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Maarten Pieter Schinkel

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BARGAINING IN THE SHADOW OF THE EUROPEAN SETTLEMENT PROCEDURE FOR CARTELS

Maarten Pieter Schinkel*

1. Introduction

From the European Commission's first coming-out with the so-called "settlement package" in the fall of 2007, Commission officials have made it perfectly clear that the European settlement procedure for cartel cases would not involve any bargaining.¹ "The Commission does not negotiate the appropriate sanction," officials persisted in conferences – a line also included in the published Notice.² Cartel members can get a 10% reduction of the ultimate fine in exchange for acknowledging their involvement and cooperation in the swift conclusion of their case. That is a take-it-or-leave-it

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¹ The "settlement package" was submitted for public consultation on 26 October 2007. It consisted of a draft Settlement Notice that outlined the procedure as the Commission envisioned it, and a proposal for a Regulation to amend Commission Regulation No 773/2004 to make implementation of this procedure possible. The eventual two parts were published as 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, 2008 O.J. (C 167), 1-6 (hereinafter, "Notice"), and 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, 2008 O.J. (L 171) 3-5.

² See Notice, *supra* note 1, ¶ 2. See also, e.g., Kirtikumar Mehta & Maria Luisa Tierno Centella, *EU Settlement Procedure: Public Enforcement Perspective*, in C.D. EHLERMANN & M. MARQUIS, EUROPEAN COMPETITION LAW ANNUAL 2008: ANTITRUST SETTLEMENTS UNDER EC COMPETITION LAW 391-421 (2010).

offer. Use of the term “plea bargaining” for the procedure would be wholly inappropriate, as would be most comparisons to US antitrust law enforcement.³

The European Commission’s denial that negotiating consequences must precede a settlement is remarkable. After all, settling is all about parties finding common ground. To get there requires talking, giving and taking. Is the European Commission naïve? I think not. Allegedly, the drafters of the Notice were concerned that it would be socially unacceptable in Europe to plea bargain with cartels. Yet, they must also have realized that there are at least three other dimensions open for bargaining in cartel cases. One is the determination of the fine base to which the 10% reduction is applied. A second is the additional percentages of fine reductions that are awarded to subsequent leniency applicants. A third is the eventual phrasing that the Commission uses in its public communications about the case.

In fact, the Commission’s consistent negation of any negotiation space may well be part of its bargaining strategy. It shut the door on fine discount discussions, and so channeled talks to the other bargaining points. These may have been preferred by the Commission, because they give more leeway to find mutual agreements and offer parties what they want in return for giving up resistance much less publicly. After all, on the fine base, leniency information and the Commission’s public presentation of the case, outside observers can never really know what could have been if a full procedure had been followed—and so what the Commission gave up for settling.

³ Andreas Stephan shows, however, that such a comparison can be insightful. See A. STEPHAN, *The Direct Settlement of EC Cartel Cases*, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 627-654 (2009).

However, the European Commission may unintentionally have put itself in a weak bargaining position by choosing to disable the only hard bargaining point. We currently have no reason to think that the Commission is not a good negotiator, but there are dangers. Cartel members know that the fine base, leniency discounts and phrasing of the texts are soft targets, which leaves the Commission with less bargaining power than it could have had under, for example, negotiable individual percentage fine reductions that are made public. This may jeopardize overall deterrence—one of the stated objectives of the settlement procedure.⁴

In addition, by accepting hybrid settlements—in which settlements are reached with some cartel members but not with all in one and the same cartel case—the Commission gives up further bargaining power. Settling cartel members will want the full formal decision on those companies that exited the settlement procedure to be less revealing than a standard decision for all would have been. Or otherwise, they will probably demand a lower fine to compensate any damage from disclosure. These effects may undermine the procedure, or—if (hybrid) settlements are nevertheless carried through for reasons of efficiency of enforcement, another explicit objective—deterrence. The first settlements published so far when this article went into press, in *DRAM Producers* and *Animal Feed Phosphates*, indicate that some of the effects here pointed out may be at work.⁵

⁴ See Notice, *supra* note 1, ¶ 1.

