17)

¹²⁴ 'Draft Commission Notice on the conduct of settlement proceedings in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases' OJ 2007/C 255/20

¹²⁵ 'Proposal for a Commission Regulation (EC) No .../2008 of [...] amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases' OJ 2007/C 255/19

¹²⁶ Press Release 'Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels' 26th October 2007 IP/07/1608 and 'Frequently asked questions' 26th October 2007 MEMO/07/433.

5.1 Stated Aims

Recall from the introduction to this paper how the savings that can be accrued from a settlement procedure are two fold: resource gains through shortened proceedings that bring cases to a more timely close, and a reduction in the number of resulting appeals. However, the draft notice only refers to the former as an explicit aim: to “allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission’s delivery of effective and timely punishment, while increasing overall deterrence”¹²⁷ This implies an increase in the number of cases dealt with, clearing the backlog of leniency applications. Reference to the latter saving is only mentioned in one of the press releases: ‘Settlementscould reduce litigation in cartel cases’. However it is important to understand from the outset that the settlement procedure does not prevent infringing firms from appealing the Commission’s final decision before the CFI or the ECJ. The incentive for firms to participate in the settlement procedure is an extra discount in the fine imposed, drawing a line under their past illegal behaviour more quickly.

5.2 Procedure

The settlement procedure exists in parallel to the standard procedure for finding an infringement in cartel cases; it constitutes a faster and more simplified route for settling a case. However, there is no right to settle; it is entirely at the discretion of the Commission to decide whether the settlement procedure is appropriate in a given case, having regard to factors such as the number of parties involved and the likelihood of reaching a common understanding about the extent of liability within a reasonable time frame. Settlement proceedings are initiated once the “core” investigation (leniency, inspections) takes it to the stage of drafting an SO.¹²⁸ Where the Commission considers settlement discussions to be appropriate, it will set a time limit of no less than 2 weeks to receive a written declaration from the parties of an intention to engage in ‘settlement discussions’.¹²⁹ Upon receipt of these declarations, the Commission can decide to open discussion rounds; these will tackle alleged facts, their classification, the gravity and the duration of the infringement and on the

¹²⁷ Draft Settlement Notice (n 124) recital 1

¹²⁸ Draft Settlement Notice, (n 124) recital 9

¹²⁹ Draft Settlement Notice, (n 124) recital 11

liability for involvement. This includes discussing the potential maximum fine, not including any reductions for leniency. At this time, firms have some access to the Commission's case file.¹³⁰

If an agreement is reached that the Commission is happy with, a time limit will be set in which the firms must send a formal request (Written Settlement Submission) principally containing:

- Acknowledgement of the parties' liability for the infringement;
- An indication of the maximum amount of the fines the parties foresee to be imposed by the Commission;
- The parties confirmation that they have been informed of the Commission's objections in a satisfactory manner and that they have been given the opportunity to be heard;
- Parties' confirmation that they will request neither access to the file nor a formal oral hearing.

In return, the infringing firms subject to the settlement procedure will receive a discount in the fine imposed, in addition to any discount attained through the leniency notice.

The settlement procedure yields savings in two ways: Firstly, in participating in the settlement procedure, firms agree not to request access to the file or a formal hearing once the SO has been issued. The infringing firms will have already been given the opportunity to raise any defences in the written settlement submission and during the settlement discussions, 'enabling the Commission to take their views into account'¹³¹. Thus while the SO is still being drafted, the firm will reach a common understanding with the Commission. Once the SO has been issued, firms are given a time limit in which to endorse it 'simply by confirming (in unequivocal terms) that the SO corresponds to the contents of their settlement submissions and that they therefore remain committed to follow the settlement procedure'¹³². The Commission can then

¹³⁰ Draft Settlement Notice, (n 124) recital 17

¹³¹ Draft Settlement Notice, (n 124) recital 17

¹³² Draft Settlement Notice, (n 124) recital 26

swiftly deliver its final decision¹³³, after consulting with the Advisory Committee¹³⁴. Secondly, a Commission's SO endorsing the contents of the party's settlement submission could be much shorter than a SO issued to face contradiction¹³⁵, meaning that less resources will be need to be employed in its drafting.

