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THE INDIVIDUALITY IN COLLECTIVE INFRINGEMENT**

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HYBRID CASES UNDER THE EU CARTEL SETTLEMENT PROCEDURE: THE INDIVIDUALITY IN COLLECTIVE INFRINGEMENT

Amy Dunne

This analysis will examine the mechanics of the EU cartel settlement procedure in view of the steady proliferation of hybrid cases. In order to salvage the efficiency gains of the cartel settlement procedure, it will be submitted that the Commission is required to undertake a practical remodelling of its framework in a manner which emphasises the voluntariness of the consensus reached and offers creative, individually targeted settlement outcomes to settling parties.

INTRODUCTION

Despite heralding that “*cartel settlements have proven to be a success, in particular due to [...] efficiency gains*”;¹ an appraisal of the efficiency yields of the EU cartel settlement procedure is on hiatus pending its reconciliation with the increasing frequency of “hybrid” settlement scenarios.

Cartel settlement decisions are prohibition decisions based on Article 7 and 23 of Regulation 1/2003² introduced in June 2008 through an amendment of *Commission Regulation 773/2004*,³ [hereinafter, “*Commission Regulation*”], and through the introduction of the *Commission Notice on the conduct of settlement procedures*⁴ [hereinafter, “*Commission Notice*”]. Following the investigation of an Article 101 TFEU infringement and instead of pursuing the ordinary procedure, the Commission may adopt a decision according to Article 7 of Regulation 1/2003 to reach a settlement with the infringing parties. As per Voss, “*a settlement differs from an Article 7 decision in two ways: (i) the undertaking will receive a 10 per cent reduction of their fine;*⁵ and (ii) *the undertaking must admit the infringement to the Commission.*”⁶

The efficiencies to be gained by the Commission under cartel settlements are predominantly procedural. The ability to settle complex cartel cases presents specific advantages to the Commission given that under the traditional procedure, “*the process to reach a final, fully reasoned decision by the*

¹ Flavio Laina, Head of Cartel Settlement Unit, European Commission, as referenced by David Vascott, “EU Cartel Settlements: Are they working?”, 7th May 2013, Global Competition Review: News, accessed on the 6th May 2015.

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, L1/1 OJ 4.1.2003.

³ Commission Regulation (EC) No 773/2004 of the 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L/123, 27.04.2004, at page 18.

⁴ Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases (Text with EEA) (European Commission) [2008] OJ C167/1 (hereinafter “Settlement Notice”)

⁵ *Ibid.*, para 32.

⁶ *Ibid.*, para 20(a). Katharnia Voss, “The Principle of Equality: A Limit to the Commission’s Discretion in EU Competition Law Enforcement?”, 2013 Global Antitrust Review, Interdisciplinary Centre for Competition Law and Policy, Queen Mary, University of London, at page 155.

Commission is often a prolonged one, which in more than ninety percent of cases are extended by an appeal to the Court of Justice of the European Union by the parties."⁷ Amongst the procedural benefits are resources savings in: drafting and translations, access to file, oral hearings and interpretations. Therefore settlements, as an alternative to the "very resource-intensive and time-consuming"⁸ norm, is attractive to the Commission; especially given that this alternative can also contribute to the pursuit of "achieving effectiveness in enforcement by engendering compliance."⁹ In this regard, the settlement procedure is often promoted as a means to "reduce the length of the Commission's investigations where possible, thereby freeing up the Commission's resources to pursue other investigations."¹⁰

A "hybrid case" refers to the situation whereby "one or more of the settling parties opt out of the settlement procedure ... [and] the Commission may settle with the remaining parties and follow the 'normal' procedure for the parties that opt out."¹¹ As a result of a hybridised procedure, the Commission has to undertake both the settlement procedure and the ordinary procedure in respect of a single cartel infringement. The efficiency yields of the Commission are compromised in these scenarios where it is seen the Commission accepts less than the maximum fine applicable for some or other of the cartel participants whilst orchestrating the full procedural circus in respect of those cartelists who defect to the ordinary procedure. Running an ordinary procedure and a settlement procedure in tandem can be hypothesised to not only significantly reduce the efficiency yields of the Commission but to eliminate them completely depending on the complexity of the cartel and the facts of the case. A settlement is said to lose its "raison d'être if it cannot bring procedural efficiencies."¹² In a hybrid situation, where two procedures in respect of a single continuous infringement are live, the projected efficiency gains are diminished and the efficacy of the cartel settlement procedure overall can be said to be threatened.

The incremental increase in the number of hybrid cases over the short seven year life-span of the procedure is cause for concern. To further elucidate, it is noted that no settlements were pursued during the first two years since its introduction in 2008. Abstention or defection from the settlements procedure to the ordinary procedure by *Ribererbro*,¹³ *Pometon*,¹⁴ *Credit Agricole*, *HSBC*, *JP Morgan*,¹⁵ *ICAP*¹⁶ and *Timab/CFPR*¹⁷ are incidents of the "so-called hybrid cases" phenomenon.¹⁸

⁷ Kris Dekeyser, Christian Roques, "The European Commission's settlement procedure in cartel cases", *The Antitrust Bulletin*: Volume 55, No. 4, Winter 2010, at page 820.

⁸ Anna-Louise Hinds, "All settled? Some six years of cartel settlement", 2014, Volume 35(6), *European Competition Law Review*; at page 292.

⁹ *Ibid.*

¹⁰ Greg Olsen, Mark Jephcott, "Sharing the Benefits of Procedural Economy: The European Commission's Settlement Procedure", *Antitrust* Vol. 25, No. 1, Fall 2010, at page 76.

¹¹ DG Comp, "Cartel Case Settlement", available at <http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html>; accessed on the 6th May 2015.

¹² Flavio Laina, Elina Laurinen, "The EU Cartel Settlement Procedure: Current Status and Challenges", *Journal of European Competition Law and Practice*, 5th July 2013, at page 8.

¹³ European Commission, Press Release, IP/14/727, "Antitrust: Commission fines three producers of canned mushrooms 32 million in cartel settlement", 25th June 2014, available at <http://europa.eu/rapid/press-release_IP-14-727_en.htm> "In the context of the same investigation, proceedings were opened against *Riberebro* and the investigation will continue under the standard (non-settlement) cartel procedure."

¹⁴ European Commission, Press Release, IP/14/359, "Antitrust: Commission fines producers of steel abrasives 30.7 million in cartel settlement", 2nd April 2014, available at <http://europa.eu/rapid/press-release_IP-14-359_en.htm> "In the context of the same investigation, the Commission had also opened proceedings against *Pometon S.p.A.* and the investigation will continue under the standard (non-settlement) cartel procedure for *Pometon*."

¹⁵ European Commission, Press Release, IP/13/1208, "Antitrust: Commission fines banks 1.71 billion for participating in cartels in the interest rate derivatives industry", 4th December 2013, available at <http://europa.eu/rapid/press-release_IP-13-1208_en.htm> "In the context of the same investigation, proceedings were opened against *Crédit Agricole*, *HSBC* and *JPMorgan* and the investigation will continue under the standard (non-settlement) cartel procedure."

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The *Société Générale*¹⁹ appeal from a settlement decision also presents a related and particularised concern relative to a consideration of the efficiency of the settlement procedure. An appeal also mitigates against the stated efficiency objectives of the procedure given that as an express condition of entry to the procedure, a settling party is required to admit liability for the infringement based on an agreed set of facts. This has the result of reducing the likelihood of recourse to appeal. This appeal and the aforementioned hybrid cases exemplify incidences in which the procedural efficiencies of the EU cartel settlement procedure were diminished. Since the introduction of the cartel settlements procedure in 2008, five out of the seventeen settlement decisions have been hybrids. In the preceding year alone, two out of eight settlement decisions have been hybrids.²⁰

This submission considers whether the settlements procedure is sufficiently malleable to contend with the recent proliferation of hybrid cases in order to salvage both procedural efficiencies and the efficacy of the procedure overall. As to the methodology of this submission, it is first considered in Section I whether the likelihood of hybridisation was fully foreseen in the implementing legislation and in the consequent practices of the Commission. In Section II, having affirmed an individual carteliser's prerogative to revert to the ordinary procedure, the factors which motivate a settling party to discontinue its engagement in the settlement procedure are considered. This section focuses on a settling party's cost-benefit analysis of continued participation in the settlement procedure. In this regard, it will be submitted that the voluntary nature of the consensus achieved between the Commission and the settling party is a mechanism by which a settling party can ensure that the individualised interests which it has forgone the opportunity to litigate are heard in an adequate manner before the Commission. Finally, Section III considers a practical remodelling of the settlement procedure to mitigate against the proliferation of hybridisation. However, measures which reduce the capacity of settling parties to depart from the procedure will not be advocated. Rather, this submission will challenge the Commission to re-weight the discretionary procedure which is heavily balanced in their favour and to introduce a targeted settlement procedure which accords more deference to the individual interests of settling parties. It will be concluded that this re-weighted balance will mitigate against the likelihood of hybridisation, and *inter alia* efficiency losses, in the long-term.

