FINE ARTS IN BRUSSELS: PUNISHMENT AND SETTLEMENT OF CARTEL CASES UNDER EC COMPETITION LAW. (I) *

The most beautiful thing we can experience is the mysterious. It is the source of all true art and science.

Albert Einstein

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I. INTRODUCTION.

When analysing the European Commission's antitrust fining approach, one may doubt whether to define it as an art (II) or as a science, (III) or something in between.(IV) In principle, the method used to calculate fines should be transparent and non-discriminatory, based on a certain number of parameters, which would make determining a fine in a given case a relatively easy empirical task. However, the discretion that the Commission enjoys when calculating fines, and the vague constraints imposed by the Community Courts on such discretion, have introduced a certain amount of creativity into this method.

The European Commission has developed its fining policy through various "communications" such as the Commission Notice on fines[1], the leniency program[2], and the settlements project[3]. Taking all of these instruments as a whole, companies involved in antitrust investigations are faced with a somewhat gloomy and uncertain scenario, although arguably the proposals on a settlement procedure have introduced a ray of hope for them.

Let us now review a few questions concerning fine arts in Brussels.(V)

Apart from an introduction and some conclusions, this article has two parts. The first deals with the Commission's fining policy in general, while the second focuses on the proposed settlement procedure in cartel cases.

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* Roman numbers refer to the paintings used at each moment during the presentation of this paper which are contained in the Annex.

** Garrigues. Madrid and Brussels

1 Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006, C 210/02).

2 Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17–22).

3 Proposal for a COMMISSION REGULATION (EC) No …/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases and Draft Commission Notice on the conduct of settlement proceedings in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases.

II. THE COMMISSION´S FINING POLICY.

It is well known that one of the Commission's competition policy objectives is to make the method of calculating fines more transparent, yet at the same time not to allow companies to be able to estimate in a reasonably precise way the final amount that they risk having to pay. Why is this? According to some Commission officials and other experts, uncertainty about the final amount has a deterrent effect[4]. This may be so, yet it also conflicts with the most basic principles of legal certainty applicable to criminal or administrative law.

In addition, while fines continue to increase exponentially, the conditions for obtaining a reduction or immunity from fines have been made more severe. Finally, the 10% limit established in Regulation 1/2003 applies, in the case of wholly-owned subsidiaries, to the turnover of the ultimate parent company, even if such turnover has nothing to do with the product affected by the infringement.

The crux of the issue is, therefore, whether or not the Commission's fining policy is compatible with the general principles of non-retroactivity, legal certainty, proportionality and the principle that natural or legal persons may be penalised only for acts imputed to them individually.

A. NON-RETROACTIVITY.[5]

The Commission's 2006 Fining Guidelines raise important questions concerning the possible breach of the principle of non-retroactivity, which is a general principle of European law that the Commission must observe in competition cases. The Commission has been backed by the European Courts, no question about that, but all this means is that "practical" retroactivity (as opposed to "formal" non-retroactivity) is the norm.

The Court of First Instance confirmed in *Dr Hans Heubach v Commission* that the Commission is entitled to modify its method of calculating the fines and to apply a new method without infringing the principle of legitimate expectations and non-retroactivity. As the Court put it, "*the Commission does not infringe this principle while adopting a new Fining Communication aggravating the level of the fines imposed. Undertakings involved in an administrative procedure which may give rise to a fine must take account of the possibility that the Commission may at any time decide to raise the level of fines above that applied in the past*".[6]

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[4] In this sense, see among others; W. P.J. Wils, *The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis*, Public Lecture, King's College of London, Centre of European Law, 15 February 2007, p. 14; Judge B. Vesterdorf, acting as AG in Case T-1/89, *Rhône-Poulenc v Commission (Polypropylene)*, ECR II-867; and H. de Broca, at the breakfast-debate held at Hotel Silken Berlaymont Brussels, 7 February 2007.

[5] See also L. Ortiz Blanco, M. Muñoz de Juan, and A. Givaja Sanz., *Will the new Commission Leniency and Fining Policy Appeal to Multi-Jurisdictional Leniency Applicants?*, Paper presented at the IBA Conference on "Cartel Enforcement and Antitrust Damages in Europe", held at the Conrad Hotel in Brussels, Belgium, 7-9 March 2007.

[6] Judgment of the Court of First Instance of 29 November 2005 in Case T-64/02, *Dr Hans Heubach GmbH & Co. KG, v Commission,* ECR II-5137, §207.

The ECJ also referred to this particular issue in *Dansk Rørindustri et al. v Commission*, stating that the Commission may apply higher fines provided that the new methodology appears "*reasonably foreseeable at the time when the infringements concerned were committed*"[7].

These judgments are debatable, to put it mildly. Non-retroactivity is a basic principle of EC and national law in every Member State and should be taken seriously. According to this principle, which is enshrined in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), a heavier penalty may not be imposed than the one applicable when the criminal offence was committed.

However, the Commission has argued that the Notice on fines is not to be regarded as "law" for the purposes of Article 7 of the ECHR. Indeed, in the *ADM* case cited above, the Commission claimed that no retroactive penalisation existed because the sole legal basis for the imposition of fines by the Commission for violations of EC competition law was Article 15 of Regulation No 17. The Commission was basically saying (VI): "*ceci (the Guidelines) n´est pas une pipe (law*)", but the appearance (an image) of law.[8]

In the authors' opinion, when speaking of "law", Article 7 of the ECHR refers to the same concept as that referred to by the Convention elsewhere when using that term, a concept which covers both statute law and judge-made law, and implies qualitative requirements, including most notably those of accessibility and foreseeability.[9] As a matter of fact, the Commission was not backed by the Court on this. In *Dansk Rørindustri et al. v Commission* the ECJ admitted that the Guidelines "*come, in principle, within the principle of "law" for the purposes of Article 7(1) of the ECHR*".[10]

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[7] Judgment of the European Court of Justice of 28 June 2005 in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S v. Commission*, ECR I-05425, § 224. See also *ADM v. Commission* (Judgment of the European Court of Justice of 18 May 2006 in Case C-397/03 P, *ADM v. Commission*, ECR I-4429), where the ECJ dismissed again the applicants´ allegations concerning an infringement of the principle of non-retroactivity when the Commission applies Guidelines on the method of setting fines to events occurring before their entry into force. The Court, following Advocate General Tizzano's arguments, established that the fact that the Commission would increase the level of the fines imposed, calculated according to the Guidelines, was reasonably foreseeable for undertakings at the time when the infringement was committed and thus, the Commission did not breach the principle of non-retroactivity. In his Opinion in that case, AG Tizzano referred to *Coëme v Belgium*, where the European Court of Human Rights established that the principle of non-retroactivity is not infringed where the penalty imposed could also have been imposed at the time when the infringement was committed. (Judgment of the ECtHR of 22 June 2000, *Coëme and Others v. Belgium,* Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96). Recalling the ECJ´s *Dansk Rørindustri* case-law, AG Tizzano proposed the Court to overrule the applicants' submissions given that (i) the Guidelines did not go beyond Article 15 of Regulation No 17, as the calculation of the fines is based on the same gravity and duration of the infringement criteria and limited to the 10% turnover threshold and (ii) the Commission may adjust the severity of fines to increase the effectiveness of competition policy, as long as it remains within the referred limits.

[8] In his painting "*La trahison des images*", Magritte shows a pipe that looks as though it might come from a tobacco store advertisement. Magritte painted below the pipe: *"Ceci n'est pas une pipe" (This is not a pipe)*, which seems a contradiction but is actually true. The painting is not a pipe, but rather an *image* of a pipe.

[9] Judgment of the European Court of Human Rights of 22 November 1995, *S.W. and C.R.* v. *United Kingdom*, Series A N. 335-B and 335-C, p. 41-42, §35.

