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Negotiation: In the shadow of competition law

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ABSTRACT

L'article explore une dimension cruciale mais encore inexplorée du droit de la concurrence – la négociation. Après avoir décrit les deux types de négociations en droit de la concurrence, à savoir, la négociation en asymétrie de position (dite "verticale") et la négociation à "armes égales" (dite "horizontale"), l'auteur y transpose les enseignements de la "négociation raisonnée" venues des Etats-Unis et, en particulier, ceux applicables en situation de négociation asymétrique entre entreprises et régulateurs.

The article explores a crucial but still unexplored dimension of competition law – negotiation. It discusses the two types of negotiations in competition law, namely, vertical (negotiation in the asymmetry of power) and horizontal (arm's length negotiation), then it delves into the lessons from US-pioneered "principled negotiation", in particular, those applicable to asymmetric negotiations between enterprises and regulators.

1. Competition law provides fertile ground for negotiation as it, by its nature, pits conflicting positions arising from clashing interests. This tension is intrinsic to the discipline. A considerable number of negotiated decisions (cartel settlements, settlements in actions for damages, commitment decisions, or remedies) are taken in the shadow of courts, in the Berlaymont building of the European Commission, at competition authorities' premises or at multinational headquarters (for the settlement of private actions[1]).

2. However, in spite of the increasing prominence of those decisions, awareness about the importance of negotiation skills is still limited within the competition law community.[2] We are still a long way behind the United States, where negotiation is a legal discipline in its own right.[3] Competition law is seldom addressed in academic or professional circles from the negotiation angle, despite the existence of economic literature[4] and economic models[5] on when it is beneficial to enter into a settlement from the perspective of both businesses and enforcers.

3. In many cases, after the law has played its role, the final outcome is determined in a negotiation whereby the enterprises and competition authorities concerned do not adhere to the application of well-established liability principles, but negotiate in the shadow of these legal principles. In other words, very often a negotiation is what determines the success or failure of the project or case at issue.[6]

4. Since the adoption of the policy of so-called "modernisation" of competition law, the development of negotiated solutions for the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) has grown to an unprecedented scale. Today most of the cases sanctioned by the Commission are settled through the leniency procedure[7] or, to a lesser extent, the commitment procedure.[8]

1 *See*, for a recent example, A. Yaïche and N. Hirst, Orange settles rival SFR's EUR3 billion antitrust suit, *MLex*, 23 March 2021.

2 A. Lamadrid, Negotiations (and other non-legal abilities) in Antitrust Practice, Chillin'Competition, 29 August 2012.

3 *See* the pioneering article by H. Jacob, The Elusive Shadow of the Law, *Law & Society Review*, 26(3), 1992, pp. 565–590, which has raised awareness on this issue. *See also* courses on negotiation at Harvard Law School (https://www.pon.harvard.edu) or at Stanford (https://law.stanford.edu/courses/negotiation).

4 *See* P. Bougette, C. Montet and F. Venayre, Jeux de négociation dans les affaires antitrust : engagements et transaction, Concurrence et consommation, 146, 2006, pp. 50–56; and K. Edwards and J. Padilla, Antitrust Settlements in the EU: Private Incentives and Enforcement Policy, in *European Competition Law Annual 2008: Antitrust Settlements Under EC Competition Law*, C.-D. Ehlermann and M. Marquis (eds.), Hart Publishing, 2010, p. 661.

5 P. Choné, S. Souam and A. Vialfont, On the optimal use of commitment decisions under European competition law, *International Review of Law and Economics*, 37, 2014, pp. 169–179.

6 A. Lamadrid, *op. cit.*, note 2. This phenomenon dates back many years. In the eighties, only one case out of thirty was concluded by a formal decision (*see* the Commission's reply to a question from Mr Battersby, OJ C 118, 3.5.1983, p. 23).

7 Since 2011, more than 90% of the cartels prosecuted have been reported by applicants for immunity. *See* E. Sakkers and J. Ysewyn, *European Cartel Digest*, Supplement 30, November 2017, Wolters Kluwer; and http://ec.europa.eu/competition/cartels/cases/cases.html

8 Admittedly, it seems that the commitment procedure is now a less frequent choice for the Commission and investigated parties. For some of the reasons accounting for this decline, *see* E. Barbier de la Serre, Antitrust Alert: Will the European Commission Reduce Use of the Commitment Procedure in Dominance Cases?, Jones Day, May 2015. This trend is exemplified by the *Google Search (Shopping)* case (*see* Commission Decision of 27 June 2017, *Google Search (Shopping)*, case AT.39740), where the Commission reverted to the sanction procedure after engaging in a commitment procedure.

*All opinions expressed are solely my own and do not necessarily express the views or opinions of the CJEU. The author would like to thank Professor Laurence Idot for her enlightening advice in the writing of this article.

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The *sui generis* cooperation procedure for antitrust cases (as opposed to cartel cases) is also playing an increasing role[9] in the resolution of competition law disputes.

5. Negotiations before competition authorities can be divided into two categories. Competition authorities may negotiate directly with the infringing parties; in this situation, the negotiation may be considered as vertical or "asymmetric" because competition authorities enjoy, in principle, much more bargaining power than the parties with whom they negotiate (I.). Competition authorities may, on the other hand, oversee a negotiation *inter partes* (between the parties) within the framework of competition proceedings; in this situation, the negotiation may be considered as horizontal or at "arm's length" (II.). In both types of negotiations, even if negotiation skills are somewhat innate, we maintain that drawing upon the reasoned negotiation model[10] some principles should be applied to improve the outcome of the discussions (III.). The negotiated procedures before the European Commission serve as the basis for the findings in the present article. However, conclusions made are equally applicable for negotiations before national competition authorities (NCAs) inasmuch as they use the same settlement tools (transaction, leniency, commitments) as the European Commission.

