From 'Mono' to 'Stereo': Fine-Tuning Leniency and Settlement Policies

Laura GUTTUSO*

The article brings out the ambivalent role played by leniency and settlement policies in today's cartel enforcement. Both occupy a prime position in the prosecution of cartels, whilst nevertheless having the potential, if not carefully managed, to undermine deterrence. The article first discusses leniency and settlements within the context of economic theories on deterrence and optimal sanctions.

The key practical challenges in the operation of leniency and settlement policies are then outlined, providing examples from recent European Commission and United Kingdom practice, as well as from experiences further afield. There is a risk that over-reliance on leniency and settlements compromises fairness, particularly in the context of the often one-dimensional manner in which these tools are deployed.

In the second part, the article argues that beyond a purely economics-driven paradigm, the effective administration of leniency and settlement policies requires fairness and due process to be accommodated in equal measure. Due process within penalty-setting has multiple facets, such as respecting the principles of transparency and equality of treatment, to name but a few.

The message in the final part is that competition agencies need to consider ways in which to administer remedies more effectively, addressing the goals of deterrence, restoration and behaviour control in a more coherent manner.

1 INTRODUCTION

1.1 Optimal sanctions and deterrence in cartel enforcement

Within the context of the wider cartels-related literature, there is a large body of already existing research in place on optimal sanctions and deterrence more generally.[1] Particularly important is the influence of the Chicago

* Assistant-Director, United Kingdom Competition and Markets Authority.

BSc (Economics) London School of Economics, BA (Law) Cambridge University, LLM, Auckland University, (First Class Honours), Ph.D. Research Scholar, TC Beirne School of Law, University of Queensland, Australia.

Email: laura.guttuso@uq.net.au. Some of the themes expounded in this article are based on an earlier presentation given by the author at the 1st Annual Competition and Economic Regulation (ACER) Week, Southern Africa (Victoria Falls, 20–21 Mar. 2015). Any views expressed are personal and any errors are the author's only.

1 See for example W.M. Landes, *Optimal Sanctions for Antitrust Violations,* 50 U Chi L Rev 652 (1983).

Guttuso, Laura. 'From "Mono" to "Stereo": Fine-Tuning Leniency and Settlement Policies'. *World Competition* 38, no. 3 (2015): 395–422.

School.[2] Forming part of this economics-focused outlook, the paradigm of classical deterrence theory is a key determinant in the approach taken to cartel enforcement to date. The literature suggests that a violation can be deterred if the value of the sanction imposed exceeds the expected gain from the violation, adjusted by the probability that the sanction will be imposed. In great part, the optimal deterrence argument builds on the work of Becker and Coase.[3]

By now, leniency policies occupy a prime position in most competition authorities' toolkits,[4] and are consistently credited by the agencies with the successful detection and prosecution of cartel cases.[5] Leniency policies, so the argument goes, increase the probability of cartel detection and therefore add to the level of deterrence in the system. Furthermore, settlement policies are praised as achieving speedier, less costly, and hence more effective, enforcement by the agencies, meaning more antitrust infringements can be detected and dealt with.[6]

Notwithstanding their notable successes, there have been some high-profile instances where the competition authorities' handling of leniency and settlement policies has resulted in substantive procedural challenges for the authorities.[7] Even when this is not the case, questions can justifiably be asked about leniency and

---

2 See, e.g., R.H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press, 1993); R. H. Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J. L. & Econ. 7 (1966). For a summary of the Chicago School and subsequent competing visions of antitrust policy, see H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution,* 32–39 (Harvard University Press, 2005).

3 See *G.S. Becker, Crime and Punishment: An Economic Approach,* 76 J. Political Economy 169 (1968); R. H. Coase, *The Problem of Social Cost, 3* J.= L. & Econ. 1 (1960). See also W.M. Landes, *Optimal Sanctions for Antitrust Violations,* 50 University of Chi. L. Rev. 652 (1983); A. Mitchell Polinsky and S. Shavell, *The Economic Theory of Public Enforcement of Law,* 38 J. Econ. Lit. 45 (2000).

4 Over 50 jurisdictions have some form of leniency policy for cartel conduct. See S.D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, 3, paper presented at the 24th Annual National Institute on White Collar Crime, (Miami, 25 Feb. 2010), www.justice.gov/atr/public/speeches/255515.pdf.

5 In the United States (US), over 90% of penalties imposed by the Department of Justice for cartel violations since 1996 are linked to investigations assisted by leniency applicants. See G. J. Werden, S. D. Hammond and B. A. Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 56 Antitrust Bull. 207, 224 (2011). For a recent study at the European Union (EU) level, based on a dataset of 57 cartels comprising 352 companies from the year 2000 onwards, see O. Dominte, D. Şerban and A.M. Dima, *Cartels in EU: Study on the Effectiveness of Leniency Policy,* 8 Mgt. & Mkt .529 (2013). The study confirmed that out of the fifty-seven cartels, fifty-three were discovered due to the leniency notice, and 47.16% (166) of the companies involved applied for leniency, meaning that the leniency notice was frequently used.

6 See, for example, W.P.J. Wils, *The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles*, 31 World Competition 335, 343 (2008).

7 In a US context, see the *Stolt-Nielsen* case, where the Department of Justice had revoked Stolt-Nielsen's previously granted immunity on the grounds of alleged failure to promptly terminate the infringement. The company and its officers were thereafter indicted. The courts subsequently decided to dismiss the indictment against Stolt-Nielsen on the grounds of lack of credibility of witnesses of other companies testifying against the defendant, in return for obtaining reduced sentences themselves. See *United States v. Stolt-Nielsen SA*, 2007 U.S. Dist. (E.D. Pa. 2007). In a UK context, see the collapse of the *British Airways* criminal cartel case, *R v. George, Crawley, Burns and Burnett* [2010] EWCA Crim 1148, referred to later in this article.

settlement policies' overall impact on deterrence, and how to most effectively construct and implement such policies.

1.2 Leniency and settlements distinguished

This article uses the European Commission (EC)'s leniency and settlement policies as primary reference points. Whenever appropriate, it also provides other comparators, in terms of competition authorities' experiences with these tools in other jurisdictions, notably, for example, the UK, as well as, further afield, the United States (US), Australia and South Africa.

Under the EC's processes, leniency is an instrument to gather the evidence of the cartel infringement in administrative proceedings directed against companies involved in cartel behaviour. The EC's leniency policy offers companies involved in a cartel, which self-report and hand over evidence, either total immunity from penalties, or, if immunity is no longer available, a reduction in the penalties otherwise imposed on them.[8]

In comparison, the EC's settlement procedure is a tool that aims to simplify and shorten the procedure leading to the adoption of a formal decision in cartel cases. In return for the procedural efficiencies said to be achieved by the EC, companies can expect a settlement discount of 10%.[9] The two policies are correlated, however, in that the introduction of the EC's settlement policy in 2008 can be seen as a result of the EC having by then become a victim of the success of its own leniency policy, translating into more cases being opened than the EC could realistically proceed with at any one time.[10]

Under the UK regime, similar to the EC's procedures, subsequent corporate applicants that no longer qualify for immunity can still receive leniency discounts of up to 50%,[11] whereas separate settlement discounts are also available for companies in cases regarded as suitable for settlement. Unlike under the EC's procedure, however, settlement discounts are not fixed, but capped at a maximum level of 20%, depending on the resource savings achieved in settling the case at that particular stage of the investigation.[12]

---

[8] See Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/11 for further detail [Leniency Notice].

[9] For further detail, see Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Art. 7 and Art. 23 of Council Regulation (EC) No. 1/2003 in cartel cases [2008] OJ C167/1 [Settlements Notice].

[10] See Stephan here, who notes that the introduction of the settlements procedure has been supported by a number of commentators as a natural corollary of the leniency policy. A Stephan, *The Direct Settlement of EC Cartel Cases,* 58 *ICLQ* 627, 628 (2009).

[11] See Office of Fair Trading, *Applications for leniency and no-action in cartel cases,* OFT1495, para. 6.9 (July 2013).

[12] CMA, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases,* CMA8, para. 14.27, (March 2014), ('CMA Procedures Guidance') https://www.gov.uk/

In prosecutorial jurisdictions, the lines between leniency as an evidence-gathering tool, and settlements as an efficiency enhancing, resource-saving device, can be more blurred. For example, under the US corporate leniency programme, leniency means total immunity from criminal penalties, and that is only available to the 'first-in', subject to certain conditions being met.[13] Companies that are not 'first in' may still be able to obtain a reduction of the penalty for cooperation, however. As plea-bargaining arrangements can be concluded prior to the conclusion of an investigation, a settling cartel participant may be in a position to inform the Department of Justice (DoJ) of additional evidence of wrongdoing which the DoJ was previously unaware of. In the US, the size of the settlement discount cartel participants can obtain is therefore dependent upon the timeliness and the quality of their cooperation, with earlier settling defendants usually receiving larger discounts compared to later settling parties.[14]

Similarly, in South Africa, only a firm that is first to the door to confess and provide information can benefit from the corporate leniency policy.[15] For a firm that does not achieve full immunity, the settlement discount on offer can be a percentage figure varying between 10%–50% of the administrative penalty, again depending on the timeliness of and the quality of the settling firm's cooperation.[16]

1.3 Structure

The remainder of this article is structured as follows. In the next section, the article will highlight some of the ambivalent features inherent in both leniency and settlement policies, discussed in the economic literature. If not carefully managed, both leniency and settlements have the potential to undermine, as opposed to increase, deterrence in the system. The article then proceeds with outlining some of the practical challenges associated with leniency and settlements. It argues that beyond a purely economics-driven paradigm, the effective administration of leniency and settlement policies requires fairness and due process to be

government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases (accessed 4 Jun. 2015).

