

## Cartel settlements

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### Cartel Settlements: An overview of EU and national case law

#### Anticompetitive practices, Foreword

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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#### I. An Overview

In less than ten years since the introduction of the EU settlement procedure [1], the European Commission ("**Commission**") has successfully settled 21 cartel cases of varying degrees of complexity and with different unique features. The Commission's settlement practice has evolved to a point where it has significant experience in the pragmatic resolution of cartel cases: 21 out of 35 cases decided since 2010 are settlement cases, whilst 8 out of 10 cases settled in 2014, and 2 out of 5 cases settled in 2015.

The Commission settlements concluded to date cover a wide range of conduct (including price coordination, market sharing and information exchange). Each settlement discussion has involved between 2 and 13 parties, not all of whom applied for leniency or eventually settled. Fines imposed range from EUR 6 million to just under EUR 3 billion. The process itself lasts from 7 to 13 months [2] (from the point of the first settlement meeting) - the difference generally being a reflection of the complexity of each particular case, but also of the preparatory work done by the parties and the Commission during the investigation stage.

From the Commission's perspective, the aim of increasing procedural efficiencies appears to have been achieved. From the settling parties' perspective, experience shows that the incentives to enter into an EU settlement go beyond the 10% discount granted. Companies often find that the real incentive for settling a case is the establishment of a communication channel with the Commission. The Commission's public, formal position is that it does not negotiate on settlement fines. Yet, participants in settlement discussions frequently feel that there is some value in opening a dialogue with the Commission and providing assistance in the latter's understanding or scoping of the case. This process of scoping the settlement case can reap potential benefits in the calculation of the value of affected sales, or in influencing the other calculation levers which form the basis of the fine.

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In the past few years, cartel settlement procedures have made their appearance in EU Member States and non-EU countries alike. In Greece, the Hellenic Competition Commission ("**HCC**") recently established terms and conditions for the settlement procedure, with the aim to simplify and speed-up the handling of cases [3]. Hungary successfully concluded its first cartel settlement case in July 2016 (albeit a hybrid settlement) [4]. The possibilities offered by national settlement procedures often go beyond those offered by the EU settlement procedure. For instance, in Germany the settlement procedure is not just employed for cartels. It is also available in pure information exchange cases [5], vertical restraints cases [6], and cases relating to gun jumping or submission of inaccurate information in merger control proceedings [7]. France, Belgium and the UK also have broader settlement regimes than the Commission's. In Singapore, the Competition Commission is currently proposing to introduce a settlement procedure for both cartel and abuse of dominance investigations.

In contrast, many jurisdictions (including within the EU) remain without a cartel settlement procedure, for example Spain, Hong Kong and Japan. In Australia, while parties may cooperate with the Australian Competition and Consumer Commission ("**ACCC**") regarding penalty submissions, there is no formal settlement procedure – in that it is ultimately for the Federal Court to decide on the penalty.

Notwithstanding the current Commission trend towards cartel settlement proceedings, settlements still raise significant questions. The increased use of settlements has helped to provide some clarity and practical insights as regards the process followed (see Part II to this Foreword). However, a number of legal issues remain. To what extent is there an interplay between leniency and settlement discounts (Part III)? How do hybrid settlements fit in the picture of procedural efficiency gains (Part IV)? To what extent may settling parties go on to appeal settlement decisions (Part V)? And, of increasing importance, what is the impact of cartel settlements on private damages actions (Part VI)?

## **II. EU Cartel Settlements in Practice**

The Commission follows a formal settlement procedure, at the heart of which are three settlement meetings that take place on a bilateral basis between the Commission and each settling party. Aside from following these formal steps, the Commission takes a very flexible approach in many respects.

For instance, settlement discussions in reality start before the formal settlement process officially begins. The Commission only initiates the settlement process when it is fully prepared and has a solid framework for the case. Consequently, pre-settlement discussions with the Commission can be very important for the parties to try to influence the scope of the case before the Commission fixes its opening position. The Commission tends to offer its key "sweeteners" up front, and it may be harder to "win" larger concessions after the case summary has been presented at the first settlement meeting. Non-papers and presentations during so called "technical meetings" may be helpful in providing the parties with the opportunity to provide comments. These do not generally go on the Commission's file and are not used as evidence.

After the formal invitation to settle is received and responded to, the parties have their first settlement meeting with the Commission. The Commission provides a case summary to the parties, and illustrates the facts of the case by reference to specific contemporaneous evidence. The

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Commission finds it helpful to have the company's management in the room during this first meeting, to demonstrate senior level commitment to the process.

