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Negotiated Antitrust Settlements: Some Perspectives from the Point of View of (Potential) Plaintiffs

Introduction

I have been invited to comment on negotiated settlements from a plaintiff's point of view. Whilst it seems perfectly normal to call for comments by potential defendants or by agencies, at least with respect to the Commission's proposal for negotiated settlements, potential plaintiffs play a bizarre role. On the one hand, they are completely inexistent, yet on the other hand they are almost omnipresent. They are inexistent insofar as neither the draft Settlements Notice nor the draft Regulation that would amend Regulation 773/2004 takes any notice of them. They are omnipresent, however, as almost every comment submitted to the Commission in response to the draft settlement procedure deals with a perceived danger or disincentive represented by the use potential plaintiffs could make of certain documents created in the settlement process. This justifies a closer look at the position of potential plaintiffs, and if I may propose to slightly enlarge the subject matter, it is useful to consider the position of third parties (understood more broadly) in negotiated settlements.

Before properly addressing the subject matter, allow for a cautionary remark as to my ability and willingness to present the plaintiff's point of view. It happens that my firm represents a plaintiff in proceedings in a German court directed against members of what the German Federal Cartel Office (FCO) has claimed to be a cartel of cement producers in Germany. We do so as lawyers in private practice and on the basis of the standards applying to members of the German Bar. In particular, we don't act on a contingency basis nor do we otherwise identify with CDC, the plaintiff in this case, in a way different from the way we identify with any of our corporate clients. In addition, I understand this to be a scientific debate and I take the liberty to express my personal views, which will not necessarily be those of any particular plaintiff, nor of plaintiffs in general.

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Why the absence of third party interests is not surprising

We should not be too surprised that the draft Commission Notice does not address the role of or the possible effects on third parties. After all, the draft deals with negotiated—or to be more precise—"discussed" settlements and, those who will enter in these discussions are the Commission and the undertakings on whom the Commission is likely to impose a fine. Quite logically, therefore, the Notice starts with the Commission's interest in realizing procedural efficiencies in order to free resources allowing it to deal with more cases in a shorter period of time. The proposal also looks at the incentives for former cartelists to settle the case by offering them what is called a settlement reward. The settlement discussions are held individually, secretly and exclusively between Commission and defendant. The "common understanding" (the term "agreement" is carefully avoided) is reached between those participating in it. It follows that the common understanding will only reflect the interests of those discussing or negotiating. Neither the cartelists nor the Commission have any incentive to include third party interests in the "common understanding" or agreement reached.

Third parties are interested in transparency

For the subject matter of this discussion third parties comprise not only potential plaintiffs that may have been hurt by the cartel, but also complainants. Furthermore, I believe that the *public* interest in a fair trial and in transparent administrative proceedings is also a third party interest that needs to be taken into account.

Any of these third parties are interested in transparent proceedings. Transparency should allow complainants and potential plaintiffs to make their voices heard during the instruction of the case. It should also allow them to assess the extent to which the Commission's proceedings and their subject matter are likely to affect their legal or economic position. I believe that this interest in transparency coincides with fundamental legal principles which apply to any proceeding resulting in sanctions imposed on individuals or firms. They reflect the public interest in due process and fair proceedings. Currently, transparency is in part achieved by hearings and, to a larger extent, by the obligations incumbent on the Commission to publicly state the reasons motivating its decisions.

Settlements, by their very nature, seem hostile to transparency. Settlements are reached behind closed doors; they involve none others but the parties "discussing" or negotiating. Furthermore, the terms of a settlement generally

take the form of a package deal. It is part of the specific nature of such deals that neither party is too much interested in having detailed, discussed or commented upon the various elements which formed the package or the respective weight attributed to them.

The importance of transparency becomes more apparent if we look at specific requirements with respect to what could be called "deals" in criminal proceedings. Others are much better placed than me to detail the elements of judicial supervision applied to US plea bargains. However, it seems apparent that one of the key functions judicial supervision has to provide is a minimum level of transparency and consistency. As a German lawyer I may offer a short reference to restrictions applied in our jurisdiction to "deals" in criminal proceedings. In Germany it has long been questioned to what extent deals are permissible at all in criminal proceedings.[1] The German Supreme Court eventually accepted what it called institutionalized agreements,[2] but only under a number of severe restrictions due to constitutional principles. A major element of these restrictions is the requirement to make the deal transparent and public. It is therefore necessary to state in the public hearing that institutionalized agreements have been reached, to detail their elements, and ensure that all parties to the proceedings have the ability to comment upon and to participate in the agreement.[3]

The UK Competition Appeals Tribunal has also stressed the requirements of fairness and transparency in relation to third party interests in settlement cases. In particular, the Office of Fair Trading (OFT) has to inform a complainant about the outcome of the negotiations, and it has to give him the right to be heard before it definitively commits itself to accept the undertakings offered.[4]

As regards negotiated settlements with the Commission, due to the administrative nature of these proceedings we already have to accept that there will be no proper judicial supervision. We therefore cannot afford any further reduction of the transparency which is built into the "normal" administrative process before the Commission.

