The Settlement Procedure for Cartel Cases – A Useful Tool in Practice?

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A. Introduction

In July 2008, the European Commission introduced the "Settlement Package" in order to deal with the high number of cartels investigated. It sets up a procedure that is shorter and simpler than the ordinary infringement procedure and provides for a 10 % reduction of the fine for the undertaking's cooperation. This paper will put the settlement procedure in the context of the enforcement tools of European Competition Law and will analyse its usefulness in practice.

B. Settlement Procedure

I. Legal Basis

The Settlement Package adopted by the Commission in July 2008 consists of

– Regulation 622/2008[1] amending Regulation 773/2004,[2] and

– the Settlement Notice.[3]

Regulation 622/2008 provides for all the amendments necessary to include the settlement procedure into Regulation 773/2004. It lays down the procedure to be followed in order to come to a settlement decision.

The Settlement Notice sets out the specific framework for settlements. It explains in detail the different procedural steps and the rights of the parties and the Commission. It also elaborates on general questions such as discovery, disclosure and judicial review.

II. Objective

The Commission introduced a streamlined procedure which would allow it to handle more cases with the same resources.[4] The main efficiency gains lie in bilateral settlement discussions instead of an oral hearing and restricted access to the file as well as

1 Commission Regulation 622/2008/EC of 30 June 2008 amending Regulation 773/2004/EC, as regards the conduct of settlement procedures in cartel cases, OJ L 171 of 1/7/2008, p. 3.

2 Commission Regulation 773/2004/EC of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123 of 27/4/2004, p. 18.

3 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 on cartel cases, OJ C 167 of 2/7/2008, p. 1.

4 Ibid., para. 1; *Ortega González*, The cartel settlement procedure in practice, ECLR 32 (2011), p. 173; *Soltész/Köckritz*, EU cartel settlements in practice – the future of EU cartel law enforcement?, ECLR 32 (2011), p. 258; *Stephan*, The Direct Settlement of EC Cartel Cases, International and

the reduction of translations and subsequent appeals before the European Court of Justice.[5] The procedure also offers benefits for the undertakings submitting to it and thereby waiving some rights: the fine is reduced by 10 %[6] and the increase for deterrence will not exceed a multiplication by two;[7] it is also in the undertaking's interest to bring the case to a fast end and limit collateral damage to its reputation.[8] The settlement procedure creates a win-win situation for the Commission as well as the undertakings accused.[9]

III. Procedure

1. Initiation of Proceedings

The Commission investigates the alleged cartel (inspections, requests for information – potentially triggered by a leniency application) and provisionally qualifies the evidence gathered.[10] With this information at its disposal, the Commission examines whether the case is suitable for settlement. It thereby has a wide margin of discretion. It may take into account "the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of

Comparative Law Quarterly 58 (2009), p. 627; *Ascione/Motta*, Settlement in Cartel Cases, in: Ehlermann/Marquis (eds.), European Competition Law Annual: 2008, 2010, p. 69; *Waelbroeck*, The Development of a New "Settlement Culture" in Competition Cases – What is Left to the Courts?, in: Gheur/Petit (eds.), Alternative enforcement techniques in EC competition law, 2009, p. 242.

5 *Dekeyser/Roques*, The European Commission's settlement procedure in cartel cases, The Antitrust Bulletin 55 (2011), p. 829 et seq.; Horányi, The European Commission's Settlement Procedure for Cartel Cases – Costs and Benefits, ZEuS 2008, p. 681; *Ascione/Motta*, (fn. 4), p. 71; *Mehta/Centella*, EU Settlement Procedure: Public Enforcement Policy Perspective, in: Ehlermann/Marquis, (fn. 4), p. 395; *Waelbroeck*, (fn. 4), p. 242.

6 Note that the amount of reduction is not negotiable. The Commission emphasises that there is no bargaining concerning the fine. However, there is opportunity to discuss the level of fine in the bilateral settlement discussions and thereby influence the Commission's decision, see Brankin, The first cases under the Commission's cartel-settlement procedure: problems solved?, ECLR 32 (2011), p. 168 et seq.

