

Survey

The EU Cartel Settlement Procedure: Latest Developments

Flavio Laina and Aleko Bogdanov*

I. The settlement procedure in EU competition law

The settlement procedure was introduced in EU competition law rules with the adoption of the *Commission Notice on the conduct of settlement procedures*¹ in 2008. The instrument allows the settlement of a cartel case whereby the parties to the proceeding acknowledge the existence of an infringement of Article 101 of the Treaty on the Functioning of the European Union ('TFEU'), as well as their liability for it. In turn, they benefit from a 10% reduction of their fine, after any application of the Leniency Notice.²

The instrument was designed to speed up the proceedings leading to the adoption of a decision. The final decision presents all the usual characteristic of a 'cease-and-desist' and a prohibition decision under Articles 7 and 23 of Regulation 1/2003.³

From a public enforcement point of view, the instrument allows to gain procedural efficiencies and to shorten the proceedings in cases where the Commission has solid evidence of an infringement, and thus to free resources. This in turn allows the Commission to deal with more cartel cases more quickly, while ensuring the necessary remedies and deterrence effect.

II. The importance of certain key steps

With 14 decisions adopted under the settlement procedure, the procedure is by now a well-oiled instrument.⁴ In

Key Points

- Following its introduction in 2008, the settlement procedure has become a well-oiled instrument with already 14 decisions adopted by the Commission.
- The pace has accelerated over the period 2013–2014, with more than half of all decisions adopted and almost EUR 3 billion collected in fines.
- The procedure has proven to achieve procedural efficiencies, generally reducing the duration of the procedure by 2 years.
- Five cases have so far been pursued as 'hybrid' cases and one case is currently being challenged before the European Courts.

another case the settlement procedure was terminated by the Commission because of the lack of progress of the settlement talks. In this last case, the Commission reverted to the normal procedure and recently adopted a final decision.⁵

The settlement process is by now known to the members of business and legal communities who have participated in settlement cases and, more in general, through articles and speeches.⁶ There is no need to revisit the procedural steps. Experience has shown that

* Flavio Laina is Head of the Cartel Settlement Unit in the Cartel Directorate of the European Commission's Directorate General for Competition; Aleko Bogdanov is Case Handler in the same Cartel Settlement Unit. The opinions expressed by the authors in this article are personal and do not necessarily reflect the Commission's opinion.

1 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2 July 2008, pp. 1–6, the 'Settlement Notice'.

2 Commission Notice on Immunity from fines and reduction of fines in cartel cases (Text with EEA relevance), OJ C 298, 8 December 2006, pp. 17–22, the 'Leniency Notice'.

3 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, 4 January 2003, pp. 1–25, 'Regulation 1/2003'.

4 This article covers decisions adopted before July 2014, See Table 1 for the details of the cases.

5 Commission Decision of 3 September 2014 in case AT.39574 Smart Card Chips (no public version available).

6 See, for instance, K Mehta and M-L Tierno Centella, 'Settlement procedure in EU cartel cases' (2008) *Competition Law International* 11–16; D Waelbroeck, 'Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?' (2008) GCLC Working Paper 01/08, 31–48; A Ascione and M Motta, 'Settlements in Cartel Cases' in C-D. Ehlermann and M Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing, Oxford and Portland 2009); MP Schinkel, 'Bargaining in the Shadow of the European Settlement Procedure for Cartels' (2010) Amsterdam Center for Law & Economics Working Paper No. 2010-17; R Gamble, 'Speaking Formally with the Enemy' – Cartel Settlements Evolve' (2011) 32(9) *European Competition Law Review* 449–456; M Marquis, 'Cartel Settlements: An Overview of EU and National Case Law' (2012) *e-Competitions* No. 46057; F Laina and E Laurinen, 'The EU Cartel Settlement Procedure: Current Status and Challenges' (2013) 4(4) *Journal*

the essential feature of a successful settlement is the will of parties to settle. In that light, certain key steps deserve a closer look: (A) the screening phase, (B) the settlement talks between the Commission and the parties and (C) the (one) appeal of settlement decisions to the General Court. Finally, (D) a few remarks should also be spent on 'hybrid' cases, ie cases in which a settlement was reached with most but not all of the involved parties. In these cases, the non-settling parties are prosecuted under the normal procedure.

A. The screening phase: factors for a successful settlement

While conducting its cartel investigation, the Commission also explores the parties' interest in settlement.⁷ This is usually done in the form of informal contacts with representatives of the companies under investigation. It is however more and more frequent that parties proactively approach the Commission in order to enquire whether the Commission is considering the settlement option for a specific case or even to express their own interest for a settlement procedure. As specified in the Settlement Notice,⁸ the Commission retains, at any stage of the procedure, the power to treat the case as a settlement or not, depending on elements which make the success of this procedure more or less certain. The parties do not have a right to settle: it is for the Commission to decide whether or not it explores their interest in the procedure. However, the proactive attitude of parties is beneficial for both sides. For the Commission it helps reducing the uncertainty on the willingness of parties to engage into settlement. For the parties, such proactive approach may in the end lead to a faster resolution of the case, as it may help the Commission decide to go for the settlement route.