I. Vertical negotiations: Negotiating with the Commission

6. Official position. European Commission officials have made perfectly clear, since the release of the Commission's "settlement package" in the autumn of 2007, that the European settlement procedure for cartel cases would not involve any bargaining.[11] As officials insisted in conferences, the Commission does not negotiate the appropriate sanction, a sentiment echoed in the published Settlement Notice.[12] However, at both the Commission and NCAs, the so-called "negotiated procedures" necessarily involve a dimension of "negotiation." This is true for the settlement procedure (1.), for the leniency procedure (2.) and for the commitment procedure (3.).

1. Settlement procedure

7. The settlement procedure, which is similar to a plea bargaining, is the place for negotiation. Initially put in place for secret cartels, it has been progressively extended to all antitrust cases[13] through the so-called "informal cooperation" procedure.

1.1 Cartel cases (formal cooperation)

8. Procedure. The procedure leading to the adoption of a settlement decision is described as follows in the Settlement Notice (in each phase of this procedure, negotiation is instrumental in the outcome of the case):

"*I. Investigation as usual*

– *Parties may express their interest in a hypothetical settlement.*

II. Exploratory steps regarding settlement

– *Letter to all companies (and MS* [Member States]*) informing of the decision to initiate proceedings in view of settlement (Article 11(6)) and requesting them to express their interest in settlement.*

III. Bilateral rounds of settlement discussions

– *Disclosure and exchange of arguments on potential objections, liability, fines range.*

– *Disclosure of evidence used to establish potential objections, liability, fines.*

– *Disclosure of other non-confidential versions of documents in the file, when justified.*

IV. Settlement

– *Conditional settlement submissions by the companies* (. . .)

V. 'Settled' statement of objections

– *Notification of streamlined SO* [statement of objections] *endorsing company's settlement submissions, where appropriate.*

– *Company's reply to SO confirming clearly that it reflects its settlement submission.*

VI. 'Settlement' Decision pursuant to Articles 7 and 23 of Regulation No (EC) [sic] *1/2003* (. . .)."[14]

9 *See* C. Gauer and J. Lübking, Cooperation with the European Commission in antitrust cases: A new way paved by the *ARA* case, *Concurrences* No. 1-2017, art. No. 83454, pp. 81–87.

10 This is the leading negotiation model used today. It has been popularised by the work within the context of the Harvard Negotiation Project of three professors, R. Fisher, W. Ury and B. Patton, and led to a reference book in the field of negotiation entitled *Getting to Yes: Negotiating Agreement Without Giving In*. We refer, in this article, to the third edition of this book (2011).

11 *See* European Commission, MEMO/08/458 of 30 June 2008, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions, https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_08_458.

12 *See* M. P. Schinkel, Bargaining in the Shadow of the European Settlement Procedure for Cartels, *The Antitrust Bulletin*, 56(2), 2011, p. 462. *See also* Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases, OJ C 167, 2.7.2008, pp. 1–6 (the "Settlement Notice"), recital 2; and K. Mehta and M. L. Tierno Centella, EU Settlement Procedure: Public Enforcement Perspective, in C.-D. Ehlermann and M. Marquis, *op. cit.* note 4, pp. 391–421.

13 In the present article, the term "antitrust cases" refers to Article 102 TFEU and Article 101 TFEU cases that are not secret cartels within the definition of the Leniency Notice.

14 *See* "*Overview of the procedure leading to the adoption of a (settlement) Decision pursuant to Articles 7 and 23 of Regulation No (EC)* [sic] *1/2003*" in the Settlement Notice.

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9. The signalling phase. In essence, phases 1 and 2 of the negotiation are a signalling game where the parties and the Commission explore whether they have a mutual interest in settling. The difficulty in this phase is that an obvious strong interest in settling can reveal the weakness of one party's position. Therefore, eagerness to settle should be carefully weighed. Paradoxically, cartel members who are eager to settle are likely those that the Commission wants to find guilty of a full infringement. Conversely, eagerness to settle shown by the Commission may signal to the cartel members that its case is not sufficiently solid to withstand an appeal; thus, discouraging them from agreeing to the settlement.

10. The "bargaining" phase. The third phase consists of a set of simultaneous bilateral bargaining games composed of a series of steps in which the Commission gradually exposes the strength of its case and the nature and gravity of the possible penalties that it might seek. At the same time, the alleged cartel members demonstrate their readiness to challenge the Commission's findings, as well as assess whether they can succeed on appeal at the CJEU. All parties will naturally move cautiously, trying to prevent unnecessary exposure of their own reservation value.[15] This phase is fundamental as it gives the parties the possibility to "*exchange* (. . .) *arguments on potential objections, liability, fines range*" and lead the Commission to "[d]*isclos*[e] (. . .) *evidence used*" for these purposes. There are at least two dimensions open for negotiation during the "bargaining phase." One is the determination of the base fine to which the 10% reduction is applied.[16] In practice, the sticking point in the discussion is the duration of the infringement, which can be difficult to determine and subject to interpretation in single and continuous infringements lasting for a long period. In practice, enterprises engaging in those procedures are more interested in the reduction of the foreseen duration of the infringement (i.e., the fine base) than in the 10% fine reduction in itself. The second dimension is the eventual phrasing that the Commission uses in its public communications about the case.[17] Such phrasing can be decisive in the context of potential follow-on actions. The less information is mentioned, the more it will be difficult for victims of the infringement to secure damages. Negotiation plays obviously a significant role in conducting the transaction.