[10] Judgment of the European Court of Justice of 28 June 2005 in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S v. Commission*, ECR I-05425, § 223. The ECJ also noted that "[i]*t cannot be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects*" (§ 211) and that "*a change in an enforcement policy, in this instance the Commission´s general competition policy in the matter of fines,*

We agree with the Court on this point, but we would go further: Article 23 of the Regulation is a basic rule whose vagueness calls for further implementation by means of secondary legislation, this being precisely the *raison d´être* of the successive Guidelines on the method of calculating fines. Article 23 is a rule that simply provides that companies found in breach of EC competition law will face a fine of up to 10 per cent of their annual turnover on account of the duration and gravity of the behavior in question. The vagueness of this provision does not meet the minimum standards of legal certainty required from a punitive norm of such far-reaching consequences. Both the Regulation and the Guidelines should thus be interpreted jointly, and jointly regarded as "law" in the sense of Article 7 of the ECHR. In our view, if they are altered in any way this should be subject to the principle of non-retroactivity.

In any case, even if we were to accept the Commission´s argument that only Article 23 of Regulation No 1/2003, and not the Guidelines, can be regarded as "law" for the purposes of Article 7 of the ECHR, a new problem would arise in respect of foreseeability.

The new fining policy has been applied to every case for which a Statement of Objections was notified after 1 September 2006 (the date of publication of the Notice), but pursuant to the above-mentioned case law, the Guidelines should only be applicable to those cases for which the modification of the fining policy was foreseeable at the time when the infringement was committed. We base our view on the ECJ´s judgment in *Dansk Rørindustri,* where the Court ruled that there had been no breach of the principle of non-retroactivity because an increase in the level of fines was foreseeable at the time the infringements were committed. Admittedly, the Court said that undertakings "*cannot acquire a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed or in a method of calculating fines*" and should therefore "*take account of the possibility that the Commission may decide at any time to raise the level of fines by reference to that applied in the past*".[11] But in our view, this cannot be interpreted as *carte blanche* for the Commission to introduce retroactively huge modifications to its fining policy.

Was the new fining policy "*reasonably foreseeable at the time when the infringements concerned were committed*"? (VII). As in "Le sort interrogé", could we see in the cards that the "duration index" (10% plus) would be multiplied tenfold (100% plus)? Could we guess that recidivism would be taken into account for each infringement at 100%? Could it be thought foreseeable that recidivism would be applied also when a national competition authority has adopted a previous decision against the same company? Was the new "entry fee" foreseeable?

Whatever the situation, let us go back to Article 23 of Regulation No 1/2003 and "think national" for a moment. Would it be acceptable in any of the legal systems of the EU Member States that breaches of the law that are punishable were liable to "a maximum of 30 years' imprisonment" (under criminal law), or a fine of, say, "maximum 10%" of the infringing undertaking's turnover (under administrative law), depending on the gravity and the duration of the infringement? That is the first question.

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especially where it comes about as a result of the adoption of rules of conduct such as the Guidelines, may have an impact from the aspect of the principle of non-retroactivity"(§222).

[11] Judgment of the European Court of Justice of 28 June 2005 in Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S v. Commission*, ECR I-05425, §§ 228-229.

Assuming that this were acceptable, would it then be acceptable that, in order to give a better idea of what an infringer could expect, the enforcement authority created its own *ad hoc* enforcement rules? Further, would it be acceptable that those *ad hoc* rules were modified *ad libitum* (eg multiplying the prior level of punishment tenfold, from one to ten years imprisonment for, say, tax evasion, or increasing tenfold the supplement charged for an infringement lasting a number of years) without there being consequences as regards retroactivity, basically because the ground rule (which simply sets the maximum penalty) has not been modified, and the *ad hoc* rules are not taken seriously? [12]

In Spain, for example, the Europeanization of the Competition Law 1989[13] brought the "maximum 10% rule" into Spain's antitrust law, which is purely administrative as in most other European countries. The system was at odds with Spanish administrative law, but was nevertheless backed by the Supreme Court, perhaps for fear of being dubbed "Eurosceptical" otherwise. In any event, there were serious doubts about its legality, and the new Spanish Competition Act, adopted in July 2007 has shed EC-style indetermination and returned to more traditional principles on administrative fines in Spain[14].

B. PROPORTIONALITY.

Like Saint Michael the Archangel in the Final Judgement (VIII), who holds a pair of scales in which he weighs the souls of the departed, or the book of life, the Commission should take a balanced approach towards antitrust sinners.

The 2006 Fining Guidelines result in a very significant increase in the fines to be imposed on undertakings infringing Community competition law. Large companies now face a greater risk of being fined amounts closer to the 10 % limit and fines may now even endanger companies' economic viability. This very significant increase in the level of fines raises serious concerns about the observance of the principle of proportionality.

According to settled case law, the Commission, in spite of enjoying a wide margin of discretion as regards the calculation of fines for an infringement of EC competition rules, is bound by the rules established in Regulation No 1/2003 and by the guidelines on the method for setting fines, as well as by the general principles of law as interpreted by the European Courts, including the principle of proportionality.[15] We have seen that, in

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[12] Under the 2006 Fining Guidelines, fines for infringements of long duration are much higher, as they are now increased by 100 % – rather than 10 % – for each extra year. Secondly, the Notice introduces a new possibility for the Commission to add to the basic fine: a sum equal to 15 % to 25 % of the yearly relevant sales as an 'entry fee' punishment. This is intended to act as an additional deterrent by raising the cost of even short-lived infringements. Thirdly, fines for companies repeating infringements shall also increase dramatically. Under the 2006 Notice, the Commission has clarified that it will apply an increase of up to 100 % of the basic amount for each infringement established. In previous cases, the Commission's general practice was to apply a 50 % increase. Finally, increases of the fine may also occur where it is possible to estimate the improper gains made as a result of the infringement.

[13] Law 16/1989 on the Defence of Competition, of 17 July 1989.

[14] See Articles 63 and 64 of Law 15/2007 on the Defence of Competition, of 3 July, 2007 (Spanish Official Journal No 159, p. 28848).

[15] See *inter alia* Judgment of the Court of First Instance of 8 July 2004 in Case T-44/00, *Mannesmannröhren-Werke v. Commission*, ECR II-2223, § 231; Judgment of the Court of First Instance of 21 October 1997 in Case T-229/94, *Deutsche Bahn AG v. Commission*, ECR II-1689, § 127; Judgment of the European Court of Justice

practice, the Courts have endorsed the Commission´s decisions as long as they keep within the limits imposed by Regulation No 1/2003, that is to say, as long as they take into consideration the gravity and duration of the infringement and provided that the final amount of the fine does not exceed the 10% cap.

However, we believe that staying within the limits set out in Article 23 of Regulation No 1/2003 does not necessarily mean that the principle of proportionality has been observed.

On many occasions, notably since the application of the 2006 Guidelines, the Commission´s calculation will begin by fixing a starting amount which is already above the 10% threshold - which is the case of any firm which operates in only one market, given that pursuant to the new Guidelines the starting amount will equate to 30% of their turnover in that market. In all these cases, if the Commission has greatly exceeded the 10% limit from the outset, any moderation of the initial amount, due, for instance, to a mitigating circumstance, could not affect at all the final amount of the fine.

