BAKER & McKENZIE

CARTELS & SETTLEMENTS: CUTTING A DEAL WITH THE EUROPEAN COMMISSION

Fiona Carlin, Lynda Martin Alegi, Grant Murray[1]

1. INTRODUCTION

"Can't we just pay what we need to, put our house in order and get on with running the business?" How often have we heard this plea from managers embroiled in cartel cases in Europe, particularly from those who have settled parallel proceedings with the U.S. Department of Justice?

Business people are understandably frustrated at having to sit out the lengthy administrative procedure of the European Commission which, of late, tends to result in the imposition of a seemingly disproportionate fine which in turn triggers appeals and years more delay.

An increasing number of competition authorities are beginning to recognize the benefits that the swift settlement of these cases bring to all concerned.

Speaking after her first one hundred days in office, Competition Commissioner Neelie Kroes admitted the problems with the status quo when she portrayed the Commission as a victim of its own "cartel-busting" success, slavishly investigating the minutiae of available evidence and tying up its limited resources in too few cases for too long. She hinted that some form of plea-bargaining may be the cure.[i]

Nearly two years later, an EU settlements policy is anxiously awaited, but the policy needs to be right.

This paper considers the benefits and challenges of cutting a deal and suggests how the Commission might best structure a settlements policy to ensure that it is sufficiently attractive for companies to avail of it.

2. THE NEW "GAP"

Competition enforcement in Europe has gone through something of a revolution in recent years. Leniency policies at both EU and national level[ii] have proved effective in unearthing anticompetitive behaviour by encouraging companies to self-report in return for immunity for the first in, and varying levels of reduction in fines for subsequent applicants. In recent years, the European Commission has received approximately 20 leniency applications *per annum*.

---

[1] Fiona Carlin is a partner and head of Baker & McKenzie's European & Competition Law Practice in Brussels. Lynda Martin Alegi is Of Counsel and Grant Murray is a professional support lawyer with the Firm's London office. The authors would like to thank Georg Weidenbach of Baker & McKenzie Frankfurt for his helpful comments on an earlier version of this paper.

The recent agreement amongst EU Member States on a model leniency programme has gone some way to lessening the multiple filing burden associated with the absence of a one-stop leniency shop in Europe and is another helpful initiative[iii].

The commitments procedure, available since May 2004, enables the Commission to adopt a decision requiring an infringement to be brought to an end in circumstances which are not so serious as to warrant the imposition of a fine. It has been emulated as national competition laws in Europe are updated to reflect the introduction of Regulation 1/2003[iv]. Recourse to this procedure has been relatively scarce and has not prevented the parties concerned from appealing[v], so it is too early to tell whether it will become an effective enforcement tool in practice.

What the Commission now needs is an instrument enabling it to dispose quickly of cartel cases which do warrant a fine and where the parties are willing to accept some degree of culpability. The ability to "settle" a case whereby the accused admits certain facts or at least agrees not to challenge them in return for a speedy resolution of the investigation and a related reduction in fines, would be an obvious complement to the leniency and commitments procedures in terms of optimising the deployment of finite enforcement resources and letting companies get on with running their businesses. There are benefits for all involved.

3. BENEFITS FOR COMPANIES

The Commission's 2006 fining guidelines[vi], coupled with the protracted nature of administrative proceedings, mean that companies under investigation are put in the intolerable position over many years of being unable to realistically estimate their exposure short of assuming that 10% of their global annual aggregate turnover is at stake[vii]. The resulting uncertainty can have chilling effects on share prices as well as important investment and other commercial decisions[viii].

For business, speed, clarity and closure may be of the essence, regardless of whether the cartel is a clandestine and dishonest arrangement brokered by senior executives or simply the product of an errant employee who is unaware of the fact that the mere passive receipt of competitive information which is not acted upon may be enough to impute liability for cartel behaviour in Europe[ix].

In many cases, the benefits of prompt closure in return for a materially discounted penalty will outweigh the prospect of any potential reduction in fines resulting from mounting a sophisticated, thorough and lengthy defense and appeal strategy.

4. BENEFITS FOR THE COMMISSION

The willingness of companies to settle ought to provide the Commission with more information at an earlier stage in the procedure thus facilitating a more focused and efficient investigation, including into the role of companies that, for whatever reason, are not interested in availing of either leniency or settlement.