11. The "pay-off" phase. Phases 4 and 5 revolve around a "pay-off phase." The negotiation can have three types of outcomes. The parties may (outcome 1) or may not (outcome 2) decide to enter into the settlement procedure, and one or more (possibly all) parties may decide to break off their involvement in the settlement procedure before it is completed (outcome 3), forcing the Commission to conclude a "hybrid settlement." This third scenario is exemplified by the *Timab*[18] and, more recently, *Pometon*[19] cases, where the Court of Justice lowered the fine, which had already been reduced by the General Court. In this situation, the potential to render most of the efforts of the procedure wasted by necessitating a full decision gives each individual member considerable bargaining power over the Commission, not to mention the risk that the undertaking departing from the settlement procedure might obtain an annulment of the decision handed out by the Commission. The *Pometon* case shows that this risk is in no way hypothetical; it limits drastically the asymmetry of the negotiation to the benefits of undertakings.

1.2 Antitrust cases (*sui generis* cooperation)*

12. *ARA* decision. In cartel cases, parties can cooperate under the leniency and settlement procedures. In other antitrust cases leading to a prohibition decision, there is no structured framework to reward cooperation by the parties; therefore, there have been few incentives for the parties to cooperate. Nevertheless, cooperation by parties in such antitrust prohibition decisions can be rewarded within the framework of the Commission's 2006 Fining Guidelines.[20] This was done for the first time in the *ARA* case,[21] in particular by applying point 37 of the Fining Guidelines. According to Commission officials,[22] the procedure is modelled on the settlement procedure for cartel cases. This means that, in terms of negotiation, the same phases as those described above (see paragraphs 9 to 11) apply. However, there are significant differences between the two procedures in terms of negotiation. For instance, a settlement can be entered into after the statement of objections as is the case in France and structural commitments can be offered.

13. Requirements. Since the *ARA* decision in 2016, which was the first to apply this *sui generis* settlement procedure, the Commission has been granting several fine reductions on this basis.[23] In a factsheet[24] published following its *Guess* decision[25] in December 2018 to describe its cooperation scheme, the Commission

15 "Reservation value" is the least favourable point at which one will accept a negotiated agreement. *See* http://www.successfulnegotiators.com/negotiators-blog/2017/1/16/basic-negotiation-terminology-batna-reservation-value-zopa.

16 *See* recitals 16, 17 and 20(b) of the Settlement Notice; and section III ("*Bilateral rounds of settlement discussions*") of the "*Overview of the procedure leading to the adoption of a (settlement) Decision pursuant to Articles 7 and 23 of Regulation No (EC)* [sic] *1/2003*" in the Settlement Notice.

17 *See* section V ("'*Settled' statement of objections*") of the "*Overview of the procedure leading to the adoption of a (settlement) Decision pursuant to Articles 7 and 23 of Regulation No (EC)* [sic] *1/2003*" in the Settlement Notice.

18 GCEU, 20 May 2015, *Timab Industries and CFPR v. Commission*, case T-456/10, EU:T:2015:296.

19 CJEU, 18 March 2021, *Pometon v. Commission*, case C-440/19 P, EU:C:2021:214.

* For the use of this expression, *see* M. Vestager's speech at the GCLC Conference in Brussels, 1 February 2016; and also at the 10th Annual Global Antitrust Enforcement Symposium, Georgetown, 20 September 2016.

20 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210, 1.9. 2009, pp. 2–5.

21 Commission Decision of 20 September 2016, *ARA Foreclosure*, case AT.39759.

22 *See* C. Gauer and J. Lübking, *op. cit.*, note 9.

23 For the list of these decisions *see* Cleary Gottlieb, *EU Competition Law Newsletter*, February 2020.

24 *See* https://ec.europa.eu/competition/publications/data/factsheet_guess.pdf.

25 *See* Commission Decision of 17 December 2018 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area, *Guess*, case AT.40428.

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declared that it favours instances where "*companies are willing to acknowledge their liability for an infringement (including the facts and their legal qualification) as well as providing evidence or offering remedies.*" The extent of fine reduction, "*will be based on an overall assessment of the extent and timing of the cooperation given and the procedural efficiencies gained in each individual case*."

14. Risks. In this procedure, the Commission intends to secure a fine but also, in addition to the acknowledgement of the infraction, wishes to be provided with evidence and to be offered remedies (if need be structural[26]). A commentator has questioned whether the Commission was not trying to "*have the cake and eat it*."[27] The scope of the cooperation required by the Commission is wide-ranging and the interest in cooperating may be weighed against the amount of fine reduction secured, and potential follow-on actions that may derive from the sanction decision. In the *ARA* case, for instance, it seems that the company had carefully limited this possibility in agreement with the Commission before accepting the settlement.[28] The timing of the acknowledgement of the facts may also be key in the negotiation. The earlier the enterprise acknowledges the facts, the more fine reduction will be given. However, what if the Commission "had nothing in store?" In terms of negotiation, the Commission may want to secure the highest fine and the most far-reaching commitments, while the undertaking concerned may want to get away with the fine and avoid offering wide-ranging commitments impeding its ordinary course of business. The scope of the cooperation may be "negotiated" with the Commission, impacting on the commitments offered in exchange for the fine reduction envisioned.

2. Leniency

15. Principle. Negotiation plays a role in the leniency procedure. As stated in the Commission Notice on Immunity from fines and reduction of fines in cartel cases,[29] undertakings disclosing their participation in an alleged cartel affecting the Community that do not meet the conditions for immunity of fine may be eligible to benefit from a reduction of any fine that would otherwise have been imposed. Undertakings must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession. The Commission determines in the final decision the level of reduction the undertaking will benefit from. The notice provides for a reduction of 30–50% for the first undertaking communicating evidence with significant added value, 20–30%, for the second undertaking and a reduction of up to 20% for subsequent undertakings.[30] The system is similar in several Member States, particularly in France.