It would be a fundamental mistake to assume that the consensual character of settlements is some form of substitute for transparency in "ordinary" proceedings. The motivations to settle are manifold, and there is no reason to believe that any of them take sufficient account of the interests of third parties or the public interest in general. So, if anything, the nature of settlements rather increases than reduces the need for transparency.

[1] BGH of 20.02.1996, BGHSt 42, 46, 47; Schmidt-Hieber, Verständigung im Strafverfahren, 1986, p. 91; Jeschek, JZ 1970, 204; Baumann, NStZ 1987, 157 m.w.N; Weigend, NStZ 1999, 57 ff.

[2] BGH of 28.08.1997, BGHSt 43, 195, 202 ff.; BGH of 03.03.2005, BGHSt 50, 40.

[3] BGH of 28.08.1997, BGHSt 43, 195, 205 ff., BGH of 03.03.2005, BGHSt 50, 40, 50 ff.

[4] Case No 1017/2/1/03, *Pernod Ricard SA and Campbell Distillers Limited v. Office of Fair Trading,* [2005] CAT 9.

Obligation to state reasons as a means of transparency

A principal means to assure a minimum level of transparency is the obligation imposed on the Commission by Article 253 of the Treaty to state reasons for its decisions. It is established case law that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case.[5] These circumstances are not limited to the interest an addressee may have in obtaining explanations—an interest we expect to be extremely limited in settlement cases. The obligation to state reasons also depends on the interest of other parties to whom it may be of concern.[6]

It is apparent that a decision imposing fines for participation in a cartel does concern those possibly harmed by the cartel, and it is for good reason that the Commission, in its press releases on decisions taken against cartels, routinely invites consumers to consider whether they could be entitled to damages under Article 81 EC.

It is perhaps also worth recalling that, normally, competition authorities would want to publicize as much information about an infringement as possible. This information enhances general awareness with respect to competition issues, and it will normally have a deterrent effect on all those participating in similar practices, or on those contemplating them. Finally, it should be recalled that the Court of First Instance (CFI) has in various cases stressed the interests of the public and of third parties in the reasons given for a Commission decision in competition matters. I may quote the CFI in the *Bank Austria* case, where it referred to

> "the public interest in knowing as fully as possible the reasons behind any Commission action, the interest of the economic operators in knowing the sort of behaviour for which they are liable to be penalised and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished".[7]

It therefore seems fair to say that the interest of third parties in transparency not only coincides with the requirements of due process but also with the natural interest of competition authorities. So why is it that these authorities, including the Commission, seem inclined to considerably reduce the level of transparency for decisions taken in relation to settlements?

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[5] Case C-367/95 P, *Sytraval v. Commission,* [1998] ECR I-1719, para. 63; Joined Cases 296/82 and 318/82, *Netherlands and Leeuwarder Papierwarenfabriek v. Commission,* [1985] ECR 809, para. 19; Case C-350/88, *Delacre and others v. Commission,* [1990] ECR I-395, para. 16 *et seq*.; Case C-56/93, *Belgium v. Commission,* [1996] ECR I-723, para. 86.

[6] *Sytraval v Commission,* cited previous footnote, para. 63.

[7] Case T-198/03, *Bank Austria Creditanstalt AG v Commission* [2006] ECR II-1429, para. 78.

Level of information on infringement as a cheap bargaining chip

Reaching a settlement is a bargaining process, despite all the semantics about having discussions only and avoiding bazaar-type transactions. Primarily what the Commission has to offer in return for some form of admission of an infringement is the settlement reward, i.e. a reduction of the fine otherwise imposed. On the other hand, all parties subject to the proceedings have an apparent interest in reducing, as far as possible, the amount of information available to third parties in relation to their purported infringement. This may be due in part to PR considerations, but is certainly motivated by an interest to make follow-on actions for damages as difficult as possible, if not to avoid them altogether. This obvious interest provides a valuable bargaining chip to the Commission. The Commission may offer, in addition to the settlement reward, to limit the information contained in its Statement of Objections and in the subsequent decision to a bare minimum. This offers high value to the cartelists—at virtually no price for the Commission. The price to the Commission may even be negative: a decision reduced to its very minimum reduces its workload and thus increases the administrative efficiencies. Moreover, settlements may be obtained more easily if, in addition to the reduction in fine, a "skeleton decision" is on offer. A skeleton decision may fall short of the reasoning requirements under Article 253, but decisions based on settlements are unlikely to be challenged in court.