13 DoJ, *Corporate Leniency Policy* (August 1993). See also D. Clanton and C. Koh *USA*, 494, 496 in S. Mobley and R. Denton (eds.), *Global Leniency Manual* (Oxford University Press, 2010).

14 For a fuller discussion, see A. O'Brien, *Cartel Settlements in the U.S. and EU: Similarities, Differences and Remaining Questions,* 181, in C.-D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing Ltd, 2010).

15 Competition Commission South Africa, *Corporate Leniency Policy,* para. 5.6, (February 2004), http://www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-12052008.pdf (accessed 5 Jun. 2015).

16 See Competition Commission South Africa, *Guidelines for Determination of Administrative Penalties for Prohibited Practices,* para. 6.1, (17 Apr. 2015). http://www.gov.za/sites/www.gov.za/files/38693_gon323.pdf (accessed 5 Jun. 2015).

accommodated in equal measure.[17] The final part of the article calls for agencies to consider ways in which to administer remedies and sanctions more effectively, addressing the goals of deterrence, restoration and behaviour control in a more coherent manner.

2 ECONOMIC THEORIES ON LENIENCY AND SETTLEMENTS

2.1 Ambivalence of leniency and settlement: a closer look at pay-offs and incentives

Game theory demonstrates the useful effects leniency policies generate for competition authorities, in that the possibility for a cartelist to apply for leniency increases the pay-off of cheating, making collusion harder to sustain.[18] Further, leniency policies increase uncertainty and diminish trust amongst the conspirators, thereby raising the need for costly monitoring strategies.[19]

The same literature has however also shown that these policies can be used strategically by wrongdoers, for example, to punish defections and stabilize cartels. Allowing colluding firms to pay reduced fines may raise the expected pay-off from continuing to collude, meaning that leniency policies can have potentially perverse effects.[20] These effects need to be compensated for by the positive effect of a higher probability of conviction.[21]

Academic research has often recognized a degree of ambivalence inherent in leniency policies.[22] For one, leniency policies display a bias towards uncovering collusive conduct close to the breaking point, that is to say at the end of the life of

---

17 'Fairness' refers to the quality of treating parties equally or in a way that is right or reasonable. Due process or procedural fairness is achieved if a party receives a fair hearing and, more widely, if a party is able to exercise its rights of defence in accordance with the principle of good administration. In a European context, the right to a fair trial and the right to good administration are enshrined in the Charter of Fundamental Rights of the EU (Charter), Arts 47 and 41 respectively. As to the right to a fair trial, see also the European Convention on Human Rights (ECtHR), Art. 6(1). Since the entry into force of the Treaty of Lisbon, the Charter became legally binding on the EU institutions and national governments.

18 J.E. Harrington Jr., *Optimal Corporate Leniency programs,* 56 The J. Indus. Econ. 215, 217, (2008), referring hereby to the 'Deviator Amnesty Effect'.

19 See G. Spagnolo, *Divide et Impera: Optimal Leniency Programmes,* CEPR Discussion Paper No. 4840, (December 2004) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=716143 (accessed 4 Jun. 2015). See, more generally, W.P.J. Wils, *Leniency in Antitrust Enforcement: Theory and Practice,* 30 World Competition 25, 42 (2007).

20 J.E. Harrington Jr., *Optimal Corporate Leniency Programs,* 56 J. Indus. Econ. 215, 217 (2008). Harrington refers to this raised pay-off as the 'Cartel Amnesty Effect'. See also M. Motta and M. Polo, *Leniency Programs and Cartel Prosecution*, 21 Intl. J. Indus. Org. 347, 349 (2003).

21 Spagnolo, *supra*, at 21.

22 See, for example, M. Bigoni et al., *Fines, Leniency and Rewards in Antitrust: An Experiment,* CEPR Discussion Paper No. 7417, (August 2009) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1744864 (accessed 4 Jun. 2015).

a cartel.[23] This seems to signal that leniency policies may be least efficient at dismantling cartels when they are at their most detrimental.[24]

Clarity and certainty as to the enforcement of the policy and the discounts on offer are said to be critical pre-requisites to the policy's success. For the potential leniency applicant, they reduce the risk of choosing to cooperate with the authority.[25] This also ties in with the wider question of competition authority commitment, playing a key role in the success of the programme. In order for the use of self-reporting programmes to be socially efficient, a clear commitment by the agency to an investigation effort *ex ante* is necessary.[26]

Moreover, the probability of being caught and convicted absent the leniency policy is key to inducing firms to apply for leniency.[27] A similar point applies to settlements, in that for the authority to have adequate bargaining power in a settlement context, it should be able to effectively prosecute infringements outside the settlement process.[28]

As to settlements, the economic literature starts with the assumption that each of the parties, as a self-interested actor, is seeking to maximize its expected benefits from the settlement.[29] Economic models on settlement 'bargaining' assume that the parties possess asymmetric information, where the presence of private information affects the strategic behaviour on each side. Those models rely on strategic response to informational differences, whereby litigants choose their strategies based not only on their own private information, but also their assessment of the limitations of the other side's private information.[30]

---

23 See R. Abrantes-Metz and P. Bajari, *Screens for Conspiracies and Their Multiple Applications*, 24(1) Antitrust 66, 97 (2009).

24 For example, research by Gärtner and Zhou, based on a dataset of European Commission cartel decisions issued between 1996 and 2012, establishes that over three quarters of the leniency applications by first-in applicants took place after, and not before, a cartel collapses. D.L. Gärtner and J. Zhou, *Delays in Leniency Application: Is There Really a Race to the Enforcer's Door?* (2012) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188141 (accessed 4 Jun. 2015).

25 Wils, *Leniency in Antitrust Enforcement*, *supra*, at 43. Risk is reduced because actors who report their behaviour bear certain, rather than uncertain sanctions. See L. Kaplow and S. Shavell, *Optimal Law Enforcement with Self-Reporting of Behavior*, 102 J. Pol. Econ. 583, 584 (1994). See also D.L. Rubinfeld, *Settlements in Antitrust Enforcement: A U.S. Economic Perspective*, 87 in Ehlermann and Marquis, *supra*, arguing that the clarity of the enforcement signal from the competition authority increases certainty.

26 H. Gerlach, *Self-Reporting, Investigation and Evidentiary Standards,* 56 J. L. & Econ. 1061, 1068 (2013).

27 J. E. Harrington and M.-H. Chang, *Endogenous Antitrust Enforcement in the Presence of a Corporate Leniency Program,* 3, Working Paper, Cleveland State University, (30 Nov. 2012) <www.csuohio.edu> (accessed 4 Jun. 2015).

28 See e.g., G. S. Georgiev, *Contagious Efficiency: The Growing Reliance on US-Style Antitrust Settlements in EU Law,* 4 Utah L. Rev.w 971, 1024 (2007).

29 L. Coppi and R.J. Levinson, *The Interaction between Settlements and Private Litigation – An Economic Perspective,* in Ehlermann and Marquis, *supra*, at 691.

30 A. F. Daughety and J. F. Reinganum, *Economic Theories of Settlement Bargaining*, 1 Annual Rev. L. & Soc. Sci. 35 (2005).

The economic literature establishes that a rational party will only engage in a consensual arrangement with the authority if it receives a strategic benefit, in comparison to the unilateral enforcement of the relevant statutory framework by the authority. Whilst settlements thus offer incentives to reveal private information if and when trust is created, it is equally possible parties might choose to reveal biased or distorted information, thereby using their information advantage in a strategic sense.[31]

Schinkel in his model breaks up the EC's settlement process into a number of phases, with the settlement initiation stage being akin to a 'signalling game', followed by a set of simultaneously played bilateral bargaining games. Decisions resulting from these games materialize in the 'payoffs' phase, crystallizing, by and large, in procedural efficiencies in the form of the streamlined statement of objections (SO) and decision:[32]

> More widely, there is research suggesting that negotiating parties in repeated games build up trust and a reputation for being reliable partners. A dynamic game contains consensual solutions which are in the common interest of both sides, meaning that the likely outcome is one of mutual compromise, demanding concessions from each side.[33]

Edwards and Padilla focus more particularly on the companies' and the EC's respective incentives to enter into settlements. For the competition authority, the incentives to settle increase, the higher the consumer welfare loss resulting from any unsuccessful litigation, and the higher the savings achieved through streamlined procedures and avoided litigation, compared to the costs of settlement in terms of reduced fines and diminished deterrence.[34] As for the parties under investigation, they will rationally settle only when the present value of their expected private costs from settling outweigh their (net) private benefits from pursuing a fully-litigated outcome.[35]

This article will subsequently connect some of these underlying theories with the practical challenges associated with leniency and settlements. Before that, however, it is necessary to more specifically assess the impact leniency and settlements can be said to have on deterrence.