7 Settlement Notice, (fn. 3), para. 32.

8 *Gamble*, Speaking (formally) with the enemy – cartel settlements evolve, ECLR 32 (2011), p. 450; *Schinkel*, Bargaining in the shadow of the European settlement procedure for cartels, The Antitrust Bulletin 56 (2011), pp. 468, 474 et seq.; *Dekeyser/Roques*, (fn. 5), p. 830; *Horányi*, (fn. 5), p. 696; *Vallery*, Les procedures de règlement négocié de la Commission européenne en matière de concurrence: entre flexibilité et sécurité juridique, in: de Walsche/Levi (eds.), Mélanges en hommage à Georges Vandersanden – Promenades au sein du droit européen, 2008, p. 739.

9 *Dekeyser/Roques*, (fn. 5), p. 821; *Taladay*, Implications of International Cartel Settlements for Private Rights of Action, in: Ehlermann/Marquis, (fn. 4), p. 317 et seq.

10 *Mehta/Centella*, (fn. 5), p. 407.

the facts", "the prospect of achieving procedural efficiencies in view of the progress made overall in the settlement procedure, including the scale of burden involved in providing access to non-confidential versions of documents from the file" and "the possibility of setting a precedent".[11]

2. Exploratory Steps

If the Commission considers the case suitable for settlement, it explores the undertakings' interest to engage in settlement discussions.[12] It will therefore set a time limit of no less than two weeks during which the undertakings can express their interest in the settlement procedure.[13] The undertakings have to indicate their interest in written form, which however "does not imply an admission by the parties of having participated in an infringement or of being liable for it".[14]

3. Settlement Discussions

If the Commission considers a case suitable for settlement and the undertakings are interested in it, the Commission conducts the settlement discussions by means of bilateral contacts between DG Competition and the settlement candidates.[15]

The Commission retains full discretion concerning those settlement talks: It decides about the order and sequence of discussions as well as the timing of disclosure of information.[16] The information has to enable the undertakings to assert their views on the potential objections against them and to make an informed decision about settling or not.[17] They therefore have to be informed of the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines and the evidence used to establish the potential objections.[18] The undertakings may also request access to non-confidential versions of a document of the list in the file, if this is justified for the purpose of enabling it to ascertain its position regarding a time period or any other aspect of the cartel.[19]

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11 Settlement Notice, (fn. 3), para. 5.

12 Ibid., para. 11.

13 Ibid.

14 Ibid.; critically about the consequences of expression of interest by the undertaking *Soltész/Köckritz*, (fn. 4), p. 260.

15 Settlement Notice, (fn. 3), para. 14.

16 Ibid., para. 15.

17 Ibid., para. 16.

18 Ibid.; *Dekeyser/Roques*, (fn. 5), p. 835 et seq.

19 Settlement Notice, (fn. 3), para. 16.

In practice, in the *DRAMs* settlement, the discussions basically consisted of three rounds:[20]

First, the undertakings were informed of the objections of the Commission and the evidence supporting them. Second, the objections were discussed in the light of the evidence having been made available in order to reach a common understanding regarding the scope and duration of the cartel. Third, the undertakings were informed of the range of likely fines and how the Fining Guidelines would apply.

The Hearing Officer can be asked to intervene at any time if issues related to due process arise;[21] he has to ensure the effective exercise of the rights of defence.[22]

4. Settlement Submissions

If the Commission and the undertakings come to a common understanding regarding the scope of the potential objections and the estimation of the range of likely fines, the Commission sets the undertakings another time limit of no less than 15 days to introduce a formal request to settle.[23] The submission should reflect the common understanding and not deviate from it.[24] The submission is binding for the undertakings.[25]

It should contain:[26]

- an acknowledgement of the undertaking's liability for the infringement summarily described,[27]
- an indication of the maximum amount of the fine the undertaking is willing to accept,
- a confirmation that it has been sufficiently informed of the objections raised against it and given sufficient opportunity to make its views known,
- a confirmation that it will not request access to the file or to be heard again in an oral hearing and
- an agreement to receive the Statement of Objections and final decision in an agreed official language of the EU.

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20 Final report of the Hearing Officer COMP/38.511 – *DRAMs*, OJ C 180 of 21/6/2011, p. 13.

21 Settlement Notice, (fn. 3), para. 18.

22 Ibid.

23 Ibid., para. 17.

24 *Dekeyser/Roques*, (fn. 5), p. 837.