The European Courts have established that the observance of the 10% limit set out in Article 23 of Regulation 1/2003 "*does not prohibit the Commission from referring, during its calculation, to an intermediate amount exceeding 10% of the turnover of the undertaking concerned, provided that the amount of the fine eventually imposed on the undertaking does not exceed that maximum limit*". Nonetheless, in our view, the fact that a starting amount above the 10% limit does not generally contravene the principle of proportionality does not mean that the Commission has been given one more *carte blanche*. We agree with Advocate General Tizzano that the assessment of the proportionality of a specific starting amount should be carried out on a case-by-case basis.[16]

In this area, the principle of proportionality operates both in an absolute and a relative sense. The absolute dimension of the principle is reflected in the requirement of observing the limit of 10% of the total turnover of the undertaking at stake, while in relative terms, the principle is "*designed to ensure that the penalty is 'personalised' and therefore proportionate to the gravity of the infringement and to the other circumstances, both subjective and objective, of each case. From that standpoint, the proportional and non-discriminatory character of the fine does not derive from a simple correlation with the overall turnover for the previous business year".*[17] On the contrary, such calculation will depend upon a set of factors, notably "*the volume and the value of the products involved in the infringement, the size and economic strength of the undertakings which committed the infringement and the influence they are able to exercise on the market, the conduct of each undertaking, the role played by each in committing the infringement, the benefit which they have obtained from such anti-competitive practices, and the economic context of the infringement, and so forth*".[18]

Although Advocate General Tizzano considered that the Commission's method of calculation was not contrary to the spirit or the letter of the procedural Regulation, he

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of 7 June 1983 in Joined Cases 100/80, 101/80, 102/80 and 103/80, *Musique Diffusion Française et al. v. Commission,* ECR I-1825, §§ 120 and 129.

[16] In the same sense, see Advocate General Tizzano´s Opinion of 8 July 2004 in Case C-189/02, *Dansk Rorindustri v. Commission*, ECR I-5425, § 114.

[17] Ibid, §§ 103-107.

[18] Ibid, § 69.

expressed his concerns about the fairness of the system particularly in the light of the emerging trend towards increasingly large sanctions for the most serious infringements,[19] concerns expressed, moreover, in relation to the adoption of the 1998 Guidelines on fines, which was much softer than the applicable 2006 Guidelines.

There must be a limit to the progressive increase of the amount of fines. Otherwise, fines will seriously undermine the financial situation of companies, the net effect of which will be to hurt the innocent (IX) (workers and shareholders) while leaving those responsible for the infringement (the managers) unscathed.

It would be better to explore other means of achieving the deterrent effect sought by the Commission, such as disqualifying the "guilty parties" from the possibility of acting as directors or even imposing criminal sanctions on them. The Commission's reluctance to move in this direction may be because both of these alternatives would involve a transfer of competences from the Commission to national courts. However, this is no excuse for not doing the right thing. In short, the Commission needs to bite the bullet, however reluctant it might be to do so.

C. INDIVIDUAL PENALTIES.[20]

Let us move on to parents and subsidiaries (or parents paying for their children´s wrongs). (X)

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[19] Ibid, §§129-133:

"*I must nevertheless point out that the examination so far carried out shows that the calculation method used by the Commission is not without risk as far as the fairness of the system is concerned.*

It does not seem to me to be fully consistent with the requirements of individualisation and progressiveness of the 'penalty' – two principles of cardinal importance in any punitive system, both in the criminal and the administrative spheres – that, as in the present cases, some of the calculation operations are essentially formal and abstract in character and therefore do not have concrete repercussions on the final amount of the fine. Nor can the fact be ignored that, for the same reasons, the objective of greater transparency pursued by the Guidelines is liable to be less than fully attained. "*I must nevertheless point out that the examination so far carried out shows that the calculation method used by the Commission is not without risk as far as the fairness of the system is concerned.*

I would add that those situations are not in fact exceptional and indeed run the risk of becoming ever more frequent. When the Guidelines were adopted in 1998, the Commission's policy on fines for infringements of competition law entered a new phase which, for reasons which it is not for me to judge, is certainly more rigorous and has led to an increase in the level of fines, particularly for more serious infringements. In addition, that intensification, deriving as it does from a calculation method based on flat-rate amounts, is liable for the most part to hit small and medium-sized undertakings.
In short, a new situation is emerging, which is more problematical than was the case when the method followed by the Commission did not, in principle, lead to the limit of 10% of total turnover being exceeded in the calculation process, so that the amount of the fine could be made to reflect all the circumstances of the case more easily and immediately.

The question must then be asked whether the abovementioned consequences of the new trend in the fines policy might not make it appropriate to steer a slightly different course so as to make certain that it is possible in every case to guarantee results that are in conformity with the general requirements of reasonableness and fairness".

[20] On this issue, see also A. Montesa, and A. Givaja, "When Parents Pay for their Children´s Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios", 29(4) *World Competition*, Kluwer Law International, pp. 555-574.

The new Fining Guidelines and the sharp increase in the amount of fines to be imposed for competition infringements have a particularly negative effect on parent companies of wholly-owned subsidiaries.

According to ECJ case law, the Commission is almost always allowed to take into account the turnover of the parent company as the relevant figure when calculating the fine's 10% cap. Thus, the potential consequences of the parent company being found liable for infringements by its subsidiaries are tremendous.

The Community Courts have established that where a parent company wholly owns a subsidiary, the Commission is entitled to presume that, at the time of the infringement: (i) the parent company was able to exercise decisive influence on the subsidiary and (ii) the parent company did so.[21] It is then for the parent company to rebut that presumption, by adducing sufficient evidence to the contrary.

As a result, in the case of wholly-owned subsidiaries the Commission's burden of proof on the parent company's joint liability for the infringement has been substantially eased. The Commission uses this possibility extensively. In our experience, it systematically attributes joint liability for the infringement to the parent company of the subsidiary involved in the infringement and, where possible, to the ultimate parent company of the first parent company (chain responsibility). As far as we know, the Commission has never formally accepted specific evidence proposed by affected companies demonstrating that a wholly-owned subsidiary acted independently in the market, although occasionally it has made limited use of the above presumption, as we will see.

In practice, the Commission generally relies on further evidence to confirm the rebuttable presumption. This evidence can be classified as "business links" and "personal links".[22] Business links arise when the parent company effectively influences the subsidiary's business policy.[23] Personal links arise when both parent and subsidiary share directors and/or executives.[24]

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[21] Although the roots of this reasoning could be already found in the Judgment of the European Court of Justice of 25 October 1983 in Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission,* ECR I-3151, it is only clearly stated in *Stora*, (Judgment of the European Court of Justice of 16 November 2000 in case C-286/98 P, *Stora Kopparbergs Bergslags AB v Commission*, ECR I-9925). More recently in the Judgment of the Court of First Instance of 15 June 2005 in Joined Cases T-71, 74, 87 and 91/03, *Tokai Carbon Co. Ltd and others* v. *Commission*, ECR II-10, §§ 59-60, the CFI has made it even more explicit.

[22] See C. Stanbrook and J. Berasategi*, Parent/Subsidiary Liability in EU Competition Law: A Critical Issue for Companies and Practitioners*, available at http://www.mwe.com.

[23] In *Pre-Insulated Pipes*, when attributing liability to the parent undertaking the Commission took into consideration the fact that "(…) *the product which is the subject of the cartel is only one of many activities in which the group is engaged and within the corporate structure, is the responsibility of a sub-group, division or subsidiary is not decisive*". See, *Pre-Insulated Pipes*, Commission Decision of 21 October 1998, Case IV/35.691/E-4, (OJ 1999, L 24/1), para. 155. Also, in the *Copper Plumbing Tubes* case, the Commission stated that if both the parent undertaking and its subsidiary produce the same product and participate in the same cartel, it is difficult to conceive of independent conduct regarding prices, sales or production volumes in the market. See *Copper Plumbing Tubes*, Commission Decision of 3 September 2004, Case COMP/38.069 (not yet published), para. 565. In the *Organic Peroxides* case, Commission Decision of 10 December 2003, Case COMP/E-2/37.857 (not yet published), para. 380, the Commission referred to a letter sent by a subsidiary to its parent undertaking in order to obtain its approval for certain decisions "*of lesser importance than that of participating in a cartel*". Therefore, the parent undertaking can also be held liable if it gives instructions to its subsidiary even if, generally speaking, its control over its subsidiary's activities is relatively strict. On the other hand, in the Commission Decision of 27 November 2002, on the *Plasterboard* case, Case COMP/E-

But despite the critical importance of this subject, the Commission's decisions, which have used a number of inconsistent and even contradictory criteria, have merely served to muddy the waters.