---

31 O. Budzinksi and B. Kuchinke, *Deal or No Deal? Consensual Arrangements as an Instrument of European Competition Policy*, 63 Jahrbuch fűr Wirtschaftswissenschaften 265, 276 (2009).

32 M. P. Schinkel, *Bargaining in the shadow of the European settlement procedure for cartels*, 56 The Antitrust Bull. 461, 465 (2011)..

33 Budzinski and Kuchinke, *supra*, at 281.

34 See K. Edwards and A. J. Padilla, *Antitrust Settlements in the EU: Private Incentives and Enforcement Policy*, in Ehlermann and Marquis, *supra*, at 674.

35 L. Coppi and R.J. Levinson, *The Interaction between Settlements and Private Litigation*, in Ehlermann and Marquis, *supra*, at 691.

2.2 Penalties, deterrence and sanctions more widely

The inevitable consequence of a leniency policy is that penalties are waived or reduced. Similarly, the increasing use of settlement procedures in cartel cases means the ultimate fine imposed on defendants is being reduced by the amount of the settlement percentage discount.[36] Penalty reductions inevitably lead to an enforcement loss, which has to be offset by a corresponding increase in the number of cartels detected and penalzsed in order to avoid a net reduction in the overall level of the fine.[37] The concern is that the deterrence objective is being undermined by large and often cumulative penalty discounts.[38]

One way to neutralize the penalty-lowering effect of leniency and settlements may be to increase the level of penalties applicable in the absence of cooperation.[39] Yet there are clear limits on how high penalties can be set. High fines can potentially lead to the undesirable result of forcing companies into bankruptcy, which brings with it a variety of negative social costs. In the absence of actual bankruptcy, there may also be negative effects on companies' investment decisions.[40] Further limits are imposed by concerns about disproportionate justice.[41]

More widely, there is economic research which finds that even large corporate fines may not be able to induce sufficient deterrence. According to the agency theory of the firm, the incentives of individual company personnel may not necessarily be aligned with the owners when it comes to engaging in or reporting cartel conduct.[42] Individual managers or employees engaging in the cartel conduct may not be particularly concerned about any increased exposure to penalties, absent any direct personal disciplining. There is no way of being sure, however, that

---

[36] As already referred to, under the EC's settlement procedure, the settlement reward consists of a reduction of the fine by 10%. See Settlements Notice, para. 32.

[37] Wils, *The Use of Settlements*, *supra*, 345.

[38] As referred to, under the EC's procedures, discounts under the leniency and settlement policies can be cumulatively rewarded. See Settlements Notice, para. 1.

[39] Wils, *Leniency in Antitrust Enforcement*, *supra*, 46.

[40] In a South African context, see the discussion in J. Aproskie and S. Goga, *Administrative Penalties – Impact and Alternatives*, paper presented at the Fourth Annual Conference on Competition Law, Economics and Policy (25 Aug. 2010) http://www.compcom.co.za/wp-content/uploads/2014/09/Aproskie-and-Goga-Administrative-Penalties-Impact-and-Alternatives.pdf (accessed 4 Jun. 2015).

[41] W.P.J. Wils, *Optimal Antitrust Fines: Theory and Practice*, 29 World Competition 183, 197 (2006). See also R. Nazzini and A. Nikpay, *Private Actions in EC Competition Law*, 4 Competition Policy Intl. 107, 114 (2008). These theories are also discussed in L. Guttuso, *Leniency and the two faces of Janus: where public and private enforcement merge and converge*, in C. Beaton-Wells and C. Tran (eds.), *Anti-Cartel Enforcement in a Contemporary Age: The Leniency Religion* (Hart Publishing, 2015) (forthcoming).

[42] F. Thépot, *Leniency and Individual Liability: Opening the Black Box of the Cartel,* 7 *CLR* 221, 225 (2011).

sanctions against corporations will lead to a proper allocation of responsibility as a matter of internal disciplinary control.[43]

Under the EC's cartel laws, it is only the corporation, not the individual, which is being sanctioned.[44] In this context, Fabra and Motta advocate that personal, managerial penalties are needed, as opposed to corporate fines only.[45] There is an important link here between individual sanctions and leniency: experience from the United States suggests that the net result of incorporating sanctions against individuals into the public enforcement system results in an increase in the effectiveness of the authority's leniency programme.[46] In this context, Werden argues that effective deterrence requires a combination of monetary penalties on companies and individual sanctions in the form of imprisonment.[47] However, in reality, in those jurisdictions where criminal personal sanctions against cartel behaviour exist, competition authorities have often struggled to identify and deconstruct internal lines of accountability after the event,[48] in addition to the difficulties inherent in proving the offence to the requisite standard of beyond reasonable doubt.

Coming back to monetary penalties, in a European context, there is a wider question to do with calculating fines and how effective they are in achieving deterrence. One aspect of this is that at EU-level, the law, based on the 2006 Guidelines, continues to grow, but is at present still largely in flux.[49] More consistency is needed, and arguably, also more clarity in its application. This lack of clarity is often compounded in a settlements context, as will be explored in more detail below.

Under the 2006 Guidelines, fines are calculated in accordance with a two-step methodology.[50] Under the first step, the basic amount of the fine is determined on the basis of a proportion of the value of the affected sales made by the company during the last full business year of participating in the infringement,[51] multiplied

---

43 See B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability,* 8 (Cambridge University Press, 1993).

44 Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No. 1/2003 [2006] OJ C210/02 [2006 Guidelines], para. 1.

45 N. Fabra and M. Motta, *Antitrust Fines in Times of Crisis,* CEPR Discussion Paper No. 9290 (January 2013) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210260 (accessed 4 Jun. 2015).

46 See, e.g., S.D. Hammond, *Cornerstones of an Effective Cartel Leniency Programme,* 4(2) Competition Law Intl. 4 (2008).

47 Werden, *supra*, 193 (arguing that imprisoning executives deters in an entirely different way than imposing financial penalties on the corporations they work for).

48 Fisse and Braithwaite, *supra*, at 38.

49 E. Barbier de La Serre and E. Lagathu, *The Law on Fines Imposed in EU Competition Proceedings: On the Road to Consistency,* 5 JECL & Pract 400, 401 (2014).

50 2006 Guidelines, paras 9f.

51 As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales, 2006 Guidelines, para. 21.

by the number of years that the infringement lasted.[52] Under the second step, the basic amount is adjusted on the basis of aggravating or mitigating circumstances.[53] The settlement and leniency discounts, if applicable, will be factored in at the end, after the 10% statutory maximum has been applied.[54] Economic research however establishes a number of distortive effects resulting from the current fining rules.[55]

More fundamentally, the complex task of attaching a monetary value to sanctions, whether in Europe or elsewhere, ultimately reveals the practical limitations surrounding the elusive concept of optimal deterrence.[56] This concept is based, as is well known, on the notion that the expected fine is to exceed the expected gain.[57] There are difficulties inherent in quantifying any potential gains originating from the violation, a task which also needs to take into account relevant probabilities. Authorities are not under a duty to establish the expected gains from the infringement.[58] This would require a rather precise modelling exercise, but more often than not, proxy measurements are used in penalty calculations to circumvent this problem.[59] One particular manifestation of this pragmatism also translates in the fact that the current rules do not require that the actual effect of the cartel is investigated.[60]

Certainly, fines based on affected commerce do little to remedy the situation for the victims of the cartel breach, or to restore the market more coherently.[61]

This begs the question whether an altogether different approach is required in the use of these administrative tools, which might more effectively integrate the goals of deterrence, behaviour control and market restoration.

---

52 Further, a company can face an additional 15–25% of the value of sales added to the basis amount as an 'entrance fee' for joining the cartel, 2006 Guidelines, para. 25.

53 2006 Guidelines, paras 21–29.

54 Settlements Notice, para. 32, and 2006 Guidelines, para. 34. The 10% statutory cap rule establishes that the final amount of the fine shall not exceed 10% of the total turnover in the preceding business year of the undertaking participating in the infringement. 2006 Guidelines, para. 32.

55 For example, Bageri et al. find distortive effects, *inter alia*, in fine caps related to total firm turnover and in fines based on revenue rather than collusive profits. See V. Bageri, Y. Katsoulacos and G. Spagnolo, *The Distortive Effects of Antitrust Fines Based on Revenue*, 123 The Econ. J. F545-F557 (2013).

56 For a broader discussion, see Fisse and Braithwaite, *supra*, at 88f.

57 The expected fine equals the nominal amount of the fine discounted by the probability that a fine is effectively imposed, see Wils, *Optimal Antitrust Fines*, *supra*, at 190.