⁵ Press Release, European Commission, Antitrust: Commission Fines DRAM Producers € 331 Million for Price Cartel; Reaches First Settlement in a Cartel Case (May 19, 2010), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/586>; Press Release, European Commission, Antitrust: European Commission Fines Animal Feed Phosphates Producers

In this paper, I look at the European settlement procedure for cartel cases from a strategic negotiation point of view. I will loosely apply some game theoretical concepts to outline the contours of two consecutive sequential-move sub-games in the procedure. Formal analysis I leave for future research.⁶ This suffices for my thesis that there is plenty of room for bargaining in the shadow of the European Commission's settlement procedure for cartels, and that there are detrimental outcomes possible. I conclude that the settlement package could benefit from a credibly commitment of the Commission being a tough negotiator, if not by enabling individual percentage fine reductions after all, then possibly by embedding a binding independent review of all settlement proposals in the procedure.

2. The European Settlement Procedure for Cartel Cases

Consider the stage at which the European settlement procedure for cartels becomes relevant. In a certain market there have been agreements between several producers to restrict competition in ways that would likely qualify as breaches of Article 101(1) of the Treaty on the Functioning of the European Union. Suppose that the European

€175,647,000 for Price-Fixing and Market-Sharing in First “Hybrid” Cartel Settlement (July 20, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/985&format=HTML&aged=1&language=EN&guiLanguage=en>. There are rumours of a third settlement that is (about to be) reached, but no public information is available. The same—of course—is true about settlement talks that were unsuccessful and broken off.

⁶ See Kirsten Edwards & Jorge Padilla, *Antitrust Settlements in the EU: Private Incentives and Enforcement Policy*, and Lorenzo Coppi & Robert Levinson, *The Interaction between Settlements and Private Litigation – An Economic Perspective in* C.D. EHLERMANN & M. MARQUIS, EUROPEAN COMPETITION LAW ANNUAL 2008: ANTITRUST SETTLEMENTS UNDER EC COMPETITION LAW (2010) for some first attempts to do a formal analysis.

Commission's DG Competition has gotten wind of this, and a case team has started investigations. These are the players. State of play: the Commission has collected evidence and begins to feel confident that it can build a case. The companies have noted that they attracted the attention of the authorities, and start to realize they may have gotten themselves into a precarious situation.

In various presentations of the (draft) settlement procedure, officials of the European Commission have summarized its practical implementation in eleven steps:⁷

1. Commission gauges suitability and interest for settlement.
2. Commission initiates settlement procedure.
3. Commission sends invitation letter to the parties—with time line.
4. Parties declare willingness to cooperate by letter.
5. Bilateral talks—with access to file.
6. Joint conclusions regarding infringement and fine ranges.
7. Parties submit formal requests to settle—specifying conditions.
8. Commission drafts the Statement of Objections—honoring conditions.
9. Parties confirm phrasing of the Statement of Objections.

⁷ The following is based on a presentation by Ewoud Sakkers at the annual Elsevier conference Developments in Competition Law 2008, October 9, 2008 in the Kurhaus in Scheveningen. *See* I.W. VERLOREN VAN THEMATAAT (ED.), *ONTWIKKELINGEN IN MEDEDINGINGSRECHT 2008* (2009); *see also* Mehta & Tierno Centell, *supra* note 2 (distinguishing slightly fewer, but similar, steps).

10. Commission consults advisory committee.

11. Commission publishes streamlined formal decision—rewards 10% discount.

Completing all steps successfully results in a full settlement. Alternatively, parties can decide not to enter into the procedure at all. And third, at any stage in an on-going settlement procedure can either the Commission or one or more (possibly all) of the alleged cartel member break off the settlement talks. Companies can unilaterally exit up until between steps 8 and 9, if they conclude that the Commission has formulated the Statement of Objections with too little regards for their settlement submission.⁸ The Commission retains the right not to settle and default to normal case handling at any step in the procedure, until it has taken the final step 11.⁹ It may also settle with some but not all companies in one cartel case.

For the purpose of analyzing strategies, it is useful to group these eleven steps in three phases. Steps 1-4 make up a “courting-phase” in which players explore if there is a mutual interest to enter into a settlement procedure. This phase is a signaling game. Steps 5-7, the “talking-phase,” make up a consecutive bargaining game. Lastly, decisions in these two games materialize in the “payoffs-phase,” steps 8-11.

3. Information: Private, Common and Public

While the structure of the settlement procedure is common knowledge, decision making at every step is characterized by asymmetric information. That is, the Commission and the alleged cartel members are formal opponents, and each has private information about the own side of the dispute. The companies will generally

⁸ See Notice, *supra* note 1, ¶¶ 26-27.