16. Active cooperation of second rank applicants. Obtaining the maximum reduction within the preset band demands active cooperation with the competition authority. The range of the reduction hinges on the level of cooperation of the leniency applicants. In practice, NCA case handlers rely on leniency applicants to substantiate their case, via corporate statements or information requests. They normally ask leniency applicants to provide evidence on aspects of the cases which are too fragile to ground objections. However, while cooperating actively allows leniency applicants to secure a higher fine reduction, information provided may increase the gravity of the infringement and therefore the fine base on which the reduction is calculated. Hence, leniency applicants often face a conscious or unconscious[31] trade-off. Either they cooperate actively and their fine base may be increased, or they limit their cooperation to what is strictly necessary, and they may obtain no or a very small fine reduction but on a stable fine base. Solving this trade-off implies negotiating with the enforcer.

17. Paragraph 26 of the Notice. Paragraph 26 (last sentence) provides that "[i]*f the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence*." However, this paragraph deals with compelling evidence used to establish "*additional facts*," it does not address the most common situation, namely, compelling evidence used to establish "existing but unproven facts." What if those elements become established due to the cooperation of a leniency applicant? This may have an impact on the base of the fine and overcompensate the reduction granted for cooperation except when the enterprise "negotiates" an extra discount taking into account this circumstance. Whether an enterprise will fare better in these leniency procedures depends on the way it interacts with the competition authority and, to some extent, on its negotiation skills. While a good negotiation for leniency applicants involves cooperating actively and providing more information without increasing their liability, a good negotiation for competition authorities involves filling in the grey areas of the case, which may lead, in turn, to an increase of the scope and the gravity of the infraction, and culminate in an increase of the fine.

26 *See* the *ARA* case, ibid,note 21.

27 A. Lamadrid, The ARA "consent decree" – a new enforcement tool for abuse cases ante portas?, Chillin'Competition, 18 October 2016.

28 This risk seems to have been fully part of the discussions between the undertaking and the Commission in the *ARA* case.

29 Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, pp. 17–22.

30 Ibid., recital 26.

31 Many enterprises are not aware of this trade-off and cooperate actively without assessing the risk in terms of fine increase.

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3. Commitments

18. Signalling game. The same three sequences of negotiation apply in a transaction. The first phase is a signalling game. Article 9 of Regulation (EC) No. 1/2003 ensures that undertakings "offer" commitments. However, in practice, commitments may be submitted by the undertakings of their own initiative, or in response to an informal offer by the Commission or behaviour indicating that the latter would be willing to accept commitments. In practice, the Commission will, in principle, show its intent to accept commitments when the infringement is innovative, may be ended in the future and is not significantly damaging to the economy. Negotiation skills play a role in this phase inasmuch as, as said above (paragraph 9), eagerness to settle from the Commission or the enterprise concerned may reveal either the weakness of the Commission's case or its strength.

19. Bargaining game. The second phase is a bargaining game. The undertakings concerned will have to weigh the risk of being fined versus that of accepting commitments that may exceed any requirements imposed on an infringement procedure. Indeed, as put by the Commission in a policy brief, "*it is possible for the Commission to accept commitments that potentially go beyond what it could have imposed under Article 7*."[32] Such a possibility has been upheld by the court in *Alrosa*.[33] Thus, the Commission may impose remedies that go beyond what could realistically have been achieved through formal infringement decisions,[34] or at least could be so inclined.[35] This may have been the case in several Commission decisions.[36] The commitment procedure is somewhat peculiar in the EU legal system as commitments are not approved by a judge or a separate body as is the case in the United States[37] or in certain Member States such as France.[38] The fact that, on the one hand, the Commission may impose commitments in a situation where a fine should have been imposed and, on the other hand, no judges or administrative decision body (as the "*collège*" of the French Competition Authority[39]) ascertain the proportionality of the agreement, gives the Commission significant bargaining power over undertakings concerned. The bottom line for the latter is that a fine could be imposed in case they refuse to engage in the procedure. However, in reality, commitments required by the Commission can be structuring for the market and have more far-reaching long-term consequences than a regular fine.

20. Pressure of the fine. While the pressure to accept commitments should be weak, as, pursuant to recital 13 of Regulation (EC) No. 1/2003, "[c]*ommitment decisions are not appropriate in cases where the Commission intends to impose a fine*," the Commission, in practice, uses the commitment procedure in situations where a fine may be levied and shift the negotiation equilibrium. Many cases, such as *Coca-Cola*,[40] concerned behaviours that had been subject to large fines in the past.[41] This possibility, which considerably strengthens the Commission's bargaining power, seems to have been upheld by the General Court in *CB v. Commission.*[42] It may also be noted that, in *Google Search (Shopping)*,[43] the Commission reverted to the sanction procedure after having engaged in the commitment procedure.

21. Feasibility. The Commission's practice of imposing far-reaching commitments, possibly exceeding those that could have been required in a classic sanction procedure, and the commitment procedure itself may be hampered by the recent judgment *Canal +*[44] of 9 December 2020. The court held that the Commission must assess the proportionality of the commitments with regard to the protection of the contractual rights of third parties when it decides to make commitments binding. This decision may have an impact on both the Commission's acceptance and the undertakings' proposed commitments. Both parties will have to take into account the effect of the commitments on third parties, in particular when contracts are involved. In terms of negotiation, this judgment is likely to shift the balance between the respective interests of the parties and the Commission, as one of the main incentives for the Commission to engage in this procedure lies in its procedural efficiency.

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32 European Commission, To commit or not to commit? Deciding between prohibition and commitments, *Competition Policy Brief*, Issue 3, March 2014, p. 2.

33 CJEU, 29 June 2010, *Commission v. Alrosa*, case C-441/07 P, EU:C:2010:377, point 48. *See also* J.-F. Bellis, The Commitment Procedure: The EU Experience, presentation given for the Organisation for Economic Co-Operation and Development (https://www.oecd.org/daf/competition/Commitment_decisions_JF_Bellis.pdf).