¹⁶ European Commission, Press Release, IP/13/1208, "Antitrust: Commission fines banks 1.71 billion for participating in cartels in the interest rate derivatives industry", 4th December 2013, available at http://europa.eu/rapid/press-release_IP-13-1208_en.htm "In the context of the same investigation, the Commission has also opened proceedings against the cash broker ICAP. This investigation continues under the standard (non-settlement) cartel procedure."

¹⁷ European Commission, Press Release, IP/10/985, "Antitrust: European Commission fines animal feed phosphates producers €175 647 000 for price-fixing and market-sharing in first "hybrid" cartel settlement case", 20th July 2010, available at http://europa.eu/rapid/press-release_IP-10-985_en.htm "After the Commission had informed the parties of the fines ranges, one company, Timab Industries S.A./Compagnie Financière et de Participation Roullier, decided to discontinue the settlement proceedings, becoming the only party in the ordinary procedure."

¹⁸ European Commission, Cartel Case Settlement, available at http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html, accessed on the 6th May 2015. "In case 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 for the parties that opt out (so-called hybrid cases)."

¹⁹ T-98/14 Action brought on 14 February 2014 — Société Générale v Commission, C 142/47 OJ 12 May 2014.

²⁰ DG Comp, Cartels: Cases, available at <http://ec.europa.eu/competition/cartels/cases/cases.html>, accessed on the 6th May 2015.

I

1.1 IMPLEMENTING LEGISLATION OF THE CARTEL SETTLEMENT PROCEDURE

It is to be ascertained whether the current settlement procedure anticipated or made accommodations for the likelihood of the bifurcation of cases which threatens projected efficiency gains. In this regard, the implementing legislation is examined. It is highlighted below that although it is explicitly appreciated within the implementing legislation that reversion to the ordinary procedure is a consequent result of the failure of settlement discussions; limited consideration of the phenomenon of hybridisation is undertaken. Further, there is little indication that this is accounted for in the actual mechanics of a settlement. Upon close examination, it is clarified that the implementing legislation is predisposed to only consider the prerogatives of the Commission to halt the procedure and elicit a hybrid situation; rather than taking appreciation of scenarios to a certain degree beyond the control of the Commission in which individual cartelists may induce a hybrid procedure. Factors which motivate cartelists to depart from the procedure are given little attention in neither the implementing legislation nor the consequent practice of the Commission. Practice ensuing from the implementing legislation therefore shows has not developed mechanisms to buffer the settlement procedure from the potential hybridisation that occurs as a result of a settling party's prerogative to defect. It is this oversight which is said to have contributed to the creeping hybridisation of cartel settlements.

This deficiency is attributed to the fact that; while the cost-benefit analysis of the adoption of the settlement procedure by the Commission is well elaborated, the cost-benefit analysis of the participation of cartelists in the procedure represents a significant gap in the analysis. The grand assumption is that the ten per cent reduction, shorter procedure and streamlined infringement decision are sufficient to both incentivise and satiate cartelists. In light of the upwards trend in the hybridisation; this paper advocates for the introduction of measures which weigh the cost-benefit analysis of participation closer to the interests of settling parties. This would mandate a consideration of the factors which motivate cartelists to defect to the ordinary procedure. Hereunder, the extent to which the implementing legislation limitedly addresses the phenomenon of hybridisation is examined.

1.2 PREFERENCE FOR COLLECTIVITY IN CULPABILITY

It is clear from the structure of the settlement procedure that there is a preference for all parties to an infringement to partake in the settlement procedure. This preference is gleaned from the *Commission Notice*, which refers to the preference for the admission of all parties related to the investigation to the settlement procedure; "*while parties to the proceedings do not have a right to settle, should the Commission consider that a case may, in principle, be suitable for settlement, it will explore the interest in settlement of all parties to the same proceedings.*"²¹ Further, reference is made to the cumulative acknowledgment of the parties of their participation in a cartel.²² The preference for

²¹ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, at section 2, recital 6.

²² Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, at recital 2. "*When parties to the proceedings are prepared to acknowledge their participation in a cartel violating Article 81 of the Treaty and their liability therefore, they may also contribute to expediting the proceedings leading to the adoption of the corresponding decision pursuant to Article 7 and Article 23.*" Recital 27, *The Commission retains the right to adopt a statement of objections which does not reflect the parties' settlement submission. If so, the general provisions in Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004 will apply. The acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used in evidence against any of the parties to the proceedings. Hence, the parties concerned would no longer be bound by their settlement submissions and would be granted a time-limit allowing them, upon request, to present their defence anew, including the possibility to access the file and to request an oral hearing.*

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collective settlement is also evident in the practice of the Commission; specifically pre-settlement stress testing. Pre-settlement screening is utilised to ascertain the likelihood of collective and successful settlement with all parties to the infringement. The implementing legislation in this respect notes that the Commission may take account of the probability of reaching a common understanding with regard to factors such as “*number of parties involved*” and “*foreseeable conflicting positions on the attribution of liability*.”²³ Whilst the Commission has indicated that it continues to screen cases at the exploratory stage to avoid hybrid cases, the Commission may not through pre-settlement screening predict a shift in the perspective of the parties who may evaluate their participation and interests in a settlement differently throughout the lifetime of the procedure. As a result, it is conceivable that at a late stage in the settlement discussions, being better informed with access to all the adverse evidence, a party will be better able to foresee the likely outcomes of the settlement procedure and may be so inclined to re-assess its interest in participating. It is suffice to say that participation in the settlement procedure is envisioned in the implementing legislation as a collective endeavour undertaken amongst co-cartelists and that Commission practice to date supports a preference for this approach.²⁴ It is seen that a collective approach does indeed accord well with the projected efficiency gains of the procedure.

However, whilst adverse to hybridisation and exhibiting a preference to conclude the settlement procedure collectively with all cartelists; bifurcation is not fatal to the Commission’s ability to conclude settlements with individual cartelists. It is seen that the Commission aims to “*settle the case with each of the parties with whom the settlement process has been launched*”;²⁵ irrespective of whether some co-cartelists have reverted to the ordinary procedure. The settlement procedure is deemed to have “succeeded” where concluded on an individual basis with each of the distinct settling parties. It is further submitted that the fact that a party “*could opt out should not necessarily force the Commission to discontinue the settlement to the detriment of all the other parties*.”²⁶ It can be submitted that the Commission does not allow the defection of individual cartelists to hinder the possibility of arriving at a settlement with other cartelists in order that the behaviour of one party (outside the scope of admissions) should not directly affect a cooperating party. This is exemplified in the *Animal feed phosphate*²⁷ case where the Commission decided to continue settlement with the cooperating parties and addressed a fully motivated statement of objection and prohibition decision separately to the non-settling party under the standard procedure.²⁸ The defection of the non-settling party therefore did not have an adverse impact on its co-cartelists opportunity to proceed to settlement. Hence, hybrid cases may be advanced to be tolerated in the interest of fairness to cooperating parties but disfavoured in terms of their diminishing effect on procedural efficiencies. There, of course, is a ceiling – at which point, the Commission may revert to the ordinary procedure with all parties as per *Smart Card Chips*,²⁹ discussed further below. Within the spectrum of favouring collective settlements and appeasing hybrid cases, the circumstances in which the implementing

²³ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases; at section 2, recital 5. “*In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable timeframe, in view of factors such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts.*”

²⁴ Commission Notice, Op. cit., at para 2(6). “While parties to the proceedings do not have a right to settle, should the Commission consider that a case may, in principle, be suitable for settlement, it will explore the interest in settlement of all parties to the same proceedings.”