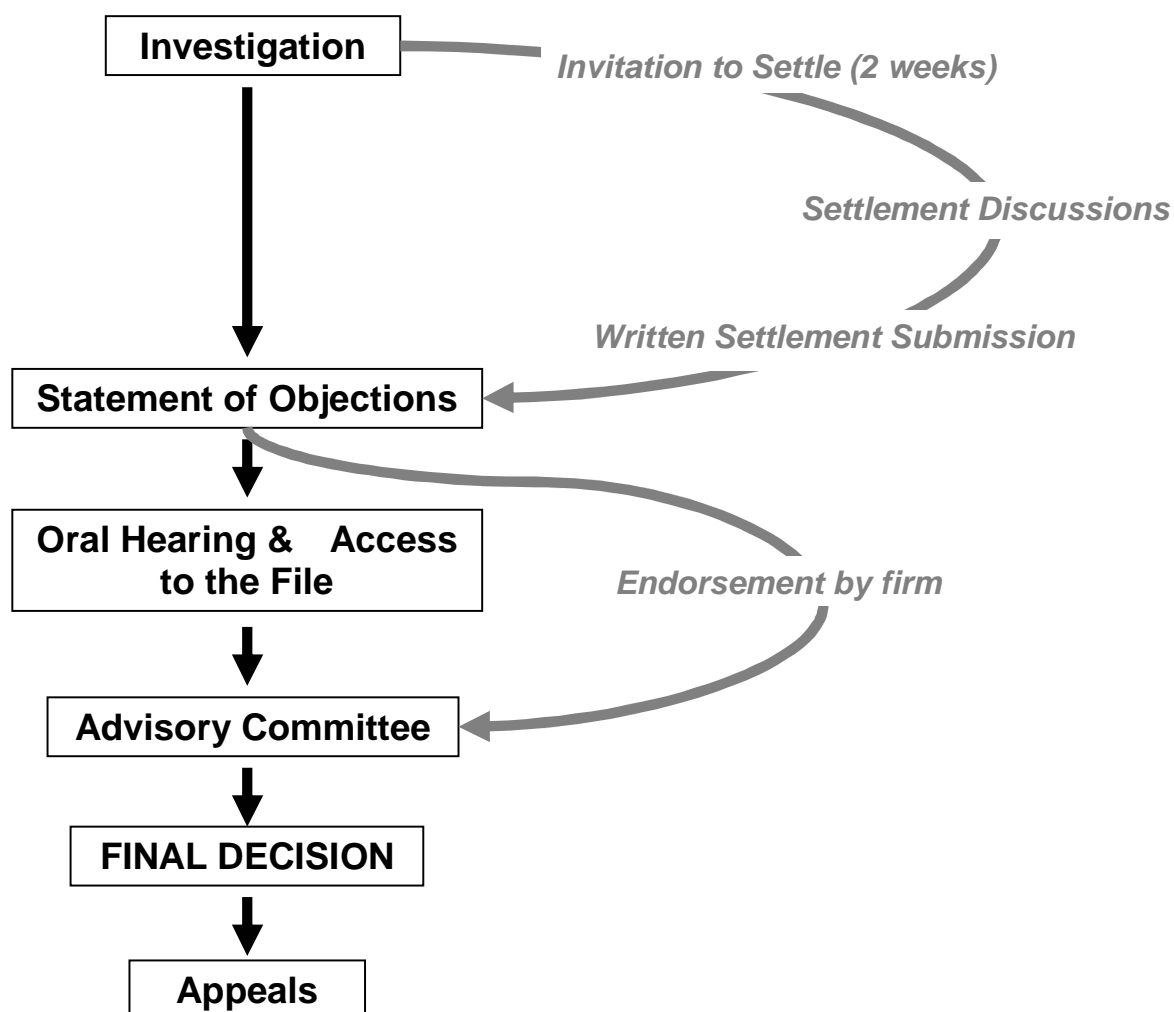
The Commission retains the possibility to depart from the parties' settlement submission at any time before the final decision is delivered. The amount of the settlement discount will be established after public consultations, but the Commission has made it clear that all parties in the same case will receive equivalent reductions in the fine. The settlement procedure is summarised in Figure 2 below.

¹³³ Pursuant to Articles 7 and/or 23 Regulation 1/2003

¹³⁴ Pursuant to Article 14 of Regulation 1/2003

¹³⁵ Press Release 'Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels' 26th October 2007 IP/07/1608

Figure 2 – The European Settlement Procedure for cartel cases



5.3 The likely benefit of the Settlement Procedure

The stated aim of the settlement procedure is to free up resources so that timely punishment can be delivered more frequently in cartel cases. Recall from 3.1.2 that, excluding appeals, cartel cases currently average three and a half years from when an investigation is opened, to when the Commission delivers its final decision. The saving outlined in the settlement notice clearly comes between the SO and the final decision, when accesses to the file and requests for oral hearings by infringing firms typically occur. Looking at cartel cases delivered since 2001, this period averages 12-13 months. Hence, assuming the settlement procedure operates as smoothly as the notice envisages, a potential reduction in the procedure time by up to a third may be possible. This should free up significant resources which can be employed in the next

cartel case; providing more timely punishment to more infringements, and consequently increasing deterrence.

