HAS THE DUST SETTLED FOR CARTEL SETTLEMENTS?

By Chris Bryant & Marieke Datema[1]

I. INTRODUCTION

In January 2016 the European Commission reached a significant milestone when it imposed fines in the twentieth cartel settlement case. Many of the benefits of settlement have been realized since the procedure's inception in 2008. The Commission benefits from a simplified and quicker procedure, allowing it to handle more cases with the same resources, and has to contend with significantly fewer appeals. The settling parties benefit from a 10 percent reduction in the level of their fine, a shorter timeframe for the investigation, typically a more concise infringement decision and potentially more subtle benefits such as greater influence on the content of a decision than under the standard procedure.

However, this article examines some of the issues that have arisen in relation to the settlement procedure and how settlement cases are handled. In particular, we consider the complex issues that arise for both the settling and non-settling parties in "hybrid" cases. Furthermore, we examine the Commission's considerable discretion in relation to the initiation and continuation of settlement discussions. Finally, we consider the appeals by Société Générale and Tompla in relation to the fines imposed in settlement decisions.

II. HYBRID CASES

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Hybrid cases, in which some parties choose to settle and other parties opt to follow the standard procedure, raise issues for all parties. The Commission is not able to fully benefit from procedural efficiencies. Furthermore, the settling parties may be concerned that the standard decision addressed to the non-settling parties will contain a fuller factual description and assessment of the facts, which could potentially be used in damages actions against the settling parties. The settling parties may also have to face damage claims earlier than the non-settling parties. Conversely, the non-settling parties may be concerned that they will be treated unfavorably by the Commission as a result of opting out of the settlement procedure.

While the Commission has repeatedly stated that it expects hybrid cases to be "the exception,"[2] as of 1 June 2016 there have been 5 hybrid cases out of a total of 20 cartel settlement cases. Hybrid cases are clearly more prevalent than the Commission anticipated, making a hybrid case a real possibility for any party involved in settlement discussions. The Commission must grapple with the tension between not allowing non-settling parties to disrupt the procedure while at the same time not eroding the benefits to the settling parties. It is by no means apparent that the Commission has yet found the right balance.

A. Risks for the settling parties

1. Information in the standard decision used against the settling parties

One of the advantages for settling parties is that a settlement decision generally contains far fewer details about the cartel arrangements than a standard decision. In hybrid cases, this creates an inherent conflict, as the Commission issues both a settlement decision and a standard decision.

As of 1 June 2016, the Commission has published the non-confidential standard decision in only one hybrid case–the decision addressed to the non-settling party, Timab, in the animal feed phosphates case ("Timab decision").

The Commission found that the animal feed phosphates cartel dated back to 1969 but could only establish Timab's participation in the cartel between September 16, 1993 and February 10, 2004. Nonetheless, the *Timab* decision surprisingly contains significantly more information than the settlement decision about the settling parties' cartel activities in relation to the period before Timab's participation, including detailed accounts of meetings in the mid-to-late 1970s involving settling parties. This information would be extremely useful to a party seeking damages from the settling parties.

It not obvious why the Commission chose to include this information in the *Timab* decision, as it is not relevant to Timab and clearly provides a disincentive for parties to settle in a hybrid case. The settling parties in the animal feed phosphates case would be well within their rights to feel aggrieved about the content of the *Timab* decision (or, at the very least, the public version). If the Commission wishes to keep encouraging parties to settle in hybrid cases, it will need to take care to avoid more information than necessary about the settling parties in the public versions of standard decisions.

[2] See *e.g.* Joaquín Almunia speech, "Fighting against cartels: A priority for the present and for the future", SV Kartellrecht, April 3, 2014.

2. Earlier damages claims?

Appeals of settlement decisions remain very rare. This might have the consequence of exposing settling parties to damages claims at an earlier point than the non-settling parties. In 2014 the UK Supreme Court ruled in *Morgan Crucible*[3] that, if an addressee of a cartel decision successfully appeals against it, this has no effect on the findings of infringement against addressees who did not appeal. As a result, the parties that do not appeal are exposed to follow-on damages claims at an earlier point than the parties that appeal the decision.

In a hybrid settlement scenario (assuming the settling parties choose not appeal the Commission's decision), the timing implications can be particularly dramatic: the settling parties will be the subject of a public settlement decision on which follow-on damages actions can be based significantly ahead of the date when the Commission may issue an infringement decision against the non-settling parties (which could then be appealed). The concept of joint and several liability means that the settling parties will be liable for all the losses suffered by the claimants and will not be able to claim contribution from the appealing parties until those parties are also subject to final infringement decisions. The main exception to this is that, once the EU Damages Directive is fully implemented, it will provide a safeguard for immunity recipients who will only be liable to their own direct and indirect purchasers (unless the claimant can prove that it cannot obtain damages from other infringers).