Shortly after the first settlement meeting, parties are given access to file. Access to the file in EU settlement cases is limited to key evidence – which is usually far less than the totality of evidence on the file. Where parties have also made leniency applications, access to the file has two elements: (i) access to notes of leniency statements on the Commission's premises, with parties not being allowed to copy or otherwise download the statements; and (ii) access to contemporaneous evidence, which is generally provided on a CD/DVD.

Parties are given a (often very short) deadline to request further evidence and comment on the case summary. Comments are generally provided in technical meetings, non-papers, or during calls with the Commission's case team. The Commission may take these comments into account, but it is not obliged to do so. The Commission will then typically provide parties with a "case overview", which will effectively form the basis of any subsequent Settlement Submission and Statement of Objections. Whilst the Commission maintains that there is no negotiation on the fine parameters, discussions on the scope of the case can influence its view as to duration, affected products, affected sales, or level of cooperation. The potential for arguing for a narrower scope of case, both in pre-settlement discussions and potentially during the settlement process is one of the key attractions of settlement, which can have a much higher impact on the fine than the 10% settlement discount. The same holds true at national level. In Greece, for example, although the HCC's official position is that it will not "bargain" about evidence, its objections, or the finding of an infringement, the HCC has indicated that settlement discussions may provide parties with the opportunity to influence its objections through argumentation [8].

Parties formally confirm that they agree with the case overview and the calculation of the value of sales during the second settlement meeting. At this meeting, the Commission describes the "case team's view" on the parameters of the fine. No fine range is provided. Instead, the Commission explains (i) what the gravity percentage will reflect (e.g. the territorial scope of the infringement, whether it is a multi-faceted infringement, etc.), (ii) the duration relevant for the fine calculation, (iii) whether there are any aggravating or mitigating circumstances, (iv) whether companies should expect a deterrence uplift, [9] and (v) a very general view as to the level of cooperation relevant to any leniency discount.

It is only during the third settlement meeting that companies are provided with a fine range. The Commission also provides them with specific details regarding any mitigating or aggravating circumstances. What the Commission does not provide at this meeting are the specific gravity and entry fee percentages. Fine ranges are also provided in the course of settlement proceedings at national level – for example, this is now occurring in France, following the introduction of the so-called "transaction procedure" [10]. In Germany, the Federal Cartel Office (**FCO**) usually presents the entire "settlement package" (that is, the alleged wrongdoing, the contemplated method for the calculation of the fine, and the envisaged amount of the fine) during the first settlement meeting.

Shortly after the third settlement meeting, the Commission provides the parties with a draft Settlement Submission for their comments. The Commission then issues a Statement of Objections which typically follows the statements made by the companies in their Settlement Submissions. The fact that this is a flexible process is emphasised by the recent decision in *Truck Producers*, [11]

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where the Commission issued a Statement of Objections prior to opening the formal settlement process.

The procedures at national level can vary. In Germany, for example, there is a great deal of procedural flexibility, with only a few formal rules. It is generally up to the FCO and the company's discretion how the discussions evolve and are structured. In the UK, companies and the CMA have the option of initiating settlement discussions before or after the Statement of Objections is issued [12]. This is also the case in Greece, though the HCC notes that procedural efficiencies are less likely to accrue if a Statement of Objections has already been addressed to the parties [13].

Therefore, it is apparent that the Commission's approach to settlement discussions may vary in any given case on the basis of the facts and the bigger picture. This further emphasises the importance of seeking, via pre-settlement discussions, as many concessions as possible up front on key parameters such as products, customers involved and duration, before the Commission fixes its opening position in the formal settlement process.

### III. Leniency and Settlement Interplay

EU law draws a distinction between settlement and leniency. Whilst both regimes require an admission of liability, they serve different purposes. Leniency is an investigative tool, used to uncover information on cartel conduct. Settlement is a procedural efficiency tool, used after the investigation has been completed. This distinction is reflected by the different reductions that are available under the Leniency Notice and the Settlement Notice, respectively.

Leniency and settlement are not mutually exclusive processes. Indeed, the Commission is more likely to pursue settlement in cases where all or most of the parties have already admitted liability in their leniency statements. Companies which have applied for leniency may (and in practice often do) participate in settlements, in order to benefit from an additional 10% fine discount [14]. In fact, all 21 settlement cases but one have had at least one immunity/leniency applicant, and in 9 out of 21 settlement cases all of the settling parties applied for leniency. The typical position is that new leniency applications cannot be submitted once settlement discussions start, [15] which potential applicants should factor into their decisions on timing and strategy. It is however worth noting that, in *Wire Harnesses* [16], a participant applied for leniency after the Commission initiated proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 with a view to engaging in settlement discussions. This suggests that there may be some flexibility on the part of the Commission, depending on the circumstances of a particular case.

