28 The European Leniency Programme and the European Cartel Settlement Procedure

General Overview and Selected Issues

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28.1 Introduction

The most egregious competition law infringements are the hard-core cartels[1] which are purely anti-competitive in nature, having as their goal the restriction of competition in the markets. Mario Monti, the former Competition Commissioner's words reflect how dangerous cartels are to the EU when he described cartels as 'cancers on the open market economy.'[2]

Hard-core cartels aimed at fixing prices, production or sales quotas, dividing or sharing markets, restricting imports or exports yield no efficiency or welfare gains but lead to higher prices for other undertakings purchasing from the producers of the cartelised products and they result in artificial prices and reduced choices for the consumers.[3] Due to these harmful effects, fighting cartels is one of the top priorities of the national competition agencies (NCAs) as well as the European Commission[4, 5] (Commission).

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1 Commission Notice on Immunity from fines and reduction of fines in cartel cases OJ C 298, 8.12.2006, rec. 1.

2 M. Monti, 'Fighting Cartels – Why and How? Why should we be concerned with cartels and collusive behaviour' The 3rd Nordic Competition Policy Conference in Stockholm, 11-12 September 2000. Available at http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm (accessed on 10 September, 2016).

3 Commission Notice on Immunity from fines and reduction of fines in cartel cases OJ C 298, 8.12.2006, rec. 2.

4 Commission Notice on the non-imposition or reduction of fines in cartel cases OJ C 207, 18.7.1996, rec. 1.

5 See the statements of the Commission, e.g. 'Statement by Commissioner Vestager on decision to fine truck producers €2.93 billion for participating in a cartel', Brussels, 19 July, 2016, STATEMENT/16/2585. Available at http://europa.eu/rapid/press-release_STATEMENT-16-2585_en.htm (accessed on 15 August, 2016).

The Commission and the NCAs have three main sources for detecting cartels. Firstly, they may monitor markets themselves, however, this requires an abundance of resources and/or they must carry out an economic analyses of the data collected. Secondly, enforcers of competition law may obtain information from third parties such as competitors or consumers, however, this source is not as reliable as the third one, namely, when the undertakings involved in the infringement provide information.[6]

In order to fight secret cartels, the Commission developed a leniency policy and adopted its first leniency notice[7] in 1996[8] which was later replaced in 2002.[9] Since then, it has been amended several times.[10] Under the Leniency Notice, any undertaking party to a cartel providing information and evidence to the Commission about the cartel it participates or has participated in may receive full or partial immunity from fines. The Commission's leniency policy became a frequently used tool in the Commission's repertoire for competition law enforcement, since, according to General Court judge Marc van der Woude,[11] almost all relevant proceedings of the Commission start with leniency.[12]

The cartel settlement procedure of the Commission was introduced in 2008. The aim of the settlement procedure is to promote the procedural efficiency of cartel investigations, to accelerate the proceedings, to avoid subsequent litigation in the European courts,[13] thereby economizing on the Commission's resources enabling it to pursue other cartel cases and open new investigations.[14] Accordingly, the settlement procedure is an expedient tool in improving deterrence, because it relieves the resources of the Commission allowing it to fight a greater number of cartels, increasing the probability of detection. Undertakings willing to participate in the settlement procedure and acknowledging their participation

6 W.P.J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years' (June 10, 2016). World Competition: Law and Economics Review, Vol. 39, No. 3, 2016; King's College London Law School Research Paper No. 2016-29. Available at SSRN: http://ssrn.com/abstract=2793717 (accessed on 5 August, 2016), p. 11.

7 The framework set out by the Commission for rewarding cooperation in the Commission investigation.

8 Commission Notice on the non-imposition or reduction of fines in cartel cases OJ C 207, 18.7.1996, pp. 4-6.

9 Commission notice on immunity from fines and reduction of fines in cartel cases OJ C 45, 19.2.2002, pp. 3-5.

10 E.g. in 2006, see Commission Notice on Immunity from fines and reduction of fines in cartel cases OJ C 298, 8.12.2006, pp. 17-22 (Leniency Notice) or in 2015 see Communication from the Commission — Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases OJ C 256, 5.8.2015, pp. 1-1.

11 See 'General Court judge says ECN requires "therapy"', available at http://globalcompetitionreview.com/news/article/41086/general-court-judge-says-ecn-requires-therapy/ (accessed on 20 May, 2016).