For the Commission, shortening the administrative process has the attraction of freeing up resources to process more cases which seems imperative given the backlog of leniency applications. The Commission is thought to handle around forty cartel investigations at a time but on average only adopts five or six decisions in a year[x]. Even

in cases initiated by a leniency application where one would assume that there are fewer contested issues, it takes the Commission an average of three years to reach a decision. Nor is the Commission's decision the end of the process: each cartel decision usually spawns at least several appeals that go all the way to the European Court of Justice.

Continuing adjustments to the Commission's fining guidelines, guaranteed in many cases to generate higher fines, will ensure that appeals continue to be brought in ever greater numbers. Defending a decision before the European Courts in first instance and on subsequent appeal is therefore an integral part of the process for which the Commission must plan when it allocates resources at the outset. If calibrated correctly, settlements may offer the only real prospect of reducing the appeal rate in the future.

5. SOURCES OF INSPIRATION

In the UK, the Office of Fair Trading (OFT) has pragmatically recognized the merits of settlements. In the *Independent Schools*[xi] case, the defendants admitted to an unlawful information exchange in relation to their fees and, in return, the OFT imposed nominal fines of £10,000 on each without making any finding in its decision as to the actual effect of the anti-competitive arrangements. The OFT heralded this groundbreaking "*agreed resolution*" as a demonstration of a broader willingness to "*consider innovative solutions in appropriate cases*"[xii]. More recently, the UK's rail regulator (which also enjoys competition enforcement powers) struck a deal in an abuse of dominance case[xiii], agreeing to reduce the penalty by 35% in return for the defendant agreeing to accept the regulator's findings and citing the *Replica Kit* case[xiv] where a discount of 40% was given to Umbro for cooperation by way of admissions and agreeing remedial steps.

The prevalent favourable attitude towards settlements is also apparent from comments made in the context of the recent UK Fraud Review which mooted the possibility of plea-bargaining for serious and complex frauds (which might include some cartels). In this context, the OFT has openly acknowledged that the early resolution of cases may benefit not only the regulator but also the infringing company and possibly victims and witnesses too[xv].

In France, there is also a generous range of options including a simplified procedure and a system of settlements. A senior case officer can propose a reduced fine and use a shorter administrative procedure when a company does not contest the contents of a Statement of Objections and undertakes to pay the fine and to modify future behaviour[xvi]. This option is in principle available in relation to all types of anti-competitive conduct including cartels, abuse of dominance and unlawful vertical restraints[xvii]. French law does not limit the amount by which the fine can be reduced although it is usually in the range of 30-50%. However, in a landmark decision in 2004, the French Competition Council went as far as granting La Poste a 90% reduction in relation to an alleged abuse of a dominant position.

In Germany, the Bundeskartellamt has been testing ways of adopting "consensual" fining decisions, albeit under general provisions for setting fines[xviii]. This involves informal negotiations between the Bundeskartellamt and the companies under investigation in relation to the evidence and potential level of fines before a formal Statement of Objections is issued. After a non-binding "agreement" has been reached, the Bundeskartellamt renders an abbreviated decision focusing on setting out the main

facts and fines as previously negotiated. The fact that negotiations have taken place is unlikely to be mentioned.

The Dutch competition authority, the NMa, adopted a pragmatic approach on realising that almost 600 construction companies had been involved in illegal anticompetitive conduct. To avoid the administrative burden associated with dealing with each company on an individual basis, the NMa offered a 15% reduction in fine (and shorter proceedings) to companies that agreed to accept the facts and legal assessment and to forgo the right to an individual hearing. Over 80% of the companies involved elected to take advantage of this *ad hoc* expedited procedure and did not engage in individual proceedings against the NMa. The process has been repeated in other sectors of the economy.

Whilst these initiatives at Member State level are welcomed, they are not necessarily suited[xix] or sufficiently developed to serve as an adequate model at EU level, but they provide plenty of food for thought. There are also valuable lessons to be learnt from the U.S. where plea-bargaining has played a vital role in cracking cartels efficiently. In the last twenty years, no less than 90% of corporate defendants have entered into plea agreements whereby the defendant pleads guilty and cooperates fully with the authorities in return for a reduced penalty. Although the U.S. has a fundamentally different criminal regime whereby the prosecutor and defendant agree on a plea that is then presented to a judge for approval, it is worthwhile asking what lessons Europe can learn from this apparent success story.