For instance, the Commission has held that the fact that both parent company and subsidiary submit a single response to the Commission's Statement of Objections, or that they share the same legal representative, or that the parent company appears as the sole interlocutor of the Commission during the administrative proceedings, constitutes strong evidence that the conduct of the subsidiary on the market was not independent at the time of the infringement.[25]

However, the fact that both parent company and subsidiary submit a single response to the Commission's Statement of Objections (or the fact that they share the same legal representative or that the parent company appears as the sole interlocutor of the Commission) has no bearing whatsoever on the subsidiary's autonomy on the market. Different companies often share the same legal advisor in relation to a particular set of proceedings. They may also provide a single, common reply to the Statement of Objections and rely on a specific law or consultancy firm to act as a particular channel of communication with the Commission. This does not necessarily mean that they are not autonomous. It only means that they have a common interest in the outcome of the case.

There are several other examples of inconsistent decisions in the Commission´s practice. For instance, in the *Belgium brewers* case,[26] the Commission decided that there were two cartels: (i) the Interbrew/Alken-Maes cartel and (ii) the so-called private-label cartel. In that context, the Commission considered that it was appropriate to attribute liability to Danone, a parent company fully controlling the infringing subsidiary, Alken-Maes, during the time that both types of anticompetitive conduct took place, but for only one of the two cartels. The Commission explained that while Danone was "*itself directly involved in the* [Interbrew/Alken-Maes] *cartel"*, Danone "*itself was not involved in the private-label cartel*". In line with the Stora presumption, the Commission could have

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1/37.152, (not yet published), para 506, the Commission referred to a letter in which a parent undertaking recommended that its subsidiary make an investment under certain circumstances.

[24] For instance, in the *German Banks case*, Commission Decision of 11 December 2001, Case COMP/E - 1/37.919 (OJ 2003, L15/1), para. 171, the Commission took the view that Deutsche VerkehrsBank AG, a parent company of Reisebank AG, was the addressee of its Decision. The Commission came to the conclusion that the parent undertaking had a decisive influence on its subsidiary based on its participation in meetings and discussions with other members of the cartel.

[25] In *Industrial and Medical Gases*, the Commission took into account the presence of a member of the legal department of the parent undertaking of BOC NV during the inspection carried out by Commission's officials at its headquarters. It also took into consideration the fact that the outside legal counsel of the parent undertaking was representing both undertakings in order to reply to the Statement of Objections. See *Industrial and Medical Gases,* Commission Decision of 24 July 2002, Case COMP/E-3736.700 (OJ 2003, L 84/1) para. 401. However, in *Souris-Topps*, the Commission did not consider the allegation made by the parent undertaking, Topps USA, regarding the different legal counsel for the parent undertaking and for its subsidiary during the administrative procedures before the Commission. See *Souris-Topps*, Commission Decision of 26 May 2004, Case COMP/37.980 (not yet published) para. 165. See also *Methionine*, Commission Decision of 2 July 2002, Case C.37.519 (OJ 2003, L 255/1) para. 244; *PO Video Games, PO Nintendo Distribution and Omega — Nintendo*, Commission Decision of 30 October 2002, Cases COMP/35.587, COMP/35.706 and COMP/36.321(OJ 2003, L 255/33) para. 358.

[26] *Interbrew and Alken-Maes,* Commission Decision of 5 December 2001, Case IV/ 37.614, (OJ 2003, L 200/1).

lawfully presumed that Danone had exercised "decisive influence" on its subsidiary in both cartels but for some unexplained reason it preferred not to do so.

In the *Opel* case,[27] the Commission considered that *"General Motors Nederland BV controls Opel Nederland BV and is thus equally responsible for this infringement"*. In this case, the parent undertaking, General Motors Nederland BV, was a *"controlling holding company, fully owned by General Motors Corporation Detroit, Michigan"*. The fact that the Commission did not attribute liability to the last undertaking in the ascendant line of control (*General Motors Corporation, Detroit, Michigan*), can be understood as meaning that it was not reasonable to attribute to the American parent undertaking the commercial decisions of Opel Nederland BV, even if this would have been consistent with the *Stora* presumption. Furthermore, the fact that the Commission attributed liability to the parent undertaking of Opel Nederland BV (i.e. General Motors Nederland BV) rather than to the ultimate controlling parent company in the United States demonstrates the arbitrary nature of its decision.

In the *Organic Peroxides* case,[28] the Commission did not find a parent company liable (Elf Aquitaine) for the infringement of its subsidiary without giving any reason, whereas the same parent company was found liable for the conduct of the same subsidiary in identical circumstances in *MCAA*.[29]

More recently, in *Italian Raw Tobacco,*[30] the Commission considered that Universal, the parent company of its wholly-owned subsidiary Deltafina, satisfied the conditions for the attribution of liability to the parent company while, in its previous Decision in the *Spanish Raw Tobacco* case,[31] Universal was not held liable for a similar and contemporary infringement also by Deltafina, but in a different geographical market[32]. In the decision concerning the Italian case, the Commission acknowledged that fact, but did not give any particular reason as to why it had arrived at a different conclusion.

For its part, the CFI´s case law on the interpretation of the above mentioned presumption is still ambiguous. For example, in its judgment of 26 April 2007 in the *Bolloré* case, the Court actually pointed out that "*although the evidence relating to the 100% shareholding in its subsidiary provides a strong indication that the parent is able to exercise a decisive influence over the subsidiary's conduct on the market, this is not in itself sufficient to attribute liability to the parent for the conduct of its subsidiary but*

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27 *Opel,* Commission Decision of 20 September 2000, Case COMP/36.653 (OJ 2001, L 59/1), paras. 4 and 172.

28 *Organic Peroxides,* Commission Decision of 20 October 2005, Case COMP/E-2/37.857 (not yet published).

29 *MCAA*, Commission Decision of 19 January 2005, Case COMP/E-1/37.773 (not yet published).

30 *Italian Raw Tobacco*, Commission Decision of 20 October 2005, Case C/38.281/B2 (not yet published).

31 *Spanish Raw Tobacco,* Commission Decision of 20 October 2004, Case C/38.238/B2 (not yet published).

32 The Commission attributed liability for the anti-competitive conduct of Deltafina to the parent company Universal, essentially arguing that (i) Universal often acquired tobacco bought by its subsidiary; (ii) Deltafina acted as the European manager of the Universal group; and (iii) Deltafina reported to Universal, which approved its budget and operating plan. These circumstances also arose in the Spanish case, hence the inconsistency of the Decision on the Italian cartel (*Italian Raw Tobacco)*, currently under appeal, at paras. 340 to 347.

something more than the extent of the shareholding must be shown, but this may be in the form of indicia". [33]

Yet in the recent *Akzo-Nobel* case, the CFI declared that this presumption is a "*simple presumption*" and that "*it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy".*[34] Different chambers of the CFI therefore appear to take a different approach to this presumption. In our view, the interpretation given in the *Bolloré* case is the appropriate one. Moreover, the CFI´s ruling in *Akzo Nobel* would also be at odds with its judgment in the *Daimler Chrysler* case.[35]

Furthermore, we doubt that, in the absence of further evidence, the application of the "Stora" presumption would comply with general principles recognized by the Community courts and in the European Court of Human Rights ("ECtHR").