There is no recipe for a good settlement case, and cases must be examined by the Commission *in concreto* to determine the chances of success of a possible settlement in a cartel case. It is intuitive that a case with an unsuccessful settlement followed by a normal procedure against all parties does not bring procedural efficiencies. The Settlement Notice contains a non-exhaustive list of criteria that are taken into account by the Commission

in order to establish the suitability of the case for a settlement.⁹ These elements all lead to the possibility to reach a common understanding. It is crucial for the parties to the proceeding to achieve a level of trust and understating of the essence of the case that will facilitate the discussions and the agreement on the infringement, the liability, and the range of fines. In the absence of such possibility—that is where a strong conflict or opposition appears from the outset—settlement is likely to fail its goal, which is to achieve procedural efficiencies, and will most likely not be pursued by the Commission.

Among the elements which allow estimating the possibility of reaching a common understanding, the Commission will consider the following.¹⁰

- *The number of parties involved.* *Prima facie*, it appears less likely to reach a common understanding with a large number of parties than with a small number of parties. As an example, in the *Power Exchanges* case,¹¹ only two undertakings were involved. Practice shows that the number of undertakings in cartels which were settled so far never exceeded 10 – in the *DRAMs* case,¹² which was the first application of the procedure and was a regular case transformed into a settlement case once the instrument was created. In the subsequent cases, the undertakings involved were between two and six (respectively in the *Power Exchanges*¹³ and *Bearings*¹⁴ cases).
- *The number and proportion of leniency applicants.* Where all of the parties to the proceedings have lodged applications under the Leniency Programme, it is more likely that they will go beyond cooperation required in leniency and will also be interested in a fast-track procedure. In three out of the 14 cases, all parties were immunity or leniency applicants (*Consumer Detergents*,¹⁵ *Refrigeration compressors*¹⁶ and *Automotive Wire Harnesses*¹⁷). In the other cases most of the applicants were leniency applicants. In one case, none of the parties had applied for Leniency (*Power exchanges*¹⁸).
- *The degree of cooperation of the parties.* This criterion is certainly linked to the degree of robustness of the objections. The more a case is solid, the less it

of Competition Law & Practice, 302–311; Joaquín Almunia, 'Remedies, commitments and settlements in antitrust', 2013, SPEECH/13/210.

7 §6 of the Settlement Notice.

8 §6 of the Settlement Notice.

9 §5 of the Settlement Notice.

10 See, for instance, §5 of the Settlement Notice.

11 Commission Decision of 5 March 2014, C(2014) 1204 final (case AT.39952).

12 Commission decision of 19 May 2010, C(2010) 3152 final (case COMP/38.511).

13 Commission Decision of 5 March 2014, C(2014) 1204 final, case AT.39952.

14 Commission Decision of 19 March 2014, C(2014) 1788 final, case AT.39922 (no public version available).

15 Commission Decision of 13 April 2011, C(2011) 2528 final, case COMP/39579.

16 Commission Decision of 7 December 2011, C(2011) 8923 final, case COMP/39600.

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

18 Commission Decision of 5 March 2014, C(2014) 1204 final, case AT.39952.

should be prone to contestation. Should the parties demonstrate many disagreements with the facts exposed to them by the Commission, it is less likely that the case will be suited for a settlement. While the Treaty gives the parties the right to appeal a settlement decision before the European Courts, significant procedural efficiency is actually achieved by the low probability of subsequent litigation. So far, discounting litigation by non-settling parties after a 'hybrid' case,¹⁹ only one appeal has been lodged with the General Court in the *EIRD* case.²⁰ It should be pointed out that, from the available public information, this appeal is limited to the determination of the value of sales and does not concern the scope of the infringement or the liability for the infringement. In the same vein, although it is difficult to avoid that a case becomes hybrid – ie where parties opt out from the settlement at a late stage of the procedure – the possibility of ending up with a hybrid case at an early stage should be carefully analysed upfront and avoided.

- *Agreement to a fine.* In a settlement case, the parties need, in their settlement submissions, to commit to pay a fine and to agree as to the level of the fine. Where there are factors in the Commission's file which can be later retained as aggravating circumstances (which would lead to a possible increase of the fine), it can be expected that the parties will be more reluctant to settle – which might have a negative impact on the procedural efficiencies sought. Furthermore, where the fines are unlikely to be very high, a settlement might appear as an option. However, in the *Bearings* case²¹ the total fine imposed by the Commission approached 1 billion euro, which did not prevent the case from being treated under the settlement procedure.
- *The possibility of setting a precedent.* Some cases might not be suited for the settlement procedure, which leads to a much shorter decision (an average of some 30 pages for the 14 settlement decisions adopted so far, with some decisions being only some 20 pages long) which reflects the parties' settlement submissions and the statement of objections. This format is

not always best suited for treating novel legal issues, as this usually requires more detail and in-depth analysis.

- *International cartel enforcement procedures and private enforcement claims.* When the cartel is of an international scope and where other competition (or regulatory) authorities are also pursuing the same conduct and the same parties, a settlement procedure might not be the best option. Parallel proceedings add up to the complexity of the case and may have a negative impact on the settlement discussions, especially in terms of timing and the parties' willingness to admit the participation in an infringement. The possibility of victims of the cartel lodging private damages actions can also make the parties reluctant to admitting their participation in a cartel. In such a case, those parties might not be interested by a swift resolution of the case with the Commission. It would be interesting to know whether this type of motivation played a role in the choice of certain non-settling parties in some of the recent hybrid settlement cases.