12 For exact figures see Table 1 in W.P.J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years'.

13 J. Faull and A. Nikpay, 'The EU Law of Competition', Oxford University Press, Third Edition, 2014, p. 1358.

14 Report on Competition Policy 2008, point 18.

in the cartel, shall be granted a 10% reduction of the fine in exchange as a 'reward for cooperation'.[15]

The reason why this paper deals with these two instruments is that they are important and frequently used tools in the cartel enforcement of the Commission. Leniency and settlement are complementary in nature which is reflected in the cumulative character of the reductions granted under each of these policies.[16] However, it should be underlined that they pursue different purposes. Leniency, being an investigative tool, helps the Commission to obtain information and evidence allowing to reveal a cartel and establish infringement, while the settlement procedure enables the Commission to carry out the proceedings in a simplified way saving resources for the Commission. This explains the difference in the reward applicable to the parties undertaking either leniency or settlement or both. Another connection between these policies is that once settlement discussions start, leniency is no longer available.[17]

28.2 Leniency

28.2.1 Applicable Rules

According to Subsection 1 of Article 4a Regulation 773/2004,[18] the Commission, under its leniency policy, may reward undertakings that are or have been party to secret cartels, for their cooperation in disclosing the cartel and facilitating the establishment of an infringement of Article 101 TFEU, with immunity from fines or a reduction in fines which would otherwise be imposed.

Under the Leniency Notice, the Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the Community, if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to i. carry out a targeted inspection or ii. find an infringement of Article 101 TFEU.[19]

15 R. Whish, 'Competition Law', Oxford University Press, Eighth Edition, 2015, p. 277.
16 J. Faull and A. Nikpay, 'The EU Law of Competition', Oxford University Press, Third Edition, 2014, p. 1127.
17 MEMO/08/458, 'Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions'. Available at http://europa.eu/rapid/press-release_MEMO-08-458_en.htm.
18 Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Arts. 81 and 82 of the EC Treaty OJ L 123, 27.4.2004, pp. 18-24.
19 Leniency Notice, rec. 8.

28.2.2 Statistics on Leniency

In the first years following the adoption of the Commission's first Leniency Notice, between 1996 and 2000, only one decision was taken where immunity was granted.[20] The lack of decisions where immunity was granted is most likely due to the fact that a cartel investigation takes several years, therefore a couple of years will pass between the application and the final decision is taken. In the next period, between 2001 and 2005, however, the Commission had 20 decisions in which immunity was granted under the leniency programme. The trend has been very similar since then.[21] It should be noted that while immunity was only granted in 10% of the cartel decisions taken between 1996 and 2000, in the period 2011-2015 this figure was higher, namely 90% of the cartel decisions granted immunity. Moreover, in the vast majority of the cases in which immunity was granted under the leniency programme, a 30-50% reduction of the fine was also granted to the second undertaking submitting a leniency application and in several cases other reductions were also granted.[22] Consequently, it may be concluded that leniency plays a paramount role in the cartel investigations of the Commission.

28.2.3 Issues Raised Concerning the Leniency Policy of the Commission

One may ask why a cartelist is rewarded with immunity if it is or has been the member of an illegal cartel. The reason is spelled out in the Leniency Notice. Cartels by their very nature are difficult to detect and investigate because all the parties are interested in keeping it secret.[23] Therefore, the Commission has to provide incentives to the undertakings participating in a cartel and willing to put an end to their participation and inform the Commission about the same. According to the Commission, it is in the Community interest to reward these undertakings.[24] The Commission adds that the interest of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.[25] The Commission is of the view that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value.[26]

Thus, leniency is useful for the Commission because it receives reliable and robust insider information on the cartel enabling it to detect a cartel or establish an infringement.

20 Source: W.P.J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years', table 1.
21 Ibid.
22 W.P.J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years', p. 10.
23 J. Faull and A. Nikpay, 'The EU Law of Competition', Oxford University Press, Third Edition, 2014, p. 1080.
24 Leniency Notice, rec. 3.
25 Ibid.
26 Ibid., rec. 4.