Indeed, the attribution to a parent company of liability for an infringement committed by a subsidiary should be applied in a much more restricted manner. This requirement stems from the principle of presumption of innocence embodied in Article 6(2) of the ECHR as well as from the case law of the ECtHR. Although Article 23(5) of Regulation No 1/2003 provides that the decisions by which the Commission imposes fines for the infringement of the competition rules "shall not be of a criminal law nature", the rights enshrined in the ECHR have been held to be applicable to sanctions proceedings in the field of European competition law given that the level of the fines imposed within the framework of such proceedings justifies attributing them a quasi-criminal nature.[36] Moreover, the infringement of the competition rules is considered to be a criminal offence in certain Member States.[37]

According to recital 37 of Council Regulation No 1/2003, this Regulation should be interpreted and applied with respect to the fundamental rights and principles recognised by the Charter of Fundamental Rights of the EU, which includes the principle of presumption of innocence.

Thus the application of the presumption of joint liability of parent companies by the European Commission must comply with the case law of the ECtHR which has expressly stated that "*[p]resumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within reasonable limits in this respect as regards criminal law".* In addition, the ECtHR has established that Article 6(2) of the ECHR "*requires*

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[33] Judgment of the Court of First Instance of 26 April 2007 in Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02*, Bolloré v. Commission*, ECR II-947, § 132

[34] Judgment of the Court of First Instance of 12 December 2007 in Case T-112/05, *Akzo Nobel NV v. Commission*, §§ 60 and 62 (not yet reported).

[35] Judgment of the Court of First Instance of 15 September 2005 in Case T-325/01, *DaimlerChrysler AG v. Commission*, ECR II-3319, § 218.

[36] See, in this sense, Judgment of the European Court of Human Rights of 8 June 1976, *Engel and Others v. Netherlands*, Series A nº 22, § 81; Judgment of the European Court of Human Rights of 21 February 1984, *Öztürk v. Germany*, Series A nº 73, §§ 46 et seq; and Judgment of the European Court of Human Rights of 25 August 1987, *Lutz v. Federal Republic of Germany*, Series A, n. 123.

[37] Among others, Ireland, United Kingdom and even Spain in certain circumstances.

States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".[38]

Consequently, the attribution of liability to a specific legal person cannot occur in the absence of sufficient evidence which individually incriminates that person,[39] nor can it be based on presumptions not supported by additional solid incriminating evidence, as is sometimes the case with Commission decisions.

The question arises as to whether the existing case law and Commission practice are sufficient to enable a parent company to ascertain in advance whether it can be held liable for the purported conduct of its subsidiary. It is probably helpful to recall briefly that the ECtHR has stated that Article 7 of the ECHR enshrines, inter alia, the principle that an offence must be clearly defined in the law and that this requirement is only satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.[40]

However, it is doubtful that a parent company can draw valid conclusions from European case law and Commission practice on the attribution of parent/subsidiary liability. Even the most authoritative experts on the subject are uncertain on this point. As mentioned previously, this issue can, however, have major consequences for the undertakings concerned.[41]

It therefore seems advisable for the Commission to lay down clearer criteria in its future decisions, criteria that are capable of being validly tested by the courts. Less ambiguity and greater consistency between different decisions may also be desirable. The Commission should analyse, in particular, whether its own practice is transparent and non-discriminatory and ask itself whether it is entirely appropriate to double or triple the fine by automatically attributing liability to parent companies without convincing evidence of their involvement or acquiescence in the infringement.

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38 Judgment of the European Court of Human Rights of 7 October 1998, *Salabiaku v. France*, Series A, n. 141-A, § 28.

39 Opinion of Advocate General Kokott delivered on 3 July 2007 in Case C-280/06, *Autorità Garante Della Concorrenza e del Mercato v. Ente Tabacchi Italiani- ETI SpA and Others*, § 71: "*The consequence of the sanctionative nature of measures imposed by competition authorities for punishing cartel offences – in particular fines – is that the area is at least akin to criminal law. Therefore, what is decisive for the attribution of cartel offences is the principle of personal responsibility, which is founded in the rule of law and the principle of fault. Personal responsibility means that in principle a cartel offence is to be attributed to the natural or legal person who operates the undertaking which participates in the cartel; in other words the principal of the undertaking is liable*".

40 See for instance the Judgment of the European Court of Human Rights of 22 November 1995, *S.W. and C.R.* v. *United Kingdom*, Series A nos. 335-B and 335-C, §35. As previously stated, when speaking of "law", Article 7 alludes to the same concept as that referred to by the Convention elsewhere when using that term, a concept which comprises both statute law and judge-made law, and implies qualitative requirements, including most notably those of accessibility and foreseeability.

41 In the *MCAA* Decision already mentioned, the fact that Elf Aquitaine (parent company) was found liable together with its subsidiary Atofina, instead of Atofina on its own, doubled the final fine because of the corresponding multiplying factor. Similarly, in the *Italian Raw Tobacco* Decision mentioned earlier, the consequences of the attribution of liability to Universal (parent company) for the conduct of its subsidiary Deltafina led to the application of a 1.5 multiplying factor to the starting amount of Deltafina's fine. The Commission eventually imposed a fine exceeding 10 per cent of Deltafina's total turnover in the preceding business year.

D. LEGAL CERTAINTY, DETERRENCE AND LENIENCY.[42]

It is widely agreed that the success of a given competition policy relies, among other factors, upon the legal certainty, predictability and transparency of its cartel enforcement programme.

For example, when deciding whether to confess (XI) and apply for leniency, the applicant company will want to be able to predict with a high degree of certainty how it will be treated when seeking leniency (legal certainty), and what the consequences will be if it does not do so (deterrence). These two ingredients, essential for a successful leniency recipe, have to be balanced. Nevertheless, it seems that while the Commission has increased deterrence (raising fines in a way which -as already stated- might fall beyond the "reasonable foreseeable standard" recognized by the ECJ in *Dansk Rørindustri et al. v Commission),*[43] it has been much less generous as regards legal certainty, and has in fact gone backwards in comparison with the 2002 Notice. The result is a very salty salad but with little lettuce, one which will have to be eaten carefully to avoid serious stomach problems.

It is true that the threat of more severe sanctions may encourage companies involved in cartels to apply for immunity. However, should the increase be disproportionate, companies only eligible for a reduction in the fine (not full immunity) are likely to think twice before confessing their anti-competitive sins to the Commission.

As we have seen, the new Fining Guidelines mark the start of a new 'overriding' fining policy. If we take this fact together with the uncertainties surrounding the conditions for obtaining a reduction in the fine, companies other than the immunity applicant will find it makes more sense to go back to the old 'full denial' strategy rather than to cooperate with the Commission's investigation. Indeed, the massive increase in fines to be imposed on infringing companies may well be a better reason not to cooperate with the Commission, but concentrate instead on other strategies that will certainly make the Commission's work much more complicated.

Much of the success of the 2002 Leniency Notice was due to the fact that to make its case the Commission often had more than one application for leniency. Under these conditions it was relatively straightforward to draft a Statement of Objections and to adopt a decision detecting a secret cartel and fining the companies involved. In the new scenario, it is doubtful that companies will go immediately to the Commission once they have been inspected. Any prospective fine (once any percentage reduction below 50% has been applied and possible aggravating and mitigating circumstances taken into account) which jeopardises the financial viability of an undertaking will be a non-starter, since companies will take the view that they may as well go down fighting rather than effectively commit suicide.

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[42] In this respect, see also L. Ortiz Blanco, M. Muñoz de Juan, and A. Givaja Sanz, *Will the new Commission Leniency and Fining Policy Appeal to Multi-Jurisdictional Leniency Applicants?*, Paper presented at the IBA Conference on "Cartel Enforcement and Antitrust Damages in Europe", held at the Conrad Hotel in Brussels, Belgium, 7-9 March 2007.