In the light of the lessons learned from all the decisions adopted by the Commission under the settlement procedure, and in particular considering the eight decisions adopted during the last 13 months (June 2013 to June 2014), it can be concluded that the screening factors work correctly. Even in cases where one or the other of those criteria was not fulfilled, this did not prevent to reach a settlement. For example, in some cases, there were a minority of immunity or leniency applicants. This was the case in the *Water Management Products* case,²² the *Steel abrasives* case²³ (with only one leniency applicant in both cases), or the *Power Exchanges* case²⁴ (where there were no leniency applicants). Furthermore, the high amount of the final fine imposed on undertakings, which would normally dissuade parties from settling, did not prevent the adoption of settlement decisions in the *YIRD* and *EIRD* cases²⁵ (respectively, around EUR 670 million and more than EUR 1 billion) and in the *Bearings* case²⁶ (almost EUR 1 billion). More, the *Bearings* case²⁷ is also an example of a successful settlement with rather numerous parties (six undertakings were fined).

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

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

21 Commission Decision of 19 March 2014, C(2014) 1788 final, case AT.39922 (no public version available).

22 Commission Decision of 27 June 2012, C(2012) 4313 final, case COMP/39611.

23 Commission Decision of 4 April 2014 in case AT.39792 (no public version available).

24 Commission Decision of 5 March 2014, C(2014) 1204 final, case AT.39952.

25 Commission Decisions of 4 December 2010 in cases AT.39861 and AT.39914 (no public versions available).

26 Commission Decision of 19 March 2014, C(2014) 1788 final, case AT.39922 (no public version available).

27 Commission Decision of 19 March 2014, C(2014) 1788 final, case AT.39922 (no public version available).

On the other hand, in general the Commission did not engage in settlement where several screening criteria were *ex-ante* not fulfilled, thus proving the overall reliability of these criteria. As far as hybrid cases are concerned, they seem to come from the fact that at a certain point of the procedure (ie when the settlement was already ongoing) several of the criteria became no longer fulfilled (see Section D).

B. Settlement discussions and settlement submissions

1. Settlement discussions

The settlement procedure has above all allowed speeding up the procedures, on average, reducing their length by 2 years. The first key lesson learned is that the participation and the commitment of the senior management of the involved undertakings is instrumental to the success and the speed of the process and is, therefore, encouraged by the Commission. The first settlement meeting is in general the first time when companies and their management are confronted with the reality of an infringement or with its full extent. It is also crucial that there is only one procedural language.

The settlement discussions allow the reaching of a common understanding on the scope of the case. From the feedback received from parties, it appears that the settlement discussions allow them to gather a better and earlier understanding of the objections held against them. Indeed, a reasonable anticipation of the Commission's envisaged findings as regards their participation in the infringement and the level of potential fines and the agreement to those fines appears to be useful for parties to a cartel in better assessing their own responsibilities and in acknowledging their participation in a cartel and their liability in respect of such participation.²⁸

With 15 cases (including the Smart cards chips case²⁹) already dealt with under the settlement procedure, both the Commission and the parties have by now gained experience with the settlement meetings. The discussions phase has also brought significant procedural efficiencies, as the period from the opening of proceedings until the adoption of the decision has never exceeded 1 year and a half (for the *Animal Feed Phosphates*³⁰) and more recently has often been shorter than 1 year (in the *Automotive*

Wire Harnesses, the *EIRD*, the *YIRD*, and the *Power Exchanges* cases³¹).

The Commission retains a high degree of discretion as far as the settlement meetings are concerned.³² In practice, until now, the Commission has always organised the procedure in three steps, through three rounds of bilateral meetings with parties. During the first round of bilateral meetings, the Commission presents to the parties and their legal representatives the evidence on its file allowing it to build its cartel case. The purpose of the second round is to record that a common understanding has been reached between the Commission and each of the parties regarding the scope of the potential objections and that there is agreement on the value of sales. The objective of the third round of bilateral meetings is to present to the parties the maximum amount of a possible fine.

Another successfully implemented procedural efficiency is the access to the key documents supporting the preliminary objections. The Commission's internal process is made quicker, as there will be only access to the essential pieces of the file (as opposed to the otherwise complete access to all documents of the file, even those with no or marginal probative value). After the first round of discussions, in which a selection of the key documents is presented and explained to the parties, these are granted access to all the essential pieces of the file on which possible objections will be based, so that they can form their opinion on their participation with full knowledge of the facts. Upon a reasoned request by the parties, access can be given to further evidence, based on the list of non-confidential versions of accessible documents which is provided to the parties.³³ In the large majority of settlement cases until now, the parties satisfied themselves with the access initially granted by the Commission and only in a limited number of cases, there was a request for access to additional documents. Even in this case, in general, the request for additional access concerned a limited number of documents. Another postulate of the settlement process finds here a confirmation: quality is better than quantity. As long as evidence is robust and incontestable, there is no need for the Commission to produce thousand pages of evidence to convince parties of the existence of an infringement.