B. Bias against non-settling parties?

The former Competition Commissioner Joaquin Almunia stated that hybrid decisions "tell companies they cannot hold up the process if the Commission finds it appropriate to follow this route."[4] He added that this was only one way that the Commission has to "protect settlement proceedings from manipulation."[5]

A party may opt out of settlement on the basis of the fine, as Timab did in animal feed phosphates, or it may dispute its involvement in the alleged cartel and therefore not be willing to admit liability (as is required under the settlement procedure). As will be discussed in further detail below, the Commission's actions in animal feed phosphates will disincentivize any party considering opting out of settlement on the basis of the fine. Opting out of settlement on the basis of liability is a different matter and parties doing so need to be cognizant of the risks of bias that they may face in such a scenario.

1. Animal feed phosphates: the *Timab* appeal

The above statement by former Commissioner Almunia suggests that the Commission views non-settling parties unfavorably, despite the fact that it is within a party's right to opt out of settlement. This point was considered by the General Court in the appeal brought by Timab, the non-settling party in the animal phosphates case, arguing that it was "punished" for abandoning settlement discussions.

[3] *Deutsche Bahn AG & Ors v. Morgan Advanced Materials Plc* (formerly Morgan Crucible Co Plc) [2014] UKSC 24.
[4] Joaquin Almunia speech, "Some highlights from EU competition enforcement", IBA 18th Annual Competition Conference, September 19, 2014.
[5] Joaquin Almunia speech, Ibid.

In that case, the Commission initiated settlement proceedings with all undertakings. During settlement discussions Timab was informed that it would incur a fine between EUR 41 and EUR 44 million as a result of its participation in the infringement from December 31, 1978 until February 10, 2004. This fine range took into account the 10 percent settlement reduction, a 35 percent reduction for mitigating circumstances under the 2006 Fining Guidelines (discussed further below) and a 17 percent reduction under the Leniency Notice. After being informed of the fine range, Timab opted out of settlement proceedings but was eventually fined a far higher sum, EUR 59.85 million, under the standard procedure.

In its General Court appeal, Timab argued that the Commission had infringed its rights of defense, the principle of protection of legitimate expectations and the principle of sound administration, as well as infringing the Settlement Regulation and Notice,[6] due to the fact that it was penalized for withdrawing from settlement discussions. Timab claimed that it was punished because the likely fine that the Commission had set during settlement discussions was subsequently increased by 25 percent (despite the duration of the infringement having been reduced) and argued that the amount of the fine should in no event be higher than that corresponding to the upper limit (increased by 10 percent) in the range of fines which had been notified to them during settlement discussions.

In its judgment of May 20, 2015, the General Court noted that "even in…a hybrid case…the principle of equal treatment must be observed",[7] adding that, while the settlement procedure is an alternative to the standard procedure "in determining the amount of the fine, there cannot be any discrimination between the participants in the same cartel with respect to the information and calculation methods which are not affected by the specific features of the settlement procedure."[8]

Despite the fine of EUR 59.85 million, the infringement period in the (standard) *Timab* decision was September 16, 1993 and February 10, 2004, significantly shorter than the period the Commission had referred to during settlement discussions. However, the General Court found that the Commission applied the same method of calculating the fine (provided for in the 2006 Fining Guidelines) during both procedures. The difference in the two figures could be explained by the following factors:

- Timab's turnover between 1993 and 2004 increased sharply meaning that average sales (a key component of the fine) were over 50 percent higher in the shorter (standard procedure) period than in the longer (settlement procedure) period;

- Timab had provided evidence to the Commission in relation to the period 1978-1993 and during settlement discussions the Commission indicated that, while it could not grant the partial immunity requested by Timab in relation to this period as its cooperation had made it possible only to determine its own participation (not to extend the duration and scope of the cartel), it would grant a reduction of 35 percent for mitigating circumstances by way of

[6] Regulation No 773/2004 and the Notice on the conduct of settlement procedures.
[7] Paragraph 72, Judgment of the General Court, May 20, 2015, Case T-456/10, *Timab Industries and Cie financière et de participations Roullier v. European Commission*.
[8] Paragraphs 73 and 74, Ibid.

reward for Timab's cooperation outside the Leniency Notice. However, during the standard procedure, this period was not used and so the reduction no longer applied;

- Timab was granted a lower reduction under the Leniency Notice (5 percent instead of 17 percent); the 17 percent reduction the Commission intended to grant Timab during settlement discussions was based on the information it had provided in relation to the period 1978-1993;

- And the removal of the 10 percent settlement reduction.