[43] Judgment of the Court of Justice of 28 June 2005 in Joined Cases C-189/02 P, C-202/02 P, C-205/02P to C-208/02 P and C-213/02 P, *Dansk Rørindustri et al. v Commission*, ECR I-5425.

Should the Commission wish to maintain the current level of leniency applications, it may need to use its discretionary powers to extend and enhance the protection to second and successive applicants i.e. those who merely seek a reduced fine. Otherwise the Commission will have to face the investigation of cartels with the help of only one company.

A possible way of making it more attractive for applicants seeking a reduced fine to cooperate with the Commission could have been to increase the bands for possible reductions under the Leniency Notice.[44] That was indeed the case under the 1996 Leniency Notice, which allowed reductions of up to 75% for the first applicant and up to 50% for all other applicants for reduction of fines. This solution would have also been consistent with the sharp increase in fines imposed by the new Fining Guidelines.

However, the new Leniency Notice has maintained the bands established in the 2002 Notice. Therefore it is necessary to invent another system in order to overcome the uncertainties of the new leniency program for second and successive applicants and the threat of very heavy fines indeed, anyway.

In this new scenario, the "settlements" project which the Commission is currently working on is more necessary than ever. For the Commission, this project should save enforcement resources, as it will surely entail the collaboration of the concerned undertakings. For undertakings, the project may overcome the problems created by the combination of a new fining policy that may threaten their economic viability, and the uncertainties stemming from the new leniency program.

II. THE COMMISSION'S SETTLEMENTS PROJECT.

On 27 October 2007, the Commission launched a public consultation on a draft legislative package intended to introduce a settlement procedure for cartel cases. The package consists of a draft Commission Regulation amending Regulation No 773/2004 and a draft Commission Notice.[45]

In our view, settling a cartel case should be a kind of "gentle surrender", like Justin Nassau´s to Ambrosio Spinola, depicted by Velázquez in "The Lances", where everyone was treated with dignity and respect.(XII)

There are also a few things worth of comment on settlements.

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[44] This solution was proposed by Shearman & Sterling LLP it its comments on the Commission's draft notice on immunity from fines and reduction of fines in cartel cases, available at http://ec.europa.eu/comm/competition/cartels/legislation/leniency_consultation.html

[45] Proposal for a Commission Regulation (EC) No…/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, available at: http://ec.europa.eu/comm/competition/cartels/legislation/cartels_settlements/regulation_en.pdf

Draft Commission Notice on the conduct of settlement proceedings in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, ("Drat Notice") , available at: http://ec.europa.eu/comm/competition/cartels/legislation/cartels_settlements/notice_en.pdf

The package is complemented by a FAQs document which, in some aspects, is even more detailed. See Press Release "Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels- frequently asked questions"-. MEMO/07/433, 26/10/2007.

A. LEGAL BASIS.

The texts submitted for consultation do not envisage any amendment of Council Regulation No1/2003 but merely of Commission Regulation No 773/2004. The likely reason for this is that the Commission wanted to introduce and put in place this new procedure as soon as possible, for which it needed to avoid involving the Community legislature. This might also be the reason for the main features of the envisaged procedure, which is intended to be added on piggyback fashion (like Venus on the Satyr) (XIII) to the standard infringement procedure contained in Regulation No1/2003.

One may wonder whether Regulation No 773/2004 constitutes an appropriate legal basis for the proposed settlement procedure. According to the Commission, "*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*".[46] However, Regulation No 773/2004 is only an implementing Regulation which the Commission itself adopted on the basis of Article 33 of Regulation No1/2003.

In our view, it would have been better to set out a specific settlement procedure, different from the infringement procedure governed by Regulation No 1/2003, which would have given the Commission freedom to move beyond the limits of the Regulation's straightjacket. In any event, the currently envisaged settlements procedure is better than nothing – particularly for second and successive leniency applicants - given that the Commission did not contemplate amending Regulation No 1/2003. But let us not forget that Venus, the goddess of love, should dominate the wild Satyr: *Omnia vincit Amor, et nos cedamus Amori.*[47]

B. PRACTICAL BACKGROUND.

The virtues or defects of the settlements procedure should be assessed in the light of its practical application. In this sense, one must note that practically all the cartel cases currently handled by the European Commission are the result of leniency applications made after inspections have been carried out. Although we have been told by Philip Lowe that three investigations have been opened recently, it is very rare to find *ex officio* cases nowadays; in fact, one of the reasons that led the Commission to think about a transactional procedure was precisely the fact that a large part of its resources were being dedicated to leniency cases, which meant that there was a risk of the leniency program being a victim of its own success.[48]

In practice, then, in the absence of a leniency application it is unlikely that any undertaking would spontaneously decide to settle a case with the Commission and one may therefore expect virtually all settlement proceedings to run parallel to leniency cases. So, confession is the background to settlement. (XIV)

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[46] Draft Notice, para. 3.

[47] Virgil, *Ecologues* X, 69, cited by Véronique Bücken in *Musée d'Art Ancien. Oeuvres choisie*s, Brussels, MRBAB, 2001, p.114.

[48] See Commissioner Kroes´ Speech*, Delivering on the crackdown: recent developments in the European Commission´s campaign against cartels*; 10th Annual Competition Conference at the European Institute, Fiesole, Italy, 13 October 2006, SPEECH/06/595.

C. CRITERIA FOR THE COMMISSION WHEN CONSIDERING SETTLING A CASE.

The criteria for the Commission when considering settling a case are also worth some comment. In principle it is stated that the Commission would only engage in settlement discussions upon the request of the undertakings concerned, following which the Commission would explore the interest of all other parties in a settlement provided that the case is considered to be suitable for such solution.[49]

The Commission has stated that not all cartel cases would be suitable for settlement and has vested itself with a "*broad margin of discretion*" to determine which cases are considered as such, to which end "*account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections"* as well as of *"the prospect of achieving procedural efficiencies*".[50] Is the Commission saying that its decision on whether or not to offer a settlement will depend on whether the parties will, more or less, accept DG COMP`s position? Are we not talking about Breda? (XV); or are we possibly talking about Antwerp?[51](XVI) Further, is the Commission saying that its decision whether to settle or not will also depend on whether all the parties are coming on board ("all for one, one for all", like the Three Musqueteers) (XVII)

Pursuant to the Draft Notice, should the Commission consider that the case is suitable for settlement, it will give all parties the chance to make their views known on whether they may envisage engaging in settlement talks. From this moment on, the Commission may decide to commence bilateral discussions with each of the settlement candidates and within these discussions each undertaking will be informed of the essential elements of the case, namely the alleged facts, the classification, nature and duration of the infringement as well as of the attribution of liability and an estimation of a range of likely fines.[52]

In our view, this "bilateralization", together with the obligation of preserving the confidentiality (vis-à-vis third parties) of the "discussions" at the risk of being imposed a greater fine,[53] is not only unfair, but also conflicts with the very aim of ensuring that all undertakings concerned walk hand in hand.

Probably, the Commission does not intend to adopt a "take it or leave it approach", nor a musqueteer approach, but it should make this clear.

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[49] Draft Notice, para. 6.

[50] Draft Notice, para. 5.

[51] On 4 November 1576, some fifty years before the surrender of Breda, Spanish soldiers sacked the city of Antwerp, killing more than 6000 people and burning 500 houses, including the Town Hall.

[52] Draft Notice, para. 16 and projected amendment of Regulation No 773/2004 Article 10a (2).