28 Recital 2 of Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (Text with EEA relevance), OJ L 171, 1 July 2008, pp. 3–5.

29 Case 39574 Smart cards chips, Decision of the Commission of 3 September 2014 under normal procedure. See Commission Press Release IP/14/960 of 3 September 2013.

30 Commission Decision of 20 July 2010, C(2010) 5004, case COMP/38866.

31 Respectively Commission Decisions of 10 July 2013, C(2013) 4222 final, case AT.39748, of 4 December 2010 in cases AT.39861 and AT.39914 (no public versions available) and of 5 March 2014, C(2014) 1204 final, case AT.39952.

32 §15 of the Settlement Notice.

33 Article 10 (a) 2 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance), OJ L 123, 27 April 2004, pp. 18–24.

Between the rounds of formal meetings, the Commission can organise technical discussions at the request of the parties. These discussions are held outside the three formal rounds of meetings, and their purpose is to clarify specificities of the case, such as the products concerned. Parties may also submit technical ‘non-papers’ for the purpose of clarifying these issues. Their objective is the clarification of a technical issue and they are not used as evidence. There is no obligation to communicate such non-papers to the Commission, although experience has shown that they can help to clarify certain technical issues and thus streamline the Commission’s observations. So far, the parties have chosen to focus discussions on a limited number of targeted key issues. This has confirmed the premise on which settlement is built according to which in a straight-forward case only few elements require discussion. From the Commission’s point of view, all discussions so far have been thorough, allowing the parties to present their views in great detail. This is also evidenced by the length of settlement talks in the various cases. As mentioned above, the discussions have lasted up to a year, which shows that the parties have fully used their rights to be heard.

2. Settlement submissions

Once the Commission considers that a common understanding has been reached with all the parties, it will set a deadline of at least 15 working days for the parties to introduce written settlement submissions.³⁴ These submissions, which are the reflection of the settlement discussions, are the essential elements for the remainder of the procedure. Hence, they must contain several elements which will thereafter be included in the Commission’s statement of objections and its decision. These elements include³⁵ (i) a clear and unequivocal acknowledgment of the parties’ liability for the infringement, (ii) an indication of the maximum amount of the fine that they are willing to accept, (iii) their confirmation that they have been sufficiently informed of the Commission’s objections and have been given sufficient opportunity to state their views (and that they will not request an oral hearing), (iv) their confirmation that they do not envisage to request access to the whole of the Commission’s file, and (v) their agreement to receive a statement of objections and a decision under Articles 7 and 23 of Regulation 1/2003 in an agreed EU language (all 14 settlement cases were treated in English). The

more settlement submissions are standardised, the easier it is to draft more streamlined statements of objections and decisions.

By filing a settlement submission, parties express their commitment to cooperate in the expeditious handling of the case.³⁶ So far, in none of the cases the settlement submission has been revoked according to point 22 of the Settlement Notice. In the only case in which the settlement procedure was discontinued,³⁷ this was done at the stage of the settlement discussions and no submissions had been filed.

C. Appealing a settlement decision

The settlement decision is a regular prohibition decision, and, as such, can be appealed by its addressee before the General Court. *Prima facie*, this seems to be a contradiction. Why would a company appeal a Commission settlement decisions when it has (i) voluntary and unequivocally acknowledged its liability for the infringement and accepted the other elements contained in the settlement submission and (ii) confirmed in its reply to the statement of objections that the latter reflected its settlement submission? Furthermore, there are several opportunities for a company to opt out from the settlement procedure, before the adoption of a decision.

If companies would not be willing to reach a common understanding with the Commission, it would appear clearly and early enough in the process, either with the companies stating it explicitly or with the Commission discontinuing the settlement talks for lack of progress. In addition, a company has the possibility to opt out from settlement until the moment of making a settlement submission. This has happened in the recent hybrid cases. It would follow that a company which has undergone the whole process until the positive reply to the statement of objections and the final decision and then appeals the decision, would likely make this step because it disagrees with some elements of the decision that were not already mentioned in the statement of objections.³⁸ One possible element fitting with this description is the calculation of the fines on which there are already indications in the statement of objections but which is more detailed and motivated only at the stage of the decision, for instance, concerning the value of sales of all the parties. Before that step, only the fines’ range and a broad description of the fines’ calculation are presented to the parties.

34 Article 10 of Regulation 773/2004 and recital 17 of the Settlement Notice.

35 §20 of the Settlement Notice.

36 §21 of the Settlement Notice.

37 Case 39574 Smart cards chips, Decision of the Commission of 3 September 2014 under normal procedure. See Commission Press Release IP/14/960 of 3 September 2013.

38 In the absence of any issues related to the rights of defence and to other external factors.

Another potential question raised by the appeals of settlement decisions is what would become of the 10 per cent reduction in fine which was granted by the Commission for settling the case. For the Commission, the main reason for granting such reduction resides in the procedural efficiencies obtained with this fast-track settlement procedure. It could be argued that one of the key components of such procedural efficiencies could be seen as the absence of subsequent litigation after the adoption of a decision by the Commission. At some point, the Courts may have to assess whether an appeal concerning facts, information or elements of liability previously acknowledged by the party during the settlement process would be in contradiction with the notion of cooperation in the conduct of proceedings foreseen in point 1 of the Settlement Notice and which is the basis for the 10 per cent reduction of fine. In the appeal lodged by *Société Générale* in the so-called *EIRD* case³⁹, it appears from the published application that the applicant challenges, among others, the calculation by the Commission of the value of sales. Whatever the outcome of this appeal, it will be very interesting to follow how the General Court shall judge in law and fact under its unlimited jurisdiction.