34 A. D. Melamed, Antitrust: The New Regulation, *Antitrust*, 10(1), 1995, pp. 13–15.

35 P. Choné, S. Souam and A. Vialfont, *op. cit*. note 5.

36 *See*, inter alia, case COMP/39.316 (*GDF Foreclosure*), case COMP/39.317 (*E.ON Gas*), case AT.39398 (*Visa MIF*), case COMP/38.636 (*RAMBUS*), case COMP/39.692 (*IBM Maintenance Services*), case COMP/C-2/37.214 (*Joint selling of the media rights to the German Bundesliga*) and case COMP/E-2/39.140 (*DaimlerChrysler*). *See also*, on the various cases in the energy sector that may have justified a sanction decision, V. Dimulescu, Antitrust Cases and the Commitment Decision in the Energy Sector, *Petroleum Industry Review Magazine*, 2011.

37 This is the case in the United States with so-called "consent decrees" or "consent judgments" of the Department of Justice. This is the same for "transactions," known in the United States as "plea bargains," which must be approved by a district court. Pursuant to Article 11(b)(2) of the Federal Rules of Criminal Procedure, the judge must ensure the agreement "*did not result from force, threats, or promises*." *See* A. Stephan, The Direct Settlement of EC Cartel Cases, *International & Comparative Law Quarterly*, 58(3), 2009, pp. 627–654; and D. Waelbroeck, Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions) : que va-t-il rester aux juges ?, *Global Competition Law Centre Working Paper* 01/08, 2008, p. 45.

38 In France, given the separation between the investigation and the judgment, commitments are negotiated by parties with the investigation services but then approved by the judgment body (the *collège*) of the French Competition Authority. It is the same for transactions. In its judgment of 6 November 2007 in *Canal+ v. GIE Les Indépendants*, the Paris Court of Appeal stated that this system complied with Article 6(1) of the European Convention on Human Rights.

39 Judging body of the French Competition Authority.

40 Commission Decision of 22 June 2005, *Coca-Cola*, case COMP/A.39.116/B2, OJ L 253, 29.9.2005, p. 21.

41 *See* CFIEC, 30 September 2003, *Michelin v. Commission*, case T-203/01, EU:T:2003:250, and CJEC, 15 March 2007, *British Airways v. Commission*, case C-95/04 P, EU:C:2007:166.

42 GCEU, 30 June 2016, *CB v. Commission*, case T-491/07 RENV, not published, EU:T:2016:379, para. 470.

43 Commission Decision of 27 June 2017, *Google Search (Shopping)*, case AT.39740.

44 CJEU, 9 December 2020, *Groupe Canal + v. Commission*, case C-132/19 P, EU:C:2020:1007.

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II. Horizontal negotiations: Negotiating *inter partes*

22. Negotiations may also be at arm's length when they take place under the Commission's supervision in concentrations or antitrust procedures. On appeal of Commission's decisions, the General Court may also invite the parties to negotiate.

1. Negotiating under the supervision of competition authorities

1.1 Concentrations

23. Trustees. In practice, both the decisions adopted by the Commission and the NCAs provide for the appointment of a monitoring trustee who oversees the implementation of the execution of commitments. Initially, the monitoring trustee was given no power to adjudicate on disputes arising from the concentration. However, as pointed out by Laurence Idot,[45] this has changed. In France, the trustee is given a conciliatory role[46] and no further procedure is provided for if conciliation fails, thus incentivising the parties to find a negotiated solution. The Commission is more specific. The monitoring trustee is often granted the role of conciliator[47] or mediator.[48] Exceptionally, in the *SNCF/LCR/Eurostar* case,[49] the trustee is given the power to adopt a binding decision subject to a possible appeal before the national sectoral authority. In these cases, negotiation skills are primordial, as the trustee acts as a "mediator" or a "conciliator."

24. Arbitration. Following the *ARD* judgment,[50] the Commission has over the years accepted merger remedies containing an arbitration clause in order to improve the effectiveness of non-divestiture commitments, in particular that of access remedies.[51] As of March 2017, the Commission had used arbitration clauses to monitor the implementation of commitments in 70 cases, for example, for accessing airport slots, premium films and satellite pay-TV platforms or telematics gateway.[52] Fifty per cent of phase 2 decisions contain arbitration clauses.[53] A so-called "fast-track arbitration" model has progressively developed.[54] As put by Gordon Blanke, one of the most prominent EU arbitration specialists, "*international arbitration has come to play a quasi-judicial monitoring mechanism of behavioral remedies.*"[55] In this regard, it must be noted that the Remedies Notice[56] of the Commission includes the use of arbitration as an institution to enforce behavioural remedies. However, as of 2016, despite the development of fast-track arbitration clauses, the Commission has no knowledge of any arbitration procedure on commitments. There is, thus, as put by a Commission official, a discrepancy between the success of these arbitration clauses and their actual impact in practice. Arbitration clauses seem to act as a Damocles sword on the parties incentivising them to negotiate and, somewhat paradoxically, accounting for the development of negotiation in merger proceedings.[57]

1.2 Antitrust

25. FRAND litigation. Recourse to arbitration is less developed in antitrust law, which is paradoxical insofar as, in principle, commitments are behavioural in nature and therefore more suitable for arbitration. In 2016, 8 out of 32 decisions accepting commitments provided for arbitration.[58] Strategic alliances in the air transport sector are mainly concerned. The so-called fast-track arbitration clauses are modelled on those developed in merger control.[59] A field of competition law where negotiation plays a particular role is access issues in fair, reasonable and non-discriminatory (FRAND) litigation.[60] For instance, in the *Samsung*[61] case, the licensing framework set up by commitments provided for a negotiation period of up to 12 months for the determination of FRAND terms. Then, in the *Huawei*[62] judgment, the Court of Justice set up a negotiation framework for FRAND

45 L. Idot, in « Arbitrage et droit de l'Union européenne », (edited by p. P. Mayer), Paris, Litec, coll. Credimi, vol. 38, 2012.