5.4 Lower fines at the expense of deterrence

Any deterrence gains in terms of freed-up resources that can be employed to complete more cases, must be weighed against the loss in deterrence from lower fines resulting from the settlement concession. There is a general consensus that fines are currently too low to achieve effective deterrence in Europe, given that they are the only sanction against cartels on the community level.¹³⁶ The discount available to firms through the settlement procedure is effectively available to every infringing party in a given case that is subject to the settlement procedure; effectively resulting in a reduction in the level of fines imposed. This is particularly so given that the settlement discount is granted *in addition* to the leniency discount (which the Commission views as a separate investigatory tool) and is deducted after the 10 per cent cap is applied.¹³⁷ In addition, firms can enjoy the settlement discount and then still appeal to the CFI on the grounds that the fine or leniency discount is miscalculated.

As discussed earlier in this paper, the greater the settlement concession, the greater will be both the incentive for firms to settle, and the loss in deterrence. The size of the concession will be decided after public consultation, however it is the opinion of this author that it should be kept to an absolute minimum until other sanctions, not least criminal sanctions and private enforcement on the national level, ease the Commission's reliance on fines as the sole deterrent tool, or until the 10 per cent annual turnover cap on fines is lifted.

It is unclear how high the settlement discount needs to be in order for the settlement procedure to be effective. On the one hand the incentive to settle in Europe may be low, requiring a high concession for the procedure to be widely employed. Recall how in the US, firms have strong incentives to settle which do not rely on an additional settlement concession: Firms wishing to receive a leniency discount in return for

¹³⁶ Wils (n 36) at 6.5.2; Buccross and Spagnolo (n 71)

¹³⁷ Draft Settlement Notice, (n 124) recital 32

cooperation once the immunity prize has gone, have no choice but to settle; Very little information about the infringement enters the public domain (hindering private actions for damages); and the fact that individual as well as corporate liabilities can both be settled at plea bargain.

In Europe, firms can benefit from leniency discounts without partaking in a settlement procedure, as the two mechanisms are distinct. Even where the settlement procedure has been employed, a detailed Commission decision will be published. Moreover, the only criminal sanctions that exist are applied on the national level, independently of the Commission and have thus far resulted in very few convictions as compared to the US. These factors all suggest that settlement concessions in Europe need to provide a convincing incentive if the procedure is to be widely used.

On the other hand, as the settlement procedure does not require infringing firms to waive their right of appeal, firms have very little to lose by participating in the settlement procedure. They are given an opportunity to raise any objections during the settlement discussions and following the final decision, are still free to appeal to the courts if they feel they have been treated unfairly. This would suggest that the concession will make the settlement procedure worthwhile for infringing firms, even if it is only small; say 5 per cent. However, as appeals are still allowed, this reduction in fines imposed must be weighed against the resources freed-up by a shorter procedure, not necessarily by any curb the number of lengthy appeals – discussed below.

5.5 Will settlements be fair and consistent?

The Commission has emphasised three characteristics of the draft settlement procedure which are ostensibly intended to safeguard the process from abuse and insure fair and consistent settlements.

First, it is made clear that the settlement procedure will be reserved for robust cases, where the facts are in little doubt and where a thorough investigation, including dawn

raids, has been conducted.¹³⁸ Settlement discussions do not occur until a thorough investigation has been undertaken, ‘irrespective of whether the standard or the settlement procedure applies’ and leniency applications have been completed, limiting the scope for abuse through the submitting of misleading information at leniency.¹³⁹ Moreover, the Commission is free to abandon a settlement at any time before the final decision is delivered if new information emerges. A new statement of objections is communicated to the parties, who are given the opportunity to respond in the normal way before a final decision is adopted.¹⁴⁰

Secondly, the Commission has emphasised that the settlement concession will be uniform between firms involved in the same infringement.¹⁴¹ Ostensibly this uniformity prevents the Commission from favouring some firms over others, or from offering over-generous concessions in order to settle as many cases as possible.¹⁴²

Thirdly, settlement discussions are not to involve negotiations or bargaining: “the Commission would neither negotiate nor bargain the use of evidence or the appropriate sanction, but could reward the parties’ cooperation to attain procedural economies”¹⁴³ In emphasising this, the Commission demonstrates its unease with the language of more comprehensive forms of settlement such as US plea bargaining which suggest bargaining with infringing firms in a bazaar-like process.¹⁴⁴

It is sensible to reserve settlement for robust cases so as to avoid unfair outcomes, assuming that dawn raids and the bulk of a conventional investigation are concluded before an invitation to enter settlement discussions is made. However if the settlement process is only employed in a minority of cases, then a significant saving of resources

¹³⁸ Press Release ‘Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels’ 26th October 2007 IP/07/1608