In fact, the price for the absence of transparency and information is incurred by others. Those possibly harmed by the cartel may find it difficult to even determine precisely what the alleged infringement was, let alone to what extent they may have been hurt by the cartel. Complainants will find it extremely difficult to comment, as there is little to comment on, and they will never know to what extent the Commission took note of their arguments.

In a more abstract way, the price will have to be paid by more general principles such as transparency of the administrative process and due process at large—and consequently by all of us or by nobody, depending on one's perspective. In economic terms, the costs of this additional bargaining chip are externalized. We therefore cannot expect that the Commission, once the path to settlements is paved, will care sufficiently for the transparency of the settlement process and its outcome. Quite to the contrary, it has every incentive to use this bargaining chip and to obtain further concessions in return.

Access to the Commission's files for potential plaintiffs

It seems, though, that the Commission misjudges the limits of its liberty to bargain with defendants in the course of settlement proceedings. At paragraph 35 of its draft Commission Notice on the conduct of settlement proceedings, the Commission seems to consider barring potential plaintiffs from access to the Commission's files. In this context, it seems worth recalling a number of elements which are set out in more detail in the Commission Staff Working Paper accompanying the White Paper on Damages Actions.[8] Competition cases are characterized by a very asymmetric distribution of the available information and the necessary evidence. Access to evidence is crucial for ensuring effective exercise of the right to seek compensation for antitrust damages. The Commission considers it indispensable to improve the position of victims as regards their access to the relevant evidence. It therefore proposes to introduce across the EU a minimum level of disclosure *inter partes* in antitrust damage cases, building on the approach adopted in the IP Enforcement Directive.[9] Whereas the Commission's proposal is ambitious and deserves support, it is certainly controversial and will meet at least a lot of scepticism from continental Member States which largely ignore *inter partes* discovery in their rules of civil procedure. We therefore cannot assume that the solution proposed will solve the access to evidence problem for those seeking redress for past damages.

If it is still correct—as the ECJ confirmed in *Manfredi*—that the right to damages is necessary to guarantee the useful effect of the EC competition rules,[10] the evidence contained in the files of competition authorities cannot be omitted. It rather seems necessary to access this evidence prior to the introduction of *inter partes* discovery. The authorities, however, collectively seem to dislike the idea of their files being used to obtain evidence for the purposes of pursuing private damage actions. The Commission Staff Working Paper expressly claims that Regulation 1049/2001[11] (sometimes referred to as "Transparency Regulation") normally does not constitute an appropriate legal basis for obtaining access to evidence for this purpose.[12]

[8] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 404 of 2 April 2008.

[9] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, 2004 OJ L157/45.

[10] Case C-295/04, *Manfredi* [2006] ECR I-6619, para. 95.

[11] Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to the European parliament, Council and Commission documents, 2001 OJ L145/43.

[12] Commission Staff Working Paper accompanying the White Paper, cited *supra* note 8, para. 104.

This attitude is also reflected in the draft Settlements Notice, where the Commission, in its only—but indirect—reference to third party interests, considers that

> "normally public disclosure of documents and written or recorded statements received in the context of this Notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to the European parliament, Council and Commission documents, even after the decision has been taken".[13]

After all I tried to demonstrate with regard to the Commission's interest in settlement proceedings, and in particular with regard to the Commission's built-in incentives to reduce information available to third parties, this comes as no surprise. The only (but important) question that remains is whether this attitude is in line with Community law.

With respect to the private interests which are most obvious in a settlement context, it should be noted that there is no absolute protection granted even if these interests amount to professional secrets. According to the CFI in *Bank Austria*, the assessment as to the confidentiality of a piece of information requires a balancing operation in which the legitimate interests opposing disclosure of the information are to be weighed against the public interest in ensuring that the activities of the Community institutions take place as openly as possible. Before entering into this balancing operation the Commission has to assess whether the interests liable to be harmed by disclosure are, objectively, worthy of protection.

It seems at least very doubtful whether the interest in avoiding disclosure of the participation in a cartel, its operation, duration and those potentially affected merits any protection at all. The CFI acknowledged in *Bank Austria* and confirmed in *Pergan* that

> "the interest of an undertaking which the Commission has fined for breach of competition law in the non-disclosure to the public of details of the offending conduct of which it is accused does not merit any particular protection, given, first, the public interest in knowing as fully as possible the reasons for any Commission action, the interest of economic operators in knowing the sort of behaviour for which they are liable to be penalised and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished, and, second, the fined undertaking's ability to seek judicial review of such a decision".[14]

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[13] Draft Commission Notice on the conduct of settlement proceedings, 2007 OJ C255/51, para. 35.

[14] Case T-474/04, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v. Commission* [2007] ECR II-4225, para. 72; Case T-198/03, *Bank Austria Creditanstalt AG v. Commission* [2003] ECR II-4879, para. 78

As regards the necessary balancing, the CFI considers that the Community legislature has already balanced the public interest in the transparency of Community action against interests liable to militate against such transparency in various acts of secondary legislation, including *inter alia* Regulation 1049/2001.[15] It therefore seems difficult to argue that the balance struck in that legislation should be disregarded in settlement cases.

