THE DIRECT SETTLEMENT OF EC CARTEL CASES

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Abstract In June 2008 the European Commission adopted a system of direct settlement for cartel cases, inspired by a comparative glance across the Atlantic where the majority of antitrust defendants enter negotiated guilty pleas. Whereas settlements in Europe are viewed as a method for expediting the conclusion of cases (distinct from the leniency notice), in the US they complement the offer of immunity as a device for encouraging cooperation. In both jurisdictions they have the effect of reducing the levels of fines imposed. This paper compares how well the two systems fare at enhancing administrative efficiency and deterrence, while maintaining transparency.

I. INTRODUCTION

Cartels have come to be seen as 'cancers on the open market economy';[1] as the 'supreme evil' of antitrust,[2] and as striking 'at the very heart of the principal virtue of economic activity'.[3] 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, modelled on those developed in US antitrust enforcement. In particular, these have included the refinement of leniency programmes and the escalation of pecuniary fines.[4] This combination of immunity for the first party to self report and stiff sanctions for those who choose not to has disrupted countless secretive cartels and forced them to the surface. In Europe, this may have

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[1] 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. September 2000.

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

[3] N Kroes, 'Enforcement of Prohibition of Cartels in Europe' in C Ehlermann and L Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, Oxford, 2006).

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

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resulted in more cases coming to light than the European Commission (DG Competition) could reasonably investigate with their given resources.

For years, the European Commissioner for Competition, Neelie Kroes, tentatively mooted the possibility of introducing a direct settlement procedure to increase the throughput of cartel cases.[5] 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. This allows more cases to be completed with the same resources, but also reduces the level of fines imposed. The Commissioner's 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).[6] These represent an absolute form of direct settlement in which the competition authority and the infringing firm agree on a sanction in lieu of a criminal trial and subsequent appeals. In June 2008, DG Competition adopted a system of direct settlement which provides a streamlined version of the existing civil procedure for cartel cases.[7] Under this procedure, firms do not directly negotiate with the Commission, but do reach a common understanding as to their involvement in the infringement and the maximum fine that might be imposed. In return firms receive a uniform 10 per cent concession and retain their rights to appeal the Commission's final decision, although it is hoped that the settlement procedure will also 'reduce litigation before the European Courts'.[8]

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.[9] However, the Commission views its settlement procedure as distinct from the leniency notice, which is considered the principal device for uncovering

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

[6] SD Hammond, 'The US Model of Negotiated Plea Agreements: A Good Deal With Benefits For All' Speech delivered to OECD Competition Committee Working Party No. 3, Paris. October 2006. 1.

[7] '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 in cartel cases' OJ [2008] C 167; '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 [2008] L 171; DG Competition Press Release, 'Antitrust: Commission introduces settlement procedure for cartels' IP/08/1056 (30 Jun 2008) and 'Antitrust: Commission introduces settlement procedure for cartels—frequently asked questions' MEMO/08/458 (30 June 2008).

[8] Press Release (n 7).

[9] For the policy see: 'Commission notice on immunity from fines and reduction of fines in cartel cases' OJ [2006] C 298/17 preceded by OJ [2002] C 45/3 and OJ [1996] C 207/4; Commentators include: 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.

infringements and encouraging cooperation. Even after the immunity prize has been claimed, the leniency notice provides for fine discounts of up to 50 per cent for firms that subsequently cooperate. By contrast, the DOJ acknowledges the procedural savings gained through plea bargains, but views settlements as a complement to leniency in encouraging cooperation.[10] The US Corporate Leniency Program only offers immunity to the first firm to self report; subsequent firms who wish to benefit from cooperation have no choice but to plea bargain. There are also a number of differences between these enforcement regimes more generally, which are relevant to the effects of direct settlement. First, US antitrust law punishes cartels through a criminal procedure, whereas the EU enforcement regime is administrative. Secondly, US antitrust law imprisons individuals in addition to imposing pecuniary fines on undertakings; no sanctions against individuals exist in Europe on the Community level. Thirdly, there is a high level of private enforcement in the US, attracted by the availability of treble damages. Only single damages are available in Europe and the level of private enforcement is perceived as weak.

Despite these differences, the central objectives of cartel enforcement remain the same on both sides of the Atlantic: to uncover and punish as many cartel infringements as possible (given available resources), with sanctions of sufficient magnitude to encourage desistence.[11]

The purpose of this paper is to compare how well these two systems of direct settlement fare at enhancing administrative efficiency and deterrence within their respective enforcement regimes, while maintaining transparency. This will involve looking at how the regimes operate in the absence of settlement, and the impact settlement has on leniency, fining policy and private enforcement. The purpose of this paper is not to analyse procedural equivalence per se, nor is it to suggest how there might be convergence between the two systems. Section II of this paper outlines the procedures by which the competition authority and infringing firm reach a direct settlement in the EU and the US. Section III compares the administrative efficiency of each system of direct settlement as compared to the full procedures. This involves considering the procedural gains from each system, the frequency with which firms are likely to settle (the strength of the incentives on offer), and the scope for averting costly subsequent legal defence. Section IV reflects on the deterrent effect of each system, focusing in particular on the concessions in fines offered to firms who settle, the availability of other sanctions and the impact direct settlement has on private enforcement. Section V focuses on the detrimental effect both systems of direct settlement have on transparency and examines the safeguards in place to ensure consistency and fairness; in particular in the calculation of fines. Section VI concludes by summarizing the main findings of this paper.

[10] Hammond (n 6).

[11] See for example: Kroes (n 5); Hammond (n 6).

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II. THE PROCESS OF DIRECT SETTLEMENT IN THE US AND EU

The burden for initiating settlement discussions in the US normally rests with the defendant firm and its counsel, who can individually approach the DOJ for discussions.[12] Although settlement is not a right, the DOJ is unlikely to refuse a settlement, especially given plea bargain's role in encouraging cooperation as a complement to the availability of immunity. By contrast, the European Commission will decide whether a 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.[13] Settlement proceedings can be initiated at any stage before the Commission issues a Statement of Objections (SO) against the parties concerned.[14]

Where the Commission considers settlement discussions to be appropriate, it will set a time limit of no less than two weeks to receive a written declaration from the parties of an intention to engage in 'settlement discussions'.[15] 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 the 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.[16] 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 (Settlement Submission) principally containing:

1. An acknowledgement of the parties' liability for the infringement summarily described as regards its object, and its possible implementation.
2. An indication of the maximum amount of the fines the parties foresee to be imposed by the Commission;
3. 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;
4. Parties' confirmation that they will request neither access to the file nor a formal oral hearing;
5. Parties' agreement to receive the statement of objections and the final decision in an agreed official language of the European Community.[17]

In return, the infringing firms subject to the settlement procedure will receive a 10 per cent fine discount or concession, after the annual turnover cap is applied, and in addition to any leniency discount granted.[18] Fines will be calculated in accordance with the Commission's guidelines.[19]

[12] Grand Jury Manual, Chapter IX, Rule 11.
[13] Settlement Notice (n 7) 5.
[14] Settlement Notice (n 7) 9.
[15] ibid 11.
[16] ibid 16.
[17] ibid 20.
[18] ibid 32–33.
[19] 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003' OJ [2006] C 210.