¹³⁹ ‘Frequently asked questions’ 26th October 2007 MEMO/07/433

¹⁴⁰ Draft Settlement Notice, (n 124) recital 29

¹⁴¹ ‘Frequently asked questions’ 26th October 2007 MEMO/07/433

¹⁴² OECD (n 22) recital 63; O Gazal, ‘Partial Ban on Plea Bargains’ (2005) The John M. Olin Center for Law & Economics Working Paper Series, Working Paper 59, available at: <<http://law.bepress.com/cgi/viewcontent.cgi?article=1052&context=umichlwps>>

¹⁴³ Press Release ‘Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels’ 26th October 2007 IP/07/1608; Draft Settlement Notice, (n 124) recital 2

¹⁴⁴ OECD (n 22) recital 6; K Dekeyser, ‘The Commission’s Fight against Cartels: Two Years with Neelie Kroes’ Speaking at 9th CLaSF Workshop, *Deterrence: Cartels, Leniency and Criminalisation*. Glasgow 12 April 2007.

will be unlikely. Moreover, even where the settlement procedure is invoked, the fact that the Commission and the infringing firms can, in effect, pull out of the settlement procedure at any time before the final decision, makes the settlement process very fragile. This characteristic has been cited as one of the reasons that US style plea bargaining failed to succeed in Italy.¹⁴⁵ There is also a danger that some devious firms may initially agree to the procedure in order to gain a ‘head-start’ in its defence by gaining a picture of the Commission’s case while the SO is still being drafted, only to then pull out of the discussions.

Uniform concessions in settlements assume that either firms have a similar willingness to settle or that the concession is generous enough to entice even the most reluctant settlement candidates. As the saving through settlement is primarily procedural (firms can still appeal), even a modest concession should ensure that every firm settles. Indeed, allowing different settlement concessions to different firms would engender problems of its own. The first firm to settle may challenge its settlement at appeal if subsequent firms receive a larger concession because they are less willing to settle, or have stronger negotiators. Under the principle of proportionality, comparable situations cannot be treated differently and different situations cannot be treated in the same way unless such treatment is objectively justified.¹⁴⁶

However, the fact that the concession is uniform between settlements does not necessarily prevent inconsistencies. This is because the Commission and the infringing firm must still reach a common understanding about the potential fine. Despite the introduction of guidelines for the method of calculating fines in 1998 and 2006, the Commission retains wide discretion in its calculation of fines; in particular, having the power to make deductions for mitigating circumstances as it sees fit.¹⁴⁷ As discussed in Section 3.6, the way in which fines and leniency discounts are calculated in cartel cases leads to a high number of successful appeals to the CFI and ECJ. The absence of narrow guidelines for the calculation of fines means that some inconsistency in the agreed potential fines between settlements will be inevitable. It

¹⁴⁵ E.g. *Boari and Fiorentini* (n 74)

¹⁴⁶ *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission* [2003] ECR II-5761, paragraph 430

¹⁴⁷ The method for calculating fines in cartel cases is discussed in detail in Chapter 4

also makes unlikely that some element of negotiation and bargaining can be entirely excluded from the settlement discussions. The settlement notice states, ‘the progress made during the settlement discussions leads to a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed by the Commission’.¹⁴⁸ In arriving to this common understanding some negotiation will be inevitable. Firms are represented separately in discussions (unless they constitute the same undertaking) and the level at which the Commission sets fines will depend to some extent on the skill of the firm’s representatives.¹⁴⁹

Apart from the danger of inconsistencies, the unpredictable method for calculating fines may bring rise to the agency effect. The Commission may start to lower the potential fine levels they are willing to accept at appeal (in addition to the settlement concession) in order to settle more cases more quickly. The Commission is also in a position to exert pressure on firms to accept settlement; in particular by retaining ‘discretion to determine throughout the procedure on the appropriateness and the pace of the bilateral settlement discussions with each undertaking’¹⁵⁰. This is compounded by the fact that whereas in the US the alternative to settling is facing the regulator as a prosecutor in a court, in the EU the alternative to reaching a settlement, is being put at the mercy of the same body that settlement discussions have broken down with.

A final criticism that can be made is that safeguards to ensure a fair and consistent settlement procedure are weak, although firms are still free to appeal following a settlement. The professionalism and skill of the competition authority officials and of competition lawyers will only go some way in ensuring fairness and consistency. Two issues of particular concern can be identified. First, the prosecutorial and judicial functions of the Commission are not separated in its cartel investigations. Secondly, the only supervision that exists over the settlement process is a consultation with the Advisory Committee¹⁵¹ before a final decision is delivered. The Advisory Board is not a judicial body and is comprised of the representatives of competition authorities of member states. As discussed in 3.4.2.3, ensuring effective supervision over any settlement process is difficult; in particular, insuring that the supervisory body has

¹⁴⁸ Draft Settlement Notice, (n 124) recital 17

¹⁴⁹ Lott Jr. (n 76)

¹⁵⁰ Draft Settlement Notice, (n 124) recital 15

¹⁵¹ Regulation 1/2003, Article 14.

strong enough incentives to scrutinise settlements in a meaningful way. Although, any detailed scrutiny would imply a significant workload and thus negate some of the savings of a settlement procedure.