25 Settlement Notice, (fn. 3), para. 22.

26 Ibid., para. 20.

27 See in detail *Soltész/Köckritz*, (fn. 4), p. 262.

If the undertakings do not introduce a settlement submission, the ordinary procedure resumes and the undertakings can ask for an oral hearing and full access to the file.[28] This can also only happen to individual undertakings of the same cartel as in *Animal Feed Phosphates*, thereby resulting in a hybrid settlement.[29]

5. Statement of Objections and Reply

The Statement of Objections is short and does not contain details because it basically takes over the settlement submission.[30] It is "essentially an editorial exercise".[31] If the Statement of Objections reflects the settlement submissions, the undertakings have to confirm this during the time-frame of at least two weeks set by the Commission.[32] If the undertakings omit to do so, the Commission will consider this as a breach of their commitments and resume the ordinary procedure.[33]

6. Settlement Decision

After consultation of the Advisory Committee, the Commission can adopt a final decision pursuant to Articles 7 and 23 of Regulation 1/2003.[34]

The fine will be calculated according to the 2006 Fining Guidelines.[35] As a reward for submitting to the settlement procedure, the Commission will reduce the fine by 10 %.[36] This percentage applies after the application of the 10 % cap and cumulatively to reductions pursuant to the leniency programme.[37] Any increase for deterrence will not exceed a multiplication by two.[38]

28 Settlement Notice, (fn. 3), paras. 19 and 27.

29 Commission decision of 20/7/2010, COMP/38.866 – *Animal feed phosphates*.

30 *Horányi*, (fn. 10), p. 682.

31 *Soltész/Köckritz*, (fn. 4), p. 262.

32 Settlement Notice, (fn. 3), para. 26.

33 Ibid.

34 Ibid., para. 28.

35 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, OJ C 210 of 1/9/2006, p. 2.

36 Settlement Notice, (fn. 3), para. 32.

37 Ibid., para. 33.

38 Ibid., para. 32; Fining Guidelines, (fn. 35), para. 31.

C. Leniency and Settlements

I. Leniency in General

The Commission considers that it is in the interest of the EU, the citizens and consumers that undertakings involved in secret cartels are rewarded for being willing to stop participating and to cooperate with the Commission's investigation.[39] Hence, the Commission put into practice a leniency programme that offers "companies the incentives to 'blow the whistle' on cartels, making cartel participation riskier and creating a 'race to confess' in order to obtain full immunity".[40] The leniency programme has proven a highly valuable tool for uncovering secret cartels.[41]

The leniency programme is laid down in a Commission's Notice that is largely influenced by the US amnesty programme.[42] Two regimes under the leniency programme have to be distinguished.

Firstly, the Commission grants immunity from any fine to the first undertaking that submits information and evidence which enables the Commission to carry out a targeted inspection or to find an infringement of Article 101 TFEU.[43] Furthermore, the undertaking has to cooperate fully, continuously and expeditiously throughout the Commission's administrative procedure.[44] An undertaking that coerced others to join or remain in the cartel is not eligible for immunity.[45]

Secondly, an undertaking that does not qualify for immunity can still be eligible for a reduction of the fine: 30-50 % for the first undertaking, 20-30 % for the second undertaking and up to 20 % for subsequent undertakings.[46] In order to benefit from a reduction, the undertaking has to provide the Commission with evidence of the infringement that has significant added value with respect to the evidence the Commission already possesses.[47]

The procedure for immunity provides for conditional immunity upon the formal immunity application and the receipt of the information and evidence;[48] at the end of the administrative procedure, the undertaking will be granted immunity if it has

39 Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298 of 8/12/2006, p. 17, para. 3.

40 Ortiz Blanco (ed.), European Community Competition Procedure, 2nd ed. 2006, p. 219, para. 6.01.

41 See further *Joshua*, The Uncertain Feeling: The Commission's 2002 Leniency Notice, in: Ehlermann/Atanasiu (eds.), European Competition Law Annual: 2006, 2007, p. 511.

42 *Ortiz Blanco*, (fn. 40), p. 219, para. 6.01.