At national level, leniency and settlement may also co-exist. In the UK, the Competition and Markets Authority (**CMA**) Guidance clearly states so [17]. In France, the French Competition Authority (**FCA**) has applied the two policies cumulatively [18]. At the same time, however, the FCA has emphasised that the two processes serve different objectives and different conditions have to be met to benefit from both. For example, in the recent infringement decision against fresh dairy producers, the FCA refused to apply both a settlement and a leniency discount to the second leniency applicant. It noted that a cumulative application of both discounts requires the procedural gains to be substantial - a condition which was not fulfilled in that case [19].

It should be noted that the lines between leniency and settlement are blurred in many jurisdictions.

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In Canada, Brazil and the US, immunity and leniency programs are in fact considered to be a form of settlement with the authorities. The approach taken in Australia is interesting as there is no formal settlement procedure (as we would recognise in the EU); rather any penalty is ultimately decided by the Federal Court. A party to a cartel that is not eligible for immunity, or a party that has contravened Australian competition law by means other than cartel conduct, may still cooperate with the ACCC and receive some benefit, such as a reduced penalty, due to its cooperation. In practice, where a party is willing to cooperate, it will enter into negotiations with the ACCC to reach an agreement as to the admitted contraventions, the facts giving rise to those contraventions and the recommended pecuniary penalties and other relief (such as declarations, injunctions and orders for compliance programs) – which are placed before the Federal Court for consideration. In that case, the party is likely to receive a penalty discount, as the Federal Court recognises that any settlement reduces the administrative and resource burden on both the ACCC and the court system by avoiding a lengthy or contested trial (although it should be noted that the Federal Court is not bound to provide a discount for not contesting a claim) [20].

#### IV. Hybrid Settlements

Hybrid settlements arise where the authority goes down a dual enforcement track, combining ordinary contested proceedings for some and settlement proceedings for other parties to the same investigation.

At EU level, hybrid settlements derive from the right of the parties to opt-out of settlement proceedings [21]. Whereas the Commission shows a clear preference for settlements that cover all parties to the investigation, and has broad discretion to discontinue settlement proceedings at any point in the process [22], it does not preclude the possibility of entering into hybrid settlements. The procedural efficiencies attained by hybrid settlements may be of a lesser amount, but still considerable [23]. This is why discontinuing settlement proceedings altogether because a limited number of parties opt-out may not be a favourable option for the Commission. Indeed, the Commission has chosen to discontinue settlement proceedings altogether in respect of all parties in only one prior case, *Smart Card Chips* [24]. In practice, where the Commission is faced with an opt-out situation, it will examine the specific circumstances of the case and decide whether to have all parties revert to the ordinary contested procedure, or instead go down a dual enforcement track [25]. To date, the Commission has chosen to conclude hybrid settlements in the *Animal Feed Phosphates*, [26] *Euro Interest Rate Derivatives* [27], *Yen Interest Rate Derivatives*, [28] *Steel Abrasives*, [29] *Canned Mushrooms* [30] and *Truck Producers* [31] investigations.

Hybrid settlements are also being pursued at national level. In the UK, the (then named) Office of Fair Trading reached a hybrid settlement regarding the distribution of Mercedes-Benz commercial vehicles (trucks and vans) back in 2013. [32] In France, the hybrid settlement process is well-established [33]. Most recently, the FCA concluded a hybrid settlement when one of the parties to the *Professional Kitchen Equipment* investigation [34] opted-out of the settlement discussions. In Germany, the FCO has clearly established that it does not exclude the possibility of hybrid settlements [35]. Examples of recent German hybrid settlements include the investigations in *Concrete Pipe*, [36] *Coffee Products*, [37] *Household Porcelain* [38] and *Ophthalmic Lenses* [39]. In Belgium, although no hybrid settlements have been concluded to date, there are no provisions in the Competition Act barring the Belgian Competition Authority from making use of them in the future. In South Africa, the settlement procedure is flexible, with parties to the investigation being able to

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opt-out from settlement discussions and revisit their decision at a later stage. Settlement discussions are done on a "without prejudice" basis and do not affect the legal position of the party to the investigation should it ultimately decide to contest the case. Finally, while there may not be a formalised settlement regime in Australia, discounts may be obtained by co-operation stopping short of a full immunity application, as explained above. In Australia, there may be a situation where one party co-operates while others continue to challenge proceedings fully. In a recent cartel case, two parties "settled" with the ACCC and received penalties as agreed with the ACCC, whereas contested proceedings continue against another party, PZ Cussons [40].