D. General remarks on hybrid cases

It cannot be said too often that the purpose of the settlement procedure is to bring procedural efficiencies. From an administrative point of view, shortening the process, using one procedural language, drafting shorter statements of objections and decisions, not having to handle a full access to file exercise, and limiting subsequent litigation before the European Courts are the main elements allowing the Commission to pursue more cases with the same resources. Therefore, when engaging into settlement, the best case scenario would involve all parties. Having to conduct a settlement with certain parties and a normal procedure with others defies this purpose to an extent which can be large or small, depending on the configuration of a case.⁴⁰ This does however not mean that parties should not be allowed to opt out from a settlement, in case profound disagreements with the Commission's objections emerge. It does however mean that the Commission will consider whether pursuing a

case with both settling and non-settling parties brings the desired procedural efficiencies.

Early hybrids, ie cases where it is reasonable to assume from the outset that they will become hybrid, are relatively easy to identify with the existing screening criteria. In this case the Commission is not likely to engage in settlement but rather develop its case under a normal procedure, thus avoiding a hybrid case from the start.

The setting is different when one or more parties opt out from the settlement after the settlement discussions. This situation is somehow difficult to avoid as it is imposed on the Commission by the partie(s) and is triggered by the incentives of parties to settle a case or not. When the first signs appear that a case will become hybrid, the Commission should decide whether it should knowingly engage in it or revert to the normal procedure with all parties. To reach the decision, the Commission will look into the procedural efficiencies that can still be gained from the settlement procedure. If the parties wishing to discontinue the settlement are not numerous, if their role of the infringement is not central, the Commission might decide that running the case as hybrid still entails procedural efficiencies and continue with the settlement. It has to be noted that in general, at that stage of a case, the Commission has assembled a solid file and the drafting of a statement of objections under the normal procedure would not be too burdensome.

To date, five hybrid procedures have been (or are) treated by the Commission in the *Animal Feed Phosphates*, the *YIRD*, *EIRD*, *Steel Abrasives*, and *Mushrooms*⁴¹ cases, the last four of which during the period 2013–2014. None of the four recent cases are yet published, and commenting on them would not be appropriate. However, if the Commission chose to pursue these cases against the non-settling parties, it is because it assessed that the procedural efficiencies described above could still be achieved. In any event, it could be useful to study the motivations that made certain parties opt out at a late stage of the process. The authors submit that in certain cases reverting to the normal procedure with all the parties would strengthen the settlement instrument.

In any event, in hybrid cases, the parties which have settled should not be put in a worse position compared with the other non-settling parties. Indeed, in the normal

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

40 Essential factors would be the number of parties opting out, their role in the alleged cartel and their (non)-cooperation status.

41 The reference of the settled cases are, respectively: Commission Decision of 20 July 2010, C(2010) 5004, case COMP/38866; Commission Decision of 4 December 2010 in case AT.39861 (no public version available);

Commission Decision of 4 December 2010 in case AT.39914 (no public version available); Commission Decision of 4 April 2014 in case AT.39792 (no public version available); Commission Decision of 19 March 2014, C(2014) 1788 final, case AT.39922 (no public version available), and Commission Decision of 25 June 2014 in case AT.39965 (no public version available).

Table 1: Settlement cases since the introduction of the settlement procedure

Decision	Fine (in EUR)	Number of parties	Number of leniency applicants	Hybrid
<i>DRAMs</i> (38.511), 19 May 2010	331,273,800	10	6	No
<i>Animal feed Phosphates</i> (38.866), 20 July 2010	175,647,000	5 settling + 1 non-settling	4	Yes
<i>Consumer Detergents</i> (39.579), 13 April 2011	315,200,000	3	3	No
<i>CRT Glass</i> (39.605), 19 October 2011	128,736,000	4	2	No
<i>Refrigeration Compressors</i> (39.600), 7 December 2011	161,198,000	5	5	No
<i>Water Management Products</i> (39.611), 27 June 2012	13,661,000	3	1	No
<i>Automotive Wire Harnesses</i> (39.748), 10 July 2013	141,791,000	5	5	No
<i>YIRD</i> (39.861), 4 December 2013	669,719,000	6 settling + 1 non-settling	5	Yes
<i>EIRD</i> (39.914), 4 December 2013	1,042,749,000	4 settling + 3 non-settling	4	Yes
<i>Polyurethane Foam</i> (39.801), 29 January 2014	114,077,000	4	3	No
<i>Power Exchanges</i> (39.952), 5 March 2014	5,979,000	2	None	No
<i>Bearings</i> (39.922), 19 March 2014	953,306,000	6	5	No
<i>Steel abrasives</i> (39.792), 4 April 2014	30,707,000	4 + 1 non-settling	1	Yes
<i>Mushrooms</i> (39.965), 25 June 2014	32,225,000	3 settling + 1 non-settling	2	Yes

part of the hybrid procedure, which will lead to a longer, more detailed decision, the parties who have previously settled should be protected.