[53] Draft Notice, para. 7 states that: "*The parties to the proceedings and their legal representatives may not disclose to any other undertaking or third party in any jurisdiction the content of the discussions or of the documents which they have had access to in view of settlement, unless they have a prior explicit authorization by the Commission. Any breach in this regard may lead the Commission to disregard the undertaking's request to follow the settlement procedure and may constitute an aggravating circumstance within the meaning of point 28 of the Commission Guidelines on the method of setting fines".*

D. ELEMENTS OF DISCUSSION.

Additional questions arise concerning the practical elements of discussion. One may wonder whether the settlement procedure will imply mere discussions or whether it will all eventually come down to negotiation.

In its Frequently Asked Questions Press Release, the Commission first affirms that it "*will not give companies the ability to negotiate with the Commission as to the existence of an infringement of Community law or the appropriate sanction*", but admits that "*however, parties will also be heard effectively on the framework of the settlement procedure and parties will therefore have the opportunity to influence the Commission´s objections through argument*".[54] Consequently, the Commission´s answer is no, but yes. No, it will not enter into negotiations, but yes, there will be discussions by means of which it could be persuaded to modify its initial stance. Where the wafer-thin line is to be drawn between "discussions" and "negotiations" is anyone's guess. Maybe, once again, Magritte's "*ceci n´est pas une pipe*" is the order of the day. (XVIII)

Doubts also arise as to whether such discussions will deal with a possible downward revision of the fine. The Commission again says "no", yet states that as settlement discussions progress, the circumstances that influenced its calculation will be tackled, that is, the alleged facts, their classification, their gravity, the duration of the infringement as well as the liability for individual involvement in the cartel. This may not be the same as negotiations, although in our view it does sound remarkably similar.[55] Accordingly, the Commission seems to be ready to "play the game" (XIX).

Indeed, bilateral discussions will enable the parties to rebut or at least discuss from a more comfortable position the evidential value of the documents contained in the file regarding the issues with a greater influence on the calculation of the fine. As a matter of fact, the rebuttal of the duration of the infringement will be paramount, given that each extra year implies a 100% increase on the amount of the fine. It could actually prove the best way for reducing a fine, even better than leniency and settlements (provided that the Commission agrees to discuss about it).

But there are some other practical ways to reduce a fine through discussion.

Nowadays it seems to be a very fashionable practice within the Commission to use (or perhaps we should say abuse) the theory of the single and continuous infringement in such a way that it gathers reliable incriminating evidence concerning some parties, mixes this up with other "evidence" related to other parties which is less incriminating or refers to shorter

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[54] See Press Release "Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels- frequently asked questions". MEMO/07/433, 26/10/2007.

[55] The Commission´s Draft Notice states that it will set a time limit for the submission of written settlement submissions "*when the progress made during the settlement discussions leads to a common understanding regarding the scope of the potential objections and the estimation of the range on likely fines to be imposed by the Commission*". (Emphasis added). Moreover, the written settlement submission is required to include "*an indication of the maximum amount of the fine the parties foresee to be imposed by the Commission and which the parties accept in the framework of a settlement procedure*". According to footnote 14, such indication "*would result from the discussions as set out in points 16 and 17*". In as much as the compromises offered in the settlement submission are conditional upon the Commission meeting their request, should the Commission decide to impose a fine exceeding the amount accepted by the undertaking the written settlement submission would be deemed withdrawn with the consequences envisaged in para. 29 of the Draft Notice.

or different periods, and thus concocts the existence of a single and continuous infringement for which all of them are liable. The abuse of this doctrine is like mixing water and old wine for all parties so that the net result is old wine for all. In this context, the settlement procedure and the related bilateral discussions may help undertakings express their views and discuss their very particular circumstances, thus avoiding any pernicious consequences for them stemming from the abuse of the cocktail of evidence referred to above.

Additionally, undertakings could also have a chance to discuss the involvement of parent companies in a particular infringement, which, as stated above, is of enormous significance as regards the determination of the 10% cap set out in Article 23 of Regulation No1/2003.

As regards this last point, it is curious to note that according to the Draft Notice "*[a]ll parties to the proceeding which belong to the same undertaking and envisage the possibility of introducing a settlement submission and requesting to engage in settlement discussions may appoint joint representatives duly empowered to act on their behalf*". The Commission´s FAQs document further states that the requirement of appointing a joint representative "*is necessary to have fruitful and efficient discussions with each of the undertakings concerned. In this regard, joint representation will not prejudge the finding of joint and several liability amongst parties of the same undertaking or group*".

Such precision is welcome, even though doubts still remain as to whether this statement may involve effectively giving up this argument as a means of establishing the joint liability of parent companies for the acts committed by their subsidiaries.

E. PROCEDURE.

The Draft Notice envisages what we could call a "mini-infringement procedure" prior to the undertakings waiving their right to a (long) formal infringement procedure: a gentle and substantive procedure (Venus) mounted on a formal but unsubstantial - yet, menacing-steed (the Satyr). (XX)

In the context of the bilateral discussions, each of the settlement candidates will be orally informed of the essential elements taken into consideration so far in order to enable them to "*assert their views of the potential objections against them*" as well as to allow them to decide whether or not to pursue a settlement procedure.[56] In practice, this means that at this stage the Commission would be issuing "mini-oral Statements of Objections".

Subsequently, if the discussions have proven to be fruitful, the Commission would grant a time limit for the undertakings to introduce their final written settlement submissions (hereinafter "WSS"). In order to enable the parties to draft their WSS, the Draft Notice has envisaged an *ad hoc* and *sui generis* access to the file.

Pursuant to paragraph 17 of the Notice, before granting the time limit for submitting the WSS, "*the parties will be entitled to have the information specified in point 16 disclosed to them upon request*". Accordingly, undertakings do have the right to total access to the incriminating evidence that the Commission may have relied upon during the bilateral discussions. Nonetheless, access to the file becomes somehow more limited and

[56] Draft Notice, para. 16.

burdensome in relation to other- including possibly exculpatory- documents. Indeed, access to those would necessarily be preceded by a reasoned request and will be dependent on whether the Commission´s services consider that it is not only justified, but also that it will not jeopardize procedural efficiencies.[57]

In our view, complete access to the file- which moreover in its present form is not so inefficient- would be preferable.

DG COMP should realize that once it decides to open a settlement procedure, all undertakings- and that includes the more innocent ones- might want to "play the game" in order to get rid of a problem (even though doing so may expose them to other risks, such as the ones deriving from "follow-on civil actions"). In all cartels there are undertakings with different degrees of involvement and presence, which can range from very slight and sporadic, to absolutely central and long-lasting. The Commission's strategy tends to be treat all those named in its Statements of Objections similarly, an approach which is only altered in its final decision. This practice should be avoided in settlement proceedings, and it is essential for parties to have access to exculpatory documents, and the only means of achieving this may be to grant access to the complete file.

Once the Commission has put forward what it has against an undertaking in terms of both allegations and relevant evidence, and the parties have been granted access to the file, they are offered the chance of presenting their arguments orally in the course of the bilateral discussions so as to enable the Commission to "*effectively take their views into account*".[58] All these discussions will eventually crystallize in the Statement of Objections which starts the subsequent formal (but abridged) infringement procedure.

It is also worth noting that pursuant to paragraph 18 of the Draft Notice, the parties may call upon the Hearing Officer at any time during the settlement procedure.

F. THE WRITTEN SETTLEMENT SUBMISSION ("WSS") AND ITS PROBLEMS.

A key element in the procedure is the drafting of a formal request to settle in the form of a written submission containing the elements specified in paragraph 20 of the Draft Notice, such elements being: a) the acknowledgement of the parties´ liability for the infringement as regards the main facts, their qualification and duration; b) an indication of the maximum amount of the fine foreseen as a result of the previous discussions and which the parties accept; c) a confirmation that they have been informed and that their defence rights have been respected; d) a confirmation that "they do not envisage" requesting access

[57] Draft Notice, para 17: "*Upon reasoned request by a party, the Commission services will also grant it access to non-confidential versions of any accessible document listed in the case file at that point in time, in so far as they consider it justified for the purpose of enabling the party to ascertain its position regarding any other aspect of the cartel and provided that the procedural efficiencies referred to in point 5 are not jeopardized*". The FAQs document is even more restrictive on this particular issue when it specifies "[a]*ccessible versions of other documents listed in the case file may be disclosed upon reasoned request when it is justified to enable a company to ascertain its position on a given time period or issue, and where this disclosure does not jeopardise the overall efficiency sought with the settlement procedure*". (Emphasis added).