This insider information may also justify the imposition of higher fines thanks to the more detailed description of the cartel.[27] We can see from the Commission's statistics that while between 1995-1999 (the European leniency programme was adopted in 1996) only 10 cartel decisions were taken by the Commission, in the next five year periods (2000-2004: 30; 2005-2009: 33; 2010-2014: 30) this number tripled[28] which may be an evidence of the fact that leniency helps the Commission to pursue more cartels than without it.

Although the Commission's leniency policy is generally considered a huge success,[29] it has been criticised by judge Marc van der Woude who, said that the overreliance of European Competition Network and the Commission on its leniency policy is a weakness and *ex officio* investigations are very rare.[30] He even said that there are worries that leniency policies do not deter cartels but rather promote them, therefore, he considers this tool to be a fragile one.[31] Other scholars claim that over-reliance on leniency may undermine the threat of detection.[32] Wouter Wils also mentions this overreliance on leniency as a risk for the whole system.[33]

Indeed, if NCAs and the Commission rely exclusively on leniency, this may have adverse effects, while being detected without recourse to leniency, i.e. *ex officio* investigations are important risks for undertakings party to a cartel because they increase uncertainty. Additionally, the Commission should not only focus on the leniency applications submitted by cartelists, since cartelists operating several cartels may use this instrument to overload the Commission. It may even turn out to be a good strategy to occupy the Commission while the cartel members continue to operate other, more profitable cartels knowing that the Commission is occupied with those which were announced by them. If we consider this to be a rational scenario, we can easily come to the logical conclusion that undertakings party to different cartels will reveal declining or less profitable cartels while they continue to operate others.

Concerns have been raised regarding the quality of the cartels revealed by leniency applicants. According to Maarten Pieter Schink, cartels typically brought up to the fore by leniency applicants 'are not the most sophisticated cartels, but rather the less well-organized ones. Or old-and-dying cartels that lost most of their profitability and so their

27 W.P.J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years', p. 12.

28 Source: W.P.J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years' (June 10, 2016), table 1.

29 A. Jones and B. Sufrin, 'EU Competition Law', Oxford University Press, 5th edn, 2014, p. 677.

30 See 'General Court judge says ECN requires "therapy"', May 19, 2016, available at http://globalcompetitionreview.com/news/article/41086/general-court-judge-says-ecn-requires-therapy/ (accessed on 20 May, 2016).

31 Ibid.

32 A. Stephan and A. Nikpay, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities' in 'Anti-Cartel Enforcement in a Contemporary Age – Leniency Religion', C.B.-Wells, C. Tran (Eds.), Hart Publishing, 2015, p. 149.

33 W.P.J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years', pp. 25-28.

stability. Or even long dead cartels, whose skeleton came falling out of a closet during a due diligence inspection in a take-over context, for example.'[34]

In summary, having and using several sources for detecting cartels and establishing infringements has a much stronger deterrent effect compared to relying exclusively on undertakings who have committed an infringement. If an NCA has a solid and robust practice of detecting cartels without leniency, it can increase the success of leniency too because it sends the message to the undertakings that the NCA is capable of punishing them on its own as well, therefore, the best way to detect and find cartels is using both methods. A solely leniency based system must therefore be avoided. A dual, leniency and ex-officio based system is the key for success in fighting cartels.

28.2.4 Relationship between the European Leniency Programme and the National Leniency Programmes[35]

The Commission was the first to design its leniency programme in 1996 and since then almost all the EU Member States introduced very similar leniency regimes thanks to harmonisation through the European Competition Network which adopted its Model Leniency Programme in 2006. It was revised in 2012. It should be noted, however, that according to the judgment of the Court of Justice of the European Union rendered in the *DHL* case,[36] the ECN Model Leniency Programme has no binding effect upon the Member States.[37, 38]

As regards the relationship between the European and the national leniency programmes the Court noted that no common rules were laid down either by the TFEU or Regulation 1/2003/EC. Accordingly, in the absence of a centralised system at the EU level for the receipt and assessment of leniency applications in relation to infringements of Article 101 TFEU, the treatment of such applications sent to a national competition authority is determined by that authority according the applicable national law of the Member State

34 M.P. Schink, 'Balancing Proactive and Reactive Cartel Detection Tools: Some Observations', November 8, 2013, DAF/COMP(2013)23. Availabe at www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2013)23&docLanguage=En (accessed on 17 August, 2016).