Once plea discussions are under way in the US, they can result in one of three forms of plea bargain which must be approved by a District Court. These are set out in the Federal Rules of Criminal Procedure, Rule 11(c)(1): Type A plea bargains are agreements not to bring, or move to dismiss other charges; Type B recommend or agree not to oppose the defendant's request that a particular sentence or sentencing range is appropriate (such a recommendation does not bind the court); and Type C agree that a specific sentence or sentencing range is the appropriate disposition of the case. According to the DOJ's 'Grand Jury Manual' (Chapter IX), the discretionary Type B plea bargains are most commonly used because courts are less likely to reject them. This is despite their power to substitute the agreed penalty under the Type B agreement for one they deem to be more appropriate. 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 entered by a criminal defendant when they face a realistic prospect of conviction, do not wish to undergo a trial, and yet are not willing to admit that they committed the offence. Generally, a defendant pleading *nolo contendere*, or '*nolo*,' will be found guilty of the offence by the court, as they have agreed not to contest the charge. Their plea (unlike any other guilty plea) may not be used against them to establish negligence per se, malice, or even that they 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. Nolo pleas were once common in antitrust cases, but are now extremely rare—to be employed only in unusual circumstances.[20] There can also be an *Alford Plea* in which a defendant pleads guilty, but continues to maintain his innocence.[21] Prosecutors normally foresee such pleas and take extra care to collect factual evidence that proves the defendant's guilt beyond doubt. *Alford* pleas offer no protection from subsequent civil action.[22]

The outcomes of direct settlement in Europe and the US are very different. In Europe, settlement results in a shortened administrative procedure, but one that is nevertheless very similar to that followed in the absence of a settlement. The European Commission still issues a Statement of Objectives (SO) which, once endorsed by the infringing firms, is referred to the Advisory Committee and still results in a final published Commission decision. The Commission retains the possibility to depart from the parties' settlement submission at any time before the final decision is delivered. The procedural savings are realized in circumventing the Oral Hearing and Access to the File which would

[20] J C Gallo et al, 'Department of Justice Antitrust Division Enforcement 1955–1977: An Empirical Study' (2000) Review of Industrial Organization 17, 75–133 at 108; Grand Jury Manual, Chapter IX.

[21] *North Carolina v Alford*, 400 US 25 (1970).

[22] 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*.

normally follow the SO. Importantly, the European settlement procedure does not affect an undertaking's right to appeal the final Commission decision to the European Courts of Justice. Any settlement procedure that suppressed this right would breach Article 230 EC. By contrast, a US plea bargain will result in a binding agreement between the competition authority and the infringing firm in lieu of trial. The details of the settlement negotiations remain confidential and very little information is contained in the final published plea bargain document. Unlike European settlements, plea bargains require defendants to waive their rights to appeal. However, the settlement reached must adhere to the United States Sentencing Commission Guidelines and are subject to the approval of a District Court. Since the Supreme Court's decision in *US* v *Brooker*, district judges have been free to depart from the Sentencing Guidelines, but this does not appear to have impacted on plea bargains.[23] Moreover, the increase in penalties introduced by the Antitrust Criminal Penalty Enforcement Act 2004, does not appear to have discouraged plea bargains from being reached.[24]

III. ADMINISTRATIVE EFFICIENCY

The need for greater administrative efficiency in law enforcement was both a factor central to the historical emergence of plea bargains in the US, and the European Commission's motivation in adopting its own system of direct settlement for cartel cases. The exact origins of plea bargaining are subject to debate, but their increasing use by US prosecutors in the 20th century is thought to have come in response to the growing complexities and costs of securing convictions at trial (in particular increased safeguards to protect defendants), and driven by factors including the fear of rising crime rates and over-criminalization.[25] Since the introduction of the Corporate Leniency Program in 1978, and its subsequent reform in 1993, plea bargains in Antitrust cases have become central to encouraging cooperation by firms once immunity is no longer available. This section will first examine the procedural savings of settlement in the US and the EU as compared to a full procedure. It will then go on to consider the frequency with which settlements are employed in the US and are likely to be employed in the EU. Finally, this section looks at the extent to which costly subsequent legal defence is averted.

[23] *United States v Booker* 124 US Supreme Court 2531, 12 Jan 2005; 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, DC March 2005.

[24] 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 FN14.

[25] See A W Alschuler 'Plea Bargaining and its History' (1979) Columbia Law Review 79 : 1, 40; J H Langbein, 'Understanding the Short History of Plea Bargaining' (1979) 13 Law & Society Review 261, 265. Alschuler notes: whereas American courts typically completed six jury trials a day in the 1890s, criminal trials averaged well over a week by the late 1960s.

A. Procedural Savings

The procedural savings of US plea bargains are such that, in order to reduce bargained guilty pleas in criminal cases from 90 to 80 per cent, it was once estimated that 'the assignment of twice the judicial manpower and facilities' would be required.[26] Commissioner Kroes' original reflections on a possible settlement procedure in European cartel cases was inspired by the speed with which she observed her US counterparts completing parallel cases against international cartels also under investigation by her own authority.[27] Table 1 illustrates a time line following the competition authorities' case against Archer Daniels Midland (involved in the Lysine cartel).[28]

Table 1. *Archer Daniels Midland ('ADM')—Lysine investigation and appeals*

YEAR	US	EU
1	INVESTIGATION OPENS (1992)	INVESTIGATION OPENED FOLLOWING LENIENCY APPLICATION (1996)
2	FBI BEGINS SECRET FILMING	DAWN RAIDS, REQUEST FOR INFORMATION
3		STATEMENT OF OBJECTIONS SENT, CHARGING ADM
4	DAWN RAIDS, ADM CHARGED	
5	ADM ENTERS PLEA BARGAIN, AGREES TO PAY $100 m (1996)	COMMISSION FINAL DECISION, €47.3 m FINE (2000)
6		
7		
8		JUDGMENT OF COURT OF FIRST INSTANCE — FINE REDUCED FROM 47.3 m TO 43.9 m (2003)
9		
10		FINAL JUDGMENT, COURT OF JUSTICE (2006)

[26] W Burger, 'The State of the Judiciary' (1970) 56 ABAJ 929, 931 (cited in J Palmer 'Abolishing Plea Bargaining: an End to the Same Old Song and Dance' (1999) 26 American Journal of Criminal Law 505) See also: RA Posner, *Economic Analysis of Law* (4th edn, Little, Brown and Co, Boston, 1992) 561–562.

[27] Kroes (n 5).

[28] Case C-397/03P *Archer Daniels Midland v Commission (Judgment)* (18 May 2006) unpublished; Case T-224/00 *Archer Daniels Midland v Commission* [2003] ECR II-2597; See also OECD (n 24).

Although Table 1 does not show a like for like comparison (we have already established major procedural differences between the two jurisdictions), it does demonstrate the speed with which cartel cases can be concluded in the US; a plea bargain was reached with in a year of ADM being charged. This averted both the costs of a lengthy trial, and subsequent appeals—both of which would have drawn resources away from other cases under investigation. By contrast, the European Commission was locked into a process that lasted a decade from the opening of its investigation to the final appeal. Measuring the length of the US procedure where a plea bargain is not reached is difficult. The incentives for firms to cooperate at plea bargain in return for a lower fine are such that very few cartel cases go to trial. Indeed, in both jurisdictions the existence of an infringement is rarely denied once it has been uncovered. However, section 1 of the Sherman Act applies equally to firms and to individuals. Two of the central characters in the Lysine case were ADM employees, Terrance S Wilson and Michael D Andreas. Both maintained their innocence, despite featuring in the most incriminating of the evidence collected during the US investigation into the case; the secret FBI filming of lysine cartel meetings. Wilson and Andreas were indicted in 1996, a jury convicted the two defendants on 9 July 1999 after a two month trial and their convictions were affirmed at appeal in June 2000.[29] Assuming they had agreed to settle within a year of indictment, that would translate into a procedural saving of around three years.

The savings which are likely to be realized through the new European settlement procedure are a little more modest. The settlement procedure should yield procedural savings for the Commission in two respects: First, by 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 during the settlement discussions, 'enabling the Commission to take their views into account'.[30] Once the SO has been issued, firms are given a time limit in which to endorse it 'by simply confirming (in unequivocal terms) that the SO corresponds to the contents of their settlement submissions and that they therefore remain committed to follow[ing] the settlement procedure'.[31] The Commission can then swiftly deliver its final decision, after consulting with the Advisory Committee.[32] Secondly, a Commission SO endorsing the contents of the party's settlement submission could be much shorter than a SO issued to face contradiction, meaning that less resources will be employed in its drafting.[33] The stated aim of the settlement procedure is to free up resources so that timely punishment can be delivered more frequently in cartel

[29] *USA v Michael D Andreas and Terrance S Wilson* (2000) No 96 CR 762 USCA 7th District.
[30] Settlement Notice (n 7) 25. [31] ibid 26.
[32] Pursuant to Articles 7 and/or 23 Regulation 1/2003 and Article 14 of Regulation 1/2003.
[33] Press Release (n 7).

cases. 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.[34] The saving outlined in the settlement notice clearly comes between the SO and the final decision, when access 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.[35] Hence, assuming the settlement notice operates as smoothly as is envisaged, the procedure may be reduced by a third (excluding appeals). This should free up significant resources which can be employed in the next cartel case, providing more timely punishment for more infringements.