46 French Competition Authority, decision No. 10-DCC-02 of 12 January 2010, *Keolia/Effia*, para. 108.

47 L. Idot, *op. cit.* note 45. *See*, for instance, decisions *GDF/Suez*, case COMP/M.4180, paras. 118 and 119; *SFR/Télé 2*, case COMP/M.4504, para. 22; *TLP/Ermewa*, case COMP/M. 5579, section F, para. 39; *Intel/McAfee*, case COMP/M.5984, section D, para. 30.

48 Ibid., in air transport cases, the monitoring trustee has a general role of mediator. *See*, e.g., decisions of 26 August 2009, *Lufthansa/Austrian Airlines*, case COMP/M.5440 (Art. 8(2), sp. Art. 8.2.1 under v); of 22 June 2009, *Lufthansa/SNAH*, case COMP/M.5335 (Art. 8(2)); of 9 January 2009, *Iberia/Vueling/Clickair*, case COMP/M.5364 (Art. 6(2)); *see* Art. 5.2.1, subpara. iv).

49 Commission Decision of 17 June 2010, case COMP/M.5655; *see* paras. 134 to 149, under "*Section D. Commitment in relation to a Fast track dispute resolution system.*"

50 CFIEC, 30 September 2003, *ARD v. Commission*, case T158/00, EU:T:2003:246.

51 *See*, on this subject, L. Idot, Arbitrage et droit de l'Union européenne : retour sur quelques développements récents, *Revue de l'arbitrage*, 2016(2), pp. 471–491.

52 C. Gauer and J. Lübking, Arbitration and Competition: Between Conflict and Cooperation, *Competition Law & Policy Debate*, 3(1), March 2017, p. 33.

53 L. Idot, *op. cit.* note 51, para. 6.

54 Ibid., p. 7.

55 Quoted in M. López-Galdos, Arbitration and Competition Law: Integrating Europe Through Arbitration, *Journal of European Competition Law & Practice*, 7(6), 2016, p. 388.

56 Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, OJ C 267, 22.10.2008, pp. 1–27.

57 L. Idot, *op. cit.* note 45, pp. 5 et 25.

58 L. Idot, *op. cit.* note 51, para. 8.

59 Ibid.

60 This is particularly the case in the United States. *See* D. A. Crane, Bargaining in the Shadow of Rate-Setting Courts, *Antitrust Law Journal*, 76(1), 2009, pp. 307–328; and S. Michel, Bargaining for Rand Royalties in the Shadow of Patent Remedies Law, *Antitrust Law Journal*, 77(3), 2011, pp. 889–911.

61 Commission Decision of 29 April 2014, *Samsung – Enforcement of UMTS standard essential patents*, case AT.39939.

62 CJEU, 16 July 2015, *Huawei Technologies*, case C-170/13, EU:C:2015:477.

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licensing of standard essential patents. It is interesting to note that, as described by Advocate General Wathelet, "*not only actions for a prohibitory injunction but also the rules on abuse of a dominant position, which should be employed only as solutions of last resort, are being used as a negotiating tool.*"[63] Indeed, a group of experts appointed by the Commission has observed recently that questioning the validity of a patent is often used as a negotiation tactic to "*game the system.*"[64] The study findings provide guidance on how to disincentives the use of litigation as a negotiation strategy.[65] Negotiation issues in FRAND licensing may arise more and more frequently in the context of the Digital Markets Act, as the proposal lays down two obligations for gatekeeper platforms that explicitly refer to fairness, or FRAND treatment, one for search engines and another for app stores, in Article 6(j) and (k).[66]

2. Negotiation on the General Court's initiative

26. Amicable settlement in competition cases. With the 2016 transfer to the General Court of jurisdiction to rule at first instance on disputes between the European Union and its officials and other servants under Article 270 TFEU, the culture of amicable settlement promoted by the Civil Service Tribunal has taken root in the practice of the General Court. The question arises as to whether this common practice in civil service matters, formalised by Article 125(a) and (b) of the Rules of Procedure of the General Court[67] (the "Rules of Procedure"), could be transferred to other areas and notably to competition cases, in the context of actions based on Article 263 TFEU (actions for annulment).

27. Conflicting provisions. The Rules of Procedure do not, at first glance, give a clear answer to this question. On the one hand, Article 89(2)(d) of the Rules of Procedure states that measures of organisation of procedure shall, in particular, "*have as their purpose* (. . .) *to facilitate the amicable settlement of proceedings*." It follows from this provision that the judge can encourage the parties to reach an amicable settlement. However, on the other hand, Article 124(3) of the Rules of Procedure, entitled "Amicable settlement," provides that:

> "*1. If, before the General Court has given its decision, the main parties reach an out-of-court settlement of their dispute and inform the General Court of the abandonment of their claims, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Articles 136 and 138, having regard to any proposals made by the parties on the matter.*
>
> *2. This provision shall not apply to proceedings under Articles 263 TFEU and 265 TFEU*."