⁹ See Notice, *supra* note 1, ¶ 29.

know better than the Commission—and possibly also than the other cartel members—what they did, what evidence may remain of it, what turnover may have been affected and how committed they are to fighting off the allegations. The Commission, on the other hand, is in a better position to decide how strong a case it believes it has on hands and where there may be weak spots that could be successfully appealed in the Court of Justice of the European Union.

Of course, there are informal talks and formal disclosures all along the way. Parties will take legal advice about the possible consequences of their actions. They will also be shown parts of the Commission's case file. So information will flow. Yet, due to the high stakes involved, all sides will try to keep strategic information from the others—if only information about the value of the information each believes it possesses about the positions of the others. It would, for example, often not be the first priority to correct erroneous views that opponents may appear to hold and that are favorable to ones own position. In addition, it is not obvious that any information that would be offered would actually be believed to be true. After all, there are strong incentives not to be truthful.

All parties involved in the process are therefore continuously probing the relative strength of their position. In the course of settlement talks, the Commission and individual cartel members will gradually have to reveal part of their private information in bilateral meetings. When the Commission believes the case is suitable for settlement, it may be willing to convince the cartel members to cooperate, illustrating some of the gains and thereby revealing information. Formal statements are expected at various defined steps in the process. Between those there likely will be opportunity to sound out the opponents in informal talks in which all parties will

probably be able to gain knowledge. Decisions to exit the procedure will be affected by the cleverness—real and suspected—of negotiators on all sides to take advantage of these possibilities.

In addition to increased sharing of private information between the parties directly involved, some information gets into the public domain. While much of the bilateral talks will go on behind closed doors, at certain later stages messages will go out as well. Complainants, victims, competitors and other competition authorities will want to monitor what is revealed about the cartel proceedings closely. In a standard procedure, the Commission has to provide extensive proof of the cartel infringement in a detailed formal decision. It will also want to gain public support for its case by publishing condemning press statements. As a result, the published European formal cartel decisions have in past been a great source of learning—despite having been censored for confidential business information.

Crucially, from what the Commission has said so far, it appears that there will be much less disclosure of public information about the case in a settlement than there would have been if an ordinary formal decision would have reached.¹⁰ In a settlement, public disclosure is neither necessary for the Commission, nor desired by the cartel members. In fact, control over what information gets into the public domain will be part of the reasons for companies to want to settle in the first place. Also, since the companies directly involved are unlikely to appeal their settlement, it is much less

¹⁰ Bach speaks in this respect of a “skeleton decision.” See Albrecht Bach, *Negotiated Antitrust Settlements: Some Perspectives from the Point of View of (Potential) Plaintiffs*, in C.D. EHLERMANN & M. MARQUIS, *EUROPEAN COMPETITION LAW ANNUAL 2008: ANTITRUST SETTLEMENTS UNDER EC COMPETITION LAW* 251-260 (2010), at 255.

likely that there will be a full judicial review by the Court of Justice.¹¹ Hence, the European settlement procedure comes at the expense of public learning from cartel case law.

4. Payoffs

With the existence of the Commission's settlement procedure, there are three possible procedural outcomes of a European cartel case: (i) the Commission and/or cartel members decide not to enter into a settlement procedure, so that the standard procedure is followed and a full decision is made; (ii) a complete settlement procedure is followed and a so-called 'streamlined decision' is reached; or (iii) a settlement procedure is entered into, but one or more (including possibly all) parties decide to break off their involvement before it is completed.

How to specify payoffs of these three different outcomes? Obviously, it is not possible to quantify monetary payoffs in general, but as a benchmark let's characterize the standard procedure as: a long and costly process for all parties involved, with a high probability of appeals, high fines, lots of information about the infringement getting into the public domain, significant reputation damage to the companies, and a good chance of follow-on antitrust damages actions by victims of the cartel.

In comparison, a full settlement agreement means: shorter and efficient procedures, closure, a small probability of appeals, a lower fine, controlled reputation damage to the companies, and a reduced ability for private claimants to mount follow-on cases.

¹¹ Third parties may appeal a settlement decision, but in doing so will suffer from the relative lack of information that is published about the case.

For the latter two effects, the various possibilities for the parties to influence the way in which the infringement decision will be communicated is of great importance.¹²

That settlements will make follow-on antitrust damages actions more difficult has been convincingly argued by several recent commentators.¹³ It may appear that acknowledgment of the facts in a public settlement increases the exposure of cartel members to damages litigation. However, a slimmer case file, an agreed Statement of Objections, and a short and superficial formal decision will make it more difficult for potential plaintiffs to prove the extent to which they suffered cartel damages. This is likely, in fact, to be the prime attraction of the procedure for settling cartel members.