43 Immunity Notice, (fn. 39), para. 8.

44 Ibid., para. 12.

45 Ibid., para. 13.

46 Ibid., paras. 23 and 26.

47 Ibid., para. 24.

48 Ibid., para. 18.

complied with the relevant conditions.[49] Also in the case of a formal application for the reduction of a fine, the Commission will inform the undertaking of its intention to apply a reduction of a fine of a specific band or that it does not qualify.[50]

II. Leniency and Settlements in Practice

The leniency programme and the settlement procedure pursue different aims: The leniency programme helps triggering and contributing to the Commission's investigation, whereas the settlement procedure helps bringing the proceedings to a faster end.[51] The leniency programme is "the carrot" in the investigative phase of the proceedings; the settlement procedure adds to the efficiency of the following administrative phase.[52]

The settlement procedure can offer an alternative to undertakings that are not eligible for immunity or a reduction of the fine under the leniency programme.[53] In these cases, a reduction of the fine can only be achieved by submitting to the settlement procedure. The decision to settle therefore depends on a balancing of advantages and disadvantages. The main advantages for an undertaking are the shorter duration of the proceedings, the reduction of the fine and the limit to the deterrence factor as well as the less detailed decision. However, in exchange it has to admit liability, waive its right to an oral hearing and full access to and translation of the file. It strongly depends on the specific case whether the advantages outweigh the disadvantages. It has to be borne in mind, however, that a settlement involves the admission of liability, a severe step that is not necessary for a leniency application. Settlements and leniency therefore do not constitute proper alternatives.

However, in practice, in *DRAMs*[54] (Toshiba, Mitsubishi and Nanya), *Animal feed phosphates*[55] (FMC), *CRT Glass Bulbs*[56] (Schott and Asahi Glass) and *Water Management*

49 Ibid., para. 22.

50 Ibid., para. 29.

51 *Ortega González*, (fn. 4), p. 174; *Italiener*, Recent developments regarding the Commission's cartel enforcement, Studienvereinigung Kartellrecht Conference on 14/3/2012, p. 7; *Burrichter/Zimmer*, Reflections on the Implementation of a "Plea Bargaining"/"Direct Settlement" System in EC Competition Law, in: Ehlermann/Atanasiu, (fn. 41), p. 620.

52 *Horányi*, (fn. 5), p. 669 et seq.

53 International Competition Network Cartel Working Group – Subgroup 1 – General Legal Framework – Cartel Settlements, Report to the ICN Annual Conference, Kyoto, Japan, April 2008, http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf (3/12/2012), p. 6 et seq.

54 Commission decision of 19/5/2010, COMP/38.511 – *DRAMs*.

55 Commission decision of 20/7/2010, COMP/38.866 – *Animal feed phosphates*.

56 Commission decision of 19/10/2011, COMP/39.605 – *CRT Glass Bulbs*.

Products [57] (Flamco and Reflex), undertakings agreed to settle without acting as a leniency applicant at the same time.

As the form of cooperation and timing is different – in the case of leniency, the provision of evidence and in the case of settlements, the admission of liability and waiver of rights – separate rewards are provided and can be accumulated.[58] It is in the interest of undertakings to reduce the damage as far as possible and to "put the past behind them and move on";[59] this is why an application of the leniency programme as well as the settlement procedure are potentially useful.[60]

If an undertaking applies for leniency, it is very likely that it will also submit to the settlement procedure.[61] The circumstances in which an undertaking applies for leniency are very similar to those in which it would agree to settle:[62] Only if an undertaking strongly believes that leaving the Commission on its own to find out and prosecute the cartel, will make things worse for it, it will opt for those tools. If the undertaking does not see the risk that the Commission finds out about the cartel and will impose a heavy fine, it will not blow the whistle nor submit to the settlement procedure.

Looking at the cases settled so far, it becomes clear that undertakings that apply for leniency are also willing to submit to the settlement procedure. All six settlement procedures followed leniency applications.[63] There was always one undertaking benefitting from immunity under the leniency programme; the same undertaking submitted to the settlement procedure. Most of the other settling undertakings applied for reductions of fines under the leniency programme. So the practice shows that from the point of view of undertakings, there is great interest in supplementing a leniency case by the application of the settlement procedure. It is because of the additional reduction of the fine and the limited publication of details (see E.II.) that an undertaking opts for the settlement procedure even if it has already applied for immunity or a reduction of the fine under the leniency programme.[64]

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57 Commission decision of 27/6/2012, COMP/39.611 – *Water Management Products*.

58 See also Settlement Notice, (fn. 3), para. 33; *Vallery*, (fn. 8), p. 765.

59 *Joshua*, (fn. 41), p. 533.