²⁵ European Commission, Memo.10/201, “*Antitrust: Commission adopts first cartel settlement decision-questions & answers*”, available at http://europa.eu/rapid/press-release_MEMO-10-201_en.htm?locale=en

²⁶ Flavio Laina and Elina Laurinen, “The EU Cartel Settlement Procedure: Current Status and Challenges”, 2013, *Journal of European Competition Law and Practice*, at page 8.

²⁷ Commission Decision, COMP/38866 – *Animal Feed Phosphates*, 20th July 2010; at para 6.

²⁸ Flavio Laina and Elina Laurinen, “The EU Cartel Settlement Procedure: Current Status and Challenges”, *Journal of European Competition Law & Practice*, 2013, Vol. 4, No. 4; at page 310.

²⁹ Commission Decision, COMP/39574, *Smart Card Chips*, 3rd September 2014.

legislation explicitly envisions that hybridised settlement procedure may arise are examined hereunder.

1.3 DEFAULT REVERSION TO THE ORDINARY PROCEDURE

Hybridisation arises out of the reversion to the ordinary procedure by some, and not all, parties to a settlement procedure. Provision is made in the implementing legislation for the likelihood that not all parties, to the single continuous infringement, successfully conclude a settlement by way of default reversion to the ordinary procedure. Default reversion to the ordinary procedure can be identified explicitly and implicitly within the implementing legislation. This default reversion may occur collectively or individually amongst the settling candidates. Where it occurs individually, hybridisation ensues. A default reversion to the ordinary procedure is acknowledged as a failsafe to the settlement procedure under the *Commission Notice*. It is stated that should:

*“the parties concerned fail to introduce a settlement submission, the procedure leading to the final decision with respect to those parties will follow the general provisions; in particular articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004 (‘the ordinary procedure’), instead of those regulating the settlement procedure.”*³⁰

Under a reflective reading of the *Commission Notice*, reversion to the ordinary procedure is envisioned *explicitly* under three circumstances. The first circumstance being whereby the (i) conduct of the parties to the settlement procedure prompts the Commission to discontinue the settlement discussions:

*“The Commission may also decide to discontinue settlement discussions if the parties to the proceedings coordinate to distort or destroy any evidence relevant to the establishment of the infringement or any part thereof or to the calculation of the applicable fine.”*³¹

In cases of discontinuation, it is the Commission who elects to depart from the settlement procedure, assessing the procedural gains to be derived as insubstantial or not in the public interest.³² This has occurred in one instance in the *Smart Card Chips*³³ investigation in which the Commission had originally invited the parties to settle the case and started negotiations in October 2011. It is understood that the Commission could not reach agreement with at least two of the parties over the terms of the settlement.³⁴ Rather than pursue a hybrid case, the Commission reverted collectively to the standard procedure with all parties.

In the other two circumstances envisioned, it is foreseen that the Commission may alight from the discretionary procedure at the stage where the statement of objections or, later, a settlements decision

³⁰ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, at recital 19.

³¹ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases; at section 2, recital 5.

³² Flavio Laina and Elina Laurinen, “The EU Cartel Settlement Procedure: Current Status and Challenges”, 2013, *Journal of European Competition Law and Practice*, at [...] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, Article 10a(4): “The Commission may also decide to discontinue settlement discussions with all parties in a case, or in relation to one or more of the parties involved in the settlement process, where it considers that procedural efficiencies are not likely to be achieved.”

³³ Commission Decision, COMP/39574, *Smart Card Chips*. See also Commission, Press Release, IP/13/346, “Antitrust: Commission sends Statement of Objections to suspected participants in Smart Card Chips Cartel”, 22nd April 2013.

³⁴ King&Wood Mallesons, “Statement of objections sent to suspected participants in smart card chips cartel”, 26th April 2013; available at <<http://www.sjberwin.com/insights/2013/04/26/statement-of-objections-sent-to-suspected-participants-in-smart-card-chips-cartel>>

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is adopted. The parties' procedural rights are thereafter reinstated. As per the *Commission Regulation*, the (ii) Commission may issue a statement of objections that does not reflect the parties' settlement submissions; in which case, no consensus is reached and the parties revert to the ordinary procedure. *Commission Regulation*³⁵ as amended by *Regulation (EC) No 622/2008*³⁶ of 30 June 2008 regarding the conduct of settlement procedures in cartel cases,³⁷ makes provision for this default reversion as per Article 7 of the amending Regulation that states:

*"[...] when introducing their settlement submissions, the parties shall confirm to the Commission that they will only require access to the file after the receipt of the statement of objections, if the statement of objections does not reflect the contents of their settlement discussions."*³⁸

In the same vein, the (iii) Commission retains the right to adopt a final position that departs from its preliminary position as expressed in a statement of objections endorsing the parties' settlement submissions. As per the *Commission Notice*, settlement submissions are "*conditional upon the Commission meeting their settlement request, including the anticipated maximum amount of the fine.*"³⁹ When the Commission adopts a statement of objections that does not reflect a participant's settlement submission, the Commission is then required to comply with the "*applicable general rules of procedure*"⁴⁰ under the ordinary procedure.

These three circumstances describe scenarios whereby the Commission elects to discontinue the settlement procedure. Despite the fact that discontinuation may arise as a result of the conduct of the settling parties and in particular, the inability of the parties to arrive at a consensus with the Commission; the prerogative to discontinue the settlements procedure as envisioned in the implementing legislation is seen to rest firmly with the Commission. It is advanced that reversion to the ordinary procedure is seen as an "instrument" of the Commission, used to coax or pressure a settling party towards a consensus; depending on the perspective taken. The broad margin of discretion of the Commission to use this instrument is set out in the *Commission Regulation*:

*"the Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. Therefore, the Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties."*⁴¹

Therefore, the implementing legislation fails to take account of the extent to which reversion to the ordinary procedure may occur at the behest of the settling parties; over which the Commission has little control due to the voluntary nature of the accession and participation of parties in the procedure. This right to elect to depart may similarly result in the hybridisation of a settlement procedure. It is emphasised that this is a means by which the settlement procedure may become hybridised over which the Commission lacks control. Therefore, it is submitted that the implementing legislation errs

³⁵ OJ L 123/18.

³⁶ Commission Regulation (EC) No 662/2008 of 30 June 2008 amending Regulation (EC) No 773/2004 as regards the conduct of settlement procedures in cartel cases, L 171/3 OJ 1.07.2008

³⁷ [2008] OJ L 171/3.

³⁸ *Ibid.*, Article 1(7).

³⁹ Commission Notice, *Op. cit.*, at para 21.

⁴⁰ *Ibid.*, at recital 29. "*The Commission retains the right to adopt a final position which departs from its preliminary position expressed in a statement of objections endorsing the parties' settlement submissions, either in view of the opinion provided by the Advisory Committee or for other appropriate considerations in view of the ultimate decisional autonomy of the Commission to this effect. However, should the Commission opt to follow that course, it will inform the parties and notify to them a new statement of objections in order to allow for the exercise of their rights of defence in accordance with the applicable general rules of procedure.*"

⁴¹ *Ibid.*, at recital 3. "*In this regard, Regulation (EC) No 773/2004 bestows on the Commission the discretion whether to explore the settlement procedure or not in cartel cases, while ensuring that the choice of the settlement procedure cannot be imposed on the parties.*"

in focusing predominantly on the discretion of the Commission to depart or discontinue; rather than fully appreciating the discretion of the parties to opt-out of the settlement procedure.

The Commission must give consideration in its practice as to the reasons why a settling party would prefer to litigate its interests rather than conclude the Commission's investigation with a settlement decision if it is to counter the increasing incidences of hybrid cases developing during the lifetime of settlement discussions. By considering proactive mechanisms by which to counter defection, the Commission may render the procedure more favourable to settling candidates and secure their continued engagement whilst incidentally, increasing its control over the procedure as a whole in pursuit of procedural efficiencies.