As a third possibility, one or more parties may decide to exit a settlement procedure entered into. Obviously, if this would be the Commission, the settlement discussions are aborted and the procedure defaults to standard. If one or more companies decide no longer to want to cooperate in a settlement, the Commission can decide to adopt a hybrid settlement. The Commission initially pledged that it would be very reluctant to agree such hybrid settlements, but already the second settlement decision, in *Animal Feed Phosphates*, was one.

It is not clear for all cases what the consequences of having entered into a settlement procedure may be for companies that decide to discontinue negotiations while well into it. Generally, information will have been shared and both parties will know more about each others position than they probably would have known if a full standard procedure would have been followed. The extent to which this may affect the

¹² See Notice, *supra* note 1, ¶¶ 17, 22, & § 2.4.

¹³ See Bach, *supra* note 10; Coppi & Levinson, *supra* note 6.

ultimate outcome of a case will depend on the mutual assessments made during the settlement procedure of how committed the other parties are (and remain) to actually reaching an agreement. Trust in this will, after all, determine the kind and amount of information that parties believe can safely be shared in the process.

The Commission may turn out to be an unreliable partner, and largely ignore the parties' conditions for settlement once it knows it is in a strong position. On the other hand may companies be advised by their legal council to always pretend, when asked, to have an interest in settling, just to test the Commission's case, and later opt out. To what extent entering into a settlement procedure is actually free of engagement will be crucial to determining optimal strategies. Presently, there seems to be a net gain in always at least initially be open to talking. What will be the optimal process strategy remains to be seen, however, for it requires more experience with the way in which the Commission will treat the various settlement options.

There is some indication that the Commission can punish harsher in a full procedure after a company initially pretended to want to cooperate in a settlement but then intentionally frustrated the process. The relevant passages are probably not meant to be read this way, but in at least two places in the settlement procedure it may be implied that lack of cooperation can count as an aggravating circumstance.¹⁴ It seems right that there are some consequences of abusing the settlement procedure—although it will be difficult to prove intent. In order to be both a strong and a reliable negotiation partner, the Commission should make explicit how it will retaliate if a settlement procedure was entered into under false pretences.

¹⁴ See Notice, *supra* note 1, ¶¶ 5, 7.

5. The Courting-Phase is a Signaling Game

Obviously, the companies and the Commission would only want to enter into a settlement procedure if they all expect to gain from doing so over following the standard procedure. The Commission must believe that it has a sufficiently well documented case to impress upon the alleged cartel members that they can expect penalties—but maybe not, without further investigation, enough to push on with a standard procedure. At the same time must cartel members realize that resisting the Commission will be more costly than cooperating. In such circumstances, if the handling of the case is a cooperative effort of all parties involved, this can significantly shorten the standard administrative and appellate proceedings, as well as ease punishment in various ways.

Formally, the Commission makes the first move in deciding whether or not to start talks. If so, it assesses if there is an interest to participate with the alleged cartel members. Yet, all these assessments are informal at first—only in steps 3 and 4 is the willingness to settle made formal. Therefore, in practice it may not be so clear-cut who mentioned an interest to settle to whom first.

In essence, the courting-phase is a signaling game. Showing an interest in settling is a signal to the other party about the private assessment of the strength of one's own position in the case relative to that of one's opponents. At the core of this is the dilemma that the Commission would most want to interest those companies for a settlement against which it believes its case would require a large enforcement effort to carry through a full procedure. At the same time will companies want to fight a case that they expect to be able to win. So those alleged cartel members who are

willing to settle are more likely to be the ones the Commission would want to find a full formal infringement against.

It is essential therefore in the courting-phase not to appear too eager to settle, as this may lead the other party to believe it pays to fight. If information is sufficiently asymmetric, for example in cases in novel or complex markets, this tension may make it impossible to reach a settlement, even if that would be best for all parties involved. In case entering into settlement discussions is effectively free of engagement, so that companies will often opportunistically pretend to have an interest to settle, the decision to enter the procedure may lose its value as an informative signal.

Whether or not always-pretend-to-want-settle is an optimal strategy depends on how the Commission will come to treat companies that exit. However, more subtly—and depending on how information exchanges will work out in practice—the precise point of exiting the settlement procedure may become informative. How and where this happens depends on when in practice steps will have definitive consequences—probably not before taking step 6. This in turn is a function of the bargaining skills of negotiators involved, their ability to worm information out of the opponent(s) in the process, and the sanctions for having acted on false pretences.