5.5 Will settlements hinder private enforcement?

The Commission does not directly address the issue of adverse affects on private enforcement in its settlement procedure. However, in a press release the Commission has envisaged that if ‘parties chose to introduce a settlement submission acknowledging them, a Commission’s SO endorsing the contents of the parties settlement submission could be much shorter than a SO issued to face contradiction’. A less detailed SO would certainly help save resources and would also encourage firms to settle, but will mean that there will be less information contained therein that can be relied upon by a private party in a follow-on action for damages. This comes at a time when the Commission is trying to encourage follow on actions for damages. However, the SO after settlement will still contain a lot more information about the infringement than would a US style plea bargain. Moreover, hiding details of the infringement in order to encourage settlement is unlikely to be necessary for as long as firms are not expected to waive their right to appeal. A more pressing issue is how to deal with the costly and time consuming legal defence that is required following each cartel decision.

6 Dealing with lengthy appeals: the problem of unpredictable fining

Although the settlement procedure may free up some resources by shortening the Commission’s procedures, there are more substantial savings to be made by curbing the number of lengthy and costly appeals to the CFI and ECJ. Recall from the ADM case illustrated in table 1, the time consumed between the SO and the final decision was two years, whereas the subsequent appeals lasted for six years. Under the Commission’s draft procedure, firms party to a settlement are sill free to appeal after

the final decision has been delivered.¹⁵² By virtue of Article 230 EC, the Commission would not be able to adopt a system of direct settlement that forces infringing firms to waive those rights. In one respect this is a good thing; in order for firms to be willing to waive their rights of appeal, the concession offered at settlement would have to outweigh the likely downward adjustment in fines at appeal. As was discussed at the beginning of this paper, there are hardly any cases of fines being increased at appeal, yet on average fines are decreased by 18-20 per cent. A greater settlement concession could be seriously detrimental to deterrence because fines are the only sanction.

The commission hopes that the settlement procedure could “reduce litigation in cartel cases”¹⁵³ despite parties’ freedom to appeal even if they have entered into a settlement. If the majority of successful appeals concerned the *extent* of a firm’s participation in an infringement, then settlements might reduce the amount of litigation, as firms reach an understanding with the Commission of their involvement, while the SO is still being drafted. However, if most appeals concern the way in which the fine or a leniency discount are calculated, then the settlement procedure is unlikely to curb the costly level of litigation. The procedure only allows firms to agree to the ‘potential’¹⁵⁴ or ‘maximum’¹⁵⁵ fine that they might face, not the final amount and not the level of leniency. Moreover, the settlement procedure may not be employed in the majority of cases, and even if it is, inconsistencies between settled cases could bring rise to more appeals.

In 2005 and 2006 some 59 actions against 11 cartel Commission decisions were made to the CFI. Of these, 5 appealed the extent of the claimant’s liability only. 16 appealed the way in which the fine or leniency discount was calculated only. The remaining 38 appealed on both grounds; typically primarily on grounds such as mistake of facts and the liability of a parent firm for the behaviour of a subsidiary. In these actions, the method of calculating fines and leniency were presented as an alternative ground for appeal. These figures are summarised in Figure 3.

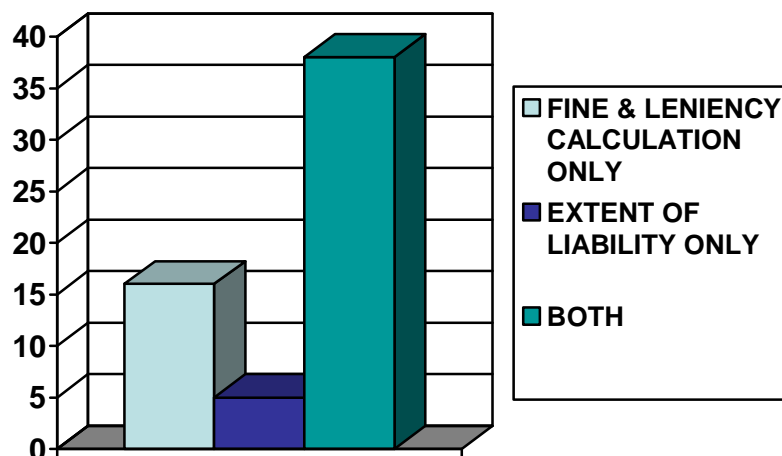
¹⁵² Draft Settlement Notice, (n 124) recital 36