EU hybrid settlements recently came under scrutiny by the EU Courts in Luxembourg in the *Timab* [41] case. The party opting out appealed the Commission's decision, alleging that it was penalised for withdrawing from the settlement discussions in *Animal Feed Phosphates*. In its ruling, the General Court ("GC") ruled that the Commission must not discriminate between the participants to the same cartel in determining the amount of the fine (including between settling and non-settling parties) [42]. Yet, the GC found that the 25% increase in the fine was not a result of discrimination against non-settling parties, but rather a consequence of *Timab* changing its admissions under the leniency programme [43]. *Timab* serves as a warning that parties need to carefully examine the various fining scenarios that may be applied outside the settlement procedure and calibrate their strategy accordingly. Whilst certain core parameters of the case such as duration and products / customers / territories in scope are likely to be consistent across settling and non-settling parties, a party that is likely to receive significant leniency reductions or reductions for cooperation outside of the scope of leniency, should carefully consider whether it makes sense to withdraw from the settlement process.

## V. Appeals of Settlement Decisions

An appeal of a settlement decision by a party that has settled with the authority is a possibility in the EU, albeit it may appear counterintuitive. It has been noted by academics and practitioners, including Commission officials, that there is "little point in further litigation" if a party has decided to settle [44]. This is because any settlement is an agreement by the party with the Commission's view of the infringement, as well as a respective acceptance of liability.

Recent practice, however, indicates that settlement proceedings and judicial appeals are by no means mutually exclusive when it comes to the calculation of the fine, rather than a challenge on liability grounds. At EU level, *Société Générale*, a settling party in *Euro Interest Rate Derivatives*, was the first company to contest a settlement decision [45]. It claimed, among other things, that the Commission committed a manifest error of assessment in the determination of the method of calculating the value of sales, and infringed its duty to state reasons, its duty of diligence, violated the principle of equal treatment as well as the protection of legitimate expectations [46]. *Société Générale* did not challenge the core facts of the case nor the legal assessment by the Commission. An appeal of the findings of fact and their legal assessment would likely have had little chance of success, given that *Société Générale* had already admitted liability during the settlement proceedings. Therefore, *Société Générale* contested the fine calculation on the basis of a number of fundamental principles of EU law [47].

*Printeos*, a settling party in *Paper Envelopes*, lodged a similar appeal against the settlement decision addressed to it. Among other things, it argued that the Commission infringed its duty to state reasons and the principle of equal treatment in setting the basic amount of the fine [48]. In *Paper*

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*Envelopes*, pursuant to point 37 of the Fining Guidelines, the Commission reduced the fines imposed on most of the parties given the mono-product nature of those businesses. Printeos contested that, in so doing, the Commission treated it unfavourably compared to the other parties to the investigation.

The first settlement appeals at EU level indicate that providing the parties with a description of the manner in which the fine will be calculated, as well as the range of potential fines to be imposed, may not always be enough to remove the risk of appeals. Since settlement discussions are held on a confidential bilateral basis, the parties only get a complete picture of their situation compared to the other settling parties once the settlement decision is issued. Does the fact that the parties agreed to a maximum potential fine during the settlement discussions bar them from successfully arguing that a lower fine should have been imposed, once it is clear how the other parties to the settlement were fined? There is at least one early indication that parties are not barred from successfully contesting the Commission's fine calculation, as in the *Société Générale* case the Commission agreed to recalculate the fine, even before the GC had a chance to rule on the appeal. However, the question remains as to whether, if an appellant's arguments are rejected by the EU Courts in Luxembourg, the 10% fine reduction could be withdrawn on account of reduced procedural efficiency. Indeed, in the UK, settlement discounts are no longer applicable if a settling party decides to appeal the CMA's decision. This will be an interesting point to consider when the appeal in *Paper Envelopes* is ruled upon. An alternative would be to use the model applied in Belgium, where a settlement decision cannot be appealed (irrespective of whether the appeal is on liability or fine calculation).

## **VI. Impact on Private Damages Actions**

There has been a lot of discussion in recent years on what impact an increased use of settlement proceedings may have on private damages actions. At EU level, it has been argued that settlement proceedings may pose hurdles for private damages claimants to make their case.

On the one hand, it is worth noting that both ordinary contested procedure and settlement decisions are deemed to irrefutably establish an infringement of competition law for the purposes of an action for damages [49]. There can be no question as to whether an infringement actually took place.

However, the parties' Settlement Submissions, which may contain useful information including an express admission of liability, are protected from disclosure before national courts [50]. In addition, the settlement process, where settlement submissions feed directly into the scope and wording of final settlement decisions, provides more scope for settling parties to argue for the exclusion or rephrasing of findings which may be harmful to them in any subsequent private damages actions. Indeed, this opportunity may ultimately prove to be one of the key benefits of settlement for the settling parties. Settlement proceedings culminate in shorter decisions that do not contain the level of detail that one finds in ordinary contested procedure decisions [51]. In this context, it is worth noting that to the extent damages claims relate to elements of the infringement that are not identified in the (shorter) settlement decision, those claims would need to be pursued on a stand alone basis.