6. The Talking-Phase is a Bargaining Game

The talking-phase consists of a series of steps in which the Commission little by little exposes the strength of its case and the nature and gravity of the possible penalties that it might ask for. At the same time will the alleged cartel members give insight into their readiness to challenge the Commission's findings, as well as gauge whether they could have success on appeal to the Court of Justice. All parties will naturally

move cautiously, trying to prevent unnecessary exposure of the own reservation value, while assessing those of the others.

In essence, the talking-phase is a set of simultaneously played bilateral bargaining games, in which the Commission controls the sequence and pace of the meetings. Once a settlement procedure has sincerely been entered into, all parties potentially gain from a swift completion, saving on process costs and securing a mutually agreeable outcome.¹⁵ That is, the negotiations are a “positive-sum game.” Such games are not strictly competitive. There is room for cooperation, and using it is what the settlement procedure aims at.

Formally, a European cartel settlement is all and only about whether or not a 10% reduction of the ultimate fine for cooperating companies is given. The question arises however: 10% reduction of what? After all, according to the European Commission’s 2006 Fining Guidelines, the Commission has a wide margin of discretion in determining the size of the fine.¹⁶

The fine—before leniency and settlement reductions—is set following a two-step method.¹⁷ In the first step, the basic amount of the fine is determined. It is based on the value of the affected sales made by the company during the last full business year

¹⁵ See Notice, *supra* note 1, ¶ 15.

¹⁶ European Commission, Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2) of Regulation No. 1/2003, 2006 O.J. (C 210) 1-5 (hereinafter “Guidelines”), available at <http://ec.europa.eu/competition/antitrust/legislation/fines.html>.

¹⁷ For a more extensive discussion, see I. Bos & M.P. Schinkel, *On the Scope for the European Commission’s 2006 Fining Guidelines under the Legal Maximum Fine*, 2(4) J. COMPETITION L. & ECON. 673-682 (2006).

of participating in the infringement, multiplied by the number of years that the infringement lasted.¹⁸ Both are not obviously determined. The calculation of affected sales relies on bookkeeping rules and an estimated contamination, for example. Cartel duration in practice is often determined by the first date for which the Commission can firmly prove existence of the cartel, typically the date of a meeting held or minutes discovered.¹⁹

A proportion of up to 30% of this estimate of the total value of affected sales is taken as the basic amount of the fine. In addition, a company can face a further 15% to 25% of the value of sales added to the basis amount as an ‘entrance fee’ imposed for joining a hard core cartel.²⁰ The effective percentages that the Commission can apply depend on a number of factors, including the nature of the infringement, its scope in terms of market share and geographic area, and its effectiveness in restraining trade.²¹

In the second step, the basic amount is adjusted on the basis of aggravating and mitigating circumstances. Aggravating circumstances can increase the fine to up to twice the basic amount. This can happen when an undertaking was active as a ringleader, for example, or coerced others into the anticompetitive agreement.²² Mitigating circumstances may be reason to lower the fine from the basic amount.

¹⁸ See Guidelines, *supra* note 16, ¶ 13.

¹⁹ Andreas Stephan emphasizes that cartel duration is a likely flexible parameter in settlement negotiations. See *Supra* note 3, at 653.

²⁰ See Guidelines, *supra* note 16, ¶ 25.

²¹ See Guidelines, *supra* note 16, ¶¶ 22, 25.

²² See Guidelines, *supra* note 16, ¶ 28.

Some factors that may count to reduce the fine are evidence of instantaneous termination upon the Commission's intervention, or of limited involvement.²³

Combined, these factors form a multiplier that captures the Commission's discretionary authority in setting the fine base. Its value may either increase or decrease the ultimate fine base from the basic amount, as its value can range from close to zero—low end of the 30%-scale and/or many mitigating circumstances—to several times the value of sales for an infringement that lasted several years—high end of 30%-scale, effective cartel, serious aggravating and no mitigating circumstances. For an infringement that lasted for a number of years, the fine base can easily amount to a large number of times the value of last year's affected sales.

So the 10% may be non-negotiable, the fine range to which the 10% reduction is applied certainly is a function of the Commission's assessment of the case, which in turn depends on the information the Commission has and the how it chooses to interpret that information. On all parameters, the settlement procedure allows for finding middle ground. Hence, the fine ultimately levied, which is the product of the various values set by the Commission, is open to negotiation.