6. THE RELATIONSHIP BETWEEN LENIENCY AND SETTLEMENT REDUCTIONS

The concern has been voiced that any settlement system should not undermine the incentive for companies to apply for immunity/leniency. Striking the correct balance between settlements and the leniency regime will be a delicate and a critical exercise. In many cases, settlements are likely to be a "bolt-on" to leniency applications. However, a cumulative system of discounts poses a dilemma.

The Commission's most recent cartel decisions and its latest fining guidelines have triggered serious questions about the attractiveness of leniency in the absence of near total certainty that full immunity is available and that there is virtually no risk of the company being caught out ever again.

The Commission appears to be getting tougher on leniency. Shell obtained no reduction in the *Synthetic Rubber* decision of 29 November 2006[xx]. In the *Gas Insulated Switchgear* decision of 24 January 2007[xxi], the Commission granted immunity to ABB but failed to grant any reduction to the remaining six leniency applicants on the grounds that their cooperation did not add any significant value to the Commission's understanding of the facts on the basis of the immunity application**.** In the *Elevators and Escalators* decision of 21 February 2007 imposing record fines of €992 million, the immunity applicant, Kone, was fined a total of €142 million, qualifying for immunity in Belgium and Luxembourg but not in Germany or the Netherlands. Numerous other leniency applicants obtained reductions in some but not all of the national markets concerned[xxii].

These cases will make leniency a harder sell going forward. Is this a deliberate policy to make room for settlement discounts? Is the Commission taking away with one hand what it seems to be prepared to give with the other?

Of equal concern to industry is the fact that according to the 2006 fining guidelines, the Commission can increase fines by 100% for each similar infringement found by the Commission or any national competition authority, regardless of whether a fine was imposed in any such prior case and regardless of how dated the past infringement is[xxiii]. The benefits of qualifying for leniency in any given case may easily be offset by the real risk of a considerably higher fine applying in any subsequent case, and this is compounded by the absence of an "Amnesty Plus" programme such as exists in the U.S. and the UK.

Against the background of higher fines and apparently higher qualifying thresholds for leniency, a "settlement reduction" in the region of 10% for example will clearly not be enough[xxiv]. The incentive to settle in exchange for waiving important rights of defence will have to be significant. In this respect, it is disappointing that the Commission granted a meagre 1% reduction to the parties in the recent *Elevators and Escalators* decision for agreeing not to contest the facts set out in the Statement of Objections.

The introduction of a settlements policy is therefore an opportunity for the Commission to enhance transparency and predictability to ensure that industry continues to cooperate.

7. THE "BUILDING BLOCKS" OF AN EFFECTIVE SETTLEMENT POLICY

Designing an effective system of settlements raises numerous issues and challenges, the most critical of which are examined below.

7.1 The fine: how much exactly?

Of paramount importance is the need for certainty in respect of the actual fine to be imposed. The Commission must be prepared to introduce a reasonable degree of predictability in order to reduce the incentive to contest both during the Commission's investigation process and subsequently on appeal.

It is misguided to argue that too much transparency would enable would-be cartelists to carry out a cost-benefit analysis before entering into a cartel. Today's reality is that an increasing number of appeals are likely to be brought to the European Courts because of the vast margin of discretion conferred on the Commission in fixing the ultimate level of fines, including the ability to increase fines with retroactive effects[xxv]. For as long as the Courts reduce fines in at least some cases on procedural grounds, the rate of appeals is likely to increase as the level of fines increases.

It is therefore imperative that the result of a settlement be expressed in terms of a fine in euros and not as a percentage reduction from an unknown figure.

A complication arises from the fact that it is the College of Commissioners and not DG Competition that takes the final decision on the level of fines. However, the risk of a disagreement between the College and Commission officials might be offset if the

company were able to reserve the right to appeal and treat the settlement as null and void if the College were to subsequently impose a higher fine.

7.2 Must the cartelist confess?

The likely knock-on effect on private actions which the Commission is actively encouraging and which continue to plague many European companies caught in the wide net of U.S. class action law suits will be an important consideration in weighing the merits of settling.

Any settlement system would ideally entail a defendant agreeing with the Commission not to contest a basic set of facts which would be the basis of a short-form decision (reached under Articles 7 and 23 of Regulation 1/2003[xxvi]) outlining the infringement, its scope and duration as well as the appropriateness of the intended sanction. Such an approach, which involves no admission of wrongdoing and no finding on the effect of the infringement, would be the optimal way to ensure swift closure.