35 For further analysis see J. Ysewyn and J. Boudet, 'Leniency and competition law: An overview of EU and national case law', 4 August 2016, e-Competitions Bulletin Leniency, Art. No. 72355, pp. 9-11.

36 C-428/14 *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v. Autorità Garante della Concorrenza e del mercato*, ECLI:EU:C:2016:27.

37 C-428/14 *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v. Autorità Garante della Concorrenza e del mercato*, ECLI:EU:C:2016:27, p. 42.

38 For a detailed analysis of the case see for instance 'DHL Italy: European Court issues key judgment on overlapping leniency procedures', 18 February, 2016, available at http://kluwercompetitionlawblog.com/2016/02/18/dhl-italy-european-court-issues-key-judgment-on-overlapping-leniency-procedures/ (accessed on 10 August, 2016) or B. Priskin, 'Elsőkből lesznek az utolsók? A DHL ügy bemutatása', *Versenytükör*, 2016. I. szám, pp. 78-84, available at www.gvh.hu//data/cms1034632/Versenytukor_201601.pdf (accessed on 10 August, 2016).

in question.[39] The Court highlighted that the NCAs are free to adopt leniency programmes and each of those programmes are autonomous, not only in respect of other national programmes, but also in respect of the EU leniency programme.[40] The coexistence and autonomy that thus characterises the relationship between the EU leniency programme and Member States programmes is a reflection of the system of parallel competences shared between the Commission and national competition authorities established under Regulation No. 1/2003.[41]

28.3 Settlement

28.3.1 Applicable Rules

Under Subsection 1 of Article 10a of Regulation 773/2004,[42] following the initiation of its proceedings the Commission may set a time limit within which parties may indicate in writing their willingness to engage in settlement discussions with a view to possibly introducing settlement submissions. Under Subsection 2 of the same article, parties to the settlement discussions may be informed by the Commission of i. the objections, ii. evidence, iii. non-confidential version of any specified accessible document listed in the case file and iv. the range of potential fines. The information listed above shall be confidential. If the settlement discussions progress, the undertakings taking part in the settlement procedure may submit their settlement submission and acknowledge their participation in the cartel as well as their liability. The settlement submission may be given in written or oral form. Under subsection 3 of Article 10a, if the statement of objections issued by the Commission reflects the contents of the settlement submissions, the undertakings participating in the settlement procedure shall confirm it in their written reply and the Commission can proceed with the adoption of a streamlined settlement decision.

The Settlement Notice[43] gives further details on the settlement procedure, namely that

39 C-428/14 *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v. Autorità Garante della Concorrenza e del mercato*, ECLI:EU:C:2016:27, point 36.

40 Ibid., p. 57.

41 Ibid., p. 58.

42 Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Arts. 81 and 82 of the EC Treaty OJ L 123, 27.4.2004, pp. 18-24.

43 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 OJ C 167, 2.7.2008, pp. 1-6.

i. the Commission retains a broad margin of discretion either to a) determine which cases are suitable for settlement procedure[44] or b) decide to discontinue settlement discussions;[45]
ii. the parties to the proceedings do not have a right to settle;[46]
iii. initiation of settlement proceedings can take place at any point in time, but no later than the date on which the Commission issues a statement of objections against the parties concerned;[47]
iv. the Commission retains the right to adopt a statement of objections which does not reflect the parties' settlement submissions;[48]
v. the Commission retains the right to adopt a final decision which departs from its preliminary position expressed in a statement of objections endorsing the parties' settlement submissions, however, in this case the Commission shall inform the parties that it will follow the standard proceedings.[49]

28.3.2 Statistics on Settlement Cases

In the very first years no decision was taken under the settlement procedure. The first decision[50] under this procedure was only taken in May 2010. Since 2010 more than 50% of the cartel decisions have been taken under this simplified procedure.

The high number of settlement decisions proves that it is favored by both the Commission and the undertakings under investigation.

44 Ibid., pp. 5 and 15.
45 Ibid., p. 5.
46 Ibid., p. 6.
47 Ibid., p. 9.
48 Ibid., p. 27.
49 Ibid., p. 29.
50 Case COMP/38511 – *DRAMs*.