Moreover, whilst the national court may, upon request of a claimant and subject to specific conditions and exceptions, order the defendant, third parties, or competition authorities to disclose relevant contemporaneous evidence which lies in their control [52], in practice, whether such an order will be made depends on a number of factors (e.g., the nature of the claim, whether there is a

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related investigation that is still ongoing etc.).

Significant risks arguably arise in relation to hybrid settlements. Settling parties may be faced with a situation where the (longer) ordinary contested procedure decision includes details that private damages claimants could use in actions against them. Indeed, in *Timab* the decision addressed to the party that opted-out included information on a time period for which the Commission could not establish that party's participation in the infringement. This information was however directly relevant to the settling parties and could have probative value in private damages actions brought against them.

Settling parties may also find themselves facing private damages claims more quickly than non-settling parties. Whereas in *Animal Feed Phosphates* the Commission adopted the settlement and the ordinary contested procedure decisions at the same time, in all hybrid settlements that have followed since then, the Commission published the settlement decision first with the ordinary contested procedure decision following at a later stage. Given that, in principle, the parties to the investigation face joint and severable liability for the totality of damages, this timing may result in settling parties facing private damages actions before non-settling parties for the entire loss suffered by the claimants [53]. Furthermore, the fact that non-settling parties may well appeal the ordinary contested procedure decision could result in settling parties being able to claim contribution from non-settling parties only after the appeal proceedings are over and the competition authority's decision becomes final. Interestingly, to potentially avoid such issues, the FCA in France announced that it will not publish the settlement decision in *Professional Kitchen Equipment* until the decision in the ordinary procedure has been issued [54]. However, if the *Edeka* case [55] before the EU Courts in Luxembourg is any indication, private damages claimants are unlikely to accept such delays lightly. Edeka has challenged the Commission's decision refusing access to the non-confidential version of the settlement decision and/or a non-confidential version of the list of documents in the file in *European Interest Rate Derivatives*. [56]

An additional risk for settling parties to consider in hybrid cases is that of a potential court annulment of a contested Commission decision. Whilst this has not yet been tested, there is a risk that parties settling with the Commission will have their right of appeal time-barred by the time a non-settling party has successfully appealed a Commission infringement decision. This was the case for Gallaher and Somerfield in the UK, who had entered into early resolution agreements with the OFT. Gallaher and Somerfield sought to appeal out of time, after the CAT quashed the OFT's findings on an appeal made by other parties involved in the case [57]. What this type of outcome may mean in practice is that any damages actions against the non-settling party in a hybrid case will have to be made on a stand alone basis (given their successful appeal on liability), whilst settling parties will still remain the subject of a Commission decision and, thus, exposed to follow-on damages claims.

The interplay between hybrid settlement decisions and private damages actions will be a fascinating and very important area for practitioners to monitor over the coming years, and feed into their strategic assessments of how to handle settlement cases. An interesting counter-consideration arises when considering the US position, taking into account that the US is the jurisdiction which has to date seen the greatest amount of private action cartel litigation. There is an observable trend in the US that, where a group of defendants has already been pursued, those settling with the private action claimants early on are often required to provide assistance (usually by means of additional



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documents or testimony) against the remaining defendants. The result is that early settlers in a private action claim in the US might face less incriminating evidence and, therefore, negotiate lower damages figures. As cartel investigations are increasingly "global" in nature, fitting the pieces of the jigsaw together and ensuring the best possible outcomes across jurisdictions, both in terms of administrative fines and damages exposure, will increasingly be the core strategic challenge facing practitioners and the clients that they represent.

[1] The EU settlement procedure entered into force on 1 July 2008, through the adoption of Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ L 171/3, 1.7.2008). The Commission published shortly thereafter its Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167/1, 2.7.2008) ("**Settlement Notice**").

[2] This is based on settlement decisions published in full as of the date of this article.

[3] Decision No. 628/2016 of the Hellenic Competition Commission.

[4] See the announcement made by the Hungarian Competition Authority on 27 July 2016 in relation to its investigation into collusion in the car battery recycling market (2015) (Vj/2/2015).

[5] BKartA, Haribo, decision from 1 August 2012. See [European Competition Network Brief, The German Competition Authority fines a confectionery manufacturer for anti-competitive exchange of information \(Haribo\), 1 August 2012, e-Competitions Bulletin August 2012, Art. N° 49689](#).