1.4 A SETTLING CANDIDATE'S PREROGATIVE TO REVERT - AN EXCEPTION TO THE NORM?

The discretion of the settling parties to opt-out constitutes an unstipulated fourth means of reversion to the ordinary procedure not expressly set out in the *Commission Regulation* but eclipsed by references to the voluntary nature of the proceedings and to the failure of the settling parties and the Commission to reach a consensus. This fourth means of reversion is dealt with *implicitly* in the implementing legislation in instances where precautions are undertaken by the Commission to ensure that the settlement procedure cannot be imposed on parties. One such precaution ensures that the admissions made by parties during the settlement discussions are protected if a settlement is not reached given that the Commission may not use acknowledgements made as evidence in proceedings.⁴² The limited amount of consideration given to the likelihood of defection to the ordinary procedure by a settling party in the implementing regulation belies its importance to the overall cartel settlement procedure.

In referencing hybrid procedures merely as an exception to the norm; inadequate appreciation is taken of the important role played by the possibility to revert to the ordinary procedure in the success of settlement discussions. The significance of the settlement procedure remaining voluntary in nature is pivotal to the ability of the settling parties and the Commission to reach an enduring consensus. It may be submitted that not only is the ordinary procedure the default position for pursuing an Article 101 infringement, but that it is a failsafe which allows both the Commission and the parties to exercise flexibility as to the decision to settle.⁴³ A voluntary procedure enables both factions to cooperate to ensure that an enduring consensus is reached which is less likely to be defected from before it is finalised or later appealed.

Defection to the ordinary procedure during the cartel settlement procedure can be perceived as a consequential risk of a party's participation in voluntary settlement negotiations; during which the information available to the settling party concerning the benefits of settling increases which allows the settling party to re-evaluate its cost-benefit analysis of participation. The likelihood that a party may "*see the Commission's cards and walk away*"⁴⁴ is ubiquitous if the procedure is to remain

⁴² *Ibid.*, at recital 21. "*The acknowledgments and confirmations provided by the parties in view of settlement constitute the expression of their commitment to cooperate in the expeditious handling of the case following the settlement procedure. However, those acknowledgments and confirmations are conditional upon the Commission meeting their settlement request, including the anticipated maximum amount of the fine.*"

⁴³ Flavio Laina and Elina Laurinen, "The EU Cartel Settlement Procedure: Current Status and Challenges", 2013, *Journal of European Competition Law and Practice*, at page 7. Kirtikumar Mehta and Maria Luisa Tierno Centella, "Settlement Procedure in EU Cartel Cases", 2008, *Competition Law International*, at page 12. "*Neither the companies nor the Commission are obliged to enter settlement discussions or, once discussions have started, to ultimately settle. The flexibility is possible, both for the Commission and for the parties, because the ordinary enforcement procedure (with substantive replies to the Statement of Objections, full access to file and oral hearing post-Statement of Objections, upon request) remains in force and will be applicable by default to cartel cases.*"

⁴⁴ Flavio Laina, Head of Unit – Cartel Settlements, European Commission, "Use and abuse of Settlements in Antitrust Policies?", Concurrences Workshop, 14th January 2015.

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voluntary by nature. Therefore, whilst collective settlements are favoured as the most efficient use of resources, bifurcated approaches must be incorporated into the legislative schema in a considered way as they are representative of the right of the settling party to withdraw from the discretionary procedure. In other words, the possibility to revert to the ordinary procedure is representative of the voluntariness of a settlement and should not merely be a threat wielded by the Commission to ensure that the settling candidate arrives to the consensus envisioned by the Commission.

Although, it is foreseen within the *Commission Regulation and Notice*; that a procedure may develop or end as a hybrid; hybridisation is only limitedly discoursed therein. It is advanced generally that a bifurcated approach may develop due to an “irregularity” in the progress of the settlement procedure; rather than as a result of a settling party’s prerogative to depart from the procedure. Limited consideration of the ability of settling parties to invoke their right to revert to the ordinary procedure has meant that inadequate appreciation is taken of the factors which cultivate default amongst parties. In this regard, it is acknowledged that empirical research may have to be undertaken to determine the factors that in actuality motivate cartelists to leave the settlement discussions. Conducting such empirical research may become more practicable as the sample set of hybrids increases. However, in failing to venture as to the kinds of factors that give rise to defection, this has resulted in hybrid cases being residually dealt with in Commission practice as an exception to the norm. The cartel settlement procedure as is therefore proves inept to contend with any such factors which contribute to the development of hybrid cases and does not motivate the establishment of a framework to account for the reconciliation of procedural inefficiencies with a bifurcated procedure.

Given the increasing occurrence of hybridised procedures, it is short sighted to continue to view hybridised procedures as exceptional. Given that voluntariness and flexibility to proceed to consensus are tenets of the settlement framework; hybridisation cannot be estopped outright by denying a cartel list the possibility to revert to the ordinary procedure for the purpose of achieving projected efficiency gains. Whilst a model that accommodates the likelihood of bifurcation may appear not to contribute to achieving projected efficiency aims; the incorporation of mechanisms to reduce the incidence of bifurcated proceedings may in the long-term reduce the occurrence of hybrid settlement scenarios. By consequence, they may incidentally reduce the likelihood of appeals from settlement decisions.

II

2.1 COST-BENEFIT ANALYSIS OF PARTICIPATION

The factors which encourage defection from the cartel settlement procedure are hereunder considered. Due to the limited number of precedents, the intransparency of “streamlined” settlement decisions and without a published appeals decision; the factors that encourage a settling candidate to depart from the procedure are indeterminable beyond raising the assumption that its departure may be confined to the particular facts of the case of each defecting cartelists. However, in light of the increase in hybrid cases and with a view to proactively salvage the efficiency gains assured by the settlement procedure; this paper alights from that assumption. It is therefore advanced that at a particular juncture in the settlements procedure, a defecting party considers that its interests are best litigated in view of the progress or expected outcome of settlements discussions. At that juncture, a settling party’s cost benefit analysis of participating in the settlements procedure tips in favour of the ordinary procedure and a hybrid case develops.

It can otherwise be considered that a settling party is prompted to renege on the settlements process depending on its perception of the impact of the procedure on its individual interests. In order to counter defection; the Commission must be able to conduct the settlement procedure in a flexible manner which may accommodate these individualistic interests; without devolving into a negotiation over the fine. At present, the settlement procedure is a discretionary procedure heavily weighted in

favour of the autonomous perspectives and prerogatives of the Commission. Such an unbalanced and intransparent procedure does not inspire the continued engagement of cartelists who may prefer the certainties of the devil they know – the ordinary procedure and the subsequent opportunity to litigate through appeal. The litigation of individual interests is further reinforced by the ordinary protections of the adversarial systems which a settling party waives under the settlement procedure. It is submitted, therefore, that the Commission must positively impact the potential cost-benefit analysis of participation in settlement discussions in order to secure the continued participation of cartelists who would rather litigate their individual interests.

It will be considered whether the Commission already accommodates deliberations of the individual interests of settling parties within settlement discussions. However, that individual interests are not already reflected in settlement outcomes is not ascertainable from the intransparent proceedings. It is considered by brief digression whether the leniency reductions awarded within the settlement procedure evidence an assessment of each cartelists' individual perspective of its infringement. Examining the seventeen cartel settlement decisions to date, it is seen that in *DRAM*,⁴⁵ the first cartel settlements decision in 2010, Hynix and Samsung each received a reduction of 5% and Toshiba and Mitsubishi each received a 10% reduction with respect to mitigating factors relevant to its own participation in the infringement. Mitigating or aggravating reductions have not been accounted for in subsequent decisions since the first cartel settlement decisions until the most recent settlement decision of December 2014, *Paper Envelopes*.⁴⁶ In that settlement decision, leniency reductions in the range 10% to 50% were awarded to four out of five of the settlement participants. However, even an upswing in individualised leniency reductions in settlement decisions would not constitute conclusive evidence that the Commission gave express consideration to factors which would encourage cartelists to remain engaged in settlement discussions. It cannot be pronounced definitively, without knowing the content of the deliberations between settling parties and the Commission, whether the Commission in practice formulates settlement decisions attentive to the individualistic concerns raised by the settling party. Therefore, only limited conclusions can be drawn from concluded settlement decisions. This analysis must then proceed to conjecture as to the courses of action that a settling party may take when it perceives its individualist interests to be compromised during settlement discussions.