In addition, the Commission has discretion in the reductions in fines it wants to give to leniency applications that were not the first to alert the Commission to the existence of the cartel—who get immunity from fines—but added information that the

²³ See Guidelines, *supra* note 16, ¶ 29. These circumstances are applied outside the scope of, and prior to the Leniency Notice. *Id.* § 4.

Commission deemed valuable.²⁴ To qualify for fine reductions between 20% and 50%, an undertaking must provide the Commission with evidence that adds “significant value with respect to the evidence already in the Commission’s possession”.²⁵ Again, the margin for interpretation is wide, and accountability is low. Certainly from streamlined decisions will it be difficult for outsiders to tell what the true value added of each cartel member’s information has been.²⁶

To put this in context, note that the exact level of the fine is probably not the Commission’s primary concern. After all, the fine revenues benefit the Member States and their size therefore only possibly affect the Commission indirectly—through political processes that are probably more sensitive to a reputation for good decision making. What the European Commission instead seems first and foremost concerned about is its reputation as a strict enforcer. In recent years, high fines have been used to build this reputation. Former Competition Commissioner Kroes, for example, tended to use strong worded press releases on cartel findings and fines, in part to influence how the public views collusion.

Therefore, if enforcement costs were not a factor and a case is strong enough, the Commission would obtain most credit from outside stakeholders—complainants,

²⁴ See European Commission, Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 O.J. (C 298) 17-22 (hereinafter “Leniency Notice”), in particular Section III.

²⁵ See Leniency Notice, *supra* note 24, ¶ 24.

²⁶ Incidentally, in both *DRAM Producers* and *Animal Feed Phosphates* investigations had started with leniency applications long before the settlement procedure came into effect. In both the first leniency applicant received full immunity. In both also the majority of the other cartel members benefited from reductions under the leniency notice.

victims, Member State governments, and the public—for a full finding of infringement of an evidently damaging cartel. This would be most satisfying for parties adversely affected, and best for the reputation of the Commission as a tough enforcer.

However, that type of negative publicity is typically also very damaging to the reputation of the companies involved. They prefer as little hostile coverage of the infringement as possible. Engaging in a settlement can help to achieve this, since it gives influence in the phrasing of the Commission's external communication about the case. Cartel members will value this. After all, there is quite a difference between on the one hand being portrayed as a dishonest hard core cartel ring leader, or instead on the other as a remorseful mother company of which a remote and small daughter happened to have sat in a meeting in which someone raised the possibility of market segmentation—that was luckily just cleared up with the kind help of the Commission. So on the dimension of reputation, negotiations are competitive.

Now in the best of all worlds the Commission could save on enforcement costs per case and use these efficiencies to swiftly deal with many more cases using the settlement procedure, without having to jeopardize its reputation as a tough enforcer. It could strengthen its reputation this way, by now handling more cartels with the same budget. The problem is, however as discussed, that there is asymmetric information between third parties—who impose the reputation constraint—on the one hand, and the Commission and the cartel members on the other. Certainly once a streamlined decision has been reached, it will be impossible for Commission-watchers to know if that was really all that could be obtained. Both the Commission and the

cartel members have an ex post incentive to say that it was, and so outside observers have reason not to believe them.

In the first settlement decision, in May 2009, in *DRAM Producers*, the Commission indeed revealed very little information.²⁷ There is only a press release about the case and it is mostly about the fact that the settlement procedure was followed seminally. There is one paragraph on the workings of the cartel:

The overall cartel was in operation between 1 July 1998 and 15 June 2002. It involved a network of contacts and sharing of secret information, mostly on a bilateral basis, through which they coordinated the price levels and quotations for DRAMs (Dynamic Random Access Memory), sold to major PC or server original equipment manufacturers (OEMs) in the EEA. DRAMs is a common model for “dynamic” semiconductor memories for personal computers (PCs), servers and workstations.

The fines for the ten memory chip producers are tabled, each with the cumulative reductions under the leniency and the settlement notices. Interestingly enough, there is no call for cartel victims to seek reparation of their damages in the press release—which had become standard for the Commission to include in its memos in recent years. Presumably, a more detailed non-confidential formal decision will eventually be published. Yet, it remains to be seen how much information it will contain. As said, a streamlined decision will in all likelihood be much more concise than a standard formal decision used to be.

²⁷ See Press Release, Commission Fines DRAM Producers, *supra* note 5.