¹⁵³ Press Release ‘Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels’ 26th October 2007 IP/07/1608

¹⁵⁴ Draft Settlement Notice, (n 124) recital 16 and FN10; Article 10a(2) of Regulation (EC) No 773/2004 (Amendment)

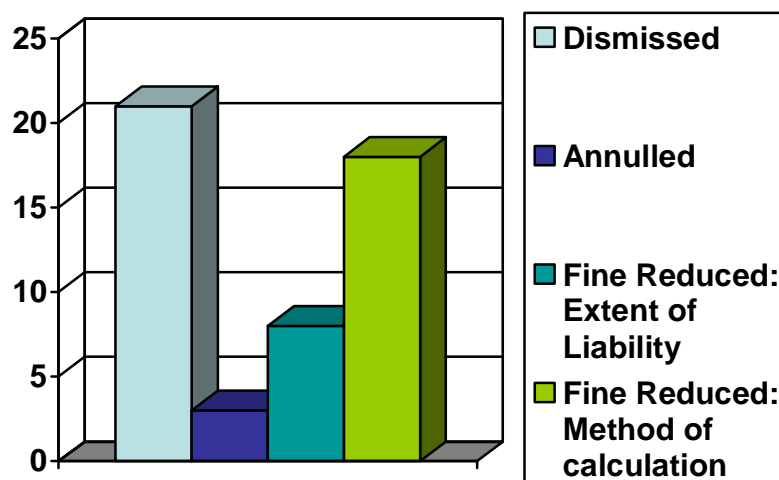
¹⁵⁵ Draft Settlement Notice, (n 124) recital 20

Figure 3 – Appeals of cartel decisions filed in 2005 and 2006



They can be compared with 50 CFI rulings concerning cartel cases delivered between 2003 and 2006. Annulments were ruled in three cases (a partial annulment in one) and 21 appeals were dismissed. Of the 26 cases where fines were reduced, 8 were on the grounds of mistake of facts or the way in which the Commission exercised its powers. In 18 cases fines were reduced on the grounds that they were incorrectly calculated by the Commission, including the application of leniency discounts. To date the CFI has never raised fines imposed by the Commission. The figures are summarised in Figure 4.

Figure 4 – Looking at 50 CFI rulings in cartel cases delivered between 2003-2006,



Suspicions that a large proportion of appeals successfully challenge the way in which fines are calculated is confirmed by the fact that the Commission went through a phase of granting a 10 per cent leniency discount to every firm in an infringement simply for not contesting the facts.¹⁵⁶ This de facto settlement concession did not curb the large number of appeals and seems to have been abandoned by the Commission, although firms who receive leniency discounts do have a lower propensity to appeal than those who do not.

The high level of successful appeals illustrated in Figure 4 may reflect a fundamental lack of transparency and consistency in the way fines are calculated by the Commission. This has for many years made the fines at times seem almost arbitrary¹⁵⁷ and the introduction of the 1998 ‘Guidelines on the method of setting fines’ failed to address many of these criticisms, preserving the Commission’s wide discretion in calculating fines and leniency.¹⁵⁸ The guidelines were revised in 2006 with the aim of enhancing transparency. Although some time is needed to assess the effectiveness of

¹⁵⁶ For example: *Graphite Electrodes (2001)*; *Interbrew & Alken-Maes (2001)*; *Zinc Phosphate (2001)*; *Specialty Graphites (2002)*; *Industrial Copper Tubes (2003)*.

¹⁵⁷ E.g. Van Bael (n 47)

¹⁵⁸ WPJ Wils, ‘The Commission’s new Method for Calculating Fines in Antitrust Cases’ (1998) *E.L. Rev.* 23(3), 252-263; R Richardson, ‘Guidance without Guidance - A European Revolution in Fining Policy? The Commission’s new Guidelines on Fines’ (1999) *E.C.L.R.*, 20(7), 360-371; JM Joshua and PD Camesasca, ‘EC fining policy against cartels after the *Lysine* rulings: the subtle secrets of x’ (2004) *The European Antitrust Review*, 5

these revisions, they are unlikely to make cartel fines any easier to predict.¹⁵⁹ The importance of transparency and predictability in every aspect of US antitrust enforcement is beyond doubt: ‘Prospective cooperating parties come forward in direct proportion to the predictability and certainty of their treatment following cooperation’.¹⁶⁰

In a speech made in 2005, the Commissioner seemed to reject calls for a more transparent and predictable fine calculation system, stating “I have to say I do not agree. I cannot see how allowing potential infringers to calculate the likely cost/benefit ratio of a cartel in advance will somehow contribute to a sustained policy of deterrence and zero tolerance”¹⁶¹. Yet elsewhere she has spoken of the need to have “a framework that imposes penalties heavy enough to outweigh the benefits that companies expect to receive from cartelization”¹⁶². These seemingly conflicting statements may reflect a recognition that fines need to be more predictable, but a reluctance to sacrifice too much of the Commission’s discretion in settling the basic amount and making adjustments for aggravating and mitigating circumstances, as well as leniency discounts.