[6] BKartA, B2-70/13, WALA Heilmittel GmbH, decision from 31 July 2013. See [German Competition Authority, The German Competition Authority imposes fines on account of vertical price fixing practices on the market for distribution of natural cosmetics \(Dr. Hauschka\), 31 July 2013, e-Competitions Bulletin July 2013, Art. N° 59596](#) and [Andrzej Kmiecik, The German Competition Authority fines a producer of natural cosmetics for vertical price fixing \(WALA\), 31 July 2013, e-Competitions Bulletin July 2013, Art. N° 58937](#).

[7] BKartA, B2-52/12, Tönnies Holding/Tummel GmbH & Co. KG, decision from 15 January 2013. See [German Competition Authority, The German Competition Authority imposes a fine of 90,000 euros on a natural person for the incomplete notification of the acquisition of a slaughtering company \(Clemens Tönnies\), 15 January 2013, e-Competitions Bulletin January 2013, Art. N° 64698](#).

[8] Hellenic Competition Commission, "HCC introduces settlement procedure for cartels", press release of 21 July 2016. See [Hellenic Competition Authority, The Hellenic Competition Authority introduces settlement procedure for cartels, 21 July 2016, e-Competitions Bulletin September 2016, Art. N° 80977](#).

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[9] Until recently there were no settlement decisions in which the Commission imposed a recidivism uplift. However, in *Alternators and Starters* (Case COMP/40028), the Commission imposed a 50% uplift on two parties for their involvement in the cartel after the adoption of the decision in *Gas Insulated Switchgear* (Case COMP/38899).

[10] The "transaction procedure" was introduced by the law Macron of 6 August 2015 at Article L. 464-2 of the French Commercial Code. The transaction procedure aims, among other things, at (i) improving the transparency and brevity of settlement discussions, and (ii) resulting in fewer appeals from settled cases.

[11] *Truck Producers* (Case COMP/39824). See [European Commission, The EU Commission fines truck producers for cartel \(MAN\), 19 July 2016, e-Competitions Bulletin July 2016, Art. N° 80282](#) and [Richard Burton, The EU Commission imposes record-breaking fines of € 2.9 billion against truck producers \(MAN, Volvo/Renault, Daimler, Iveco, DAF\), 19 July 2016, e-Competitions Bulletin July 2016, Art. N° 80690](#).

[12] From a fining perspective, discounts are capped at 20% for settlements initiated pre-Statement of Objections, and at 10% for settlements initiated post-Statement of Objections.

[13] Hellenic Competition Commission, "HCC introduces settlement procedure for cartels", press release of 21 July 2016.

[14] However, not all parties participating in the settlement process with the Commission have applied for leniency. For instance, there were no leniency applications in *Power Exchanges* (COMP/39952), and there was only one leniency applicant in each of *Water Management Products* (COMP/39611) and *Steel Abrasives* (COMP/39792).

[15] See MEMO/08/458 Brussels, Commission introduces settlement procedure for cartels - frequently asked questions, 30 June 2008.

[16] *Automotive wire harnesses*, (Case COMP/39748), see [Richard Burton, The EU Commission fines € 141.8 M four producers of wire harnesses for rigging a series of tenders in breach of Article 101 TFEU \(Automotive component suppliers' cartel\), 10 July 2013, e-Competitions Bulletin July 2013, Art. N° 56861](#). Regarding the decisions on the same cartel in the United States see [Jeffrey May, The US DoJ obtains guilty plea by two Japanese suppliers of automotive electrical components imposing a \\$548 M fine for their involvement in price fixing and bid rigging conspiracies in the auto parts sales \(Automotive component suppliers' cartel\), 30 January 2012, e-Competitions Bulletin January 2012, Art. N° 42198](#) ; in Japan see [Japanese Competition Authority, The Japan Fair Trade Commission issues cease and desist orders and imposes surcharges on participants in bidding for automotive wire harness and related products \(Automotive component suppliers' cartel\), 19 January 2012, e-Competitions Bulletin January 2012, Art. N° 69810](#) ; and in China see [Michael Gu, The](#)

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[Chinese NDRC imposes record fines and applies explicitly for the first time its leniency program \(Automotive component suppliers' cartel\), 20 August 2014, e-Competitions Bulletin August 2014, Art. N° 68697](#) and [James R. Modrall, Shan Hu, The Chinese NDRC fines the undertakings participating in two cartels in the car insurance and automotive component sectors and publishes its decisions \(Zhejiang car insurance cartel and Automotive component suppliers' cartel\), 18 September 2014, e-Competitions Bulletin September 2014, Art. N° 69432.](#)

[17] Paragraph 14.3 of the Guidance on the CMA's investigation procedures in Competition Act 1998 cases, March 2014.

[18] *Personal and Home Care Products*, Decision no 14-D-19 of 14 December 2014. See [French Competition Authority, The French Competition Authority imposes heavy fines on several manufacturers of home and personal care products for having implemented concerted practices \(Colgate-Palmolive, Henkel, Reckitt Benckiser\), 18 December 2014, e-Competitions Bulletin December 2014, Art. N° 70665.](#)

[19] *Fresh Milk Products*, Decision no 15-D-03 of 12 March 2015.

