Settlement Decisions: Testing the Limits of Dynamic Enforcement?

GCLC Annual Conference

Rafique Bachour, 27 January 2017
Overview

• Background and objectives

• Settlement in practice: a dynamic enforcement tool?

• Legacy of cartel settlement: rewards in other antitrust cases?
Background and objectives
Background and objectives

- Created in 2008: Settlement Notice and amendment to Regulation 773/2004

- Inspired by US ‘plea bargaining’ and similar processes in some Member States

- Objectives
  - Increase overall deterrence
  - Shorten procedure in exchange for a 10% fine reduction

- Requires admission of guilt and establishes existence of an infringement

- Commission enjoys broad discretion
Cartel settlement: a dynamic enforcement tool?
A success story?

‘[The cartel settlement procedure] has developed into a well-established, case-resolution system that is attractive to the business community and allows us to use our resources more efficiently’
J. Almunia

<table>
<thead>
<tr>
<th>Year</th>
<th>Total cartel decisions</th>
<th>of which were settlements</th>
<th>% of total cartel decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>7</td>
<td>2</td>
<td>29%</td>
</tr>
<tr>
<td>2011</td>
<td>4</td>
<td>3</td>
<td>75%</td>
</tr>
<tr>
<td>2012</td>
<td>5</td>
<td>2</td>
<td>40%</td>
</tr>
<tr>
<td>2013</td>
<td>4</td>
<td>2</td>
<td>50%</td>
</tr>
<tr>
<td>2014</td>
<td>10</td>
<td>8</td>
<td>80%</td>
</tr>
<tr>
<td>2015</td>
<td>5</td>
<td>2</td>
<td>40%</td>
</tr>
<tr>
<td>2016</td>
<td>6</td>
<td>3</td>
<td>50%</td>
</tr>
<tr>
<td>Total</td>
<td>41</td>
<td>22</td>
<td>54%</td>
</tr>
</tbody>
</table>

- Settlement discussions abandoned by the Commission for all parties in only one case (Smart Card Chips) because of “the clear lack of progress of these discussions”
A flexible tool?

Benefits for the Commission
- Procedural efficiencies and cost savings
- Frees up Commission resources

Benefits for the Parties
- 10% fine reduction on top of leniency reduction, if any
- Early access to the Commission’s case and key evidence
- Potentially more acceptance of advocacy/engagement
- Efficiencies (saving of time, internal resources, legal fees)
- Parties can always withdraw

First successes
- Large number of settlement cases and relative absence of appeals
- Issues which have arisen have been discrete
- Case where company discontinued settlement discussions (*Timab*)
Remaining challenges

“Hybrid” cases are more common than anticipated?

Absolute number of cartel decisions (2008-present)

- Standard procedure
- Settlements
- Hybrids
Challenges around hybrid cases

- Tension with objective of achieving procedural efficiencies
- Risks that information in standard decision is issued against settling parties
- Potential bias towards ‘hold-outs’
- Discrimination between settlers and hold-outs in fine setting

“The evidence we have collected is quite telling, so I’m pretty sure this investigation will not be closed without results.”
J. Almunia
Appeals

General expectation that settling parties will not appeal …

• But appeals are being lodged …

• Focus on amount of fine: Société Générale, Envelopes

• Broad margin of discretion by the Commission to enter settlement discussions (Air freight)

• Broad margin of discretion by the Commission to discontinue settlement discussions (Smart card chips)

• Annulment of fine on grounds of a failure by the Commission of its duty to state reasons (duty equal to that in standard procedure) (Envelopes)

• ‘Protective appeals’?
Damage claims

- Timing issue for settling parties in a hybrid case
- Joint and several liability
- Contribution from hold-outs may need to wait years until final decision in contentious procedure (and appeals)
- Shorter decision in settlement may not always be helpful
A legacy of cartel settlement: rewards other antitrust cases?
Settlements and other antitrust cases

• Abuse of dominance cases

• No structured framework to reward cooperation, but 2006 Fining Guidelines can be used: ARA case

• To be discussed whether settlement is a suitable tool
  - Deterrent effect not diminished because of settlement?
  - Suitable tool for past conduct, with commitments focussing on future behaviour?
  - Decision potential good basis for damages claims?
Questions
Thank you

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