2.2 INTERTWINED FORTUNES AND INDIVIDUAL OUTCOMES

In arriving at a final settlement outcome the Commission is not without restraint and is bound by the *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*⁴⁷ to “investigate and sanction individual infringements.”⁴⁸ The Commission, therefore, despite adopting a single streamlined decision, sanctions each cartelist individually as opposed to sanctioning the collective infringement en masse. Thus, the Commission considers the particularity of the participation of each cartelist involved in the collective infringement. This is reassuring for a settling party participating in a settlement procedure favoured to be undertaken collectively by all its co-cartelists. Such a settling party must be able to foresee with certainty that its liability is determined on the basis of its own infringement and not extrapolated from fortunes and performance of the cartel group as a whole in settlement discussions. That a settlement procedure may continue despite the defection of a cartelist is evidence for the proposition that the fortunes of cartelist are not bound. However, as seen in *Smart Card Chips*, the conduct of certain settling parties can prejudice the likelihood of settlement for the group. Hence, to an extent, it must be appreciated that successful

⁴⁵ Commission Decision, COMP/38511 DRAMs, 19th May 2010.

⁴⁶ DG Comp, Press Release, IP-14-2583, “Antitrust: Commission fines five envelope producers over € 19.4 million in cartel settlement”, 11th December 2014, available at <http://europa.eu/rapid/press-release_IP-14-2583_en.htm>

⁴⁷ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006 OJ C 210/2.

⁴⁸ *Ibid.*, recital (4)

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collective settlements require elements of joint cooperation amongst cartelists. The concept of joint cooperation in settlement proceedings becomes problematic when it becomes less apparent that sanctioning outcomes are reflective of each individual cartelists' engagement with the Commission rather than the collective interactions of the cartel group as a whole with the Commission. Adjacent to this point, it may be unclear as to what extent the individual admissions and submissions of cartelists in relation to the collective infringement may influence the individual sanctions of each cartelists. This point is well illustrated by Jones who, in relation to early resolutions entered into by cartelists in the UK, highlights that, "*parties who enter into early resolution agreements make admissions about their own conduct*"⁴⁹ as distinct from admissions about the conduct of the cartel group as a whole.

It is submitted that there is a legitimate externality that an individual cartelist's settlement outcome may be impacted by the bargaining asymmetries of the other settling parties and the Commission. This may compound to reduce the individuality of a settlement outcome. These bargaining asymmetries are described by Scordamaglia:

*"settlement decisions are not really the fruit of mutual concessions of a negotiation procedure, but they often constitute the product of negotiation asymmetry between the defendant and the competition authority. For instance, for reasons of 'corporate pragmatism', firms might agree to settle at a disproportionately high price, in order to bring a premature end to risky litigation, and reap the advantages of early settlements."*⁵⁰

An example that demonstrates that settling parties may perceive their settlement outcomes as reflective of their co-infringers' liability is the appeal of Société Générale⁵¹ to the General Court. This is the first appeal from a settlement decision by a settling party. On the 14th of February 2014, Société Générale brought an application to annul Commission decision⁵² of 4th December 2013 in the *EIRD* case in so far as it is contended that the fine imposed on Société Générale should be reduced to "*an appropriate amount*". In support of the action, the applicant relied on three pleas in law. In its third plea, the applicant sought to reduce its fine to an appropriate amount, reflective of the respective position of the banks against which the action had been brought on the relevant market. In this regard, it is advanced that the appellant considered the duration of its infringement to be conflated with that of its co-cartelists,⁵³ Barclays and Deutsche Bank, whose duration of participation was levelled at 32 months. This stands in contrast to RBS, whose duration of participation was levelled at 8 months and with whom Société Générale's position on the market was most commensurate.⁵⁴ In this regard, it is considered that Société Générale would have preferred to litigate the scope of its infringement with the protection of the adversarial system so as to distinguish its liability to those of Barclays and Deutsche Bank. If, during these settlement discussions, Société Générale perceived that it was not reaching consensus with the Commission, derivative evidence of which is the contested 32 month scope of infringement; defection to the ordinary procedure i.e. hybridisation, may have been the only attractive alternative course of action. This example is taken to elucidate the choices faced by a settling party in seeking to protect its individual interests under the settlement procedure where there

⁴⁹ Tristan Jones, "The OFT's tobacco decision: Is it Dead Yet?", 27th March 2013; available at <<http://competitionbulletin.com/2013/03/27/the-ofts-tobacco-decision-is-it-dead-yet/>>

⁵⁰ Andreas Scordamaglia, "The new Commission settlement procedure for cartels: A critical assessment", 2009, *Global Antitrust Review*, Issue 2, at page 72.

⁵¹ T-98/14 Action brought on 14 February 2014 — Société Générale v Commission, C 142/47 OJ 12 May 2014.

⁵² Commission Decision, Case COMP/39914 – Euro Interest Rate Derivatives, 4th December 2013.

⁵³ T-98/14 Action brought on 14 February 2014 — Société Générale v Commission, C 142/47 OJ 12 May 2014. "*First plea in law, alleging a manifest error of assessment committed by the Commission in the determination of the method of calculating the values of sales, in so far as the values adopted in the contested decision on the basis of that method do not reflect the respective positions of the banks against which the action has been brought on the relevant market during the infringement period (first part). [...] Third plea in law, claiming that the General Court should exercise its unlimited jurisdiction in order to reduce the applicant's fine to an appropriate amount reflecting the respective positions of the banks against which the action has been brought on the relevant market.*" It is noted that the no public version of the decision of Case Comp/39914 Euro interest rate derivatives (EIRD), 4th December 2012, is not yet available.

⁵⁴ T-98/14 Action brought on 14 February 2014 — Société Générale v Commission, C 142/47 OJ 12 May 2014..

is no true consensus reached with the Commission. Whilst the Société Générale appeal is taken as an illuminating example, it may not be representative; but in light of the intransparent nature of the settlement procedure, it serves as a discussion point to elucidate the author's considerations. In conclusion, where a settling party assesses its interests to be better served outside the settlements procedure, its cost-benefit analysis of continued participation shifts towards defection to the ordinary procedure.

Therefore, voluntariness to depart from the settlements procedure in order for a settling party to protect its own interests, even if those interests are ultimately rejected by the Commission, it is pivotal to ensure the consensual and individualised nature of a settlement outcome. Hybrid cases therefore cannot be dissuaded by limiting the ability of settling parties to revert to the ordinary procedure to litigate their interests. However, this submission identifies possible impediments to the voluntariness of the settlement procedure. Where a settling party determines its cost-benefit analysis to be tipped against participation in the settlement procedure and its interests better served under the ordinary procedure; its defection may be hindered by the threat of increased fines. A defecting cartel member *"might fear that if a settlement is not reached the Commission will seek higher sanctions deriving from the dissatisfaction of being forced to fall back to the standard procedure."*⁵⁵ In addition to this scenario, and with specific relevance for the cartel settlement procedures, the Commission has referenced two other scenarios that may result in increased fines for settlement defectors and appellants preferring to litigate their interests. These scenarios, discussed below, serve as impediments to the voluntariness of the settling parties to arrive at a consensus or depart from the settlements procedure and mitigate against a cartel member's prerogative to ensure it is receiving an individualised fining decision.

This discussion is undertaken to further elucidate that the hybridisation of the settlements procedure cannot be rectified through employing mechanisms which effectively erode the voluntariness to defect. This will serve as a contrast to the suggested means to reform the settlement procedure as extended by this submission in part III.