B. *The Frequency of Settlements*

If a settlement procedure is to be effective at either encouraging cooperation or expediting the rate at which cases are completed (or both) it must be employed in a significant proportion of cases. The rate at which firms settle in the US is as high as 90 per cent because firms cannot otherwise benefit from cooperation when beaten to the immunity prize. By contrast, the Commission views the settlement procedure in Europe as entirely distinct from its leniency notice, serving purely as a procedural time saving device, without the added incentive for increased cooperation. Moreover, the Commission appears intent on reserving the streamlined procedure only for those cases where it feels settlements are appropriate.[36] Firms may also have a varying willingness to settle, perhaps because they would prefer a drawn out process that delays follow-on actions for damages. If the 10 per cent concession proves to be inadequate, the Commission may struggle to find cases where every firm is willing to settle. Even if the full procedure must be undertaken for just one firm in an investigation, much of procedural gains promised by settlement will be lost. Unlike the US, firms who decide not to settle in Europe can still benefit from a leniency discount in return for cooperation. There are also further reasons why the incentive to settle in the US is far stronger than in the EU. First, firms in the US can negotiate the exact fine they will face, whereas in Europe they will only learn this when the Commission delivers its final decision. Secondly, apart from an admission of guilt and the level of sanction agreed, little other information about the defendant's involvement in the infringement is made public. This is attractive for firms concerned about their reputation, and may also make follow-on actions for treble damages less likely if the information made public at a full trial would assist such claims—an issue discussed later in this paper. Thirdly, the DOJ also prosecutes individuals and firms for cartel infringements, both of whom can approach the authority together in order to settle their culpability. Apart from the obvious

[34] Calculated from the author's own database of Article 81 decisions from 2001.
[35] ibid.
[36] Settlement Notice (n 7) 5.

attractions this holds for the firm, it also potentially creates a second race to the competition authority between the firm and its employees.

However, a lower willingness to settle in Europe does not reflect a failure to secure cooperation. Indeed, the Commission's decision to adopt a system of direct settlement reflects a need to streamline its procedures so that more cartels uncovered by the leniency notice can be investigated. This is also reflected in the freeing of resources formerly consumed by the notification scheme, the provision of enhanced investigative powers in Regulation 1/2003, and the re-establishment of a dedicated cartel directorate within DG Competition.[37] The leniency programme (first introduced in 1996) has proved damagingly iatrogenic in uncovering more infringements than the Commission is able to deal with, given the current pace of procedures and available resources. This is perhaps a curious contention given that the Commission's stepped up enforcement efforts have resulted in the number of cartel decisions since 2001 surpassing those issued in the previous 30 years. Moreover, the average time taken by the Commission to complete cartel cases has also fallen significantly.[38] By 2008, immunity had been granted in 28 cartel cases, most of which may not otherwise have been uncovered. The revisions made to the leniency notice in 2002 were particularly significant in encouraging self-reporting, resulting in a fourfold increase in the number of leniency applications.[39] The problem is that the Commission's reorientation towards the 'cartel busting' goal may have brought many more cases to light than the authority is easily able to accommodate. We know that some 40 cases were pending in 2006 and that the Commission has failed to surpass the spike of ten cases completed in 2001; only five cases were completed in 2005, five in 2006, eight in 2007, and seven in 2008.[40]

The relative tardiness of case determination is not the only concern. It is inevitable in this context that, in accordance with the *Automec II* prioritization principle, some cases will not be investigated at all despite their presenting prima facie instances of anti-competitive abuses.[41] 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

[37] OJ 2003 L 1/1; See generally, C Harding and J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (OUP, Oxford, 2003).

[38] Based on the author's 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.

[39] In 2005, the Commission claimed to have received 80 applications for immunity and 79 applications for a reduction of fine under the 2002 leniency notice. A total of 80 applications were received in the six and a half years of the 1996 notice. B Van Barlingen and M Barennes, 'The European Commission's 2002 Leniency Notice in Practice' (2005) EC Competition Policy Newsletter, Autumn, 6.

[40] J Ratliff, 'Plea Bargaining in EC Anti-Cartel Enforcement A System Change' in C Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, Oxford, 2006) 1; Joshua and Camesasca (n 9) 10–14.

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

unimportant . . . to investigate, given the Commission's limited resources'.[42] This is not a situation that lends itself to effective enforcement and it may become an enduring problem if settlement is only employed in a minority of cases. During the Commission's consultation process, many practitioners suggested that a significantly higher concession than 10 per cent was necessary if settlements were to become the norm.[43] However, settlements in Europe do not involve the waiving of rights to appeal, so one could argue that firms have little to lose by agreeing to a settlement. How widely settlements are employed may depend to a large extent on the Commission's willingness to open settlement discussions and on its ability to convince every party to an infringement to settle for a uniform concession.

C. The Cost of Legal Defence

Apart from procedural savings, Table 1 demonstrates how European interest in settlement procedures may also have originally been prompted by the volume of costly legal challenge to cartel decisions. In the US, plea bargains circumvent both trial and subsequent legal defence by requiring that the defendant waive their rights to appeal. In Europe, Commissioner Kroes has noted how, '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'.[44] Some statistics can help to illustrate this predicament.[45] According to Veljanovski, cartel fines were reduced by an average of 18 per cent on appeal to the CFI and ECJ during the period 1996–2005.[46] From this author's own database of cases covering the same period, it is calculated that the reductions were 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-leniency period (1975–1995), the average discount on appeal to the CFI was as high as 49.3 per cent. Prior to 2007, in no case had the final fine set by the courts been higher than that originally imposed by the Commission.[47] With a reduction in fine virtually guaranteed, it is unsurprising that so many firms choose to appeal a Commission decision rather than bringing matters to a close. Looking at the propensity to contest a Commission decision, almost three quarters of firms incurring significant fines (over €1 million) currently appeal, and those who

[42] Van Barlingen and Barennes (n 39) 7.

[43] See responses to the public consultation published on the DG Competition website at: <http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html> accessed 20 July 2008.

[44] Kroes (n 5).

[45] Unless otherwise stated, statistics from author's own database of cartel decisions.

[46] C Veljanovski, 'Penalties for Price-Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission' (2006) 27 ECLR 510, 512.

[47] In the *Graphites Electrode* appeal, the CFI reduced SGL Carbon's fine from €80 to €60.69 million, but this was subsequently increased to €75.7 million by the ECJ. See: Judgment of the Court of Justice of 29 June 2006 in Case C-301/04 P *Commission v SGL Carbon* OJ [2006] C 224.

receive leniency discounts are less likely to do so.[48] From when an appeal is launched, CFI rulings average 3.5 years, and ECJ rulings three years.[49] Although the number of appeals and reductions granted appears to be falling, it is still significant—consuming a sizable proportion of the Commission's resources.

Table 1 illustrates the cost and time the Commission typically invests in subsequent legal defence; six years in the case of ADM. This is a significant saving compared to the two years that might have been saved, had ADM engaged in the Commission's new settlement notice. It is hoped that reaching a common understanding with firms in settlement as to their relative liability and maximum potential fine, might curb the frequency of these costly appeals. Unlike the DOJ, the European Commission cannot compel parties to a settlement to waive their rights to appeal; this would breach Article 230 EC.[50] Even if it were possible, firms currently have more to gain from appealing to the courts, which awards downward adjustments in fines that average 18–20 per cent. This is more attractive to firms because the discount at appeal may actually outweigh the settlement concession and may be seen as a victory over the Commission.

Given that the Commission's leniency notice has been so successful in encouraging cooperation, it is perhaps curious that so many firms appeal the final decision and succeed in securing a downward adjustment in fines. A clue is given in a Commission press release in connection with the settlement procedure. Although they indicate a hope that the settlement procedure will reduce the number of appeals, they go on to acknowledge that, 'parties found guilty of a cartel often do not go to court to contest the existence of a cartel or their involvement in it, but rather to reduce . . . fines'.[51] The Commission's method for calculating fines in cartel cases has historically been criticized as being somewhat of a 'lottery', and its 1998 guidelines were seen by some as merely providing the illusion of mathematical rigour.[52] The reformed 2006 fine guidelines only go some way in improving the predictability of fines, particularly as the Commission retains wide discretion in making adjustments for mitigating and attenuating circumstances as it sees fit; often with little

[48] Based on actions brought against Commission decisions in 2005–2007. According to Joshua and Camesasca (n 9) 10–14 the propensity to appeal was as high as 90 per cent before 2005.