7. Who has Bargaining Power?

The Commission may appear to be in a strong bargaining position in its self-designed settlement procedure. It decides whether and at what pace there will be settlement talks at all. It has the ability to levy high fines, expose the cartel, and facilitate private follow-on damages claims. Through its investigative powers, and certainly when it has received leniency applications, the Commission can further collect the necessary information to punish harshly. The Commission's persistent claim that it only offers 10% fine reduction for settling, take-it-or-leave-it, indeed appears tough at first sight.

Motivated by maintaining reputation, however, the Commission may have chosen to take a stance on the percentage discount in order to focus negotiations on the other bargaining points identified above. After all, at the fine discount dimension, which is open for all to see, the Commission would probably run the biggest risk of reputation hits. It surely looks a lot better in the press to have applied a small 10% reduction to members of a decent gentlemen club—a cartel alright, but one with a modest total fine—than to be seen having handed out 50% or 60% discounts to companies found to have been engaged in very deliberate and detailed hard core price fixing that were initially slammed with a record fine—which most of them then got largely waived.

It is questionable, however, if this bargaining strategy is optimal public policy. There is currently no reason to doubt the good intentions of the European Commission to be a tough enforcer for the public case. Yet, on the much softer points of the fine base, leniency discounts and public phrasing of the case, the Commission seems to have less bargaining power than over the discount percentages. The settlement procedure so burdens the Commission officials with the risk of being gamed. To see how this might happen, consider the following hypothetical situation.

Suppose that the Commission has the beginning of a cartel case that it prefers to settle. Suppose that third parties know X about the cartel, so that X is the minimum amount of “harshness” that the Commission has to adopt in the wording of its decision without losing reputation. The companies involved know this. Suppose they would be willing to settle for X -harshness, but want something more than 10% fine reduction in return. This is where the flexible fine base comes in. The 10% is fixed, but the ultimate fine is negotiable. As long as a reasonably short duration is established and agreeable aggravating and mitigating factors are set—more or less matching X —a deal is possible.

It all depends on the bargaining power that the cartel members have how low the fine must go. By forcing all negotiations on points where it can ultimately not be known how much the Commission really gave away in return for securing a settlement, the Commission is likely to be forced to give away too much. After all, part of it is for free in terms of reputation loss. Indeed, in the context of follow-on private damages suits, Bach identifies the level of information in an infringement decision as “a cheap bargaining chip,” the price of which would be paid by potential plaintiffs.²⁸ He warns that: “We ... cannot expect that the Commission, once the path to settlement is paved, will care sufficiently for transparency of the settlement process and its outcome. Quite the contrary, it has every incentive to use this bargaining chip and to obtain further concessions in return.”²⁹

²⁸ Bach, *supra* note 10, at 255.

²⁹ Bach, *supra* note 10, at 255.

While protecting its reputation as a tough enforcer is constraining the Commission, that constraint is less tight along the open bargaining dimensions that it would be on explicit percentage fine discounts.

Since the second settlement decision so far, *Animal Feed Phosphates* adopted last July, hybrid settlements are a real option. This gives additional bargaining power to cartel members.³⁰ Six companies were found to have fixed prices and shared markets for a chemical compound used in feed for animals. The case originated in a leniency application in 2003—for which reductions of the fine were given to all but one of the companies. The Commission had started negotiations with all alleged cartel members. However, one of them, Timab Industries, aborted the settlement procedure, according to the Commission’s press release “after the Commission had informed the parties of the fine ranges.”³¹ That is, relatively far into the process, probably in step 5.

A hybrid settlement forces the Commission to produce two kinds of formal decisions: streamlined decisions for the settling companies, and standard full decisions for the non-settling companies. In its press release about *Animal Feed Phosphates*, the Commission announced this “first settlement of a cartel case in a hybrid scenario” as a landmark case. The Commission does not reveal its feelings towards the company that walked out of the negotiations. Yet, the option of partial settlements creates a number of problems. The formal decision for Timab has not yet been published, but presumably—and it is so described in the press release—there will be a non-confidential full version. This must mean that the Commission will not have been

³⁰ See Press Release, European Commission Fines Animal Feed Phosphates Producers, *supra* note 5.

³¹ *Id.* at 2.

able to save on enforcement costs by far as much with the settlement procedure as it had hoped to. It is also quite likely that it will still face appeals proceedings.³²

Clearly, well into a settlement procedure, the threat to destroy most of its efficiencies by necessitating a full decision after all gives each individual cartel member considerable bargaining power over the Commission. As long as all cartel members are still negotiating, each of them can use its individual power to force a hybrid settlement, which implies a discrete downward jump in benefits for the Commission. Added to this comes that the negotiations are bilateral, so that former cartel members do not know exactly with whom and how many other companies the Commission has advanced—and they need not trust what they are being told about this. The threat to jump ship is useful in bargaining the fine base down and the leniency discounts up, while make the Commission soften the tone in the phrasing of the case.