2.3 CONSEQUENCES OF A DEFICIENCY IN CONSENSUS

The first scenario under which the consensual nature of the settlement procedure comes under fire relates to the "hypothetical" consequences of a departure from the settlement procedure. Where a cartel member defects from the settling procedure, it has been advanced by Commission officials that an additional investigation into the infringement of that cartel member may have consequences for the scope of its infringement:

*"A second point of discussion among practitioners will certainly be to know whether the scope of the infringement in a standard case following a discontinued settlement case against all the involved companies should be identical to the scope of the latter. Speaking on a theoretical level, not related to any specific case, the authors submit that the scope of the infringement does not have to be identical under both procedures. Settlement means convincing the interlocutor. Should it become impossible for one or more reasons to convince one or more of the companies, the Commission will have to reflect and investigate why it was not able to convince its interlocutors. It cannot be excluded that such reflection brings new elements into the picture of that in the absence of procedural efficiencies the Commission deems it necessary to conduct an additional investigation the result of which might have an impact on the scope of the infringement."*⁵⁶ (emphasis added)

If a full investigation is already undertaken prior to the initiation of the settlement proceedings, it is logical to conclude that there would be no further scope to conduct an additional investigation that would impact the final infringement decision. It has been contended that the Commission investigates

⁵⁵ *Ibid.*

⁵⁶ Flavio Laina and Elina Laurinen, "The EU Cartel Settlement Procedure: Current Status and Challenges", *Journal of European Competition Law & Practice*, 2013, Vol. 4, No. 4; at page 9.

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all cartel cases, including cases that later on follow the settlement route, with the usual investigative measures such as leniency applications, inspections and information requests. The Commission has emphasised that “*it is important to clarify that settlements do not mean an investigative shortcut.*”⁵⁷ This is further affirmed in the *Commission Regulation* which, in relation to an overview of the settlement procedure, indicates that settlement discussions are preceded by an “*investigation as usual.*”⁵⁸ Indeed, were settlement discussions initiated prematurely before having adequately investigated the full extent of the relevant misconduct, the Commission would risk imposing sanctions whose deterrent value is sub-optimal.⁵⁹ A thorough investigation is also necessitated owing to the role of the ordinary procedure as a default failsafe. In this regard, “*if a settlement has been properly completed prior to entering into settlement, the Commission is able to switch quickly to normal procedure if settlements fails.*”⁶⁰ If an additional investigation outside the settlement procedure serves to impact the scope of infringement; the contention that the settlement procedure does not allow for a negotiated reduction in fines may be disputed. The contention that the Commission levies a fine as under an Article 7 infringement decision which is appropriate under optimal deterrence sanctioning principles but a ten per cent discount for settling can be seriously cast into discredit. Therefore, where fines awarded under the settlement are higher than that of the ordinary procedure as a result of joint participation, the benefits of engaging in the settlement procedure is devalued. However, where an individual cartel member does not perceive its own interests to be adequately appreciated by the Commission during a settlement consensus; it risks the threat of an investigation with the potential for increased fines if it defects from the settlement procedure to protect these interests.

In the second scenario, where a settling party undergoes the settlement procedure but, as per *Société Générale*, appeals the settlement outcome, the Commission has also remarked as to the “hypothetical” consequences which may ensue. Speaking at a conference, Dirk van Erps, senior Commission cartel enforcer, commented that the Commission may move for an increase of *Société Générale*’s fine: if the “*appeal is without merit, we may want to invite it to consider, in its full jurisdiction, whether a 10 per cent rebate is actually appropriate if by their appeal the party takes away one of the explicit advantages of the settlement.*”⁶¹ These sentiments were echoed by ex-Competition Commissioner Joaquín Almunia who commented with regard to the appeal which “*the court has full jurisdiction on fines – either to reduce or increase them.*”⁶² While it is inconceivable under EU law that settling parties would be able to waive their right to appeal;⁶³ as confirmed by the *Commission Notice* citing that all final decisions are subject to judicial review in accordance with Article 230 of the Treaty,⁶⁴ appeals from the settlement procedure are seen to risk the retaliation of the Commission.

It is understandable that the Commission may wish to deter appeals from settlement decisions. It is also understandable that they would wish to take away the benefit of the 10 per cent rebate. However, an appeal *de facto* indicates a lack of consensus and casts doubt over the efficiency of the settlement procedure. The settlement procedure was conceived to contribute to reducing the propensity of addressees of Commission decisions to appeal given that a meeting of minds is reached between the

⁵⁷ *Ibid.*, at page 2.

⁵⁸ Kris Dekeyser, European Commission, “Alternative procedures in the European antitrust legal framework: Cartel Settlements and Commitment Decisions”, 2009, at slide 17; available at <<http://www.euchinacomp.org/attachments/article/162/PPT1-Settlements%20and%20commitments-Kris-EN%20%20%28small%20size%29.pdf>>

⁵⁹ Dirk Arts and Francesca Miotto, “Cartel Settlements: An overview of EU and national case law”, 10th June 2014, Concurrences, e-Competitions No 67003.

⁶⁰ Flavio Laina and Elina Laurinen, *Op. cit.*, at page 2.

⁶¹ Dirk van Erps quoted as speaking at the 13th Annual Conference, International Competition Network, Marrakech, Morocco, 24th April 2014. Mlex, “*Société Générale could face call for Euribor fine increase before the EU court*”, 24th April 2014.

⁶² Joaquín Almunia, DG Comp, Speech to SV Kartellrecht, “Fighting against cartels: A priority for the present and for the future”, 3rd April 2014; available at <http://europa.eu/rapid/press-release_SPEECH-14-281_en.htm>

⁶³ See comments of Andreas Scordamaglia, “The new Commission settlement procedure for cartels: A critical assessment”, 2009, *Global Antitrust Review*, Issue 2, at page 78.

⁶⁴ Commission Notice, *Op. cit.*, para 41.

cartelist and Commission in the presentation of a settlement decision. It is acknowledged that the procedure was assumed to “*significantly limit the scope of appeals, but [...] not bring to an end the appeal predisposition of parties that, irrespective of any fine reductions, would be eager to see their fine further reduced.*”⁶⁵ Whilst vexatious litigants may always seek additional reductions; the Commission should not deter appeals in order to salvage efficiency gains.⁶⁶ In so doing, it mitigates against the preservation of a genuine recourse to appeal necessary to preserve the rights of settling parties and position itself as an arbiter of last instance. In these situations, it can be said that a settling party is dissuaded from litigating a lack of consensus with the Commission through appeal on a point of merit for fear of an increased sanction perhaps even beyond a remittance of the initial 10 per cent rebate. The cartelists’ ability to protect its interest through right of appeal is therefore curbed. Limiting recourse to a genuine appeal is another means by which the conclusion of a settlement outcome may be said to lack consensus and voluntariness; and therefore, fails to accord legitimacy to the individual interests of the settling parties.

These two above considered scenarios elucidate mechanisms by which the voluntariness to depart or appeal from the settlement procedure in order for a settling party to advance its own interests is eroded. Where these features of the settlement procedure persist, the consensual and individualised nature of a settlement outcome is thwarted. Lack of consensus to arrive at an individualised settlement outcome is deemed to be the umbrella category for the types of factors that would motivate a settling party to evaluate its cost-benefit analysis negatively during engagement in the settlement procedure. This broadstroke category is adopted in the absence of the availability of indicia of the specific factors that motivate deflection. Voluntariness to depart from the procedure or appeal a settlement decision without prejudice allows an individual cartelist to remedy the shortcomings of the settlement procedure. When factors of the kind which would encourage a cartelist to deflect to the ordinary procedure arise; the cartelist may attempt to present its concerns and reach consensus with the Commission or failing that, may depart without prejudice from the procedure. Voluntariness therefore ensures the consensual and individualised nature of an agreement reached by settling party who elects to remain within the procedure.

These submissions are relayed in furtherance of the adoption of a “targeted settlement procedure”; flexible to the interests of settling parties and with an renewed emphasis on voluntariness. In advance of outlining submissions for the adoption of a targeted settlement procedure, it is considered how the flexibility to accommodate the individual interests of cartelists under a targeted settlement procedure can be distinguished from bargaining or negotiating with the Commission. Thereafter, other mechanisms, in particular, the adoption of tailored fine reductions, which may serve to increase the attractiveness of continued participation in the procedure are considered. Finally, the concluding comments will elaborate on the nexus between the adoption of a targeted settlement procedure and the potential for a long-term reduction in the hybridisation of settlement cases.