[49] Based on 50 judgments delivered between 2003–2006.

[50] Settlement Notice (n 7) 41.

[51] Press Release (n 7).

[52] I Van Bael 'Fining a la carte: the Lottery of the EU Competition Law' (1995) ECLR 16(4), 237–243; WPJ Wils 'The Commission's New Method for Calculating Fines in Antitrust Cases' (1998) ELR 23(3) 252–263; R Richardson 'Guidance without Guidance—A European Revolution in Fining Policy? The Commission's new Guidelines on Fines' (1999) ECLR 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; J Killick 'Is it Now Time for a Single Europe-wide Fining Policy? An Analysis of the Fining Policies of the Commission and the Member States' (2005) unpublished paper. CLASF Working Paper No 07 <http://www.clasf.org/assets/CLaSFWorkingPaper07.pdf> accessed 20 July 2008.

or no explanation of how that adjustment was calculated.[53] The settlement procedure only allows infringing firms to come to a common understanding with the Commission of the 'range of likely fines' or 'maximum fine' they might face.[54] They do not walk through the fine and leniency calculations together—after all, this would directly imply negotiation rather than 'discussion'. Of 50 CFI rulings concerning cartel cases that were 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, eight 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. The CFI increased fines at appeal for the very first time in December 2007.[55]

In the US, predictability in the calculation of fines has been considered fundamental in encouraging cooperation. The United States Sentencing Commission Guidelines (USSG) methodically set out how fines should be calculated and the DOJ generally emphasises the importance of applying them consistently and predictably.[56] Time is clearly needed to study the effect of the Commission's 2006 guidelines on the calculation of fines. Some believe that they will enhance transparency and lead to an increase in fines.[57] However, Commissioner Kroes has in the past rejected calls for a more predictable fine calculation system; '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'.[58] 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'.[59] These seemingly conflicting statements may reflect a recognition that fines need to be more predictable, but also 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 importance of transparency

[53] M Hviid and A Stephan, 'The Graphite Electrodes Cartel: Fines that Deter?' forthcoming in B Lyons *Cases in European Competition Policy: the Economic Analysis* (CUP, Cambridge, 2009); A Stephan, 'The Bankruptcy Wildcard in Cartel Cases' (2006) JBL, August Issue, 511–534.

[54] Settlement Notice (n 7) 16, 20.

[55] Judgement of the Court of First Instance of 12 December 2007—Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* OJ [2008] C22/41.

[56] The United States Sentencing Commission, Guidelines Manual is available at: <http://www.ussc.gov/GUIDELIN.HTM> accessed 20 February 2009; For a discussion see: SD Hammond, 'Antitrust Sentencing in the Post-*Brooker* Era' Speech delivered to the American Bar Association, Washington DC, 30 March 2005.

[57] M Motta, 'On Cartel Deterrence and Fines in the European Union' (2008) ECLR 29(4) 209–220.

[58] Kroes (n 5).

[59] Kroes (n 3); K Dekeyser, 'The Commission's Fight against Cartels: Two Years with Neelie Kroes' Speaking at 9th Competition Law Scholars Forum (CLaSF) Workshop, *Deterrence: Cartels, Leniency and Criminalisation*. Glasgow 12 April 2007.

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'.[60]

It would thus appear that the US system of direct settlement achieves greater administrative efficiency than is likely to be realized through the Commission's settlement notice; in particular by averting both trial and subsequent appeals. Although the European settlement notice promises to reduce the procedure (excluding appeals) by a third, the *incentive* to settle is far weaker than in the US. This is due to a large extent to the role of plea bargaining as a complement to leniency in encouraging cooperation. Firms in Europe can still benefit from leniency without settling. Much will depend on the Commission's willingness to initiate settlement discussions, and its ability to convince firms of varying willingness to settle that 10 per cent is enough of an incentive. In terms of appeals, it is unlikely that the settlement notice alone will curb the number of costly appeals to the Community Courts. These do not generally contest the facts of the case, but rather the way in which fines and leniency have been calculated. This problem may be best addressed by making the calculation of fines more predictable.

IV. DETERRENCE

In any cartel enforcement regime, high fines (particularly in the absence of criminal sanctions against individuals) and private enforcement are necessary in order to ensure an effective level of deterrence. According to the criminology literature, the likelihood of detection has a far greater effect on deterrence than the imposition of stiff sanctions.[61] However, the pursuit of cartels is very different to conventional forms of law enforcement. Agreements to fix prices and share markets are secretive and well organized arrangements, the effects of which can easily be hidden behind justifications such as rising production costs.[62] Although complaints assist targeted investigations, policing industries for cartels is a very expensive exercise for competition authorities with limited resources. Leniency programmes play a crucial role in raising the rate of detection, but in order to induce cartel members into self-reporting, the difference between immunity and the sanction they would otherwise face must be sufficiently stark.[63] Private enforcement can also help

[60] Hammond (n 6) 3.

[61] D Nagin and G Pogarsky, 'Integrating Celerity, Impulsivity and Extralegal Sanction Threats into a Model of General Deterrence' (2001) 39 Criminology 4, 865–892; see also: A Von Hirsch et al, *Criminal Deterrence and Sentence Severity: an Analysis of Recent Research* (Hart, Oxford, 1999) 11.

[62] See generally: M E Stucke, 'Morality and Antitrust' [2006] Columbia Business Law Review 461 quoting: A A Young, 'The Sherman Act & the New Anti-trust Legislation' (1915) 23 Political Economy 201.

[63] SD Hammond, 'Cornerstones of an Effective Leniency Program' Speech delivered to ICN Workshop on Leniency Programs, Sydney. November 2004; OECD (n 24) 7.

to increase the sanctions cartelists face (through private follow-on actions for damages) and the rate at which they are detected (through stand-alone actions where the competition authority has failed to take up the case or lacks available resources). This section will focus on the effect direct settlements have on the level of fines imposed and the likelihood of follow-on actions for damages.

A. The Level of Fines Imposed

Settlements lower cartel fines by granting a concession to all parties in an infringement; one of the primary incentives for firms to settle in the first place. If the full benefits of a shorter procedure are to be realized, then the concession must be generous enough to ensure that every firm agrees to settle. There may be a number of reasons why some firms are more willing to settle than others.[64] For example, a ringleader to an infringement (who is precluded from receiving immunity) may be less willing to settle than a party already 'in bed' with the regulator.[65] Some firms might also seek a drawn out process so as to delay follow-on actions for damages in the courts of national Member States.[66] Even if only one firm in a particular case refuses, the procedural gains of settlement will be lost; delivering and defending a decision or conviction against that firm will require a full procedure and case file. In the US, the primary incentive to settle is the leniency discount in return for cooperation which is incorporated into plea bargaining. Firms are also encouraged to settle in order to secure lower prison sentences for their employees, or benefit from *amnesty plus*.[67] In Europe, the 10 per cent settlement concession offered by the Commission is fixed, and is available to every party to the infringement who is willing to settle. Its effect is thus to reduce the level of fines imposed in cartel cases, *in addition* to the leniency discount (which the Commission views as a separate investigative tool) and is deducted after the statutory cap turnover is applied.[68] Firms who refuse to settle will still benefit from leniency and there is not the added incentives of settling criminal sanctions against individuals. The Commission is not in a position to guarantee the immunity of individuals or any concessions on behalf of national courts. Moreover, firms can enjoy the settlement discount and then still appeal to the CFI on the grounds that the fine or leniency discount has been miscalculated. The greater the settlement concession, the greater will be both the incentive for firms to settle, and the loss in deterrence where fines are the only sanction.

[64] eg 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 213, 229.

[65] 2006 leniency notice (n 9) 13.

[66] OECD (n 24) FN39.