Once one or more cartel members have exited the settlement procedure and the Commission has decided to work for a hybrid settlement, the settling cartel members will likely want a larger fine reduction, or else threaten to walk out of the settlement talks as well. This may give downwards pressure on the fine base and upward pressure on the fine reductions for subsequent leniency applications. At the moment, we cannot know if it will have this effect, of course. But it may turn out, after sufficiently many hybrid cases have been concluded, that cartel members received a significantly lower fine—relative to affected commerce—in hybrid decisions than in

³² The saving on infringement costs possible in “partial settlements” leading to hybrids was also questioned in the discussion in Panel III at the 13th Annual EU Competition Law and Policy Workshop in Florence 2008. See EHLERMANN & MARQUIS, *supra* note 2.

complete settlements.³³ Surely this is an interesting hypothesis to test in a few years from now, when more data will be available.

It is also important to note that in a hybrid settlement, the remaining settling cartel members may not be able to benefit from reputation damage control to the extent that they had initially bargained for. After all, many of the gory details of the cartel's modus operandi will be included in the full decision that the non-settler(s) will receive. Publicly denouncing the stray cartel member is one form of punishment for cartels that frustrated a full settlement. However, the settling cartel members will want the full formal decisions on those companies that aborted the settlement procedure to be less revealing, at least about their role, than a standard decision for all would otherwise have been. That may, however, be difficult, or even impossible to do, so there will be externalities that the Commission may be pressured to compensate in the form of a lower ultimate fine.

If the Commission will be expected to more carefully phrase the full formal decisions for the non-settlers, in order to keep the settling cartel members on board, another problem may arise. If it is possible to enter in settlement discussions, break them off prematurely, and still receive a mild decision, this makes entering into a settlement procedure less engaging. As a result, it will more often be done opportunistically. Companies could so free ride on the settlement of other cartel members, as long as sufficiently many of them remain to keep the Commission interested in settling.

³³ Remarkably, in *Animal Feed Phosphates*, two companies applied for further fine discounts for inability to pay—which is possible under the 2006 Fining Guidelines, *See Guidelines, supra* note 16, ¶ 35. The application of one unnamed company was accepted and given a 70% fine discount.

Depending on the strength of the case, there could theoretically be just one cartel member settling, softening the full formal decisions given to the others in order to prevent reputation damage to the settling member. If the Commission is too eager to settle, therefore, there will be a serious threat of weakened deterrence.

8. Concluding Remarks

By adopting its settlement procedure for cartels the European Commission seems to have put itself in a more complex bargaining position than it is willing to publicly appreciate. Self-restricted to a fixed fine reduction, the Commission's bargaining power is weaker than it could have been. Apart from reducing public learning from cartel case law, the settlement procedure so also potentially works against the Commission's program of many years to stimulate the overall deterrence of cartels in Europe.

After all, whether or not collusive behavior is deterred depends in essence on the set of penalties that companies that are (considering to get) involved in a cartel can expect. Apart from the probability of detection, this is a function of the seriousness of the consequences of getting caught: public fines, reputation effects and private damages litigation. Were the unintended consequences of the settlement procedure to limit these consequences too much, companies with bad intentions may exercise less restraint in talking to the competition.

It is essential therefore that the European Commission credibly commits to being a tough negotiator. It should not use its settlement instruments lightly and absolutely avoid getting a reputation of being eager to settle, as that would give cartel members the upper hand in the negotiations. A direct way to help achieving this is by training,

negotiation courses and thinking through optimal bargaining strategies. The latter may lead to the conclusion that enabling individually negotiable percentage fine reductions are a valuable bargaining point after all.

The Commission may also want to consider improving its bargaining position by embedding a binding independent critical review as a standard step in the settlement process—for example as a specification of step 10. Such a review board could consist of senior officials of competition authorities in various jurisdictions and academics, who peer-review a settlement reached confidentially on the basis of the entire case file—and possibly additional own research. The board would have to approve the settlement, or otherwise the normal procedure is to be followed after all. If negotiation partners know that any agreement that they may find will be subject to review, this would help commit the Commission’s negotiators to keep their foot down on the appropriate sanctions—more so than just stating they will, as done in ¶ 2.

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