III. General overview of the cases treated under the settlement procedure

A. Statistics

Table 1 summarises the 14 cases that have been successfully treated under the settlement procedure since the introduction of this instrument in 2008. While the very first case paved the way to streamlining the newly introduced procedure, the pace has accelerated in the period 2013–2014, which saw eight decisions applying the settlement procedure.

So far, a total of 64 undertakings have been sanctioned for an infringement of Article 101 TFEU in settlement procedures, and more than the double of legal entities have been found liable.

In all of the cases there were several leniency applications (a total of 36 undertakings have cooperated under the Leniency Guidelines since the introduction of the settlement procedure).

A total of EUR 4,116,268,000 was imposed in fines in all 14 decisions. Almost EUR 3 billion have been imposed in the eight decisions adopted over the period 2013–2014, of which EUR 1.7 billion in the two derivatives cases, YIRD and EIRD,⁴² alone.

B. Overview of the cases dealt with in the period 2013–2014

The following section summarises the eight settlement decisions adopted in the period 2013–2014. At the time of publishing, three of the eight decisions have been published (*Automotive Wire Harnesses*,⁴³ *Power Exchanges*,⁴⁴ and *Polyurethane Foam*⁴⁵). The authors focus only on public information.

42 Commission Decisions of 4 December 2013 in cases AT.39861 and AT.39914 (no public versions available).

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

44 Commission Decision of 5 March 2014, C(2014) 1204 final, case AT.39952.

45 Commission Decision of 29 January 2014, C(2014) 438 final, case AT.39801.

1. Automotive wire harnesses⁴⁶

The Commission adopted a prohibition decision on 10 July 2013 fining five parties (all of which leniency applicants) for five separate infringements. The five cartels were operated in the sector of supply of wire harnesses to car manufacturers.

A total fine of EUR 141,791,000 was imposed. All parties expressed their interest to settle right after the Commission initiated proceedings under Article 11(6) of Regulation 1/2003, and settlement discussion started less than 2 months after the initiation of proceedings. The duration of the settlement discussions, from the initiation of the proceedings until the adoption of the decision, took less than a year.

The fines imposed are described in Table 2.

2. Yen interest rate derivatives ('YIRD')⁴⁷

On 4 December 2013, the Commission adopted a prohibition decision, applying the Settlement Notice, against six undertakings, for their participation in seven separate infringements in the sector of interest rate derivatives derived from the London Interbank Offered Rate (LIBOR). LIBOR is a benchmark rate reflecting an average of the quotes submitted daily by a number of banks and which are meant to reflect the cost of interbank lending. These rates also serve as a basis for numerous financial derivatives. The sanctioned infringements consisted of collusion between traders of the panel banks on certain Japanese Yen LIBOR submissions.

A fine of a total of EUR 669,179,000 was imposed. Five of the undertakings were cooperating with the Commission under the Leniency Notice, and, apart from the immunity granted, received reductions in fines, to which the 10 per cent settlement reduction was added. It is noteworthy that a broker, RP Martin, was fined for its participation in one of the infringements as a facilitator.

The fines imposed are described in Table 3.

One party, ICAP, a cash broker, did not participate to the settlement in this case and was not covered by the decision. On 10 June 2014, the Commission sent a statement of objections to ICAP, after opening proceedings against it in October 2013.⁴⁸

The objections held against ICAP do not reduce the overall efficiency gained from the settlement procedure in this case. Indeed, with only one party not being part of the settlement, generally speaking the procedure has

Table 2: Fines imposed in the Automotive Wire Harnesses case

Participants	Reduction under the Leniency Notice	Fine (EUR)
Sumimoto	100%	0
Yazaki	50% Nissan, 40% Toyota, 40% Honda	EUR 125,341,000
Furukawa	40%	EUR 4,015,000
SYS	45% Renault I, 40% Renault II	EUR 11,057,000
Leoni	20%	EUR 1,378,000

Table 3: Fines imposed in the YIRD case

Participants	Reduction under the Leniency Notice	Fine (EUR)
UBS	100% for all infringements	0
RBS	25% for one infringement	260,056,000
Deutsche Bank	35%, 30%	259,499,000
JP Morgan	–	79,897,000
Citigroup	35%, 100%, 40%	70,020,000
RP Martin	25%	247,000

allowed shortening the overall duration and administrative burden for the Commission.

3. Euro interest rate derivatives (EIRD)⁴⁹

On the same day as in the YIRD case, the Commission adopted a prohibition decision against four settling parties for a cartel in the sector of interest rate derivatives derived from the Euro Interbank Offered Rate (EURIBOR), a benchmark rate serving the same purpose as the LIBOR described above.

A fine of more than EUR 1 billion was imposed on three undertakings, one benefitting from immunity under the Commission's Leniency Guidelines.

The fines imposed are described in Table 4.

Three parties did not wish to settle the case, and the Commission was able to quickly revert to the normal procedure against them, with a statement of objections that has already been sent to them.⁵⁰ As far as the four settling parties are concerned, the procedure was one of

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

47 Commission Decision of 4 December 2010 in case AT.39861 (no public version available). See also Commission Press Release IP/13/1208 of 4 December 2013.