[67] Whereby further concessions are granted in return for information pertaining to another infringement. Conversely, 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; see Hammond (n 73).

[68] Settlement Notice (n 7) 32.

Fines may be lowered further as a result of an agency problem which is less obvious, but nevertheless warrants discussion. Competition authorities are naturally concerned about reputation, and keen to ensure that their activities and funding are sanctioned by strong political and popular support. Unfortunately, the benefits of competition law are not always obvious, and so a competition authority's success might crudely be measured by outside actors in terms of the number of cases completed each year. As discussed below, the fixed concession in European settlements does not preclude negotiation, nor does it ensure against inconsistencies between settlements. Offering unduly lenient concessions at settlement in order to complete many more cases may be particularly tempting where a competition authority is under political pressure to step up enforcement efforts, or where there is a backlog of leniency applications. It has been noted in the US that:

> 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.[69]

The US Sentencing Commission Guidelines do set a minimum threshold for fines, but this can be circumvented on the grounds that a firm is unable to pay the fine. The DOJ's treatment of firms including SGL, UCAR and Hynix suggests that this exception is applied loosely during plea negotiations. The firms were granted concessions under this exception as part of plea bargain settlements even though the 'continued viability' of the organizations did not appear 'substantially jeopardized' as required by the guidelines; in particular Hynix was about to spend $250 million on a business venture in China.[70] In Europe, the Commission's guidelines for calculating fines are far less detailed than the US Sentencing Guidelines. They provide a non exhaustive list of mitigating factors including 'ability to pay'.[71] The Commission has in the past granted substantial discounts on the grounds of financial constraints without proper explanation.[72] For example, the Commission used its wide discretion in calculating fines to grant a 33 per cent discount in fines to SGL Carbon AG twice on the grounds of 'financial constraints'.[73] The economic downturn will only make it easier for firms on both sides of the Atlantic to secure bankruptcy discounts in fines. Thus, although the official 'settlement concession' is set at

[69] SJ Schulhofer, 'Plea Bargain as Disaster' (June 1992) 101 Yale L J 1979.

[70] See Stephan (n 53) 530; H Mutchnik and C Casamassima, '*United States v Hynix Semiconductor, Inc.*: Opening the Door to the Inability-to-Pay Defence?' (September 2005) Antitrust Source, 4.

[71] EC Guidelines on the method of setting fines (n 19) 35.

[72] The Commission can use a number of different justifications for lowering fines in specific cases, one of which is '. . . the consequences which payment of the fine would have, in particular by leading to an increase in unemployment . . .' 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, para 371.

[73] Stephan (n 54).

10 per cent, the agency effect may lead the Commission to offer additional concessions in the way in which it calculates the final fine.

It might very well be argued that a significant increase in the number of cartel cases completed through direct settlements will be deterrence enhancing, despite the resulting reduction in fine levels.[74] However, this assumes that the sanctions imposed are already of a sufficient magnitude to ensure the infringement was not worthwhile, given that not every cartel infringement will be caught.[75] If they are not, then infringing firms may simply view fines as an acceptable cost of colluding.[76] A crucial difference between our two jurisdictions is that fines are, in effect, the only available sanction in Europe. Private enforcement in Europe is perceived as weak (as discussed below) and no criminal offence exists on the Community level. A number of Member States have adopted criminal sanctions against individuals (the UK being one of them), but only a handful of convictions have thus far materialized and some jurisdictions (such as Ireland) have only focused on individuals involved in domestic abuses.[77] Fines in Europe are also capped at 10 per cent of worldwide turnover for the protection of undertakings. This has been criticized by some as preventing fines from reaching the levels necessary to exceed the illegal cartel profits earned, especially given that not every infringement will be detected and punished.[78] The inadequacy of achieving deterrence through fines alone also formed one of the principal justifications for criminalization in the UK, as discussed in the White Paper which preceded the Enterprise Act 2002.[79] Although fines are also capped in the US by the Sentencing Commission Guidelines, there exists a high level of private enforcement, encouraged by the availability of treble damages, and the regular imprisonment of individuals responsible for cartel conduct. Some 19 executives were convicted of antitrust offences in the fiscal year ending

[74] For discussions see: WPJ Wils, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 World Competition: Law and Economics Review 3 14; Motta (n 57).

[75] WPJ Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics* (Kluwer Law International, The Hague, 2002) 6.5.2; P Buccirossi and G Spagnolo, 'Optimal Fines in the Era of Whistleblowers, Should Price Fixers Still Go to Prison' (2005) unpublished paper. Lear Research Paper 05-01 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=871726> accessed 20 July 2008.

[76] The OECD estimates that some cartels can achieve overcharges as high as 60 per cent: OECD 'Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes' (2002) Reports to the Organization for Economic Co-Operation & Development. Meanwhile, the probability of detection is estimated to be as low as 13 per cent: P G Bryant and E W Eckard, 'Price Fixing: The Probability of Getting Caught' (1991) 73 Review of Economics and Statistics 3 531.

[77] A Stephan, 'The UK Cartel Offence: Lame Duck or Black Mamba?' (2008) CCP Working Paper 08-19.

[78] Hviid and Stephan (n 53); Wils (n 75) 6.5.2; Buccirossi and Spagnolo (n 75); The cap is contained in Council Regulation (EC) No 1/2003, Article 23.

[79] Department of Trade and Industry (DTI), *A World Class Competition Regime*. Cm 5233. (2001). (The Stationery Office, London, 2001; CM 5233) 7.13–7.18.

30 September 2006 alone, many of them foreign nationals. It is thought that the imprisonment of individuals makes up for any shortfall in deterrence left by inadequate fines; in particular by punishing the individual decision makers rather than the corporation as a whole.[80]

B. Private Enforcement

In recent years, there has been a drive from DG Competition to encourage private actions for damages in the national courts. Due to the availability of treble damages in US antitrust claims, the cost of follow-on suits has in the past outweighed public fines incurred by some international cartels, despite the perceived weakness of private enforcement in Europe. Treble damages for antitrust cases were originally conceived in order to increase deterrence at a time when public enforcement was feared to be inadequate.[81] It would seem that deterrence is still their central purpose, as evidenced by US Supreme Court decisions such as *Hanover Shoe* and *Illinois Brick* which denied a passing-on defence and indirect purchaser standing.[82] Private actions for damages in the US increase both the size of sanctions faced by cartels (follow-on actions for damages) and the number of infringements uncovered (stand-alone or original actions for damages). Although the Commission's motivation relates mainly to the compensation of consumers, as evidenced in its recent White Paper on private enforcement, deterrence is also recognized as a key purpose.[83] It is important to point out that the immunity from fines granted to the first whistleblower does not extend to private damage suits in the US or the EU. This puts private enforcement at loggerheads with leniency programmes; firms are less likely to self-report in return for immunity from fines if this involves exposing themselves to potentially greater treble damage suits. The US Antitrust Criminal Penalty Enhancement and Reform Act 2004 has offered some protection from private damage claims to an amnesty (immunity) recipient by reducing that firm's liability to single (rather than

[80] See generally: KJ Cseres (ed), *Criminalization of Competition Law Enforcement* (Edward Elgar, London, 2006).

[81] DI Baker, 'Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?' (2004) 16 Loyola Consumer Law Review 4 379.

[82] *Hanover Shoe v United Shoe Machinery Corp* 392 US 481 (1968); *Illinois Brick Co v Illinois* 431 US 720 (1977); A I Gavil 'Antitrust Remedy Wars Episode I: Illinois Brick from inside the Supreme Court' (2005) 79 St John's Law Review 553; F Cengiz, 'Passing-on Defense and Indirect Purchaser Standing in Actions for Damages Against the Violations of Competition Law: What can the EC Learn from the US?' (2007) unpublished paper. Centre for Competition Policy Working Paper 07-21 <http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP07-21.pdf> accessed 20 July 2008.

[83] DG Competition *White Paper: Damages Actions for Breach of the EC Antitrust Rules*. COM(2008) 165 final (2 April 2008) 3; See also: DG Competition *Green Paper: Damage Actions for Breach of EC Antitrust Rules*. COM(2005) 672 (19 December 2005).

treble) damages, and by removing joint and several liability from that firm. The present question is whether there is a similar conflict between follow-on actions for damages and direct settlement (ie settlement increases the risk of damage suits) or whether direct settlement actually makes private actions for damages less likely (in which there is an added incentive to settle).