III

3.1 EMPHASISING INDIVIDUALITY: DISTINGUISHED FROM BARGAINING

It is submitted that in order to discourage abstention or defection and *inter alia* hybridisation, settlement discussions are suggested to be conducted in a manner which guarantees the individuality

⁶⁵ Andreas Scordamaglia, *Op. cit.*, at page 66.

⁶⁶ *Ibid.*, at page 65. “*This established propensity to appeal is not positive for the cartel enforcement process, but could probably be limited by adopting clearer criteria on the setting of fines. As long as the Commission retains ample discretion in fine determination, appeals are inevitable, irrespective of the procedure followed. Therefore, the new settlement procedure, given its consensual nature and limited appeal potential, would probably significantly limit the scope of appeals, but will not bring to an end the appeal predisposition of parties that, irrespective of any fine reductions, would be eager to see their fine further reduced.*”

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of the settling party and the voluntariness to defect. A commitment to explicitly weighted individual settlement outcomes is distinguished from reducing the settlement procedure to bargaining or negotiations. Rather, it is representative of a commitment to consider the individual position of each cartel member entering into the settlement procedure.

The Commission has rebuked the contention that these settlement discussions should be construed as negotiations and has affirmed that the settlement procedure for cartel cases does not involve bargaining.⁶⁷ Indeed, the *Commission Notice* makes clear that the Commission does not negotiate the question of the existence of an infringement of Community law or the appropriate sanction amount. As opposed to bargaining over the final sanction, a settlement allows an admitted cartel member “to waive certain procedural rights in order to save money and time.”⁶⁸ As per the *Commission Notice*,

*“whilst the Commission, as the investigative authority and the guardian of the Treaty empowered to adopt enforcement decisions subject to judicial control by the Community Courts, does not negotiate the questions of the existence of an infringement of Community law and the appropriate sanction, it can reward the cooperation described in this Notice.”*⁶⁹

It has been commented that, “the European Commission’s denial that negotiating consequences must precede a settlement is remarkable. After all, settling is all about parties finding common ground.”⁷⁰ It is considered that this “denial” is an obstacle to the development of a targeted settlement regime which would be more amenable to prospective settling parties. The distinction between “influencing” and “bargaining” may appear wholly artificial; yet in a procedure built on the artifice that the conclusion of a settlement outcome is not a two way street of exchange between the Commission and the cartel member, it must be taken as a fact. It is accepted that the Commission cannot “bargain” and neither be seen to engage in conduct amounting to a bargaining of sanctions awarded to those infringing EU competition law. However, it can acknowledge the peculiarities of the settlement framework which allow it to sanction infringers who voluntarily participate, make admissions and produce evidence. While the Commission acknowledges these peculiarities to some extent through awarding a 10% discount; this discount appears unrelated to the quality of participation and therefore, the conditions for its application to each settling party could be intensified relative to their quality of engagement in the procedure.

It is asserted by the Commission that it does not enter settlement discussion on the pretext of being swayed by the submissions of the cartel members; and already has some, although insufficient, evidence of their individual participation.⁷¹ However, parties entering into the settlement procedure do have the opportunity to present their individual interests favourably without bargaining as to the fine. In order to reach a consensus, during settlement discussions, the parties will express their views on the objections envisaged against them and the evidence supporting those objections. The Commission may modify or retract some original objections owing to the parties’ submissions and consequently this may impact the range of potential fines.⁷² In this regard, there may be legitimate scope for sanctions to vary as between settling parties relative to their performance in their discussions with the Commission. Therefore, the settlement discussions contribute to developing the Commission’s

⁶⁷ Maarten Pieter Schinkel, “Bargaining in the Shadow of the European Settlement Procedure for Cartels”, 2010, Amsterdam Center for Law & Economics, available at <<http://dare.uva.nl/document/337522>>

⁶⁸ Molly Kelley, “Settling for Settlement: The European Commission’s New Cartel Settlement Procedure”, 2010, Washington University Global Studies Law Review, Volume 9, Issue 4, at page 709.

⁶⁹ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, article 1(2).

⁷⁰ Maarten Pieter Schinkel, “Bargaining in the Shadow of the European Settlement Procedure for Cartels”, *Antitrust Bulletin*, 22nd December 2010.

⁷¹ Flavio Laina and Aleko Bogdanov, “The EU Cartel Settlement Procedure: Latest Developments”, *Journal of European Competition Law & Practice*, 2014, Volume 14, No. 10, at page 717. “From a public enforcement point of view, the instrument allows to gain procedural efficiencies and to shorten the proceedings in cases where the Commission has solid evidence of an infringement, and thus to free resources.”

⁷² Kirtikumar Mehta and Maria Luisa Tierno Centalla, *Op. Cit.*, at page 13.

understanding of the extent of the individual liability of each settling party which in turn informs the settlement outcome. This is divorced from the performance of the cartel group overall; and every other cartelists' bargaining asymmetries.

The influencing of a settling party of its own individual settlement outcome is rather correlated with the legitimate opportunity of each party to present its case and directly affect its own outcome. It is distinguished from bargaining in that it would not allow the settling party to sway the Commission and negotiate the terms and conditions of a final infringement decision. As well as distinguishing this proposition from bargaining, it is also distinguished from negatively or positively impacting the fortunes of the cartel group as whole. Therefore, the settlement discussions are not interpreted to concern admissions by each of the settling parties as to the infringements of the cartel as a whole – rather they concern admissions and discussions as to the individual infringements of each party. This influencing more accurately describes settlement discussions as being conducted with the collective participation of co-cartelists but evaluated on an individualist basis.

Therefore, while this submission may take it at face value that settlement discussions are not negotiations or bargains; it is submitted that it should be explicitly acknowledged that settlement discussions do have real influence on the settlement outcomes. In this format, the Commission still holds the cards, yet the settling cartel is graced with an element of certainty and foreseeability that the culmination of its engagement in the procedure will result in an outcome commensurate to its case and cooperation. Accepting this possibility to influence, the Commission may consider the introduction of mechanisms under a targeted settlement procedure such as the possibility to offer differentiated fine reductions or other non-monetary benefits to render the procedure more attractive to cartelists without devolving discussions into a negotiation. The settling party is conversely assured that the Commission is prepared to sit as an audience for the deliberation of its particularised concerns and interests; whether or not these are ultimately accepted.

3.2 TOWARDS A TARGETED SETTLEMENT PROCEDURE

Presently, the Commission is at pains to outwardly distinguish settlement discussions from negotiations through emphasising that despite appearances, negotiation as to the fine or scope of infringement is not allowable. This submission argues that it should not be denied that these settlement discussions furnish sufficient information to allow the Commission to customise and tailor the targeted settlements offered so as to negate the defection of the settling parties to the ordinary procedure where they consider that their individual position and performance, as divorced from group, will not factor sufficiently in the Commission's deliberations. Whilst it is accepted that under an individualised assessment of the conduct of each party, fines may increase or decrease,⁷³ it is submitted that a customised settlement regime would lend an element of clarity to the settlement procedure. Requiring the Commission to emphasise the individuality of cartelists is described in this submission as the adoption of a "targeted settlement procedure".

This submission calls for the tactful adaption of the settlement procedure in a manner that would render its mechanics more attentive to the interests of participating individual cartelists. A targeted settlements procedure should seek "*creative, individual tailored resolutions*"⁷⁴ for cartelists engaged in collective infringement. In this regard, a less culpable cartel member should be able to present the

⁷³ *Ibid.*, at page 59. "Finally, the CFI, whose remit to review fining decisions is unfettered, essentially checks whether the 1998 Guidelines or 1996 Leniency Notice are correctly applied and only rarely endeavours to clarify the principles behind the Commission's fining decisions. Further, it has never increased a fine imposed by the Commission. Indeed, the worst that undertakings can expect at the moment is that the CFI will re-affirm a Commission fine."