[20] This was recently illustrated by the Federal Court of Australia decision involving the supply of LPG gas for forklifts. In that case, the ACCC reached settlements prior to the first day of trial with each of the parties to the proceedings. Renegade Gas paid a penalty of \$4.8 million whereas the other party to the cartel, Speed-E-Gas, paid a penalty of \$3.1 million. Speed-E-Gas cooperated with the ACCC's investigation from an early stage and the lower penalty reflects that cooperation. Renegade Gas settled the proceedings with the ACCC a few weeks prior to trial and was given a modest discount as a result. See *ACCC v Renegade Gas Pty Ltd* (trading as Supagas NSW) [2014] FCA 1135. See [Australian Competition Authority, The Australian Competition and Consumer Commission institutes proceedings in the Federal Court in Sydney against forklift gas supply cartel \(Renegade Gas\), 23 August 2012, e-Competitions Bulletin August 2012, Art. N° 57575.](#)

[21] Settlement Notice, points 11 and 22. To date, there has been no case where the settlement procedure was pursued despite some of the parties' refusal to participate in it from the outset. The decision to opt-out has always been taken in the course of the settlement discussions. Whereas the reasons for opting-out are not always clear, they may be owed to a number of factors – such as peer pressure to enter into settlement discussions in the first place, profound disagreements with the authority's objections and estimates of potential fines, or the lack of a serious commitment by senior management to admit liability.

[22] To this end, prior to entering into settlement discussions, the Commission rigorously screens cases to determine whether they are suitable for a settlement resolution. See examples of screening criteria in the Settlement Notice, point 5.

[23] For example, a more limited number of potential appeals before the EU Courts in Luxembourg.

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[24] Smart Card Chips (Case COMP/39574).

[25] Flavio Laina and Aleko Bogdanov, "The EU Cartel Settlement Procedure: Latest Developments", *Journal of European Competition Law and Practice*, 2014, Vol. 5, No. 10. Among other things, the Commission will consider the progress already made in the settlement discussions with the other parties.

[26] Animal Feed Phosphates (Case COMP/38866). See [Peter Crowther, The European Commission fines animal feed phosphates producers for price-fixing and market-sharing in its first "hybrid" cartel settlement case \(Yara Phosphates, Tessenderlo Chemie\), 20 July 2010, e-Competitions Bulletin July 2010, Art. N° 37343.](#)

[27] Euro Interest Rate Derivatives (Case COMP/39914). See [European Competition Network Brief, The EU Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry \(Barclays, Deutsche Bank, RBS and Société Générale\), 4 December 2013, e-Competitions Bulletin December 2013, Art. N° 62161.](#)

[28] Yen Interest Rate Derivatives (Case COMP/39861).

[29] Steel Abrasives (Case COMP/39792).

[30] *Canned Mushrooms* (Case COMP/39965). See [European Commission, The EU Commission fines an undertaking in the market of canned mushrooms for its participation to a cartel \(Riberebro\), 6 April 2016, e-Competitions Bulletin April 2016, Art. N° 79155.](#)

[31] *Truck Producers* (Case COMP/39824).

[32] Distribution of Mercedes-Benz commercial vehicles (vans), Case CE/9161-09, 27 March 2013. See [Richard Burton, The UK OFT fines car manufacturer and three dealers £ 2.6 M over anti-competitive behaviour \(Mercedes-Benz\), 21 February 2013, e-Competitions Bulletin February 2013, Art. N° 58201.](#)

[33] For example: *Cat and Dog Food Sector*, Decision no 12-D-10 of 20 March 2012, see [European Competition Network Brief, The French Competition Authority fines three leading companies in dog and cat food sector \(Nestlé, Mars, Colgate-Palmolive\), 20 March 2012, e-Competitions Bulletin March 2012, Art. N° 46697](#); *Temporary Employment Sector*, Decision no 09-D-05 of 2 February 2009; and *Plywood*, Decision no 08-D-12 of 21 May 2008. See [Charles Saumon, The French NCA applies leniency for the third time and fines six manufacturers for price fixing in the plywood sector \("Plywood cartel"\), 21 May 2008, e-Competitions Bulletin May 2008, Art. N° 21535.](#)

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[34] Contrary to the practice of the EU Commission in case of hybrid settlement, the FCA does not publish the settlement decisions of the settling parties until the adoption of a decision on the non-settling parties. See [Lettre Creda-Concurrence, 4-8 July 2016 \(in French\)](#).