The General Court concluded that the Commission had not penalized Timab for its withdrawal from the settlement procedure and stated that the Commission was not bound by the range of fines set out during the settlement procedure, noting that the "the range notified during the settlement procedure is irrelevant [to the standard procedure]."[9] Timab has appealed the General Court's judgment–the case is pending.

This case serves as a cautionary tale for those parties that commence settlement discussions but decide to opt out on the basis of the likely fine. Unless the Court of Justice reverses the position adopted by the General Court, the *Timab* case confirms that Commission can go "back to the drawing board" when calculating a fine for a non-settling party and there is a good chance that the ultimate fine will be higher than the range provided during settlement discussions. Despite the principle of equal treatment within a hybrid case, there is a risk to any party opting out settlement discussions that the Commission will take the least favorable (albeit legal) approach to calculating its fine.

2. Euribor: Crédit Agricole complaint

The *Euribor* case raises different questions of potential bias in relation to non-settling parties in hybrid cases. In December 2013 the Commission adopted a settlement decision and imposed fines on several banks for their role in attempting to manipulate two benchmark interest rates, LIBOR and Euribor. JPMorgan Chase, HSBC and Crédit Agricole decided against settling the Euribor probe.

Crédit Agricole complained to the EU Ombudsman about several public comments made by the then Competition Commissioner Joaquin Almunia that suggested that he had already made up his mind about the conclusion of the Euribor probe, thereby ignoring Crédit Agricole's rights of defense. Importantly, Almunia's comments were made before the Commission sent statement of objections to the non-settling parties in May 2014.

The first two comments were made in the summer of 2012: a statement in MLex: ("The evidence we have collected is quite telling, so I'm pretty sure this investigation will not be closed without results"); and a statement made in the European Parliament: ("The gravity of the infringement was 'above the average'"). The Ombudsman found that the comments gave the impression that it was "almost established that a cartel existed and that the Commission was ready to impose fines"[10] even though the investigation was at a very early

[9] Paragraphs 96 and 105, Ibid.
[10] Paragraph 14, Decision of the European Ombudsman in the inquiry into complaint 1021/2014/PD against the European Commission.

stage. She added that the statements could reasonably give interested third parties "the impression that the complainant's case had already been decided."[11]

The third comment was one made by Almunia during a hearing by a committee of French senators in January 2014: "I must say that since we've uncovered a lot of information already the investigation isn't the most difficult…We'll finish the investigation."[12]

The Commission has promised to take steps to avoid such problems in the future and the current and future Competition Commissioners are likely to be more careful when commenting on ongoing investigations. However, given that the Commission's case team generally remains the same for both the settlement and standard parts of a hybrid case, the unsurprising reality is that, as a result of having been involved in the settlement part of the case, the Commission, particularly the relevant case team, will have taken a view on the non-settlement part of the case. There may therefore be a case for the Commission to consider the approach used by the UK's Competition & Markets Authority in mergers which are not cleared in Phase 1: new decision-makers and some new case team members are brought in during a Phase 2 to deal with the potential bias (or appearance of bias) that those involved in Phase 1 may have.

III. THE COMMISSION'S DISCRETION IN RELATION TO SETTLEMENT

The Settlement Notice makes clear that the Commission has a broad margin of discretion in relation to whether or not to seek to settle cases. The boundaries of this discretion in initiating or continuing settlement discussions have been considered by the General Court.

A. Discretion in relation to initiating settlement discussions

On March 28, 2012 the Commission imposed fines on several companies in the Air Freight Forwarding cartel. One of those companies, Panalpina, subsequently brought an appeal challenging (among other things) the Commission's decision not to apply the settlement procedure. Panalpina argued that the Commission was obliged to make contact with the parties before it could decide whether the case could suitably be resolved by means of settlement. Furthermore, it stated that one of the relevant factors that the Commission should have taken into account when considering settlement was whether the parties were willing to take part in settlement discussions. In its judgment on February 29, 2016, the General Court rejected these arguments, stating that it is clear from the relevant legislation that the Commission is not obliged to make contact with the parties in relation to the possibility of settlement.

Panalpina also argued that the Commission made an error of assessment in determining that the *Air Freight Forwarding* case was not suitable for settlement. The General Court also rejected this argument. When considering the possibility of settlement the Commission "must take account of the probability of reaching a common understanding, regarding the scope of the potential objections…in that context, the Commission may take account of factors such as the number of parties involved, foreseeable conflicting positions

[11] Paragraph 14, Ibid.

[12] http://videos.senat.fr/video/videos/2014/video21329.html.

on the attribution of liability, and the extent to which the facts may be disputed."[13] The General Court referred to the large number of parties (47) under investigation and noted that a significant proportion of the parties did not cooperate with the Commission's investigation, concluding that it was therefore likely that at least some aspects of the Commission's findings would be disputed. In these circumstances, the Commission was justified in deciding that all parties were unlikely to agree to a settlement, undermining the efficiency benefits which arise in a case where all parties settle.