28. Interpretation. Literally read, Article 124(3)(2) of the Rules of Procedure seems to exclude from the scope of amicable settlement any settlements entered into within the framework of Article 263 TFEU, that is, classic applications for annulment and, therefore, competition cases, inter alia. Article 124(3)(2) refers to a concept according to which judicial review cannot be subject to an agreement between the parties. However, this provision should not be construed as ruling out the possibility for the parties to conclude an amicable settlement, on the judge's initiative, in the context of an action for annulment. In the first place, Article 89(2)(d) of the Rules of Procedure has a global scope. Measures of organisation of procedure may be ordered in all fields, including those related to Article 263 TFEU. Therefore, it is not restricted to civil service cases. Moreover, the term "facilitate" is sufficiently extensive as to permit a broad interpretation referring as much to the simple suspension of the case in question in order to allow the parties to agree, as to a very active intervention similar to that applied in public service matters.[68] In the second place, Article 124(2) of the Rules of Procedure concerns cases in which the Court of First Instance ends proceedings by removing the case from the register without (apparently) relying on any particular legal analysis but rather merely on information from the parties that they are waiving their claims. It does not cover situations where, pursuant to Article 89(2)(d) of the Rules of Procedure, the judge, in light of the legal and factual situation of the case, "facilitates" an amicable settlement. In the third place, the title of Article 124(3), "Amicable settlement," may have simply aimed at distinguishing between Article 124(3), which lays down the procedure for "agreed discontinuance" (amicable settlement), and Article 125, which provides for a procedure of "unilateral" discontinuance.

29. Consequences. As a result, while an amicable settlement between the parties may be less likely in an action for failure to act under Article 265 TFEU, it seems entirely possible in disputes concerning legality, not about the legality of the infringement decision in itself as it relates to a matter of public order but on the legality of acts deriving or surrounding the infringement decision (e.g., confidentiality requests, corrective measures, commitments, injunctions, requests for information), or the so-called procedural infringements (i.e., obstruction during an inspection) which are subject to an autonomous procedure.[69] Recently, the General Court has "facilitated" an amicable settlement for a staggered payment of the

63 Opinion AG Wathelet, 20 November 2014, *Huawei Technologies*, case C-170/13, EU:C:2014:2391, para. 11.

64 Group of Experts on Licensing and Valuation of Standard Essential Patents, "SEPs Expert Group"(E03600), Contribution to the Debate on SEPs, January 2021, p. 72.

65 Ibid., p. 134.

66 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 15 December 2020.

67 Consolidated Version: Rules of Procedure of the General Court of 4 March 2015 (OJ 2015 L 105, p. 1).

68 *See* Article 125(a) and (b) of the Rules of Procedure.

69 *See*, on these infringements, C. Gauer and F. Christ, The procedural infringements in European competition law, *Concurrences* No. 4-2012, Art. No. 49313, pp. 29–37.

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fine in a cartel case[70] through a measure of organisation of the procedure, pursuant to Article 89(2)(d) of the Rules of Procedure.[71] This provision may be used again in the future, when there are no real disagreements between the parties as to the essence of the dispute. Costs may be "agreed" by the parties on the basis of Article 136(2) of the Rules of Procedure.[72]

III. Principled negotiation

1. Universally applicable principles

30. Soft and hard negotiators. Generally, people negotiate in one of two ways: soft or hard. This applies to officials of competition authorities and lawyers in private practices. The soft negotiator wants to avoid personal conflict and so makes concessions readily to reach an agreement. The hard negotiator sees any situation as a battle of wills in which the side that takes the more extreme position and holds out longer fares better. The soft negotiator, who wants an amicable solution, often ends up exploited and feeling bitter. The hard negotiator exhausts the soft negotiator and their resources, harming the relationship between the two sides. Other standard negotiation strategies vary between hard and soft, but each involves an attempted trade-off between getting what the negotiator wants and getting along with the other party.

31. Loopholes. This type of negotiation can last indefinitely, with negotiators successively taking positions and then giving them up. It may be used in competition law settlement procedures, for instance for the range of a fine or in the commitments procedure when it comes to the scope of commitments. Generally, this form of negotiation will not produce wise outcomes. Indeed, when negotiators bargain over a position they tend to lock themselves into those positions: the more a party clarifies its position and defends it against attack, the more it becomes committed to it, notably due to a desire to "save face." Positional bargaining is particularly perilous for the party that is in a weaker position, as in this type of negotiation a hard game dominates a soft one.

32. Principled negotiation. However, the method of principled negotiation, or negotiation on the merits, makes it possible to move away from positional bargaining. Principled negotiation boils down to four basic points:

70 GCEU, Order of 28 January 2021, *Global Steel Wire and Others v. Commission* case T-545/19, not published, EU:T:2021:47.

71 Ibid., para. 2.

72 Ibid., paras. 3 and 5.

Table

People	Separate the people from the problem
Interests	Focus on interests, not positions
Options	Invent multiple options, looking for mutual gains, before deciding what to do
Criteria	Insist that the results be based on a set of objective standards

1.1 Separate the people from the problem

33. Firstly, emotions generally become entangled with the objective merits of the problem. Taking positions just makes this worse because negotiators' egos become identified with their positions; they see the matter from their own perspective and frequently confuse their point of view with reality.[73] This is particularly true in competition law procedures. Competition authority officials have a vision based on their institutions' general interests and enforcement objectives, which may lead to the adoption of (overly) strict enforcement stances. Conversely, enterprises have a far less ordo-liberal vision of the economy which may lead to excessive stances. Out of the mass of information that emerges from the case, both parties tend to pick out and focus on those facts that confirm their prior perceptions and to disregard or misinterpret those that call their perceptions into question. This may lead to irreconcilable positions and conflicts. In this type of procedure, the ability to see the situation as the other sides see it, as difficult as it may be, is one of the most important skills a negotiator should possess. As Fisher, Ury and Patton have stated, "*it is not enough to study* [other parties] *like beetles under a microscope, you need to know what it feels like to be a beetle*."[74]

1.2 Focus on interests, not positions

34. Negotiators in competition authorities or in private practices should be hard on the problem and soft on the people. It is usually advisable to be tough not on positions but on interests. In competition proceedings, parties may have strong positions, driven by the need of competition authorities to enforce the law and companies' wish to ensure the smooth running of their business. This is the area of the negotiation where energies should be concentrated most aggressively.[75] Fighting hard on the substantive issues increases the pressure for an effective solution; giving support to the human beings on the other side tends to improve the relationship with the other party and increase the likelihood of reaching an agreement.[76]

73 On the importance of emotions in negotiation, *see* R. Fisher and D. Shapiro, *Beyond Reason: Using Emotions as You Negotiate*, Penguin Books, 2006.