Alternatively, a company may be prepared to admit the infringement on condition that the Commission does not make any findings as to effect or on issues of exclusionary or coercive intent, or to admit the facts only for the purposes of the Commission's investigation.

The fact that direct settlements may result in less factual evidence being available to potential litigants should not be a major concern. The primary role of a public authority is to detect and punish infringements while the burden of proving causation and seeking restitution falls to private litigants. With at least some Member States apparently competing to hold themselves out as the most attractive forum for private actions, it is surely up to the Member States to provide for discovery or whatever other mechanisms they determine might be needed to ensure that cartel victims have adequate recompense[xxvii].

7.3 When can companies settle?

The possibility to settle should be broadly available (as is the case in the U.S.) at the behest of the Commission or the defendant. The object will be defeated if the Commission retains full discretion over the availability of a settlement and uses it as sparingly as the commitments procedure.

Nor should the Commission deny the availability of settlement because of a desire to publish a full decision to clarify interesting points of law. There is no reason why clarification cannot be made in a short-form decision and, indeed, there is a long history of the Commission having recourse to soft law tools to clarify its policies[xxviii].

Any settlement has to relate to a set of specific allegations and therefore the Commission will need to undertake a certain amount of investigatory work itself to enable a meaningful and reliable settlement to be reached, particularly in the absence of multiple leniency applications where factual details may be scarce.

Companies should nonetheless be able to express their willingness to settle at any stage of the procedure. There is no need to wait until a Statement of Objections has been issued before making settlements possible (by which time the bulk of the investigatory work will have been completed by the Commission). Companies willing to settle can,

after all, play an important role in clarifying facts and assisting the Commission's understanding of market realities. The filing of corporate statements under the revised Leniency Notice[xxix] should also mean that in many cases the Commission has a sufficiently clear idea of the basic information it needs in order to reach a settlement, and part of any settlement could include confirmation that the company has revealed all relevant facts of which it is aware after a proper inquiry.

An early settlement may run the risk of the facts being subsequently disputed by a third party but this risk might be adequately managed if the Commission were able to withdraw its settlement in the event of misrepresentation and reopen the procedure[xxx].

7.4 Settlements with only a few of the defendants?

Settlements encompassing all defendants clearly bring most efficiencies but if the policy is to succeed, the Commission must avoid an "all or nothing" approach. The benefits of settlement with only one or some of the cartel members are still tangible and reluctant defendants may be encouraged to settle where it is obvious that others are in negotiation with the Commission.

The attractiveness of the system would be much enhanced if settlements concluded in good faith on a limited factual understanding were protected, even if the subsequent full-fledged prosecution of certain defendants who opt not to settle were to reveal a more serious picture of the gravity and duration of the cartel.

7.5 Confidentiality

It is essential that negotiations be carried out on a strictly confidential basis. The Commission should not be able to rely on what is said during negotiations until a settlement is actually reached. Once a settlement is agreed, the details of negotiations should remain confidential unless the settlement is subsequently breached and the Commission chooses to prosecute the defendant as a result.

A separate team of Commission officials, preferably with mediation training, should be appointed to handle settlement talks. This would both maximize the chance of success and shield the Commission's case team in order to preserve the "no prejudice" basis of the exchange so as not to colour any eventual leniency application or the assessment of "co-operation" by companies for whom immunity is no longer available.

7.6 Access to the file and third party rights?

Access to the file can be a major cause of delay. Where there have been focused discussions on the parameters of the infringement, the Commission might avoid giving rise to such a right in the first place by ensuring that any preliminary assessment it produces does not take the form of a Statement of Objections which would trigger a right of access[xxxi] or, alternatively, the settling company may be prepared to waive any such right if its legal situation is made sufficiently clear.

To minimize the risk of subsequent appeal however, and to protect against regulatory over-zealousness, the companies concerned should, on balance, be able to form a view of just how strong the Commission's case against them in fact is by having access to the file[xxxii].

The position of third parties opposing a proposed settlement is arguably protected by the possibility of lodging a complaint under Article 7 of Regulation 1/2003 (where that third party has a "legitimate interest") and obtaining access to information held by the Commission where its complaint is rejected[xxxiii] (as in the context of Article 9 commitments under Regulation 1/2003). However, recent case law from the European Court of First Instance suggests that third party access rights exist pursuant to the Transparency Regulation and the Commission is studying the repercussions[xxxiv].