28.3.3 *The Essence and Legality of the Settlement Procedure of the Commission – the Timab Decision*[51]

The General Court (GC) delivered its decision[52, 53] on a hybrid settlement case[54] on 20 May, 2015 clarifying several aspects of the settlement policy and the hybrid cases and concluding that settlement procedures are in conformity with European competition rules.

The GC made a number of observations concerning the settlement procedure when it established that

i. the aim of the settlement procedure is to simplify and speed up administrative procedures and to reduce the number of cases brought before the EU judicature, and thus to enable the Commission to handle more cases with the same amount of resources;[55]
ii. the decision to initiate the settlement procedure is exclusively a matter for the Commission, unlike in the case of leniency cooperation, the initiative for which lies with the applicant undertaking;[56]
iii. the purpose of the leniency policy is to reveal the existence of cartels and to facilitate the Commission's work in that regard, while the purpose of the settlement policy is to serve the effectiveness of the procedure in dealing with cartels;[57]
iv. the settlement procedure is a 'simplified procedure' under which a decision is issued which is 'addressed to the participants in the infringement who have decided to enter into a settlement and reflecting the commitment of each of them', while the 'decision addressed to participants in the infringement who have decided not to enter into a settlement' is adopted under the 'standard procedure';[58]
v. settlement procedure is a 'simplified procedure', it is an 'alternative to the – adversarial – standard administrative procedure, distinct from it, and presenting certain special features'[59] elaborated in the Settlement Notice and Regulation 773/2004;

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51 T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v. European Commission* ECLI:EU:T:2015:296.

52 Ibid.

53 For a detailed analysis of the case see for instance Flavio Laina and Aleko Bogdanov, 'The EU Cartel Settlement Procedure: Latest Developments', *Journal of European Competition Law & Practice*, 2016, Vol. 7, No. 1, pp. 72-84; Noëlle Lenoir and Mélanie Truffier, 'Timab Industries et al.: General Court's Ruling on the First Hybrid Settlement Case', *Journal of European Competition Law & Practice*, 2016, Vol. 7, No. 1, pp. 24-25.

54 If one or more of the settling parties opt out of the settlement procedure, the Commission may settle with the remaining parties and follow the 'normal' procedure in relation to the parties that opted out.

55 T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v. European Commission* ECLI:EU:T:2015:296, p. 60.

56 Ibid., p. 63.

57 Ibid., p. 65.

58 Ibid., p. 71.

59 Ibid., p. 73.

vi. the settlement procedure is not a mandatory, but a 'voluntary procedure';[60]
vii. should the settlement discussions terminate without proceeding with the settlement submission, 'the procedure leading to the final decision is governed by the general provisions of Regulation No. 773/2004, instead of those governing the settlement procedure. […], the situation is, therefore, that of a 'tabula rasa', in which the liabilities are yet to be determined.';[61]
viii. the Commission does not negotiate the fact of the existence of an infringement or the penalty with the undertakings participating in a settlement procedure[62] – as confirmed by Flavio Laina, head of the Commission's cartel settlement unit;[63]
ix. the 'settlement procedure requires, by its very nature, an exchange of views between the parties.' Should the Commission and the party or parties fail to agree during the settlement discussions, 'only the standard procedure remains';[64]
x. the settlement procedure is based on the free will of the undertakings under investigation,[65] the Commission has no right to impose it on them.

28.3.4 Issues Raised Concerning the Settlement Procedure of the Commission

As it has been established in the *Timab* decision,[66] the aim of the settlement procedure differs from the aim of leniency as the aim of the former is to improve and streamline the procedure for fighting cartels, to increase the effectiveness of the procedure, unlike leniency, the aim of which is to detect cartels and establish infringements. The two instruments complement each other since a leniency based cartel investigation may be a proper incentive for the undertakings under investigation to enter into settlement discussions with the Commission. Nevertheless, leniency is not a necessary precondition for a settlement procedure. It should be noted, however, that in several cases[67] all the settling parties were leniency applicants too. In the so-called *Libor* cases,[68] in the EIRD Libor cartel and in the