[58] Recital 2 of the Proposal for a Commission Regulation (EC) No…/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases; Draft Notice, para. 25. According to the FAQs document "[t]*his enables companies to influence even the contents of the Statement of Objections and, thereby, of the decision itself*".

to the file or requesting to be heard unless their settlement submission is rejected; and e) the parties´ agreement the Statement of Objections and the final decision being addressed to them in a given official language.

The Draft Notice only allows for the settlement submission to be presented in written form, but why not accept oral submissions too? In our view, this could be a very convenient alternative since oral submissions may be easier to withdraw without spill-overs, should the settlement procedure fail to bear fruit.

The Commission has not provided any further guidance concerning the required content of the WSS, thereby raising doubts about the necessity of either submitting a detailed WSS or, on the contrary, just including the "bare bones". The latter alternative seems more tempting, given that including more "flesh" in the WSS could imply a serious danger if third parties asked for discovery in other jurisdictions.

As to the requirement of indicating the acceptable level of fines in the WSS, we do not think that undertakings should be hesitant to put the rope around their necks at this stage, especially in view that such thing will not occur unless there is a prior common understanding with the Commission as regards, among other things, the likely range of fines.

It is interesting to note that the Commission, by requiring an acknowledgement of liability "in unequivocal terms", has dismissed the possibility of reaching a settlement without admission of liability for the infringement, a possibility that, on the contrary is open as regards commitments decisions pursuant to Article 9 of Regulation No 1/2003. However, its failure to do so may be understandable in as much as it would have rendered necessary a new "Article 9" and therefore an amendment of Regulation No 1/2003, which takes us back again to the problem of the legal basis of the settlement package.

The WSS will be deemed to have been endorsed by the Commission when its contents are reflected in the Statement of Objections as regards the description of the cartel, the undertakings´ involvement therein and the legal qualification thereof.[59] In such case, the parties are requested to reply to the Statement of Objections within a time limit of one week confirming that the contents of the Statement of Objections correspond to the contents of their settlement submission.

However, the Commission may also choose to adopt a Statement of Objections which goes beyond the parties´ settlement submission. In such case, the settlement submission will be deemed to have been withdrawn and the parties will be granted a new time-limit to present a new defence, including the possibility of requesting an oral hearing and access to the file. Nonetheless, the withdrawal of the WSS implies several problems:

The first and paramount problem is that the cards would be already on the table (again, as in "Le sort interrogé") (XXI), in the sense that there would be at least self-incriminatory statements left behind. In this respect, the Draft Notice indicates that "[t]*he acknowledgements provided by the parties in the settlement submission would be deemed to be withdrawn and could not be used against any of the parties to the proceedings*".[60]

[59] Draft Notice, para. 22.

[60] Draft Notice, para. 27.

As regards incriminatory evidence, this should not be problematic. In settlement cases promoted by leniency applicants all self-incriminatory evidence would have already been handed to the Commission, while in the absence of a leniency application it is hard to think why an undertaking would have provided the Commission with anything other than exculpatory documents within the framework of a settlement procedure.

With respect to incriminatory statements, in our view the best solution would be to negotiate with DG COMP in hypothetical terms which could limit the undertaking's exposure. Indeed, a company may negotiate simply because not to do so would be more trouble than it is worth, not necessarily because liability in respect of the Commission's allegations is admitted.

Finally, attention should be drawn to a possible unwelcome side effect of the settlement procedure, namely a reduction of complainants' rights. Pursuant to the envisaged amendment of Article 6(1) of Regulation No 773/2004, the Commission will no longer be bound to send a non-confidential version of the Statement of Objections to the complainant, but merely "may" do so.[61] Although it is assumed that the reason for this change is to protect settlement candidates, its effects may be felt right across the board, not just in settlement cases. It is submitted that the Commission should tread very carefully so as not to limit complainant's rights in standard infringement procedures.

G. SUBSTANCE: FINE REDUCTIONS.

The reward envisaged in paragraph 32 of the Draft Notice adds up, in practice, to the reduction of the fine which might be obtained by means of the "discussions" about the nature, duration, aggravating and mitigating circumstances, and so on, as well as to the reduction which the Commission may grant under the leniency program.[62]

The Draft Notice further states that "*any specific increase for deterrence (...) will not exceed a multiplication by two*".[63] In non-settlement cases such increase could be even greater, at the (wide) discretion of the Commission.[64] This is acceptable, but, in our view, limiting the multiplying factor to x2 basically amounts to a commitment not to be disproportionate in settlement cases, which should be the rule, anyway.[65]

According to the Commission, the reduction of the fine as a reward to companies for having settled a case will be equivalent for each party having settled. We understand that

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[61] Article 1(2) of the Proposal for a Commission Regulation (EC) No…/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, envisages an amendment of Article 6(1) according to which it will read as follows: "1. *Where the Commission issues a Statement of Objections relating to a matter in respect of which it has received a complaint, it shall inform the complainant in writing of the nature and subject matter of the procedure and set a time-limit within which the complainant may make known its views in writing. The Commission <u>may</u> also provide the complainant with a copy of the non-confidential version of the Statement of Objections*." (Emphasis added).

[62] Draft Notice, para. 33.

[63] Draft Notice, para. 32

[64] The 2006 Fining Guidelines state in para. 30 that: "*The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates".*

[65] We are very critical of the possibility of the Commission disregarding its own rules in the event that they do not deliver the expected results, i.e. enormous fines.

this does not mean that the degree of involvement, participation, duration and gravity of the infringement will be considered to be the same for all of them. As a consequence, in spite of the homogeneity of the final reduction granted for having settled, each undertaking may have the chance to benefit individually from the results of the discussions with the Commission as regards its specific circumstances.

III. CONCLUSIONS.

The settlements proposal is undoubtedly a positive development provided that DG COMP takes a flexible approach. It would be desirable for the Commission to show its willingness to discuss all the relevant issues with the parties and to admit that there is no need for all of them to participate in the settlement. Most importantly, it is also vital to provide parties with all the relevant information and allow them to have complete access to the file, thus ensuring that their defence rights are fully respected.

As to fines, the Commission should be bolder and aim to get to the root of the problem: the activities of companies' managers. Disqualification or the imposition of criminal sanctions on managers is much more proportionate than a policy of artificially inflating fines, which, at the end of the day, is extremely detrimental to the interests of innocent shareholders and employees (XXII), but far less so for the real perpetrators of the infringements. (You will notice that this time I am illustrating my point with a much more dramatic massacre of the innocents, by Paul Rubens).

Lastly, let us not forget that the "maximum 10%" rule dates back 46 years. Fines were a latecomer to DG IV's administrative practice and, when they did finally arrive, proved to be extremely moderate, as they have generally been until relatively recently. Today, EC Commission's fines may ruin infringing undertakings. Given this dramatic situation, the Community Courts need to abandon their kid-glove approach to the Commission's fining policy. (This is particularly true of the Commission's fines´ practical retroactivity and lack of proportionality, and in the imputation of liability to parent companies for the infringements of their subsidiaries). If they did, and provided that our friend Adriano Raffaelli invited us again, we would be more than glad to talk about fine arts in Luxembourg. (XXIII)

Thank you very much for your attention (XXIV).