60 However, it has to be pointed out that undertakings might increasingly refrain from applying for leniency and take the risk that the Commission finds out by itself, because they can still benefit from a 10 % reduction of fine under the settlement procedure. However, that tendency will not be very strong because the 10 % reduction is rather limited compared to the high reductions or even immunity under the leniency programme, see *Dekeyser/Roques*, (fn. 5), p. 832; *Horányi*, (fn. 5), p. 691 et seq.

61 *Soltész/Köckritz*, (fn. 4), p. 265.

62 See also *Vallery*, (fn. 8), p. 766.

63 See fn. 54-57; Commission decision of 13/4/2011, COMP/39.579 – *Consumer detergents*; Commission decision of 7/12/2011, COMP/39.600 – *Refrigeration Compressors*.

64 See also International Competition Network Cartel Working Group, (fn. 53), p. 7 et seq.

To sum up, in practice, for undertakings, the settlement procedure does not constitute a valuable alternative to the reduction of the fine under the leniency programme because of the necessary admission of liability, but it can supplement a leniency case due to its unique advantages. On the one hand, the recourse to the settlement procedure can increase the number of leniency applications because undertakings know that the case will be handled expediently; and on the other hand, a leniency application can be the first step towards a submission to the settlement procedure. However, it strongly depends on the facts of the case whether a leniency application and/or a settlement are to the advantage of the undertakings involved.

D. Commitments and Settlements

I. Commitments in General

Article 9 of Regulation 1/2003 provides for a formalised commitment decision as a form of direct settlement with the Commission.[65] In cases where the Commission's preliminary assessment of an undertaking's conduct indicates that it will adopt a decision requiring the infringement to stop, the undertaking concerned can offer commitments to meet the concerns expressed. They can be either behavioural or structural.[66] If the Commission takes a positive view on the commitments, it has to publish a summary of the case and the commitments in the Official Journal in order to give interested third parties the possibility to comment on it within the time limit of a month.[67] If this "market test" reveals heavy criticism, the Commission can renegotiate the commitment or abandon it completely.[68] If it considers it appropriate, it can make it binding by decision.[69]

65 *Burrichter/Zimmer*, (fn. 51), p. 614; *Vallery*, (fn. 8), p. 746 et seq.

66 *Martinez/Allendesalazar*, Commitment Decisions ex Regulation 1/2003: Procedure and Effects, in: Ehlermann/Marquis, (fn. 4), p. 591; *Temple Lang*, Commitment Decisions and Settlements with Antitrust Authorities and Private Parties sunder European Antitrust Law, in: Hawk (ed.), International Antitrust Law & Policy: Fordham Corporate Law 2005, 2006, p. 286; Press release, Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour), MEMO/04/217 of 17/9/2004.

67 Article 27(4) of Regulation 1/2003.

68 *Whish*, Commitment Decisions under Article 9 of the EC Modernisation Regulation: Some Unanswered Questions, in: Johansson/Wahl/Bernitz (eds.), Liber Amicorum in Honour of Sven Norberg, A European for all Seasons, 2006, p. 560.

69 Article 9(1) sentence 1 of Regulation 1/2003.

A commitment decision concludes that there are no longer grounds for action by the Commission.[70] It does not say whether or not there has been or still is an infringement.[71]

Commitments thus do not involve an admission of liability, but only give undertakings as to future conduct. A commitment decision is also "without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case".[72]

Proceedings can be reopened if there is a material change in the facts on which the decision was based, the undertaking breaches the commitments or the decision is based on incomplete, incorrect or misleading information provided for by the undertaking.[73]

In practice, commitments are very popular;[74] in 2010, six out of seven antitrust decisions (cartel decisions excluded) were commitments.[75]

II. Commitments and Settlements in Practice

In theory, there is no overlap between cases that can be brought to an end by commitments and cases that can be brought to an end by settlements. The settlement procedure on the one hand can only be applied to cartels;[76] commitment decisions on the other hand are not appropriate in cases where the Commission plans to impose a fine, such as cartels.[77] An explanation for the restricted scope of commitments can be the greater deterrent effect of an infringement decision compared to a commitment decision.[78] It is desirable that in case of serious infringements, a formal decision is rendered in order to increase general deterrence in the eye of the public ("public censure"[79]).[80] This argument is, however, questionable because

70 Article 9(1) sentence 2 of Regulation 1/2003.

71 Recital 13 sentence 2 of Regulation 1/2003.

72 Recital 13 sentence 3 of Regulation 1/2003.

73 Article 9(2) of Regulation 1/2003.

74 *Martinez/Allendesalazar*, (fn. 66), p. 582; *Schweitzer*, Commitment Decisions under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law, in: Ehlermann/Marquis, (fn. 4), p. 551.

