CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
March 2013 (3)

A Plea for Plea Bargaining—Closing the Gaps Between the EU's Leniency, Settlement, and Commitments Procedures

Ken Daly
Sidley Austin LLP

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I. INTRODUCTION

In laudable efforts to increase its output, the European Commission has developed three tools—leniency, settlements, and commitments—to help it discover infringements of EU competition law, to help it prove those infringements, and to help it bring cases to a speedy conclusion. Although these tools encourage cooperation and do reduce the resources needed to resolve cases, they also lack coherence and to some extent the Commission has needlessly tied its own hands. In some cases—even where parties are willing to cooperate—the Commission's own procedures render it incapable of concluding cases quickly. This becomes most evident in cases with an international dimension where regulators in other jurisdictions can wrap up their own investigations of the same issues several years before the Commission.

At least one of the Commission's three tools has been used in a majority of all antitrust cases leading to a decision in the last decade. According to a recent speech by Commissioner Almunia, in the 10 years since the coming into force of Regulation 1/2003, the Commission has adopted 41 decisions in which commitments were considered: in 15 of these cases, prohibition decisions were adopted while in the remaining 26, commitments were accepted. In the same period, more than 50 cartel prohibition decisions have been taken, almost all of which have included some element of leniency, and six of which have involved the more recent settlement procedure.

The Commission's choice of tool can be difficult as it has imposed strict constraints upon itself, which prevent the use of some of its best tools in certain cases. However, by recalling the essential purpose of each of the existing tools, one can see a high degree of overlap. A single, more flexible, "plea-bargaining" tool would make the Commission's enforcement activities much more efficient and, at the same time, would reduce the chances of parties subject to investigations feeling needlessly constrained by the Commission's need to choose among its three existing tools.

II. LENIENCY

The Commission's long-standing leniency program—under which the first undertaking to reveal evidence to the Commission may receive fines immunity, and subsequent companies offering "significant added value" in helping the Commission to prove an infringement may receive fine reductions of up to 50 percent depending on the order of their presentation to the Commission—continues to be the main driver of Commission enforcement activity in relation to cartels. Those seeking immunity or leniency are required to acknowledge their role in the

[1] Ken Daly is a partner in the Brussels office of Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP, its partners, or its clients.
The author would like to thank Patrick Harrison for his valuable contributions and insights.

activities constituting the infringement in question and are required to cooperate in helping the Commission to prove its case.

The policy logic for the immunity part of the leniency program is that the Commission foregoes the opportunity to impose penalties in exchange for being alerted to the existence of a cartel that it might not otherwise have discovered. The policy logic for the existence of subsequent fine reductions is that the additional evidence provided renders it more likely that the Commission will be able to prove the existence of the infringement to the requisite standard with the cooperation of those participating in the program and, thus, more efficiently.

III. SETTLEMENTS

Settlements were created to accelerate the end of proceedings in cartel cases, including those already within the leniency program.

However, the term "settlement" is somewhat misleading inasmuch as it suggests a negotiated and mutually agreed outcome. In reality, the Commission's settlement program is an opportunity for those under investigation to earn a limited fine reduction in exchange for pleading "no contest" to the Commission's charges.

At an advanced stage in the Commission's investigation, parties may be shown the evidence in the Commission's file. Having considered their position, parties may be ready to "throw in the towel" in exchange for a speedier end to the case. To qualify, those "settling" must give a written submission including an unequivocal acknowledgement of their liability, an outline of the main facts of the case, a summary of the object of the infringement, a description of how it was implemented, and an indication of the maximum amount the party itself foresees the Commission imposing as a fine, and which the party would accept under the settlement procedure. Assuming the Commission accepts the party's "surrender," the Commission will adopt a final decision in which the party may receive a maximum reduction of 10 percent of its fine (though the real value of this 10 percent will not be known until the Commission's final decision is taken, as only then will the total amount of the fine become known).

While the policy aims behind the Commission's leniency program are to ensure the Commission is alerted to the existence of cartels and can prove its cases to the requisite standard, the settlement process does not require any evidence to be handed over. It merely requires an acceptance of the Commission's case and an acknowledgement of responsibility. The policy rationale for the latter is therefore limited to speeding up the conclusion of existing cases and reducing subsequent litigation before the European Courts.

As the main focus of the settlement tool is the accelerated completion of cases and as—in cartel matters—the Commission takes decisions against multiple infringers in a single collective decision—an interesting quirk arises. If some wish to settle and some do not, the Commission might make few if any procedural economies by settling with only some as it will still need to proceed to a full "contested" decision against the remainder. For this reason, settlement discussions are conducted with all parties simultaneously and settlement might not be available unless all parties are prepared to participate. This greatly limits the scope for an early conclusion of cases, even for parties who are prepared to accept their responsibility in full.