[35] BKartA, Merkblatt zum Settlement-Verfahren in Bußgeldsachen, February 2016, page 2. See [Silke Heinz, The German Competition Authority publishes note on settlements in national antitrust proceedings, 23 December 2013, e-Competitions Bulletin December 2013, Art. N° 62389](#).

[36] BKartA, B12-15/09, Betonrohre, decision from 10 August 2011.

[37] BKartA, B11-18/08, Instant-Cappuccino, decision from 18 October 2011.

[38] BKartA, B12-14/10, Haushaltsgeschirr, decision from 17 October 2013.

[39] BKartA, B12-11/08, Brillenglashersteller, decision from 28 May 2010.

[40] *ACCC v Colgate Palmolive Pty Ltd (No 2)* [2016] FCA 528; *ACCC v Colgate Palmolive Pty Ltd (No 2)* [2016] FCA 676. See [Olivier Beddeleem, The French Competition Authority fines the four major laundry detergent manufacturers for violating cartel legislation \(Unilever, Procter & Gamble, Henkel and Colgate Palmolive\), 8 December 2011, e-Competitions Bulletin December 2011, Art. N° 43693](#) and [European Competition Network Brief, The French Competition Authority detects cartel of world four major detergent manufacturers and imposes fines amounting to € 368 000 000 \(Unilever, Procter & Gamble, Henkel and Colgate Palmolive\), 8 December 2011, e-Competitions Bulletin December 2011, Art. N° 44833](#).

[41] Case T-456/10 – *Timab Industries and CFPR v Commission*, on appeal in Case C-411/15 P (not yet decided). See [Patrick Harrison, The EU Court of Justice receives an appeal from an undertaking part to a cartel settlement against EU General Court judgement in the animal feed phosphates cartel case \(Timab\), 27 July 2015, e-Competitions Bulletin July 2015, Art. N° 75777](#) and [Richard Burton, The European General Court rejects an appeal against a Commission decision fining companies for a cartel participation \(Hybrid Cartel\), 20 May 2015, e-Competitions Bulletin May 2015, Art. N° 73720](#).

[42] Case T-456/10 – *Timab Industries and CFPR v Commission*, para. 74.

[43] Case T-456/10 – *Timab Industries and CFPR v Commission*, para. 94.

[44] Flavio Laina, and Elina Laurinen, "*The EU Cartel Settlement Procedure: Current Status and Challenges*", *Journal of European Competition Law & Practice*, 5 July 2013.

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[45] Case T-98/14 – *Société générale v Commission*.

[46] Application in Case T-98/14 – *Société générale v Commission*, OJ C 142/36, 12.5.2014.

[47] Société Générale eventually withdrew its appeal, following an amendment of its fine by the Commission on the basis of corrected financial figures supplied (Order of the President in Case T-98/14 – *Société générale v Commission*, OJ C 136/44, 18.4.2016).

[48] Application in Case T-95/15 – *Printeos and Others v Commission*, OJ C 127/36, 20.4.2015.

[49] Directive 2014/104/EU, Article 9(1). The Directive further provides that where a final decision is adopted by the competition authority in another Member State, the national court will consider that final decision to be at least *prima facie* evidence that an infringement of competition law occurred (Article 9(2)).

[50] In the past, private damages claimants attempted to get access to leniency statements. Similar attempts could be made as regards Settlement Submissions. However, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349/1, 5.12.2014) prohibits the disclosure of Settlement Submissions by law (Article 6(6)(b)). EU Member States have until 27 December 2016 to transpose the Directive in their national legal orders. Following that date, there will be no room for arguing that Settlement Submissions (or leniency statements) should be disclosed. However, national courts will be able to order the disclosure of withdrawn settlement submissions, after the competition authority has closed its proceeding (Directive 2014/104/EU, Article 6(5)(c)).

[51] To give some recent examples: the settlement decision in *Alternators and Starters* (Case COMP/40028) was 27 pages long; the settlement decisions in *Blocktrains* (Case COMP/40098) and *Parking Heaters* (Case COMP/40055) were 25 pages long each; whereas the settlement decision in *Power Exchanges* (Case COMP/39952) was 23 pages long.

[52] Directive 2014/104/EU, Articles 5 and 6.

[53] Directive 2014/104/EU, Article 11.

[54] [Lettre Creda-Concurrence, 4-8 July 2016 \(in French\)](#).

[55] Case T-611/15– *Edeka-Handelsgesellschaft Hessenring v Commission* (not yet decided).

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[56] Application in Case T-611/15- *Edeka-Handelsgesellschaft Hessenring v Commission*, OJ C 27/65, 25.1.2016.

[57] See *The Office of Fair Trading v Somerfield Stores Limited and Co-operative Group Food Limited* [2014] EWCA Civ 400.

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