The contention of this writer is that costly appeals can be avoided by making the calculation of fines more transparent and predictable. This will reduce the level of appeals, free up resources to process more cases and clear the backlog. This will happen without the need for a US style plea bargaining system where defendant’s rights of appeal are waived – an avenue that is not open to the Commission anyway, by virtue of Article 230 EC. Increased predictability in fining may also be necessary if the settlement procedure is to operate effectively. If firms cannot evaluate at settlement the likely fine they should face, settlement discussions may fail.

¹⁵⁹ The new Guidelines are discussed in detail in Chapter 4

¹⁶⁰ SD Hammond (n 4) p3

¹⁶¹ Kroes (n 1)

¹⁶² Kroes (n 7) ; Dekeyser (n 144)

7 Conclusion

It appears that the leniency notice is attracting more applications than the Commission can reasonably process under the existing enforcement regime. Although the length of proceedings has improved, resources are still tied up in a process that on average takes three and a half years to produce a cartel decision. Enforcement efforts are hindered further by the lengthy appeals process which can draw cartel cases out by as much as ten years from when an investigation is opened to when the ECJ delivers its final ruling. If resources are not freed-up to process more cases, the Commission will inevitably have to start turning away leniency applications in relation to smaller infringements, to avoid being overwhelmed. This will not lend itself to a policy of effective deterrence.

Systems of direct settlement promise to free up competition authorities' resources and time by shortening procedures and reducing appeals. These resources can then be employed to deliver timely punishment to more cartel infringements, ultimately enhancing deterrence. The US system of plea bargaining represents one of the most extreme settlement procedures, in which an exact penalty is negotiated between the competition authority and the firm, and where rights of appeal are waived. The obvious benefits of such a system must be weighed against the potential costs: A net *reduction in fines* resulting from the use of a settlement concession and the pressure on the authority to process more cases, will negatively impact on deterrence where fines are the only sanction; The number of *unjust outcomes* may increase as a result of shortened investigations and procedures, and from parties waiving their rights of appeal. In particular settlements may rely on inaccurate information, and some individual firms may accept unduly high sanctions out of corporate pragmatism. Safeguards are needed to ensure fairness (particularly if firms are forced to waive their right of appeal), however effective oversight by the courts is hard to implement where neither party wants the settlement to be challenged; *Private Enforcement* in the form of follow-on actions may be weakened if settlements result in less information (or no information at all) about the infringement becoming publicly available – yet this is an important incentive for firms to settle in the first place. The first and third effects will be particularly detrimental to deterrence and may outweigh any benefits in

terms of processing more cases in a timely manner or clearing a backlog of leniency applications.

The European Commission's draft settlement procedure promises to shorten the length of proceedings in cartel cases by holding discussions with firms about the extent of their liability and potential fine while the SO is still being drafted. This circumvents the time otherwise consumed granting access to the file and holding oral hearings subsequent to the SO being completed. If it is effective, the length of Commission proceedings in cartel cases could be cut by up to a third, freeing up resources to process more cartel cases.

However, in a cartel enforcement regime where fines are the only sanction, any gains from freeing up resources must be balanced against the loss of deterrence in applying yet another fine discount, in addition to leniency and mitigating factors, after fines have already been adjusted so as not to exceed the statutory 10 per cent annual turnover cap. Indeed, if cartel fines are currently at levels that do not outweigh the expected benefits and perceived likelihood of getting caught, the settlement procedure may simply offer a further way for infringing firms to discount the cost of collusion.

The incentives to settle in Europe are weaker than in the US; in particular, firms can still benefit from leniency once the immunity prize has gone without entering into a settlement. Nevertheless, a large settlement concession should not be necessary as firms are not expected to waive their right to appeal in return. One contentious issue for the future is the relationship between settlements for civil proceedings on the Community level, and the criminal prosecution of individual employees on the national level. In the US firms and employees are able to approach the DOJ together and enter into plea bargains for both, or obtain immunity for both. Although there have been cases of national competition authorities employing forms of direct settlements in civil proceedings¹⁶³, these are not generally available in member states'

¹⁶³ *Sevenoaks Survey case*, UK Office of Fair Trading Press Releases 88-06, 19 May 2006 and 214/05, 9 November 2005; Ratliff (n 17) FN8. In December 2007, the OFT also reached an 'early resolution agreement' with three supermarkets and three dairy companies in connection to the price fixing of dairy products. The parties accepted liability in principle and agreed maximum penalties, under the understanding that 'significant' reductions would be granted in return for continued cooperation: OFT,

criminal proceedings, and it is unlikely the Commission will ever be in a position to make any guarantees to individuals.