48 See Commission Press Release IP/14/656 of 10 June 2014.

49 Commission Decision of 4 December 2010 in case AT.39914 (no public version available). See also Commission Press Release IP/13/1208 of 4 December 2013.

50 See Commission Press Release IP/14/572 of 20 May 2014.

Table 4: Fines imposed in the EIRD case

Participants	Reduction under the Leniency Notice	Fine (EUR)
Barclays	100%	0
Deutsche Bank	30%	465,861,000
Société Générale	5%	445,884,000
RBS	50%	131,004,000

the fastest, with a period of only 9 months between the opening of proceedings and the decision.

Another particularity of the case is that on 14 February 2014, an addressee of the adopted settlement decision lodged an appeal before the General Court against said decision.⁵¹ In its appeal, the applicant only challenged the method of calculating the value of sales. It is the first time that an addressee of a settlement decision attacks the decision and puts its fate in the hands of the General Court.

4. Polyurethane foam⁵²

This 10th settlement decision was adopted on 29 January 2014. It sanctioned four producers (and as many as 30 legal entities) of flexible polyurethane foam for their participation in a cartel covering 10 Member States, the aim of which was to pass on raw material price increases of bulk chemicals to customers and to avoid aggressive competition. A fine of a total of EUR 114,077,000 was imposed.

Only three out of the four settling parties were also leniency applicants. Apart from immunity granted to one undertaking, the other applicants received a reduction in their fine, prior to the application of the 10 per cent settlement reduction. The fourth undertaking did not apply for leniency. It is interesting to note that unannounced inspections were carried at its premises more than a year after the first inspections. This shows that the settlement procedure might be appealing for parties who otherwise chose not to cooperate under the Leniency Programme, nevertheless showing a successful interplay between settlement and leniency.

The case is interesting in terms of parental liability, as two of the undertakings fined also had a joint venture, and one of the parents (Recticel) was sanctioned both for its own role in the conduct and for its parental responsibility for the conduct of the joint venture Euro-

Table 5: Fines imposed in the Polyurethane Foam case

Participants	Reduction under the Leniency Notice	Fine (EUR)
Vita	100%	0
Carpenter	–	75,009,000
Recticel (for its own participation)	50%	7,442,000
For the conduct of Eurofoam	50%	
Eurofoam, Recticel and Greiner	50%	14,819,000
Greiner and Recticel	50%	9,364,000
Recticel	50%	7,443,000

foam, while the total fine of Recticel reached the 10 per cent legal limit of the total worldwide turnover. This case shows that the settlement procedure does not preclude the Commission from dealing with complex issues, and in particular, with the elements of the calculation of a fine.

The fines imposed are described in Table 5.

5. Power exchanges⁵³

By a decision adopted on 5 March 2014, the Commission sanctioned a non-compete agreement between two of the leading European spot power exchanges. The cartel concerned the parties' spot electricity trading services in the EEA and beyond. The total fine imposed on the parties was EUR 5,979,000.

There are several points of interest in this case. First, none of the parties were leniency applicants, and despite that they chose to engage in settlement. The decision sanctioned an infringement of some 7 months, a relatively short duration compared with regular hard-core cartels, since the infringement ended with the unannounced inspections carried out by the Commission in February 2012. Only 2 years after these inspections, a final decision was adopted. In terms of administrative process, the duration from the beginning of the settlement talks to the decision was only 9 months.

Secondly, this decision was adopted against the background of the creation of the Internal Energy Market. In recent years, Article 9 of Regulation 1/2003 has been used in several antitrust cases to ensure structural rem-

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

52 Commission Decision of 29 January 2014, C(2014) 438 final, case AT.39801. See also Commission Press Release IP/14/88 of 29 January 2014.

53 Commission Decision of 5 March 2014, C(2014) 1204 final (case AT.39952). See Commission Press Release IP/14/215 of 5 March 2014.

Table 6: Fines imposed in the Power Exchanges case

Participants	Reduction under the Leniency Notice	Fine (EUR)
EPEX	–	3,651,000
NPS	–	2,328,000

edies on EU energy markets. The settlement procedure, in the current case, has shown a further route to a swift remedy to an antitrust concern in the energy sector, whereby infringers can also be fined.

The fines imposed are described in Table 6.

6. Bearings⁵⁴

On 19 March 2014, the Commission adopted a decision fining six companies for their participation in a cartel in the sector of automotive bearings used by car, truck, and car part manufacturers. The Commission imposed a total fine of EUR 953,306,000.

Only one undertaking did not cooperate with the Commission under its Leniency Programme, whereas the others saw their fine reduced between 20 and 40 per cent, along with the immunity from fines granted.

The settlement procedure has here again allowed to accelerate considerably the process of adopting a decision, with only two years and a half between the inspections carried out⁵⁵ and the adoption of a decision.

The fines imposed are described in Table 7.

7. Steel abrasives⁵⁶

On 2 April 2014, less than a month after the previous settlement decision, the Commission adopted a decision fining four undertakings for their participation in a cartel with the objective of coordinating prices for steel abrasives in Europe. A fine of a total of EUR 30,707,000 was imposed for an infringement which lasted more than 6 years and during which the cartelists applied an agreed raw materials surcharge.