IV. COMMITMENT DECISIONS

Under the Commission's commitments procedure, in exchange for forward-looking commitments to address competition concerns, the Commission agrees to close its case without imposing any penalties for the behavior that has brought the case to the Commission's attention.

The rationale for this procedure is somewhat confused.

Article 9 of Regulation 1/2003 explains that: "Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings." Thus, most parties and their advisors see commitments as a means of persuading the Commission to close an infringement case without imposing fines.

Indeed, the reality is that the Commission extracts commitments about future behavior through the threat of fines for past behavior. This is evident, for example, in the Commission's current negotiations with Google which gives rise to headlines such as "Formal EU charges could lead to fine up to $5 bn - Google in settlement talks with EU regulators to avert sanction."[2]

However, the confusion arises because Recital 13 of Regulation 1/2003 states, "Commitment decisions are not appropriate in cases where the Commission intends to impose a fine." In a "frequently asked questions" memorandum dated March 8, 2013,[3] the Commission declared that:

> commitment decisions are not appropriate in cases where the Commission considers that the very nature of the infringement calls for a fine. Consequently, the Commission in particular does not apply the commitment procedure to secret cartels that fall under the Leniency Notice. Furthermore, in cases like cartels, there is no commitment possible to solve the competition problem. In such cases, an order to stop the practice and/or to pay a fine is the only appropriate outcome.

At least formally therefore, the Commission's own procedures require it to choose (often artificially) between imposing a fine for a past infringement **or** concluding that the nature of the infringement never called for a fine in the first place, and can therefore be settled via commitments.

The rigidity of these procedures leaves no possibility of a negotiated middle proposition: that the past behavior did merit a fine, and in exchange for an agreement payment **and** commitments about the future, the Commission will close its case.

V. A MODEL FOR NEGOTIATED OUTCOMES

The above three models have their own origins and purposes, and, at least to some degree, each has been successful in its own right.

However, having three separate systems generates gaps and creates problems. Would a single, more flexible, and all inclusive "plea-bargaining" system not be more effective? Why could

[2] Thomson Reuters (March 13, 2013).

[3] Memo/13/189

the Commission not simultaneously offer rewards and incentives for evidence, for cooperation, and for compliant future behavior all in one go?

Consider an example: if the Commission were faced with a cartel case involving an immunity applicant, second- and third-placed leniency applicants, and a fourth party who contests some—but not all—of their involvement. The immunity applicant has no financial interest in participating in the settlement procedure, making it redundant for that party. Parties two and three may have plenty to offer in terms of cooperation—additional evidence, paying fines, designing structural solutions for the future, and helping the Commission to bring the matter to a close—but the rewards and incentives for doing so diminish the later one joins the leniency program. The rigidity of the leniency program means that even if the third adds significantly more value than the second, the Commission has little flexibility to take this into account, and the incentives of the third are therefore to do enough to qualify for the program, but no more. The fourth party may have been a more peripheral player and may dispute parts of the Commission's version of events. This undertaking has nothing concrete to gain by cooperating (apart perhaps from a very uncertain recognition of cooperation in any fines calculation). Also, the Commission has little to offer this party for their cooperation and the absence of their cooperation may make it impossible to pursue settlement with the others, even though they are prepared to admit their responsibility in full.

In such a case the Commission would have enough evidence to establish an infringement and issue a prohibition decision against the cartel. The need for firm action against the cartel would be satisfied. However, the Commission would have denied itself the possibility of an early resolution to the case because it could not agree the exact scope of participation of a peripheral player that was prepared to admit to its (albeit lesser) involvement. The fourth undertaking may even be prepared to pay a penalty for the uncontested part of its participation, provided it did not have to admit liability for the contested part. Surely this would be a welcome option for both the Commission and the fourth party. And it would not be difficult to achieve. The negotiated outcome available in commitments cases could simply be expanded to include voluntarily paid penalties for past behavior, and also be made available in at least some settlement-worthy cases where it would be in the interests of achieving an efficient outcome.

Similarly, in more complex cases—such as Article 102 proceedings—the Commission has found itself in the binary lock of either dealing with cases on a full decision basis (without any possibility of early termination or agreement) or on a commitments basis (in which case the Commission can extract no penalty). Surely there are some cases in which the Commission would want to accept an agreed payment along with an admission of partial responsibility in order to resolve a case early, or—in suitable cases—even a voluntary settlement payment without an admission of responsibility? Surely also there are cases where a sanction for past behavior is appropriate, but it is also sensible to agree commitments for the future at the same time (rather than impose remedies through the more rigid mechanisms of a prohibition decision)?