60 Ibid., p. 76.
61 Ibid., p. 104.
62 Ibid., p. 117.
63 'Cartel settlement discussions are not negotiations, says DG Comp official', 22 January 2015. Available at http://globalcompetitionreview.com/news/article/37813/cartels-settlement-discussions-not-negotiations-says-dg-comp-official/ (accessed on 10 May, 2016).
64 T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v. European Commission* ECLI:EU:T:2015:296, p. 117.
65 Ibid., p. 120.
66 Ibid., p. 65.
67 See e.g. Case COMP/39579 – *Consumer Detergents*; Case COMP/39600 – *Refrigeration Compressors*; Case AT.39748 – *Automotive wire harnesses*; Case AT.39914 – *Euro Interest Rate Derivatives*; Case AT 39801 – *Polyurethane foam*; Case COMP/39922 – *Bearings*; Case AT.39924 – *Swiss Franc Interest Rate Derivatives*; Case AT.40098 – *Blocktrains*; Case AT.40028 – *Alternators and starters*.
68 Case AT.39861 – *Yen Interest Rate Derivatives*; Case AT.39914 – *Euro Interest Rate Derivatives*; Case AT.39924 – *Swiss Franc Interest Rate Derivatives*.

CHF Libor cartel all the undertakings applied for leniency and all undertakings settled. Thanks to leniency and settlement, in the *Libor* cases the undertakings concerned could escape substantial fines which would otherwise have been imposed on them. UBS for instance in the *YEN Libor* case received full immunity (instead of a fine of EUR 2.5 billion) thanks to its leniency application. The Settlement Notice itself also refers to leniency when it declares, '[w]hen settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward.'[69] The Libor cartels or the latest cartel decision of the Commission in the *Trucks* case[70] are good examples, where four out of the five settling undertakings also applied for leniency and received a certain reduction of fines besides the reduction for settling the case.

The settlement procedure entails several pros both for the Commission and the undertaking participating in it. Pros for the Commission might be

i. a shorter, quicker administrative process, allowing for a more efficient use of staff in the cartel department;
ii. the use of a single language, no translations are required;
iii. a reduced number of appeals brought before the court and thus less post-decision work will be required;
iv. the absence of oral hearing, limited access to files, reduced time spent on the preparation for access to files;
v. a better forum for advocacy before the Commission on the merits before it becomes a more adversarial procedure (i.e. after the statement of objections);
vi. shorter statement of objections and decision making it possible to focus on only the essential issues;[71]
vii. reduced reputation harm in the media for the parties.[72]

Additionally, the settlement procedure also provides for enhanced deterrence, because, thanks to its procedural efficiencies, it enables the Commission to render more cartel decisions, while it also has the positive effect that it relieves Commission resources, thereby increasing the risk of detection.

Besides the Commission, this procedure entails several pros for the undertakings as well such as

i. a shorter procedure making it possible for the undertaking to terminate the proceedings earlier and focus on its business;

69 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 OJ C 167, 2.7.2008, p. 33.

70 Case AT.39824 – *Trucks*.

71 R. Snelders, 'The EU Cartel Settlement Procedure: The First Years' Experience and Challenges', available at https://www.studienvereinigung-kartellrecht.de/sites/default/files/14h_30_snelders_sv_kartellrecht_-_cartel_settlements_final_0.pdf (accessed on 10 May, 2016).

72 R. Whish, 'Competition Law', Oxford University Press, 8th edn, 2015, p. 277.

ii. reduced fines which may be further reduced in case the undertaking is also a leniency applicant;
iii. a shorter decision provides less information for private enforcement;
iv. early access to the files, albeit later less access to files;
v. less attorney fees due to shorter procedure;
vi. less adversarial proceedings, allowing for a 'more meaningful discussion with the Commission staff'.[73]

It might be said that the settlement procedure has no cons for the Commission but
i. a limited access to files;
ii. the unequivocal acknowledgement of the parties' liability for the infringement and its consequence of a limited right of appeal because of the admission of liability;
iii. the earlier payment of fines due to the earlier adoption of the decision might be considered as cons for the undertakings.[74]

Shorter decisions may have another effect besides the positive effect for the undertakings concerned (i.e. shorter decision provides less information for private enforcement), namely that it does not provide so much for the development of competition law like decisions adopted under the standard procedure due to the fact that they contain less factual analysis. A settlement decision is much shorter than a non-settled decision which may be ten times longer. The drawback of having shorter decisions results in less elaborated findings of facts and legal analyses. It should be noted, however, that the cases where the settlement procedure is successfully applied and the decisions are adopted under this procedure are generally well-founded, the Commission already possesses the core evidence which is very solid, in other terms, the cases, where the settlement procedure is applied, are straightforward cases otherwise undertakings would reject to participate in a settlement procedure. In these cases, generally, there is no essential novelty, there is no need to resolve novel issues. Therefore, the development of competition law cannot be expected from these cases to the same extent as in te case of decisions adopted under standard procedure.