58 See for example, European Competition Authorities, *Pecuniary Sanctions Imposed on Undertakings for Infringements of Antitrust Law Principles for Convergence*, para. I.3, (May 2008), http://www.autoritedelaconcurrence.fr/doc/eca_principles_uk.pdf (accessed 4 Jun. 2015).

59 In a European context, it is said that the expected gain from the violation can be assumed to be positively correlated with the company's turnover in the affected market throughout the duration of the infringement. See W.P.J. Wils, *The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis*, 30 World Competition 197, 210 (2007).

60 R. Wesseling & M. van der Woude, *The Lawfulness and Acceptability of Enforcement of European Cartel Law,* 35 World Competition 573, 592 (2012).

61 See C.J.S. Hodges, *European Competition Enforcement Policy: Integrating Restitution and Behaviour Control,* 34 World Competition 383, 389 (2011).

3 ENFORCEMENT CHALLENGES IN PRACTICE

The second part of the article will set some of the economic theories discussed in the previous section in the context of competition authorities' enforcement challenges in practice. It will proceed as follows.

In keeping with the optimal deterrence outlook, the first section adopts a more microscopic perspective: once the authority embarks on the use of a particular tool, the agency's goal is to successfully navigate the process within its existing confines, aiming to achieve the best possible welfare outcome, taking into account the constraints it is often facing. There is nevertheless a question mark as to whether too narrow a focus on efficiencies is justified in this context. Such an approach could potentially backfire. Examples are provided below, drawing from instances where important principles to do with fairness, transparency and equality of treatment have been at issue.

The following section then moves towards a more macroscopic perspective, arguing that the effectiveness and attractiveness of leniency and settlements depend on a number of variables that are beyond the one single proceeding they are embedded in. The argument made here is that the sub-optimal employment of a particular procedural device not only risks weakening the effectiveness of that tool, but also, it risks affecting the balanced operation and dynamics of the enforcement system more widely.

In the final part, it is argued that a fairer, and ultimately more effective, approach requires the authorities to adopt a more holistic perspective, which also takes into account the role of third parties and the victims of the competition law breach.

When engaging in administrative processes such as leniency and settlements, competition authorities would be well advised to adopt a pluralistic perspective that seeks to accommodate in a complementary way different and potentially conflicting objectives of deterrence, procedural fairness and market restoration.

3.1 Too narrow a focus on efficiency could backfire

The concept of entering into negotiations between the regulator and regulated parties potentially risks compromising the constitutional values required by fairness, in that cooperation under the settlement procedure essentially demands a voluntary waiver of certain procedural rights. The EC settlement procedure

contains a number of built-in procedural safeguards, however, in order to avoid falling short of the basic due process fundamentals.[62]

Notably, the screening phase, where the EC assesses whether the case is suitable for settlement, usually takes place once the EC has broadly concluded the bulk of the fact-finding of the case.[63] This avoids that settlement discussions are opened prematurely, for example, when the EC is not yet fully cognizant of the main evidentiary elements of the case, but also avoids the risk of picking the wrong candidates for settlement cases.[64]

The settlement discussions, which are usually divided into three rounds of bilateral meetings with the parties, are confidential to each party. The EC sets the pace and sequence of the meetings, in accordance with the complexity of the case.[65] In the first round, each of the parties is faced with the key evidence making up the infringement allegation on the authority's file. In round two, the focus is on clarifying any outstanding issues regarding the infringement, with a view to recording a common understanding. The aim of the final round is to set out for each party the maximum amount of a possible fine.[66]

If a common understanding is reached during the settlement discussions, this is subsequently formally recorded in the settlement submissions, introduced by the parties.[67] Each party in its submission expressly acknowledges its liability for the infringement, formally confirms that it has been sufficiently informed of the EC's objections, and that it will not request an oral hearing, nor access to the whole of the Commission's file.[68]

From the perspective of the EC, the efficiencies achieved during the procedure do not affect the parties' rights of defence, with residual safeguards remaining at the parties' disposal.

Notably, during the settlement discussions phase, the parties can, within limits, request access to additional non-confidential versions of accessible documents on the case file. They will have to demonstrate that those documents are legitimately

---

62 Due process, in broad terms, refers to the right to good administration, including the right to be heard, to have access to the file, and to receive reasons for the authority's decisions. Charter, Art. 41.

63 See K. Dekeyser and C. Roques, *The European Commission's settlement procedure in cartel cases,* 55 The Antitrust Bull, 819, 826 (2010).

64 The Settlements Notice sets out the screening factors used by the EC for determining the suitability of a case for settlement. Factors taken into account, amongst others, are the number of parties involved, foreseeable conflicting positions on attribution of liability, extent of contestation of facts. Settlements Notice, para. 5. See also F. Laina and A. Bogdanov, *The EU Cartel Settlement Procedure: Latest Developments',* 5 JECL&P 717, 718 (2014).

65 Schinkel, *supra*, 471.

66 Dekeyser and Roques, *supra*, 834. See also Laina and Bogdanov, *supra*, 720.

67 The Settlements Notice makes clear that the EC may grant a final time-limit of at least fifteen working days for a company to introduce a final settlement submission after a common understanding has been reached. Settlements Notice, para. 17.

68 Settlements Notice, para. 20.

required in order to ascertain their position on specific aspects of the alleged infringement.[69] Furthermore, the parties can request the intervention by the hearing officer on due process questions.[70] Importantly also, any party, or indeed the EC, are free to revert back to the ordinary procedure if they feel this would be more advantageous to them, making so-called 'hybrid' settlements a possibility.[71]

The parties also maintain their right to an effective judicial appeal, albeit that it is assumed that parties who are willing to reach a common position with the EC will be less likely to appeal the final decision. Indeed, the low probability of subsequent litigation is often cited as a major procedural saving.[72]

Nevertheless, challenges still subside, in terms of the need to respect fundamental principles such as transparency, wider due process and equality of treatment. The desired efficiency drive, if the process is not carefully handled, might not materialize to the same extent expected. Worse still, the process could altogether derail, leading to additional delays, resource expenses and possible reputational damage, either during the administrative stage, or in subsequent appeal or judicial review proceedings.

3.1[a] *Challenges Based on a Possible Lack of Transparency*

Some of the criticisms advanced by commentators pertain to a lack of clarity and transparency as to the penalty calculation in a settlements context.[73] Recall here some of the economic literature mentioned earlier. This referred to the need for clarity in enforcement and discount-setting. A cartel participant must be able to predict with some degree of certainty the consequences of settling or not. Further, the literature referred to possible negotiation strategies and their ultimate outcome being affected by information asymmetries.[74]

In this respect, commentators have pointed out that even though the official settlement discount is fixed at 10%, and the EC is at pains to stress that this is non-negotiable,[75] this does not, however, preclude the EC from granting other concessions along the various steps of the calculation.[76] Doing so may be

---

69 *Ibid*. Paragraph 16.
70 *Ibid*. Paragraph 18.
71 In a hybrid case, the EC conducts a settlement under the 'streamlined procedure', leading to a streamlined decision, as well as conducting a fully contested procedure with those parties who do not wish to settle, leading to a standard, fuller infringement decision for the latter. Recent examples of hybrid cases are: *Steel Abrasives*, Commission Decision of 4 Apr. 2014 in case AT.39792, and *Mushrooms*, Commission Decision of 25 Jun. 2014 in case AT.39965.
72 Laina and Bogdanov, *supra*, 719.
73 See, for example, Stephan, *supra*, at 642.
74 See Section II.A of this article.
75 Settlements Notice, para. 2.
76 Schinkel, *supra*, 473.

particularly tempting the further advanced the EC is into the process, so as to obtain the desired consensus.[77] Schinkel argues that the fine ultimately levied, as the product of the various values set by the authority (including, for example, the estimate of the total value of affected sales, and adjustments for aggravating and mitigating circumstances) is open to negotiation.[78] In this context, he perceives a risk of the EC being 'gamed' in the settlement negotiations. Namely, given there is no real way of knowing how much the authority has given away to secure the settlement, the authority is likely to be forced to give away too much.[79]

It is important here to realize that potentially, it is not only the monetary penalty that is at stake. The messaging around the level of detail of the press release issued upon conclusion of the settlement is important to the settling party, as well as, to a certain extent, the level of detail of the infringement decision insofar as the party's information is concerned. Bach views this 'bargaining chip' around the level of information revelation to the public as an externality for the authority, arguing that the price for it is ultimately paid by others, such as the public at large, or the victims of the cartel.[80]

For the companies themselves, there can be a risk of a mismatch in their expectations at the final infringement decision stage, given that during the settlement process, the EC usually only discloses to each company the range of likely fines that the Commission intends to impose,[81] as well as a description of the main parameters of the calculation, with further detail being provided at the decision stage. It is therefore not to be excluded that a settling party would lodge an appeal after issue of the decision, challenging the actual method of calculating the fine.[82]

Moreover, beyond any lack of clarity as to the calculation of penalties, there is also a wider concern, only briefly referred to here, to do with a possible lack of visibility of the full evidential picture in a settlements context.[83] This carries risks not only for the parties under investigation.[84] If the agency settles a case before it

---

77 See Stephan here, *supra*, 643.

78 Schinkel, *supra*, 473.

79 *Ibid*., 477.