7.7 A commitment not to appeal?

Reducing the number of appeals is a priority for the Commission. However, Article 31 of Regulation 1/2003 which stipulates that the Court of Justice has unlimited jurisdiction to review decisions where the Commission has fixed a fine means that a commitment not to appeal is unlikely to be legally binding as well as being contrary to public policy. This may be more of a theoretical than a real problem where the company has already accepted the accuracy of the facts in the draft decision, and the appropriateness and proportionality of the proposed fine.

The Commission may reserve the right in any settlement agreement to withdraw its "short-form" decision in the event of an appeal and set in motion the normal investigatory process leading to a fully reasoned decision, or ask the Court to apply the fine without the settlement reduction[xxxv].

7.8 Predictability and transparency

To be effective, any settlement system needs to be transparent and predictable. In this respect, valuable lessons can be learned from the U.S. approach to "plea-bargaining". The Antitrust Division of the U.S. Department of Justice has recently stated that it is "*…not only critical to fostering confidence among the defense bar and the business community that the Division provides proportional and equitable treatment of antitrust offenders, but …also essential to securing co-operation from the culpable parties*"[xxxvi].

It is imperative that the Commission provide clear guidance on its policies and objectives including how it will use its discretion. The details of individual settlements must also be published to shed light on the Commission's practice as it develops.

7.9 Legal certainty

Any settlement must preclude investigation at Member State level, mirroring the fact that Member States' competition authorities are already precluded from applying Article 81 of the EC Treaty where the Commission has initiated proceedings[xxxvii]. The settlements process should therefore provide greater certainty than the commitments procedure which does not preclude national authorities from applying the competition rules[xxxviii].

The Commission should also make it clear that a settled case would not count as a prior infringement for recidivism purposes within the meaning of the fining guidelines[xxxix]. This approach would enhance the incentive to settle and counterbalance the diminishing attraction of leniency in light of the enormous financial risks associated with being a recidivist under the 2006 fining guidelines.

8. CONCLUSION

All parties stand to benefit from a transparent and predictable settlements policy. The Commission's backlog of leniency applications combined with the necessity of engaging in a very detailed factual investigation capable of withstanding judicial scrutiny must surely make settlements attractive. The corporate need to reassure stakeholders, and especially the financial markets, by realistically estimating exposure and obtaining prompt closure in return for some tangible discount in fines makes the prospect of settlements equally appealing.

Rather than being seen as bargaining away justice, settlements should be acknowledged as being entirely in line with an effective enforcement policy since they have the potential to optimise the use of limited resources and allow more cases to be taken on.

Overall, the EU fining regime is sufficiently mature (and certainly sufficiently punitive) for a system of settlements not to undermine the wider deterrent effect of fines. The concepts of transparency, predictability, proportionality, certainty and finality are key to the success of the project. At least some of these concepts have not figured strongly in the Commission's recent practice. The Commission is therefore encouraged to decide a number of "test" cases and to consult on the options with a view to producing a policy that clearly sets out the parameters within which it will exercise its discretion.

It is in the interests of all for the Commission to forge ahead with a more pragmatic and efficient means of enforcing competition law.

---

[i] Kroes, *The First Hundred Days*, International Forum on European Competition Law Brussels, 7th April 2005. http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/205&format=HTML&aged=0&language=EN&guiLanguage=en

[ii] A total of 22 of the 27 EU Member States currently operate leniency programmes and a further 3 Member States are on the verge of introducing a leniency programme.

[iii] http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf

[iv] Article 9 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

[v] See Case T-170/06, *Alrosa v Commission*, pending.

[vi] European Commission, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003,* OJ 2006 C 210/2: http://ec.europa.eu/comm/competition/antitrust/legislation/fines_en.pdf

[vii] By way of illustration, in the *Synthetic Rubber* decision of 29 November 2006, the Commission fined one company the maximum fine of 10% of its global turnover for allegedly having attended one meeting at which prices and customers were discussed amongst competitors. http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1647&format=PDF&aged=0&language=EN&guiLanguage=en.
The European Courts have on numerous occasions reaffirmed that the cap of 10% of global aggregate annual turnover set out in Article 23(2) of Regulation 1/2003 is effectively the only constraint on the Commission's discretion in fixing the level of fines. See, for example, Case C-308/04 P - *SGL Carbon AG v Commission*, judgment of 29 June 2006, para 46 where the European Court of Justice explained that "*…the Commission enjoys a wide discretion as regards the method used for calculating fines and that it can, in this respect, take account of numerous factors, whilst complying with the ceiling on turnover laid down in* [the legislation]". See also Case C-3/06 P, *Groupe Danone v European Commission*, judgment of 8 February 2007, para 90 where the Court of Justice reiterated that the "*…proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy*".