The GC concluded that the aim of the settlement procedure is to promote the procedural efficiency of cartel investigations and thus spare the Commission's resources enabling it to pursue other cartel cases and open new investigations. Nevertheless, if we take a glance at the number of the cartel decisions, it can be established that during the period 2000-

73 H. Schweitzer and M. Bay 'Commitment and Settlements – Benefits and Risks' (April 12, 2016). 23rd St.Gallen International Competition Law Forum (ICF) 2016. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2763792 (accessed on 10 August, 2016).

74 R. Snelders, 'The EU Cartel Settlement Procedure: The First Years' Experience and Challenges', available at https://www.studienvereinigung-kartellrecht.de/sites/default/files/14h_30_snelders_sv_kartellrecht_-_cartel_settlements_final_0.pdf (accessed on 10 May, 2016).

2004 30 cartel decisions were rendered, in the course of the period 2005-2009 33 cartel decisions were taken, while during the period 2010-2014 30 cartel decisions were adopted.[75] It means that the number is more or less the same, there is no in increase in cartel decisions. However, we should not forget that cartels are getting more and more complex and of an international scale requiring more resources. It might be deduced that without the instrument of the cartel settlement, the Commission could not have maintained the number of cartel decisions, but would much rather have been able to take significantly less cartel decisions.

28.4 Conclusion

In order to fight secret cartels, the Commission developed its leniency policy and adopted its first leniency notice in 1996. Since its adoption, the Commission's leniency policy became a frequently used tool in the Commission's anti-cartel enforcement. While between 1996 and 2000 immunity was only granted in 10% of the cartel decisions, this figure was much higher in the period 2011-2015, 90% of the cartel decisions were decisions where immunity was granted. Thus, we may conclude that leniency plays a paramount role in the Commission's cartel investigations. Despite the facts mentioned before, concerns have been raised in connection with the Commission's overreliance on leniency. It may be stated, that having and using several sources for detecting cartels and establishing infringements has a much stronger deterrent effect as compared to relying exclusively on the applications of undertakings that have committed such infringements. If an NCA has a solid and robust practice of detecting cartels without leniency, it can increase the success of leniency because it sends the message to undertakings that it is capable of punishing them on its own as well. Therefore, the best method to detect cartels is using both sources. A dual, leniency and ex-officio based system is the key to success in fighting cartels.

The cartel settlement procedure of the Commission was introduced in 2008. Although in the very first years no decision was taken under the settlement procedure (the first decision[76] under this procedure was only taken in May 2010), since 2010 more than 50% of the cartel decisions have been rendered under this simplified procedure.

In the *Timab* decision[77] the GC clarified several aspects of the settlement policy (essence, aim, etc.) as well as the hybrid cases and concluded that settlement procedures are in conformity with European competition rules. It should be highlighted that despite the fact

75 See DG COMP statistics, available at: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (accessed on 14 August, 2016).

76 Case COMP/38511 – *DRAMs*.

77 T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v. European Commission* ECLI:EU:T:2015:296.

that settlement decisions are significantly shorter and thus less elaborated than decisions adopted under the standard procedure, settlement decisions do not have a negative effect on the development of competition law as in these cases, generally, there is no essential novelty, i.e. no novel issues must be resolved. If there is novelty, or the Commission has no very persuasive evidence, the parties generally do not settle resulting in long, detailed decisions which yield more for the development of competition law.

The settlement procedure has several pros and some cons for the parties, however, the high number of decisions adopted under this procedure proves that it is favored both by the Commission and the undertakings under investigation as, for instance, the Libor cases or the most recent cartel decision in the *Trucks* case proves it.

The aim of the settlement procedure is to promote the procedural efficiency of the cartel investigations, to accelerate the proceedings and thus spare Commission to enable it to pursue other cartel cases and open new investigations. Accordingly, the settlement procedure is an expedient tool in enhancing deterrence because it relieves the resources of the Commission making it possible for it to fight more cartels and thus increase the probability of detection.