A number of respondents to the Commission's public consultation on settlements suggested that, depending on the rules of discovery, the requirement of an admission of guilt at settlement could be relied upon by claimants seeking damages in Europe and in other jurisdictions.[84] However, undertakings rarely deny the existence of a cartel infringement, but often maintain that the conspiracy never succeeded in raising prices, and so no harm was actually caused. Two recent examples of this in the UK are the Sevenoaks Survey case, involving the price fixing of private school fees, and the British Airways/Virgin passenger fuel surcharge case.[85] The real difficulty for claimants may thus be proving that an injury has been suffered *as a result* of the cartel.[86] This is no easy feat given that the calculation of damages necessitates some estimation of the counterfactual market prices, had the cartel not been formed. Hence, the amount of information which is made public concerning an infringement may be of far greater use to a claimant than an admission of guilt. The overwhelming majority of antitrust defendants in the US choose to enter plea bargains despite the requisite admission of guilt because very little information about the infringement becomes public at plea bargain, other than the identity of the firm, its admission that an infringement has been committed, and the agreed level of fine it will pay. This contrasts sharply to the volume of material disclosed at trial or contained in a full Commission decision. These will not normally attempt to quantify the extent of harm caused by the cartel, but usually includes details of how the cartel was organized, when meetings were held, and when price rises and/or output restriction were attempted. Private enforcement is commonplace in the US, despite the limiting effect plea bargains have on the amount of information that can be relied upon, because the incentives to sue are so strong. Apart from the availability of treble damages in antitrust, which are alleged to encourage lawyers to put an 'antitrust spin' on breach of contract cases, claimants are also encouraged to sue by asymmetric cost rules which heavily favour claimants and class action suits.[87]

[84] See the published responses to the public consultation (n 43).

[85] See: D MacLeod, 'Elite schools "breached law" on fees' *The Guardian* (9 Nov 2005); and remarks by BA Chief Executive, Willie Walsh: 'OFT/DOJ competition investigation resolved' British Airways Press Release, 01 August 2007. Available: <http://www.britishairways.com/travel/bapress/public/en_gb> accessed 20 July 2008.

[86] See for example: RD Blair and WH Page, '"Speculative" Antitrust Damages' (1995) 70 Washington Law Review 423; JE Lopatka and WH Page, 'Economic Authority and the Limits of Expertise in Antitrust Cases' (2005) 90 Cornell Law Review 617.

[87] DI Baker, 'Revisiting History—What Have We Learned About Private Antitrust Enforcement That We Would Recommend To Others?' (2004) 16 Loyola Consumer Law Review 4 379.

Settlements in Europe may serve a similar 'information limiting' function for firms, depending on how 'streamlined' the final decision following settlement will be. The Commission certainly envisages that SOs resulting from settlements will be much shorter than those issued without cooperation.[88] It is also notable that the Commission made two changes to the draft settlement procedure following the public consultation. Firstly, although firms must acknowledge their 'liability for the infringement summarily described as regards its object', they now need only acknowledge its 'possible implementation'.[89] This provides some protection from private parties using the settlement submission to prove that they suffered an injury as a consequence of the cartel. Secondly, the Commission is willing to accept that settlement submissions be provided orally, and that they will not be transmitted to national courts without the undertakings' consent. The extent to which their content will feature in the Commission's final published decision remains to be seen as of mid-2009.

Systems of direct settlement have the effect of reducing the level of fines imposed, because of the concession granted in return for settlement and the possibility of an agency effect. The negative impact of fines is likely to be greater in Europe because the settlement concession is granted in addition to leniency and the statutory 10 per cent turnover cap. In the US, the concession is granted in return for cooperation once the immunity prize is no longer available. Moreover, the effect of lower fines is far more detrimental to deterrence in Europe because no other effective sanctions are currently enforced. Criminal sanctions against individuals exist on the national level but are invoked infrequently. Settlements also appear to discourage follow-on actions for damages by limiting the amount of information that is given away upon conviction. Despite this, there are high levels of private enforcement in the US, driven by the availability of treble damages and other incentives. In Europe, all private enforcement is perceived as weak and anything that limits their scope further is detrimental to deterrence and runs counter to the Commission's objective of ensuring consumers are compensated for their losses. However, there will at least be greater scope for recovering follow-on damages by virtue of the fact that more cases will be completed by the competition authority.

V. TRANSPARENCY

Regardless of how beneficial direct settlements are in terms of enhancing administrative efficiency or strengthening deterrence, there are serious concerns about transparency in any shortened procedure which results in an admission of liability. Transparency is important in ensuring that a competition

[88] Press Release (n 7).

[89] Settlement Notice (n 7) 20.

authority's decisions can be effectively scrutinized and that there is consistency between them. Historically, plea bargains have been strongly criticized in the US because they involve negotiations between prosecutors and defendants that are not subject to direct judicial oversight or public scrutiny. Moreover, it is argued that the incentive to settle in return for a concession is perverse, as it essentially means defendants may be punished twice: once for breaking the law and once for exercising their right to defend themselves.[90] Yeung identifies three safeguards which can limit a settlement procedure's impact '... on values of procedural fairness, accountability, transparency, consistency, and proportionality'.[91] First, the separation of prosecutorial and judicial powers is considered fundamental, otherwise the defendant firm is vulnerable should they decide to reject a settlement offer.[92] Secondly, much depends on the skills and professionalism of the legal representatives and the competition authority officials, especially as settlements are normally reached behind closed doors. Thirdly, the outcome of settlements negotiated in closed session should be monitored by a judicial body to ensure consistency, proportionality and fairness. Predictable fines are thought to be particularly important in acting as a 'screening device' for settlements; when a firm is unable to negotiate a fine 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.[93]

There is a separation of prosecutorial and judicial powers in the US; the alternative to settlement is a trial in which the DOJ acts as prosecutor. That is not the case in Europe. The European Commission acts as investigator, judge and jury in an administrative process that allows it to impose fines of an enormous magnitude, subject only to the approval of the Advisory Committee of representatives from national competition officials. In the past, the same Commission employees have been involved in both investigating a case and drafting the final decision, and firms have criticized the Commission for not properly taking into account arguments put forward by them following in response to the SO.[94] There is thus a danger that a minority of firms will agree to settle when it is not in their best interest to do so.[95] In Australia, for example, there have been instances of firms entering negotiated guilty pleas

[90] For a summary of literature up to 1979, see Alschuler (n 25).

[91] K Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, Oxford, 2004) 132–138.

[92] M Loughlin, *Swords and Scales* (Hart Publishing, Oxford, 2000).

[93] M Grossman and M Katz, 'Plea Bargaining and Social Welfare' (1983) American Economic Review 73, 749–757.

[94] R Wesselling, 'The Draft-Regulation Modernising the Competition Rules: The Commission is Married to One Idea' (2001) 26 ELR 357; Van Bael (n 52); M Levitt 'Access to the File: The Commission's Administrative Procedures in Cases Under Article 85 and 86' (1997) 34 CMLR 1413.

[95] RE Scott and WJ Stuntz, 'A Reply: Imperfect Bargains, Imperfect Trials and Innocent Defendants' (1992) 101 Yale L J 2011.

while publicly protesting their innocence.[96] On the one hand, firms may do this out of corporate pragmatism; because they want a swift conclusion to the case and are particularly averse to risk and uncertainty.[97] A major source of uncertainty in Europe is the unpredictable manner in which fines have been calculated in the past; this would make it difficult for firms to predict the fines they would face if they refused to settle.[98] On the other hand, firms may choose to settle because pressure is exerted by the competition authority, or because they are simply aware of the regulator's strong bargaining position.[99] DG Competition finds itself in a particularly strong position in this respect. It retains 'discretion to determine throughout the procedure on the appropriateness and the pace of the bilateral settlement discussions with each undertaking'.[100] Moreover, to refuse a settlement is to have fines calculated by the same body that settlement discussions broke down with in the first place. Firms may fear that a failure to settle will result in unduly high fines.[101] 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', illustrating the pressures that may be exerted on firms.[102] These unfair settlements are made more likely, the greater the concession on offer.[103] Much thus depends on the professionalism of the competition authority.