viii See *On the Effect of EU Cartel Investigations and Fines on the Infringing Firms' Market Value* by Gregor Langus and Massimo Motta to be published in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2006*, Hart Publishing.

ix See Case C-204/00P, *Aalborg Portland v Commission ,* judgment of 7 January 2004 and Joined Cases 40/73 *et al*, *Suiker Unie* [1975] ECR 1663.

x The Commission adopted six cartel decisions in 2004 and only five cartel decisions in each of 2005 and 2006.

xi *Exchange of information on future fees by certain independent fee-paying schools,* OFT decision of 20 November 2006; www.oft.gov.uk/NR/rdonlyres/03E98168-5F5E-48C1-8DEB-DEB0CB9FB187/0/schools.pdf

xii See OFT press release of 23 November 2006; http://www.oft.gov.uk/News/Press+releases/2006/166-06.htm

xiii *English Welsh and Scottish Railway Limited*, decision of the Office of the Rail Regulator of 19 December 2006 http://www.rail-reg.gov.uk/upload/pdf/ca98_decision_ews-dec06.pdf

xiv Decision of the OFT of 1 August 2003: http://www.oft.gov.uk/NR/rdonlyres/B8798974-E5B3-4106-9255-4DA315AE0935/0/replicakits.pdf

xv *Fraud review: a consultation response*, OFT, November 2006: www.oft.gov.uk/NR/rdonlyres/553303E1-3C42-42D1-9EA7-13FC4AD967AC/0/oft875.pdf

xvi Law No. 2001-420 of 15 May 2001 on New Economic Regulations published in the French Official Journal on 16 May 2001. See also Lucie Carswell-Parmentier, *Recent developments in French competition law - commitments, leniency and settlement procedures - the French approach,* ECLR 2006, 27(11), 616-630. In a decision of 9 March 2006 concerning concerted practices in the heating and sanitary markets, the *Conseil de la Concurrence* granted *Brossette* a 40% reduction in fine for not contesting the facts and agreeing to certain behavioural undertakings which were accepted as credible and verifiable even if not very substantial (Decision 10.06-D-03, paras. 1408-1410).

xvii Note however the announcement on 23 January 2007 of a settlement with *Veolia Propreté* and *Sita France* regarding bid-rigging in certain waste treatment markets in which the *Conseil de la Concurrence* warns that the 35% reduction in fines granted does not create a precedent that settlements will generally be available in relation to illegal horizontal agreements: http://www.conseil-concurrence.fr/user/standard.php?id_rub=211&id_article=672

xviii Section 81 of the Act Against Restraints of Competition in conjunction with the Administrative Offences Act.

xix For instance, whilst indirect compensation through the establishment of a trust fund for the benefit of the injured class was a feature in the UK *Independent Schools* case, mirroring the notion of restitution in the U.S. plea-bargaining system, this would simply be unworkable in a more complex multi-jurisdictional context.

xx See note vii.

xxi Commission fines members of *Gas Insulated Switchgear* cartel: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/80&format=PDF&aged=0&language=EN&guiLanguage=en

xxii Commission fines members of *lifts and escalators* cartels over €900 million: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/209&format=HTML&aged=0&language=EN&guiLanguage=en

xxiii This radical change in policy seems to have been validated by the European Court of Justice in the recent *Danone* case cited at note vii above in which it held that "*… the finding and appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion and that the Commission cannot be bound by any limitation period when making such a finding*" (para 38). The effect is to penalise conglomerates particularly heavily and, more generally, to further undermine the attractiveness of leniency.

xxiv The 1996 Leniency Notice (OJ 1996 C 207/4) expressly foresaw a reduction in fine where a defendant agreed not to substantially contest the facts as set out in the Statement of Objections. In the majority of cases, these reductions were limited to 10%.

xxv See note vii.

xxvi Article 7 of Regulation 1/2003 enables the Commission to take a decision requiring a company to bring an infringement to an end. Article 23 enables the Commission to impose fines for infringing the competition rules.