This case showed that reaching a common understanding with the parties is possible despite the fact that only one undertaking applied for immunity (and received it) under the Leniency Programme. It is also illustrative for a hybrid case which does not reduce procedural efficiencies for the Commission. Indeed, one undertaking decided not to submit a settlement submission and the investigation under the regular procedure is ongoing.

54 Commission Decision of 19 March 2014, C(2014) 1788 final, case AT.39922 (no public version available). See also Commission Press Release IP/14/280 of 19 March 2014.

55 See Commission Press Release MEMO/11/766 of 8 November 2011.

Table 7: Fines imposed in the Bearings case

Participants	Reduction under the Leniency Notice	Fine (EUR)
JTEKT	100%	0
NSK	40%	62,406,000
NFC	30%	3,956,000
SKF	20%	315,109,000
Schaeffler	20%	370,481,000
NTN	–	201,354,000

Table 8: Fines imposed in the Steel Abrasives case

Participants	Reduction under the Leniency Notice	Fine (EUR)
Ervin	100%	0
Winoa	–	27,565,000
Metalltechnik Schmidt	–	2,079,000
Eisenwerk Würth	–	1,063,000

The Commission's discretionary power under point 37 of the Fining Guidelines was also applied in this case so as to reduce the fines so that they match the characteristics of the undertakings involved as well as their different participation in the infringement.

The fines imposed are described in Table 8.

8. Mushrooms⁵⁷

On 25 June 2014, the Commission has adopted its last to date settlement decision, by which it fined three undertakings for their participation in a cartel aiming at coordinating prices and allocating the customers of canned mushrooms in Europe for over a year. The total fine imposed was EUR 32,225,000.

In this case, two undertakings only cooperated with the Commission under the Leniency programme and received, respectively, immunity from fines and a 30 per cent fine reduction.

One company decided not to submit a settlement submission and regular proceedings were opened against it. However, as far as the settling parties are concerned, the procedure was very much accelerated thanks to the settlement. Indeed, less than two years and a half passed

56 Commission Decision of 4 April 2014 in case AT.39792 (no public version available). See also Commission Press Release IP/14/359 of 2 April 2014.

57 Commission Decision of 25 June 2014 in case AT.39965 (no public version available). See also Commission Press Release IP/14/727 of 25 June 2014.

Table 9: Fines imposed in the Mushrooms case

Participants	Reduction under the Leniency Notice	Fine (EUR)
Lutèce	100%	0
Prochamp	30%	2,021,000
Bonduelle	–	30,204,000

between the unannounced inspections carried out in this case and the adoption of a decision.

The fines imposed are described in Table 9.

IV. Conclusion

With 14 decisions adopted under the settlement procedure, the instrument has proven to have reached its efficiency-seeking goal. While not very used in the beginning, the pace of settlement cases has increased in the period 2013–2014. Five out of the six cartel decisions adopted until June 2014 were settlement decisions, which have allowed DG Competition to allocate resources to the investigation of more cases. The low risk of an appeal brought by the settlement procedure makes it also attractive not only for the Commission, but also to parties.

The settlement procedure has also allowed the Commission to handle cases and adopt decision with fines more rapidly, therefore increasing deterrence. The settlement procedure is however not becoming a *l'art pour l'art* proceeding. The main drive for a successful settlement remains the genuine will of the parties to settle a case. This depends on a solid investigation by the Commission and on the trust that the parties and the Commission are able to develop with each other. This, in turn, helps building a 'settlement relationship' or a 'settlement attitude', where both sides exchange more freely in a constructive way.

The settlement procedure has shown its full compatibility with the Commission's Leniency Programme.

Unlike in other jurisdiction, in the EU, settlement and leniency are instruments which serve a different purpose. While leniency is an investigative tool (which allows the Commission to uncover most cartels), settlement is one aiming at accelerating the process leading to a decision. This is why the Commission may disregard any application for immunity from fines or for reduction of fines when settlement starts⁵⁸ as an investigation needs to be completed when settlement starts. However, the two instruments need to be consistent with each other and, for example, the reduction in fine under the settlement procedure has therefore been set at 10 per cent. The reduction needs to be sufficiently high to make settlement appealing to parties which do not cooperate under the leniency programme, while at the same time it should not approach the lower bands of leniency in order to preserve the incentive for parties wishing to cooperate under that programme. Until now, this rationale has proven effective, as around half of the undertakings engaging into settlements were also leniency applicants, as shown above. A good illustration of the successful interplay between the two tools is the fact that there are cases where leniency applicants are a minority of the undertakings involved in a case.

Finally, one of the challenges of the elaboration of the politically agreed proposal for the directive on private damages is its coexistence with both the Leniency and the Settlement procedures. Indeed, the text aims at removing obstacles to compensation of victims of infringements of EU antitrust law, but it also needed to strike a balance and protect parties' incentives in engaging in leniency and settlement. One of the main measures contained in the Directive is thus the protection of settlement submissions, which cannot be disclosed in a private damages action, thus protecting the incentives of companies to engage in settlements.

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58 §13 of the Settlement Notice.