Direct settlements on both sides of the Atlantic may also increase the risk of abuse. If settlements are to free up resources, increase the number of cases completed and (in the US) encourage cooperation, they must occur at an earlier procedural stage than is otherwise the norm.[104] Depending on how substantial the competition authority wants the savings in resources to be, a shortened procedure will inevitably result in a less rigorous investigative process and will be based on less detailed evidence obtained primarily from

[96] *ACCC v J McPhee* (1998) ATPR 41-628; *ACCC v NW Frozen Foods Pty* Ltd (1996) ATPR 41–515 42, 441; Yeung (n 91) 145 & FN19.

[97] BH Kobayashi and JR Lott Jr, 'Low-Probability-high-Penalty Enforcement strategies and the efficient operation of the Plea-bargaining System' (1992) IRLE 12, 69–77.

[98] See Hviid and Stephan (n 53).

[99] For example, the competition authority is typically able to withdraw from a settlement procedure at any time before its completion; M Furse, 'The Decision to Commit: Some Pointers from the US' (2004) 25 ECLR 1 5–10.

[100] 'Draft Commission Notice on the Conduct of Settlement proceedings in view of the adoption of Decisions pursvant of Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases' OJ [2007] C255.15.

[101] Yeung (n 91); 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 95); Kobayashi and Lott Jr (n 97); F H Easterbrook, 'Plea Bargaining as Compromise' (June 1992) 101 Yale L J 1969; SJ Schulhofer 'Criminal Discretion as a Regulatory System' (1988) 17 JLS 43; Grossman and Katz (n 93).

[102] Van Bael (n 52).

[103] Yeung (n 91) at 115; Kobayashi and Lott Jr (n 97).

[104] Scott and Stuntz (n 95).

the cooperating cartel members. As in the US, there is 'no provision or any general principle of Community law [that] prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings . . .'[105]. The danger is that cooperating firms may exaggerate the involvement of fellow cartel members (now competitors once more) with a view to granting themselves a competitive advantage in the post-cartel period. The temptation to embellish evidence may be heightened by the 'race to the competition authority' and concerns as to whether enough information will be provided to secure immunity. It is not inconceivable that in extreme cases, that cartels may use the threat of exaggerating a cheating firm's role in an infringement to sustain the collusive agreement.[106] 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'.[107] Consequently, it will be harder for firms possessing less evidence of the infringement to rebut any claims made by the primary leniency applicant. Allegations of exaggerated evidence from whistle blowing parties have in the past been made before the CFI and ECJ. An early example of this was *Cartonboard*.[108] More recently, it was alleged in *Pre-Insulated Pipes* that ABB had its fine reduced by exaggerating the participation of others in the cartel, when it had actually been the instigator of the infringement.[109] In *Copper Fittings* 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.[110] On a related point, Ratliff asks what if firms in later settlements admit to a much longer duration than those who were first to reach agreement with the competition authority?[111] If the facts of an infringement later prove to be inaccurate in the US, a plea bargain will cease to be binding on the prosecutor. In Europe, the Commission may be unable to re-open the case in the same circumstances because of the principle of *ne bis in idem.*[112]

[105] Joined Cases T-67/00 T-68/00, T-74/00 and T-78/00 *JFE Engineering Corp v Commission* (8 July 2004) unpublished; see also Van Barlingen and Barenes (n 39).

[106] It is not uncommon for the leniency policy to uncover cartels that have already failed, rather than active ones: A Stephan, 'An Empirical Assessment of the European Leniency Notice' (2008) Journal of Competition Law and Economics.

[107] OECD (n 24) para 53; BH Kobayashi, 'Deterrence with Multiple Defendants: An Explanation for 'unfair' Plea Bargains' (Winter 1992) *THE RAND Journal of Economics*, Vol 23, No4 507–517.

[108] [1998] ECT II-2099; Harding and Joshua (n 37) 251.

[109] 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 C-189/02 P *Dansk Rørindustri A/S v Commission of the European Communities* OJ [2002] L 202.

[110] DG Competition Press Release, IP/06/1222 (20 Sept 2006).

[111] Ratliff (n 40).

[112] WPJ Wils, 'The Principle of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 World Competition 131.

The discussion above serves to highlight the importance of effective judicial oversight in ensuring fairness and consistency.[113] In the US, plea agreements must adhere to the Sentencing Commission Guidelines and are subject to court approval. The DOJ is keen to emphasise the importance of consistency and certainty in reaching plea bargains, pursuant to their role as devices for encouraging cooperation by infringing firms.[114] However, we have seen how in some cases the DOJ can agree fines that are below those prescribed by the guidelines. Critics also suggest that when plea agreements are reached, judges 'routinely accept agreed penalty recommendations, thus effectively usurping the court's role in sentencing and replacing it with trial by prosecutor'.[115] The difficulty is that courts have very little incentive to effectively scrutinise an agreement when the prosecutor and defendant are in agreement; effective judicial review relies on an adversarial dynamic that is notably absent here. If the competition authority has been unduly lenient, or a firm has decided to settle when it is not in best interests out of its corporate pragmatism, the defendant may conceal facts from the court to ensure the settlement is approved.[116] Where the courts themselves are overworked, they may even encourage settlements.[117]

In Europe, there will be no direct scrutiny of settlements by the Community courts. Firms may call upon the Hearing Officer to ensure that the effective exercise of the rights of defence is respected.[118] There is also an Advisory Committee, comprised of the representatives of the Member States' competition authorities, which must be consulted before a final decision is delivered. The interests of these individuals clearly overlap with those of the Commission, and so it is not clear how settlements will be scrutinized in any meaningful way. Any detailed scrutiny by a supervisory body would, in any case, involve the expenditure of resources and run counter to one of the motivations for adopting settlements in the first place. As previously discussed, the Commission also calculates fines in a manner that is highly discretionary and widely perceived as lacking predictability, as reflected by the volume of appeals to the CFI and ECJ that result in a downward adjustment. However, the Commission's settlement procedure does contain three characteristics which ostensibly safeguard the process from abuse, and ensure fair and consistent outcomes. First, the Commission is free to abandon a settlement at any time before the final decision is delivered, if new evidence casts doubt over information obtained through leniency. A new statement of objections is

[113] Scott and Stuntz (n 95); D Waelbroeck, 'The Emergence of a New Settlement Culture: What is Left to the Courts?' (2008) Speech delivered to Fourth Annual Conference of the Global Competition Law Centre 19–20 June, Brussels.

[114] Hammond (n 6) 1.

[115] Yeung (n 91) 141; K Mack and S Anleu, *Pleading Guilty: Issues and Practices* (Carlton South Victoria 1995) p98; OECD (n 24) 14.

[116] ibid 116.

[117] Yeung points to an Australian case in which the court accepted a plea agreement, even though the defendant in this case consented to the allegations without admitting their truth; *NW Frozen Foods Pty Ltd v* ACCC (1996) 71 FCR 285, 296–7; Yeung (n 91) 145.

[118] Settlement Notice (n 7) 18.

communicated to the parties, who are given the opportunity to respond in the normal way before a final decision is adopted.[119] Secondly, the Commission has emphasised that the settlement concession will be uniform between firms involved in the same infringement; preventing them from favouring one firm over another, or accepting over-generous concessions in order to complete as many cases as possible.[120] Thirdly, the Commission 'neither negotiates nor bargains the use of evidence or the appropriate sanction', to ensure that settlements are not seen as a 'bazaar-like' process.[121]

The use of a uniform concession alone will not guarantee consistency between settlements. In particular, it is unclear how settlement 'discussions' will not involve some level of negotiation. Bargaining may, for example, occur in agreeing the 'range of likely fines' and the duration of the infringement.[122] There is also the unpredictable manner in which the Commission has calculated fines more generally. A DOJ official recently noted that unpredictable fines make inconsistencies in settlement discussions inevitable, and make it unlikely that negotiation and bargaining are entirely excluded from the settlement discussions.[123] 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.[124] With respect to the duration of an infringement, many international cartels have a long history—the price fixing of carbon and graphite, for example, can be traced back to 1937.[125] Commission decisions do not generally recognise the full duration of an infringement (another reason why current fines may be inadequate). The further back in time a cartel is found to have operated, the harder it will potentially be to defend a cartel decision at appeal. The start date of an infringement, and thus its duration, may also be subject to negotiation.