xxvii For example, the UK High Court has established that, where there is an English element to a cartel, a claimant may bring an action in the UK courts in respect of all of its European losses, instead of having to pursue separate

claims in multiple jurisdictions (*Provimi Ltd v Aventis Nutrition SA and others* [2003] EWHC 961 (Comm)). In July 2005, the German Parliament amended the Act against the Restraint of Competition in order to facilitate private litigation in cartel cases. On 21 February 2007, the Regional Court in Düsseldorf accepted the admissibility of the first collective action for cartel damages brought on behalf of 29 customers of companies found to have participated in a cement cartel by the company Cartel Damages Claims SA. The European Court of Justice in Cases C-295 – 298/04, *Manfredi et al*, judgment of 13 July 2006, has also strengthened the hands of claimants in ruling that national courts must respect the principles of equivalence and effectiveness when considering procedural rules as to the limitation periods for damages actions.

xxviii For example, the Autumn 2006 EC Competition Policy Newsletter contains an article written by Commission officials which provides details on how the fining guidelines will be applied in practice that are not to be found in the guidelines themselves. www.ec.europa.eu/comm/competition/publications/cpn/cpn2006_3.pdf

xxix European Commission, *Notice on Immunity from fines and reduction of fines in cartel cases,* OJ 2006 C 298/11. www.eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_298/c_29820061208en00170022.pdf

xxx The Commission can reopen the procedure if it finds that a commitments decision taken under Article 9(1) of Regulation 1/2003 was based on incomplete or misleading evidence pursuant to Article 9(2)(c) of Regulation 1/2003.

xxxi Article 15(1) of Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L123/18, provides that "*if so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections*".

xxxii Wouter Wils argues that access to the file ensures to at least some extent that consent to Article 9 commitments is "informed consent". See *Settlements of EU Antitrust Investigations: Commitments Decisions under Article 9 of Regulation 1/2003* in World Competition, Volume 29, No. 3, September 2006.

xxxiii According to Article 8 of Regulation 773/2004 cited at note xxxi.

xxxiv See Cases T-2/03, 13 April 2005 (*Verein für Konsumenteninformation VKI /Commission*), T-198/03, 30 May 2006 (*Bank Austria Kreditanstalt/Commission*), T-44/00, 8 July 2004 (*Mannesmannröhren-Werke AG/Commission*) and (ex contrario) T-376/03, 4 April 2005 (*Michel Hendrickx*); also Lampert/Weidenbach, Wettbewerb in Recht und Praxis (WRP) 2007, 153.

xxxv Some may argue that the very concept of settlements sits uneasily with Article 31 and that Regulation 1/2003 would require amendment to provide a specific legal basis, especially since companies willing to settle will in practice forgo their full rights of access to justice. In cartel proceedings, given the significant fines and administrative burden at stake, it can be doubted whether such a waiver of rights can be reconciled with the purported voluntariness of a settlement. In the context of the drafting of Regulation 1/2003, scholars raised doubts as to whether even the commitment decisions pursuant to Article 9 Regulation 1/2003 are acceptable under the principles of due process and access to justice, see *Jaeger*, Wirtschaft und Wettbewerb (WuW), 2000, 1062, 1069; K. *Schmidt,* Betriebs Berater (BB) 2003, 1237, 1242; more generally *Whish*, Competition Law, 5th edition, 2003, page 256 seq.: *"(...) strange provision which sits oddly with Article 16* (…)." However, the authors submit that a specific legal basis is not strictly required for as long as the parties retain access to judicial review should the Commission's application of its leniency and settlements policies prove insufficiently transparent.

xxxvi For further details, see Scott Hammond, *The US Model of Negotiated Plea Agreements: A Good Deal With Benefits For All, 17 October 2006; www.usdoj.gov/atr/public/speeches/219332.htm*

xxxvii Article 11 of Regulation 1/2003. Even this is not without problems as the recent *Elevators and Escalators* case cited at note xxii has demonstrated. This involved a series of national infringements which were investigated by the Commission. Facts involving the Austrian market were apparently uncovered too late for the Commission to extend the scope of its inquiries leading the Austrian authority to investigate and propose to fine the companies just a few weeks after the Commission's decision imposing record fines. There have been other cases in which national authorities in the new Member States have investigated cartels simultaneously with the Commission in relation to effects in their respective territories in the years prior to accession.

xxxviii See Recital 13 and Article 9 of Regulation 1/2003.

xxxix See the text accompanying note xxiii above.