In the United States, plea bargaining is both an investigative tool and an instrument that rewards the cooperation of companies. Crucially, plea bargains can be concluded with one company at a time, instead of requiring all companies to participate (unlike Commissions settlements). Authorities like the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), and Securities and Exchange Commission ("SEC") routinely accept plea bargains—

either including admissions of liability or not—and covering either past or future behavior (or both past and future behavior) as the case requires.

This explains why jurisdictions that use plea bargaining can close cases with individual companies much faster than the Commission can, even when investigating the same conduct. For example, the U.S., U.K., and Swiss authorities have each already closed cases with a number of the banks caught up in the LIBOR investigations. Even though the Commission's related case is based on leniency applications, its investigation into the same facts could still run for years.

VI. AN ANSWER TO THE REDRESS DEFICIT?

If there were a single plea-bargaining system which was flexible enough to meet the different circumstances that arise in different types of antitrust cases, it would also seem relatively straightforward for the Commission then to direct its attention to what it insists is the greatest unanswered need in EU competition enforcement: the need for redress for those harmed by infringements.

It is already the case that regulators around the world have the ability to require (in the context of negotiated outcomes) the adoption of voluntary redress schemes. The U.S. SEC, for example, operates a "fair funds" scheme under which companies agree to pay out to injured parties as part of the package of measures closing individual infringement cases. In 2012 the United Kingdom proposed the introduction of "Deferred Prosecution Agreements" under which businesses under investigation for certain financial crimes would be able to strike a deal to defer (and ultimately discontinue) a prosecution, pending compliance with a set of conditions which would potentially include punishments (including payment of penalties), disgorgement of profits, payment of reparations to victims, disclosure to prosecutors of evidence including giving access to witnesses, an obligation to replace implicated individuals, and implement compliance policies going forward.

The Commission's traditional reluctance to get involved in such broad-reaching negotiated outcomes—including redress—is largely attributed to resources: it argues that it would simply be too complicated and time consuming for the Commission to administer redress.

This may be true if one were to add a redress mechanism to the end of the existing procedural timeline (potentially five years for a full infringement procedure, and another five years on various appeals, potentially only then followed by private follow-on actions). However, wouldn't the incentives of all concerned—Commission, investigated party, and victim—be far better served by a negotiated solution which included a voluntary redress mechanism for victims as part of a global settlement in the first phase (removing the need both for appeals and for follow on litigation)?

VII. PROBLEMS WITH NEGOTIATED OUTCOMES

These reflections would be incomplete without an acknowledgement that negotiated outcomes have their own problems. Specifically, the increased use of commitments decisions by the Commission in recent years has led to a deficit of precedent and carefully reasoned decisions in some key policy areas. Indeed, in many cases—on the Commission's own argument—it is precisely because the areas are fast moving and uncertain that they are not cases suitable for fines

but are instead cases suitable for prospective remedial commitments only. It is these cases that most need careful investigation and reasoned decisions.

However, if the Commission were prepared to take a more radical approach to the negotiated resolution of cases, wouldn't it have far greater resources available to apply to the production of guidelines, block exemptions, and other policy statements that might play a greater role in preventing infringements in the first place? Couldn't the Commission also have greater recourse to its other procedures for helping companies understand difficult areas of competition law, including, for example, its notice on "informal guidance relating to novel questions," which has never been used since its publication in 2004?

Another potential objection might be the need for equal treatment. In cases where the Commission has been found to have applied incentives and cooperation benefits unevenly, appeals have followed. However, the equal treatment principle would merely require the Commission to be even-handed in its approach to negotiated solutions. The guidance that has been issued with respect to leniency, settlements and commitments all allow for differentiated outcomes in appropriate cases. Other regulators manage to achieve settlements while still respecting the fundamental right to fair and equal treatment. With appropriate guidance, fully negotiated outcomes should be equally possible in the Commission's competition cases.

VIII. TIME FOR GREATER FLEXIBILITY?

The Commission has focused on segments of its enforcement activities and tried to make those segments more efficient. This is welcome, but too inward-looking and too focused on the Commission's own processes rather than on the end-goals: to restore competition, provide appropriate penalties, and offer redress to victims. If the Commission dares to take the opportunity and adjust its procedures more globally, there may be a chance—at least in some cases—to achieve all of its goals in one negotiated "grand bargain," which could greatly reduce the strain on its enforcement resources, eliminate years of uncertainty for the businesses that might have erred, and offer victims meaningful redress up to a decade earlier than they might otherwise achieve it. Isn't it time for more dynamic enforcement through a full plea-bargaining system?