The Commission has indicated that it will only invite firms to settle in cases that are robust and where a thorough investigation has been carried out (including dawn raids). This will hopefully ensure that inaccurate information is not relied upon and that the Commission does not seek to settle cases too early. There is however a danger that settlements will be under-employed; yielding few gains, especially as both the firms and the Commission are free to abandon the settlement procedure at any time before the final decision. Some firms may even initially participate in settlement discussions, only to later abandon them. They may do this in order to gain a 'head start' at building their defence by having premature access to the Commission's case against them.

Uniform concessions in the settlement procedure ostensibly prevent inconsistencies between settlements. However, although the concession remains, the Commission must still reach an understanding with firms about the maximum likely penalty they will face. The wide discretion with which the Commission calculates fines makes it hard for firms to accurately estimate the fine they should face, and thus reach common understanding with the Commission that is consistent with previous settlements. Moreover, achieving a mutual understanding through discussions will inevitably involve some negotiating. Apart from the possibility of European firms receiving favourable treatment, the agency problem may emerge whereby the Commission becomes willing to accept lower potential maximum penalties (already subject to the concession) in order to settle more cases. The Australian experience outlined by Yeung highlights the difficulty of ensuring effective safeguards in a settlement procedure to prevent unfairness and inconsistencies. The Advisory Committee may provide some oversight, but creating incentives for the meaningful scrutiny of settlements is extremely difficult. Firms are at least still free to appeal to the CFI and ECJ where they feel they have been treated unfairly.

'OFT Welcomes early resolution agreements and agrees over £116m penalties' Press Release 170/07, 07 December 2007. Available: <<http://www.ofc.gov.uk/news/press/2007/170-07>>

With respect to implications for private enforcement, the Commission envisages the settlement procedure to produce less detailed SOs. This may hinder follow on actions for damages, and comes at a time when the Commission is trying to encourage such litigation in national courts. However the resulting SO from the settlement procedure should still be reasonably detailed and will certainly provide more assistance to private parties than a US style plea bargain. For as long as firms are not required to waive their right of appeal, the US incentive to settle may not be necessary.

The preserved rights of appeal are not only essential pursuant to Article 230 EC, but also because firms would only be prepared to waive them if the settlement concession outweighed the average fine discount awarded on appeal; currently at between 18-20 per cent.¹⁶⁴ However without this requirement, the settlement procedure is only likely to yield procedural savings; not the more substantial savings that can be made by curbing costly and time consuming appeals. This paper has shown that most cartel appeals in recent years have succeeded on grounds that fines and leniency discounts have been miscalculated, not on contested facts. Indeed for some time the Commission awarded 10 per cent leniency discounts to firms for not contesting the facts and this did not stop firms from appealing.¹⁶⁵ The settlement procedure is unlikely to curb such appeals because firms only agree the potential maximum fine they might face, not the final fine.

It is argued that this second cost saving can be realised, not by the Commission extending the draft settlement procedure so as to exclude appeals (something that is not possible by virtue of Article 230 EC), but rather by making the process by which fines are calculated more transparent and predictable, so that they are harder to challenge at appeal. A clearer fining policy may also make it more likely that firms will settle; in the US, 'transparency, predictability and proportionality are key policies governing the negotiated resolution of cartel cases'¹⁶⁶, as emphasised by DOJ

¹⁶⁴ See Section 1.2

¹⁶⁵ For example: *Graphite Electrodes (2001)*; *Interbrew & Alken-Maes (2001)*; *Zinc Phosphate (2001)*; *Specialty Graphites (2002)*; *Industrial Copper Tubes (2003)*.

¹⁶⁶ OECD (n 22) recital 15

officials.¹⁶⁷ Time is needed to observe how the Commission applies the 2006 guidelines on the method of calculating fines. However, on paper these guidelines do not differ fundamentally from the 1998 guidelines which have received substantial criticism for giving an illusion of scientific rigour, while preserving the Commission's very wide discretion in calculating fines.

¹⁶⁷ Hammond (n 4); GR Spartling, 'Transparency in Enforcement Maximises Cooperation from Antitrust Offenders' *Presented at Fordham Corporate Law Institute, 26th Annual Conference on International Antitrust Law & Policy*, October 15, 1999 FN12