80 A. Bach, *Negotiated Antitrust Settlements: Some Perspectives from the Point of View of (Potential) Plaintiffs,* in Ehlermann and Marquis, *supra*, at 251.

81 Settlements Notice, para. 17.

82 Note, in this respect, that in a recent settlement case, *EIRD*, the applicant appealed and challenged the method of calculating the value of sales. See Commission Decision of 4 Dec. 2013 in case AT.39914, and on appeal, Case T-98/14 *Action brought on 14 February 2014 – Société Générale v. Commission* [2014] OJ C 142/36.

83 The EC tries to manage this risk by avoiding the entering into settlement discussions at too early a stage. Arguably, this risk cannot be entirely eliminated absent having carried out a full review of all the underlying evidence.

84 See J.D. Cooke, *Negotiated Settlements under EC Competition Law: A Judicial Perspective*, in Ehlermann and Marquis, *supra*, 272.

has had a chance to uncover the full extent of the infringement, it could grant too large a de facto settlement reward as compared to the real magnitude of the infringement.[85]

3.1[b] *Challenges Based on Equality of Treatment and Fairness Principles*

Parties under investigation need to be treated fairly throughout the process, and, if subject to the same circumstances, equally. That is to say, a concession granted to one party, if another party happens to be in the same or similar situation, needs to be granted to that other party also.

These challenges can be accentuated in circumstances involving hybrid settlements. Namely, it is inevitably more likely that cases subject to hybrid settlements will be appealed by at least some of the non-settling parties, meaning that there is a risk that the authority's case may be altogether disproved on appeal. In such circumstances, difficult questions can arise as to the status of the earlier settlement concluded with the settling parties. Further, it is likely the settlement process itself will receive heightened scrutiny in the later litigation proceedings.

In the UK, these challenges all came to the fore in the seminal *Tobacco* litigation, based on the Office of Fair Trading's (OFT's) cartel decision into alleged price-fixing agreements between tobacco manufacturers and retailers.[86]

In the course of the hearing of the appeals brought by the non-settling parties in 2011, the OFT's theory of harm effectively fell apart.[87] Two of the settling parties, Gallaher and Somerfield, then attempted to obtain leave to appeal out of time. Whilst the request initially succeeded in the lower court,[88] the Court of Appeal overturned the Competition Appeal Tribunal's ruling.[89] The Court of Appeal held that the need for finality and legal certainty meant that parties, who had failed to appeal during the relevant time-limits prescribed by the law, were not then able to take advantage of rulings favourable to those who did appeal.[90]

In the meantime, it had become knowledge that around August 2012, the OFT had made a penalty repayment to another settling party, TMR. This was on the basis that, despite existing case law as to legal certainty and finality, the OFT had apparently given certain assurances to TMR during the settlement process, in

---

85 See Wils, *The Use of Settlements*, *supra*, 346.

86 Case CE/2596-03: *Tobacco* (15 Apr. 2010) http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/tobacco.pdf (accessed 4 Jun. 2015).

87 See *Imperial Tobacco Group PLC v. Office of Fair Trading* [2011] CAT 41.

88 *Somerfield Stores Limited v. OFT*; *Gallaher Group Limited v. OFT* [2013] CAT 5.

89 *Office of Fair Trading and Somerfield Stores Ltd* [2014] EWCA Civ 400.

90 *Ibid*. at [42]. See also on the principle of finality in relation to competition cases in domestic law, *Lindum Construction Co Ltd v. OFT* [2014] EWHC 1613 (CH).

2008, as to what would happen to TMR if another party were successful in its appeal against the OFT's decision. Namely, TMR was apparently led to believe that if another party successfully appealed against the OFT's infringement decision, and to the extent that any principles established by that court would read across to TMR, the OFT would apply the same corresponding principles and adjustments to TMR as applied to the other party.

The other two settling parties, Gallaher and Somerfield, subsequently sought similar repayments from the OFT, and brought judicial review proceedings on the basis that they should have been given the same assurances during the settlement process.[91] On the issue of fairness and equality of treatment, Collins J unambiguously held that the failure to notify other settling parties of the assurances given to TMR was contrary to the public law requirements of fairness and equal treatment. In his own words:

> Thus it is essential that in negotiations in relation to [settlements] one party is not given an advantage denied to another. There must be what is sometimes described as a level playing field. […] Anything which can act as an inducement to enter into [a settlement] is likely, if not limited to the particular circumstances of a party, to be material and should be put to all parties. To give one party an unknown advantage where there are no special circumstances pertaining to that party is in my judgment clearly unfair.[92]

Ultimately, Collins J ruled that Gallaher and Somerfield should however not receive such payments, based on the principle that a mistake should not be replicated where public funds are concerned.[93] This does not change the fact that the ruling raises fundamental questions over the appropriate conduct of the authority in a settlements context, in relation to the due process aspects of settlement procedures.

The Court of Appeal has subsequently granted permission to appeal.

3.2 Towards a more macroscopic perspective

Beyond the particular facts of the case, and beyond issues of fairness pertaining to the treatment of the actual parties under investigation, there is also the bigger question as to fairness in the choice of the appropriate use of a tool, and the effects its deployment has on the wider system.

Taking a step back from the cartels context, the wider benefits of the processes of consensual settlement have long been recognized in the pursuit of civil liability disputes, as constituting a quicker and more cost-effective means of

---

91 *R (Gallaher Group Limited and Ors) v. Competition and Markets Authority* [2015] EWHC 84 (Admin).
92 *Ibid*. at [38] and [39].
93 See *Customs and Excise Commissioners v. National Westminster Bank plc* [2003] STC 1072.

achieving the desired resolution of the underlying proceeding. Furthermore, there is a large body of scholarly research according a prominent role to negotiation as a distinct feature of regulatory enforcement.[94] In a UK context, the 'better regulation' agenda, moving away from formal court-driven, adversarial approaches to enforcement, in pursuit of a more flexible approach favouring negotiation between the regulator and regulatee, can be cited here.[95]

However, the above résumé also brings out the risks inherent in an enforcement process increasingly reliant on the expeditious resolution of regulatory violations. Particularly, the emphasis on negotiation and bargaining may clash with important constitutional values such as transparency and due process.[96] Insofar as the resolution of disputes by negotiation is being underpinned by a degree of mutual concession and bargain, rather than by adherence to strict legal rules per se, some commentators have expressed the concern that it could undermine the rule of law ideal.[97]

Further, in a competition law context, Budzinski and Kuchinke query whether the increased acceptance of consensually derived infringement decisions comes at the expense of diluting the underlying competition law rules and enforcement themselves. In other words, if cartelists can hope for a settlement in most circumstances, the incentive increases to take on more and more risk, testing out the rules and the limits of their application in practice.[98]

This section further elaborates on several themes to do with fairness, all finding their common expression in the adoption of a more macroscopic lens to the question. First, the risk that over-reliance on leniency and settlements compromises fairness, particularly also in the context of the often one-dimensional manner in which these tools are being deployed. Second, the need to foster a culture and perception of fairness, based on strong procedural safeguards,[99] and on a greater participation of third parties in the process.

---

94 See, e.g., K. Hawkins, *Environment and Enforcement: Regulation and Social Definition of Pollution* (Clarendon Press, 1997), B. Hutter, *Compliance: Regulation and Environment* (Clarendon Press, 1997) and R. Cranston, *Regulatory Business: Law and Consumer Agencies* (Macmillan, 1979). For a useful summary on sociological theories of regulation, see V. Comino, *Australia's 'Company Law Watchdog' – ASIC and Corporate Regulation,* Ch. 3 (Thomson Reuters, 2015).

95 See, for example, Better Regulation Executive, *Reducing Regulation Made Simple,* HMSO, (December 2010) http://www.advantagewm.co.uk/assets/biscore/better-regulation/docs/r/10-1155-reducing-regulation-made-simple.pdf (accessed 4 Jun. 2015).

96 In a broader context, see K. Yeung, *Better Regulation, Administrative Sanctions and Constitutional Values*, 33 Leg. Stud. 312 (2013).

97 Yeung, *supra*, at 328.

98 See Budzinski and Kuchinke, *supra*, at 281.

99 In this context, academic research establishes that parties are more likely to accept and adhere to a negotiated agreement when they believe the negotiation was concluded in a fair manner, see R. Hollander-Blumoff and T.R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. Disp. Resol. 1, 17 (2011).