Once the scope for negotiation in the process is established, the danger of the agency problem identified earlier in this section becomes a possibility. The Commission may become increasingly willing to accept lower fine levels in order further to increase the rate at which cases are completed. It may also have to be flexible in the calculation of fines where firms have a different willingness to settle, rendering a uniform concession ineffective. The settlement notice does envisage that in some cases, not every party to the

[119] ibid 29.

[120] OECD (n 24) para 63; O Gazal, 'Partial Ban on Plea Bargains' (2005) unpublished paper. The John M Olin Center for Law & Economics Working Paper Series, Working Paper 59 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=794549> accessed 20 July 2008.

[121] Press Release (n 7); OECD (n 24) 6.

[122] Settlement Notice (n 7) para 17.

[123] A O'Brien, 'Cartel Settlements in the US and EU: Similarities, Differences & Remaining Questions' Speech delivered at 13th Annual EU Competition Law and Policy Workshop, Florence, Italy. 6 June 2008 3.

[124] Kobayashi and Lott Jr (n 97).

[125] *Graphite Electrodes*—Commission Decision of 18 July 2001 (Case 36.490) OJ [2002] L 100 70.

infringement will settle.[126] Conducting the full procedure—even for only one of the undertakings—surely defeats the point of entering into settlement discussions in the first place, in particular by delaying the Commission's final decision while the oral hearing and access to the file are exercised. Any system of settlement adopted with a view to freeing-up resources will entail some loss of rigour in the enforcement process. The Commission might meet this criticism by reserving settlements for the most robust cases, but if the procedure is under-employed, then the resource saving objective will not be realized. The fact that the Commission can abandon a settlement at any time before the final decision may only serve to discourage firms from settling in the first place.[127] There is also a danger that devious firms may initially agree to settlement discussions in order to gain a 'head-start' in their 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.

VI. CONCLUSION

Although the European system of direct settlement in cartel cases was inspired by a 'comparative glance across the Atlantic' at US plea bargains, the two systems are different in a number of respects. US plea bargains represent a final settlement in lieu of criminal trial and appeals, in which defendants can agree the exact level of sanction they will face. The European settlement notice, by contrast, represents a streamlined version of the regular administrative process. Firms receive a uniform concession and their rights to appeal are unaffected. The European Commission views its settlement procedure as distinct from leniency, intended to allow them to 'handle more cases with the same resources' and 'reduce litigation before the European Courts'.[128] This need for increased efficiency stems mainly from the success of the European leniency notice, which offers immunity to the first to self-report, and discounts of up to 50 per cent to subsequent whistleblowers. The procedural benefits of settlement are evident in the historical emergence of plea bargains in the US and are acknowledged by the DOJ. However, their primary purpose in US cartel cases is as a complement to leniency where the immunity prize is no longer available. Subsequent firms who wish to benefit from cooperation in the US cannot benefit from discounts through leniency and so have no choice but to plea bargain.

This paper has attempted to compare how well these two systems of direct settlement fare at enhancing administrative efficiency and deterrence within their respective enforcement regimes, while maintaining transparency. These

[126] Settlement Notice (n 7) 35.

[127] This characteristic has been cited as one of the reasons why US plea bargaining failed to succeed in Italy see eg Boari and Fiorentini (n 64).

[128] Settlement Notice (n 7) 1; Press Release (n 7).

themes reflect the common aims of cartel enforcement between these two jurisdictions, in spite of the institutional and procedural differences outlined above. Both aim to uncover and punish as many cartel infringements as possible (given available resources), and impose sanctions of sufficient magnitude to encourage desistence.

Turning first to administrative efficiency, the US system of settlement achieves greater gains in a number of respects. First, plea bargains avert both a full trial and subsequent legal defence by requiring defendants to waive their rights to appeal. European settlements circumvent only the oral hearing and access to the file. Secondly, the link between settlement and cooperation (no leniency discounts after immunity) strengthens the incentive to settle in the US and guarantees that the procedural gains outlined above are realized in as many as 90 per cent of cases. In Europe, firms can refuse to settle but still benefit from significant discounts in return for cooperation under the leniency notice. Thirdly, European settlements are unlikely to curb the level of costly appeals as these tend to concern the unpredictable manner in which the final fine and leniency are calculated, rather than the extent of a firm's liability. If the uptake of settlements in Europe remains low and the volume of appeals high, little benefit will be realized in terms of freed-up resources. The Commission may even have to start turning cases away altogether.

Deterrence depends on the number of cartels uncovered (and punished) and the level of sanctions imposed in relation to the proportion of infringements that go undetected. Although the rate of detection is normally thought of as being more important to deterrence than the size of the fine, in cartel enforcement the principal detection tool is the offer of immunity to the first firm to self report. The greater the sanctions otherwise faced, the more likely it is that infringements will be self reported in this way. Settlements have the effect of lowering fines; something that is less troubling to deterrence in the US where other sanctions include the frequent imprisonment of individuals and a high level of private enforcement. In Europe, fines are the only effective sanction (criminal sanctions only exist on the national level and have thus far been invoked infrequently) and there have been suggestions that these are currently too low to ensure deterrence. The settlement procedure has the effect of granting a 10 per cent reduction in fines, *in addition* to leniency and any adjustment for the 10 per cent turnover cap under Regulation 1/2003. By forcing firms to plea bargain once the immunity prize has gone, the US settlement system has the advantage of not offering an additional discount. Firms must settle if they wish to be rewarded in return for cooperation.

Private enforcement can also serve to enhance deterrence by recovering damages in follow-on cases and uncovering new infringements through original actions. There is a natural clash between follow-on actions and the leniency programme, which the US has dealt with by providing some protection from damage suits for the firm reporting first. No equivalent protection exists in Europe. It would seem that settlements hinder private enforcement in

the US by reducing the amount of information a defendant publically discloses, despite the requisite admission of guilt. The effect will be the same in Europe, depending on how much less detailed the Commission's final decisions will be through the settlement process. This dampening effect does not appear to be a problem in the US, where there is a high number of damage suits attracted by treble damages and cost rules which favour claimants. In Europe, this is more troubling as current sanctions may be inadequate and the level of private enforcement is low. However, given the clash between leniency and private enforcement outlined above, there is a question as to whether encouraging private actions in Europe is sensible, as it may discourage self-reporting.

In terms of transparency, both systems of settlement inevitably have an adverse affect by providing a shorter, less exhaustive process. As Yeung points out, a 'plea bargain is not fair simply because it represents a genuine consensual agreement between parties'.[129] It substitutes the rigours of trial and subsequent appeals for an agreement reached between the prosecutor and defendant, behind closed doors and without direct judicial oversight. However, when firms do refuse to settle in the US, there is at least a separation of prosecutorial and judicial powers. In Europe there is not and so a refusal to settle will still result in the Commission imposing the fine. There is a particular danger that the concessions on offer encourage some firms to settle when it is not in their best interests to do so. Shortened investigations also place a greater weight on information obtained through leniency, which may be inaccurate. Effective judicial oversight is important, but where there is a consensual agreement and an absence of adversarial dynamic, it is difficult for courts to conduct any meaningful scrutiny of settlements. In Europe, firms can at least still appeal after settlement. Moreover, the concession on offer is uniform and the Commission does not intend to 'negotiate'. However, the Commission's discretion in calculating fines and deciding duration are such that deviations between settlements may be inevitable if 10 per cent proves to be insufficient for some firms. The unpredictable manner in which fines are calculated means that many firms will not be able to discern the benefits of settlement. As one DOJ official has said, 'a (10 per cent) discount means little to a cartel participant that cannot predict the starting point for its fine reduction'.[130] The link between plea bargains and leniency in the US makes consistency and predictability essential if firms are to show a willingness to cooperate. If, as has been suggested in the settlement notice, the Commission only reserves the procedure for robust cases, significant benefits in terms of freed up resources will not be realized.

[129] Yeung (n 91) 130.

[130] O'Brien (n 123) 8.