It seems even more difficult to claim, as the Commission does in the draft Settlements Notice, that the disclosure of settlement documents could infringe upon the protection of the purpose of inspections and investigations within the meaning of Article 4 of Regulation 1049/2001. The CFI has held that the third indent of Article 4(2) of the Regulation must be interpreted in such a way that this provision, the aim of which is to protect "the purpose of inspections, investigations and audits, applies only if disclosure of the documents in question may endanger the *completion* of inspections, investigations or audits".[16] Any inspections or investigation in competition cases are completed, at the latest, when the Commission issues a Statement of Objections. At any later stage, access to settlement documents cannot be refused by invoking the exception under the third indent of Article 4(2) of the Regulation.

I would therefore conclude that, prior to the introduction of a minimum level of *inter partes* discovery, access to documents in the Commission's files based on the Regulation 1049/2001 has to be regarded as an essential means of obtaining evidence in follow-on actions for damages.

Acknowledgement of liability is a price set by the Commission

Many observers commenting on the Commission's proposal criticized the fact that the Commission requires a written settlement submission and, in particular, a written acknowledgement of liability for the infringement. They usually point to the negative consequences any such acknowledgement might have for private actions. It seems to me that the Commission, in opting for a written settlement submission, had no intention to facilitate private follow-on actions. It simply set the price for a settlement reward. A written acknowledgement of liability is of no specific interest to third parties. Other possible pricing levels might also comply with the interests of third parties and of the Commission. It might be sufficient not to contest the facts established in a Statement of Objections, or to admit the facts only (as opposed to their legal

[15] Case T-198/03, *Bank Austria Creditanstalt AG v. Commission* [2003] ECR II-4879, para. 72.

[16] Joined Cases T-391/03 and T-70/04, *Franchet and Byk v. Commission* [2006] ECR II-2023, para. 109, emphasis added.

qualification), or to come forward with any other form of *nolo contendere*. Clearly, any pricing level has different incentives and disincentives and allows for different levels of administrative efficiencies. This is a choice to be operated by the Commission as part of the overall institutional setting of agreed settlements. On the other hand, if the price (as is currently proposed) is the acknowledgement of liability, it is hard to see why it should be paid in full with respect to the imposition of fines but only in part, or even not at all, in relation to the consequences attributed to any such acknowledgement in the law of torts.

One could of course argue that the Commission might easily accept a concept of "split prices". If only the administrative part of the price was paid, the Commission would still obtain both the administrative efficiencies and the fine. Any arrangements that would make it possible to escape from the consequences of liability in relation to those harmed by the cartel would have no detrimental effect on the administrative enforcement process. Again, the negative consequences would only be borne by others, which could make it all the more attractive to accept split prices and obtain yet another bargaining chip at no (or only external) costs.

However, I am convinced that this is no option available to the Commission—which is not a simple prosecutor, but the guardian of the Treaty. After the *Courage* and *Manfredi* judgments it should no longer be questioned that Article 81 directly confers rights to those harmed by restrictions of competition.[17] The Commission, when considering institutional choices in relation to settlements, has to attribute the respective weight to these rights. I am fully aware that such institutional choices also have to take other elements into consideration, and the proper functioning of the Commission's services, including the efficiency of the enforcement process, is certainly among those elements. On the other hand, mere administrative efficiencies definitely do not share the same rank as rights conferred to individuals and firms directly by the Treaty. The Commission will therefore have to protect the interests of those harmed by the cartel in question when making its choices for a settlement process. This clearly excludes a setting in which cartelists, while acknowledging their liability to the Commission, would be able to hide this liability and the elements of the wrongdoing from those harmed.

Commentators have frequently drawn a parallel to the Commission's practice under the Leniency Notice, urging a similar approach that would allow oral statements and avoid any discoverable documents in settlement proceedings. However, in my opinion, it seems highly questionable whether the Commission struck the right balance between facilitated enforcement and third party rights under Article 81 as regards leniency. In any event, the possible contributions to efficient enforcement of competition law of leniency

[17] Case C-453/99, *Courage and Crehan* [2001] ECR I-6297, para. 26; *Manfredi,* cited *supra* note 10, para. 95.

applicants on the one hand and parties prepared to settle an instructed case on the other differ considerably. Those prepared to settle will not uncover secret cartels which otherwise might have continued for years; they will simply facilitate the administrative tasks of the Commission to deal with cartels already discovered and dismantled. Administrative tasks, as opposed to the safeguarding of competition, though, should be addressed by increasing human resources, rather than by impeding access to remedies for potential plaintiffs, whose legal position is already difficult enough.