3.2[a] *Over-Reliance on Leniency and Settlements*

Competition authorities have arguably become over-reliant on leniency, and there is a risk this might also become the case with the procedural efficiencies obtained through settlements. It is a well known fact that most competition authorities to date are subject to rigorous enforcement targets, and hence under pressure to deliver more and more cases.[100] As to leniency, at European level, allegations of overinflated evidence from leniency parties have been heard more than once in the European courts.[101] The *British Airways* criminal case in the UK is a stark example of the pitfalls inherent in the agency becoming over-reliant on the leniency applicant, failing to fully verify the accuracy and completeness of information disclosed.[102] The case concerned an alleged price-fixing cartel to which there were only two parties, Virgin Atlantic, the immunity applicant, and British Airways.

The dynamics of cartel prosecution are particularly problematic in circumstances where one party is seeking leniency and is responsible for providing the agency with a significant amount of evidence, to be used against the only other party to the infringement.[103] In that case, the criminal trial against British Airways began on 26 April 2010. It was however abandoned on 10 May 2010, when new electronic evidence held by Virgin came to light after the start of the trial. Given that neither side had sufficient time to review the material, it was accepted that it would potentially be unfair to continue the trial.[104] In the aftermath of the *BA/Virgin* criminal case, the OFT undertook a series of internal reviews and reforms of its leniency and wider investigative processes, aimed at strengthening its enforcement capabilities.[105]

Sensitive to the above risks, competition authorities have progressively been conducting their own, intelligence-led investigations in recent years.[106] Enhanced

---

100 On this point, see also Stephan, *supra*, 642.

101 See, for example, *Cartonboard* [1998] ECT II-2099. For a fuller discussion, see Stephan, *supra*, at 649.

102 See A. Stephan, *Cartels* 230 in I. Lianos and D. Geradin (eds.), *Handbook on European Competition Law: Substantive Aspects*, Elgar Original Reference, 230 (Edward Elgar Publishing Ltd, 2013). Separately, Spagnolo has argued that oral statements, which are increasingly used in leniency applications, 'are harder to verify, and can open the door to falsifications or distortions'. See G. Spagnolo, *Leniency and Whistleblowers in Antitrust*, 295 in P. Buccirossi (ed.), *Handbook of Antitrust Economics* (MIT Press, 2008).

103 See, for a fuller discussion, M. Furse, *The criminal law of competition in the UK and in the US: failure and success,* Ch. 4 (Edward Elgar, 2012).

104 OFT, *Project Condor Review*, Annex, 9, OFT 2010.

105 *Ibid*.

106 See H.W. Friederiszick and F.P. Maier-Rigaud, *Triggering Inspections Ex Officio: Moving Beyond a Passive EU Cartel Policy,* 4 J. Competition L. & Econ. 89 (2008); R. Abrantes-Metz and P. Bajari, *Screens for Conspiracies and Their Multiple Applications,* 24(1) Antitrust 66 (2009); A. Nikpay, *UK Cartel Enforcement – Past, Present, Future,* paper presented at the Law Society Anti-Trust Section, (London,

screening and proactive detection methods act as complements to the leniency policy and are increasingly adopted by agencies in Europe and more widely.

Furthermore, the important maxim that over-using any one key enforcement tool, be it leniency or settlements, can be considered sub-optimal, also applies at more granular level. The concern here is that the possible resort to any related components that together could make up the scope of the actual procedural device in question is not being maximized. In the case of settlements, these components could be based on a much wider mix between personal and corporate strategies.

Non-pecuniary, more targeted remedies could involve applications for director disqualification orders, to the extent available under the existing legislation,[107] or, for example, requirements to set up internal compliance and disciplining processes within the company.[108]

However, the practice in the UK so far seems to indicate a more one-dimensional risk-based approach, in which settlements concluded in civil cartel cases usually would not encompass any application to the court for competition disqualification orders. This approach is apparently mainly based on a desire to preserve incentives to settle.[109] On the contrary, corporations under investigation often try to obtain assurances during the settlement process that their directors would not be prosecuted under disqualification proceedings.[110]

The CMA has publicly stated that, as a matter of discretion, it can decide not to pursue a competition disqualification order against the directors of a settling business.[111] Equally, the CMA has made it known that it will not apply for a

---

11 Dec. 2012) http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/speeches/2012/1112.pdf (accessed 4 Jun. 2015).

107 Director disqualification orders for competition law breaches are not available under the EC regime. In the UK, however, under the Company Directors Disqualification Act 1986, as amended by the Enterprise Act 2002, the CMA may apply to the court for an order disqualifying a director from, amongst other things, being involved in the management of a company (a competition disqualification order). See OFT, *Director disqualification orders in competition cases,* OFT510, (2010) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324978/oft510.pdf (accessed 4 Jun. 2015).

108 For a wider discussion on the importance of corporate internal disciplining systems, see Fisse and Braithwaite, *supra*, at 193f. On corporate compliance, note that in a recent CMA investigation involving a membership organization of private consultant ophthalmologists, the organization proposed to introduce a comprehensive compliance programme as part of its admissions and agreement to co-operate with the CMA. If the programme is satisfactorily implemented prior to conclusion of the CMA's investigation, the CMA will grant a further reduction in its fine imposed on the membership organization. See https://www.gov.uk/government/news/eye-surgeons-membership-organisation-fined-500000 (14 Jul. 2015).

109 In contrast, the criminal court imposed director disqualification orders on the defendants in the *Marine Hose* criminal cartel case, see *R v. Whittle, Brammar & Allison* [2008] EWCA Crim 2560; [2009] UKCLR 247.

110 It is understood that those requests were made and acceded to during the early resolution discussions in the OFT's *Dairy Retail Price Initiatives* case, for example (Case CE/3094-03).

111 See CMA Procedures Guidance, *supra*, para. 14.30.

competition disqualification order against any current director of a company whose company has benefited from leniency, for similar reasons.[112]

3.2[b] *The Need to Foster a Greater Perception of Fairness in the Deployment of These Tools*

The over-use of any one key enforcement tool, at the expense of the employment of any other, cannot only be considered sub-optimal, but it might also affect the wider system and the actors within it in multiple, complex ways.[113]

This ought to make the deployment of such tools a carefully considered affair. In those jurisdictions following the administrative model, such as is the case in the EU, however, there is no judicial oversight over the actual settlement process by a court,[114] except in those instances where the final infringement decision is being appealed. In contrast, in those jurisdictions following the prosecutorial model, any proposed penalties agreed within a settlement context are put to the courts for their consideration and require the courts' separate approval.[115] In Australia, the Full Federal Court has recently pushed back even further, ruling that the court is not permitted to receive or act on submissions by the regulator or a respondent as to the appropriate amount or range of penalties.[116] The parties retain the ability to submit agreed facts to the court for its consideration,[117] including facts going to relevant considerations for determining the penalty. It is the judiciary only, however, which is entrusted with the unfettered discretion to determine pecuniary penalties.[118]

If anything, the administrative model pleads in favour of heightened transparency and stronger procedural safeguards being built into settlements.

---

112 See CMA Procedures Guidance, *supra*, para. 3.7.

113 See also, on this point, Georgiev, *supra*, 1035, arguing that over-reliance on settlements has worked against the goals of instituting stronger procedural protections into the EU system, thereby carrying a greater scope for political pressure, ultimately also providing less guidance for companies.

114 Under the EC's procedure, the adoption of the streamlined infringement decision is subject to the agreement of the College of Commissioners, see Settlements Notice, *Overview of the procedure leading to the adoption of a (settlement) Decision pursuant to Articles 7 and 23 of Regulation No (EC) 1/2003*.

115 See pronouncements made in *Minister for Industry, Tourism & Resources v. Mobil Oil Australia Pty Ltd* [2004] ATPR ¶41-993, 48,630 at [70], noting that the court must form its own view on the appropriate range of penalties. Nevertheless, concerns have been expressed in the past as to the role of the courts being in actual fact compromised in determining whether the proposed penalty is appropriate. See for a fuller discussion, C. Beaton-Wells and B. Fisse, *Australian Cartel Regulation,* 11.3.2 (Cambridge University Press, 2011).

116 *Director, Fair Work Building Industry Inspectorate v. CFMEU* [2015] FCAFC 59 [CFMEU]. See also for further detail P. Renehan and P. Stevenson, *Purity but at what price: the application of Barbaro principles to pecuniary penalty proceedings*, paper presented at the 2015 Competition Law Conference (Sydney, 30 May 2015).

117 CFMEU, e.g., at [237].

118 See CFMEU, e.g., at [241], referring to the fact that the agreed amount offers no assistance in fixing the amount of the *appropriate* penalty. An application for special leave to appeal to the High Court has been made.