75 Report on Competition Policy 2010, COM (2011) 328 final of 10/6/2011, p. 18.

76 Settlement Notice, (fn. 3), para. 1.

77 Recital 13 of Regulation 1/2003.

78 However it is not entirely clear whether the Commission actually sticks to that principle, see *Vallery*, (fn. 8), p. 752; *Whish*, (fn. 68), p. 570.

79 *Wils*, Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003, World Competition 29 (2006), p. 349.

80 *Whish*, (fn. 68), p. 570.

the Commission also uses commitments in cases of serious infringements of the competition rules. Furthermore, cartels usually stop operating after the undertakings find out that the Commission is investigating, so that commitments do not make any sense at that stage.[81] In short, an undertaking is never faced with the choice between making a commitment or submitting to the settlement procedure. They are alternatives, but their application does depend on the alleged infringement and not the undertaking's choice.

Commitments and settlements are formal settlement procedures which require the cooperation of undertakings.[82] From the point of view of the Commission, the incentives to settle according to the settlement procedure or by a commitment decision are similar. It is motivated by the same wish to "improve the effectiveness and timeliness of Commission intervention in appropriate cases".[83] From the point of view of the undertakings, the situations in which recourse is had to commitments and settlements are also comparable: If an undertaking understands that the Commission will have a case against it, it is inclined to give a commitment instead of contesting the issues.[84] The same is true for settlements: An undertaking will not risk an ordinary decision imposing a high fine if it knows that the Commission has a case against it, but submit to the settlement procedure instead. To conclude, settlements offer an alternative to commitments in cartel cases for the undertakings looking to avoid ordinary infringement proceedings.

In practice, commitments have proven to be a very powerful and widely used tool. Settlements to the contrary have only been reached very scarcely. As has been pointed out, commitments are also given in cases of serious infringements of competition rules, so it is questionable whether the Commission would have recourse to another alternative procedure simply because of the categorisation of the infringement. The Commission is likely to use commitments as a well proven tool in cases where it does not want to pursue ordinary proceedings, no matter how serious the infringement is. Only in a worst case scenario – such as price-fixing and market-sharing cartels in the six cases so far –, it is impossible for the Commission to ask for commitments. It follows that the settlement procedure generally could serve as an alternative to commitments, but is likely to do so in practice only in cases of hard-core cartels.

81 *Mehta/Centella*, (fn. 5), p. 398.

82 Ibid., p. 399.

83 *Ratliff*, Plea Bargaining in EC Anti-Cartel Enforcement – A System Change?, in: Ehlermann/Atanasiu, (fn. 41), p. 599.

84 *Ducore*, Settlement of Competition Conduct Violations at the United States Antitrust Agencies and at the European Commission – Some Observations, in: Hawk, (fn. 66), p. 233.

E. Private Enforcement and Settlements

I. Private Enforcement in General

Private enforcement in the area of competition law means that natural or legal persons claim damages caused by a breach of competition law. The right to compensation is guaranteed by Community law.[85] The ECJ has held in *Courage and Crehan*[86] and *Manfredi*[87] that national law has to provide effective remedies for the pursuit of damages caused by a breach of EU Law. The claim is brought before a national court which decides on it in conformity with its national rules on damages. The principles of equivalence and effectiveness apply.[88]

Private enforcement is not an alternative to public enforcement, but rather a complement.[89]

Private and public enforcement serve different ends: Public enforcement aims at punishing and deterring unlawful conduct and preventing others to do so. Private enforcement aims at making good the damage caused, i.e. compensating the victims.[90] They therefore can be applied cumulatively.

II. Private Enforcement and Settlements in Practice

Private actions are very costly for undertakings and therefore pose a great threat. Thus, it is important for an undertaking to know whether settlements favour follow-up private litigation and thereby increase the risk of further costs or make private damages claims more unlikely and therefore have an additional advantage.

On the one hand, settlement proceedings are speedy and bring the infringement to an end faster. This means that a decision is rendered much closer to the unlawful conduct and therefore makes private litigation more likely.[91] On the other hand, a

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85 White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 final of 2/4/2008, p. 2.