Despite the General Court confirming the Commission's wide scope of discretion in relation to the settlement procedure, it was unwilling to put the Commission's decision in relation to whether to initiate settlement discussions beyond scrutiny, stating that there was "no need to give a ruling on whether the Commission's decision not to explore the willingness of the parties to enter into a settlement can be the subject of proceedings."[14]

B. Discretion in relation to continuing settlement discussions

The *Smart Card Chips* case was the first time that the Commission commenced and then abandoned settlement proceedings. In its press release on September 3, 2014 the Commission stated that it had explored the possibility of settling the case with some of the companies but decided to discontinue the settlement discussions and to revert to the normal procedure because of the clear lack of progress of these discussions. In a speech on September 19, 2014, the then Commissioner Joaquin Almunia stated that "[w]hen we noticed that the talks were stalling because they were refusing to acknowledge liability for an infringement for which we had good evidence, we went back to the ordinary procedure."[15] Philips and Infineon, two out of the four parties fined by the Commission, have issued appeals against the Commission's decision. The significant issues raised in both appeals validate the Commission's decision to discontinue settlement discussions in this case.

IV. APPEALS AGAINST FINES IMPOSED IN SETTLEMENT DECISIONS

Settling parties' rights to appeal are limited given that the settlement procedure requires the parties to admit liability. The general expectation has also been that settling parties will not appeal, even though a settlement decision is subject to a right of appeal. However, two parties have now appealed settlement decisions.

Société Générale was fined EUR 445 million in December 2013 in relation to the Euribor cartel. It subsequently made legal history by being the first party fined under the Commission's settlement procedure to appeal to the General Court. In its appeal, Société Générale challenged the way in which the Commission established the value of sales relevant to the cartel, a key component of how its fine was calculated. In March 2016, Société Générale announced that it expected its fine to be cut and simultaneously withdrew the appeal. The Commission subsequently announced on April 6, 2016 that Société Générale's

[13] Paragraph 215, Judgment of the General Court, Case T-270/12, *Panalpina World Transport (Holding) Ltd, Panalpina Management AG, Panalpina China Ltd v. European Commission*.
[14] Paragraph 233, Ibid.
[15] Joaquin Almunia speech, "Some highlights from EU competition enforcement", IBA 18th Annual Competition Conference, September 19, 2014.

fine had been reduced to EUR 227 million–slightly over half of the original amount. The reduced fine was calculated based on revised data, but applying the same methodology. Although the appeal itself was dropped, Société Générale achieved a huge reduction in the level of its fine and its decision to appeal will therefore be viewed as a success.

Société Générale is, however, not the only party that has appealed the fine in a settlement decision. Tompla filed an appeal in relation to the fine imposed by the Commission in December 2014 in the *Paper Envelopes* settlement case. Tompla argued that the Commission infringed the duty to state reasons and the principle of equal treatment in its approach to setting the basic amount of the fine and infringed the principles of proportionality and non-discrimination by failing to take account a fine imposed by the Spanish Competition Authority.

The outcome of Tompla's appeal will be awaited with great interest, especially in the light of the reduction in Société Générale's fine. It is notable that, in neither case, was the party's liability challenged, and it will almost certainly remain the case that challenges to settlement decisions on liability grounds will be difficult and unlikely. However, the cases do highlight that, when issues concerning the calculation of the fine are concerned, settling and appealing may no longer be regarded as mutually exclusive options.

V. CONCLUSION

The Commission has referred to the settlement procedure as a "success story."[16] Given the number of cases and the relative absence of appeals, this has to be correct. However, settlement cases are not immune from problems, especially hybrid decisions, which are more common than the Commission perhaps anticipated.

Parties considering settling will need to weigh the advantages of doing so against the potentially significant disadvantages associated with hybrid cases, regardless of whether they are a settling or non-settling party. The detailed information provided about the settling parties' cartel activities in the *Timab* decision provides a strong disincentive for parties to settle and the Commission will need to ensure that this issue is addressed in any future hybrid decisions. Parties opting out of settlement also need to think carefully, in the knowledge that the Commission may well take the least favorable approach to calculating its fine under the standard procedure. Parties opting out of settlement in a hybrid case on the basis of liability need to be aware of the risks of bias.

More generally, the Commission retains considerable discretion in relation to the initiation and continuation of settlement discussions and this appears unlikely to change. However, one change that may be afoot is that settling and appealing may no longer be regarded as mutually exclusive options.

[16] See *e.g.* Eric Van Ginderachter's presentation at IDEE, "European Commission's settlement procedure–a success story", November 28, 2014.