Schinkel for example recommends a binding independent critical review of the actual terms of the settlement as a standard separate step being built into every settlement.[119] There are also questions to do with the appropriate separation between the 'adversarial' case teams and settlement teams. This might be necessary in order to avoid, particularly in a hybrid settlement context, the 'standard' procedure being tainted by a possible prior knowledge or enforcement bias stemming from the prior settlement negotiations.[120] Some of these or similar heightened procedural protections have already made their way into the authorities' policy guidance documents and investigative processes.[121]

Equally relevant, however, are the wider manifestations of the authority's duty of impartiality, particularly, the need to avoid even any appearance of bias. As concerns hybrid settlement cases, the possible risks for non-settling parties of procedural inequities have recently been brought to the fore in a complaint lodged with the European Ombudsman (Ombudsman) by the French bank Crédit Agricole.[122] The Ombudsman in that case concluded that statements made by the former Commissioner about the Euro Interest Rate Derivatives (EIRD) cartel,[123] involving Crédit Agricole, one of the non-settling parties, created a public impression of bias.[124] The Ombudsman found that the Commission was perceived to have already reached a conclusion regarding Crédit Agricole's participation in the cartel before the investigation against the non-settling parties was completed.[125] The Ombudsman also recommended that the European Commission issue guidelines on public statements made by Commissioners on ongoing investigations.

Ultimately, there is a question whether the current settlement process displays sufficient regard to wider fairness considerations, particularly, fairness vis-à-vis third

---

119 Schinkel, *supra*, 481.

120 See also, on this point, Cooke, *supra*, 270.

121 For example, in a UK context, the CMA guidance specifies that approval to settle must be sought from the wider CMA Case and Policy Committee. Further, any admissions made during failed settlement discussions will not be disclosed to other businesses involved in the investigation, or to the ultimate case decision-makers. See CMA Procedures Guidance, *supra*, paras 14.19 and 14.22.

122 Case 1021/2014/CK.

123 Case AT.39914 – Euro Interest Rate Derivatives.

124 See European Ombudsman Press Release No. 5/2015 of 12 Mar. 2015 http://www.ombudsman.europa.eu/en/press/release.faces/en/59265/html.bookmark (accessed 4 Jun. 2015).

125 In particular, the Ombudsman took issue with a statement made by the former Commissioner in the context of a speech to the French Senate, in which he expressed himself as follows: '*Il y a encore trois institutions bancaires et un broker qui continuent à être investigués parce qu'ils n'ont pas voulu participer à l'accord final: une institution française Crédit Agricole [.] dont l'investigation continue, et on ira jusqu'à la fin, et je dois dire comme on a beaucoup d'informations [rires] déjà, l'investigation n'est pas la plus difficile du monde, à partir de ce moment-là on finira cette investigation*'. European Ombudsman, *Draft recommendation of the European Ombudsman in the inquiry into complaint 1021/2014/CK against the European Commission*, para. 24 (10 Mar. 2015) http://www.ombudsman.europa.eu/en/cases/draftrecommendation.faces/en/59249/html.bookmark (accessed 4 Jun. 2015).

parties. Infringement decisions concluded by way of settlement tend to be less detailed as concerns the factual and evidential description of the infringement and its effects.[126] This also poses the question as to whether settlements risk sacrificing wider advocacy and public learning from cartels law, in view of the limited precedential value these decisions carry.[127]

Arguably, settlements also render the pursuit of enforcement actions by private parties more challenging,[128] in that parties under investigation are not to disclose the settlement documents to any third parties, nor will complainants be granted access to the settlement submissions.[129] Further, the recently agreed EU Directive on private damages actions also specifies that national courts cannot at any time order a party or a third party to disclose settlement submissions in private litigation proceedings.[130]

Both leniency applicants and settling parties assign a high value to confidentiality and the protection of self-incriminating information voluntarily provided to the authorities.[131] Shutting complainants and the victims out of the process completely, however, makes settlements inherently more secretive and less democratic. More widely, it raises questions to do with a wider lack of accountability characterizing the current settlement process.[132]

A fine balance needs to be struck between recognizing the positive social welfare implications flowing from streamlined settlement procedures, and therefore wishing to preserve the parties' incentives to settle, whilst at the same time not unduly depriving private claimants of the outcomes achieved in the prior public proceeding.[133]

---

126 By way of comparison, note that in a non-settlement context at least, the European Commission and General Court seem to be more willing, as of late, to provide more detail and to reject requests by cartel members to redact certain information from the non-confidential version of the infringement decision. See Case T-462/12 *Pilkington Group Ltd v. European Commission*, judgment of the General Court dated 15 Jul. 2015.

127 See Schinkel, *supra*, 467.

128 See Dekeyser and Roques, *supra*, 841, Bach, *supra*, 255 and Stephan, *The Direct Settlement*, *supra*, 645.

129 Settlements Notice, para. 7. See also Dekeyser and Roques, *supra*, 838.

130 The same prohibition also applies to leniency statements. European Parliament and Council, Directive 2014/104/EU of the European Parliament and of the Council 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 [2014] OJ L 349/1, Art. 6(6) [EU Private Damages Directive].

131 For a fuller discussion, see L. Guttuso, *The Enduring Question of Access to Leniency Materials in Private Proceedings: One Draft Directive and Several Court Rulings,* 7 GCLR 10, 10 (2014).

132 See Georgiev, *supra*, at 1036. See also First and Weber Waller, who have argued that the institutional re-balance that is required to combat the antitrust democratic deficit also has a procedural side, in terms of making antitrust decisions more transparent and more responsive to the interests that antitrust laws are meant to serve. See H. First and S. Weber Waller, *Antitrust's Democracy Deficit*, 81 Fordham L, Rev. 2543, 2573 (2013).

133 See also L. Guttuso, *A view of the macrocosm of international cartel enforcement: How the boomerang of cross-border disclosure springs back to its domestic context,* 43 ABLR 27, 46 (2015).

The EU Private Damages Directive attempts to go some way towards achieving this delicate balance, by establishing that infringement findings in final competition authorities' decisions (including those reached by settlement) are to be binding in damages claims heard before their national courts.[134] In Australia, recent competition law reform proposals recommend amending the current legislation to make it easier for private parties to be able to rely on admissions of fact obtained in the context of the competition authority's settlement process when pursuing their own private damages actions.[135]

4 TOWARDS A MORE PLURALISTIC STRATEGY

Some commentators have gone further and have called for a review of the entire enforcement policy so as to better integrate public and private enforcement,[136] particularly as concerns the competition authorities' fining policies in the context of settlements.

The theme of more closely combining the award of private compensation and public enforcement in the one proceeding is not novel.[137] For example, in 2006, as part of the UK OFT's settlement of the Independent Schools case,[138] the schools under investigation agreed to make payments totalling GBP 3 million into a trust fund to benefit the pupils who attended the schools.[139]

Admittedly, the public agency's limited resources are prima facie not best spent furthering private aims. The process of quantifying harm and working out

---

134 EU Private Damages Directive, *supra*, Art. 9(1). Subject to the limitations on access to leniency and settlement submissions set out in Art. 6, the Directive also advocates that greater powers be given to national courts to order disclosure of evidence in damages actions, EU Private Damages Directive, Art. 5(1).

135 The recommendation relates to the *Competition and Consumer Act 2010* (Cth), s. 83, proposing it be made clearer that the section extends to admissions of fact made by the person against whom the proceedings are brought, in addition to findings of fact made by the court. See Competition Policy Review, *Final Report*, Recommendation 41, p. 74 (March 2015) http://competitionpolicyreview.gov.au/final-report/ (accessed 4 Jun. 2015).

136 See, for example, M.J. Frese, *Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability,* 34 World Competition 397 (2011), C.J.S. Hodges, *European Competition Enforcement Policy: Integrating Restitution and Behaviour Control,* 34 World Competition 383 (2011) and A. Ezrachi and M. Ioannidou, *Public Compensation as a Complementary Mechanism to Damages Actions: From Policy Justifications to Formal Implementation,* 3 JECL & Pract 536 (2012).

137 See also the discussion in L. Guttuso, *Leniency and the two faces of Janus*, *supra*.

138 Office of Fair Trading, *Schools: Exchange of Information on Future Fees*, Decision No. CA98/05/2006, (2006) http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/schools (accessed 4 Jun. 2015).

139 See Office of Fair Trading, *OFT Issues Final Decision and Imposes Penalties in Independent Schools Investigation*, Press Release 166/06, (23 Nov. 2006) http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news/press/2006/166-06 (accessed 4 Jun. 2015). In return for the schools paying monies into the trust, the fine imposed on each school was significantly reduced.

suitable means of redress may be fraught with challenges, particularly for the more nascent authorities.