74 R. Fisher, W. Ury and B. Patton, *op. cit.* note 10, p. 25.

75 Ibid., p. 56.

76 *See* D. Stone, B. Patton and S. Heen, *Difficult Conversations: How to Discuss What Matters Most*, 2nd ed., Penguin Books, 2010.

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1.3 Invent multiple options, looking for mutual gains, before deciding what to do

35. This third point tackles the difficulty of designing optimal solutions while under pressure. Trying to decide in the presence of an adversary narrows the parties' vision. Having a lot at stake inhibits creativity. So does searching for the "one right solution."

1.4 Insist that the result be based on a set of objective standards

36. Only standards such as law, jurisprudence, custom or expert opinion should determine the outcome of the procedure. In most negotiations, parties use precedents and objective standards simply as arguments in support of a position while they should be the core of the negotiation.[77]

2. Principles applicable in vertical negotiation

37. The best alternative to negotiated agreement (BATNA). This principle is particularly important in a situation of asymmetry in terms of bargaining power as those described in section I. Generally, parties who negotiate worry about failing to reach an agreement and see the "no deal" as the worst-case scenario. In the context of competition law, these agreements typically relate, for instance, to commitments, transactions or leniency. However, in a negotiation, there is a danger for enterprises to be accommodating of the views of the competition authority. In several cases, the siren song of "let's all agree and put an end to this" becomes too persuasive and the company ends up with a deal it should have rejected.[78] One way of avoiding this common shortcoming in negotiation is the BATNA,[79] which should always be kept in mind by negotiators. What happens if no agreement is reached? In competition law, the answer is straightforward—litigation, which is the standard against which any proposed agreement should be measured.

38. The cost of opting out. In most circumstances, not having developed a BATNA, enterprises are unduly pessimistic about what will happen if negotiations are broken off.[80] In reality, the relative negotiating power of the two parties depends primarily on how attractive the option of not reaching an agreement is to each party. The BATNA in competition law can be readily translated as "is settlement worth it?" Many enterprises overestimate the risk of litigation and choose to settle while empirical studies show that leniency procedures are not necessarily advantageous compared to a proper trial that fully respects the right to defence.[81] The same is true for transactions (see paragraph 11 above) or commitments (see paragraph 21 above).

39. Relevance. The recent wave of Commission cases annulled by the General Court[82] and the deepening of judicial review in competition cases following *Intel*[83] also show that settlement is not always beneficial for enterprises. Where applicants challenge the facts underlying a Commission decision in the field of competition law, the latter is obliged to prove those facts or risk the annulment of the decision. In this context, the Court of First Instance does not grant the Commission any margin of deference, as the Commission is not entitled to err on the facts on which a decision is based. Parties who put together the necessary factual and legal elements in support of their case can thus win their case without the need to bang on the table.[84] The same is true for the Commission—settlement procedures are not necessarily in the public interest as they lead to reduced or no sanctions and little clarity for competition behaviours, thus undermining legal certainty. Moreover, these may become complicated to handle in light of the recent *Canal* +[85] case for commitments and *Pometon*[86] for transactions. Procedural efficiencies are less and less certain.

IV. Conclusion

40. Negotiation has expanded to all competition proceedings even though recent cases may render the handling of these procedures more difficult in the future. It will be interesting to see how the Commission will use its settlement powers in the future and whether judges will, at some point in time, be involved in Commission settlements, as is the case in the United States. In any event, negotiated solution should not be used for cases dealing with novel or complex infringements without being endorsed by a judge, not only because, in this case, defendants may overturn the Commission decision before the courts but also because law needs clarity and, in competition law, stakes are too high for the economy and for EU citizens to accept settlement in the shadow of courts. ■

77 For an illustration of the usefulness of this method *see* J. K. Sebenius, *Negotiating the Law of the Sea: Lessons in the Art and Science of Reaching Agreement*, Harvard University Press, 1984.

78 R. Fisher, W. Ury and B. Patton, *op. cit.* note 10, p. 100.

79 Ibid., pp. 99–108.

80 Ibid., p. 103.

81 *See* J. Ysewyn and S. Kahmann, The decline and fall of the leniency programme in Europe, *Concurrences* No. 1-2018, art. No. 86060, pp. 44–59.

82 *See*, recently, for mergers, judgment of 28 May 2020, *CK Telecoms UK Investments v. Commission*, case T-399/16, EU:T:2020:217; for State aid, judgment of 15 July 2020, *Ireland and Others v. Commission*, joined cases T-778/16 and T-892/16, EU:T:2020:338 (Apple); for abuse of dominance, judgment of 12 December 2018, *Servier and Others v. Commission*, case T-691/14, EU:T:2018:922; for investigations, judgment of 5 October 2020, *Intermarché Casino Achats v. Commission*, case T-254/17, not published, EU:T:2020:459; and order of 29 October 2020, *Facebook Ireland v. Commission*, case T-452/20 R, not published, EU:T:2020:516.

83 CJEU, 6 September 2017, *Intel v. Commission*, case C-413/14 P, EU:C:2017:632.

84 A. M. Collins, No need to bang on the table, *Concurrences* No. 4-2020, art. No. 96683, pp. 2–4.

85 Ibid., note 44.

86 Ibid., note note 19.

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