86 ECJ, case C-453/99, *Courage/Crehan*, ECR 2001, I-6279.

87 ECJ, joined cases C-295/04 to C-298/04, *Manfredi*, ECR 2006, I-6619.

88 Concerning effectiveness see *Becker/Bessot*, The White Paper on Damages Actions for Breach of the EC Antitrust Rules, in: Gheur/Petit, (fn. 4), p. 15.

89 Ibid., p. 14; *Komninos*, The White Paper for Damages Actions: Putting the Community Right to Damages in Effect, in: Gheur/Petit, (fn. 4), p. 30; *Roquilly*, Competition Law as a Strategic Issue for Companies: Does Private Enforcement Constitute a Greater Threat?, in: Gheur/Petit, (fn. 4), p. 79; White Paper on Damages Actions, (fn. 85), p. 3.

90 *Dekeyser/Becker/Calisti*, Impact of public enforcement on antitrust damages actions: Some Likely Effects of Settlements and Commitments on Private Actions for Damages, in: Ehlermann/Marquis, (fn. 4), p. 679.

91 *Ortega González*, (fn. 4), p. 175; *Ascione/Motta*, (fn. 4), p. 75; *Vallery*, (fn. 8), p. 767.

settlement is much less detailed than an ordinary infringement decision. A settlement has evidentiary value before a national court, but the limited revelation of information makes private litigation more difficult.[92] This can considerably reduce private litigation following a settlement and render it therefore very attractive to undertakings.[93]

Although until now, not many settlements have been reached, it can be expected that in practice private follow-up actions are reduced because of the increased difficulty to prove an infringement due to the limited useful evidence in a settlement decision. From the point of view of the undertakings, this is an advantage; however it also leads to the efforts of the Commission concerning private enforcement being jeopardized. The Commission sacrifices the success of private enforcement for the sake of faster public enforcement. From a deterrence point of view and effectiveness of enforcement of competition rules, it would be best if public enforcement continues to play an important role, but is supplemented by private enforcement. The settlement procedure goes against this prospect by discriminating against private enforcement.

F. Conclusion

In leniency cases, the settlement procedure offers additional advantages (reduction of the fine and limited public exposure) and is therefore often applied cumulatively. Nevertheless, it should be borne in mind that this additional option of cooperation with the Commission involves the admission of liability by the undertaking, a difficult step, taking into account its consequences for the undertaking in follow-up court proceedings. It is therefore too far-reaching to consider the settlement procedure as a complement or alternative, but in cases where it is obvious that the Commission has a case against an undertaking, both tools are appreciated and applied.

Settlements constitute an alternative for cases in which commitments under Article 9 of Regulation 1/2003 are not admitted. They are similar, but differ in the essential aspect of admission of liability and finding of an infringement. Settlements require an admission of guilt, but have the advantage of eliminating the risk of contradicting decisions by national competition authorities. However, in practice, the Commission is very generous with the acceptance of commitments and will therefore only rarely have recourse to the settlement procedure.

92 *Horányi*, (fn. 5), p. 693; *Dekeyser/Becker/Calisti*, (fn. 90), p. 684; critically *Vallery*, (fn. 8), p. 767.

93 *Ortega González*, (fn. 4), p. 255. However, it has to be pointed out that in case of hybrid settlements, an ordinary decision will be rendered for the undertaking that does not submit to the settlement procedure which can lead to more information being published than the settling undertakings would have hoped for.

Private enforcement is not widespread in Europe yet. However, it poses a great financial risk for undertakings that they desire to reduce. With the settlement procedure, fewer details about the infringement are revealed which makes private litigation more difficult. This jeopardizes the Commission's efforts in promoting private enforcement, but poses a great advantage to undertakings and will increase the recourse to settlements.

To sum up, the usefulness of the settlement procedure is limited to cases in which the Commission has a clear case against the undertaking and cannot ask for commitments because of the seriousness of the infringement. It follows that it should be doubted whether the settlement procedure can in fact play a significant role next to the other enforcement tools in European Competition Law. This is very unfortunate because, as the six settlements so far show, the duration of the proceedings is shortened considerably and the settlements have not been appealed before the European Court of Justice. This results in savings of time and resources of both the Commission and the undertakings involved.