⁷⁴ Scott D. Hammond, Former Director of Criminal Enforcement, U.S Department of Justice, Antitrust Division, "Detecting and Deterring Cartel Activity Through an Effective Leniency Program", 2001, available at <http://www.usdoj.gov/atr/public/speeches/9928.htm>

facts of its liability in a manner which can be reflected in settlement outcomes. Other terms of the settlement may also be individually tailored. For example, it may be considered that “*non-monetary benefits such as ... limiting the scope of the charged conduct could provide an attractive alternative to an individual cartelist.*”⁷⁵ These measures are submitted to equilibrate the Commission’s currently heavily balanced discretionary settlement procedure in favour of participants. Under a targeted approach, some control over settlement discussions is relinquished to the settling parties to influence their settlement outcomes. A modicum of control is reserved to the parties where it is understood that comporting well with the settlements procedure in the presentation of their case can have commensurate positive outcomes for the final outcome. Further, providing tailored settlement outcomes renews a commitment to individuality in a procedure that is orientated to favour collectivity. In this regard, the Commission would also be required under a remodelled version of the settlement procedure to give greater clarity as to the consequences faced by a settling party that defects to the ordinary procedure. It must be possible for a settling party to foresee whether it has recourse to protect its individual interests, if it deems them to be insufficiently deliberated during the course of the settlement procedure, without Commission retaliation. The specific mechanism of offering tailored fine reductions is explored briefly hereunder as an example of one facet of targeted approach to concluding settlement outcomes.

3.2.1 TAILORED FINE REDUCTIONS

The settlement procedure suffers from the obvious drawback “*that it is necessary to settle for something less than the maximum possible penalty that could have been imposed against a cartel participant.*”⁷⁶ Perhaps this consideration motivated the regulator to adopt a cap on the percentage reduction allowable. Conversely, that the incidence of hybridised procedures were not adequately accounted for in the legislation may indicate that the Commission over-estimated the likelihood that all parties would concurrently and non-contentiously submit to the settlement procedure. This assumption may have been based partly on the inflated assumption that the ten per cent reduction was an attractive bargain that would encourage the cartel participant to forgo litigation. This ten per cent fine reduction may be unnecessarily restrictive. This assumption may be remedied in light of a commitment to consider the individualistic engagement of each settling party in the procedure if, instead of a standard ten percent reduction in fines, the Commission allows for a spectrum of reductions, which may have a cap, to be applied to each party participating in the cartel settlement procedure.⁷⁷

It is considered to what extent allowing for flexibility as regards the percentage rebate imposed could deter incidents of hybrid procedures. Like an effective leniency program, an effective cartel settlement program requires sufficient benefits and incentives for both an enforcement agency and the cartel participant, or neither will commit to settlement. Similarly, “*the mere possibility of reduced sanctions usually will not be enough to induce a company to settle*”;⁷⁸ however, tailoring the level of reduced sanctions to factors such as the settling party’s cooperation and performance in the settlement discussions may encourage a party to view their participation in the settlement procedure more favourably. This would also deter abuse of the settlement procedure by vexatious settling parties; with no genuine interest in participation, who would achieve lower reductions. It is considered to what

⁷⁵ International Competition Network, Cartel Working Group, “Cartel Settlements”, Report to the ICN Annual Conference, April 2008, at page 13.

⁷⁶ ICN, Cartel Working Group – General Legal Framework, 2008, at page 17.

⁷⁷ Ann O’Brien, “Cartel Settlements in the U.S and the EU: Similarities, Differences & Remaining Questions”, 2008, 13th Annual EU Competition, Law and Policy Workshop., at page 12. O’Brien, *Op. cit.*, at page 3. “*In fact, members of the antitrust bar are skeptical about whether the ten percent reduction in fines offered by the EC’s settlement procedure will be enough to induce companies to entertain the idea of settlement at all.*”

⁷⁸ International Competition Network, Cartel Working Group, Subgroup 1 – General Legal Framework, Cartel Settlements, 2008, at page 9; available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf>

extent the Commission may offer a further fine reduction without negotiating the fine and having already accommodated leniency. In this regard, the Commission may tailor the percentage reduction to reflect the value and quality of an individual cartelists' participation in the settlement procedure. This quality of participation can be determined by weighting the value of the range of factors which a settlement decision would ordinarily encompass. An additional fine reduction may also be accorded taking acknowledgement of the manner in which the settling party has engaged in timely and productive cooperation with the Commission.⁷⁹ While the settlements procedure has been distinguished from a negotiation, it is undeniable that each individual settlement outcome requires the participation of two parties in a manner less than adversarial. This is relevant, in particular, where the Commission does not have the entirety of the evidence sought. In these situations, the Commission may consider scope to reward the meaningful cooperation of the cartelists in the procedure as cooperation in these circumstances is exponentially more valuable.

3.3 CONCLUSIONS ON THE REMODELLING OF THE CARTEL SETTLEMENT PROCEDURE

In light of the steady proliferation of hybrid cases, the Commission should consider reformulations of the settlement model to best conclude future cases.⁸⁰ According to Kris Dekeyser, Senior Commission Cartel officer, the procedure for wrapping up cartel investigations whereby some parties voluntarily settle and others hold out for a full decision is "*not set in stone*."⁸¹ The realisation of the objectives of the cartel settlement procedure will depend on the Commission's willingness to reform the procedure to more properly accord for the possibility or likelihood of hybrid scenarios. Neglecting to account for the inefficiencies resulting from a hybridised procedure was the initial fundamental flaw in the implementing legislation.

Where the procedure remains voluntary, the likelihood of hybrid procedures may never be ruled out definitively. Therefore, the Commission must be prepared to undertake measures to combat the consequent losses of efficiency which such hybrid scenarios elicit due to the resources expended by the Commission in executing dual procedures in respect of a single cartel investigation. This loss of efficiency is not combated, as described above, by constraining the voluntariness of the procedure.

Whilst the ability of the Commission to individually fix the reductions accorded to each party would require legislative reform; largely, the submissions set out in this discourse advocate for a practical remodelling of the current procedure to allow for the potential gains of the settlement procedure to be more clearly evaluated by the settling parties. This submission has identified an emphasis on the interests of individual settling parties and the voluntariness of the procedure as a means to assuage disaffection with the current cartel settlement framework. It is envisaged that these factors can be infiltrated into the current framework where the Commission adopts a targeted settlement procedure emphasising the individual interests, influence and engagement of a participant in the procedure. In this regard, it is submitted that clarification as to the consequences of a settling party defecting or appealing is warranted.

⁷⁹ Although the EU cartel settlements procedure is expressly distinguished from the US plea bargaining system, analogies can be drawn with regard to the granting of benefits in return for efficient and timely cooperation. As per Scott D. Hammond, Department of Justice, "The US Model of Negotiated Plea Agreements: A Good Deal with Benefits for All", OECD Competition Committee, Working Party No. 3, 17 October 2006; available at <<http://www.justice.gov/atr/public/speeches/219332.htm>>, "*The Division can still offer that company and its executives substantial benefits in return for timely cooperation.*"

⁸⁰ Lewis Crofts, "Almunia warns cartel members to play fair in settlement talks", 3rd April 2014, available at <<http://www.mlex.com/EU/Content.aspx?ID=521082>>

⁸¹ Ana Rita Rego, "'Hybrid' cartel settlement model 'not set in stone', EC official says", 2nd December 2011, available at <<http://www.mlex.com/EU/Content.aspx?ID=194945/>>

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It is considered that the adoption of targeted settlement outcomes is an investment in the endurance of the settlement decisions which minimises the likelihood of defections to the ordinary procedure or appeals from the settlement decision. Over time, series of well-founded decisions will generate confidence in the procedure and encourage participation rather than defection. Under this approach, efficiency gains are sought in the long-term through reaching enduring agreements which are unlikely to be reneged upon or later appealed and which inspire confidence and credibility in the cartel settlements procedure as an enforcement tool. It is acknowledged that the prospect of a hybrid case developing will remain as long as it remains a voluntary procedure. However, in pursuing targeted settlement outcomes, it is submitted that the cases in which the hybridisation of the cartel settlement procedure does transpire may, in the long-term, truly become an exception to the norm.⁸²

⁸² European Commission, SPEECH/14/281, “Fighting against Cartels: A priority for the present and for the future”, 2nd April 2014. “*Hybrid cases [...] remain the exception.*”