An example from South Africa, aiming to implement remedies pursuing distributive justice, can be found in the *Pioneer Foods* bread cartel case.[140] In that case, the overall sanction imposed on Pioneer as part of the settlement also contained a penalty in the form of a requirement to set up an Agri-fund to be managed by the Industrial Development Corporation, dedicated to assisting new entrants in the baking and milling markets.[141] The settlement, particularly that part of the remedy requiring the endowment of the fund, initially became politicized, and led to allegations by the Department of Finance of appropriation of public funds by the Department of Economic Development.[142]

As part of the overall package, Pioneer was also required to invest a further ZAR 150 million in additional baking capacity, and to reduce its margins on bread by a further ZAR 160 million over a specified period.[143] From an economic perspective, however, alternative mechanisms of disbursing parts of the fine through, say, a discount remedy, albeit legitimately targeted at benefiting consumers through lower prices, can potentially carry the risk of creating additional unwanted distortions in the market.[144]

Instead, more sophisticated arrangements could involve the parties under investigation by the authority agreeing to an external court-approved mediation or other alternative dispute resolution processes, ruling over the possible amounts and mechanisms for compensating the victims more directly.[145] From the perspective of the competition authority, this would do away with having to expend scarce

---

[140] See Competition Tribunal, case number 15/CR/Mar10, *Competition Commission v. Pioneer Foods (Pty) Ltd*, 30 Nov. 2010, http://www.comptrib.co.za/cases/consent-order/ (accessed 4 Jun. 2015). See also T. Bonakele and L. McNube, *Designing Appropriate Remedies for Competition Law Enforcement: The Pioneer Foods Settlement Agreement,* paper presented at the Fifth Annual Competition Law, Economics and Policy Conference in South Africa (4 & 5 Oct. 2011) http://www.compcom.co.za/wp-content/uploads/2014/09/Designing-Appropriate-Remedies-for-Competition-Law-Enforcement-The-Pioneer-Foods-Settlement-Agreement-25082011.pdf (accessed 4 Jun. 2015).

[141] The initial sanction incorporated a fine of ZAR 250 million, and a further penalty of ZAR 250 million in the form of a requirement to endow a fund dedicated to new entrants in the baking markets.

[142] In the end it was agreed to increase the fine component to ZAR 500 million, ZAR 250 million of which being used by the Department of Finance for the endowment of the fund. See also the interesting discussion in R. Lewis, *Enforcing competition rules in South Africa: thieves at the dinner table,* Ch. 5 (Edward Elgar Publishing, 2013).

[143] The Penalty Guidelines recently published by the South Africa Competition Commission refer to the ability of the Commission to consider other remedies that seek to address the harm caused to competition as a result of the competition law breach, over and above the imposition of a monetary penalty, see Competition Commission, *Guidelines for the Determination of Administrative Penalties for Prohibited Practices*, para. 9.1 (17 Apr. 2015) http://www.gov.za/sites/www.gov.za/files/38693_gon323.pdf (accessed 4 Jun. 2015).

[144] For a more detailed discussion, see Aproskie and Goga, *supra*.

[145] Hodges, *supra*, 394. See generally L. Guttuso, *I'm an Immunity Applicant, Get Me out of Here: Joint and Several Liability Revisited* 7 GCLR 94, 104 (2014).

resources on the compensatory aspects of the settlement. It would also limit any reputational risk for the authority, in that the task of setting up the scheme and working out the exact quantification of the damage would be outsourced to others. The companies may also have strong incentives to deal with both sets of liability in one proceeding, and to address any private law exposure within the context of the public settlement.[146]

Some of the current legislative reform proposals in the UK envisage a role for such agency-endorsed compensation.[147] It is proposed that the competition authority, the Competition & Markets Authority (CMA), will have a limited role in approving schemes voluntarily set up by parties under investigation who want to provide redress, without it actually being responsible for calculating the appropriate amount of redress. The CMA will be able to have regard to the level of compensation offered when deciding whether to approve a scheme. The voluntary set up of such redress schemes is likely to translate into a penalty reduction being obtained by the companies under investigation in the agency's public proceeding, albeit that there is no absolute right to a discount.[148]

Incorporating a redress function into the public leniency policy[149] or settlement process can serve as a general corrective justice tool and bridge any possible compensation gap, particularly in jurisdictions with as yet untapped private redress capabilities.[150]

One of the distinct benefits of incorporating a compensatory element into the settlement is that it can be seen as a much more tangible public outcome than the imposition of penalties on their own. This is particularly important given that, as has already been discussed, monetary penalties imposed through settlement

---

146 See P. Marsden, S. Weber Waller and P. Fabbio, *Antitrust Marathon V: When in Rome Public and Private Enforcement of Competition Law*, 9 European Competition Journal 503, 527 (2013), where Renato Nazzini argued that in systems moving towards opt-out class actions, parties may have sufficient incentives to deal with their private law liability as part of the settlement with the competition authority.

147 See Consumer Rights Act 2015, Sch. 8, Pt. 1; Office of Fair Trading, *OFT Response to the Draft Consumer Rights Bill Proposals*, para. 8.8, OFT1502, (September 2013), http://hb.betterregulation.com/external/OFT%20Response%20to%20the%20Draft%20Consumer%20Rights%20Bill%20proposals%20-%2016%20Sep%2013.pdf (accessed 4 Jun. 2015) and CMA, *Guidance on the CMA's approval of voluntary redress schemes*, CMA40con, (March 2015) ('CMA Guidance on redress schemes') https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408333/Draft_guidance_-_CMA_voluntary_redress_schemes.pdf (accessed 4 Jun. 2015).

148 CMA Guidance on redress schemes, para. 2.34f.

149 Note, for example, that the grant of leniency under the US Department of Justice's leniency policy requires leniency recipients to provide restitution to the victims wherever possible. DOJ, *Corporate Leniency Policy,* para. A5 (10 Aug. 1993), www.justice.gov/atr/public/guidelines/0091.pdf (accessed 4 Jun. 2015).

150 See A. Ezrachi and M. Ioannidou, *Access to Justice in European Competition Law – Public Enforcement as a Supplementary Channel for 'Corrective Compensation'*, 19 Asia P. L. Rev. 195, 209 (2011).

processes can often be subject to significant reductions achieved in a commercially sensitive, and hence by definition, non-transparent, environment.

In an Australian setting, and outside the specific cartels context, the settlement recently achieved by the Australian Competition and Consumer Commission (ACCC) in its long-running investigation into supplier complaints in the supermarkets sector,[151] constitutes an interesting example of a settlement incorporating a formal redress procedure, in addition to imposing a monetary penalty.[152]

In that case, the undertaking given to the ACCC by the supermarket chain Coles, enforceable by the court, provides for the establishment of a formal process to secure redress for more than 200 suppliers impacted by Coles' unconscionable conduct. The process is overseen by an independent arbiter, determining the eligibility of suppliers affected by Coles' practices to obtain refunds of any prior payments made to Coles, such as payments for 'profit gaps', or penalties for alleged late deliveries by suppliers.[153]

In addition, the ACCC's press release also refers to public statements from Coles, 'unconditionally apologising and accepting full responsibility for its actions in these supplier dealings'.[154] This can be contrasted with the EC's public messaging following a cartel settlement, which usually does not refer to a similar public apology being given by any of the cartelists. Companies might be more willing to make this kind of apology in circumstances where their liability, public and private, has been conclusively dealt with in the one proceeding.

An enforcement process which builds on elements of restorative justice, and uses a mix of techniques such as monetary penalties, apologies and a credible commitment to forward-looking market reparation, can ultimately attract a greater sense of responsibility and legitimacy, not only with victims, but also with the public at large.[155] This enhanced perception of fairness within the wider enforcement system will in the long-run be more effective at achieving deterrence in the market than the imposition of penalties, no matter how substantive, on their own.

---

151 This was a case brought by the ACCC under the 'unconscionable conduct' provisions enshrined in Australian Consumer Law, against Coles Supermarkets Australia Pty Ltd ('Coles'), a leading Australian supermarket.

152 In that case the Federal Court ordered Coles pay combined pecuniary penalties of AUD 10 million and costs. See ACCC 'Court finds Coles engaged in unconscionable conduct and orders Coles pay USD 10 million penalties' (Press release, 22 Dec. 2014) https://www.accc.gov.au/media-release/court-finds-coles-engaged-in-unconscionable-conduct-and-orders-coles-pay-10-million-penalties (accessed 4 Jun. 2015).

153 *Ibid*. See also the Undertaking provided by Coles at: http://registers.accc.gov.au/content/index.phtml/itemId/1183859 (accessed 4 Jun. 2015).

154 ACCC press release, *supra*.

155 See, for a fuller discussion, S. Wilks, *A Political Science Approach: Restorative Justice and the 'Fairness Critique'*, in Ehlermann and Marquis, *supra*, 93.

5 CONCLUSION

The aim of this article is not to provide an outright critique of the utilitarian, efficiencies-based outlook towards leniency and settlements. On the contrary, it is without question that the procedural efficiencies gained through settlement procedures can increase enforcement throughput by the authorities. Ultimately, provided these tools are employed carefully, they can therefore add to the deterrence and wider consumer welfare in the system. Nevertheless, experience from Europe and beyond has shown that the effective administration of leniency and settlement policies requires deontological principles such as fairness and due process to be accommodated as well. This means giving proper regard to such principles in dealing with parties under investigation.

Beyond that, however, a fairer, and ultimately more effective, approach also requires the authorities to adopt a holistic perspective, which takes into account the appropriate mix between personal and corporate sanctions, as well as factoring in the role of third parties and the victims of the competition law breach. When engaging in administrative processes such as leniency and settlements, competition authorities would be well advised to adopt a pluralistic perspective that seeks to accommodate different objectives of deterrence, compensation and market restoration in a more coherent manner. Doing so is likely to further enhance deterrence in the wider system.